Unconstitutional Politics

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INTRODUCTION

As you consider these words, someone, somewhere, is railing against politicians. "All they care about is getting re-elected." "They're all on the take." "They never solve any problems; they only make them worse." "All they do is vote themselves pay raises." These are common populist refrains. Indeed, common enough that complaining about politicians takes on the comfortable ritualism of a national pastime.

Yet, if past elections prove anything, voters are quite pleased with their politician. While politicians generally are regarded beneath used car dealers and, naturally, lawyers, incumbents are returned to office at a startling rate. The public seems to say, "Politicians are all no good. Except, of course, for my local representative." And, nowhere is this electoral schizophrenia more evident than in elections for the United States House of Representatives. In the 1998 elections, the House's approval rating was forty-one percent,1 yet voters returned ninety-eight percent of the incumbents who sought re-election.2

Practically speaking, why do voters see a specific politician as "their" representative? With the United States House of Representatives, the answer is straightforward. The House is elected by single-member districts: each state is divided into as many districts as there are representatives, and each district elects one representative. Thus,

1 The rating is from a Gallup Organization poll taken from November 13 to 15, 1998. See Gallup News Service, Do You Approve or Disapprove of the Way Congress is Handling its Job?, at http://www.gallup.com/poll/trends/pjobapp_cong.asp (last visited Oct. 6, 2000). The poll asked, "Do you approve or disapprove of the way Congress is handling its job?" Id. In addition to the 41% who responded "approve," 54% responded "disapprove" and 5% responded "no opinion." Id.
2 Karen Foerstel, Voters' Plea for Moderation Unlikely to be Heralded, 56 CONG. Q. WKLY. REP. 2980, 2980 (1998) (reporting that 401 House incumbents were re-elected while only seven were defeated).
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voters in each district can readily identify a single person as “their” representative.

This system is neither inevitable nor our uniform political tradition. The Constitution does not require election of the House by single-member districts. Rather, it simply grants States the power to run federal elections and reserves to Congress the power to “alter” the state election laws.3 For the first fifty or so years after ratification of the Constitution, the States elected their House members in a variety of ways. For example, some States elected all of their representatives at large,4 while others did so by multi-member districts.5 In either system, voters could not identify a single politician as “their” local representative.

In 1842, Congress passed the first law to require election of the House by single-member districts.6 Congress re-enacted this requirement in seven subsequent reapportionment statutes, one of which continues in force today.7 And, it is this law, and its single-member-district requirement, that allows voters to identify a single incumbent as “their” representative, selected within and speaking for their local district. Over the last 160 years, the single-member-district requirement has become embedded in our political psyche and shaped our political world. The modern truism that “all politics is local” is built


4 By “at large,” I mean an election system in which each voter in a state votes for every representative. This method has also been referred to as the “general ticket” system. See Rosemarie Zagarr, The Politics of Size: Representation in the United States, 1776–1850, at 105 (1987). It is possible, as several States have done, to mix different systems within the same state. For example, a State entitled to twelve representatives might elect eleven of those representatives by single-member districts and elect the twelfth representative at large.

5 By “multi-member districts,” I mean an election system that divides a state into more than one district, but fewer districts than the number of representatives. In this system, one or more districts elect more than one representative, with all voters in a district voting for all representatives allocated to that district. See Kathryn Abrams, “Raising Politics Up”: Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U. L. Rev. 449, 451 n.13 (1988). For example, if a State were entitled to twelve representatives, the State might be divided into four districts with each district electing three representatives. Of course, other permutations of districts and representatives would be possible under a multi-member district system.


7 See Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581, 581 (codified at 2 U.S.C. § 2c (1994)). Throughout this Article, I refer to this requirement, whether under the 1842 statute or one of its successors, as the “congressional districting requirement” or simply the “districting requirement.” For the text of the various statutes, see the Statutory Appendix at the end of this Article.
upon the edifice of House members representing local districts, one per district.\textsuperscript{8} This accepted structure informs and permeates all elements of the present system.

But, what if the federal statute requiring single-member districts were held unconstitutional? States would then be free to elect their House members through other electoral systems, as was done during the early decades of the Republic. Consider, for example, what would happen if Texas went from single-member districts to an at-large, winner-take-all system. Under the last reapportionment, Texas elects thirty House members, with its delegation presently split seventeen Democrats and thirteen Republicans.\textsuperscript{9} In an at-large, winner-take-all election, each party would put up a slate of thirty candidates, and each voter would cast a single vote for a party’s entire slate of candidates. The switch to such an at-large election would have two immediate consequences. First, the entire Texas delegation would be one party—either all Republican or all Democrat. This all-or-nothing electoral result could radically shift the balance of power in the House.\textsuperscript{10} Second, Texans could no longer identify a single politician as “their” representative. At-large elections would redo voters’ expectations and likely dilute loyalty to incumbents. In short, a switch from single-member districts could remake American politics.

This Article argues that the federal statute requiring single-member districts is unconstitutional and that the States should be free to choose their own method for electing the House. This result flows from the Supreme Court’s recent federalism precedents, which have carefully and consistently returned power to state governments.\textsuperscript{11} Curiously, while the Congress that passed the first single-member-district statute in 1842 hotly debated the constitutionality of the districting requirement, no one has addressed the question since.\textsuperscript{12} This nearly 160 years of neglect persists even though we elect a new House under the single-member-district requirement every two years,\textsuperscript{13} and, every ten years, state legislatures labor under that requirement as they strug-

\textsuperscript{8} See generally Tip O’Neill, All Politics is Local and Other Rules of the Game (1994).
\textsuperscript{10} The same concern over the political balance of power in the House led to enactment of the 1842 districting requirement. See Zagari, supra note 4, at 129–31; Johanna Nicol Shields, Whigs Reform the “Bear Garden”: Representation and the Apportionment Act of 1842, 5 J. Early Republic 362, 362–63 (1985).
\textsuperscript{11} See infra Part III.A.
\textsuperscript{12} See infra notes 389–400 and accompanying text.
\textsuperscript{13} U.S. Const. art. I, § 2, cl. 1.
gle to redraw congressional districts.\textsuperscript{14} Given the current federalism revival and the approaching reapportionment after the 2000 census, now is an apt time to examine the question anew.

Before outlining my plan of analysis, let me frame the question more exactly. The Times, Places and Manner Clause in Article I, Section 4 of the Constitution\textsuperscript{15} charges States with the duty to regulate, not surprisingly, the times, places, and manner of holding elections for federal office, leaving the nature of those regulations to the States' discretion.\textsuperscript{16} The Clause also grants Congress the secondary power to "make or alter" any of the States' regulations.\textsuperscript{17} On its face, then, the Clause does not mandate any specific manner of electing the House. Rather, States may choose their preferred method, as they did for the first fifty years after ratification of the Constitution,\textsuperscript{18} subject to change by Congress.

In 1842, as part of its decennial reapportionment of the House,\textsuperscript{19} Congress passed an act mandating that States with more than one representative elect their representatives by single-member districts.\textsuperscript{20} Significantly, neither this statute nor any of its successors actually drew congressional districts; rather, each statute directed the state legislatures to do so.\textsuperscript{21} In the parlance of modern constitutional law, each statute "commandeered" the States into drawing House districts.

Fast forward to 1992 and the Supreme Court case \textit{New York v. United States},\textsuperscript{22} decided almost 150 years to the day after Congress passed the first congressional districting requirement.\textsuperscript{23} In that case, the Court held that Congress could not commandeer state legislatures to make law. At issue was a federal statute that required the States to

\begin{itemize}
  \item \textsuperscript{14} U.S. \textit{Const.} art. I, § 2, cl. 3.
  \item \textsuperscript{15} U.S. \textit{Const.} art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").
  \item \textsuperscript{16} See \textit{Foster v. Love}, 522 U.S. 67, 69 (1997) ("The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." (citation omitted)); \textit{Roudebush v. Hartke}, 405 U.S. 15, 24 (1972) (same).
  \item \textsuperscript{17} U.S. \textit{Const.} art. I, § 4.
  \item \textsuperscript{18} See ZA.ARm, \textit{supra} note 4, at 125--26, 154--57.
  \item \textsuperscript{19} U.S. \textit{Const.} art. I, § 2 (decennial census and apportionment).
  \item \textsuperscript{20} Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491 (current version at 2 U.S.C. § 2c (1994)).
  \item \textsuperscript{21} See, e.g., \textit{id.}; statutes cited \textit{infra} Statutory Appendix.
  \item \textsuperscript{22} 505 U.S. 144 (1992).
  \item \textsuperscript{23} The congressional districting requirement was enacted on June 25, 1842, \textit{see Act} of June 25, 1842, § 2, and \textit{New York v. United States} was decided on June 19, 1992, \textit{see} 505 U.S. at 144.
\end{itemize}
enact certain regulations of low-level radioactive waste. The Court held that while Congress could enact such regulations itself, it could not command the States to do so.\textsuperscript{24} As part of its analysis in \textit{New York v. United States}, the Court explained that it had not come across any prior federal statute that had commandeered the States to make law, implying none existed.\textsuperscript{25} But, what about the congressional districting requirement? That is nothing short of a clear prior instance of commandeering. Yet, none of the briefs before the Court cited to that statute, and none of the commentary on the case, before or since the Court's decision, has done so either.\textsuperscript{26} Thus, one of the central cases in the Court's new federalism jurisprudence was decided in complete ignorance of directly contrary historical precedent.\textsuperscript{27} Ignorance of the districting statute takes on even greater significance when one considers that the Congress that passed the 1842 districting requirement debated the very issue central to \textit{New York v. United States}—whether Congress has power to commandeer state legislatures.\textsuperscript{28} Ultimately, the 1842 Congress decided it had the power to do so, having enacted a statute that commandeered the States to draw districts. But, the House of Representatives came to the opposite conclusion just two years later when four States persisted in electing their representatives at large.\textsuperscript{29} When the at-large representatives arrived in Washington, the House debated whether to seat them even though at-large elections violated the districting requirement.\textsuperscript{30} A House committee appointed to study the issue concluded that the districting requirement was unconstitutional because it commandeered the state legislatures; the House adopted the committee's conclusion.\textsuperscript{31} So, two consecutive Congresses reached opposite conclusions on the same constitutional issue. And, in each instance, Congress was closely divided.\textsuperscript{32}

\textsuperscript{24} New York v. United States, 505 U.S. at 187–89.
\textsuperscript{25} \textit{Id.} at 177.
\textsuperscript{26} The first districting requirement is discussed in Joel Francis Paschal, \textit{The House of Representatives: "Grand Depository of the Democratic Principle,"} 17 LAW & CONTEMP. PROBS. 276, 280–86 (1952).
\textsuperscript{28} See infra notes 424–30 and accompanying text.
\textsuperscript{29} See infra notes 463–64 and accompanying text.
\textsuperscript{30} See infra notes 463–69 and accompanying text.
\textsuperscript{31} H.R. Rep. No. 28-60, at 6 (1844).
\textsuperscript{32} See infra notes 449–50, 499 and accompanying text.
The congressional districting requirement is like a missing piece to a puzzle that nobody knew was incomplete. In *New York v. United States*, the Court probably believed it had the whole commandeering picture before it. The Court reviewed the pieces it had, the Constitution’s text, history, structure, and precedent, and concluded that Congress could not commandeering state legislatures.\(^3\) The Court even mentioned that the puzzle did not reflect any prior government practice, noting the supposed absence of any prior acts of commandeering.\(^4\)

Against the full historical background, this Article returns to the question last debated nearly 160 years ago: Can Congress commandeer the States to draw House districts? Returning to this question serves several purposes. First, as noted above, it raises an issue of immense political importance. If Congress cannot make States draw districts, it has two choices: draw districts itself for all fifty states, or leave the States to choose the election method they prefer (for example, single-member districts, multi-member districts, or at-large election).\(^5\) If Congress were to draw the districts itself, the task might be politically or practically impossible. Districting is a politically divisive, expensive, and time-consuming process when done separately within each State’s legislature. Those difficulties would increase exponentially if consolidated in a single, national body, where regional pressures would rear their heads.

If Congress left the choice to the States, the political balance of power in Congress could shift dramatically. A State with a House delegation split between the major political parties under the single-member-district system could switch to an at-large, winner-take-all system, where one party would elect the entire delegation to Washington. In an almost evenly divided House, as we have now, the possibility of such a dramatic shift in membership invites experimentation.

A second reason to return to the question is that the districting statute potentially undermines a key precedent lying at the heart of the Court’s new federalism: *New York v. United States*. In a controversial five-to-four decision in the mid-1980s, the Court withdrew almost entirely from applying federalism-based limits on Congress’s enumerated powers.\(^6\) The national political process, not judicial review, was

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4. Id. at 177.
5. A more complex question, which is reserved for future consideration, is whether Congress could condition state receipt of federal funds on a State electing its representatives by single-member districts.
the States' primary protection against Congress's enumerated powers. But then, seven years later, with some turnover on the Court, a new five-to-four majority put the Court back in the federalism business. That case, New York v. United States, revived judicial review of federalism limits on Congress's power. As noted above, however, New York v. United States ignored prior congressional precedent for commandeering state legislatures—the congressional districting requirement. So, the districting statute forces us to confront a flaw in the Court's new federalism.

Third, the districting question offers an apt opportunity to take stock of the Court's new federalism jurisprudence. The question is untouched by Supreme Court precedent, leaving us free to explore the issue through various methods of constitutional interpretation, without the cloud of authoritative Supreme Court precedent hanging overhead. Now is an especially appropriate time to ask the question, as the Court's recent decision in Alden v. Maine has tied together several strands of the new federalism jurisprudence. The Court's emerging approach to federalism issues can guide our application of the various methods of interpretation.

This Article proceeds in four Parts. Part I sets up the dilemma posed by the districting requirement in light of New York v. United States, which held that Congress cannot commandeer the States. The districting requirement plainly commandeers the States. Part I outlines the options constitutional lawyers face in trying to reconcile this conflict.

Part II then reviews the Court's opinion in New York v. United States. The discussion analyzes the Court's various arguments in support of the anti-commandeering rule, identifying the different methods of constitutional argument used. This review serves as background for analysis of the congressional districting requirement, both illustrating the methods of constitutional argument in action

(1985) (noting that the Court's jurisprudence in Garcia effected a "withdrawal of substantive judicial review" of federalism questions); John C. Yoo, Sounds of Sovereignty: Defining Federalism in the 1990s, 32 Ind. L. Rev. 27, 27 (1998) (noting that Garcia represented a "striking declaration of judicial abdication" from federalism questions).

37 Garcia, 469 U.S. at 550-55. The Court suggested it might find some limits on Congress's enumerated powers, but did not elaborate. Id. at 556 ("These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause.").

38 527 U.S. 706, 758-60 (1999) (holding that Congress cannot commandeer state courts to hear private damages suits against their states).

39 505 U.S. at 187-89.
and suggesting substantive arguments to be applied to the districting requirement.

Part III turns to the question first posed in 1842: Can Congress commandeer the States to draw House districts under its Times, Places and Manner Clause power? Part III analyzes this question by using a methodology of constitutional interpretation that considers text, history, precedent, structure, and prior government practice. I am compelled by the Constitution's text, history, and structure, the Court's reasoning in *New York v. United States* and other relevant precedents, and the history of the districting statute itself to conclude that Congress cannot commandeer the States to draw districts under the Times, Places and Manner Clause. I am mindful of the drastic political consequences that might flow from this conclusion. But the Supreme Court itself set the major premise in *New York v. United States*, and we ought not shrink intellectually from exploring the full constitutional syllogism.

The Conclusion performs two tasks. First, it takes stock of the current project. As noted above, the districting requirement is potentially at odds with the Court's decision in *New York v. United States*. Given Part III's conclusion that Congress cannot commandeer under the Times, Places and Manner Clause, the Conclusion suggests that the anti-commandeering rule in *New York v. United States* should extend to that Clause, and that the districting requirement should be struck down.

The Conclusion's second task is to explain how this Article fits within a larger scholarly project. Striking down the districting requirement would raise a host of questions for future study. For example, if the districting requirement is unconstitutional, where does that leave impending House elections? Could States choose whatever election system they desired, or is their choice limited by the Constitution or other law? Could Congress re-enact the districting requirement under another grant of power? As these questions suggest, the question examined in this Article, though substantial, is just the beginning of a larger project. The Conclusion briefly outlines that larger project.

I. The Dilemma Posed

This Part frames the rest of the Article. Section A describes *New York v. United States* and its anti-commandeering rule. Section B then explains how the congressional districting requirement commandeer state legislatures. Section C then draws together *New York v. United States* and the districting requirement to ask how they affect one an-
other. Does *New York v. United States* require courts to strike down the districting requirement? Or, does the existence of the districting requirement undermine the Court's reasoning in *New York v. United States*? Or, is there a way to reconcile the two?

A. *New York v. United States*

In *New York v. United States*, the Supreme Court reviewed the Low-Level Radioactive Waste Policy Amendments Act of 1985, which created several incentives for States to dispose properly of their low-level radioactive waste. New York challenged the constitutionality of three of the incentives. First, the Act imposed a surcharge on waste disposal and authorized payment from the surcharge to States that complied with a waste disposal timetable set forth in the Act—the Court called this requirement the "monetary incentive." Second, the Act barred a State from access to other States' disposal sites if it did not meet milestones in the federal waste disposal timetable—the Court called this requirement the "access incentive." Third, the Act forced any State that had not met federal waste disposal deadlines to take title to all waste within the State's borders—the Court called this requirement the "take title" provision.

The Court easily upheld the monetary and access incentives. The monetary incentive fell within Congress's Spending Clause power, under which Congress may place conditions on state receipt of federal funds. The monetary incentive merely conditioned receipt of the surcharge funds on compliance with the federal timetable for low-level radioactive waste disposal. Next, the access incentive merely threatened pre-emption of state law if a State did not regulate waste disposal. Specifically, the access incentive would displace state law.

41 505 U.S. at 152.
42 Id. at 153.
43 Id.
44 U.S. Const. art. I, § 8, cl. 1.
45 See, e.g., South Dakota v. Dole, 483 U.S. 203, 207–08 (1987). Specifically, Congress may condition receipt of federal funds when: (1) the condition promotes the general welfare, (2) the condition is unambiguous, (3) the condition is related to the purpose for which the federal funds are to be used, and (4) there is no independent constitutional bar to States complying with the condition. See id. For example, in *Dole*, Congress had conditioned 5% of federal highways funds on state passage of a drinking age of twenty-one or over. The drinking age would promote the general welfare (public safety); the condition was unambiguous (raise the drinking age or lose 5% of the funds); the drinking age was related to the purpose of the highway funds (safe interstate highways); and the Constitution did not bar state compliance with the condition. Id. at 207–09.
with a federal law—a law that denied access to other States’ disposal sites\textsuperscript{46}—if a State failed to regulate.

The take title provision posed a more difficult question. That provision could not be upheld as conditional spending because it did not deal with receipt of federal funds. Similarly, the take title provision could not be upheld as pre-emption of state law because it did not threaten to displace state law with a federal regulation. The question, then, became whether the provision fell in a third class of federal statutes—those that commandeered state legislatures to make law. The Court explained that Congress does not have power to “commandeer” States to enact legislation.\textsuperscript{47} If the take title provision fell in this third category, it was unconstitutional.

So, the Court had to determine whether the take title provision commandeered the States.\textsuperscript{48} The provision confronted States with the following choice: either regulate low-level radioactive waste as Congress has prescribed, or take title to all such waste within your borders.\textsuperscript{49} The Court concluded that this choice effectively commandeered the States because each option standing alone was impermissible commandeering.\textsuperscript{50} Consider each option in turn. First, Congress could not simply direct States to enact regulation of low-level radioactive waste; that would be a straightforward case of com-

\textsuperscript{46} The Supreme Court had previously held that the dormant Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, prevents a State from prohibiting disposal of out-of-state waste. See City of Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978). Congress, however, can authorize States to take actions that would otherwise violate the dormant Commerce Clause. See Northeast Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 174 (1985). The access incentives, then, authorized conduct—denial of access to out-of-state low-level radioactive waste—that was otherwise prohibited by the Court’s prior decision in City of Philadelphia v. New Jersey.

\textsuperscript{47} 505 U.S. at 158–65. Part II of this Article reviews the reasons for the anti-commandeering rule.

\textsuperscript{48} 505 U.S. at 174–77.

\textsuperscript{49} The Act stated the choice as follows:

If . . . a State . . . in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State . . . by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.


\textsuperscript{50} 505 U.S. at 175–76.
mandeering.\textsuperscript{51} Second, Congress could not simply direct States to take title to the low-level radioactive waste within their borders. By shifting the financial burden of the waste from private waste generators to the States, the law effectively directed the States to subsidize private waste generators.\textsuperscript{52} And, such a subsidy is no different from a state law either appropriating funds, granting tax relief, or some similar act.\textsuperscript{53} Because Congress could not enact either option standing alone, it could not force States to choose between the two.\textsuperscript{54} Thus, the take title provision unconstitutionally commandeered the States.

In concluding its analysis, the Court observed: "The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress."\textsuperscript{55} As the next Section explains, this is not so. Rather, the districting requirement poses the same choice as the take title provision and, in doing so, commandeers the States.

\textbf{B. The Districting Requirement}

The current districting requirement commandeers the States in the same way that the take title provision did. Congress enacted the first requirement in 1842, and such a requirement has been in effect on-and-off since that time. The Statutory Appendix at the end of this Article sets forth the various versions of the districting requirement and explains when each was in force. As codified, the current districting requirement reads:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a)

\textsuperscript{51} \textit{Id.} ("[The command of] regulating pursuant to Congress's direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.").

\textsuperscript{52} \textit{Id.} at 175 ("[The take title provision's] forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers.").

\textsuperscript{53} See \textit{id.} (stating that the requirement of taking title "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments").

\textsuperscript{54} \textit{Id.} at 176 ("[Congress has] held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all.").

\textsuperscript{55} \textit{Id.} at 177.
of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).56

Section 2c expressly commands the States to make law. As emphasized above, States “shall . . . establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled . . . .”57 Consequently, the States are commanded (“shall”) to make law (“by law”) by drawing congressional districts. As with the command to regulate low-level radioactive waste in New York v. United States, this is commandeering.

Section 2c could also be read as posing States an impermissible choice: either draw districts, or the House will not seat your representatives.58 As with the take title provision in New York v. United States, Congress could not enact either option standing alone. First, Congress could not direct state legislatures to draw congressional districts—this is straightforward commandeering.59 Second, Congress could not refuse to seat a State’s representatives, unless the representative did not have the constitutional qualifications.60 Consequently, the districting requirement forces States to choose between two options, neither of which Congress could enact standing alone. As with the take title provision, this choice is tantamount to commandeering.

So, the districting requirement operates in a way similar to the take title provision. In short, both commandeer the States to enact legislation. The next Section draws the implications of this similarity.

C. Initial Implications

New York v. United States missed an important piece of constitutional history. Recall that the Court said it was not aware of any prior

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57 Id. (emphasis added).
58 The statute does not expressly make this threat, but the history of the districting requirement shows that the refusal to elect by districts would be a ground for refusing to seat a State’s representatives. See infra notes 455–69 and accompanying text.
59 Of course, this statement assumes, for purposes of exposition, the answer to the question that takes up Part III of this Article: Whether Congress can commandeer the States under the Times, Places and Manner Clause.
instance where Congress had commandeered the States. Yet, on and off since 1842, Congress has commandeered the States into drawing districts for election of the House of Representatives. The question is what to make of this historical omission. I suggest three options.

**Option One:** The Court’s reasoning in *New York v. United States* is weakened. If the Court relied heavily on the absence of prior congressional commandeering, then the opinion could be fatally flawed. Even if that factor was a subsidiary point, it is still a piece of the opinion’s overall supporting structure, and that piece’s load bearing capacity is weakened because the Court failed to deal with critical contrary precedent. In that event, the Apportionment Act of 1842 and its progeny are the correct precedent, and Congress may properly commandeer the States.

**Option Two:** The Court got it right in *New York v. United States*, and the districting requirement is an unconstitutional commandeering of state legislatures. Under this option, the existence of the districting requirement does not weaken the Court’s rationale one bit. Rather, the districting requirement has always been unconstitutional (as a congressional committee actually concluded in 1844), and the Court’s (and the litigants’) failure to address that law in *New York v. United States* does not change that fact.

**Option Three:** While the Court got it right in *New York v. United States*, the districting requirement is nonetheless constitutional. *New York v. United States* simply held that Congress cannot use its Com-

61 See *supra* note 55 and accompanying text.

62 Professor Martin Flaherty makes this point well in critiquing various constitutional theorists’ use of history. See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 *COLUM. L. REV.* 523 (1995). Professor Flaherty recognizes that few, if any, constitutional theorists rest their arguments solely on history. *Id.* at 528–29. As he explains in critiquing Richard Epstein’s work:

[N]one of this may matter much for Epstein’s ultimate theoretical conclusions, if those conclusions in the end do not rest on his views of the Founding or of history generally. But even if they do not, this hardly means that the problems with Epstein’s appeals to the past themselves do not matter. To the contrary, they count precisely to the extent that Epstein himself—rightly—invo kes the authority of history to enhance, reinforce, and embellish his prescriptions. Any failure to make the relevant historical assertions in a credible fashion diminishes his overall project in just the proportion he hoped to strengthen it.

*Id.* at 557. The same goes for the Supreme Court’s use of history—or, perhaps in this case, absence of history—to support its holding in *New York v. United States*. To whatever degree the Court relied on the absence of prior congressional commandeering, the Court’s opinion loses that degree of support.
merce Clause power (or presumably any other power enumerated in Article I, Section 8) to commandeer the States. The districting requirement, however, was enacted under the Times, Places and Manner Clause of Article I, Section 4, which grants Congress the power to "make or alter" the "Regulations" of "the Times, Places and Manner of holding Elections for Senators and Representatives ...."63 History, text, structure, precedent, and other sources of constitutional argument might show that the Times, Places and Manner Clause, unlike the Commerce Clause, granted Congress the authority to commandeer the States.

Part III discusses the issue raised by Option Three: Can Congress commandeer the States under the Times, Places and Manner Clause? Whether we must make the further choice between Options One and Two is contingent on the answer to this question. If Congress can commandeer the States under the Times, Places and Manner Clause, New York v. United States and the districting requirement can peacefully coexist and no further choice is required. If, however, Congress cannot commandeer the States under the Times, Places and Manner Clause, we face a choice: either New York v. United States or the districting requirement must go—Option One or Option Two.

As a prelude to Part III’s discussion of commandeering under the Times, Places and Manner Clause, Part II reviews the reasoning behind New York v. United States’ anti-commandeering rule. The Court appealed to precedent, history, structure, and prior government practice in support of its holding. These arguments, in turn, will inform Part III’s discussion of commandeering under the Times, Places and Manner Clause. The Conclusion then considers whether and, if so, how we should choose between Option One (keeping the districting requirement) and Option Two (keeping New York v. United States).

II. New York v. United States Analyzed

All parties in New York v. United States acknowledged that Congress could regulate disposal of low-level radioactive waste under the Commerce Clause.64 For example, Congress could regulate where and how private waste generators dispose of their waste.65 Thus, New

65 Under the Court’s prior decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), Congress can regulate both private and state conduct in the same law. For example, a law that required all waste producers to dispose of their waste in a certain manner would validly apply to both private waste producers and state governments. Because the take title provision solely regulated state governments, and effectively commanded them to legislate, that provision did not come
York v. United States was not about what subjects Congress could regulate. Rather, the case considered how Congress could regulate those subjects. Specifically, could Congress command the States to make law, instead of making the law itself?

Unlike conduct listed in the Bill of Rights, commandeering of state legislatures is not prohibited by the Constitution's text. For example, the First Amendment expressly prohibits Congress from, among other things, making any "law respecting an establishment of religion." Conversely, no provision of the Constitution says "Congress shall make no law directing the States to make law," or some wording to that effect. Indeed, the only text usually trotted out on the issue—the Tenth Amendment—provides no answer: "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." The Tenth Amendment merely begs the question: Is the power to commandeer the States a power "delegated to the United States by the Constitution"?

Absent helpful text, the Court in New York v. United States rightly turned to accepted methods of constitutional interpretation: history, within the Garcia rule. See New York v. United States, 505 U.S. at 160 ("This litigation presents no occasion to apply or revisit the holdings of [Garcia and related cases], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.").

66 United States v. Lopez, 514 U.S. 549 (1995), addressed what subjects Congress could properly regulate. Specifically, the Court held that Congress could not use its Commerce Clause power to regulate mere possession of a firearm near a school. See id. at 559–68.

Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. ... Regulation of the ... interstate market in waste disposal is ... well within Congress's authority under the Commerce Clause. Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

Id. (citations omitted).

68 U.S. Const. amend. I; see also id. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."); id. amend. III ("No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law."); id. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

69 Id. amend. X.
precedent, structure, and prior government practice. The remainder of this Part reviews the Court's arguments under each method. This review shows the various methods in action and provides background for the discussion in Part III about whether Congress can commandeer under the Times, Places and Manner Clause. The following discussion is not an exhaustive review or critique of the Court's reasoning. Rather, review and critique are pursued only insofar as necessary to the issues discussed later in this Article.

A. Precedent

*New York v. United States* used precedent for two main purposes. First, the Court argued that two of its prior cases established an anti-commandeering rule. Second, the Court cited a series of older cases as establishing background principles of federalism that, in turn, supported the anti-commandeering rule. This Section examines each use of precedent.

1. Cases Establishing an Anti-commandeering Rule

This Subsection assesses the Court's use of precedent, but not in order to criticize the Court's holding in *New York v. United States*. Rather, this discussion identifies the attitude the Court brings to its use of precedent. As any student of the law knows, judges can read a precedent either broadly, extending its reach beyond the narrow issue decided in that case, or narrowly, limiting its holding to the issue, or even the facts, of that case. This is what I mean by the "attitude" a court brings to precedent—the Court's predisposition to read a case or line of cases narrowly or broadly. This Subsection reviews the use of precedent in *New York v. United States* to determine the Court's attitude toward federalism precedents.

*New York v. United States* pointed to two prior decisions, *Hodel v. Virginia Surface Mining and Reclamation Ass'n* and *FERC v. Mississippi*. Of course, other methods of interpretation, such as prudential concerns, could have been brought to bear on the question. See infra notes 437–42 and accompanying text.

70 Of course, other methods of interpretation, such as prudential concerns, could have been brought to bear on the question. See infra notes 437–42 and accompanying text.


as recognizing an anti-commandeering rule. Neither case, however, did so. Instead, each case carefully set aside that issue for future decision, though each opinion contained loose language that, taken out of context, could support an anti-commandeering rule. Simply put, *New York v. United States* mischaracterized prior precedent. The remainder of this Subsection explains how the Court did so and concludes by suggesting what this use of precedent tells us about the Court's attitude toward its federalism precedents generally.

*Hodel* involved a challenge to the Surface Mining Control and Reclamation Act of 1977. In pertinent part, the Act regulated the mining and reclamation of steep slopes requiring a company mining a steep slope to return the site to the "approximate original contour." The Act was challenged as infringing a State's right to regulate an area of traditional state interest: land use. The Court disagreed, explaining that this argument misunderstood the nature of state sovereignty protected by the Constitution. The Constitution protects against Congress regulating the States themselves, but not against federal regulation of private conduct. The Act did not regulate the States or direct them to act, but rather regulated private behavior—mining of steep slopes. While the Act did pre-empt state land use laws, state sovereignty is not violated when Congress simply pre-empts state regulation of private behavior.

Since the Act did not regulate the States themselves, the Court never had to address the issue of commandeering. Indeed, the Court said as much:

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73 456 U.S. 742 (1982).
76 See id. § 1265(d)(4) (1994) (defining "steep slope" as "any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State").
77 Id. § 1265(d)(1).
78 See *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 284–85 (1981) (noting that the district court had "concluded that the Act contravenes the Tenth Amendment because it interferes with the States' ‘traditional governmental function’ of regulating land use").
79 Id. at 286–87.
80 Id. at 288 (“[T]he steep-slope provisions of the Surface Mining Act govern only the activities of coal mine operators who are private individuals and businesses.”).
81 Id. at 289–90 (“To object to [the Act], appellees must assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect.”)
Moreover, the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. . . . Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.  

Immediately after this passage, the Court cited three court of appeals cases that also noted but did not decide the issue of commandeering. Each of these cases was appealed to the Supreme Court, where the federal government made pertinent concessions that mooted the appeals and led the Court to vacate and remand each case. Thus, neither Hodel nor the court of appeals cases cited therein analyzed or addressed the issue of commandeering. Each case left that issue for another day.

While a careful reading of Hodel shows the Court bracketing the commandeering issue, New York v. United States transmogrifies the case into precedent for an anti-commandeering rule. Consider the following paragraph from the Court’s opinion.

As an initial matter, Congress may not “commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” In Hodel, the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did not commandeer the States into regulating mining.

Both sentences in this passage are misleading. First, the Court introduces its quote from Hodel as if those words stated the rule from the case. This is the ordinary import of beginning the sentence with the phrase “Congress may not”; it tells the reader that what follows that phrase will identify what Congress may not do—here, commandeer the States. Yet, in context, that quote merely described the federal statute under review. The full quote is: “Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” As discussed above, this observation led the Court to leave aside the issue of

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82 Id. at 288.
86 Hodel, 452 U.S. at 288 (emphasis added).
commandeering: Since the Act did not commandeer the States, the issue of Congress’s power to commandeer was not properly before the Court. Thus, by quoting *Hodel* out of context, the Court transforms a passing observation into a rule of law.

The second sentence of the above-quoted passage also misleads. According to that sentence, *Hodel* upheld the Act “precisely because” the Act did not commandeer the States. This language suggests that the absence of commandeering itself provided the reason for the Court’s decision to uphold the Act. The Court means to give the impression that *Hodel* set forth an anti-commandeering rule, and that the Act survived that rule because it did not commandeer. But, once again, the Court mischaracterizes *Hodel*. *Hodel* observed that the Act did not commandeer in order to place the Act in a category of clearly constitutional federal law making—federal statutes that regulate private behavior. Further, that observation meant that the Court did not have to decide whether commandeering was constitutional. Thus, rather than forming the basis of *Hodel*, the fact that the Act did not commandeer merely clarified and limited the issue before the Court.

*New York v. United States* gave the same misleading treatment to *FERC v. Mississippi* as it did to *Hodel*. *FERC v. Mississippi* involved a federal statute that required the States to “consider” enactment of certain federally prescribed legislation, but stopped short of requiring the States to enact the provisions. *New York v. United States* claimed that *FERC v. Mississippi* “reached the same conclusion” as *Hodel*, presumably that commandeering is unconstitutional, and that *FERC v. Mississippi* “upheld the statute at issue because it did not view the statute as such a command.” But, just as in *Hodel*, *FERC v. Mississippi* never decided whether commandeering was permissible. Indeed, the Court explicitly reserved that issue: “[T]he Court in this case to make a definitive choice between competing views of federal power to compel state regulatory activity.” Yet, *New York v. United States* portrays *FERC v. Mississippi* as making just that choice against commandeering.

*New York v. United States* shows the Court exaggerating precedent to support a pro-federalism result. *Alden v. Maine*, one of the

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87 See id.
88 See id.
90 Id. at 745–53 (describing operation of the statute at issue).
91 New York v. United States, 505 U.S. at 161.
92 Id. (emphasis added).
93 *FERC v. Mississippi*, 456 U.S. at 764.
Court's most recent Eleventh Amendment cases, shows the Court doing just the opposite when precedent does not support a pro-federalism result. As discussed further in Part III, Alden held that States entered the Union with an immunity from private damages suits in state or federal court.95 The main issue in the case was whether Congress could use an Article I power—for example, its power to regulate interstate commerce—to abrogate that state immunity.96 As in New York v. United States, the Alden Court faced several prior decisions that contained loose language bearing on the issue.97 Specifically, Hilton v. South Carolina Public Railways Commission98 contained language supporting congressional abrogation of the States' immunity. There, the Court wrote that when "a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court."99 The Court in Alden distinguished Hilton, writing, "Hilton... did not squarely address, much less resolve, the question of Congress's power to abrogate States' immunity from suit in their own courts."100 But, the same could be said of Hodel and FERC v. Mississippi, the two cases New York v. United States used to support its anti-commandeering rule. Nonetheless, Alden distinguished Hilton and boldly declared that the issue was one of "first impression" allowing the Court to write on a clean slate.101

95 Id. at 709.

96 The Court had previously held in Seminole Tribe v. Florida, 517 U.S. 44 (1996), that Congress could not use its Article I powers to abrogate state immunity from suit in federal court. Id. at 72–73. The Court has recognized, however, that Congress can abrogate state immunity to suit in federal court under its power to enforce the Fourteenth Amendment. See U.S. Const. amend. XIV, § 5; Seminole Tribe, 517 U.S. at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). But see Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642–43 (1999) (holding that federal patent laws did not abrogate state immunity to suit in federal court because they were not a valid exercise of Congress's power to enforce the Fourteenth Amendment's prohibition of deprivations of "property" without due process of law); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 690–91 (1999) (holding that federal trademark laws did not abrogate state immunity to suit in federal court because they were not a valid exercise of Congress's power to enforce the Fourteenth Amendment's prohibition of deprivations of "property" without due process of law).

97 Alden, 527 U.S. at 735 ("There are isolated statements in some of our cases suggesting that the Eleventh Amendment is inapplicable in state courts.").


99 Id. at 207.

100 Alden, 527 U.S. at 737.

101 Id. at 741 ("Whether Congress has authority under Article I to abrogate a State's immunity from suit in its own courts is, then, a question of first impression.").
So, the *Alden* Court faced the mirror-image type of precedent faced by the Court in *New York v. United States*. In *New York v. United States*, the Court faced precedent that did not address its issue, but contained language *favorable* to the Court’s pro-federalism result. The Court seized on the favorable language, claiming the precedent directly supported the Court’s holding. Conversely, in *Alden*, the Court faced precedent that did not address its issue, but contained language *adverse* to the Court’s pro-federalism result. The Court diminished the unfavorable language, claiming the precedent did not control the issue before the Court. These two cases reveal the Court’s *attitude* toward federalism precedent. When dicta supports the Court’s pro-federalism agenda, the precedent is embraced, and its authority exaggerated. But, when dicta contradicts the Court’s desired result, the precedent is marginalized, and its authority minimized.

Two questions arise from the Court’s treatment of precedent in federalism cases: (1) Why did the Court do it?; and (2) What are the implications, if any, for the analysis in this Article? We can never know subjectively “why” the justices did so,¹⁰² but objectively *New York v. United States* reads as if the Court had a conclusion in mind—commandeering is unconstitutional—and read precedent through the lens of that conclusion. As with any lens, it bent and distorted that which passed through it so that the Court saw an altered version of what was really there. It was only through thick federalism spectacles that the Court could see an anti-commandeering rule in *Hodel* and *FERC v. Mississippi*.

For purposes of our present analysis, precedent should be reviewed through the same lens of federalism.¹⁰³ This lens would concentrate and focus the state sovereignty aspects of the Court’s opinions and filter out any of the qualifying language or, still worse, language supporting stronger national power over the States. Practically speaking, this attitude toward precedent yields a sort of default

¹⁰² Unless, of course, either a Justice reveals the reason to a biographer, or a Supreme Court clerk working for the Court at the time writes a book that brings new information to light. *See*, e.g., *Edward Lazarus, Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (1998).

presumption—read precedent to give the strongest support to federalism that the opinion’s language will allow. When a case is ambiguous on an issue of federal versus state power, read the case to support the States.

That judicial attitude affects the reading of precedent should not be surprising. Because the methods of legal argument do not always (or often) yield determinate answers, judges will decide close cases based on background beliefs about “what is fair or otherwise desirable.” If a pro-federalism principle is one of those background beliefs, judges will comb cases for snippets of language, however out of context, that will support greater state sovereignty. As with *Hodel* and *FERC v. Mississippi*, dicta and passing observations can be converted to holdings and rules. And, precedent squarely contrary to the Court’s federalism values can be distinguished or, if absolutely necessary, ignored or overruled.

2. Cases Establishing Background Principles

In discussing a second group of precedents, *New York v. United States* reviewed cases that presage the discussion of history in Section B. The Court cited these cases for two basic propositions. First, both the state and national governments were to retain respective areas of sovereignty under the new Constitution that could not be invaded or destroyed by the other. Second, the Constitution created a national government that would regulate individuals directly, as opposed


to the Articles of Confederation, where the national government regulated indirectly through the States. These two propositions complement one another. The first proposition holds that States entered the union with certain aspects of their sovereignty intact, and that the federal government cannot invade or destroy the remaining aspects of state sovereignty. This is an unwritten principle derived from the Constitution's structure. The second proposition uses the history of the Articles of Confederation to show that commandeering of state legislatures would improperly invade the States' remaining sovereignty. This history is discussed at greater length in Section B.

In the end, none of the cases cited or discussed in New York v. United States directly supported the Court's anti-commandeering rule. Indeed, none of the cases even addressed the issue. Instead, Hodel and FERC v. Mississippi reserved the issue for future resolution. The remaining cases discussed background federalism principles consistent with an anti-commandeering rule. Under no conventional use of the term precedent, then, could one say that these cases required the outcome in New York v. United States.

So, of what use were these precedents? Consider two possible uses. First, to show that the anti-commandeering rule was not rejected by prior precedent. Second, to establish background principles from which one could deduce an anti-commandeering rule. And, as discussed above, the Court's pro-state-sovereignty attitude affected its use of precedent, leading the Court to overstate the effect of those precedents. Part III.D.1 will incorporate these lessons in reviewing Supreme Court precedent on the Times, Places and Manner Clause.

B. History

New York v. United States used history to make two related points. First, government under the Articles of Confederation was flawed because Congress regulated through the States. Second, the Framers corrected this flaw by creating a national government that regulated

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106 See New York v. United States, 505 U.S. at 162-63. On this point, the Court cited Coyle v. Smith, 221 U.S. 559, 565 (1911), and Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868) ("Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States."). 505 U.S. at 162.
individuals directly, not through States. The remainder of this Section outlines the Court's historical evidence on each point.

The Articles of Confederation hamstrung the national government by making its laws dependent upon the States. Alexander Hamilton made the familiar point in Federalist No. 15: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contra distinguished from the INDIVIDUALS of whom they consist." Under the Articles, Congress could ask States to provide funds to the national government, but the States were largely free to ignore the request, as they often did. Similarly, when Congress concluded treaties with other nations, many States ignored those documents unless a particular treaty happened to coincide with their economic interests. And, when other nations took coordinated action against the United States, Congress could not reliably enlist the States in a common response. All of these problems stemmed from Congress's dependence on the States to implement national policy and law.

Having identified the problem, the Court's next step was to determine how the Framers solved the problem. The Constitution did so by creating a national government that regulated individuals directly

109 Id. at 164–66.
112 See James Madison, Vices of the Political System of the United States (1787), reprinted in 1 THE FOUNDERs' CONSTITUTION 166–67 (Philip B. Kurland & Ralph Lerner eds., 1987) (complaining of the “[f]ailure of the States to comply with the Constitutional requisitions”); THE FEDERALIST No. 15, supra note 111, at 106–07 (Alexander Hamilton).
114 Shortly after the Revolutionary War, Britain closed its ports to American ships. To regain access, the United States wanted to implement a national response, closing its ports to British ships until such time as Britain re-opened its ports. Since the federal government did not have power over the subject, the coastal States acted in their best interests by keeping their ports open, and the United States could not coordinate a successful response. See Jack N. Rakove, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 26–27 (1996).
instead of regulating through the States.\footnote{One dissent argued that the Constitution created a national government that would regulate individuals \textit{in addition to} regulating States. \textit{New York v. United States}, 505 U.S. 144, 210 (1992) (Stevens, J., concurring in part and dissenting in part). For a brief critique of this position, see \textit{infra} note 134.} The remainder of this Section outlines the historical evidence the Court offered on this point.

The Court began with debate in the federal drafting convention over the Virginia and New Jersey plans, comparing the relevant aspects of the two plans. Consider the following passage from the Court's opinion:

Under the Virginia Plan, as first introduced by Edmund Randolph, Congress would exercise legislative authority directly upon individuals, without employing the States as intermediaries. Under the New Jersey Plan, as first introduced by William Paterson, Congress would continue to require the approval of the States before legislating, as it had under the Articles of Confederation.\footnote{\textit{New York v. United States}, 505 U.S. at 164. For the Virginia Plan, see \textit{1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787}, at 20–22 (Max Farrand ed., 1966). For the New Jersey Plan, see \textit{id.} at 242–45. The Virginia Plan would give Congress the power to "legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." \textit{id.} at 21. While the New Jersey Plan would have authorized Congress to raise revenue through charging for postage, \textit{id.} at 243, it still had Congress making requisitions from the States. \textit{id.} at 243–44.}

In choosing the Virginia Plan over the New Jersey Plan, the Framers rejected commandeering of the States.\footnote{\textit{See New York v. United States}, 505 U.S. at 165 ("In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan."); \textit{see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787}, \textit{ supra} note 116, at 313 (listing vote on motion "not to agree to the Jersey proposition but to report those offered by Mr. Randolph").} The main reason for this choice was the impracticability of commandeering; the Framers were not willing to create a government that could make commandeering work.

The Framers saw that enforcing laws against an individual was much easier than enforcing laws against a State. When a government commands individuals to act, as with the income tax laws, the government can easily arrest, try, and imprison any individual who refuses to comply.\footnote{\textit{The Federalist} No. 15, \textit{ supra} note 111, at 110 (Alexander Hamilton).} When one government commands another government to act, however, as with congressional commandeering of the States, conventional law enforcement methods simply will not work. Rather,
compliance can be gained only by military force.\textsuperscript{119} So, if the Framers wanted Congress to commandeer the States, they faced the following choice: If commandeering were to succeed, Congress would need to raise a standing army in peace time to enforce its commands against the States; if Congress was not prepared to wield military force against the States, its commands would be ignored, as under the Articles of Confederation.\textsuperscript{120}

Neither choice was acceptable to the Framers. First, given the Framers' well-known fear of a national standing army,\textsuperscript{121} it was unthinkable that Congress could raise and keep such an army for the express purpose of coercing the States.\textsuperscript{122} The colonists had considered the English standing army a significant threat to their liberty.\textsuperscript{123} In their mind, a professional army was only loyal to whomever paid them\textsuperscript{124} and could be used to silence political dissent or harass politi-
cal opponents. Indeed, this lingering fear lay behind the Second Amendment, which protects the citizen militia—neighbor fighting alongside neighbor—as “necessary to the security of a free State.” And, the Constitution itself protects against abuse of a national standing army by placing power to initiate use of the army—the power to declare war—in civilian hands, and by limiting appropriations for raising and supporting a standing army to two years, thereby requiring each new Congress to renew the appropriation after an election by the People.

But, commandeering without a standing army would simply set up Congress for continued failure, as under the Articles of Confederation. This too was unacceptable. A main impetus for the new Constitution was Congress's weakness under the Articles. The work of the drafting and ratifying conventions would have been for naught if that important failing went unaddressed. Also, an important part of the Constitution's structure was the vertical division of power between national and state governments. Each level of government was to protect the people from abuse by the other and, in doing so, protect individual liberty. If the national government was stillborn under

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125 U.S. CONST. amend. II.
126 Id. art. I, § 8, cl. 11 (“The Congress shall have Power... To declare War...”);
see also The Federalist No. 46, supra note 111, at 298–99 (James Madison) (explaining how the States could guard against the national government raising a standing army to be used to harass the States). The Framers considered Congress to be a civilian branch of government, while the President, as commander in chief of the armed forces and as the national officer empowered to wage war, was considered to be part of the military in the exercise of those powers. See Amar, supra note 124, at 1174; John Dwight Ingram & Alison Ann Ray, The Right(?) to Keep and Bear Arms, 27 N.M. L. Rev. 491, 498 (1997) (noting that the Framers gave Congress authority to raise an army, but subject to civilian control).
127 U.S. CONST. art. I, § 8, cl. 12 (“The Congress shall have Power... To raise and support armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years...”). If the people were upset by a particular appropriation to that purpose, they could express their opinion in the next congressional election and send back a Congress that would not renew the appropriation. The immensely political nature of the issue is illustrated by the partisan fighting that took place over an appropriation for raising troops passed during President John Adams's administration. See Elkins & McKitrick, supra note 122, at 595–618.
128 See supra notes 108–15 and accompanying text.
129 The Federalist No. 51, supra note 111, at 323 (James Madison).

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.
the new Constitution, this important structural safeguard would not exist.

So, commandeering posed an unacceptable choice: To be effective, it would require a standing army during peace time; to be palatable to the people, there could be no standing army in peace time, and Congress would retain its former impotence. Speaking in the New York ratifying convention, Alexander Hamilton described the choice as follows:

But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream, it is impossible. Then we are brought to this dilemma—either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support.130

Other Framers, at both the drafting and state ratifying conventions, echoed this concern over the workability of commandeering.131

In the same speech, Hamilton concluded that commandeering must be abandoned: “What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do.”132 When two types of sovereigns, one national and one local, rule the same territory, both must act upon the individual citizens within that territory, and neither should act upon the other. To do otherwise would invite a cruel dilemma: a standing army in peace time to enforce one sovereign’s edicts over the other, or effective destruction of the sovereign who can only act through the other. So, as many of the Framers explained at the drafting and ratifying conventions, the Constitution chose direct

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131 See 2 id. at 56 (Statement of Rufus King at the Massachusetts ratifying convention) (“Laws, to be effective, therefore, must not be laid on states, but upon individuals.”); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 116, at 9 (Statement of James Madison at the drafting convention) (“The practicability of making laws, with coercive sanctions, had been exploded on all hands.”); 1 id. at 256 (Statement of Randolph at the drafting convention) (“There are but two modes, by which the end of a Genl. Govt. can be attained: the 1st. is by coercion as proposed by [the New Jersey Plan, the 2nd] by real legislation as propd. by the other plan. Coercion he pronounced to be impracticable, expensive, cruel to individuals.”).

132 2 Elliot’s Debates, supra note 130, at 233.
congressional regulation of private behavior over commandeering of the States. In sum, the Court used history to make the following point: Congressional commandeering of the States would not establish a workable national government, and thus the Framers empowered Congress to regulate individuals directly and not through the States. In Part III.C.2, we will see how this point bears on Congress’s power to commandeering under the Times, Places and Manner Clause.

133 New York v. United States, 505 U.S 144, 166 (1992) (“In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”). The Court cited to the following statements from the state ratifying conventions: 4 Elliot’s Debates, supra note 130, at 153 (statement of Samuel Spencer at the North Carolina ratifying convention) (“All the laws of the Confederation were binding on the states in their political capacities, . . . but now the thing is entirely different. The laws of Congress will be binding on individuals.”), 2 id. at 197 (statement of Oliver Ellsworth at the Pennsylvania ratifying convention) (“This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity . . . . But this legal coercion singles out the guilty individual.”), and 4 id. at 256 (statement of Charles Pinckney to the South Carolina ratifying convention) (“The necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present.”). See also The Federalist No. 16, supra note 111, at 116 (Alexander Hamilton) (For the new national government to succeed, “[i]t must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations, but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions.”); id. No. 45, at 293 (James Madison) (“The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.”).

134 One dissenter in New York v. United States reviewed the same history and concluded that while the Framers believed that commandeering alone would not establish a workable national government, commandeering coupled with the power to legislate for individuals would do so. See 505 U.S. at 210 (Stevens, J., concurring in part and dissenting in part). I will not venture here a critique of the Court’s and the dissent’s relative arguments on this point. For purposes of the present analysis, however, it is sufficient to note that the dissent’s argument recognizes only one objection to commandeering—that it reduces the effectiveness of the national government. See id. (“Because that indirect exercise of federal power [under the Articles of Confederation] proved ineffective, the Framers empowered the Federal Government to exercise legislative authority directly over individuals within the States . . . .”). If that were the only objection, then allowing commandeering along with direct regulation of individuals would be a benign result. But, as the Court explained, the Framers actually feared commandeering because it required a standing army to enforce national mandates against the States. See supra notes 118–27 and accompanying text. Considering this objection, we can see why the Framers would have rejected commandeering at the same time they embraced direct regulation of individuals.
C. Structure

New York v. United States also made a structural argument in support of its anti-commandeering rule. Structural arguments in constitutional law generally follow four steps of analysis. First, identify the constitutional structure to be used. Second, infer a relationship that exists within that constitutional structure. Third, make a factual statement about the world that bears on the relationship inferred from the constitutional structure. Fourth, draw on the first three steps to formulate a rule that applies to the issue at hand. Of course, when these arguments are made in practice, lawyers generally do not speak in these terms. Rather, they just go ahead and make the arguments, not stopping to label each step in the chain of logic. But, as with any practice, it is helpful for purposes of initial explanation to be artificially formal about the method so readers unfamiliar with this type of argument can follow and critique its logic.

The canonical constitutional law case McCulloch v. Maryland offers an excellent illustration of structural argument. One issue in McCulloch was whether the States could tax the national bank. Chief Justice John Marshall analyzed this issue using the following structural argument: First, the constitutional structure involved was federalism, the system of government under which the People govern themselves through both national and state governments. Second, within this structure, we can infer a relationship between the national and state governments, namely that the national government is supreme within its limited sphere of power. Third, we can make several factual statements about how the power to tax operates in the world. If

135 In this discussion, as well as the discussion on structure in Part III, I follow Professor Philip Bobbitt's outline of structural analysis in his book Constitutional Interpretation. See Philip Bobbitt, Constitutional Interpretation 16 (1991).


137 Id. at 425. The first issue in the case was whether Congress had the power to create a national bank. Id. at 401. In deciding this first issue in the affirmative, Chief Justice John Marshall held that Congress possessed implied powers to do all things convenient to implementing its enumerated powers. See id. at 422.

138 Professor Bobbitt summarizes this analysis in Philip Bobbitt, Constitutional Fate: Theory of the Constitution 79 (1982).

139 This inference, of course, is made explicit in the Supremacy Clause of Article VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.
one government can tax another government, the taxing government can alter the policy choices of the taxed government. Policy choices are made, in part, based on the relative costs and benefits of different law making options. If a State can tax one option under consideration by the national government, a national bank for example, then the State could change the cost-benefit calculus of that option and, in doing so, alter the national government's decision. If the state tax alters the national government's decision, the state tax effectively makes the state government supreme on that decision. Fourth, we can formulate a rule to answer the issue in *McCulloch*: States cannot tax the national government because such a tax would violate the structure of federalism in which the national government has limited but supreme power.

In *New York v. United States*, the Court used a structural argument to support its anti-commandeering rule. While the Court did not walk through the four steps of a structure analysis, we will do so here. First, the Court relied on the structure of representative government. Second, from that structure, one can infer something about the relationship between the electorate and their representatives. Specifically, representatives are held accountable to the electorate at periodic elections. This accountability allows the electorate to check their representatives' use of government power, preventing government tyranny. Third, we can make several factual observations about how accountability works in practice. If Congress can commandeer the States, Congress can effectively blur the lines of accountability and insulate their decisions from popular review. The Court explained that when Congress regulates private behavior directly, it is the Federal Government that makes the decision in the full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

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141 See id. at 168.
Fourth, the Court derived a rule that decided the case: Congress cannot commandeer state legislatures because such action interferes with the constitutional structure of accountable representation.\textsuperscript{144} Part III.E.1 will show how this structural argument applies to commandeering under the Times, Places and Manner Clause.

\textbf{D. Past Government Practice}

Past government practice can serve as precedent that supports or undermines challenged government action. \textit{McCulloch} again offers a helpful illustration. Another issue in \textit{McCulloch} was whether Congress had the power to create the Bank of the United States.\textsuperscript{145} The bank in \textit{McCulloch} was actually the second national bank; Congress had first chartered a national bank about thirty years before, during George Washington's first term as President.\textsuperscript{146} Chief Justice Marshall used the first bank as precedent that supported the constitutionality of the second bank. According to Marshall, the first bank was passed after thorough discussion in both Congress and the executive branch over Congress's power to do so.\textsuperscript{147} Also, at that time, many members of Congress and the executive branch had participated in the drafting and ratifying conventions only a short time before. Thus, the people who enacted and implemented the first bank had peculiarly intimate knowledge of the Constitution's meaning. For all these reasons, the first bank was strong precedent for the constitutionality of the second bank.\textsuperscript{148}

In \textit{New York v. United States}, the Court noted the absence of prior government practice. The Court concluded its analysis of the take title provision with the following paragraph.

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress's enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is in-

\textsuperscript{144} Id.
\textsuperscript{145} 17 U.S. (4 Wheat.) 316, 425 (1819).
\textsuperscript{146} For a discussion of creation of the first national bank, see Elkins & McKittrick, supra note 122, at 226–33; Paul E. McGreal, Ambition's Playground, 68 Fordham L. Rev. 1107, 1119–21 (2000).
\textsuperscript{147} 17 U.S. (4 Wheat.) at 401–02.
consistent with the federal structure of our Government established by the Constitution.\footnote{149} As discussed below, it is unclear from context exactly what weight the Court placed on the absence of a prior statute commandeering the States. It suffices to note that the Court found the fact important enough to mention, especially in the paragraph that restated the Court’s holding. Government practice is another brick in the wall of the Court’s argument. As discussed shortly, however, this brick can bear no weight because the Court was wrong—prior government practice exists in the congressional districting requirement.

\subsection*{E. Coda: Commandeering State Executive Branch Officials}

Before moving on, I briefly pause to note that five years after \textit{New York v. United States}, the Court extended the anti-commandeering rule to state law enforcement officials. \textit{Printz v. United States}\footnote{150} involved a challenge to the Brady Act, which required state law enforcement officials to conduct federally mandated background checks in connection with certain firearms sales.\footnote{151} The United States tried to distinguish \textit{New York v. United States}, arguing that Congress could commandeering the state executive branch even though it could not commandeer state legislatures.\footnote{152} The Court disagreed, explaining that the reasoning from \textit{New York v. United States} equally applied to commandeering of state executive branch officials.\footnote{153}

The congressional districting requirement does not commandeer state executive branch officials into enforcing federal law, so \textit{Printz} is not immediately relevant to this Article. But, Congress could attempt to do so under the Times, Places and Manner Clause, as it has done in the National Voter Registration Act of 1993.\footnote{154} One Supreme Court opinion suggests that Congress may exercise power over state election

\footnotesize{\begin{itemize}
\item \footnote{149} New York v. United States, 505 U.S. at 177.
\item \footnote{150} 521 U.S. 898 (1997).
\item \footnote{151} See 18 U.S.C. § 922(s) (1994).
\item \footnote{153} \textit{Printz}, 521 U.S. at 927–33.
\end{itemize}}
officials as an incident to enforcing its own regulations of the election process\textsuperscript{155} and that state officials owe a duty to the national government to administer federal elections.\textsuperscript{156} None of these cases, however, have either approved federal control over state \textit{legislatures} or characterized state legislatures as federal officials on matters related to federal elections.\textsuperscript{157} We will not consider whether the Court was correct to suggest that Congress can direct state election officials under the Times, Places and Manner Clause, though analysis of that issue would undoubtedly draw in part on arguments made in this Article regarding commandeering of state legislatures.

III. Commandeering Under the Times, Places and Manner Clause

This Part uses accepted methods of constitutional interpretation to determine whether Congress can commandeer the States under the Times, Places and Manner Clause.\textsuperscript{158} Specifically, I examine arguments from text, history, precedent, structure, and prior government

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Ex parte} Siebold, 100 U.S. 371, 383–87 (1879).
\item See id. at 387–89; Evan H. Caminker, \textit{Printz, State Sovereignty, and the Limits of Formalism}, 1997 Sup. Cr. Rev. 199, 237 ("A fair reading of this text suggests that Congress may still require the same state election officers to implement the federally altered scheme, unless Congress chooses instead to replace them by authorizing the appointment of federal election officials.").
\item In some cases, it may be a close call whether a federal statute only commandeers enforcement of state law or also commandeers state law making. For example, Congress could pass a statute that requires States to provide detailed information about polling places and ballot contents to voters in federal elections. On its face, this law appears to only command States to enforce a federal mandate. But, to do so, some States might need to enact legislation approving funds for enforcement, allocating responsibility for enforcement within the state government, or establishing guidelines for enforcement. Thus, commandeering of state law enforcement officials may require some incidental legislation by the State. The question is when, if ever, such incidental law making should be considered commandeering of state legislatures. This question need not be addressed presently, as the congressional districting requirement is a straightforward commandeering of state legislatures. See supra Part I.B.
\end{enumerate}
\end{footnotesize}
practice. Instead of re-opening the debate in *New York v. United States* over Congress’s power to commandeer under any circumstances, this Part accepts the Court’s holding that Congress cannot commandeer under the Commerce Clause and asks whether any of the sources of constitutional argument suggest a different result under the Times, Places and Manner Clause. Thus, the analysis will take two main forms: analysis of the Times, Places and Manner Clause itself and comparison of the Times, Places and Manner Clause to the Commerce Clause. As a preface to this analysis, Section A reviews one of the Court’s most recent federalism decisions, which sets forth a sort of federalism standard of review.

A. State Sovereignty and a Federalism Standard of Review

In *Alden v. Maine*, decided in 1999, the Court brought some welcome structure to its federalism analysis. Up until *Alden*, the Court’s recent federalism decisions had taken on a somewhat ad hoc flavor, though with a decided preference for greater state autonomy. Read separately, each decision seemed to stand on its own, largely independent of parallel developments. Only by lining up the decisions next to one another did the trend become clear. But, then, the Court tied it all together in *Alden*. Section A explains how *Alden* did so, setting the stage for the remainder of Part III’s analysis.

At first blush, *Alden* seemed to raise the issue whether the Eleventh Amendment barred private suits against a State in its own state courts. Under the Amendment’s text, this argument is patently absurd: “The *Judicial power of the United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by Citizens of another State, or by Citizens or

159 See Fallon, supra note 104, at 575 (noting that in practice constitutional scholars often “assume obligations of consistency”); Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1351–54 (1999) (applying a standard of consistency to arguments over whether judges ought to consider the “judicial history” of a court opinion, meaning the private papers of individual judges created or exchanged during deliberation over a case).


161 Id.

Subjects of any Foreign State." The text refers solely to the "Judicial power of the United States," saying nothing about suits in state court. But, in *Alden*, the Court explained that the Eleventh Amendment stood for more than just its literal text. It was evidence of a larger principle of state sovereignty, and that principle extended far beyond private suits in federal court. It is this larger principle that can inform our analysis of commandeering under the Times, Places and Manner Clause.

To understand the lessons of *Alden*, we need to ask three questions: how, what, and when. Specifically, we must ask *how* the Court derived its principles of state sovereignty, *what* those principles are, and *when* those principles must yield to federal power. We will consider each question in turn.

First, let us examine the "how" question. The Court found its federalism principles in the history of the Eleventh Amendment, which had three main components. First, the Framers assumed that the Constitution left the States with a substantial residual of state sovereignty, which included, among other things, immunity from suit by private individuals in state or federal court. Federal courts must protect the States by striking down federal laws that unduly encroach on that sovereignty. Second, in *Chisholm v. Georgia*, the Court held, contrary to the intentions of the Framers, and thus the manifest meaning of the Constitution, that States were subject to suit in federal court. Third, Congress, in a fit of outrage over *Chisholm*, quickly proposed the Eleventh Amendment to overrule *Chisholm* and confirm that state sovereignty included immunity from suit in federal court; the States quickly ratified the proposed Amendment. To

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163 U.S. CONST. amend. XI (emphasis added).
164 See *Alden*, 527 U.S. at 713–14.
165 See id. at 715. ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.").
166 2 U.S. (2 Dall.) 419 (1793).
167 See *Alden*, 527 U.S. at 719.

Despite the persuasive assurances of the Constitution's leading advocates and the expressed understanding of the only state conventions to address the issue in explicit terms, this Court held, just five years after the Constitution was adopted, that Article III authorized a private citizen of another State to sue the State of Georgia without its consent.

*Id.* (construing *Chisholm*).
168 See id. at 721 ("Each House spent but a single day discussing the Amendment, and the vote in each House was close to unanimous.").
169 *Id.* at 722 ("The text and history of the Eleventh Amendment... suggest that Congress acted not to change but to restore the original constitutional design."); see also *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy*, Inc., 506 U.S. 139, 146 (1993)
the *Alden* Court, this history shows that the Eleventh Amendment did *not* create a new state immunity, but rather confirmed one aspect of a larger notion of state sovereignty that underlies the Constitution.171

The first part of *Alden*’s history lesson, that the Constitution establishes judicially enforceable state sovereignty limits on federal power, marks another, unsurprising turn in the Court’s overall federalism jurisprudence. No one in the federalism debate disputes that the Constitution recognizes two levels of government, state and federal, and relies on the continued existence and proper functioning of each level of government as a safeguard against abuse of government power.172 All agree that the Constitution allocates power between the two levels of government, giving some powers to one or the other and giving both levels concurrent power on other matters.173 Of course, the boundaries between state and federal power will not always be easy to discern, and Congress (and the President) and the States may disagree in specific cases. When disagreements arise, the question arises: Who is to decide precisely where the boundary lies? Over the last twenty-five years or so, the Court has divided sharply over whether the courts should play any role in defining the boundary between federal and state power. A brief description of this struggle is in order before completing the discussion of *Alden*.

The modern saga began with *National League of Cities v. Usery*,174 where the Court addressed the constitutionality of applying the federal minimum wage to state employees.175 The federal minimum "The [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.").


171 *Alden*, 527 U.S. at 728–29 ("The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.").

172 See, e.g., *id.* at 713–15 (discussing division of power between state and federal government); *id.* at 799–800 (Souter, J., dissenting) (acknowledging the importance of division of power between state and national governments); New York v. United States, 505 U.S. 144, 155–59 (1992) (same); *id.* at 206–07 (White, J., dissenting) (same).

173 When power is concurrent, the Supremacy Clause requires that federal law trumps conflicting state law. U.S. CONST. art. VI, cl. 2.


wage applied equally to private and public employees, so there was no argument that Congress was targeting the States. Yet, the States argued that even generally applicable federal laws could violate state sovereignty by unduly affecting how the States made decisions. For example, the federal minimum wage affected a State’s decision of how much to pay its employees, which decision was the product of various policy considerations. The Court agreed, holding that generally applicable laws violate state sovereignty when those laws regulate “a traditional government function” of the State. Since setting employee wages was a traditional government function, the federal minimum wage was unconstitutional as applied to the States. Thus, in National League of Cities, the Court decided that it would police the boundary of federalism under the “traditional government function” test.

After living under National League of Cities for a little under a decade, the Court reversed course in Garcia v. San Antonio Metropolitan Transit Authority. Garcia again raised the constitutionality of applying the federal minimum wage to state employees. The Court reconsidered and ultimately rejected the holding of National League of Cities that courts could enforce federalism limits on federal power. Instead, Garcia held that the Constitution established the national political process as the States’ main protection. According to the Court, the Constitution gave States much input into the federal law making

176 See id. § 203(c) (1994) (defining employer to include state governments).
178 Id. at 852.
179 See id.
180 National League of Cities was actually read to state a four part test. In Garcia, the Court summarized the test as follows:

First, it is said that the federal statute at issue must regulate “the ‘States as States.’” Second, the statute must “address matters that are indisputably ‘attributes of state sovereignty.’” Third, state compliance with the federal obligation must “directly impair [the States’] ability ‘to structure integral operations in areas of traditional government functions.’” Finally, the relation of state and federal interests must not be such that “the nature of federal interests . . . justifies state submission.”

181 Id.
182 Id. at 548–49.
183 See id. at 550 (“Apart from the limitation on federal authority inherent in the delegated nature of Congress’s Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”).
process, such as the power to regulate federal elections and the equal representation of the States in the Senate. It was this process, and not judicial review of federal law, that would guard the border between federal and state power.

Then-Justice William Rehnquist dissented in Garcia, also joining dissents by Justices Lewis Powell and Sandra O'Connor. All three Justices argued for a judicially enforceable federalism, as in National League of Cities. Rehnquist ended his brief dissent with the ominous warning that judicial enforcement of federalism “will, I am confident, in time again command the support of a majority of this Court.” Rehnquist proved prescient, as the Court has since gradually formulated new judicial doctrines to protect the States from federal intrusion. New York v. United States and Printz severely restricted Congress’s power to abrogate state immunity from suit in federal court. And, the Court has used its power to interpret statutes to protect States, holding that it will not read federal statutes

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See id. at 550–51 (“[I]t is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”).

Id. at 551. This same argument had been made by constitutional commentators and had earned the label “the political safeguards of federalism,” derived from the classic article of that title by Professor Herbert Wechsler. See Jesse H. Choper, Judicial Review and the National Political Process 175–84 (1980); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). Of course, any proponent of the political safeguards of federalism must account for the Seventeenth Amendment, which removed state legislatures from selection of the United States Senate and, in doing so, reduced state influence in the federal law making process. See Garcia, 469 U.S. at 554; Choper, supra, at 176; Wechsler, supra, at 546–47.

Garcia, 469 U.S. at 556 (“[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.”). Garcia acknowledged some role for courts for defining the federal-state boundary. First, as none of the Justices disputed in National League of Cities or Garcia, the Court could review whether a specific statute was within one of Congress’s enumerated powers. Id. Second, Garcia said that the courts could step in to impose “affirmative limits” on Congress’s power, but refused to “identify or define” what those limits might be. Id.

Id. at 579–80 (Rehnquist, J., dissenting).
Id. at 557–79 (Powell, J., dissenting).
Id. at 580–89 (O’Connor, J., dissenting).
Id. at 580 (Rehnquist, J., dissenting).
See supra notes 152–53 and accompanying text.
See supra note 96.
to apply to the States unless the statute's text unmistakably requires such a reading.\textsuperscript{193} \textit{Alden} ties these developments together, firmly rejecting Garcia's hands-off approach to federalism issues. \textit{Alden} makes explicit what had become apparent in \textit{New York v. United States} and \textit{Printz}: The Court has re-entered the business of judicially enforceable rules of state sovereignty.

Now on to the "what" question: What are these larger principles of state sovereignty that the Court will henceforth enforce? The Court explained that the Constitution protects state sovereignty in two ways.\textsuperscript{194} First, the Constitution delegates certain limited, enumerated powers to Congress, reserving the remainder of government power to the People in their states.\textsuperscript{195} If Congress's enumerated powers are properly construed, the States will have a substantial area of autonomous power, free from federal interference.\textsuperscript{196} Second, even when Congress acts within one of its enumerated powers, it may not use those powers to invade a State's sovereignty.\textsuperscript{197} For example, Congress may not commandeer the States to enact or enforce federal law\textsuperscript{198}—the holdings of \textit{New York v. United States}\textsuperscript{199} and \textit{Printz}\textsuperscript{200} respectively. \textit{Alden} added to this second category, holding that Congress cannot commandeer state courts into hearing private damages suits

\begin{itemize}
\item \textsuperscript{194} See \textit{Alden v. Maine}, 527 U.S. 706, 714 (1999).
\item \textsuperscript{195} Id. (stating that the Constitution "reserves to [the States] a substantial portion of the Nation's primary sovereignty").
\item \textsuperscript{196} During the recent federalism revival, the Court has begun to constrict the reach of Congress's enumerated powers. See \textit{City of Boerne v. Flores}, 521 U.S. 507, 535--36 (1997) (holding that Congress is limited to enforcing existing constitutional rights under its power to enforce the provisions of the Fourteenth Amendment); \textit{United States v. Lopez}, 514 U.S. 549, 567--68 (1995) (holding that Congress's Commerce Clause power does not extend to possession of a gun near a school).
\item \textsuperscript{197} \textit{Alden}, 527 U.S. at 714.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} \textit{Id.} (quoting \textit{Printz v. United States}, 521 U.S. 898, 919--20 (1997) (quoting \textit{The Federalist No. 15}, \textit{supra} note 111, at 109 (Alexander Hamilton))).
\item \textsuperscript{200} 505 U.S. 144, 166 (1992).
\end{itemize}
against their States. After *Alden*, one task is to identify other federal actions that violate this state sovereignty.

The Court readily acknowledged that these principles of state sovereignty must, at times, yield to federal authority. After all, the Constitution declares the federal government supreme within its limited sphere of power. This brings us to the “when” question: When do the principles of state sovereignty that underlie the Constitution give way to supreme federal power? *Alden* offers a sort of constitutional burden of proof: The principles of state sovereignty remain intact and protect States from the federal government, unless “there is ‘compelling evidence’ that the States were required to surrender this power to Congress pursuant to the constitutional design.” And, the Court declares that it will look at the traditional sources of constitutional argument—text, history, past government practice, precedent, and structure—to determine whether such evidence exists. Following the Court’s latest prescription, the remainder of Part III analyzes whether “compelling evidence” exists such that the Times, Places and Manner Clause abrogates a State’s sovereign right against commandeering by the federal government.

One last word before turning to the analysis. Now, of course, what constitutes “compelling evidence” is just about anybody’s guess, and *Alden* offered no further elaboration on the phrase. The
Court's application of that standard, however, suggests two important points. First, the Court will presumethat a State retains the attributes of state sovereignty that Alden identified: no commandeering of a state legislature or executive, and immunity from a private damages suit in state or federal court. Second, the party seeking to overcome that presumption has the burden to identify specific evidence in the Constitution's text, structure, history, precedent, or prior government practice that the Constitution authorizes the specific abrogation of state sovereignty.

To illustrate these two points, consider the issue to be discussed shortly: Whether Congress can commandeer the state legislatures under the Times, Places and Manner Clause. First, the Court will presume that the Times, Places and Manner Clause does not authorize commandeering unless "compelling evidence" to the contrary is brought forth. Second, the Court will look for evidence specifically bearing on commandeering under the Times, Places and Manner Clause. Evidence that Congress was to have ultimate control over the times, places, and manner of federal elections, that such power was important to the functioning of the new national government, or that Congress's power under the Clause was plenary simply does not speak to the issue. Each piece offers some inferential evidence, but the Court has rejected such inferences elsewhere because they do not speak directly to the issue posed. The evidence does not compel the conclusion. In the last section of Part III, we will return to these two guidelines from Alden and see if the evidence under the Times, Places and Manner Clause measures up.

When a burden becomes undue, or when an obstacle becomes substantial. The bottom line is that most doctrinal catch phrases and buzz words are merely labels for analysis that must take place on different grounds. We can say we are looking for an "undue burden" or a "substantial obstacle," but, in reality, we are really trying to figure out what key factors or facts controlled the Court's decision, and whether those factors or facts apply to our case.

For example, the Court has acknowledged that Congress was to have ultimate control over interstate commerce, that such power was important to the functioning of the new national government, and that Congress's Commerce Clause power is plenary. See United States v. Lopez, 514 U.S. 549, 553 (1995); New York v. United States, 505 U.S. 144, 157–59 (1992). Yet, the Court has also concluded that Congress cannot use that power to abrogate state immunity against commandeering or against private damages suits. See Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. at 188.
B. Text

Depending on the author consulted, textual analysis can take many forms. This Section will examine text in two main ways. First, it will examine how ordinary speakers of the language used the words of the text at the time the Constitution was drafted. Dictionaries from the founding era are possible sources of usage, as are other contemporary writings. Often, usage of some words at the time of the founding will not differ materially from the usage of those words today. Where a word or phrase had more than one usage, one must use context to decide among the different usages. Also, in determining whether a word or phrase can bear a particular usage, one can consider whether alternate words or phrases would more naturally convey that meaning. For example, if the Framers wanted the Time, Places and Manner Clause to grant Congress the power to commandeer the States, would there have been a clearer way to say so?

Second, one can examine how the word or phrase under consideration was used (or not used) in other portions of the Constitution. The various uses may shed light on how the document uses the word or phrase generally. Conversely, the use of different words or phrases in other parts of the Constitution may shed light on the meaning of the word or phrase under consideration. For example, if another portion of the Constitution grants Congress (or someone else) power to commandeer States, and that other portion uses words or phrases different from the Times, Places and Manner Clause, one could infer that the Times, Places and Manner Clause does not authorize commandeering. Otherwise, the Constitution would have used the same commandeering language in the Times, Places and Manner Clause. This Section will use both types of textual argument.


210 Professor Akhil Amar refers to this method as “intratextualism”—searching a document to see how its authors used words throughout the text. Amar, Intratextualism, supra note 158, at 748. Some commentators have criticized this approach as resting on the erroneous assumption that the Constitution is a tightly integrated document. See Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L.J. 1225, 1287–95 (1999); Adrian Vermeule & Ernest A. Young, Hercules, Herbert, and Amar: The Trouble with Intratextualism, 113 Harv. L. Rev. 730 (2000). Only a tightly integrated document would justify careful intratextual comparisons of word usage, Tushnet, supra, at 1288–89, and the Constitution is not such a document. Id. at 1294.
in analyzing whether the Times, Places and Manner Clause grants Congress power to commandeer the States.

To start, let us get the text of the Times, Places and Manner Clause out on the table: "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 choosing Senators."\(^\text{211}\) The Clause gives States the power to "prescribe[]" the "Times, Places and Manner" for electing representatives and senators, and it gives Congress the power to "make" or "alter" the States' "regulations." Consider what the words "regulation," "make," and "alter" can tell us about Congress's power to commandeer the States.

First, the word "regulation" suggests a law made through ordinary legislative processes.\(^\text{212}\) Dictionaries of the time of the founding bear out this observation.\(^\text{213}\) This usage makes sense in context, given that the regulations are to be made "in each State by the Legislature thereof," and that Congress—the federal legislative branch—is the body to "make or alter" the regulations. Usage, then, suggests that the power described in the Times, Places and Manner Clause is closely akin to the other legislative powers granted Congress in Article I, Section 8. Specifically, it is the same type of power that Congress is granted by the Commerce Clause, only over a different subject matter (times, places, and manner of federal elections, as opposed to interstate commerce). Thus, this legislative law making power, regardless of its context, should be subject to the same limitations—namely, no commandeering of the States.

Further evidence that "regulation" refers to legislative law making can be found in other portions of the Constitution. For example, the Commerce Clause, which was the very clause Congress used to enact

\(^{211}\) U.S. Const. art. I, § 4, cl. 1.


\(^{213}\) See 2 Samuel Johnson, A Dictionary of the English Language (London, Strahan, 4th ed. 1773) (listing "to adjust by rule" as a definition of "regulate"); 2 id. (London, Strahan, 7th ed. 1785) (same); Thomas Sheridan, A Complete Dictionary of the English Language (Philadelphia, W. Young, Mills & Son, 6th ed. 1796) (same); see also N. Bailey, An Universal Etymological English Dictionary (London, C. Elliot & T. Kay, 26th ed. 1789) (listing "to govern" as one of the definitions of "regulate"); Barclay's Universal English Dictionary (London, James S. Virtue, B. Woodward rev. 1782); 2 Noah Webster, American Dictionary of the English Language 1913 (New York, S. Converse 1828) (listing the following as a definition of "regulate": "to govern or direct according to rule ... to bring under the control of law or constituted authority").
the take title provision struck down in *New York v. United States*,\(^{214}\) grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."\(^{215}\) The Clause uses "regulate"—the power to make "regulations"—in referring to Congress's power to pass laws governing interstate commerce. The "regulations" Congress passes under the Times, Places and Manner Clause should be of the same character. Thus, if Congress cannot commandeer the States while "regulat[ing]" under the Commerce Clause, it should not be able to do so in making or altering "regulations" under the Times, Places and Manner Clause. In both contexts, the grant of power to regulate does not entail the power to commandeer the States.

Next, consider the words "make" and "alter." On their face, these words are ill-suited to authorize commandeering. In the Times, Places and Manner Clause, the object of the verbs "make" and "alter" is the "regulations" that are made, or not made, by the States. In exercising its power to "make or alter," Congress is to act on the regulations, not the States.\(^{216}\) This cuts against commandeering, where the States, not Congress, would be "making" or "altering" the regulations.

Use of the word "make" parallels the text of the Necessary and Proper Clause, which was invoked in *New York v. United States*.\(^{217}\) The Necessary and Proper Clause grants Congress power to "make all Laws . . . 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."\(^{218}\) In *New York v. United States*, the Court held that the Necessary and Proper Clause did not give Congress the power to commandeer the States when acting in furtherance of an enumerated power; commandeering was not a "proper" exercise of Congress's enumerated powers.\(^{219}\) Just as Congress's power to "make" all laws necessary and proper does not entail the power to commandeer, Congress's

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\(^{215}\) U.S. Const. art. I, § 8, cl. 3 (emphasis added).

\(^{216}\) Article I, Section 10, Clause 2 uses similar language, providing that all state inspection laws "shall be subject to the Revision and Control of the Congress." U.S. Const. art. I, § 10, cl. 2. Again, it is the laws, not the States, that are subject to Congress's control.

\(^{217}\) *New York v. United States*, 505 U.S. at 166.

\(^{218}\) U.S. Const. art. I, § 8, cl. 18 (emphasis added).

\(^{219}\) *New York v. United States*, 505 U.S. at 166.
power to “make” regulations governing the times, places, and manner of federal elections should not do so.

A more natural way to express commandeering would be a clause providing, “Congress shall make or alter such regulations or direct the States to make or alter such regulations according to rules prescribed by Congress.” This hypothetical text specifically grants Congress the power to direct States to make law, not simply to make law itself. In this way, our example resembles the Militia Clause, which specifically allows Congress to direct state action. The Militia Clause grants Congress power to “provide for organizing, arming and disciplining, the Militia,” and reserves “to the States respectively . . . the Authority of training the Militia according to the discipline prescribed by Congress.”

As in our hypothetical example, the Militia Clause provides for federal direction of state conduct. Indeed, the Militia Clause is a striking parallel to the Times, Places and Manner Clause. Both Clauses grant the States and Congress concurrent authority over a subject—militia and federal elections, respectively. Yet, only the Militia Clause specifically grants Congress the power to direct the States. Again, the inference is

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Id. The Court further elaborated this point in Printz, 521 U.S. 898, 923–24 (1997). The dissent of course resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause. It reasons that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” conclusively establishes the Brady Act’s constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of delegated powers but merely prohibits the exercise of powers “not delegated to the United States.” What destroys the dissent’s Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a “La[w] . . . for carrying into Execution the Commerce Clause” violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a “La[w] . . . proper for carrying into Execution the Commerce Clause,” and is thus, in the words of The Federalist, “merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.”

Id. (citations omitted). One commentator has mistakenly argued that New York v. United States did not explain how its anti-commandeering fiat might impact the scope of the Necessary and Proper Clause. See Kevin K. Green, Note, A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993, 22 J. Legis. 45, 81 (1996). Thus, while this commentator argues that the Necessary and Proper Clause is “dispositive” in favor of Congress’s power to commandeer under the Times, Places and Manner Clause, id. at 80, the truth is that the Necessary and Proper Clause undermines such a power to commandeer.

220 U.S. Const. art. I, § 8, cl. 16 (emphasis added).
that the text of the Times, Places and Manner Clause does not grant Congress power to commandeer the States.

The Supremacy Clause also contains language better suited to commandeering. That Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.221

The Supremacy Clause commands all state court judges to obey—"be bound[] by"—all "Laws of the United States which shall be made in Pursuance" of the Constitution. Since Congress has power to "make" such laws, we can infer that the Supremacy Clause commands state judges to obey Congress when Congress acts within its constitutional powers. Neither the Times, Places and Manner Clause nor the other power-granting clauses of Article I, Section 8 (for example, the Commerce Clause), contain similar language commanding state legislatures to obey Congress.222 Rather, these clauses simply grant Congress power to regulate private conduct directly.

And, both the Extradition Clause223 and the Full Faith and Credit Clause224 provide further instances where the Constitution expressly requires the States to obey the commands of other actors. The Extradition Clause requires States to return fugitives who are charged with a crime in another state:

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.225

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221 Id. art. VI, cl. 2 (emphasis added).
222 The Supreme Court relied on this textual observation in Print., 521 U.S. 898, 907 (1997).
223 U.S. Const. art. IV, § 2, cl. 2.
224 Id. art. IV, § 1.
225 Id. art. IV, § 2, cl. 2 (emphasis added). The Fugitive Slave Clause contains similar language:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due. 

Id. art. IV, § 2, cl. 3. This Clause effectively empowers the slave owner—a private citizen—to commandeer a State into returning an escaped slave. This extraordinary
The Clause commands States to obey a "Demand" by the executive authority of another state under specific circumstances. In the parlance of New York v. United States and Printz, the executive authority of one state can commandeer another State to act. The Full Faith and Credit Clause acts similarly: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Here, the Clause empowers both Congress and other States to commandeer a State. When a State generates "public Acts, Records, and Proceedings," it effectively commandeers other States to respect those matters in certain cases. Similarly, when Congress prescribes "the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof," Congress tells the various branches of state government how they must act when faced with the "public Acts, Records, and Proceedings" of another state. Thus, in both the Extradition and Full Faith and Credit Clauses, the Framers expressly empowered some actor to commandeer the States. The Times, Places and Manner Clause does not contain such language.

The Articles of Confederation further illustrate how commandeering could be expressed. Comparing the text of the Articles to the text of the Constitution is an accepted method of textual analysis. As discussed above, the Constitution was in large part a response to the perceived flaws in government under the Articles. So, in some cases, we can better understand the Constitution's text by comparing it to the Articles.

Chief Justice John Marshall made such a comparison in McCulloch. One issue in that case was whether Congress had power to create a national bank. Beginning with the Constitution's text, Marshall noted that none of Congress's enumerated powers specifically authorized Congress to charter a bank. Next, Marshall asked whether Congress was strictly limited to those powers expressly enumerated, or whether Congress had implied power to do those things

breach of state sovereignty—granting a private citizen power to direct a State—shows the lengths to which some Framers went to protect the slave trade.

226 Id. art. IV, § 1.
228 See supra notes 108–15 and accompanying text.
230 Id. at 401.
231 Id. at 406.
helpful in the exercise of enumerated powers.\textsuperscript{232} In deciding this question, Marshall compared the Articles of Confederation to the Tenth Amendment to the Constitution.\textsuperscript{233} While the Articles of Confederation reserved to the States all powers not "expressly delegated" to the United States,\textsuperscript{234} the Tenth Amendment reserved to the States only those "powers not delegated to the United States."\textsuperscript{235} Use of the word "expressly" in the Articles suggested that Congress possessed only those powers specifically listed. Conversely, omission of the word "expressly" in the Tenth Amendment suggested that the Constitution allowed Congress certain implied powers in addition to the enumerated powers.\textsuperscript{236}

The same type of comparison can be made on the commandeering issue.\textsuperscript{237} Several provisions of the Articles of Confederation provided that Congress would act only through the States. For example, Congress could raise revenue or troops only by making requests to the States.\textsuperscript{238} Further, each State was directed to "abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them."\textsuperscript{239} Conversely, the Times, Places and Manner Clause does not contain similar language granting Congress power to command or make a request of the States. Thus, comparison to the Articles of Confederation provides further textual evidence that Congress cannot commandeer under the Times, Places and Manner Clause.

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\begin{itemize}
\item \textsuperscript{232} Id. at 405–07.
\item \textsuperscript{233} Id. at 406–07.
\item \textsuperscript{234} ARTICLES OF CONFEDERATION art. II (emphasis added). Article II states specifically: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Id.
\item \textsuperscript{235} 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.").
\item \textsuperscript{236} \textit{McCulloch}, 17 U.S. (4 Wheat.) at 406–07. This textual inference was supported by arguments from history, prior government practice, structure, and other texts. Id. at 401–25.
\item \textsuperscript{237} As discussed above, the Court made a similar analysis in \textit{New York v. United States}, 505 U.S. 144, 163–64 (1992). See supra notes 108–17 and accompanying text.
\item \textsuperscript{238} ARTICLES OF CONFEDERATION art. VIII (stating that all expenses "incurred for the common defence or general welfare" were to be paid "out of a common treasury" provided by the States "according to such mode as the United States in Congress assembled, shall from time to time direct and appoint"); \textit{id.} art. IX (granting Congress power "to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding").
\item \textsuperscript{239} Id. art. XIII.
\end{itemize}
This textual argument squares with constitutional history. The Framers' experience under the Articles of Confederation showed that congressional commands to or requests from the States could not be enforced.\textsuperscript{240} So, rather than carrying that pathetic power over to the Constitution, the Framers granted Congress power to regulate private behavior directly.

In sum, the text of the Times, Places and Manner Clause does not support a power to commandeer. The words of the Clause—"regulation," "make," and "alter"—suggest that Congress must make and alter the regulations, not command the States to do so. Also, comparing the Clause to other texts, we see that there are better ways to express commandeering.

\textbf{C. History}

Constitutional commentators of all stripes recognize the relevance of history to constitutional interpretation.\textsuperscript{241} Though many rationales or theories are offered for this recognition, the common sense reason is that history can help us understand why our predecessors did something.\textsuperscript{242} After all, the Constitution is not merely a theoretical tract expressing abstract hopes and aspirations.\textsuperscript{243} Rather, it is an instrumental document—a charter for government aimed at con-

\textsuperscript{240} See supra notes108–14 and accompanying text.

\textsuperscript{241} Though, of course, commentators vary in the role they assign to this source of meaning. See, e.g., Robert H. Bork, \textit{The Tempting of America} 143–60 (1990); Paul Brest, \textit{The Misconceived Quest for the Original Understanding}, 60 B.U. L. Rev. 204, 214 (1980) (describing as "moderate" those originalists who use "the framers' intent on a relatively abstract level of generality"); Michael C. Dorf, \textit{Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning}, 85 Geo. L.J. 1765, 1766 (1997) ("Although there are very few strict originalists, virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation."); Larry D. Kramer, \textit{Madison's Audience}, 112 Harv. L. Rev. 611, 677 (1999) ("We are all originalists, we are all non-originalists' is the order of the day, and everyone willing to tackle problems of constitutional law consults sources beyond the Founding while still giving the historical evidence careful consideration."); Michael J. Perry, \textit{The Legitimacy of Particular Conceptions of Constitutional Interpretation}, 77 Va. L. Rev. 669, 718 (1991).

\textsuperscript{242} James Madison took this common sense view of the relevance of history to the Constitution's meaning: "Such were the defects, the deformities, the diseases and the ominous prospects, for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided." \textit{3 The Records of the Federal Convention of 1787}, supra note 116, at 549 (quoting the draft of James Madison's Preface to his notes on the debates of the federal convention).

\textsuperscript{243} At times, however, constitutional commentators treat the document that way. See Richard Posner, \textit{The Problematics of Moral Theory} 144–46 (1999).
crete challenges and problems. In interpreting that document, then, we ought to understand the problems it addresses as well as how the document does so.

This Section examines the history of the Times, Places and Manner Clause. As with much of the Constitution, this history shows tension between national and state interests. On the one hand, advocates of national interests argued that Congress should have broad power to regulate elections in the event that States either refused to do so or did so negligently. On the other hand, advocates of state power argued that Congress's power over elections should be narrow, lest Congress use such a power to harm the States. In short, it is a microcosm of the federalism dilemma that ran throughout the drafting and ratifying conventions: how to create a national government strong enough to be effective, yet not so strong that it unduly threatened the States. Subsection 1 reviews how the drafters and ratifiers addressed this dilemma in the Times, Places and Manner Clause. The second Subsection asks what this history means for congressional commandeering under that Clause.

1. Drafting and Ratifying Conventions

We will look principally to the drafting and ratification debates to discern the history and purposes of the Times, Places and Manner Clause. The canonical sources for this history are James Madison's notes from the federal drafting convention, the collected notes from the thirteen state ratification conventions, and The Federalist Papers, which are newspaper editorials that Alexander Hamilton, John Jay, and James Madison wrote to convince New York voters to ratify the Constitution. While some historians have criticized reliance on


245 Elliot's Debates, supra note 130, is the standard source for the state ratifying conventions. The Library of Congress also has an on-line version of this source. See Library of Congress, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, at http://lcweb2.loc.gov/ammem/amlaw/lwed.html (last modified Sept. 15, 2000).

246 See generally The Federalist, supra note 111. Several sources maintain on-line versions of The Federalist. See generally The Avalon Project: The Federalist Papers, at http://www.yale.edu/lawweb/avalon/federal/fed.htm (last modified Sept. 15, 2000); Library
these sources, the sources are part of the constitutional law canon in that lawyers, judges, and constitutional law scholars treat them as authoritative on the Constitution's history and purposes.

Textually, the most striking thing about the Times, Places and Manner Clause to the founding generation was that it granted the national and state governments concurrent authority over federal elections, with the national government getting the final word. When we look at these sources, we see two main reasons for this division of labor. First, it would have been impractical to set a single time, place, and manner for federal elections in the Constitution. Because local circumstances in each state might dictate different regulations, some discretion was needed to tailor the elections to local needs. And,


247 For example, some have criticized Madison's notes as incomplete, as they surely were given that he hand wrote them during spoken debate, and as biased in that he selectively recorded comments, ignoring unfavorable arguments and recording favorable ones. See, e.g., James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1, 24–35 (1986) (setting forth and critiquing criticisms of Madison's notes). Similarly, The Federalist Papers are criticized as mere political propaganda, which they surely were in the sense that they sought to influence a political decision by New York's ratifying convention, that was calculated to gain votes rather than offer a genuine interpretation of the Constitution. See, e.g., William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 682 (1993) ("The Federalist Papers were, after all, propaganda documents . . . ."); Chase J. Sanders, Ninth Life: An Interpretive Theory of the Ninth Amendment, 69 Ind. L.J. 759, 765 n.25 (1994) ("For all the deference paid to the Federalist papers in two centuries of constitutional interpretation, it is easy to forget that the essays were hardly a neutral exposition, but constituted, in effect, a brief in favor of ratification."); Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 Va. L. Rev. 1295, 1316 (1990) ("[T]he Federalist Papers were not even official statements of the framers. Rather, they were written as much to persuade as to explain."); James W. Ducayet, Note, Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation, 68 N.Y.U. L. Rev. 821, 850 (1993). We need not join this larger debate to assess the history of the Times, Places and Manner Clause. Rather, the legal community's practice of using these sources legitimates the arguments as "legal arguments," at least until the community's practices change.

248 See Balkin & Levinson, supra note 162, at 975–81 (noting consensus, but also that canons for practicing lawyers and academics might diverge at times). Of course, the fact that these sources are canonical, meaning the legal community has accepted resort to them in making constitutional arguments, does not mean that that community has reached consensus on what weight to give those sources. See Bobbitt, supra note 135; Dorf, supra note 104, at 602–05; Fallon, supra note 104, at 572–76.

249 See 3 Elliot’s Debates, supra note 130, at 367 (statement of James Madison at the Virginia ratifying convention) ("It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution."); The Federalist No.
between the federal and state governments, the state governments were most familiar with the local circumstances and, thus, should regulate in the first instance.250

Second, this method was more congenial to the States, whose approval the Constitution would need. Presumably, the States would like to hold the new federal elections at the same times and places as their existing state elections.251 If the Constitution or Congress had set an uniform time, place, and manner for federal elections, either the States would have to hold two sets of elections, incurring added expense and inconvenience in the process, or the States would have to change the time, place, and manner of their own elections to coincide with the federal elections. This might be seen as an intolerable intrusion on state sovereignty.

State power over the times, places, and manner of federal elections, however, was a double edged sword. While that power enabled States to meet local circumstances, the power could also hinder or destroy Congress if abused. The Framers foresaw three main threats from the States’ times, places, and manner power: States refusing to hold federal elections; States being unable, due to rebellion or invasion, to hold federal elections; or States holding unfair federal elections.252 In the first two circumstances, if enough States were unable or unwilling to hold federal elections, those States could deprive ei-

59, supra note 111, at 362 (Alexander Hamilton) ("It will not be alleged that an election law could have been framed and inserted in the Constitution which would have been applicable to every probable change in the situation of the country; and it will therefore not be denied that a discretionary power over elections ought to exist somewhere.").

250 The Federalist No. 59, supra note 111, at 363 (Alexander Hamilton) (stating that it was "both more convenient and more satisfactory" for States to regulate federal elections "in the first instance"); see also 3 Elliot's Debates, supra note 130, at 367 (statement of James Madison at the Virginia ratifying convention) ("It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people.").

251 The Federalist No. 61, supra note 111, at 376 (Alexander Hamilton) (explaining that States would want "the convenience of having the elections for their own governments and for the national government at the same epoch").

252 See 2 Elliot's Debates, supra note 130, at 440–41 (statement of James Wilson at the Pennsylvania ratifying convention) (describing how States might abuse power over federal elections to the harm of the national government); 2 The Records of the Federal Convention of 1787, supra note 116, at 240 (James Madison) (arguing that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power" of the States to regulate federal elections); Paschal, supra note 26, at 279–80.
ther or both houses of Congress of a quorum. Without a quorum, Congress would be dead. And, even if a quorum could be mustered, Congress would not be the truly representative body it was intended to be, as several States and their citizens would have no voice in that body.

In the third case, States could enact election regulations that unfairly infringed on citizens' right to vote for representatives. While the Framers did not define what they meant by "unfair" election regulations, they did offer examples. An example cited by Madison was unequal allocation of representatives within a state. Specifically, he

253 See U.S. Const. art. I, § 5 ("[A] Majority of each [House] shall constitute a Quorum to do Business.")

254 See The Federalist No. 59, supra note 111, at 363 (Alexander Hamilton).

Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.

Id.; see also 3 Elliot's Debates, supra note 130, at 367 (statement of James Madison at the Virginia ratifying convention) ("Were [federal elections] exclusively under the control of the state governments, the general government might easily be dissolved.").

In the Massachusetts ratifying convention, George Cabot argued,

[I]f the state legislatures are suffered to regulate conclusively the elections of the democratic branch, they may, by such an interference, first weaken, and at last destroy, that check, they may at first diminish, and finally annihilate, that control of the general government, which the people ought always to have through their immediate representatives.

2 id. at 26.

255 3 id. at 367 (statement of James Madison at the Virginia ratifying convention) ("Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust."); see 2 id. at 440–41 (James Wilson) (making a similar argument at the Pennsylvania ratifying convention); 4 id. at 303 (Charles Cotesworth Pinckney) (making a similar argument at the South Carolina ratifying convention). Hamilton offered another example: The power over federal elections "might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others by confining the places of election to particular districts and rendering it impracticable to the citizens at large to partake in the choice." The Federalist No. 60, supra note 111, at 367 (Alexander Hamilton). In context, Hamilton was stating an objection to Congress's ultimate power over federal elections. But, the objection applies equally to state power over the same subject. See The Federalist No. 61, supra note 111, at 373 (Alexander Hamilton). Hamilton states,

It may readily be perceived that it would not be more difficult to the legislature of New York to defeat the suffrages of the citizens of New York by confining elections to particular places than for the legislature of the United States to defeat the suffrages of the citizens of the Union by the like expedient.
referred to South Carolina, which had allocated two-thirds of the State's representatives to the eastern seaboard even though that area had only one-fifth of the State's population. The eastern part of the State, then, was substantially overrepresented in the State's house. If South Carolina apportioned its federal representatives in a similar way, Madison believed it would be an abuse of the State's time, place, and manner power.

Id. And, the objection taps into the common fear of the time that physical distance between the elected and the electorate, or between the electorate and the polling places, threatened republican government. See Zagarri, supra note 4, at 8–35. At that time, placing the polls at a distance of twenty miles could discourage voter turnout. See The Federalist No. 61, supra note 111, at 373 (Alexander Hamilton) ("[W]hen the place of election is at an inconvenient distance from the elector, the effect upon his conduct will be the same whether the distance be twenty miles or twenty thousand miles.").

256 See Zagarri, supra note 4, at 48; see also 3 Elliot's Debates, supra note 130, at 367 (statement of James Madison at the Virginia ratifying convention) ("Elections are regulated now unequally in some states, particularly South Carolina, with respect to Charleston, which is represented by thirty members."). In the Massachusetts ratifying convention, Rufus King appealed to the same situation:

By the constitution of South Carolina, the city of Charleston has a right to send thirty representatives to the General Assembly; the whole number of which amounts to two hundred. The back parts of Carolina have increased greatly since the adoption of their constitution, and have frequently attempted an alteration of this unequal mode of representation; but the members from Charleston, having the balance so much in their favor, will not consent to an alteration; and we see [that] the delegates from Carolina in Congress have always been chosen by the delegates of that city. The representatives, therefore, from that state, will not be chosen by the people, but will be the representatives of a faction of that state.

2 id. at 50–51. Professor Zagarri describes the political circumstances in South Carolina that created and preserved this system of unbalanced representation. Zagarri, supra note 4, at 46–53.

257 This problem was akin to the "rotten boroughs" that the Framers criticized in England. See Bailyn, supra note 121, at 166; Gordon S. Wood, The Creation of the American Republic 170–73 (1969); see also 2 Elliot's Debates, supra note 130, at 49 (criticism from a member of the Massachusetts ratifying convention) ("A borough of but two or three cottages has a right to send two representatives to Parliament, while Birmingham, a large and populous manufacturing town, lately sprung up, cannot send one.").

258 Several other Framers and ratifiers expressed the same concern. See 2 Elliot's Debates, supra note 130, at 49 (statement of a member of the Massachusetts ratifying convention) (noting that Rhode Island was about to adopt an apportionment of the state legislature that would "deprive the towns of Newport and Providence of their weight, and that thereby the legislature may have a power to counteract the will of a majority of people"); id. at 50 (statement of a member of the Massachusetts ratifying convention) (noting that in Connecticut, "Hartford, one of their largest towns, sends no more delegates than one of their smallest corporations").
Given these three threats, the Framers allocated Congress the power of self-preservation—final say on the times, places, and manner of electing its members. The Framers made this point repeatedly in defending and explaining Congress’s power under the Times, Places and Manner Clause. If the States were unable or unwilling to hold federal elections, Congress could provide for such elections and ensure at least a quorum. If States passed unfair regulations, Congress could “alter” those regulations to achieve fairness.

2. The Implications of History for Commandeering

One could argue that the Times, Places and Manner Clause should allow commandeering because its grant of federal power was in direct response to a threat posed by the States. To adequately meet this threat, one could argue, Congress must have the power to commandeer non-complying States. Indeed, the power to commandeer

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Today, such an apportionment scheme would violate the Court’s one-person-one-vote line of cases. See Kirkpatrick v. Preisler, 394 U.S. 526, 530–32 (1969) (applying the one-person-one-vote principle to congressional districts); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (same); see also Reynolds v. Sims, 377 U.S. 533, 558–76 (1964) (applying one-person-one-vote principle to an election system for state legislature).

Hamilton emphasized that even the potential for abuse justified precautions against destruction of Congress by the States. The Federalist No. 59, supra note 111, at 363 (Alexander Hamilton) (“It is to little purpose to say that a neglect or omission of this kind would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection.”). Indeed, the power to commandeer

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259 Hamilton emphasized that even the potential for abuse justified precautions against destruction of Congress by the States. The Federalist No. 59, supra note 111, at 363 (Alexander Hamilton) (“[E]very government ought to contain in itself the means of its own preservation.”); see also 2 Elliot’s Debates, supra note 130, at 440 (statement of James Wilson to the Pennsylvania ratifying convention) (“I hope, sir, that it was no crime to sow the seed of self-preservation in the federal government; without this clause, it would not possess self-preserving power.”). Madison also made this point in the first Congress when Representative Burke proposed a constitutional amendment to limit Congress’s power over federal elections. See 1 Annals of Cong. 768 (Joseph Gales ed., 1789). The proposed amendment read: “Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections of Senators, or Representatives, except when any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election.” Id. Madison opposed the amendment because it “tend[ed] to destroy the principles and efficacy of the Constitution.” Id. at 770.

262 Lower court cases reviewing the National Voter Registration Act have made a version of this argument, see infra notes 341–45 and accompanying text, as has one
is surely "necessary and proper" to Congress's power to keep the States in line.

This argument fails for two reasons. First, it ignores the Framers' expressed fears about commandeering. Recall from the history discussion in New York v. United States that the Framers saw commandeering as an impracticable power. They argued that commandeering was only enforceable by military force. Otherwise, States could freely disobey Congress's commands, as they did under the Articles of Confederation. But, a credible threat of military force would require a national standing army, which was an unacceptable threat to liberty. So, commandeering posed an unacceptable dilemma: it was only workable through an unacceptable threat to liberty.

This dilemma highlights the problem with commandeering under the Times, Places and Manner Clause. Congress was granted power to regulate the times, places, and manner of federal elections because States might neglect their constitutional duty to do so. The need for congressional regulation, then, will be most acute precisely when the States are least willing to comply. If States are already refusing to follow the federal command set forth in the Constitution, why

commentator, see Green, supra note 219, at 80 ("The Framers believed substantial authority in Congress was necessary in order to protect the right of the people to elect the government, and to ensure that all provisions of the Constitution pertaining to the electoral process were respected.").

263 See supra notes 108–34 and accompanying text.

264 See Cong. Globe, 27th Cong., 2d Sess. app. at 352 (1842) (statement of Rep. Summers of Virginia) (asking in the debate over a districting requirement, "How would this Government go about to force the States to supply Representatives in this hall? What mandate could it issue? With what sanction or penalty would such mandate be accompanied?").

265 See supra notes 118–27.

266 Again, Congress's power to act is not restricted to such cases. Indeed, six state ratifying conventions proposed amendments that would have limited Congress's times, place, and manner power to cases where states refused to act or enacted abusive regulations. See Paschal, supra note 26, at 278; see also 3 Elliot's Debates, supra note 130, at 661 (reporting a proposed amendment in the Virginia ratifying convention that read, "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"). As these amendments were not adopted, one can reasonably infer that Congress's power was not so limited. But, the history clearly shows that such cases were the Framers' prime concern in giving Congress ultimate say under the Times, Places and Manner Clause. See supra notes 252–61 and accompanying text. And, such "paradigm cases" are helpful in interpreting the reach of a clause. See Jed Rubenfeld, Reading the Constitution as Spoken, 104 Yale L.J. 1119, 1169–71 (1995).
would an additional command from Congress fare any better? Indeed, state intransigence further illustrates the problem with commandeering: States could only be made to comply with their federal duty—whether that duty be imposed by the Constitution or Congress—through military force. But, as discussed above, the Framers rejected the use of military force out of fear of a standing army. Thus, an impasse over the times, places, and manner of federal elections presents a paradigm case of the impracticability of commandeering.

As under the Commerce Clause, direct congressional regulation under the Times, Places and Manner Clause would be much more effective than commandeering. Congress could enact all laws necessary to hold elections for national office, leaving no role for the recalcitrant state governments. If only one or a few States were misbehaving, Congress could target its regulation to the federal elections in those states. State executive branch officials could then enforce the national regulations if they wanted. But, if the state executive also refused to cooperate, Congress could direct federal officials to enforce the election regulations. By regulating federal elections directly, Congress would avoid reliance on reluctant States (a flaw of the Articles of Confederation) as well as the use of military force to coerce the States (a flaw in commandeering).

The second reason to reject the historical argument for commandeering is that it ultimately fails to distinguish the Times, Places and Manner Clause from the Commerce Clause. Consider the parallel between the two clauses. Like the Times, Places and Manner Clause, the Commerce Clause was a response to state action that threatened the

267 CONG. GLOBE, 27th Cong., 2d Sess. app. at 360 (1842) (statement of Rep. Payne of Alabama) (asking, if States refused to abide by the districting requirement, "Would the President be called upon to send a military detachment into the State, surround its capitol with an armed soldiery, and enforce legislation at the point of a bayonet?").

268 See supra notes 118–27 and accompanying text.

269 See Paschal, supra note 26, at 286 ("It certainly was not anticipated that there would be a general failure on the part of the states to provide the Congress with Representatives but rather that now and then one state might fail to do so.").

270 See id. ("Nor does there seem to be any constitutional barrier to Congress exercising its power in respect to a single state only."). Since the early apportionment statutes, Congress has included exceptions or special regulations for individual states or groups of states to meet the specific needs of those states. See id. at 286 ("Congress has made regulations in respect to the time of Congressional elections applicable to particular states."); infra note 554.
nation's well being. Under the Articles of Confederation,271 Congress did not have power to regulate interstate commerce.272 Without any central regulation, States waged economic warfare that threatened the stability of the new nation.273 The Framers particularly focused on conflicts between States that produced and exported goods and some coastal States whose main commerce was the trade that flowed through their ports.274 A State with few resources other than its loca-

271 See Andrew C. McLaughlin, A Constitutional History of the United States 137–47 (1935); Rakove, supra note 114, at 46–47 (discussing James Madison’s critique of the Articles of Confederation); Richard B. Collins, Economic Union as a Constitutional Value, 63 N.Y.U. L. Rev. 43, 53 (1988) ("Interstate rivalry was the Convention’s greatest concern."); Gordon S. Wood, Interests and Disinterestedness in the Making of the Constitution, in Beyond Confederation: Origins of the Constitution and American National Identity 69, 72 (R. Beeman et al. eds., 1987). As Gordon Wood points out, while the inadequacies of the Articles of Confederation may explain why the Philadelphia Convention convened to amend that document, those problems do not fully explain the push for an entirely new document. See Wood, supra note 257, at 403–25; Wood, supra, at 72; see also Elkins & McKitrick, supra note 122, at 10 (stating that the deficiencies of the Articles of Confederation probably formed a lesser part of the urgency that led to drafting an entirely new Constitution). An additional impetus toward a new Constitution came from the petty politics practiced by the state governments of the time. In the view of the Framers, state governments were promoting personal, selfish interests at the expense of the public good. See McGreal, supra note 146, at 1129–34.

272 See Articles of Confederation art. IX (setting forth the powers of “The United States in Congress assembled”).

273 As the Supreme Court has noted, the economic opportunism practiced by the States after the revolution threatened the continuing survival of the newly-created United States. See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) ("When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began."). A federal power over interstate commerce was thought necessary to keep the peace.

The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was “to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony” and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states.

Id. (quoting H.R. Doc. No. 398, at 38 (1925)).

tion as a trade center could exact a great toll to allow passage of goods to other states or foreign markets.275 And, many States did so, either by closing their ports to or imposing prohibitive taxes on goods from other states.276 The Constitution responded, in part, by granting Congress the power to regulate interstate commerce.

The Commerce Clause, like the Times, Places and Manner Clause, targeted a specific threat the States posed to the new nation. Yet, as New York v. United States explained, commandeering was not part of the power granted under the Commerce Clause.277 In meeting the States' threat to interstate commerce, Congress could only regulate individual conduct, not direct the States to regulate. So, standing alone, the fact that the Times, Places and Manner Clause was a response to potential state misconduct does not imply congressional power to commandeer the States. And, nothing in the drafting or ratifying debates discussed above suggest that the power to commandeer was granted in the Times, Places and Manner Clause but not the Commerce Clause.

Two aspects of history, then, point away from commandeering under the Times, Places and Manner Clause. First, history shows that Congress's power under the Times, Places and Manner Clause was aimed at abuse of state power over federal elections. History also shows that commandeering was not considered an effective way to deal with non-complying states. Second, history does not offer any reason to distinguish commandeering under the Times, Places and Manner Clause from commandeering under the Commerce Clause. Consis-

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275 See The Federalist No. 7, supra note 111, at 62 (Alexander Hamilton) ("The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors."); see also id. No. 42, at 264–71 (James Madison) (discussing the importance of regulating commerce in relieving States "which import and export through other states, from the improper contributions levied on them by the latter").

276 2 Elliott's Debates, supra note 130, at 58–59; 4 id. at 254; 5 id. at 119; David Hutchinson, The Foundations of the Constitution 102–04 (1975).

tency demands that if commandeering is prohibited under one clause it be prohibited under the other.\footnote{See Vermeule, supra note 159, at 1351–54.}

\section*{D. Precedent}

The Supreme Court has never addressed commandeering under the Times, Places and Manner Clause. So, in legal parlance, we do not have any four square, mandatory precedent on the issue. Instead, we have two types of weaker precedent that illuminate the issue.\footnote{Assuming that Congress cannot enact the districting requirement under the Times, Places and Manner Clause, the Conclusion asks whether Congress could enact the requirement under another power, such as Congress’s power to enforce the Fourteenth Amendment. U.S. Const. amend. XIV, § 5. Since the Equal Protection Clause of the Fourteenth Amendment has been held to protect a right to vote, Congress could try to enact a districting requirement under the guise of enforcing that right. The Conclusion raises this potential defense of the districting requirement.} First, we have a web of Supreme Court cases interpreting and applying that Clause. These cases shed light on different aspects of the Times, Places and Manner Clause and suggest approaches to our issue. As the Court itself has recently stated, the “theory and reasoning of earlier cases” can “suggest” the right approach to an issue, even if those cases do not address that precise issue.\footnote{Alden v. Maine, 527 U.S. 706, 745 (1999).}

Second, a line of recent lower federal court cases addresses the constitutionality of the National Voter Registration Act, or, as it is more commonly known, the “Motor Voter Law.” The Motor Voter Law directs States to create and enforce a series of rules and regulations regarding voter registration for federal elections.\footnote{42 U.S.C. §§ 1973gg to 1973gg-10 (1994 & Supp. IV 1998).} Congress enacted the Motor Voter Law on the authority of the Times, Places, and Manner Clause.\footnote{See Ass’n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1997).} Relying on \textit{New York v. United States}, States have challenged the Motor Voter Law as unconstitutional commandeering.\footnote{See infra notes 332–43 and accompanying text.} Thus, the Motor Voter Law cases address the very issue under consideration: Does Congress have the power to commandeer the States under the Times, Places, and Manner Clause? We review these cases not because they authoritatively settle the issue in the federal judicial system—only the Supreme Court can do so.\footnote{And, even the Supreme Court does not finally settle constitutional issues in the federal system. For example, if the Supreme Court upheld the constitutionality of the Motor Voter Law, the President, based on a contrary interpretation of the Constitution, could refuse to enforce the law. See McGreal, supra note 146, at 1114–19.} Instead,
these cases offer arguments, using the various methods of constitutional interpretation, for our consideration. We review these cases for their persuasive force, not their binding authority.

1. Cases Interpreting the Times, Places and Manner Clause

   Generally

   The first Times, Places and Manner Clause case dealt with a federal law that prohibited actions intended to disrupt federal elections. In *Ex parte Siebold*,285 the Court reviewed criminal convictions under federal laws prohibiting stuffing the ballot box and interference with federal elections officials.286 The defendants argued that Congress could not regulate only part of the federal election process. If Congress exercises its power under the Times, Places and Manner Clause, it must "provide[] for the complete control over the whole subject over which it is exercised."287 So, according to the defendants, Congress must either regulate all aspects of federal elections—the time and place for holding elections, how the elections shall be conducted, by whom, et cetera—or not regulate the subject at all. Congress could not regulate only part of the election process, such as protecting election officials or prohibiting ballot box stuffing. Congress's power was all-or-nothing.

   The Court rejected the defendants' argument; we will review two of the Court's reasons for doing so. First, the Court turned to the text of the Times, Places and Manner Clause.288 As discussed previously, the Clause grants Congress the power to "make" or "alter" regulations of federal elections.289 The Court explained how this text allowed partial regulation:

   "Make or alter": what is the plain meaning of these words? ... There is no declaration that the regulations shall be made either wholly by the State legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its

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285 100 U.S. 371 (1879).
286 One federal statute provided for appointment of "supervisors of election" in certain elections for Congress. Act of Feb. 28, 1871, ch. 99, § 2, 16 Stat. 433, 433–34 (codified as amended at 2 U.S.C. § 9 (1994)). These supervisors were to be present at the polling places and to perform certain duties while there. Id. §§ 4–5. Some of the defendants were indicted and convicted of preventing supervisors from getting to the polling places or from performing their duties at the polling places. *Siebold*, 100 U.S. at 377–82.
287 *Siebold*, 100 U.S. at 382–83.
288 Id. at 383.
289 See supra note 211 and accompanying text.
doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject.\footnote{Siebold, 100 U.S. at 383.}

The plain meaning of "alter" shows that Congress can enact partial regulations. While this passage does not address commandeering, the Court's language suggests an assumption about how Congress will make or alter regulations. Notice first how the Court speaks of regulations "made either wholly by the State legislatures or wholly by Congress." The assumption here is that the state legislatures and Congress act in a parallel fashion when "making" these regulations: Each legislature will make the regulations itself, not command some other body to do so. Commandeering was not anticipated.

Also, notice how the Court speaks of Congress altering some regulations, and then "leaving" other regulations to the States. This passage suggests that either one or the other—States or Congress—will be making any specific regulation. If Congress regulates an aspect of federal elections, it does so on its own. If not, then that aspect of federal elections is "left" to the States. What the Court does not envision, however, is Congress regulating an aspect of federal elections by enacting a command to the States and then "leaving" it to the States to follow the command. Rather, the States are "left" to act when Congress has not acted. Again, the Court's language does not anticipate commandeering.

In a second argument, the Court analogized the Times, Places and Manner Clause to the Commerce Clause. Specifically, the Court explained how both clauses give Congress and the States concurrent authority over a subject:

The peculiarity of the case consists in the concurrent authority of the two sovereigns, State and National, over the same subject-matter. This, however, is not entirely without a parallel. The regulation of foreign and inter-state commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the States. But where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that State regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they are valid and binding.
So in the case of laws for regulating the elections of representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.\footnote{Id. at 384–86.}

\textit{New York v. United States} explained how the Commerce Clause reflected another aspect of the federal-state balance of power: Congress cannot commandeer the States.\footnote{The Court analogized Congress’s power over federal elections to Congress’s general Article I, Section 8 powers in \textit{Ex parte Yarbrough}, 110 U.S. 651, 658–59 (1884). In that case, the defendants challenged Congress’s power to prohibit racially motivated intimidation of voters in federal elections. \textit{Id.} at 657–58. The defendants argued that the Constitution did not specifically grant Congress power to enact such a prohibition. \textit{Id.} The Court held that Congress’s power to regulate federal elections, like its other powers under the Constitution, extends to passage of all laws necessary and proper to exercise of Congress’s enumerated powers. \textit{Id.} at 658–59; \textit{see also McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 420–24 (1819) (stating that Congress has implied power to enact all laws useful and convenient to the full exercise of its enumerated powers). In other cases, the Court has similarly upheld Congress’s power to regulate broadly under the Times, Places and Manner Clause. \textit{See, e.g.}, \textit{Roudebush v. Hartke}, 405 U.S. 15, 24–25 (1972) (regulation of recount in federal elections); \textit{United States v. Classic}, 313 U.S. 299, 318–20 (1941) (regulation of party primary elections); \textit{United States v. Gradwell}, 243 U.S. 476, 481–85 (1917) (regulation of voter registration and certification of election results in federal elections); \textit{United States v. Mosley}, 238 U.S. 383, 386 (1915) (regulation of tampering with ballots in federal elections); \textit{Ex parte Clarke}, 100 U.S. 399, 404 (1879) (prescribing punishment for state official’s failure to abide by state laws governing conduct of federal elections).} Thus, \textit{Ex parte Siebold} can be used to further

\footnote{Of course, as with any analogy, this analogy between the Times, Places and Manner Clause and the Commerce Clause could be severed by showing that the two clauses are different in a relevant respect. In this case, the relevant respect would be}
disapprove of commandeering under the Times, Places and Manner Clause.

The Court has also made a relevant analogy between the Times, Places and Manner Clause and the Commerce Clause in the separation of powers context. In *Buckley v. Valeo*, the Court held that the method for selecting the Federal Election Commission violated the separation of powers. At that time, the President *pro tempore* of the Senate and the Speaker of the House of Representatives each appointed some members of the Commission. Because the Appointments Clause limited appointment of such officials to the President, executive department heads, or judges, appointment by legislative officials violated that Clause.

In trying to get around the Appointments Clause, the government argued that the Times, Places and Manner Clause granted Congress plenary power over federal elections that overrode any separation of powers limitations on Congress's power. The Court summarily rejected this argument, sounding a note in tune with *Ex parte Siebold*:

But Congress has plenary authority in *all areas in which it has substantive legislative jurisdiction*, so long as the exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.

Again, the Court places the Times, Places and Manner Clause on the same footing as Congress's other powers. Separation of powers limits apply equally to Congress's Times, Places and Manner Clause power.
as to Congress’s other powers. And, the same principle should apply
to federalism limits on Congress’s power. If the anti-commandeering
rule limits Congress’s other powers, it should similarly limit Con-
gress’s power under the Times, Places and Manner Clause. 301

A third argument in Ex parte Siebold has led one commentator to
conclude that Congress can commandeer under the Times, Places
and Manner Clause. The Court cited the 1842 Apportionment Act, 302
the first law to require election of the House by districts, as an exam-
ple of Congress regulating only part of the federal election process:

Congress has partially regulated the subject heretofore. In 1842, it
passed a law for the election of representatives by separate districts;
and, subsequently, other laws fixing the time of election, and di-
recting that the elections shall be by ballot. No one will pretend, at
least at the present day, that these laws were unconstitutional because
they only partially covered the subject. 303

Citing this portion of the Court’s opinion, the commentator asserted
that the argument that Congress cannot commandeer the States into
drawing districts “would not appear to be maintainable in light of the
language in Ex parte Siebold.” 304 But, this misreads Ex parte Siebold. The
passage just quoted cites the 1842 districting requirement for the pro-
position that Congress can enact partial regulations, not to support
commandeering. Indeed, commandeering—or any argument or
issue resembling it—never appears in the Court’s opinion. 305

301 Indeed, the discussion below explains why commandeering violates separation
of powers concerns. Buckley would require that any separation of powers limit applies
to all of Congress’s plenary powers equally, including the Times, Places and Manner
Clause. See id.

§ 2c (1994)).

303 Ex parte Siebold, 100 U.S. 371, 384 (1879) (emphasis added).

304 CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED
STATES OF AMERICA: ANALYSIS AND INTERPRETATION 115 n.3 (Leland E. Beck & Johnny

305 The same can be said of the Court’s reference to the 1842 districting require-
ment in United States v. Gradwell, 243 U.S. 476 (1917). In Gradwell, the Court men-
tioned the 1842 requirement as part of a general summary of statutes Congress had
passed under the Times, Places and Manner Clause. Id. at 482-84. This summary
served solely as background to the Court’s interpretation of a statute regulating con-
spiracies to defraud the government. Id. at 484-89 (holding that a general federal
statute prohibiting conspiracies to defraud the federal government did not apply to a
conspiracy to bribe voters in a federal election). No issue in Gradwell raised the scope
of Congress’s power under the Times, Places and Manner Clause, not to mention
commandeering of state legislatures under that Clause.
Thus, *Ex parte Siebold* does not settle the issue under consideration.\(^{306}\)

*Smiley v. Holm*\(^{307}\) fills in another aspect of the Times, Places and Manner Clause picture. *Smiley* involved Minnesota's attempt at districting following the 1929 congressional reapportionment. Both chambers of the Minnesota legislature had passed a bill that divided the state into nine districts.\(^{308}\) In accordance with state law, the bill was then sent to the governor for his signature.\(^{309}\) The governor returned the bill without his approval, which constituted a veto.\(^{310}\)

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\(^{306}\) Another passage from the Court's opinion bears on a related issue mentioned above: whether Congress can commandeer state officials to enforce a federal election law. The Court wrote:

As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.

*Siebold*, 100 U.S. at 386–87. In this passage, the Court indicates that Congress can make its own regulations to be implemented by federal officials, while States can make their own regulations implemented by state officials. The passage supports an argument that the rule in *Printz v. United States*, 521 U.S. 898, 933 (1997)—Congress cannot commandeer state law enforcement officials under the Commerce Clause—should extend to Congress's power under the Times, Places and Manner Clause.


\(^{308}\) *Id.* at 361.

\(^{309}\) *Id.* at 361–62.

\(^{310}\) *Id.* at 363.
Under the state constitution, a vetoed bill could not become a law unless two-thirds of each chamber of the legislature voted to override the veto.\textsuperscript{311} Without attempting to override the veto, however, the state legislature sent the bill to the state secretary of state so that elections could be held pursuant to the bill.\textsuperscript{312} A state citizen then brought suit to prevent elections under the vetoed bill.\textsuperscript{313} The question before the Court was whether the Times, Places and Manner Clause gave state legislatures the power to regulate federal elections on their own, or whether the State’s general lawmaking processes—which, in Minnesota, included a gubernatorial veto—governed the making of such regulations.\textsuperscript{314}

The state legislature relied on the text of the Times, Places and Manner Clause in support of its power to regulate independent of the State’s governor. Recall that the Clause begins, “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”\textsuperscript{315} According to the State, the text clearly commits regulation of federal elections to the State’s “Legislature,” with no mention of any other branch of the state government.\textsuperscript{316} Thus, the governor played no role in districting the state, and his veto did not void the districting bill.\textsuperscript{317}

The Court conceded that the text of the Times, Places and Manner Clause identified the state legislature as the proper “body” to regulate federal elections.\textsuperscript{318} But, that observation raised a further question: In what capacity were the state legislatures to regulate federal elections? Was it in their capacity as the law making body of the state? If so, then the law making processes of a State’s Constitution, including any role given to the State’s governor, would govern the legislature’s actions. Or, was it in the legislature’s capacity as the State’s designated agent to perform a special constitutional function regarding the federal government? In that case, the Constitution has committed that function solely to the legislature, notwithstanding any provision in the State’s constitution. The question, then, was in what

\begin{itemize}
\item\textsuperscript{311} Id. at 361.
\item\textsuperscript{312} Id.
\item\textsuperscript{313} Id.
\item\textsuperscript{314} Of course, as the Times, Places and Manner Clause dictates, Congress could replace or alter any such regulations. U.S. Const. art. I, § 4, cl. 1.
\item\textsuperscript{315} Id. (emphasis added).
\item\textsuperscript{316} Smiley, 285 U.S. at 362–63.
\item\textsuperscript{317} Id. at 364–65.
\item\textsuperscript{318} Id.
\end{itemize}
capacity did the States act when regulating the times, places, and manner of federal elections?\textsuperscript{319}

In answering this question, the Court turned to the text and nature of the regulations passed under the Times, Places and Manner Clause. First, consider text. The Court based its argument on the words “such regulations” and “by law.”\textsuperscript{320} In accord with this Article’s prior discussion in the Section on text,\textsuperscript{321} the Court concluded that these words referred to laws or regulations enacted through a government’s ordinary law making processes.\textsuperscript{322} Thus, if the Minnesota Constitution gave the Governor a role in the State’s law making process, the Governor’s approval (or an override of the Governor’s veto) was necessary to any regulation of the times, places, and manner of federal elections.

Second, the Court explained the nature of the laws to be passed under authority of the Times, Places and Manner Clause. The Clause grants authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments.\textsuperscript{323}

\textsuperscript{319} See \textit{id.} at 365–66. The Court gave some examples of different capacities in which state legislatures acted under the Constitution. The use in the Federal Constitution of the same term ["legislature"] in different relations does not always imply the performance of the same function. The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under Article V. It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term ‘legislature’ is used in the Constitution it is necessary to consider the nature of the particular action in view. The primary question now before the Court is whether the function contemplated by Article I, section 4 is that of making laws. \textit{Id.} (citations omitted).

\textsuperscript{320} \textit{id.} at 366–67.

\textsuperscript{321} See \textit{supra} notes 213–15 and accompanying text.


\textsuperscript{323} \textit{id.} at 366.
According to the Court, these types of legislation "involve[] lawmaking in its essential features and most important aspect[s]."\(^{324}\) This is so because, in general, the types of laws necessary to regulate federal elections mirror the types of laws that are the grist of the ordinary legislative mill. In its ordinary business, a legislature enacts rules that direct or prohibit individual conduct, set forth procedures for government proceedings, and provide penalties for non-compliance. The laws or regulations enacted under the Times, Places and Manner Clause have the same cast and, thus, must be enacted under the state constitution's ordinary law making procedures.\(^{325}\)

*Smiley* teaches that state laws enacted under the Times, Places and Manner Clause—in that case, a law establishing House districts—are the product of the State's ordinary law making processes. This conclusion forecloses a significant argument for supporting commandeering under the Times, Places and Manner Clause. If state action under that Clause was not ordinary law making, but instead a special function performed under the Constitution, one could argue that Congress could direct the States in performing that function. Indeed, in doing so, Congress would not be commandeering state law making processes, but only directing performance of a special federal function. But, *Smiley* precludes this argument. Under the logic of that case, the congressional districting requirement commandeers the States into ordinary law making, the very conduct proscribed by *New York v. United States.*\(^{326}\)

In sum, neither *Ex parte Siebold* nor *Smiley* address commandeering. Yet, each case contains discussions that bear on the issue. Given the Court's pro-state sovereignty attitude towards its precedents, we might expect the Court to seize on the language in each case that casts doubt on commandeering.

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\(^{324}\) *Id.*

\(^{325}\) *Id.* at 367 ("As the authority is conferred for the purpose of making laws for the State, it follows . . . that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments."). The Court has held elsewhere that districting (or, presumably, any other law passed pursuant to the Times, Places and Manner Clause) could be done, in part, through referenda, if that mechanism is part of the State's ordinary law making process. *Davis v. Hildebrant*, 241 U.S. 565, 566 (1916).

\(^{326}\) *See* 505 U.S. 144, 175–76 (1992).
2. Motor Voter Law Cases: Commandeering Under the Times, Places and Manner Clause

The National Voter Registration Act,\textsuperscript{327} more popularly known as the Motor Voter Law, is a comprehensive federal regulation of voter registration in federal elections.\textsuperscript{328} The relevant portion of the Act requires States to establish procedures for registering voters by different methods, such as by mail or with a driver’s license application.\textsuperscript{329} Several lower courts have characterized the Act as commandeering the States\textsuperscript{330} and analyzed whether Congress may do so under the

\begin{itemize}
  \item \textsuperscript{328} The Supreme Court has held that Congress does not have power under the Times, Places and Manner Clause to regulate elections of state officials. \textit{See} Oregon v. Mitchell, 400 U.S. 112, 124–26 (1970).
  \item \textsuperscript{329} 42 U.S.C. § 1973gg-2 (1994 & Supp. IV 1998). Most of the Act’s other provisions set forth detailed regulations for States to implement or enforce. These provisions implicate the Court’s decision in \textit{Printz}, 521 U.S. 898 (1997), discussed above, \textit{see supra} notes 150–53 and accompanying text, which extended \textit{New York v. United States}’s anti-commandeering rule to state enforcement or implementation of federal law. \textit{Id.} at 935. As discussed above, the \textit{Printz} issue—Congress’s commandeering of state executive branch officials—raises slightly different concerns under the Times, Places and Manner Clause than commandeering of state legislative officials. Thus, this Subsection does not address lower court review of these sections of the Motor Voter Law. \textit{See}, \textit{e.g.}, \textit{Ass’n of Cmty. Orgs. for Reform Now v. Edgar}, 56 F.3d 791, 795 (7th Cir. 1995) (arguing that because the Constitution places a duty on States to administer federal elections under state laws, States continue to have a duty to do so after Congress alters or makes those laws).
  \item \textsuperscript{330} One could argue that the Act does not commandeer the States into enacting registration procedures. Section 1973gg-2(a) of the Act provides that “each State shall establish procedures to register to vote in elections for Federal office” relating to registration by mail, in person, and along with a driver’s license application. 42 U.S.C. § 1973gg-2(a) (1994). Subsection (b), however, exempts States that either do not require registration to vote or allow registration at the polling place at the time of voting. 42 U.S.C. § 1973gg-2(b) (Supp. IV 1998). On the one hand, this choice could be viewed as commandeering because it effectively requires States to enact one of three federal registration processes: (1) mail, in person, or driver’s license registration, (2) no registration, or (3) polling place registration.
  \item On the other hand, the government could characterize the Act as threatening pre-emption of state law, if States do not act as Congress has commanded. If States do not enact procedures for in person, mail, or driver’s license voter registration, the Act effectively preempts state law by doing away with registration or allowing polling place registration. \textit{See} Condon v. Reno, 913 F. Supp. 946, 964 (D.S.C. 1995) (stating that the “Act does not require states to adopt any legislation,” because States may simply refuse to have voter registration laws); \textit{Ass’n of Cmty. Orgs. for Reform Now v. Miller}, 912 F. Supp. 976, 984 (W.D. Mich. 1995) (stating that the Act “does not require a state to pass legislation,” it merely pre-empt state voter registration laws), \textit{aff’d}, 129 F.3d 833 (6th Cir. 1997). Which characterization of the Act is proper is not within the scope of this Article. But, it is worth noting that the take title provision in \textit{New York v.
Predictably, the States have argued that *New York v. United States* prevents Congress from doing so; each lower court has rejected this argument. This Subsection examines three court of appeals decisions that did so.

The Ninth Circuit's decision in *Voting Rights Coalition v. Wilson* and the Sixth Circuit's decision in *Association of Community Organizations for Reform Now v. Miller* simply stated their conclusions without explanation. As noted above, the States had argued that *New York v. United States* prohibited the Act's commandeering. The Ninth Circuit responded as follows: "The flaw in the State of California's argument is that it ignores Article I, section 4, which, unlike the commerce power in Article I, section 8, empowers Congress to impose on the states precisely the burden at issue." Using similar language, the Sixth Circuit stated:

> Article I section 4 explicitly grants Congress the authority either to "make" laws regarding federal elections (similar to the authority granted in the Commerce Clause), or to "alter" the laws initially promulgated by the states. Thus, unlike the Commerce Clause at issue

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332 See id. at 131; Green, supra note 219, at 75–76.

333 To date, only three federal appellate courts have decided the issue. While various federal district courts have decided the issue, their opinions do not raise any additional arguments and, thus, are referenced in the footnotes.

334 60 F.3d 1411 (9th Cir. 1995).

335 129 F.3d 833 (6th Cir. 1997).

336 Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1997); Wilson, 60 F.3d at 1415.

337 Wilson, 60 F.3d at 1415 (emphasis added). For its part, the District Court for the Western District of Michigan simply quoted this assertion in lieu of making its own analysis. Ass’n of Cmty. Orgs. for Reform Now v. Miller, 912 F. Supp. 976, 984 (W.D. Mich. 1995). The District Court for the District of South Carolina made a similar assertion: "Of necessity Congress, when it exercises its authority to regulate the 'time, place and manner' of federal elections, elections which are conducted by state and local officials, requires state officials to adhere to federal laws. That in no way exceeds Congressional authority or violates the Tenth Amendment." Condon v. Reno, 913 F. Supp. 946, 965 (D.S.C. 1995). This court also conflated two separate issues: first, whether Congress can commandeer state legislatures under the Times, Places and Manner Clause and, second, whether Congress can do so to state executive branch officials. See supra notes 150–57 and accompanying text.
And that is all either court said. No arguments were presented as to why the two clauses are different on this score. No mention was made of constitutional text, structure, history, precedent, or prior government practice. Just the bare, question-begging assertion that the Times, Places and Manner Clause allows Congress to commandeer the States under the Times, Places and Manner Clause. Hopefully this Article’s discussion has persuaded the reader that many constitutional arguments can be made on the issue and that resolution is not as self-evident as the courts suggest. Indeed, on my analysis of this point, the courts’ assertions are very wide of the mark. Thus, Wilson and Miller should hold no persuasive force outside their respective circuits.

The Seventh Circuit at least offered some explanation for its holding in Association of Community Organizations for Reform Now v. Edgar. The court distinguished the Times, Places and Manner Clause from other power-granting clauses. Specifically, the Times, Places and Manner Clause already commands the States to act—“The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof”—whereas the power-granting clauses in Article I, Section 8, such as the Commerce Clause, do not command the States. On its own, this

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338 Miller, 129 F.3d at 836 (emphasis added).
339 The Ninth Circuit’s only explanation related to Congress commandeering States to enforce the voter registration requirements, not to the commandeering of state legislatures into enacting procedures. Wilson, 60 F.3d at 1415 (“Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators.”). As mentioned above, this issue is beyond the scope of the present discussion.
340 Presumably, the Sixth Circuit assumes that the word “alter” standing alone unambiguously authorizes Congress to commandeer the States. That court’s own use of language exposes the flaw in its textual argument. The second sentence of the quote uses the words “force states to alter their regulations,” Miller, 129 F.3d at 836, to refer to commandeering. Thus, from a purely textual standpoint (and the Sixth Circuit points to nothing outside the text), the word “alter” is not ordinarily used to refer to commandeering. Instead, the phrase “force to alter” more naturally expresses that idea.
341 56 F.3d 791 (7th Cir. 1995).
343 Edgar, 56 F.3d at 796 (stating that Congress’s power to compromise state sovereignty through commandeering “is built into the Constitution, precisely in Article I section 4, the first sentence of which places the burden of administering federal elections on the states”); see also Ass’n of Cmty. Orgs. for Reform Now v. Ridge, No. CIV.A.94-7671, 1995 WL 136913, at *7 (E.D. Pa. Mar. 30, 1995) (stating that the “defendants have not convinced me that there is any significant resemblance between
observation is beside the point. The necessary assumption, which the
court made but did not defend, is that if the Constitution commands
the States to act, then Congress, when exercising power in the same
area, can do so. So, the question becomes whether commandeering
by Congress is no different than commandeering by the Constitution.

Once again, text cannot answer this question. To see this point,
consider the question whether States can commandeer Congress into
legislating on federal elections. We know that this argument is ab-
surd, but not because of anything in the text of the Times, Places and
Manner Clause. Rather, principles of federalism, which show that
the federal government is supreme over the state governments within
the federal government's limited sphere of action, preclude this back-
wards commandeering. So, to answer the question, we need to re-
sort to background principles and structure.

The question is whether commandeering by the Constitution is
the constitutional equivalent of commandeering by Congress. The
answer is "no" for two reasons. First, an affirmative answer would
adopt the now bygone argument of the political safeguards of federal-
ism. Under the political safeguards argument, Congress defines the
constitutional boundary between state and federal power, without in-
terference from the judiciary. Consequently, on federalism mat-
ters, the Constitution effectively means what Congress says it means.
This argument assumes that state participation in the federal govern-
ment adequately protects state interests. While this view had a brief

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344 We could use the textual arguments set forth above in Section B to argue that
any grant of power to make "law" or "regulations" does not entail the power to com-
mandeer others to make law. See supra Part III.B.

345 We saw a similar argument from structure on the issue whether States could
tax the national bank. See supra notes 136-39 and accompanying text.

346 The political safeguards of federalism argument is discussed at supra notes
175-85 and accompanying text.

ascendancy in Garcia, the Court has since eroded it to a bare trace in a recent line of decisions: New York v. United States, Printz, City of Boerne v. Flores, Seminole Tribe, and Alden. Each decision, in its own way, embraced the view that the political process does not sufficiently protect States from the federal government. Current federalism doctrine, then, rejects any view that effectively equates the Constitution with Congress.

Second, equating commandeering by the Constitution with commandeering by Congress fundamentally misconceives the nature of American constitutional government. One of the founding generation's great innovations was a Constitution that defined and limited government power. The innovation of an enforceable Constitution followed from the twin innovation of locating ultimate sovereignty in the People of the nation, not in any organ or agency of government. As the Preamble tells us, the People exercised their sovereign power to create the Constitution, which stands above and controls the national and state governments. Through this Constitution, the People chose to govern themselves through both the state and national governments. As Justice Kennedy has described in a now much invoked passage:

The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Within American government structure, then, a clear hierarchy exists: The People created a Constitution that allocated power between state
and national governments. The Constitution stands *above* the States in the hierarchy, while Congress, unless the Constitution provides otherwise, stands on the same level as the States. While federal *law* trumps state *law*, neither government stands over the other. Thus, a command from Congress to the States does not derive from the same authority as a command from the Constitution to the States.  

To illustrate the point, take the following example. The Commerce Clause has both an affirmative and a negative component. On the affirmative side, that Clause grants Congress power to regulate interstate commerce. On the negative side, that Clause bars States from placing an undue burden on interstate commerce. In its negative aspect, then, the Commerce Clause of the Constitution commands the States *not* to do something. Now, consider a case where a State has regulated interstate commerce in a way that does not place an undue burden on interstate commerce, yet creates inefficiencies that Congress would like to remove. For example, different States have different truck length limitations. Congress could use its affirmative power under the Commerce Clause to enact a law that pre-empts those inefficient state laws. In our example, Congress could pass a law stating that there shall be no truck length limitation. But, after *New York v. United States*, Congress could *not* pass a law that directed the States to repeal their truck length limitations—that would be forbidden commandeering. This is so even though the Constitution itself already commands the States in this area, directing the States to place no undue burden on interstate commerce. Similarly, the Constitution's command that the States regulate federal elections does not, standing alone, mean that Congress can use its power over the same subject to commandeer the States. Rather, Congress ought to have

355 One member of Congress made a similar argument against the districting requirement in the Apportionment Act of 1842. See *Cong. Globe*, 27th Cong., 2d Sess. app. at 318 (1842) (arguing that the people, through the Constitution, granted Congress certain powers, and that Congress itself is to exercise those powers, not delegate those powers to a body not designated by the people).

that power only if history, text, structure, precedent, and prior govern-
ment practice point to that answer.

The Seventh Circuit's holding in Edgar, then, rests on a premise
that cannot be maintained. The court equated commandeering by
the Constitution with commandeering by Congress; this proposition is
not supportable. Thus, like the Sixth and Ninth Circuits, the Seventh
Circuit ultimately offers no persuasive arguments for commandeering
under the Times, Places and Manner Clause.

E. Structure

As discussed earlier, the Court has drawn inferences from various
constitutional structures in deciding constitutional questions. Arguments from structure follow four basic steps. First, identify the
constitutional structure to be analyzed. Second, infer some relation-
ship that exists within that structure. Third, make an observation
about the world as it relates to the relationship identified within the
structure. Fourth, draw a rule for the decision of the issue at hand.
This Section applies this structure analysis to three constitutional
structures: representative government, federalism, and separation of
powers.

1. Representative Government

This argument parallels the structural argument in New York v.
United States that commandeering disrupts the system of representa-
tive government. Let us walk through the four steps of the structural
argument. First, the structure is representative government. Second,
within this structure we can infer a relationship between the represen-
tative and the electorate. Specifically, the representative is to be ac-
countable to the electorate; in this way, the electorate can check
abuses of power by the representative. Third, we can observe that
commandeering interferes with accountability. If Congress com-
mandeers the States to act, it will be the state governments that make the
ultimate laws and thus state officials who are blamed for those laws.
Through commandeering, then, federal officials can avoid accounta-

357 See supra Part II.C.
358 For an illustration of these four steps at work, see the discussion supra note 135
and accompanying text.
359 See supra notes 140-43 and accompanying text.
The same argument applies to commandeering under the Times, Places and Manner Clause. To see how, consider step three of the argument—that commandeering blurs the lines of accountability. Under the districting requirement, state governments must draw a single-member district for each of their House members. Due to pressure from legal requirements regarding minority voting rights, these districts often take a bizarre shape and lump together non-contiguous communities. If the voters find these districts objectionable, they may hold the drafters of those districts—their state governments—accountable at the next election. Yet, if the state governments had a choice, they might have opted for an at-large system of voting, or even a multi-member district system, that would not have required bizarrely drawn districts. But, because they must draw districts, the state governments may take the blame for doing so. State governments are held accountable for a districting requirement imposed by Congress.

Thus, commandeering States to draw congressional districts poses the same accountability problem as commandeering States to regulate low-level radioactive waste. In both cases, the States may receive the blame for a federal policy choice. For this reason, both instances of commandeering conflict with the constitutional structure of representative government and are unconstitutional.

360 See 42 U.S.C. § 1973(a) (1994) (prohibiting any state election that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color”); Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986). The Court has summarized the vote dilution test under Section 2 of the Voting Rights Act as follows:

Plaintiffs must show three threshold conditions: first, the minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district”; second, the minority group is “politically cohesive”; and third, the majority “votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” Once plaintiffs establish these conditions, the court considers whether, “on the totality of circumstances,” minorities have been denied an “equal opportunity” to “participate in the political process and to elect representatives of their choice.”


361 See, e.g., Shaw v. Reno, 509 U.S. 630, 635–36 (1993) (describing how one House district in North Carolina “winds in a snakelike fashion through tobacco country, financial centers, and manufacturing areas ‘until it gobbles in enough enclaves of black neighborhoods’” and how another district “has been compared to a ‘Rorschach ink-blot test’ and a ‘bug splattered on a windshield’”).

362 The Conclusion raises the issue whether Congress could require districts under its power to enforce the Fourteenth Amendment. See infra notes 542–48 and accompanying text.
2. Federalism

The constitutional structure of federalism also cuts against commandeering under the Times, Places and Manner Clause. Under our Constitution, federalism refers to the division of power between a supreme but limited national government and state governments that hold all residual powers. Within this structure, we can infer that when each government acts within its sphere of power it should be free to set its own law making agenda. Deciding what issues to consider, when to consider them, and for how long are all matters committed to the discretion of a sovereign’s legislature. It would be a gross violation of that sovereignty for one government to prescribe any of these matters for another government’s legislature. Thus, we can infer autonomous national and state legislative processes as a relationship within the structure of federalism.

Next, we can observe that the law making process, like all human endeavors, is bounded by a scarcity of resources, namely time and money. A legislature’s law making capacity is a finite resource that can be allocated to only so many proposals. If a legislature considers one law making proposal, it must either forgo, postpone, or shorten
consideration of other proposals. The power to force a legislature to consider a proposal, then, is the power to shape and alter the legislature’s law making agenda.

Commandeering violates the structure of federalism because it gives Congress the power to control state legislative agendas. When Congress commandeers a state legislature, Congress effectively directs that legislature to place the federally mandated proposal on the State’s legislative agenda. Consideration and action on the federally mandated proposal will take up part of the state legislature’s scarce resources, crowding out other business the state legislators would have placed on the agenda instead. So, by commandeering state legislatures, Congress exercises effective control over state legislative agendas and invades the autonomy of the state legislative processes. For this reason, congressional commandeering of state legislatures violates the constitutional structure of federalism.

Another federalism argument derives from the principle that Congress has only limited and enumerated powers. In dividing power vertically between national and state governments, the Framers allocated certain powers to the national government, leaving the States largely free to exercise all other powers without federal interference. Even within its enumerated powers, Congress would not have the time or the interest to meddle in local matters. To do so, Congress would have to learn about the local circumstances within each state and then tailor its regulations to meet those circumstances. These activities are both expensive and time-consuming. Commandeering, however, reduces these costs: Congress makes the general policy choice and then directs the States to perform the costly task of tailoring the policy to local circumstances. Commandeering, then, enables Congress to regulate local matters at a reduced cost.

To see how commandeering frees up Congress to regulate more local matters, consider the districting requirement. By directing the States to draw districts, Congress gets to make a general policy choice—for example, districts over at-large—without doing the leg work of drawing 435 individual districts in fifty states. Such a maneuver circumvents one of the safeguards against Congress grabbing power—local issues are too mundane and too time consuming for Congress to regulate.

This problem will be particularly acute for states that have part time legislatures, such as the Texas Legislature, which meets for only three months every two years. See Tex. Const. art. 3, § 5 (Vernon 1997) (mandating that “[t]he Legislature shall meet every two years” and providing for a “regular session” totaling ninety days).

ture question and leave implementation to the States, Congress can suddenly engage in much more law making without the time or money costs of the nitty-gritty details, which will be much less exciting. If Congress were required to address both the big picture and the details if it chose to act at all, Congress might not legislate in the area. The Framers knew this.370

Thus, commandeering violates another aspect of the federalism structure. While the Constitution grants Congress supreme but limited power, commandeering allows Congress to expand its law making ability by making broad policy pronouncements and leaving implementation to the state legislatures. *New York v. United States* did not need to address this argument because in that case Congress specified rather precisely what laws it wanted the States to enact.371 Conversely, the congressional districting requirement leaves much work for the States to do, allowing Congress to avoid the difficult detail work by commandeering the States.

3. Separation of Powers

Last, the constitutional structure of separation of powers also cuts against commandeering under the Times, Places and Manner Clause. Separation of powers refers to the division and allocation of power among the three branches of the federal government.372 This structure recognizes two main relationships among the three branches. First, each branch is largely given a separate task within the government: The legislature is to make law, the executive is to enforce law, and the judiciary is to decide cases. Second, and more relevant to the present discussion, each branch is given sufficient power to check abuses of power by the other branches.373 Specifically for our purposes, the President can veto bills passed by both chambers of Congress, subject to Congress's power to override any veto by a two-thirds vote.374 The veto gives the President power to review and pass on the

The variety of more minute interests, which will necessarily fall under the superintendence of the local administrations and which will form so many rivulets of influence, running through every part of the society, cannot be particularized without involving a detail too tedious and uninteresting to compensate for the instruction it might afford.

*Id.*

370 See *id.*

371 See *supra* note 49 and accompanying text.

372 For a further discussion of separation of powers, see generally McGreal, *supra* note 146, at 1134-46.

373 See *id.* at 1137-40.

374 U.S. Const. art. I, § 7, cl. 2.
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constitutionality or advisability of Congress's final work product, the bill. And, a bill cannot become law unless Congress has presented the bill to the President and given the President an opportunity to exercise the veto power. The veto, then, is an important structural check on Congress's law making power.

Congressional commandeering of state legislatures circumvents the President's veto power. Consider the congressional districting requirement. The President reviewed and passed on the bills that made the general choice between single-member districts and other electoral systems, such as at-large voting. But, merely selecting single-member districts leaves States much discretion over how those districts are to be drawn. What role will party affiliation play in drawing districts? What role will traditional districting criteria, such as contiguity, compactness, and communities of interest, play in the process? Will other goals be sought in drawing districts? If these policy decisions were made in a bill passed by Congress, the President would have an opportunity to review, and perhaps veto, the bill. In structural terms, the President would have a chance to check any decisions made by Congress. But, commandeering removes the President from the law making process. State legislatures will make these policy decisions through their law making processes, and the President will play no role. Thus, commandeering violates the constitutional structure of separation of powers by removing the presidential veto as a check on law making.

Consider three possible objections to this structural argument. First, because commandeering takes both the President and Congress out of the law making loop, the President's veto is no longer needed to check Congress. But, this objection misses an important difference between the President and Congress regarding commandeering—if Congress objects to a State's implementation of the command, Congress can pass another law re-directing the State. And, if Congress agrees with the State's implementation, Congress can simply not act. So, Congress can effectively stay in the loop even after commandeering the States. The President, however, plays no role unless Con-

375 President George Washington reserved the veto for legislation he believed to be unconstitutional. See Forrest McDonald, The Life of George Washington 184–85 (1974). More recently, however, Presidents have used the veto power as a tool in forming public policy. See Bruce Ackerman, We the People: Foundations 68 (1991) (“Today's Presidents use their veto power to further their programmatic ambitions.”).

376 See INS v. Chadha, 462 U.S. 919, 946–47 (1983) (“Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented.”).
gress acts first. For example, if Congress agrees with state implementation but the President objects, the President has no power to stop the State. Congress can acquiesce in state implementation, and the President is neutralized by Congress's acquiescence.377

A second objection would note that commandeering under the Times, Places and Manner Clause merely places the President in the same position as if the States were regulating federal elections on their own. Recall that that Clause places initial responsibility for federal election regulations on the States; the President would play no role in making those regulations. So, if the President plays no role when States initially make federal election regulations, it should not matter whether the President plays any role when Congress commands the States to do so. But, the objection makes an important mistake by equating independent state action with state action under the command of Congress. When States act independently of Congress, as when they initially enact federal election regulations, Congress has not acted, and thus there is no need for a presidential veto to check congressional law making. When States are acting under a congressional command, however, the States are effectively implementing the policy directives of Congress. The state legislation should be treated as an extension of Congress's law making power, and that power should be subject to the check of a presidential veto.

A third objection would be that the President has waived any right to veto by signing the prior bill that commandeered the States378. This argument ultimately fails because, as the Court has held, no branch of the federal government can consent to a separation of powers violation.379 The Framers divided and separated fed-

377 The legislative veto posed the same problem. Id. at 956–59. A legislative veto is a device by which Congress grants an agency power to draft rules and regulations, or to take some other action, but requires the agency to submit those rules, regulations, or actions to Congress before they go into effect. Id. at 923–28. Congress can then “veto” the rules, regulations, or action upon a majority vote, without any input from the President. Id. Congress's veto is tantamount to a repeal of the rules, regulations, or actions without giving the President an opportunity to veto Congress's repeal. Id. at 952–54. Thus, the legislative veto violates the separation of powers by taking the President's veto out of certain law making decisions. Id. at 958–59.

378 Of course, this argument would not apply in cases where Congress passed a commandeering law over the President's veto.


Where Congress exceeds its authority relative to the States, ... the departure from the constitutional plan cannot be ratified by the “consent” of state officials. An analogy to the separation of powers among the branches of the Federal Government clarifies this point. The Constitution's division of power among the three branches is violated where one branch invades the
eral power among three branches to protect citizens from abuse of that power. Those protections, then, belong to the citizens and not to the branches of government. Thus, it is not the federal government’s place to waive those protections.

In sum, three structural arguments cut against congressional power to commandeer state legislatures under the Times, Places and Manner Clause. First, commandeering would undercut the structure of representative government by blurring the lines of accountability between representative and electorate. Second, commandeering would offend the structure of federalism by giving Congress power to control state legislative agendas and by allowing Congress to make policy choices without doing detailed law making. Third, commandeering would undercut the separation of powers by effectively removing the check of a presidential veto from some national law making.

F. Prior Government Practice

As discussed above, the Court and Congress have looked to prior government practice in interpreting the Constitution.\textsuperscript{380} Prior practice may be probative in two circumstances. First, if one of the first several Congresses established the practice, the practice may reflect the drafters’ or ratifiers’ understanding of the Constitution. Many of the drafters and ratifiers were members of the first Congresses, and we may presume that they acted on their understanding of the Constitution. Second, a long-time, unbroken government practice may evidence a long-accepted meaning of the Constitution. Given the nature of politics, one would expect that someone would suggest breaking with the practice if it was to their political advantage. That the practice stayed intact for such a long time, impervious to the winds of political change, might show the breadth and depth of its acceptance.

territory of another, whether or not the encroached-upon branch approves the encroachment. In \textit{Buckley v. Valeo}, 424 U.S. 1, 118–137 (1976), for instance, the Court held that Congress had infringed the President’s appointment power, despite the fact that the President himself had manifested his consent to the statute that caused the infringement by signing it into law. In \textit{INS v. Chadha}, 462 U.S. 919, 944–959 (1983), we held that the legislative veto violated the constitutional requirement that legislation be presented to the President, despite Presidents’ approval of hundreds of statutes containing a legislative veto provision. The constitutional authority of Congress cannot be expanded by the “consent” of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States. Id.

\textsuperscript{380} See supra Part II.D.
The first type of prior government practice does not support commandeering under the Times, Places and Manner Clause. Congress did not act under the Clause, moreover commandeer the States, until 1842, over fifty years after ratification. By that time, the founding generation had faded from the political scene, and a generation raised in post-ratification America largely held the reins of government. Thus, the 1842 passage of the first districting requirement, standing alone, tells us nothing about the views of the Framers or ratifiers on commandeering under the Times, Places and Manner Clause. Indeed, as some members of the 1844 Congress argued, the failure of the first several Congresses to commandeer the States under that Clause shows the Framers’ understanding that Congress did not have such a power.

The second use of prior government practice, to show a long-standing understanding of the Constitution, poses a more difficult question. On the surface, Congress appears to have a long-standing practice of requiring House districts, reflected in eight different apportionment statutes spanning 157 years. Few government practices can claim such a pedigree. Upon closer inspection, however, this practice loses much of its force. Congress omitted the requirement from several apportionment statutes, leaving gaps of several decades in the practice. And, even when the requirement was in effect, the House consistently refused to enforce it, allowing representatives elected under an at-large system to take a seat in that body, in direct violation of the districting requirement. So, further discussion is required to determine precisely what Congress’s practice has been regarding the districting requirement.

This Section reviews three episodes in the districting saga. First, we consider the congressional debates over the first districting requirement in the 1842 Apportionment Act. These debates show Congress actively engaging the issue of commandeering under the Times, Places and Manner Clause. By enacting the districting requirement, Congress voted in favor of such power.

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381 CONG. GLOBE, 27th Cong., 2d Sess. app. at 347 (1842) (statement of Rep. Clifford) (discussing the districting requirement and noting that “the power is claimed, for the first time in the history of the Government, to enforce a system upon the States by Federal command”).
382 See H.R. REP. No. 28-60, at 9-10 (1844).
383 For the districting requirements in the various apportionment statutes, see infra Statutory Appendix.
384 The Statutory Appendix, infra, indicates when the various districting requirements were in effect.
385 See infra notes 497–99 and accompanying text.
Second, in the first federal elections under the 1842 Apportionment Act, four states elected their representatives at large, in direct violation of the Act. When the elections in these states were challenged in the House, the issue of commandeering was again debated. If the districting requirement was constitutional, those representatives elected at large were not entitled to their seats; if the requirement was unconstitutional, they should have been seated. By ultimately seating the challenged representatives, the House voted against the power to commandeer.

Third, the House considered the constitutionality of the districting requirement in three subsequent election challenges. In two of the challenges, a House Report concluded that the districting requirement was unconstitutional commandeering, and in the third challenge a House Report reached the opposite conclusion.

Each of these episodes is reviewed in the following discussion. Then, this Section concludes by drawing some conclusions about what this practice means for Congress’s power to commandeer under the Times, Places and Manner Clause.

1. The Apportionment Act of 1842

As required by the Constitution, the Twenty-Seventh Congress set to reapportioning the House of Representatives based on the results of the 1840 Census. As with each prior reapportionment, Congress debated the appropriate size of the House, which would depend on

386 The Constitution grants each chamber of Congress the power to judge the elections and qualifications of its members. U.S. Const. art. I, § 5 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”).

387 U.S. Const. art. I, § 2, cl. 3 (“Representatives... shall be apportioned among the several States which may be included in this Union, according to their respective Numbers ... The actual Enumeration shall be made ... within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”); id. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

388 This debate often echoed the Framers’ concern that the House be neither too large nor too small. See Cong. Globe, 27th Cong., 2d Sess. 436 (1842); id. at 549 (statement of Senator Bagby of Alabama) (arguing that “the number should be confined to that which was best calculated to transact the business of legislation, while, at the same time, it was sufficiently large to insure a safe representation”). If the House were too large, meetings and debates would be unwieldy and no work could effectively be done. Id. at 436 (stating that Representative Thompson “opposed the increase of the House as tending to make it unwieldy; he thought it ought rather to be reduced”). If the House were too small, a cabal of factious interests could overtake a majority of representatives and make law against the public interest. Id. Madison expressed these same concerns in The Federalist No. 10, supra note 111, at 82
the appropriate ratio of constituents to representatives.\textsuperscript{389} Also, Congress debated how to account for fractional interests within a state.\textsuperscript{390} For example, if Congress designated one representative for every 70,000 people, and a state had 500,000 people, that would work out to 7 1/7 representatives.\textsuperscript{391} And, of course, whatever ratio Congress designated would result in fractional interests in each state. Should any fraction be counted as a whole representative? If so, which fractions? The answers to these questions would affect the balance of power between different regions, slave and free states,\textsuperscript{392} and large and small states\textsuperscript{393} at a time when sectional conflict was becoming more heated.\textsuperscript{394} Indeed, when one representative moved that the apportionment bill be referred to a special committee before consideration by the full House, many objected that committee consideration would be useless because the issues would simply be rehashed by the multiple interests represented in the full House.\textsuperscript{395} As one might expect,

\hspace{1cm} (James Madison) ("[T]he representatives must be raised to a certain number in order to guard against the cabals of a few; and that however large it may be they must be limited to a certain number in order to guard against the confusion of a multitude.").

389  At one point in the debates, representatives voiced support for ratios spanning from 141,000 to 1 all the way down to 30,000 to 1. \textit{Cong. Globe}, 27th Cong., 2d Sess. 436 (1842).

390  For a thorough explanation of this issue as well as the various methods for addressing the issue, see generally Zechariah Chafee, Jr., \textit{Congressional Reapportionment}, 42 \textit{Harv. L. Rev.} 1015 (1929).


392  \textit{Id.} (comparing the effects of different ratios on the fractional interests of "free States" and "slave States").

393  \textit{Id.} Representative Mason argued:

Another fact worthy of consideration was, that the large fractions under this ratio [62,000 to 1] fell chiefly, excepting New York and Ohio, upon the larger States; a result to be desired, as the larger States can much better bear large fractions than the small States; as the weight of the fraction would, in one case, fall on many Representatives, when, in the other, it would fall upon a few.

\textit{Id.}


395  \textit{See the Cong. Globe}, 27th Cong., 2d Sess. 161 (1842), where Representative C. Brown observed that the question would be settled, not by a committee, but by votes. He was opposed to a commitment [to committee], because no possible advantage could be gained by it. It would be impossible for a committee to fix upon a ratio of representation that would please every body; and there-
and the Framers certainly expected, debates about reapportionment were debates about the allocation of political power.\textsuperscript{396}

Amidst the usual reapportionment politics, Congress wrestled with a proposal that the House be elected by single-member districts drawn by the States. Once again, the impetus of the proposal was a push for political power, this time from two directions. First, in the election of 1840, the Whigs had finally won a majority in both houses of Congress, as well as the White House.\textsuperscript{397} The Whigs had coasted to victory on the coattails of their war hero presidential candidate William Henry Harrison—"Tippecanoe and Tyler too"—and were poised to enact their reform program into law.\textsuperscript{398} The Whig Congress was especially energized because Harrison had made clear that he would defer to Congress on most policy matters.\textsuperscript{399} With the country in economic distress, the Whig Congress saw an opportunity to prove its mettle through a wide-ranging program of reform legislation.\textsuperscript{400}

Then, President Harrison died. When John Tyler took over as President, the Whig Congress learned not only that the new President would not defer to Congress,\textsuperscript{401} but that he disagreed with many of its reform proposals.\textsuperscript{402} Over the next two years, Congress and the President battled over several proposals, with little resulting legislation.\textsuperscript{403}

\textit{Id.} By a vote of 105 to 75, the bill was ultimately referred to the full House sitting as the Committee of the Whole on the State of the Union. \textit{Id.}; Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process 129–33 (1997) (describing the Committee of the Whole House).

\textsuperscript{396} See supra notes 241–61 and accompanying text.


\textsuperscript{398} Id. (“With control of the presidency, a 29–22 majority in the new Senate, a 133–102 margin in the new House of Representatives, and possession of a majority of state governments, the Whig party stood poised to reform government and to promote economic recovery.”). Many of their “reforms” were simply reactions to President Andrew Jackson, which is not surprising given the origin of the party as a reaction to Jackson. For example, the Whigs pushed for enactment of a new national bank, which Jackson had successfully prevented through his veto power. \textit{Id.} at 122–24. Also, Whigs supported civil service reform, which was a reaction to Jackson’s perceived abuse of the spoils system. \textit{Id.} at 28–30.

\textsuperscript{399} Id. at 122.

\textsuperscript{400} See id. at 122 (“The nation’s desperate economic condition and the financial disarray of state and national governments required new policies. Their promised alternatives, they believed, would provide the necessary remedy.”).

\textsuperscript{401} See id. at 128.

\textsuperscript{402} See id. at 128–29.

\textsuperscript{403} See id. at 128–50.
The Whigs were concerned that they had squandered their first big chance to rule the nation and that the People would hold them accountable at the polls.\footnote{See id. at 149–50.}

As the 1842 elections approached, the Whigs identified what they thought was another threat to their rule in Congress. Alabama had chosen to elect its House members by at-large elections instead of districts.\footnote{Zagarri, \textit{supra} note 4, at 130 ("In 1840, Democrats in the Alabama state legislature had switched the state from district to at-large elections in an effort to get more members of their party elected to Congress.").} The Whigs worried that at-large elections would erode their membership in the House.\footnote{See id. app. at 361 (statement of Rep. Payne of Alabama) (stating that in Alabama "the Democratic party has a majority of quite ten thousand voters").} Under the then-pending version of the Apportionment Act of 1842, Alabama was entitled to nine representatives.\footnote{Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491 (1842) (current version at 2 U.S.C. § 2c (1994)).} If these representatives were elected by single-member districts, the Whigs believed that they would win some, though perhaps not most, of the seats.\footnote{Id. app. at 361 (statement of Rep. Payne of Alabama) (stating that under the at-large system, the Democratic majority in Alabama "will be entitled" to all nine representatives from Alabama).} If, however, Alabama’s representatives were elected at large, with every voter voting for each representative, the Whigs feared that the majority of Alabama voters were Democrats,\footnote{Id. (statement of Rep. Payne of Alabama) (claiming that under the at-large system, the Democratic majority in Alabama "will be entitled" to all nine representatives from Alabama).} and thus Alabama would return an all-Democrat House delegation.\footnote{See id. app. at 362 (statement of Rep. Payne of Alabama) (claiming that the Whigs’ "conduct in this matter looks as if they were conscious of receding power; and this proposition to district the States must be regarded as the last effort to preserve the existence of a mongrel political party, incapable of producing, but adequate to} Given their political troubles with the President, the Whig Congress sought every electoral advantage it could get.\footnote{See id. app. at 362 (statement of Rep. Payne of Alabama) (claiming that the Whigs' "conduct in this matter looks as if they were conscious of receding power; and this proposition to district the States must be regarded as the last effort to preserve the existence of a mongrel political party, incapable of producing, but adequate to}
House elections by single-member districts offered one such advantage.\textsuperscript{412}

A second effect of the at-large versus district debate was renewal of old rivalries between large and small States. Both large and small States saw at-large elections as a potential threat to their relative power in the House. Large States, which had historically elected their representatives by single-member districts,\textsuperscript{413} felt at a disadvantage to small States, which had historically elected their representatives at large. Due to at-large elections, the small-state House delegations would reflect the will of single, unified state voices.\textsuperscript{414} Conversely, single-member districts would mean that the large-state House delegations would speak for varied, fractured interests. Thus, large States believed that at-large elections gave small States a relatively greater voice in the House, and a districting requirement would prevent this corruption of the House.

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\textsuperscript{412}ZAGARI, \textit{supra} note 4, at 130–31; see also CONG. GLOBE, 27th Cong., 2d Sess. app. at 350 (1842) (statement of Rep. Clifford of Maine) (arguing that the districting requirement “is designed to arrest the progress of revolution, and to stay the torrent of public opinion, which is about to move [Representative Daniel Barnard, a New York Whig,] and his friends from their places, and to give them to others more worthy of the trust”).

\textsuperscript{413}Professor Zagari explains how, soon after ratification of the Constitution, the large States gravitated toward districting while the small States stayed with at-large elections. ZAGARI, \textit{supra} note 4, at 105–33. Small States stayed with at-large elections because they saw themselves as relatively homogenous communities with relatively uniform interests throughout. \textit{Id.} at 108–11. Thus, there was no pressure from different regions to have their “voices” heard in Congress through election of their own representatives. \textit{Id.} Conversely, the large States quickly saw development of various interests tied to different regions within their own States. \textit{Id.} at 111–12. These different interests agitated for the right to select House members who would represent their interests. \textit{Id.}

\textsuperscript{414}Representative Summers of Virginia explained how at-large elections worked in practice:

Each party in the States presents its ticket, made up of candidates holding the opinions of such parties respectively. One or the other of these tickets is elected, and the successful party in the States has secured an entire delegation, holding the same opinion with itself. In this House, such a delegation gives its vote—on all party questions, at least, (and most questions are now made to partake of that character,)—with the same force as if given by one man having a right to cast the entire vote of his State. What is the result? Why, that a small State with the general-ticket system has a more potent voice in the legislation of Congress than the largest States in the Union.

\textit{CONG. GLOBE, 27th Cong., 2d Sess. app. at 353 (1842).}
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Small States basically agreed that at-large elections gave them some relative advantage over large States that elected by districts. The small States, however, feared that their relative advantage would eventually push the large States to use at-large elections. If that happened, small States would once again be at a great disadvantage. So, the question for the small States was which choice was worse: all States electing at large, or all States electing by district. In the end, many small States sided with districting to prevent undue influence from the large States.

These were the political forces that propelled the districting requirement onto the congressional agenda in 1842. And, these political considerations surfaced in the congressional debate. As with most such debates, arguments about what was politically desirable or expedient were met with arguments about what was constitutionally permissible. For example, members argued: Congress could not act under the Times, Places and Manner Clause unless the States had failed to do so; districting did not relate to the “manner of holding the election”; the Constitution required elections at large; and

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415 Id. app. at 353–54 (statement of Rep. Summers of Virginia) (“While some States adopt the plan of elections at large, and increase thereby their political weight so largely, is it to be expected that other and more populous States will long tolerate the mischief of such inequality? They will end it by adopting themselves the same system.”). But see id. app. at 343 (statement of Rep. Houston of Alabama) (arguing that large States would find the at-large system too “unwieldy,” and that multiple factions in large States would prevent adoption of an at-large system).

416 Id. app. at 340 (statement of Rep. Davis of Kentucky) (arguing that election by districts protects “the safety of the small States” against the power of the large States); id. app. at 343 (statement of Rep. Houston of Alabama) (discussing the argument that at-large elections in large States pose a threat to small States).

417 A districting requirement had been proposed and debated in prior Congresses, sometimes as a statutory proposal and sometimes as a proposed constitutional amendment. See Zagari, supra note 4, at 125–31.

418 See supra notes 408–16.


421 Id.

422 This argument rested on U.S. Const. art. I, § 2, cl. 1, which states in pertinent part, “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.” Some members argued that this Clause requires that all “the People” of each state vote for—that is, “choose”—each of the State’s representatives. See, e.g., Cong. Globe, 27th Cong., 2d Sess. app. at 361 (1842) (statement of Rep. Payne of Alabama); id. app. at 352 (statement of Rep. Summers of Virginia). This argument had also been made by proponents of the at-large
Congress had to either regulate *all* aspects of federal elections—time, place, *and* manner all at once—or none at all.\textsuperscript{423} For present purposes, the pertinent constitutional objection was that Congress could not commandeer the States under the Times, Places, and Manner Clause.\textsuperscript{424} This objection was made repeatedly, by many different representatives. Consider the following examples.

Representative Clifford of Maine:

The odious character of the amendment consists in the startling power which it assumes, to give direction to the members of the States Legislatures as to the manner in which they shall discharge their high functions as representatives of the people.\textsuperscript{425}

Representative Houston of Alabama:

[W]e are doing [districting] in the most obnoxious manner to the States, by an order to them to do that which some of them at least look upon as injurious and wrong.\textsuperscript{426}

Representative Kennedy of Indiana:

The pending amendment proposes to issue an order to the Legislatures of the different States of this Union, directing them *how*, and commanding them, *to do* a particular thing, to wit: to form their respective States into different Congressional districts . . . and to see that each district sends one member to this body.\textsuperscript{427}

Representative Payne of Alabama:

What does the amendment propose? Sir, nothing less than an interference, by this Government, with the internal policy of the States, by commanding the respective Legislatures thereof to subdivide the said States into Congressional districts, from which the members of this body are to be chosen.\textsuperscript{428}

\textsuperscript{423} system during the fifty years preceding passage of the districting requirement. See ZAGARRI, *supra* note 4, at 109–11.

\textsuperscript{424} See CONG. GLOBE, 27th Cong., 2d Sess. app. at 339 (1842) (statement of Rep. Davis of Kentucky) (responding to the argument that Congress can regulate the time, place or manner of federal elections only “in the event of failure on the part of the States”).

\textsuperscript{425} CONG. GLOBE, 27th Cong., 2d Sess. app. at 347 (1842).

\textsuperscript{426} Id. app. at 342.

\textsuperscript{427} Id. app. at 316.

\textsuperscript{428} Id. app. at 360.
And, the Congressional Globe contains many similar statements. So, many members of the Twenty-Seventh Congress thought commandeering unconstitutional, just as the Court did in New York v. United States. And, even though 150 years separated that Congress from the Court in New York v. United States, both bodies made many of the same arguments, almost to the word, against commandeering. The following discussion traces the arguments made during the House and Senate debates over the Apportionment Act of 1842, pointing out pertinent similarities to the Court’s reasoning in New York v. United States as well as to arguments made in this Article.

As we did in the beginning of Part III, let us start with text. Some representatives made an argument from the text of the Times, Places and Manner Clause similar to a textual argument advanced above. Recall that the Clause grants Congress the power to “make” or “alter” federal election regulations. This Article has argued that these words suggest that Congress ought to do the making or altering; commandeering would be better expressed by a power to “direct or command the States to make or alter such regulations,” or some such language. Representative Houston of Alabama made the point in his speech opposing the districting requirement:

[U]nder the power to “alter,” it is not competent or proper legislation for Congress to say a thing shall be altered. To alter, means, when properly applied, to change something already in existence; not to order that a thing shall be torn to pieces and changed; but to take down and build up anew, to refix, to remodel, and in all cases of change or alteration, to leave the thing perfect and complete.

Representative Kennedy of Indiana made the same argument:

[I]f the State Legislatures have districted their States in a manner that does not suit you, and you wish to “alter” them, you must make the alteration . . . by an act of Congress, say that this county, which is now in my district, shall in future be placed in the district of my

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429 See, e.g., id. app. at 372 (statement of Rep. Pope of Kentucky) (arguing that Congressional districting of states will “be a subject of perpetual controversy” as power in Washington changes hands).

430 For example, Representative Clifford of Maine advocated an anti-commandeering rule in remarkably similar terms to the Court’s rule. “The powers of Congress, in their legitimate effect, when carried out into the form of legislative enactments, were never intended to operate upon States, like the prohibitions of the Constitution, but upon individuals.” Id. app. at 348 (1842). Compare this statement to the Court’s conclusion in New York v. United States, 505 U.S. 144, 166 (1992) (“In providing for a stronger central government, . . . the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”).

431 See supra notes 216–26 and accompanying text.

432 CONG. GLOBE, 27th Cong., 2d Sess. app. at 343 (1842).
These opponents of the districting requirement recognized that a simple grant of power to make or alter regulations was not an apt way to express commandeering.

Next, several members argued against the proposed districting requirement based on the intent behind the Times, Places and Manner Clause. Recall that the Framers and ratifiers viewed Congress's power under that Clause as necessary to preserve the national government. If States refused to hold elections, could not hold elections, or did so negligently, Congress could step in to ensure elections were held so that each state would be represented. Based on this history, several members noted that Congress's power would be most needed when the States were unwilling or unable to exercise that power themselves. In those cases, commandeering the States would be self-defeating. First, consider the statement of Representative Clifford of Maine, who addressed the case of a State unable to hold federal elections:

If, in the progress of events, the time shall ever come when any one of these States shall be unable . . . to obey the mandate of the Constitution [to hold federal elections], in consequence of invasion or rebellion, how utterly futile would be any command from this Government. It would neither drive out a foreign foe, nor restore domestic tranquillity. It would amount to nothing but a solemn mockery to the State.

Second, consider the remarks of Representative Houston of Alabama regarding a State unwilling to elect by districts:

Suppose this [districting requirement] be adopted and sent forth to the States as a law of Congress. The States disobey . . . . If the members elected by general ticket should appear, you would reject them; and, if no quorum appeared besides them, the wheels of Government must stop. Then, sir, you will have defeated the very purposes of the power; you will present to this country the strange spectacle of a self-preserving [power] being applied in such a manner as to make it a self-destroying power.

433 Id., app. at 318.
434 See supra notes 259–61 and accompanying text.
435 Cong. Globe, 27th Cong., 2d Sess. app. at 347 (1842); see also id. app. at 342 (statement of Rep. Houston) ("What! order a State laboring under an immovable disability, which prevents her action, to adopt the necessary regulations for the election of members? Such a course would seem to me to be worse than foolish.").
436 Id. app. at 343.
In either case, commandeering defeats the purpose of Congress’s power: to ensure the continued functioning of Congress itself.

A third argument spoke to the consequences of allowing Congress to commandeer the States. By commanding a State to do something, Congress sets up a potential conflict between the two levels of government. If a State balks at Congress’s command, the two levels of government are at a standoff, unless Congress can muster the oppressive means necessary to compel compliance. Either way, Congress’s authority is diminished. If the State does not comply and Congress does nothing, Congress appears weak; if Congress uses force against the State, Congress appears oppressive. Either appearance erodes Congress’s support, and thus its authority, among the People.

The Court’s decision implementing Brown v. Board of Education rested on similar prudential concerns. Brown held that the Equal Protection Clause of the Fourteenth Amendment prohibited racially segregated public schools. The following Term, the Court heard arguments on how best to implement this holding. In a decision referred to as Brown II, the Court held that States need not integrate their public schools immediately, but only with “all deliberate speed,” taking account of local circumstances. Some have argued that the Justices took a go-slow approach in Brown II out of fear of state resistance.

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437 Some commentators refer to this as a “prudential” argument. See Bobbitt, supra note 138, at 59–73; Patterson, supra note 158, at 128–50; Fallon, supra note 104, at 544–45. Professor Alexander Bickel creates a set of prudential doctrines he labeled “the passive virtues.” See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111–98 (1962). The passive virtues described doctrinal devices, such as the political question doctrine or standing, that allowed the Court to avoid decisions that might threaten the Court’s legitimacy and thus its authority. See Bobbitt, supra note 138, at 72 (describing Bickel’s passive virtues as allowing “the Court to avoid going in the direction that unalloyed principle might take it when this course was dangerous to the institution and that it allowed accommodation with other branches that customarily act prudentially”).

438 Cong. Globe, 27th Cong., 2d Sess. app. at 318 (1842) (statement of Rep. Kennedy of Indiana) (arguing that a failed attempt at commandeering will “weaken your authority, and render yourselves contemptible in the eyes of the world”). In more grandiose terms, Representative Kennedy continued, ‘let Congress assume to command the States as to what they shall do in their own limits; let us here assume this insolent superiority over our domestic Legislatures,—and, as sure as that the great luminary of day is now rolling down the western declivity to set in the briny sheet of the Pacific ocean, so sure will strife, anarchy, and desolation follow.’

Id.


440 Id. at 495.

If some States disobeyed the Court’s order, what could the Court do? If Congress or the President did not back up the Court, the Court would appear weak. If Congress and the President coerced the States and the States violently resisted, the national government would appear tyrannical. Either way, the consequences of forcing a conflict with the States appeared unacceptable at that time.

In the face of these arguments, proponents of the districting requirement tried to diffuse the commandeering issue by denying that the bill would commandeer the States. The bill’s supporters repeatedly argued that it was not the districting requirement that commanded the States to act, but rather the Constitution that did so. The Constitution required that States regulate federal elections in the first instance. Thus, States are always under a constitutional duty to make whatever laws necessary to hold federal elections. After passage of the districting requirement, States remain under that duty, and drawing districts is one of the laws States must enact to hold federal elections. So, Congress merely states that the elections shall be done by districts, while the Constitution directs the States to do so.

The proponents were working with a slippery distinction that misses what commandeering is all about. Commandeering was rejected for all of the reasons discussed above under history and struc-

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443 The proponents of the districting requirement also responded to all the other constitutional and non-constitutional grounds for opposing the districting requirement mentioned above. See supra notes 405–23 and accompanying text.
444 Cong. Globe, 27th Cong., 2d Sess. app. at 408 (1842) (statement of Rep. Pendleton of Ohio) (stating that the apportionment act does not direct “that the State Legislatures shall divide their States into districts; the obligation upon them to do that comes from a higher source—the Constitution of the United States”). This argument is different from the Seventh Circuit’s argument discussed above. See supra notes 341–56 and accompanying text. The Seventh Circuit acknowledged that the National Voter Registration Act commandeers the States, but concluded that the Times, Places and Manner Clause grants Congress power to do so. See Ass’n of Cmty. Orgs. for Reform Now v. Edgar, 56 F.3d 791, 796 (7th Cir. 1995). The proponents of the districting requirement, on the other hand, argued that their bill does not commandeer the States. Id. app. at 319 (statement of Rep. Butler of South Carolina) (stating that the apportionment act did not “order the States what they shall or shall not do,” but that the Constitution imposed an obligation on the States to regulate federal elections). Rather, their bill merely set the ground rules for federal elections, as Congress is authorized to do, and the Constitution commanded the States to act. Id. app. at 492 (statement of Sen. Huntington of Connecticut) (stating that “Congress may (as they propose to do) make one regulation, and then the Constitution imposes the duty on the States to make all other proper and requisite regulations to enable the people to be represented in the National Legislature”).
445 Of course we cannot fault the proponents for not addressing commandeering as the Court has defined the problem over 150 years later. My criticism is rather
The proponents' verbal sleight of hand—that the Constitution commandeers the States and not Congress—ultimately fails because the districting requirement raises all the same problems as commandeering. To see this point, consider three of the problems associated with commandeering: it forces States to legislate when they would not otherwise do so, it forces States to take responsibility for a policy choice that they did not make themselves, and it is practically unenforceable. The districting requirement raises all three problems. States that had at-large election systems were forced to legislate when they would not have otherwise done so, and those States were forced to enact a policy—districts over at-large elections—they had not chosen. And, as discussed at length above, the command to elect the House by districts is practically unenforceable if the States refuse. If it walks like commandeering and quacks like commandeering, it is probably commandeering.

After all of the proponents' and opponents' arguments were made, and the debates were over, both houses of Congress ultimately passed the Apportionment Act of 1842, section 2 of which required election of the House by single-member districts. The House vote was 101 to 99, and the Senate vote was 25 to 19. Once passed, the bill was off to President Tyler for his signature or veto. While Tyler signed the bill into law, he did so reluctantly and with reservations about the constitutionality of the districting requirement. In a message accompanying his signing of the bill, Tyler wrote:

One of the prominent features of the bill is that which purports to be mandatory on the States to form districts for the choice of Representatives to Congress in single districts. That Congress itself has power, by law, to alter State regulations respecting the manner of holding elections for Representatives, is clear; but its power to command the states to make new regulations, or alter their existing regulations, is the question upon which I felt deep and strong doubts.

intended to take the argument on its merits in the event that it is urged today in support of the districting requirement.

446 See supra Part II.B–C.
447 See supra notes 262–76 and accompanying text.
448 See infra Statutory Appendix for the text of the districting requirement.
449 Cong. Globe, 27th Cong., 2d Sess. 471 (1842). This was the vote count on the districting provision itself, which was only one section of the apportionment bill. Id. The House later passed the entire bill, but no vote count was listed in the legislative record. Id. The House later voted to concur in two Senate amendments to the bill. Id. at 649–50.
450 Id. at 614.
451 U.S. Const. art. I, § 7, cl. 2 (setting forth requirements of bicameralism and presentment).
I have yielded these doubts, however, to the opinion of the Legislature, giving effect to their enactment as far as depends on my approbation, and leaving questions which may arise hereafter, (if unhappily such should arise,) to be settled by full consideration of the several provisions of the Constitution and the laws, and the authority of each House to judge of the elections, returns, and qualifications of its own members.\textsuperscript{452}

Despite reservations about the bill’s constitutionality,\textsuperscript{453} Tyler felt pressed to sign the bill. Undoubtedly, the fast-approaching elections of 1842 had some influence on his decision. After all, the first section of the bill apportioned the House among the several states, which was a necessary prerequisite for the coming elections. Vetoing the Apportionment Act could have wreaked havoc on the 1842 elections.

With apportionment and the districting requirement in a single bill, Tyler appeared to face an unpleasant choice: disrupt the midterm congressional elections or accept the constitutionally disagreeable districting requirement. Tyler’s message, however, attempted a middle ground: unconditionally accept the apportionment part of the bill, and postpone ultimate consideration of the districting requirement until after the 1842 election. Perhaps Tyler foresaw the political possibilities. First, the Whigs, who had pushed hard for the districting requirement, would lose seats in the House, where the requirement had passed by a narrow 101-99 margin. Second, some States would keep the at-large system for electing House members, either because time was too short to district their States before the 1842 election or out of principled objection to the constitutionality of the districting requirement. Third, when the representatives from the at-large states arrived at the new Congress, the House would have the power to decide whether to seat these new members, even though they were elected in violation of the districting requirement. In making that decision, the House could again consider the constitutionality of the districting requirement. This is what Tyler meant when he wrote that the constitutionality of the districting requirement would “be settled by full consideration of the several provisions of the Constitution and the laws, and the authority of each House to [be] judge of the elections, returns, and qualifications of its own members.”\textsuperscript{454}


\textsuperscript{453} John Quincy Adams authored a committee report that responded to the constitutional arguments in Tyler’s signing message. \textit{See} H.R. Rep. No. 27-909 (1842).

So, the Apportionment Act of 1842 could be seen as only the first round in the fight over the constitutionality of the districting requirement. After sharp debates over the constitutionality of the requirement and a close vote in both chambers of Congress, President Tyler reluctantly signed the law under a practical exigency and entreated the country to take up the question anew after the next election. As the next Subsection shows, President Tyler got his wish.

2. Election Contest of 1844

In 1842 and 1843, state voters once again went to the polls to elect the House of Representatives. This time, federal law required that States hold House elections by using single-member districts. Recall that one political reason for this requirement was the Whig belief that the district system favored their party, while the at-large system favored the Democrats. The thought was that States with a narrow Democrat majority would elect all Democrat representatives under an at-large system, whereas those same States would have at least some Whig districts under a single-member district system. Yet, in what may rank as one of American history’s great ironies, the district system contributed to the Whigs suffering what one historian has called “one of the most staggering reversals in off-year congressional elections ever witnessed in American history.” The Whigs went from a 133-102 majority in the House to a 79-142 minority position in that body.

But, how did things go so horribly wrong for the Whigs? The seeds of their problem were sown in state elections held in 1842. Recall that state governments must do the districting; after all, they are the ones being commandeered. The Whigs, however, lost miserably in most of the state elections held prior to the districting. Thus, it was Democrat controlled state legislatures and Democrat governors that drew the district lines in most states. Not surprisingly, the Democrats gerrymandered House districts whenever they could, just as

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455 Given that the Apportionment Act was passed so late in the congressional term (June 25, 1842), some States could not convene their legislatures to reapportion the States in time to hold their elections in 1842. See Holt, supra note 397, at 157. Also, some districting battles were so divisive and protracted that they dragged on into 1843. Id. (“The political battle waged over reapportionment was so fierce that several states like Ohio, Pennsylvania, New Jersey, Maine, and Vermont, which would have held elections in 1842, were forced to postpone them until 1843.”).
456 See supra notes 405–12 and accompanying text.
457 Holt, supra note 397, at 151.
458 Id.
459 Id.
many feared the Whigs would do under a district system.\textsuperscript{460} In many of these states, the Whigs maintained about the same percentage of the total vote, but saw a decreased share of representatives.\textsuperscript{461} And, in one particularly stark example, Whigs actually \emph{increased} their percentage of the total vote in North Carolina, “[b]ut because Democrats had designed the districts, the Whig share of seats fell from seven of thirteen to four of nine.”\textsuperscript{462}

So, it was a Democrat controlled House that reconsidered the constitutionality of the districting requirement. The issue arose quickly. Despite the districting requirement, four States—Georgia, Mississippi, Missouri, and New Hampshire\textsuperscript{463}—had chosen their representatives in at-large elections.\textsuperscript{464} When the Clerk of the House called the roll at the opening of the Twenty-Eighth Congress, one member objected to seating the representatives elected at large.\textsuperscript{465} The issue whether to seat these members ultimately turned on the

\begin{footnotes}
\item[460] Id. at 157 (“Where Democrats controlled [state] legislatures, the Whigs were the losers from the reapportionment process.”).
\item[461] Id. (“[R]elatively small declines in the Whig share of the total popular vote in Illinois, Ohio, Virginia, and New York produced disproportionately large declines in their share of seats.”).
\item[462] Id.
\item[463] See \textit{Cong. Globe}, 28th Cong., 1st Sess. 2 (1843). Of course, a State with only one representative would necessarily hold an at-large election for the House, and such an election did not violate the 1842 Apportionment Act. Representative John Jameson of Missouri explained that the districting requirement was unfair because it was “passed just upon the eve of a congressional election in two or three of the States, against the solemn warning that there could not be time for complying with its provisions before the election.” Id. at 45.
\item[464] Although Ohio and New York had elected their representatives by districts, their legislatures nonetheless passed resolutions condemning the districting requirement. Paschal, \textsuperscript{supra} note 26, at 282 n.34; see Con. Res., 65th Leg., 1842 N.Y. Laws 420; H.R., 41st Gen. Assem., 1843 Ohio Laws 239.
\item[465] \textit{Cong. Globe}, 28th Cong., 1st Sess. 2 (1843). The report states,

Mr. Campbell of South Carolina observed that, before the Clerk proceeded to the call of the members from New Hampshire, he would, with their permission, take the liberty of directing their attention to the second section of the apportionment act [requiring election by single-member districts], and would respectfully inquire of them whether they had been elected in conformity with the provisions of that act.

\textit{Id.} A representative from New York also objected to election of a Speaker of the House unless those representatives elected at large were removed from the House. \textit{See id.} at 9–10 (remarks of Rep. Barnard). This objection supposedly had the support of about fifty other House members. \textit{See id.} at 10 (listing members supporting Representative Barnard’s objection).
\end{footnotes}
constitutionality of the districting requirement. Instead of debating the issue at the outset of the new Congress, the House referred the matter to the Committee of Elections, which later issued a report with its conclusions. The remainder of this Subsection considers the Committee’s majority and minority reports as well as House action on whether to seat the members elected at large.

The Majority Report of the Committee of Elections concluded that the districting requirement was “not a law made in pursuance of the constitution of the United States, and valid, operative, and binding upon the States.” Of all the constitutional objections to the districting requirement mentioned above, the Committee rested its conclusion solely on the fact that Congress had commandeered the States to act. In a brief report that reads like a judicial opinion, the Committee raised several arguments against Congress’s power to commandeer the States, which we will consider in turn.

The Majority Report begins with the history and text of the Times, Places and Manner Clause. It reviewed the history, discussed above, showing that Congress’s power under the Clause was intended to protect against abuse, neglect, or disability of the States in regulating federal elections. Yet, the text does not limit Congress’s power

466 See id. at 11 (statement of Rep. Kennedy of Indiana) (arguing that “[t]he Congress of the United States had no power to pass any such law” requiring States to draw districts). The Committee of Elections framed the issue as follows: “the State laws and all the proceedings under them are void, or the second section of the apportionment act [requiring election by districts] is invalid and inoperative.” H.R. REP. No. 28-60, at 2 (1844). The report of a minority of the committee framed the issue similarly: “The elections of New Hampshire, Georgia, Mississippi, and Missouri, must consequently be void, unless the law of Congress is unconstitutional, or from some other cause is inoperative.” COMM. OF ELECTIONS, REPORT OF THE MINORITY, H.R. REP. No. 28-60 (1844), reprinted in COMM. OF ELECTIONS, CONTESTED ELECTIONS IN CONGRESS FROM 1834 TO 1865, INCLUSIVE, H.R. Misc. Doc. No. 38-57, at 55, 56 (1865) [hereinafter MINORITY REPORT].

467 CONG. GLOBE, 28th Cong., 1st Sess. 11 (1843) (regarding the debate over whether the House should refer to committee the question of whether representatives elected at large should be seated).

468 Id. at 46 (setting forth the resolution referring the matter to the Committee of Elections).

469 Id. at 173 (stating that the Committee of Elections referred its report to the Committee of the Whole House).


471 See supra notes 419–23 and accompanying text.

472 H.R. Rep. No. 28-60, at 3–5 (1844) (stating that Congress should regulate only “in the event that the States should refuse to act in the premises, or should legislate in such a manner as would subvert the rights of the people to a free and fair representation”).
to those circumstances.\textsuperscript{473} Thus, while history may bear on whether Congress should exercise its power under the Clause, text shows that Congress's power is broad enough to reach districting regardless of what the States have done.\textsuperscript{474} Then, in an analytical move that foreshadowed the Court's analysis in \textit{New York v. United States}, the Report reframed the issue: "[S]till the question arises, whether the [districting requirement] is an exercise of this power in a \textit{manner} contemplated by the constitution, and binding by the States."\textsuperscript{475} Like the Court in \textit{New York v. United States}, the Majority Report concedes that Congress has power over the \textit{subject matter} being regulated—radioactive waste in \textit{New York v. United States}, districting in the Majority Report. The question remains, however, whether Congress has the power to regulate that subject \textit{in the manner} that Congress has done so—in both cases, by commandeering the States. The Majority Report then turned to this question.

The Majority Report first discussed the relationship among Congress, the States, and the Constitution. The Constitution grants both the States and Congress power over federal elections, and each government acts autonomously within its respective sphere of power.\textsuperscript{476} The Constitution, however, does not grant either level of government the power to control or supervise the other. The following passage from the Majority Report elaborates this point.

The right to change State laws, or to enact others which shall suspend them, does not imply the right to compel the State Legislatures to make such changes or new enactments. Whatever power the Legislatures possess over elections, they derive from the constitution, and not from the laws of the United States. Congress has no more authority to direct the form of State legislation, than the States have to dictate to Congress its rule of action. Each is supreme within the sphere of its own peculiar duties; clothed with the power of legislation, and a discretion as to the manner in which it shall be exercised, with which the other cannot interfere by ordering it to be exercised in a different manner.\textsuperscript{477}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 5.
\item Id.
\item Id.
\item This argument is similar to one of the structural arguments made above on federalism. \textit{See supra} notes 363–68 and accompanying text.
\item H.R. Rep. No. 28-60, at 6 (1844).
\end{enumerate}
\end{footnotesize}
The Constitution stands above both Congress and the States, and, with respect to the exercise of their respective powers, those two governments stand independent, side-by-side. 478

Next, the Report reviewed constitutional history, specifically the problems with government under the Articles of Confederation. This portion of the Report parallels the Court’s opinion in New York v. United States. Both review the same historical concern (flaws in the Articles of Confederation), rely on the same historical source (Federalist No. 15), and draw the same conclusion (Congress cannot commandeer the States). These striking resemblances show the Majority Report applying the same anti-commandeering argument discussed in New York v. United States to the Times, Places and Manner Clause. Further, these similarities undercut any attempt to distinguish the Times, Places and Manner Clause from the Commerce Clause regarding commandeering. Now, consider the parallel more closely.

Recall that under the Articles of Confederation, Congress was weak because it acted through the States, which routinely ignored Congress’s requests. 479 The Report recounts this problem:

The great radical evil in the articles of confederation, which led to the adoption of the present constitution, was the constant collisions between the Federal and State Governments, produced by the laws of the former operating upon the latter in their corporate and sovereign capacities, instead of binding the people individually. The consequence was, that, whenever Congress passed laws requiring the States to furnish their quotas of men, munitions of war, or revenue, or to perform any other act necessary to the defence of the country, or the existence of the Government, those laws could not be executed—were inoperative—a mere dead letter upon the statute-book, until the several Legislatures assembled, and gave them life by enacting State laws to carry them into effect. If the laws of the confederation were supposed to be unjust to a particular portion of the country, or to operate unequally and oppressively upon particular States, such States refused to make provision for their execution, and thus suspended their operation. 480

This passage contains strikingly similar wording to a passage from Federalist No. 15, which begins, “The great and radical vice in the con-

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478 I emphasize the word “exercise” because the Constitution explicitly makes the product of the federal law making processes supreme over the product of state law making processes. U.S. Const. art. VI, cl. 2. This point was discussed earlier in connection with the Seventh Circuit’s decision upholding the Motor Voter Law. See supra notes 341–56 and accompanying text.

479 See supra notes 108–14 and accompanying text.

struction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist.\textsuperscript{481} Recall that \textit{Federalist No. 15} is Hamilton's critique of Congress acting through the States, of which he takes a dismal view.\textsuperscript{482} Herein lies the link to \textit{New York v. United States}. The same passage from \textit{Federalist No. 15} figures prominently in the Court's opinion in \textit{New York v. United States}, which quotes those words in full.\textsuperscript{483} Thus, both the Report and \textit{New York v. United States} identify the same historical problem confronting the Framers: how to construct an effective national government given the abject failure of commandeering under the Articles of Confederation.

Both the Report and \textit{New York v. United States} identify the same solution to the Framers' problem. The Report describes the solution as follows:

To remedy these perilous evils, and to give force, vigor, and vitality to the Government, the whole system was changed in the formation of the constitution, by distinctly separating the powers of the Federal and State Governments—making each supreme in its appropriate sphere, and giving the former, as well as the latter, the power of executing its own laws, by making them operate upon the people directly and individually, without the intervention of the State Legislatures.\textsuperscript{484}

\textit{New York v. United States} made the same point.\textsuperscript{485} The Report, then, applies the same anti-commandeering reasoning found in \textit{New York v. United States} to the Times, Places and Manner Clause.\textsuperscript{486} In the Committee's view, there was no good reason to distinguish Congress's power under that Clause from Congress's other Article I powers.\textsuperscript{487} Indeed, its Report expressly analogizes Congress's Times, Places and Manner Clause power to Congress's power under Article I, Section 8, Clause 4 to regulate bankruptcy.\textsuperscript{488} The Report explains first that

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  \item \textsuperscript{481} The \textit{Federalist} No. 15, \textit{supra} note 111, at 108 (Alexander Hamilton). The connection to \textit{Federalist No. 15} becomes explicit when the Report quotes that particular paper at length regarding the States' refusal to cooperate with Congress. \textit{See} H.R. Rep. No. 28-60, at 7 (1844).
  \item \textsuperscript{482} \textit{See} supra notes 110–14 and accompanying text.
  \item \textsuperscript{483} \textit{New York v. United States}, 505 U.S. 144, 163 (1992).
  \item \textsuperscript{484} H.R. Rep. No. 28-60, at 7 (1844).
  \item \textsuperscript{485} \textit{See} \textit{New York v. United States}, 505 U.S. at 166.
  \item \textsuperscript{486} \textit{See} H.R. Rep. No. 28-60, at 8 (1844).
  \item \textsuperscript{487} \textit{See} id.
  \item \textsuperscript{488} U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have the Power... To establish... uniform Laws on the subject of Bankruptcies throughout the United States..."); H.R. Rep. No. 28-60, at 8 (1844).
\end{itemize}
Congress cannot commandeer the States under the Bankruptcy Clause, and then asks rhetorically: "If this cannot be done in a case of bankruptcy, upon what principle is it that Congress may direct the legislative discretion of the States in regard to elections?" Again, the Committee argues that an anti-commandeering rule applies to all of Congress's powers.

The Report's final argument against commandeering relied on the absence of prior government practice. As members of Congress had done in the 1842 debates over the districting requirement, the Report pointed out that Congress had never previously commandeered the States:

This view of the subject is strengthened and confirmed by the uniform practice of the Government from the time of the adoption of the constitution to the passage of the act under consideration, a little more than a year ago.

If the doctrine contended for in the [districting requirement] be correct, it is a remarkable fact, that, during the whole period of our constitutional history, Congress has never exercised, or claimed the right to exercise, the power of directing the form of State legislation. It is said that, in the exercise of doubtful powers under the constitution, the safest rule of construction is to be found in the practical exposition of the Government itself, in all its various branches and departments, where the practice has been uniform, and the acquiescence of the people general.

Congress's "uniform practice" was a "practical exposition" of the Constitution that Congress could not commandeer the States, and this "practical exposition" should be honored on close questions. As discussed above, the Supreme Court used this interpretative guide in New York v. United States when it claimed that Congress had not previously commandeered the States. With the single exception of the districting requirement itself, the Report bolsters not only the Court's historical claim, but also the use of past government practice as an interpretive tool.

Based on these arguments, a majority of the Committee voted that the districting requirement was unconstitutional and thus the House should seat the members elected at large. A minority of the Committee, however, submitted a report supporting the districting requirement. Most of the Minority Report addressed other objec-

490 Id. at 9–10 (emphasis added).
491 See supra text accompanying note 149.
493 Minority Report, supra note 466, at 69.
tions to the districting requirement, such as Congress's power to address districting at all. Commandeering was addressed only in the following brief passage: "The Constitution of the United States, (which every member of the State legislatures swears to support before he enters upon his duties,) and not the law of Congress, is the mandamus which, in silent but impressive language, perpetually holds all to the performance of this duty." This is the same argument made by proponents of the districting requirement in debates over the Apportionment Act of 1842; the nature and weaknesses of this argument are discussed above.

Based on their view that the districting requirement was constitutional, a minority of the Committee recommended that the members elected at large not be seated.

After the Committee submitted its reports, the House took up debate over whether to seat the members elected at large. The debate focused on the constitutionality of the districting requirement, and the members basically rehashed the arguments made during the original debate over the Apportionment Act of 1842. Opponents of the districting requirement labeled that law as a command to the States

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494 See id. at 58. These other constitutional issues were described above. See supra notes 417–23 and accompanying text. For example, the Minority Report addressed whether the districting requirement was unconstitutionally vague, MINORITY REPORT, supra note 466, at 65, whether Congress had to regulate all aspects of federal elections or none at all, id. at 61–64, and whether prior government practice weighed against the districting requirement, id. at 65–66. The Minority Report also responded to the non-constitutional argument that some state legislatures did not have time to meet following passage of the Apportionment Act of 1842 and thus could not draw the necessary districts. Id. at 66.

495 MINORITY REPORT, supra note 466, at 65.

496 See supra notes 443–47 and accompanying text.

497 MINORITY REPORT, supra note 466, at 69.

498 See, e.g., CONG. GLOBE, 28th Cong., 1st Sess. 243 (1844) (statement of Rep. Woodward) (contending that Congress "had not the power to district the States themselves; and if they had, they had no right to coerce the legislation of the States"); id. at 237 (statement of Rep. Elmer) (arguing that "though [Congress] might pass a law prescribing a rule of action for the people of the United States, they had no power to pass a law directing the State legislatures to act in the matter; and, therefore, the law of the last Congress was void, and not binding on the States"); id. at 266 (statement of Rep. Rathbun) (arguing that "Congress had neither 'made' nor 'altered' regulations for the election of members to this House by the second section of the apportionment law, within the meaning of the clause in the constitution; and that no power existed to control the obedience of the State legislatures"). Representative Catlin argued:

But it is said that the second section of the act under consideration is not mandatory—that the States may pass the necessary laws to secure an election by districts, or they may refuse to pass them; but if they refuse, the people of the States so refusing shall be shut out from a representation in this hall. If
and argued that Congress could not issue such commands because the Constitution broke with the Articles of Confederation by rejecting such commands; such commands could not be enforced; and the text of the Times, Places and Manner Clause granted Congress the power to "make" or "alter" election regulations, not to direct the States to do so. Proponents of the districting requirement argued that the Constitution, not Congress, commanded the States to act. All familiar arguments.

While none of the arguments were different, the outcome was. On a largely party line vote, the House approved the seating of each representative elected at large.\textsuperscript{499} Though the House neither approved the Committee's report nor adopted a resolution condemning the districting requirement,\textsuperscript{500} its message was clear. The sole basis argued for seating the members elected at large was that the districting requirement was unconstitutional commandeering. By seating those members, the House implicitly endorsed that rationale.

In sum, the House proceedings of 1844 provide a second precedent on commandeering under the Times, Places and Manner Clause, this time against that power. In trying to embrace either the 1842 or 1844 precedent, the temptation might be to over- or under-emphasize the role of politics. While one could deride the 1844 outcome as merely partisan politics, that same charge could be made against the 1842 passage of the districting requirement itself. Unless we have some reason to give Whig politics greater weight than Democratic politics, both precedents, however political, ought to carry the same force. Conversely, one ought not give greater weight to the 1844 judgment of the House. On the surface, one could argue that the House in 1844 suddenly realized that commandeering could not be effectively enforced and, on that basis, implicitly repudiated any claim to that power. Yet, that reading ignores politics—the Whigs supported the power when they controlled Congress, the Democrats opposed it

\footnotesize{this is not the language of a \textit{mandamus}, it is the language of the \textit{highway}—"your money or your life"—"your legislation or your liberties." Is this the language which Congress may address to the sovereign States in this confederacy? Is this the tone and bearing with which Congress may approach the people of the States? No, sir.

\textit{Id.} at 259.

\textsuperscript{499} \textit{Id.} at 279–80, 283.

\textsuperscript{500} The legislative record shows that there were enough votes to pass such a resolution, if it had been properly put before the House. When the resolution was offered, however, it would have required a two-thirds vote to suspend the House's rules and proceed to consideration of the resolution. See \textit{id.} at 283. While a majority of the House voted to suspend the rules (111-62), a two-thirds majority could not be obtained. \textit{Id.}
when they took over the House. The reality lies somewhere in between: Two opposing parties held opposite views on a divisive constitutional issue, which they implemented when given the chance. Thus, government practice from this initial period is equivocal: approval followed immediately by rejection of commandeering.

3. Subsequent Reapportionment

The House returned to the constitutionality of the districting requirement in three subsequent election contests. We consider each contest in turn.

First, in the election contest styled Phelps and Cavanaugh, the House considered whether to seat two members from Minnesota. In 1857, in anticipation of gaining statehood, the Territory of Minnesota held congressional elections using the at-large system. When the State's two representatives appeared at the Thirty-Fifth Congress, the question arose whether Minnesota's at-large election violated the districting requirement of the Apportionment Act of 1842. The Committee of Elections report resolved this question based on House precedent and prior government practice. The report explained:

The obligation of [the districting requirement] was brought in question by the next Congress after it was passed, in a contest of the seats and the members returned from the States of New Hampshire, Georgia, Mississippi, and Missouri; and the Committee of Elections, to whom the subject was referred, reported a resolution as follows:

501 See id. at 236 (describing a statement of Representative Kennedy of Indiana "that . . . he would venture to make one prediction, and that was, when the vote came to be taken, all the Whig members would vote against the gentlemen who were elected under the general-ticket system, and all the democratic members would vote for them").


503 Id. at 248-49. Another issue was the validity of a congressional election held prior to statehood. Id. at 249. The Report of the Committee of Elections stated, "An objection is urged to the right of the claimants to their seats on the ground that their election was prior to the admission of the State into the Union." Id. The Committee of Elections concluded that pre-statehood elections were valid. Id.

504 The territory had elected three representatives, but only two were sent to Congress when Minnesota was allocated two representatives upon statehood. Id. at 250.

505 See id. at 249 ("Another objection urged against the admission of the members who claim seats in the House of Representatives from Minnesota is, because of their election by general ticket instead of districts.").
Resolved, That [the districting requirement] is not a law made in pursuance of the Constitution of the United States, and valid, operative, and binding upon the States.

Upon the question of the admission of members of the States named which had so elected their representatives by general ticket, and not in accordance with the law, it was decided in the affirmative by ayes 127, noes 57. This disposition of the question has never been disturbed, although members elected under the general ticket system have been upon this floor (with the exception, it is believed, of three Congresses) ever since, and without objection. It seems now too late to reopen the question.\(^{506}\)

In this passage, the Committee used precedent and prior government practice to conclude that the districting requirement was unconstitutional. The precedent was the House's decision in the 1844 elections contest, in which, as was discussed above, the House decided to seat representatives who had been elected at large.\(^{507}\) The prior government practice was the routine seating, without contest or opposition, of representatives elected at large. In light of these two constitutional arguments, it was "too late to reopen the question" whether Congress could commandeer the States into drawing districts.\(^{508}\) The House concurred, voting 135 to 63 to adopt the Committee's resolution seating the members from Minnesota.\(^{509}\)

The House reached the same conclusion in the second contested election case, Davison vs. Gilbert.\(^{510}\) This election contest challenged House elections in Kentucky.\(^{511}\) The Apportionment Act of 1872 had restated the districting requirement, this time inserting an additional requirement that the districts "contain[] as nearly as practicable, an equal number of inhabitants."\(^{512}\) The challenged Kentucky district allegedly failed this test.\(^{513}\) In rejecting the election contest, the Com-

\(^{506}\) Id. at 249–50.

\(^{507}\) See supra notes 495–500 and accompanying text.

\(^{508}\) Bartlett, supra note 502, at 250.

\(^{509}\) Id. at 251. The Committee's report concluded with a resolution that read in pertinent part, "Resolved, That W.W. Phelps and James M. Cavanaugh, claiming seats as members of this house from the State of Minnesota, be admitted and sworn as such ...." Id. at 250.

\(^{510}\) Committee on Elections No. 1, Davison vs. Gilbert, H.R. Rep. No. 56-3000 (1901).

\(^{511}\) Id. at 1.

\(^{512}\) For the full text of the Apportionment Act of 1872, see infra Statutory Appendix.

\(^{513}\) See Committee on Elections No. 1, Davison vs. Gilbert, H.R. Rep. No. 56-3000, at 1 (1901) (noting that the election contest alleged that the challenged district "was contrary to the act of Congress apportioning Representatives among the States").
mittee once again concluded that Congress did not have the power to direct the States to act. Consider the following passage from the Committee’s report:

A remarkable and convincing speech is that made in the 27th Congress by Nathan Clifford, then a Representative from Maine and afterwards a justice of the Supreme Court of the United States. Mr. Clifford argued with great cogency against the theory that Congress had any such power as the act of 1842 undertook to express, and in our opinion those arguments have never been satisfactorily answered.\(^{514}\)

Though the report does not cite to specific remarks of Representative Clifford, it is likely the reference is to his remarks that Congress did not have power to commandeer. Representative Clifford spoke forcefully against Congress’s power to commandeer the States.\(^ {515} \) The Committee concluded that these arguments had never been satisfactorily answered and that they overrode the fact that “Congress had legislated” a districting requirement “for the last three decades.”\(^ {516} \)

The third election contest, Parsons v. Saunders, generated the only Committee report to support the districting requirement.\(^ {517} \) That contest challenged two Virginia congressional districts as violating the then-existing requirement that congressional districts be compact, contiguous, and, as nearly as practicable, contain equal population.\(^ {518} \) Before the Committee on Elections, the contestee cited the election contest in Davison v. Gilbert as prior Committee precedent that the districting requirement was not constitutional.\(^ {519} \) The Committee report rejected this argument on two bases.

First, the Committee cited the Supreme Court cases Ex parte Siebold\(^ {520} \) and Ex parte Yarbrough\(^ {521} \) as supporting the districting require-
ment. But, as discussed above in Section D on precedent, neither case decided whether Congress could commandeer under the Times, Places and Manner Clause. Further, both cases contain language that cuts against such a power, especially given the pro-state attitude with which the Court currently reads its precedent.

Second, the Committee argued that Congress's continued enactment of the districting requirement showed that body's belief in its power to do so. But, each of these districting requirements was enacted without any debate on the issue. Also, during that time, Congress had not enforced the provision, with members elected at large seated in several Congresses. These statutes hardly count as a considered, firm judgment in favor of commandeering under the Times, Places and Manner Clause.

In the end, the post-1844 government practice was just as equivocal as that from the 1840s. Congress seemed to endorse the districting requirement by including it in seven different apportionment statutes. Yet, when the rubber met the road, in election contests or when members arrived at each new Congress, the House repeatedly left the requirement unenforced. Either the House decided to seat members elected at large, or those members' rights to their seats went unchallenged. The requirement existed on paper, but not in practice; and it is practice that is perhaps our best guide to Congress's understanding of the Constitution. As our parents taught us when we were children, sometimes actions speak louder than words.

523 See supra notes 303–06 and accompanying text.
524 See Siebold, 100 U.S. at 386–87.
526 Elmer C. Griffith, Congressional Representation in South Dakota, 75 The Nation 343, 343–44 (1902) (noting that at the time of writing, Washington and South Dakota both elected House members at large even though both States were entitled to more than one representative and that the House had repeatedly seated their members nonetheless).
527 See Paschal, supra note 26, at 285 ("[A]lthough the requirement for election by districts was on the statute books for nearly ninety years, Congress never denied seats to representatives elected at large.").
528 The one Committee report that upheld the districting requirement did not turn away a member elected at large, but rather challenged the composition of the State's districts. See supra notes 517–18 and accompanying text.
529 See Paschal, supra note 26, at 285 (stating that based on the fact that the House never enforced the districting requirement, "it might be argued that the 1842 Act was... null and void").
Having considered the issue under several methods of interpretation, let us take stock of where we have been and where we are. We started this Part with one of the Supreme Court's most recent federalism cases, *Alden v. Maine* which gave us a sort of federalism standard of review. According to *Alden*, States retained certain aspects of sovereignty even after joining the Union. These aspects at least include a trio of protections against Congress commandeering state legislatures, executives, or courts. And, Congress cannot intrude on these aspects of sovereignty unless there is "compelling evidence" that the Constitution gives Congress the power to do so. *New York v. United States* found no such evidence that Congress could commandeer state legislatures under its Commerce Clause power. The question we are investigating is whether compelling evidence exists that Congress can commandeer under the Times, Places and Manner Clause.

None of the sources reviewed above—text, history, precedent, structure, or prior government practice—provides much evidence, much less "compelling" evidence, that Congress can commandeer under the Times, Places and Manner Clause. The Clause's text—Congress can "make" or "alter" election "regulations"—suggests that Congress must do the making or altering, not command others to do so. History suggests that Congress's power over times, places and manner was intended to help Congress overcome inaction or malfeasance by the States; commandeering is ill-suited to serve this function. Precedent offers dicta cutting against commandeering, but no Supreme Court holding is directly on point. Structure reveals that commandeering under the Times, Places and Manner Clause would violate principles of federalism, separation of powers, and representative government. And, prior government practice is at best equivocal, with Congress and the House coming to conflicting decisions at different times. On balance, even without *Alden's* presumption, these sources of argument support extending *New York v. United States's* anti-commandeering rule to the Times, Places and Manner Clause. When we overlay *Alden's* state sovereignty presumption, this conclusion seems unavoidable.

531 See id. at 714 (citing New York v. United States, 505 U.S. 144 (1992)).
532 See id. (citing Printz v. United States, 521 U.S. 898 (1997)).
533 See id. at 759-60.
534 See id. at 730-31.
Conclusion

In concluding, let us look both backward and forward. Looking backward, we will ask the question that ended Part I: Should the Court strike down the districting requirement, or should the Court use the districting requirement as a reason to overrule New York v. United States? Looking forward, we will consider some implications of striking down the districting requirement, identifying issues for further study.

Given Part III’s conclusion that Congress cannot commandeer under the Times, Places and Manner Clause, we return to the options posed at the end of Part I. Recall that we identified three options. Briefly restated, they are:

Option One: The Court’s reasoning in New York v. United States is weakened by the Apportionment Act of 1842; New York v. United States should be overruled.

Option Two: The Court got it right in New York v. United States, and the districting requirement is unconstitutional commandeering of state legislatures.

Option Three: When it comes to commandeering, Congress’s Times, Places and Manner Clause power is different from its other Article I powers. Thus, the Court got it right in New York v. United States, and the districting requirement is constitutional.

Part III eliminates Option Three; none of the sources of constitutional argument support distinguishing commandeering under the Times, Places and Manner Clause from commandeering under Congress’s other Article I powers. So, do we extend New York v. United States to the Times, Places and Manner Clause or discard it?

The answer should be apparent from both the weight of the arguments in Part III as well as the Court’s pro-state attitude in Alden. All sources of constitutional argument considered in Part III indicate that the districting requirement, not New York v. United States, is out of place in the federalism universe. Alden’s pro-state presumption only bolsters this conclusion. Thus, when the Court acknowledges the districting requirement as a prior instance of congressional commandeering, it should hold that Congress has no authority to pass that requirement.

And now, looking to the future, a few words about what it might mean for the Court to strike down the districting requirement. First, consider the position of the States after such a holding. While they would no longer have to elect their House members by districts, all current state laws providing for election by districts would remain in effect until the States changed those laws. So, immediately after the
holding, nothing would change and no elections would need to be postponed. The States would simply have the option, if they desired, to change their election system to an at-large, multi-member district, or some other system. Legislative inertia would probably result in many States not even considering the issue. States either gaining or losing representatives after the 2000 apportionment, however, would have to confront the issue: either keep the district system and draw new districts, or scrap that system in favor of another system.

States would not have an entirely free hand in deciding whether to change from the single-member district system. First, States face several constitutional restrictions on their choices. The Supreme Court has held that the Apportionment Clause guarantees a principle of one-person, one-vote. Under this line of cases, a State that uses some form of a district system would have to ensure that the allocation of representatives among those districts was, as nearly as practicable, in proportion to the population of those districts. For example, consider a State that had six representatives to be elected in two districts, one district electing four and the other electing two. To satisfy the one-person, one-vote rule, the district electing four representatives would have to have roughly (as nearly as practicable) twice the population as the district electing two representatives. Otherwise, the people of one district would be over-represented.

The Fourteenth and Fifteenth Amendments place further restrictions on state choice of an electoral system. Generally speaking, neither Amendment prohibits the use of an at-large or multi-member district in state-run elections. But, the Court has held that these Amendments prohibit a State from using at-large or multi-member district election systems with the intent to discriminate against voters based on their race. In practice, however, such intent is hard to prove. And, no inference of intentional discrimination should arise simply from the fact that a State has changed from the single-member district system for congressional elections. Indeed, given that the States have not had a choice to change for over 150 years, many reasons could explain a State's desire to experiment given its newfound freedom.

Beyond the Constitution lies a second set of restrictions on a State's power to change its electoral system—the Voting Rights Act of

536 See Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) (applying the one-person-one-vote principle to congressional districts); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (same).

537 See Kirkpatrick, 394 U.S. at 530–31.

This statute requires that certain States submit any changes in their electoral laws for "preclearance" by the Department of Justice. Department of Justice review is to ensure that none of the changes dilutes or otherwise harms the voting power of racial minorities.

Despite these constitutional and statutory protections, some might fear that leaving States free to choose at-large or multi-member districts might still leave minorities vulnerable to vote dilution and other types of discrimination. As the ethnic and racial makeup of many states changes, however, one must ask whether giving more power to the States over congressional elections might not empower racial and ethnic minorities. For example, consider an at-large system where each party puts up a slate of representatives for an all-or-nothing election. If a racial minority group is perceived as the swing vote in an all-or-nothing election, that constituency could exert a powerful influence over the parties' entire slate of candidates. In single-member district elections, however, minorities could be corralled into a few districts, with their influence limited to those districts. Whether this scenario is likely or atypical is an empirical question for further study.

Another question for further study is what types of systems States could enact with their newfound freedom. For example, consider another proposal offered to enhance the voice of minority constituencies: cumulative voting. Under a cumulative voting system, each voter is entitled to a number of votes equal to the number of representatives to be elected, and she may allocate her votes among the different candidates. So, if a State were entitled to twelve representatives, each voter would get twelve votes in that election. Each voter then could allocate those twelve votes among the candidates as she pleased, perhaps giving one candidate five of the votes and a second candidate seven of the votes. By allocating their votes to a favored candidate, minority constituencies could use cumulative voting to elect that candidate. The question for further study is whether States could enact cumulative voting or other non-traditional voting schemes under the Times, Places and Manner Clause.

Another question for future study is whether Congress can invoke another of its powers to commandeer the States to draw districts. One obvious candidate is Congress's power to "enforce" the Fourteenth

540 Id. § 1973a(a).
and Fifteenth Amendments by “appropriate legislation.” This power itself raises important questions. A first issue is whether Congress can use these enforcement powers to commandeer the States. In a related context, the Court has held that Congress can use its power to enforce the Fourteenth Amendment to abrogate a State’s immunity from private damages suits in state and federal court. Recall that this immunity is part of the larger state sovereignty that includes the anti-commandeering rule. On this basis, one could conclude that Congress should be able to overcome the anti-commandeering rule when using that power. Conversely, one could try to argue that the anti-commandeering rule is a different aspect of state sovereignty and, on that basis, should not be subject to abrogation. And, would require “compelling evidence” that either the Fourteenth or Fifteenth Amendments were intended to abrogate the States’ immunity from commandeering. Further analysis is required to fully assess the extent of Congress’s power here.

Even if Congress could commandeer under the Fourteenth or Fifteenth Amendments, the question remains whether a districting requirement would be a law “enforcing” either Amendment. In the recent case City of Boerne v. Flores, the Court read Congress’s enforcement power narrowly, holding that a law enforces those Amendments only if the law is logically related to a violation of either Amendment. Yet, neither the Fourteenth nor the Fifteenth Amendment prohibit all uses of at-large or multi-member district elections; neither type of election is unconstitutional unless intended to discriminate against voters based on race. Thus, on its face, a blanket districting requirement is not logically related to preventing or remedying a constitutional violation. Instead, Congress would have to target uses of at-large or multi-member district systems that do or are

542 U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); id. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”). The Fourteenth Amendment guarantees equal protection of the laws, and the Fifteenth Amendment prohibits denial of the right to vote on account of race.

543 Caminker, supra note 156, at 238 (raising the question “whether Congress’s Section 5 power to ‘enforce, by appropriate legislation, the provisions’ of the Fourteenth Amendment also authorizes Congress to conscript state officials to implement federal mandates”).


547 Id. at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).
likely to discriminate against voters based on race.\textsuperscript{548} Whether Congress could tailor a law to do so requires further study.

A final question for further study is whether state experimentation with voting systems would be constitutional or politically desirable in the America of today. On the constitutional side, we could ask whether intervening events over the last 150 years have somehow transformed the districting requirement from a statutory requirement into a constitutional mandate. Have events outside of an Article V amendment enshrined districting in the Constitution?\textsuperscript{549} On the political side, we need to ask whether the upheaval of putting the districting question back on the table would have a salutary or malign effect on American politics. Would raising the question anew merely distract and divide American government at a time when focus and consensus building is needed? Or, at a time when we constantly gripe about issues such as campaign finance, would debate over the districting requirement compel us to take stock of where our politics are and where they are going?

With that, we end the first part of my project. In this part, we confronted a long-ignored question in constitutional law: Can Congress require House districts? This question allowed us to explore the Supreme Court's emerging federalism jurisprudence, exercise the tools of constitutional argument, and raise the implications of even asking the question. And, it is the implications raised in this Conclusion that chart the future direction of the larger project.

\textsuperscript{548} The \textit{City of Boerne} Court noted that the Voting Rights Act was so targeted because (1) the Voting Rights Act applied to voting regulations, like literacy tests, that had often been used to discriminate against African-American voters, and (2) the Act only applied to States with a history of discriminating against voters based on race. \textit{See id.} at 525–26, 532–33.

\textsuperscript{549} This type of extra-Article V constitutional change is explored in Professor Bruce Ackerman's recent work. \textit{See generally Ackerman, supra note 375; 2 Bruce A. Ackerman, We the People: Transformations (1998).}
STATUTORY APPENDIX

This Appendix sets forth the text of each congressional districting requirement enacted in the various apportionment statutes. Also, when a districting requirement was not included in the next apportionment statute, the text explains whether the prior districting requirement nonetheless continued in effect.

1. Apportionment Act of 1842, Section 2

And be it further enacted, That in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative.\(^5\)

As section 2 applied only "under this apportionment," its districting requirement lapsed upon the next apportionment unless carried forward in the next apportionment law.\(^5\) The apportionment laws enacted after the 1850 census did not contain a districting requirement,\(^5\) thus the States were free to choose the method of election—at large, single-member districts, multi-member districts—that they preferred.\(^5\)

2. Apportionment Act of 1862

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in each State entitled in the next and any succeeding Congress to more than one representative, the number to which such State is or may be hereafter entitled shall be elected by districts composed of contiguous territory, equal in number to the number of representatives to which said State may be entitled in the Congress for which said election is held, no one district electing more than one representative . . . .\(^5\)

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\(^5\) See Cong. Globe, 37th Cong., 2d Sess. 3117 (1862) (statement of Sen. Trumbull) (stating that the 1842 apportionment "law which required the election by single districts was a temporary law. It applied only to one census").


\(^5\) See Wesberry v. Sanders, 376 U.S. 1, 42 (1964) (Harlan, J., dissenting) (noting that the 1842 districting "requirement was later dropped" in the 1850 apportionment laws).

\(^5\) Act of July 14, 1862, ch. 170, 12 Stat. 572 (current version at 2 U.S.C. § 2c (1994)). The size of the House and apportionment of its members were set forth in a
3. Apportionment Act of 1872, Section 2
That in each State entitled under this law to more than one Representative, the number to which said States may be entitled in the forty-third, and each subsequent Congress, shall be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of Representatives to which said States may be entitled in Congress, no one district electing more than one Representative... 555

4. Apportionment Act of 1882, Section 3
That in each State entitled under this apportionment the number to which such State may be entitled in the Forty-eighth and each subsequent Congress shall be elected by Districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and equal in number to the Representatives to which such State may be entitled in Congress, no one District electing more than one Representative... 556

5. Apportionment Act of 1891, Section 3
That in each State entitled under this apportionment the number to which such State may be entitled in the Fifty-third and

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555 Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28 (current version at 2 U.S.C. § 2c (1994)). The remainder of the statute provided for the contingency that a state legislature would not be able to draw new districts before the next federal election under the new apportionment. Id. Under those circumstances, a State whose number of representatives increased could elect those additional representatives at large. Id.

556 Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 5, 6 (current version at 2 U.S.C. § 2c (1994)). The remainder of the statute provided for the contingency that a state legislature would not be able to draw new districts before the next federal election under the new apportionment. Id. Under those circumstances, a State whose number of representatives remained the same could elect under existing districts (even though population shifts since the last apportionment might have made the districts unequal in inhabitants); a State entitled to additional representatives may elect those additional representatives at large; and a State entitled to fewer representatives may elect all its representatives at large. Id.
each subsequent Congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of the Representatives to which such State may be entitled in Congress, no one district electing more than one Representative. 557

6. Apportionment Act of 1901, Section 3

That in each State entitled under this apportionment, the number to which such State may be entitled in the Fifty-eighth and each subsequent Congress shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of the Representatives to which such State may be entitled in Congress, no one district electing more than one Representative.558

7. Apportionment Act of 1911, Section 3

That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to

557 Act of Feb. 7, 1891, ch. 116, § 3, 26 Stat. 735, 735 (current version at 2 U.S.C. § 2c (1994)). Section 4 provided for the contingency that a state legislature would not be able to draw new districts before the next federal election under the new apportionment. Id. § 4, 26 Stat. at 736. Under those circumstances, a State whose number of representatives remained the same could elect under existing districts (even though population shifts since the last apportionment might have made the districts unequal in inhabitants), and a State entitled to additional representatives may elect those additional representatives at large. Id. The statute did not address the case of a State entitled to fewer representatives, in all likelihood because the 1891 apportionment did not reduce the representation of any state. Compare Act of Feb. 25, 1882, § 1, 22 Stat. at 5–6 (setting forth the number of representatives for each state for the 1882 apportionment), with Act of Feb. 7, 1891, § 1, 26 Stat. at 735 (setting forth the number of representatives for each state for the 1891 apportionment).

558 Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734 (current version at 2 U.S.C. § 2c (1994)). Section 4 provided for the contingency that a state legislature would not be able to draw new districts before the next federal election under the new apportionment. Id. § 4, 31 Stat. at 734. Under those circumstances, a State whose number of representatives remained the same could elect under existing districts (even though population shifts since the last apportionment might have made the districts unequal in inhabitants); a State entitled to additional representatives may elect those additional representatives at large; and a State entitled to fewer representatives may elect all their representatives at large. Id.
which such State may be entitled in Congress, no district electing more than one Representative.\footnote{569}{Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13, 14 (current version at 2 U.S.C. § 2c (1994)). Section 4 provided for the contingency that a state legislature would not be able to draw new districts before the next federal election under the new apportionment. \textit{Id.} § 4, 37 Stat. at 14. Under those circumstances, a State whose number of representatives remained the same could elect under existing districts (even though population shifts since the last apportionment might have made the districts unequal in inhabitants), and a State entitled to additional representatives may elect those additional representatives at large. \textit{Id.} The statute did not address the case of a State entitled to fewer representatives, in all likelihood because the 1911 apportionment did not reduce the representation of any state. \textit{Compare Act of Jan. 16, 1901, ch. 93, § 1, 31 Stat. at 733–34 (setting forth the number of representatives for each state for the 1901 apportionment), \textit{with Act of Aug. 8, 1911, § 1, 37 Stat. at 13–14 (setting forth the number of representatives for each state for the 1911 apportionment).} \footnote{560}{See Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21, 25–27 (codified as amended at 2 U.S.C. § 2a (1994 & Supp. V 1999)). Congress did not reapportion the House after the 1920 census. \textit{See Wesberry v. Sanders, 376 U.S. 1, 43 (1964) (Harlan, J., dissenting).}}}

When the Act of June 18, 1929, which set forth a reapportionment of the House, did not contain a districting requirement,\footnote{561}{Wood v. Broom, 287 U.S. 1, 6–7 (1932) (citing Act of Aug. 8, 1911, § 3).} the question arose whether the districting requirement in the 1911 Act carried forward and applied to the apportionment under the 1929 Act. Because the 1911 districting requirement applied to “each subsequent Congress,” the requirement would seem to carry forward to subsequent apportionments unless repealed. The Supreme Court, however, held that the 1911 Act’s districting requirement expired of its own terms because it expressly applied only “‘under this apportionment.’”\footnote{562}{\textit{Id.} at 7–8 (citing \textit{70 Cong. Rec.} 1496, 1499, 1584, 1602, 1604 (1929)).} As further support for this conclusion, the Court cited the legislative history of the 1929 Act, in which Congress had debated and specifically rejected a districting requirement.\footnote{563}{\textit{See Act of Nov. 15, 1941, ch. 470, 55 Stat. 761 (codified as amended at 2 U.S.C. §§ 2a–2b (1994 & Supp. V 1999)); Act of Apr. 25, 1940, ch. 152, 54 Stat. 162 (codified as amended at 2 U.S.C. § 2a (1994 & Supp. V 1999)).} Subsequently, Congress twice amended the 1929 Act and carried forward its provisions in 1940 and 1941, each time without adding a districting requirement.\footnote{564}{\textit{See Wesberry, 376 U.S. at 20 n.1 (Harlan, J., dissenting).}}

Subsequently, Congress twice amended the 1929 Act and carried forward its provisions in 1940 and 1941, each time without adding a districting requirement.\footnote{565}{\textit{Id.} at 7–8 (citing \textit{70 Cong. Rec.} 1496, 1499, 1584, 1602, 1604 (1929)).} And, with no requirement to elect House members by district, in 1962, eight States entitled to more than one representative elected all or some of their representatives at large.\footnote{566}{\textit{Id.} at 7–8 (citing \textit{70 Cong. Rec.} 1496, 1499, 1584, 1602, 1604 (1929)).}

8. Act of December 14, 1967

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative

\footnote{567}{\textit{Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13, 14 (current version at 2 U.S.C. § 2c (1994)). Section 4 provided for the contingency that a state legislature would not be able to draw new districts before the next federal election under the new apportionment. \textit{Id.} § 4, 37 Stat. at 14. Under those circumstances, a State whose number of representatives remained the same could elect under existing districts (even though population shifts since the last apportionment might have made the districts unequal in inhabitants), and a State entitled to additional representatives may elect those additional representatives at large. \textit{Id.} The statute did not address the case of a State entitled to fewer representatives, in all likelihood because the 1911 apportionment did not reduce the representation of any state. \textit{Compare Act of Jan. 16, 1901, ch. 93, § 1, 31 Stat. at 733–34 (setting forth the number of representatives for each state for the 1901 apportionment), \textit{with Act of Aug. 8, 1911, § 1, 37 Stat. at 13–14 (setting forth the number of representatives for each state for the 1911 apportionment).} \footnote{560}{See Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21, 25–27 (codified as amended at 2 U.S.C. § 2a (1994 & Supp. V 1999)). Congress did not reapportion the House after the 1920 census. \textit{See Wesberry v. Sanders, 376 U.S. 1, 43 (1964) (Harlan, J., dissenting).}}

under an apportionment made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled "An Act to provide for apportionment of Representatives," (46 Stat. 26), as amended, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-First Congress). 565

This statute sets forth the districting requirement currently in effect. 566
