

Essay

**Federal Functions: Execution of Powers the Constitution Grants to
Persons and Entities Outside the U.S. Government**

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Abstract

The Constitution grants enumerated powers to officers and agencies of the federal government. What is less widely understood is that it also grants extensive powers to persons and entities entirely outside the federal government. The courts refer to the exercise of those powers as “federal functions.”

This short Essay is the first unified survey of those federal functions. It classifies them and identifies certainly commonalities and differences.

INTRODUCTION

Much of the Constitution consists of enumerated powers. Perhaps best known is the extensive list of powers granted to Congress in Article I, Section 8.¹ Shorter lists appear in Article II (granting authority to the president)² and Article III

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¹U.S. CONST. art. I, § 8.

²U.S. CONST. art. II, §§ 2 & 3. It is frequently claimed that the first clause is a grant of “The executive Power” and that Sections 2 and 3 merely clarify its scope. That claim, however, is

(granting authority to the judiciary).³ In addition, the Constitution grants a few powers to the United States government as an entity.⁴ When officers and agencies of, and contractors with, the federal government execute these powers those actors are exercising *federal functions*.⁵

In addition, many of the Constitution's provisions persons or entities that are neither part of, nor contractors with, the federal government. Many of these actors normally carry out duties unrelated to the Constitution. For example, state governors, legislatures, and governments normally operate under their state constitutions, but exercise federal powers as well.⁶ Similarly, Congress, which normally serves as the federal legislature, also receives specific authority from the Constitution's provisions for amendment.⁷ Congress exercises its amendment authority as an independent assembly representing the people directly, rather than

inconsistent with the drafting practice applied to eighteenth century power-granting instruments. Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009).

³U.S. CONST. art. III, § 2, cls. 1 & 2.

⁴Robert G. Natelson, *More News on the Powers Reserved Exclusively to the States*, 20 FED. SOC. REV. 92, 95-96 (2019) (discussing grants to the government in U.S. CONST. arts. IV & VI).

⁵*E.g.*, *United States v. Bedford*, 914 F. 3d 422, 429-30 (6th Cir. 2018) (holding that an employee of a U.S. government contractor performs a federal function); *Commodities Export Company v. Detroit International Bridge Co.* 695 F.3d 518, 529 (6th Cir. 2012) (referring to "federal agencies that perform federal functions").

⁶*See generally infra.*

⁷U.S. CONST. art. V.

as the federal legislature.⁸

The Constitution grants other powers to persons and entities not part of any government at all. These grantees include conventions for proposing and ratifying constitutional amendments, presidential electors, jurors, and federal election voters. The courts likewise characterize these non-federal persons and entities as exercising federal functions.

To date, there has been no scholarly literature addressing the general classes of federal functions exercised by non-federal actors or their commonalties and differences. Instead, scholarly attention has been focused on particular institutions, such as the Electoral College⁹ and the conventions and legislatures acting in the amendment process.¹⁰ This Essay is designed, in part, to fill the gap and in part to provoke more examination. It draws in part on my previous research into the Elections Clause,¹¹ the amendment process,¹² and the presidential election

⁸*Infra* notes ___ and accompanying text.

⁹See Christopher Anglim, *A Selective, Annotated Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform*, 85 LAW LIBR. J. 297 (1993). Most recent legal literature on the Electoral College seems to be devoted to attacking or defending the institution rather than examining its “federal function” aspects.

¹⁰My publications on the amendment process cited below are ROBERT G. NATELSON, THE LAW OF ARTICLE V (2018) [hereinafter LAW OF ARTICLE V]; *Is the Constitution’s Convention for Proposing Amendments a “Mystery”? Overlooked Evidence in the Narrative of Uncertainty*, 104 MARQUETTE L. REV. (forthcoming, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516847 [hereinafter *Mystery*]; *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 629 (2013) [hereinafter *Conventions*]; and *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693 (2011) [hereinafter *Rules*].

¹¹U.S. CONST. art. I, § 4; Robert G. Natelson, *The Original Scope of the Congressional Power*

system.¹³

I. CLASSIFICATION OF FEDERAL FUNCTIONS

The Supreme Court first applied the term “federal function” to the actions of a non-federal entity in the 1922 case of *Leser v. Garnett*.¹⁴ Justice Louis Brandeis wrote the opinion of the Court. Justice Brandeis found that a state’s power to ratify a constitutional amendment derived directly from the Constitution rather than from any reserved state authority and that the ratification procedure was governed wholly by Article V and could not be altered by state constitutions or laws.¹⁵ Since that decision, courts at all levels have applied the term “federal function” to the execution of constitutional powers by non-federal actors.

to Regulate Elections, 13 U. PA. J. CONST. L. 1 (2010) (cited by Chief Justice Roberts in *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 135 S. Ct. 2652, 2684 (2015) (Roberts, C.J., dissenting)).

¹²U.S. CONST. art. V; *supra* note ____.

¹³U.S. CONST. art. II, § 1 & amend. XII; Robert G. Natelson, *Presidential Elector Discretion: The Originalist Evidence*, THE ORIGINALISM BLOG, <https://originalismblog.typepad.com/the-originalism-blog/2018/01/president-elector-discretion-the-originalist-evidence-part-2rob-natelson.html> (Univ. of San Diego, 2018); *but see* John Vlahoplus, *Bound Electors*, 106 Va. L. Rev. Online 1 (2020), <https://www.virginialawreview.org/volumes/content/bound-electors>. *But see* John Vlahoplus, *Bound Electors*, 106 VA. L. REV. ONLINE 1 (2020) (claiming that electors may be bound). I responded in Robert G. Natelson, *Electoral Discretion: A Response to John Vlahoplus*, THE ORIGINALISM BLOG, <https://originalismblog.typepad.com/the-originalism-blog/2020/04/elector-discretion-a-response-to-john-vlahoplusrob-natelson.html> (Univ. of San Diego, 2020) (marshaling additional evidence, including evidence pertaining to the Twelfth Amendment).

¹⁴258 U.S. 130, 137 (1922).

¹⁵*Id.*

In 2015 the Court decided *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*.¹⁶ That case grouped many of these federal functions into classes. The Court defined the classes as *electoral*, *ratifying*, *legislative*, *appointive*, and *consenting*.¹⁷ This Essay employs those designations. It further identifies three additional classes: *administrative*, *proposing* and *judicial*.

A. *Electoral Functions*

The Constitution grants certain non-federal actors power to participate in federal elections.¹⁸ Although presidential electors are not officers of the federal government,¹⁹ when they vote for president and vice president²⁰ they “exercise federal functions under, and discharge duties in virtue of authority conferred by the Constitution of the United States.”²¹ Similarly, the Constitution empowers the states to choose presidential electors in the manner their legislatures direct.²² It designates as congressional “Electors” those people who have the qualifications requisite for electors of the most numerous branch of their respective state legislatures.²³ Congressional electors derive their power from the Constitution and

¹⁶ ___ U.S. ___, 135 S. Ct. 2652 (2015).

¹⁷*Id.*, 135 S. Ct. at 2667-68 (distinguishing electoral, appointive, consenting, ratifying, and legislative functions).

¹⁸*Arizona State Legislature*, 135 S. Ct. 2652, 2667-68 (so denominating them).

¹⁹*Burroughs v. United States*, 290 U.S. 534, 545 (1934); *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890). A headnote to *Fitzgerald* in Supreme Court Reporter, 10 Sup. Ct. 586, describes presidential electors as *state* officers, but the Court’s opinion nowhere says that.

²⁰U.S. CONST. art. II, § 1, cl. 3.

²¹*Burroughs*, 290 U.S. at 545.

²²U.S. CONST. art. II, § 1, cl. 2.

exercise a federal electoral function when they cast their ballots.²⁴ Before ratification of the Seventeenth Amendment,²⁵ state legislatures served an electoral function when they elected United States Senators.²⁶

B. Appointive Functions

Before ratification of the Seventeenth Amendment, governors enjoyed direct authority to make vacancy appointments to the Senate.²⁷ Under the Seventeenth Amendment, governors still make vacancy appointments to the Senate if authorized by their respective state legislatures.²⁸ Under Article V, Congress exercises an appointive function when it determines whether state legislatures or state conventions will ratify or a reject a proposed constitutional amendment.²⁹

C. Proposing and Ratifying Functions

The Constitution grants Congress power to propose amendments.³⁰ When Congress acts in the amendment process, it does so as an independent body

²³U.S. CONST., art. I, § 2, cl. 1 (election of Representatives); *id.*, amend. xvii, cl. 1 (election of Senators).

²⁴*Ex Parte Yarborough*, 110 U.S. 651, 662-64 (1884) (stating that the Constitution grants the “function” of casting a vote for members of Congress).

²⁵U.S. CONST. amend. XVI.

²⁶U.S. CONST., art. I, § 3, cl. 1.

²⁷U.S. CONST. art. I, § 3, cl. 2.

²⁸U.S. CONST., amend. XVII, cl. 2. The Supreme Court labeled this an “appointive function” in *Arizona State Legislature*, 135 S. Ct. at 2668 n. 17.

²⁹U.S. CONST. art. V.

³⁰*Id.*

representing the people rather than as the federal legislature.³¹ The document further grants authority to state legislatures make “Application” to Congress to call a “Convention for proposing Amendments,” and when two thirds of the states apply, the call is mandatory.³² The state legislatures’ ability to compel Congress to act is, therefore, a branch of the proposal power—although authority to issue final proposed amendments rests with the convention.³³ The Constitution also empowers state legislatures and state conventions to execute ratifying functions by approving (or rejecting) proposed amendments.³⁴

³¹In re Opinion of the Justices 107 A. 673, 674 (Me. 1919) (“Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting on behalf of and as the representative of the people of the United States under the power expressly conferred by article 5.”); *State of Idaho v. Freeman*, 529 F. Supp. 1107, 1127-28 (D. Id. 1981), *judgment vacated as moot in National Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982) (stating that when acting in the amendment process Congress is not acting pursuant to its Article I legislative powers); see also *Hollingsworth v. Virginia*, 3 U.S. 378 (1798) (holding the congressional proposal of an amendment is not part of the legislative process, so presentment to the president is unnecessary).

³²U.S. CONST. art. V (“on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments”).

Although the Constitution calls this gathering a “Convention for proposing Amendments” in recent years it has become common to refer to it as a “constitutional convention.” This misnomer is deceptive, because Article V grants the convention only power to “propose Amendments to *this* Constitution” (italics added), not power to write a new one. *Id.* The convention for proposing amendments is one of three the Constitution authorizes. The others are state conventions to ratify the document, U.S. CONST., art. VII, and state conventions to ratify amendments, *id.* art. V.

³³U.S. CONST. art. V.

³⁴*Arizona State Legislature*, 135 S. Ct. at 2667-68 (distinguishing the legislative federal

D. Administrative Functions

The Constitution assigns to Congress the administrative function of calling a convention for proposing amendments when required by two thirds of the states.³⁵ Other administrative functions include a state governor’s authority to issue writs of election to fill vacancies in the House of Representatives³⁶ and like authority to issue writs of election to fill vacancies in the Senate.³⁷

E. Legislative Functions

The Elections Clause,³⁸ grants authority to “the Legislature” of each state to regulate the times, places, and manner of congressional elections.³⁹ However, the

function of making election laws from the ratifying function).

³⁵U.S. CONST. art. V. The normal scope of this kind of convention call is quite narrow, designating merely time, place, and subject for meeting. LAW OF ARTICLE V, *supra* note ___, at 53-56 (2018).

³⁶U.S. CONST. art. I, § 2, cl. 4.

³⁷U.S. CONST. amend. XVII, cl. 2.

³⁸U.S. CONST. art. I, § 4. Although the Supreme Court refers to this as the Elections Clause, a more accurate title is *Times, Places and Manner Clause*, a term adopted by several commentators. Robert E. Ross & Barrett Anderson, *Single Member Districts are not Constitutionally Required*, 33 CONST. COMMENT. 261, 263 (2018); Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 18 (2010); Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 553 (2001). The term “Times, Places, and Manner Clause” is preferable to distinguish it from other “elections clauses” scattered throughout the Constitution. *Id.*, art. I, § 2 (election of Representatives); art. II, § 1 (election of the president); amend. XII (election of the president); amend. XVII (election of Senators).

³⁹U.S. Const., art. II, § 1 cl. 2; U.S. Term Limits v. Thornton, 514 U.S. 779, 806 (1995)

grant is not to state legislatures alone, but to the entire legislative apparatus of each state. This apparatus encompasses, where applicable, initiative and referendum procedures,⁴⁰ and signature by the governor.⁴¹ The Constitution also grants (subject to some exceptions) lawmaking authority to state legislatures to regulate state choice of presidential electors.⁴²

(characterizing the Elections Clause as “[an] express delegation[] of power to the States to act with respect to federal elections.”).

⁴⁰*Arizona State Legislature*, 135 S. Ct. at 2667-68 (holding that a state may, by voter initiative, vest power to draw congressional districts in an independent commission); *Davis v. Hildebrant*, 241 U.S. 565 (1916) (holding that state regulations under the Elections Clause are subject to referendum if mandated by the state constitution).

⁴¹*Smiley v. Holm*, 285 U.S. 355, 365 (1932) (Elections Clause regulations require the governor’s signature because “these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this . . . involves lawmaking in its essential features and most important aspect.”).

The Supreme Court has not relied on originalist sources for its conclusion that the grant in the Elections Clause is to the entire state’s legislative power rather than to the legislature as a free standing assembly. However, such sources seem to support the Court’s conclusion. Before the Constitution was ratified, American states typically regulated election by statute rather than by mere legislative resolution. *Natelson, Elections, supra* note ___, at 13-17. This practice continued for congressional elections immediately after ratification. *Id.* at 17.

⁴²U.S. CONST., art. II, § 1 cl. 2. Although the Constitution explicitly lodges regulation of the choice of presidential electors in the states, *id.*, the Supreme Court has concluded that Congress also has authority to regulate presidential elections. *Burroughs, supra*. The source of that authority is unclear. Justice George Sutherland’s opinion for the Court *Burroughs* relied on *Ex Parte Yarborough*, 110 U.S. 651 (1884). However, *Yarborough* held only that the Elections Clause granted Congress implied power over *congressional* elections,

E. Consenting Functions.

In *Arizona State Legislature*, the Court referred to the power of a state legislature to agree to acquisition of federal enclaves within state boundaries as a consenting function.⁴³ It similarly denominated the legislative consent of existing states to creation of new states consisting of lands in existing states.⁴⁴ Still another such function is the consent to federal action by state legislatures or executives under the Guarantee Clause.⁴⁵

It is not entirely clear if the Constitution bestows the power to consent to enclaves or creation of new states on the legislature acting independently (as in Article V) or on the entire state legislative apparatus (as in the Elections Clause).

id. at 656-67 (reciting the terms of the indictments at issue) & 660 (citing U.S. CONST., art. I, § 4).

Despite efforts to classify Justice Sutherland's as a judicial conservative, *e.g.*, Alpheus Thomas Mason, *The Conservative World of Mr. Justice Sutherland, 1883 – 1918*, 32 AM. POL. SCI. REV. 443 (1938), he could be quite freewheeling about locating sources of federal power. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (finding, despite the wording of the Tenth Amendment, that the federal government has inherent sovereign authority not enumerated in the Constitution).

⁴³*Arizona State Legislature*, 135 S. Ct. at 2667 & 2668 n.17.

⁴⁴*Id.*, at 2668 n.17; U.S. CONST. art. IV, § 3 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”)

⁴⁵U.S. CONST. art. IV, § 4 (“The United States . . . shall protect each of them . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”)

Intuitively, however, it would seem that action effectively modifying state boundaries and territorial jurisdiction, and therefore fundamental provisions of the state constitution, should require more than a mere legislative resolution. The Supreme Court has lent incidental support to this position,⁴⁶ and historical practice has as well.⁴⁷

However, the text of the Guarantee Clause—vesting the power in the legislature or if the legislature cannot be convened, in the governor alone—suggests that the consent of each branch is given independently.

F. Judicial Functions

In several places, the Constitution conveys power through words of obligation or entitlement rather than explicit words of grant.⁴⁸ The provisions requiring trial juries and grand juries⁴⁹ are illustrative: They effectively empower federal officials

⁴⁶The Court has often characterized the consent necessary for federal acquisitions under the Enclave Clause as the consent of the *state*. *E.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 541-42 (1976) (referring in several places to state rather than merely legislative consent); *Paul v. United States*, 371 U.S. 245, 264-65 (1963); *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 530-33 (1885) (same). However, the issue was not under adjudication in these cases; perhaps the Court used “consent of the state” language merely as shorthand for consent of the state legislature.

⁴⁷*Virginia v. West Virginia*, 78 U.S. 39 (1870) (discussing Virginia’s consent to the creation of West Virginia by an act of ordinary legislation); *United States v. Brown*, 552 F.2d 817, 819 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977) (finding consent by Minnesota to a federal enclave from the totality of that state’s conduct).

⁴⁸Robert G. Natelson, *More News on the Powers Reserved Exclusively to the States*, 20 FED. SOC. REV. 92, 95-96 (2019) (discussing grants through words of obligation in U.S. CONST. arts. IV & VI).

⁴⁹U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment,

to empanel juries and the juries to carry out their respective roles. These juries exercise federal *judicial* functions.

II. SOME COMMON CHARACTERISTICS OF FEDERAL FUNCTIONS

An actor exercising a federal function derives his, her, or its authority from the portion of the Constitution empowering the actor. The courts have made this clear by rejecting claims that a state legislature’s authority in the amendment process derives from powers reserved by the Tenth Amendment⁵⁰ and is therefore subject to state law.⁵¹ Similarly, when Congress exercises Article V functions, it acts as an independent assembly—not as the legislature empowered by other portions of the Constitution.⁵²

shall be by Jury”); *id.*, amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury”), *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”); *id.* amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”).

⁵⁰U.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.”) *See* *United States v. Sprague*, 282 U.S. 716 (1931) (holding the Tenth Amendment inapplicable to Article V); *United States v. Thibault*, 47 F.2d 169 (2d. Cir. 1931) (holding the Tenth Amendment inapplicable to Article V); *McPherson v. Blacker*, 146 U.S. 1 (1892) (holding that electors receive their power directly from the Constitution).

⁵¹*Leser v. Garnett*, 258 U.S. 130 (1922); *Hawke v. Smith*, 253 U.S. 221 (1920); *Trombetta v. State of Florida*, 353 F.Supp. 575 (M.D. Fla. 1973); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975); *Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972) (all holding that a legislature is free to disregard state rules when ratifying an amendment).

⁵²*State of Idaho v. Freeman*, 529 F. Supp. 1107 (D. Id. 1981), *judgment vacated as moot in*

Explicit powers devolving federal functions carry with them incidental authority, just as explicit powers elsewhere in the Constitution do.⁵³ The scope of incidental authority is defined by custom and necessity.⁵⁴

The courts frequently have adjudicated the question of whether the grant of a federal function carries with it a particular incidental power. The issue has surfaced most often in cases involving the amendment process. For example, if Congress selects the convention mode of ratifying a proposed amendment, the state legislatures enjoy incidental authority to constitute ratifying conventions for their states.⁵⁵ Similarly, a legislature or convention serving an Article V function has the well-recognized prerogative of adopting its own rules of suffrage and procedure.⁵⁶

National Organization for Women, Inc. v. Idaho, 459 U.S. 809 (1982) (stating that when acting in the amendment process Congress is not acting pursuant to its Article I legislative powers), relying in part on *Hollingsworth v. Virginia*, 3 U.S. 378 (1798) (holding the congressional proposal of an amendment is not part of the legislative process, so presentment to the president is unnecessary).

⁵³In Article V, “what is reasonably implied is as much a part of it as what is expressed.” *Dillon v. Gloss*, 256 U.S. 368, 373 (1921) (holding that Congress has power to limit time for ratification as incidental to its selection of a mode of ratification).

⁵⁴Robert G. Natelson, *Legal Origins of the Necessary and Proper Clause* in Gary Lawson, Geoffrey R. Miller, Robert G. Natelson & Guy I. Seidman, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 60-68 (2010).

⁵⁵*State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933); *In re Opinion of the Justices*, 167 A. 176 (Me. 1933); *State ex rel. Tate v. Sevier*, 62 S.W. 895 (Mo. 1933); *In re Opinion of the Justices*, 107 A. 673 (Me. 1919)

⁵⁶*Dyer v. Blair*, 390 F. Supp. 1291, 1307-08 (N.D. Ill. 1975) (opinion by future Justice John Paul Stevens).

Because a convention for proposing amendments is a “convention of the states,”⁵⁷ presumably state legislatures enjoy the incidental federal functions of deciding how their states’ commissioners are selected and instructed—state legislative prerogatives universal in the convention of states setting.⁵⁸ Of course, these Article V cases are merely specific applications of the wider principle that implied authority follows express powers.⁵⁹

However, no person or entity has incidental powers that would defeat or impair the constitutional functions of other persons or entities.⁶⁰ For example, fixing the time and place of meeting is incidental to Congress’s power to call an

⁵⁷*Smith v. Union Bank*, 30 U.S. 518, 528 (1831); *State of Tennessee v. Foreman*, 16 Tenn. 256, 304 (1835).

⁵⁸*Mystery*, *supra* note ____; *Rules*, *supra* note ____.

⁵⁹*Yarborough*, 110 U.S. at 658 (enlisting “the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed” to conclude that congressional powers are implied by the Elections Clause).

⁶⁰Thus, in *Howard Jarvis Taxpayers Ass’n v. Padilla*, 363 P.3d 628 (Cal. 2016), the California Supreme Court held that a state legislature acting under Article V enjoys an incidental power to investigate, but that

[T]he investigative power is not unlimited. While the Legislature's powers and functions are extensive . . . they must share space with powers reserved to the executive and judicial branches. Although the Legislature's activities can overlap with the functions of other branches to an extent, the Legislature may not use its powers to “defeat or materially impair” the exercise of its fellow branches' constitutional functions, nor “intrude upon a core zone” of another branch's authority.”

Id. at 634.

amendments convention.⁶¹ Allowing Congress to dictate rules and other procedures to the convention, as some have suggested,⁶² would undercut the convention's intended role as a way to bypass Congress,⁶³ and would violate the convention's incidental power to determine such matters for itself.⁶⁴

III. DIFFERENCES AMONG FEDERAL FUNCTIONS

The principal differences among federal functions are the actors' varying spheres of authority. Spheres of authority vary because each federal function has its own purpose and arises in its own textual and historical context. Thus, for each function the courts deduce the actor's scope of authority from the Constitution's text, the nature of the function, and the historical background.⁶⁵ The following summarizes some of the differences:

A state legislature acting under the Elections Clause *may not* adopt

⁶¹*Conventions*, *supra* note ___, at 629; LAW OF ARTICLE V, *supra* note ___ at 56-58.

⁶²*E.g.*, Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L. J. 957, 959 & 964 (1963).

⁶³*Rules*, *supra* note ___, at 699-700.

⁶⁴*Dyer v. Blair*, 390 F. Supp. 1291, 1307-08 (N.D. Ill. 1975) (opinion by future Justice John Paul Stevens) (convention may establish its own rules).

⁶⁵*E.g.*, *Bush v. Gore*, 531 U.S. 98 (2000) (limiting the state power to determine the mode of choosing electors); *Ray v. Blair*, 343 U.S. 214 (1952) (defining the scope of the state power to determine the mode of choosing presidential electors); *Smiley v. Holm*, 285 U.S. 355 (1932) (holding that the governor's signature is necessary to regulations under the Elections Clause because of their legislative nature and long acquiescence); *Hawke v. Smith*, 253 U.S. 221 (1920) (examining the historical use of the word "legislature" in Article V); *United States v. Thibault*, 47 F.2d 169 (2d Cir. 1931) (relying on long acquiescence to the practice of proposing and ratifying constitutional amendments).

regulations without the governor's signature (if required by the state constitution).⁶⁶ But a state legislature *may* undertake its Article V functions without gubernatorial approval.⁶⁷

The exercise of elective functions would be meaningless unless electors may exercise free choice among available candidates. This is obvious in the case of voting for members of Congress, and prior to adoption of the Seventeenth Amendment, state legislators were free to choose the Senators they wished.⁶⁸ Although some state laws seem to restrict the choice of presidential electors, their free exercise of discretion is supported by both the original Constitution and the congressional debates over the Twelfth Amendment.⁶⁹

On the other hand, the scope of an elector's authority is restricted to voting in the election. If, for example, presidential electors tried to propose a constitutional amendment to the states for ratification, that action would be *ultra vires*.⁷⁰

⁶⁶*Smiley* (holding that the governor's signature is necessary to regulations under the Elections Clause because of their legislative nature and long acquiescence).

⁶⁷*Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977); *accord: Hollingsworth v. Virginia*, 3 U.S. 378 (1798) (when Congress proposes an amendment the president's signature is not necessary).

⁶⁸In the decades before adoption of the Seventeenth Amendment, several states allowed voters to register their senatorial preference in general elections. State legislatures frequently elected candidates other than the popular vote winner. GEORGE H. HAYNES, *THE ELECTION OF SENATORS* 142-47 (1912).

⁶⁹Robert G. Natelson, *Presidential Elector Discretion: The Originalist Evidence*, THE ORIGINALISM BLOG, (April 6, 2020 10:08 PM) <https://originalismblog.typepad.com/the-originalism-blog/2018/01/president-elector-discretion-the-originalist-evidence-part-2-robert-natelson.html> (Univ. of San Diego, 2018).

⁷⁰*Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) ("The sole function of the presidential electors is to cast, certify, and transmit the vote of the state for president and vice-president

A convention for proposing amendments creates an interesting contrast to the Electoral College. In one sense, it has a wider scope of authority in that it may consider any proposal within the legislative applications of the states that applied for it. But according to the uniform history of similar “conventions of the states,” commissioners are subject to state legislative instruction in a way electors are not.⁷¹ Moreover, a convention for proposing amendments has only proposal power; other actions would be ultra vires.

A state legislature considering whether to apply for a convention to propose amendments has unfettered discretion on whether to apply and for what amendments to apply. Lawmakers cannot be coerced by voter initiatives or otherwise.⁷² State legislatures are similarly free to ratify, or refuse to ratify constitutional amendments.⁷³ State legislatures may sponsor advisory referenda,⁷⁴ but are, of course, limited to ratifying amendments that are duly proposed.

The scope of authority of delegates to a ratifying convention is structured differently yet: They are limited to the purposes of their call (an up-or-down vote on the proposed amendment) but within that limit they are free to exercise

of the nation.”).

⁷¹*Conventions*, *supra* note __; LAW OF ARTICLE V, *supra* note __, at 74.

⁷²*Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996); *In re Initiative Petition 364*, 930 P.2d 186 (Okla. 1996); *Opinion of the Justices*, 673 A.2d 693 (Me. 1996); *American Federation of Labor-Congress of Industrial Organizations v. Eu*, 686 P.2d 609 (Cal. 1984); *State of Montana ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984);

⁷³*Leser v. Garnett*, 258 U.S. 130 (1922); *Hawke v. Smith*, 253 U.S. 221 (1920); *Decher v. Vaughan*, 177 N.W. 388, 391 (1920).

⁷⁴*Padilla*, 363 P.3d 628.

discretion.⁷⁵ Federal juries are similar in that their authority is sharply restricted and consists mostly of exercising free discretion in casting an up-or-down vote. Congressional electors are restricted to voting for candidates for Congress, although they have free discretion within that narrow scope.

State legislatures apparently may rescind ratification of a proposed amendment before three fourths of the states have ratified⁷⁶ and are free to rescind applications for a convention before two thirds of the states have applied.⁷⁷

The courts have enlisted both history and constitutional text to determine that a state legislature may not yield its power to establish a ratifying convention to a popular referendum.⁷⁸ The Supreme Court of Maine enlisted the same sources to determine that a state legislature authorizing a ratifying convention must provide for delegate-selection by district rather than at large.⁷⁹

When a state exercises its legislative function under the Elections Clause, its scope of authority is constrained by the fact that Congress may override state regulations.⁸⁰ It is further constrained by constitutional rules prohibiting certain

⁷⁵In re Opinion of the Justices, 167 A. 176, 180 (Me. 1933) (“The convention must be free to exercise the essential and characteristic function of rational deliberation.”)

⁷⁶State of Idaho v. Freeman, 529 F. Supp. 1107, 1150 (D. Idaho 1981), *judgment vacated as moot*, *National Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

⁷⁷*Padilla*, 363 P.3d at 779 (citing *Fletcher v. Peck*, 10 U.S. 87, 135 (1810): “What the Legislature has enacted, it may repeal.”).

⁷⁸In re Opinion of the Justices, 107 A. 673 (Me. 1919); *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933). *See also* In re Opinions of the Justices, 172 S.E. 474 (N.C. 1933) (discussing the scope of a legislature’s authority to constitute a ratifying convention).

⁷⁹In re Opinion of the Justices, 167 A. 176 (Me. 1933).

⁸⁰U.S. CONST. art. I, § 4.

regulations.⁸¹

Finally, a governor's *administrative* function in issuing writs of election to fill congressional vacancies is also limited. In the usual case, issuing such a writ is mandatory, and refusing to do so is outside the governor's scope of authority.⁸² In marked contrast to the functions delegated to state entities by Article V, a governor's appointive function of filling Senate vacancies is controlled in part by state law.⁸³

CONCLUSION

The prominence in the Constitution of the list of congressional powers in Article I, Section 8 sometimes overshadows the fact that the document enumerates powers in various other places, including grants of power to actors not part of the federal government at all. The courts characterize the execution of such powers as "federal functions."

Federal functions exercised by non-federal actors fall into eight classes: electoral, appointive, proposing, ratifying, administrative, legislative, consenting, and judicial. They all share two characteristics. One is that the authority for executing them comes directly from the Constitution, and not from state constitutions or state or federal law—although in some cases the relevant constitutional provision explicitly authorizes regulation by state law. Another

⁸¹U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (holding that state legislatures acting under the Elections Clause could not add qualifications for members of Congress beyond those listed in the Constitution).

⁸²*Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010); *American Civil Liberties Union v. Taft*, 385 F.3d 641 (6th Cir. 2004); *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970).

⁸³*Valenti v. Rockefeller*, 292 F. Supp. 851 (S.D. N.Y. 1968), *affirmed*, 393 U.S. 405 (1969); *Tedards v. Ducey*, 398 F. Supp. 3d 529 (D. Ariz. 2019).

common characteristic is that the grants creating the functions, like other power grants in the Constitution, included limited incidental, implied authority.

Otherwise, these functions differ substantially. This is notably true in the scope of discretion exercised by each designated actor. For example, presidential electors are limited to a very narrow agenda, while state applications for a convention for proposing amendments generally offer that convention a broader scope. On the other hand, the discretion of presidential electors cannot (constitutionally, at least) be not forced by state direction, while amendments convention commissioners are subject to instructions from the legislatures that send them. Similarly, a state legislature determining how presidential electors are chosen has wide discretion, but a state legislature determining whether to ratify a proposed amendment—like a federal jury determining guilt or innocence—may cast only an up-or-down vote. In each case, the scope of authority is determined by the language the Constitution employs, the nature of the function, and the history behind it.