"FREE AND EQUAL": JAMES WILSON'S ELECTIONS CLAUSE AND ITS IMPLICATIONS FOR FIGHTING PARTISAN GERRYMANDERING IN STATE COURTS

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INTRODUCTION

In *Rucho v. Common Cause*,[1] the Supreme Court slammed the door shut on decades of federal claims regarding partisan gerrymandering.[2] Chief Justice John Roberts, writing for the five conservative Justices in the majority, found that the steady stream of cases arriving at the Court since the 1980's presented nonjusticiable political questions, outside the purview of Article III judges.[3] Without acknowledgment, *Rucho* overruled *Davis v. Bandemer*,[4] wherein a six-Justice majority of the Burger Court affirmatively found that partisan gerrymandering claims were justiciable, though it failed to reach a consensus as to the appropriate standard of judicial review.[5]

The result was not surprising. The October 2018 term was the first following the retirement of Justice Anthony Kennedy, whose vote in *Vieth v. Jubelirer*[6] had prevented his conservative colleagues from arriving at *Rucho*'s conclusion fifteen years earlier.[7] Justice Kennedy, who refused to foreclose the possibility that judicially manageable standards might one day emerge,[8] had been replaced by

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[1] Rucho v. Common Cause, 139 S. Ct. 2484 (2019).
[2] *See id.* at 2491.
[3] *See id.* at 2494.
[4] Davis v. Bandemer, 478 U.S. 109 (1986).
[5] *See id.* at 113.
[6] Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality).
[7] *See id.* at 306.
[8] *See id.* at 317 (Kennedy J., concurring) ("If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.").

Justice Brett Kavanaugh. Unlike his predecessor, who spent years wrestling with the implications of tests based on efficiency gaps[9] and partisan symmetry,[10] Justice Kavanaugh's position was uncomplicated. At oral argument, he expressed concern that the Court "getting involved" with the problem of "extreme partisan gerrymandering"—when there was already "a fair amount of activity going on in the states on redistricting and attention in Congress and in state supreme courts"—would be a "big lift."[11] In other words, he implied that these cases should be resolved elsewhere.

It was not the majority opinion in *Rucho*, but the "searing,"[12] "scathing,"[13] "impassioned"[14] dissent, read from the bench by Justice Elena Kagan, that grabbed headlines. She lambasted her colleagues' "abdication"[15] of responsibility and "complacency,"[16] writing that "in throwing up its hands, the majority misses something under its nose: What it says can't be done has been done."[17] In a footnote, she argued that "[c]ontrary to the majority's suggestion" that state courts had been operating with more "standards and guidance" than federal courts, the Supreme Court of Pennsylvania had found a manageable standard in broad language.[18] The case Justice Kagan cited was *League of Women Voters v. Commonwealth*,[19] a 2018 ruling that invalidated the Pennsylvania Congressional Redistricting Act of 2011.[20] Specifically, it held that the redistricting plan's maximization of Republican seats in Congress by "cracking" and "packing" Democratic votes violated the Pennsylvania Constitution's mandate

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[9] *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018).

[10] *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 421 (2006) (quoting Karcher v. Daggett, 462 U.S. 725, 730 (1983)).

[11] Transcript of Oral Argument at 69, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (No. 18-422).

[12] Sam Levine, *Listen to Justice Elena Kagan Voice Her Searing Dissent in Gerrymandering Case*, HUFFINGTON POST (Oct. 28, 2019), https://www.huffpost.com/entry/elena-kagan-partisan-gerrymandering-audio_n_5db70c96e4b05df62ec315bb [https://perma.cc/2U72-VAUE].

[13] Justin Wise, *Elena Kagan Issues Scathing Dissent Knocking 'Tragically Wrong' Gerrymandering Decision*, HILL (June 27, 2019), https://thehill.com/regulation/court-battles/450694-elena-kagan-issues-scathing-dissent-knocking-tragically-wrong [https://perma.cc/4K47-NZ3P].

[14] Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html [https://perma.cc/T2FF-448C].

[15] *Rucho,* 139 S. Ct. at 2509 (Kagan, J., dissenting).

[16] *Id.* at 2512.

[17] *Id.* at 2516 (emphasis in original).

[18] *See id.* at 2524 n.6.

[19] League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018).

[20] *See id.* at 825.

that "[e]lections shall be free and equal."[21] Justice Debra Todd's majority opinion took a "plain and expansive" reading of the clause, and grounded its interpretation in an examination of state political history in the 1760's and 1770's.[22]

What would not have been obvious to the four-Justice majority in *League of Women Voters*, in a world before *Rucho*, was that it was firing the first shot in the fight over partisan gerrymandering in its expansive new arena—state courts. The clause upon which that opinion rests was introduced in the Pennsylvania Constitution of 1790,[23] but it would soon travel. Over the course of the next century and a half, the clause migrated south and west, and it now appears in some form in about one third of all state constitutions.[24] Some of these states are major political battlegrounds and swing states, others home to the most severe statistical gerrymandering in the country.

Following *Rucho*, there is no federal remedy to a partisan gerrymander, no matter how overt or egregious.[25] As litigants turn to state courts and constitutions to continue these fights over representation (among a host of other so-called "democracy disputes"),[26] this Article aims to dive further into the "free and equal" elections clause, with particular focus on its authorship, its migration, and how it might be construed moving forward. Part I will trace the drafting of the clause to a dominant figure in Pennsylvania and national politics at the time, the Framer and radical Scottish democrat, James Wilson. Part II will discuss the clause's migration and its "free and open" derivatives, which share its philosophical

[21] *See id.* at 814; *see also* PA. CONST. art. I, § 5.
[22] *See League of Women Voters*, 178 A.3d at 804–09.
[23] PA. CONST. OF 1790, art. IX, § 5.
[24] *See infra* Appendix 1: Map of "Free and Equal" Elections Language in U.S. State Constitutions; *infra* Appendix 2: Table of U.S. State Constitutions with a "Free and Equal," "Free and Open," or "Free" Elections Clause.
[25] *See, e.g.*, Ralph Hise & David Lewis, *We Drew Congressional Maps for Partisan Advantage. That Was the Point.*, ATLANTIC (Mar. 25, 2019), https://www.theatlantic.com/ideas/archive/2019/03/ralph-hise-and-david-lewis-nc-gerrymandering/585619/ [https://perma.cc/DU4C-KEHU] ("I propose that we draw the maps to give a partisan advantage to 10 Republicans and three Democrats, because I do not believe it's possible to draw a map with 11 Republicans and two Democrats.").
[26] While this Article's focus is the applicability of the "free and equal" clauses to partisan gerrymandering disputes in state courts, it should be noted that the same language proved central to other controversial suits filed in the wake of the 2020 election. *See, e.g.*, Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020) (granting a three-day extension for the delivery of ballots during the COVID-19 pandemic under the "free and equal" clause). Naturally, the history of the clause and its transmission from state to state will also prove useful for those interested in such non-districting questions.

roots. Part III will then present three plausible readings of the clause as the battle over partisan gerrymandering transitions to state courts.

I. DRAFTING

In the state constitutional landscape of the Revolutionary Era, Pennsylvania stands out. For the most part, the documents that Americans drafted as they made the transition from colonists to citizens of independent states mirrored the colonial charters they replaced. Two common alterations were the contraction of executive power and the insertion of a declaration of rights.[27] The Pennsylvania Constitution of 1776, however, went far afield of the mold. Its defining feature was an extraordinarily powerful unicameral legislature, against which neither the plural executive nor the judiciary possessed any significant checks.[28] This form of government was viewed as "the most radically democratic of all the early state constitutions."[29] It "mark[ed] the outer limits of the Revolution,"[30] and it would unsurprisingly dominate the state's politics for the next fourteen years.[31]

Scholars have paid considerable attention to the document as a whole,[32] though not in particular to the Declaration of Rights, in large part because it was "patterned after Virginia's."[33] Beyond its guarantees of the freedoms to speak and assemble and utilize the

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[27] Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 546–47 (1989) [hereinafter Williams, *Pennsylvania's Radical 1776 Constitution*].

[28] *See id.* at 556.

[29] *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 802 (Pa. 2018) (quoting Ken Gormley et. al., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 3 (2004)).

[30] Richard Alan Ryerson, *Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutionalist Party*, *in* SOVEREIGN STATES IN AN AGE OF UNCERTAINTY 96 (1981).

[31] Williams, *Pennsylvania's Radical 1776 Constitution*, *supra* note 27, at 550 (identifying the 1776 Constitution as "the focal point of controversy over the proper structure of the new state government"); *id.* at 547 (discussing how "the Whig theory of republican government" came to "dominate state level politics" in the 1770's and 1780's) (quoting DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN EARLY STATE CONSTITUTIONS 129 (1980)).

[32] *See generally* J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY (1936); Williams, *Pennsylvania's Radical 1776 Constitution*, *supra* note 27; KENNETH OWEN, POLITICAL COMMUNITY IN REVOLUTIONARY PENNSYLVANIA, 1774–1800, 19–50 (2018); Paul L. Ford, *The Adoption of the Pennsylvania Constitution of 1776*, 10 POL. SCI. Q. 426 (1895).

[33] Williams, *Pennsylvania's Radical 1776 Constitution*, *supra* note 27, at 555.

press, the 1776 Constitution mandated that "all elections ought to be free."[34] Unlike the rest of this new form of government, such language was by no means revolutionary. Apart from its analog in Virginia, nearly identical language can be found in the English Bill of Rights, dating back to 1689.[35] Today, thirty state constitutions require that elections are "free."[36]

The pivotal addition would not be made until Pennsylvania's statesmen reconvened to do away with the controversial 1776 document. The result—the Constitution of 1790—would add the words "and equal."[37] This Part examines that addition. First, it will offer a brief, contextual overview of the 1790 convention. Next, it will connect this addition to the work of the convention's most influential player and the loudest democratic voice of the founding generation—Wilson—through an examination of his *Law Lectures* and his influence on the resulting document. Finally, it will consider three proposed amendments to the clause, all of which were rejected, and what these rejections might indicate about its meaning.

A. The 1789–1790 Convention

The bitter disagreements over the 1776 Constitution pitted two factions in Pennsylvania politics against one another: the Constitutionalists and the Republicans.[38] The former was defined by deep misgivings about any governmental body that might have "equal or greater authority than that of the Assembly," which they viewed as the "only legitimate voice of the people."[39] The latter argued that a republican form of government required a system of checks and balances, which the Assembly sorely lacked.[40] Historians have viewed the divisions between these factions as the beginning of

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[34] PA. CONST. of 1776 art. I, § 7, 13.
[35] *See* 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440 (1689) ("[b]y violating the freedom of election of members to serve in Parliament.").
[36] *Free and Equal Election Clauses in State Constitutions*, NAT'L CONF. STATE LEGISLATURES (Nov. 4, 2019), https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx [https://perma.cc/7K46-2PMH].
[37] PA. CONST. of 1790, art. IX, § 5.
[38] Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-90*, 59 PA. HIST. J. MID-ATL. STUD. 122, 124 (1992).
[39] *Id.*
[40] *See id.*

political conflict based upon national issues, represented by the emerging Federalist and Democratic-Republican parties.[41]

When the delegates assembled in Philadelphia on November 25, 1789, their purported intention was to alter and amend the 1776 Constitution.[42] Their focus was the structure of government—re-balancing legislative and executive power, while framing a new system of representation.[43] The Declaration of Rights section from 1776, in contrast, would "remain largely intact."[44] Language ensuring the freedom from unreasonable searches and seizures,[45] the freedom to bear arms,[46] and the freedom to worship[47] was transposed nearly word for word from one constitution to the next. There were some notable additions[48] and subtractions,[49] but the set of liberties that Pennsylvanians enjoyed stayed largely the same.

Perhaps the most notable change came with the seventh clause of the 1776 Declaration of Rights, which became more concise and saw a meaningful addition. It first read "[t]hat all elections ought to be free; and that all free men having a sufficient evident, common interest with, and attachment to the community, have a right to elect officers, or to be elected into one."[50] In its new form, it read "[t]hat elections shall be free and equal."[51]

[41] *See* HARRY M. TINKCOM, THE REPUBLICANS AND FEDERALISTS IN PENNSLYVANIA vii (1950). For more on this subject, see ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776–1790 (1942).
[42] *See* Foster, *supra* note 38, at 123.
[43] *See id.*
[44] Elizabeth Picciani, *A Transcription, History, and Analysis of the Pennsylvania Declaration of Rights and Constitution of 1776*, 1 J. PENN MANUSCRIPT COLLECTIVE 4 (2017).
[45] *Compare* PA. CONST. of 1776 art. I, § 10 ("themselves, their houses, papers, and possessions."), *with* PA CONST. of 1790 art. IX, § 8 ("their persons, houses, papers and possessions.").
[46] *Compare* PA. CONST. of 1776 art. I, § 13 ("right to bear arms for the defence of themselves and the state."), *with* PA CONST. of 1790 art. IX, § 21 ("right . . . to bear arms, in defence of themselves and the state.").
[47] *Compare* PA. CONST. of 1776 art. I, § 2 ("a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding."), *with* PA CONST. of 1790 art. IX, § 3 ("a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.").
[48] *See, e.g.*, PA. CONST. of 1790 art. IX, § 17 (forbidding *ex post facto* laws).
[49] *See, e.g.*, PA. CONST. of 1776 art. I, § 4 ("all power being originally inherent in, and consequently derived from, the people.").
[50] PA. CONST. OF 1776, art. I, § 7.
[51] PA. CONST. OF 1790, art. IX, § 5.

B. The Case for Wilson's Authorship

Apart from ideology, the most notable difference between the two factions that governed the work of the 1790 convention was in experience. Though they constituted a minority of the delegates, the Constitutionalists were led by political "veterans" and party leaders, men who had served multiple terms in Pennsylvania's Assembly, on the Executive Council, and in the 1787 state ratifying convention for the federal Constitution.[52] The Republicans, on the other hand, "were particularly inexperienced."[53] Many of the party's dignitaries had not stood for election to the convention and the faction "relied on lesser party members [and] anti-Constitutionalist sympathizers" lending their support.[54]

The noted exceptions to this rule of inexperience in the Republican coalition were James Wilson and William Lewis.[55] Both men would sit on the Committee of Nine, elected on December 11, 1789, to propose a new constitution based upon the convention's resolutions.[56] Lewis was a "prominent Republican politician" in late 1780's Pennsylvania.[57] He had participated in the drafting of a piece of legislation for the gradual abolition of slavery in 1780, and would later receive a judicial nomination from George Washington.[58] There is evidence that Alexander Hamilton consulted with Lewis when drafting his treatise on the constitutionality of the First Bank of the United States.[59] Much more, though, can be said about the positions and influence of Wilson.

1. Situating Wilson

A product of the Scottish Enlightenment, James Wilson was one of only six men to sign both the Declaration of Independence and the Constitution.[60] Though his legacy and influence were largely forgotten in the nineteenth and twentieth centuries, some have

[52] *See* Foster, *supra* note 38, at 128.
[53] *Id.* at 127.
[54] *Id.*
[55] *See id.*
[56] *Id.* at 129.
[57] *Id.*
[58] William Primrose, *Biography of William Lewis*, 20 PA. MAG. HIST. BIOGRAPHY 30 (1896), https://www.jstor.org/stable/pdf/20085675.pdf.
[59] *See* Bradley T. Dimmitt, Alexander Hamilton and the National Bank 49 (May 2010) (Master's thesis, East Tennessee State University).
[60] *See* 1 COLLECTED WORKS OF JAMES WILSON xiii (Kermit L. Hall & Mark D. Hall eds., 2007) [hereinafter VOL. 1 COLLECTED WORKS].

commented on a "Wilsonian revival" of recent decades.[61] Wilson's national prowess as he entered the convention was only bolstered by the fact that he had just been nominated as an inaugural Associate Justice of the U.S. Supreme Court in September and, in January, briefly left his fellow delegates to accept that commission.[62]

Wilson fiercely, relentlessly opposed the 1776 state Constitution[63] and he would be erroneously viewed and labeled as a conservative for it.[64] His later work would reveal that Wilson's reasoning was not anti-democratic. Rather, it stemmed from his commitment to another principle: the separation of powers.[65] He objected to the type of omnipotent, unicameral legislature that the Pennsylvania Assembly became because it was prone to "sudden and violent fits of despotism, injustice, and cruelty."[66] Wilson believed that, like the legislature, the executive and judicial branches should exist as coequal agents of the popular will.[67] For this position, he lost his seat in the Continental Congress in 1777.[68]

When Wilson participated in the Philadelphia Convention of 1787, the only delegate who spoke more than he did was Gouvernor Morris.[69] Wilson played a major role on the Committee of Detail, which prepared a written draft in alignment with the resolutions of the Convention.[70] He was the only Framer to argue for "the direct election of the executive, the direct and proportional election of senators, and the principle of 'one person one vote.'"[71] On the topic of proportional representation, he asked: "[s]hall New-Jersey have the same right or influence in the councils of the nation with

[61] Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & POL. 189, 189 (2014). Knapp credits Gordon Wood for sparking new interest in Wilson. *Id.* at n.1; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 653 (1969); Nicholas Pederson, *The Lost Founder: James Wilson in American Memory*, 22 YALE J. L. & HUMANITIES 257, 329 (2010).

[62] CHARLES P. SMITH, JAMES WILSON, FOUNDING FATHER 1742–1798, at 305–06 (1965).

[63] VOL. 1 COLLECTED WORKS, *supra* note 60, at xvii.

[64] *Id.* at xv.

[65] *See id.*

[66] *See* Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 154 (2003).

[67] VOL. 1 COLLECTED WORKS, *supra* note 60, at xxi.

[68] *Id.* at xvii–xviii.

[69] *Id.* at xiii.

[70] *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 xxii (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS I]; IRVING BRANT, JAMES MADISON FATHER OF THE CONSTITUTION 1787–1800, at 111 (1950) ("On the straight drafting job, this might be called a committee of Wilson and four others.").

[71] MARK D. HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742–1798, at 21 (1997).

Pennsylvania? I say no. It is unjust — I never will confederate on [such a] plan."[72] Wilson, therefore, occupied a peculiar position entering Pennsylvania's 1790 convention. On the one hand, he was among the new nation's most fervent, on-the-record proponents of radical, direct forms of democracy.[73] On the other, he was among the state's most vocal opponents of the 1776 form of government, the central feature of which was a radical, direct form of democracy.[74]

2. Wilson's *Law Lectures*

As aforementioned, it is not uncommon for state constitutions and declaration of rights to require that elections be "free."[75] In this respect, the clause as it appears in the 1790 Constitution was not an entirely novel invention. This subsection will make the textual case for Wilson's authorship of the addition "and equal," by pointing to his influential role at the convention and to invocations of this exact language, as well as its underlying principles, in his most extensive project of legal writing.

Most convincing to establish this addition as Wilson's are copious references in his *Law Lectures* to the clause's basic premise, which appear in the language that the clause ultimately uses. Specifically, these references come in the second half of his work, which consists of twenty-two chapters and contains a careful examination of the federal and Pennsylvania state constitutions.[76] Though they would not be published until six years after his death, Wilson composed and delivered his *Lectures* between 1790 and 1792.[77] Furthermore, it must be understood that they were more than a series of musings or passing thoughts—he had planned to publish these, in the hopes of securing his reputation as the American equivalent of Sir William Blackstone.[78] He delivered the first lecture in the presence of "the President of the United States, with his lady—also the Vice-President, and both houses of Congress, the President and both

[72] FARRAND'S RECORDS I, *supra* note 70, at 145.
[73] *See* HALL, *supra* note 71, at 22.
[74] *See* VOL. 1 COLLECTED WORKS, *supra* note 60, at xvii–xviii.
[75] *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 36.
[76] *See* 2 COLLECTED WORKS OF JAMES WILSON 404 (Mark D. Hall & Kermit L. Hall eds., 2007) [hereinafter VOL. 2 COLLECTED WORKS].
[77] *See id.*; Mark D. Hall, *Notes and Documents James Wilson's Law Lectures*, 128 PA. MAG. HIST. BIOGRAPHY 63, 65 (2004).
[78] *See* Hall, *supra* note 77, at 65.

houses of the Legislature of Pennsylvania."[79] Early in Chapter I of the second part, Wilson writes:

> The constitution of the United States and that of Pennsylvania rest solely, and in all their parts, on the great democratical principle of a representation of the people; in other words, of the moral person, known by the name of the state. This great principle necessarily draws along with it the consideration of another principle equally great—the *principle of free and equal elections*. To maintain, in purity and in vigour, this important principle, whose energy should pervade the most distant parts of the government, is the first duty, and ought to be the first care, of every free state. This is the original fountain, from which all the streams of administration flow. If this fountain is poisoned, the deleterious influence will extend to the remotest corners of the state: if this fountain continues pure and salubrious, the benign operation of its waters will diffuse universal health and soundness.[80]

Later, he directly quotes the text of the Pennsylvania Constitution of 1790 and references the "free and equal" clause as being "enumerated among the great points" of the new charter.[81]

Wilson then bifurcates the principle and expounds upon the importance of each of its component parts. Acknowledging the practical necessity of representation in large states, he posits that "two things are essentially necessary" to the "legitimate energy and weight of true representation"—(1) the representatives should express the same sentiments as the represented would express, and (2) the sentiments of the representatives should have the "same weight and influence" on the resulting governmental actions as if their constituents had expressed them personally.[82] To accomplish

[79] Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory*, 1984 SUPREME CT. REV. 359, 374 (1984) (quoting PENNSYLVANIA PACKET, and DAILY ADVERTISER (Philadelphia), Dec. 25, 1790)).
[80] VOL. 2 COLLECTED WORKS, *supra* note 76, at 833 (emphasis added).
[81] *Id.* at 839.
[82] *Id.* at 837.

the first object, all elections ought to be free; to accomplish the second object, all elections ought to be equal.[83]

The case for Wilson's authorship is difficult to refute in light of four distinct considerations. First, there is his position as a driving force at the 1790 convention. Though at least one scholar has suggested instances of the Committee of Nine "follow[ing] the lead of [William] Lewis" in its drafting,[84] broadly speaking, Wilson's persuasive ability and talent for coalition-building won the day. One observer lauded his speeches at the convention as "ingenious, solid, sublime, and couched in the most glowing expressions."[85] On several issues, starting with the direct popular election of senators, the Republicans split between Wilson and Lewis.[86] It was Wilson who would, alongside Constitutionalist leader William Findley, form a coalition that was "nearly invincible."[87] Together, these two men formulated a new, more effective system of government, without undoing the democratic principles at the core of the 1776 Constitution.

Second, Wilson's argument—as quoted above—explicitly separates the concepts of "free" elections and "equal" elections.[88] Juxtaposing this treatment of the clause with its predecessors (which guaranteed the former and were silent as to the latter), a fair inference from Wilson's argument is that free elections alone are insufficient. Ensuring true representation requires not only that all of the represented have *access* to the ballot box, but that their voices are granted equal *weight* in the resulting government.

Third, not only are Wilson's uses of the phrase "free and equal elections" in his *Law Lectures* identical to its ultimate use in the text, but they could hardly be any more contemporaneous. For a man so famously committed to the prospect of his own fame[89] to be extolling and highlighting this addition—which received relatively little attention otherwise—and for that addition to have been made by someone else would be unusual.

[83] *See id.* Over 180 years later, this second offering would go on to be quoted with approval in landmark Supreme Court cases establishing the principle of one-person, one-vote. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Reynolds v. Sims, 377 U.S. 533, 564 n.41 (1964).

[84] Foster, *supra* note 38, at 129.

[85] *See id.* at 131.

[86] *See id.* at 125.

[87] *See id.* at 134.

[88] *See* VOL. 2 COLLECTED WORKS, *supra* note 76, at 837 ("To accomplish the first object . . . To accomplish the second object . . .").

[89] *See* GEOFFREY SEED, JAMES WILSON 30 (1979) ("Reputation and fame were at all times Wilson's deepest desire.").

Fourth and finally, Wilson ascribes paramount importance to the "free and equal elections" principle. His *Lectures* dub it "the original fountain" from which all government flows.[90] He warns of the wide-ranging negative effects that will come of any "poison" that might enter it.[91] Wilson's metaphor reflects the centrality of this guarantee to his political philosophy. In his view, "free and equal" elections are the fundamental, necessary, and first prerequisites of democratic and republican government. His clause would guarantee their preservation.

C. Three Rejected Amendments

The "free and equal" clause did not, however, enjoy a particularly smooth transition from the Committee of Nine to the Committee of the Whole, which would debate and eventually enact the 1790 Constitution. Three of Wilson's most noteworthy colleagues would rise and propose amendments before the clause was officially added to the document.[92] Though all three proposed amendments failed,[93] it is useful to consider each in turn to shed light on the meaning of the language that weathered this parliamentary storm.

All three amendments were proposed during the convention's morning session on February 3, 1790.[94] The third and fourth sections of the Bill of Rights were first to be considered.[95] The former, on rights of conscience and worship, was adopted with one minor amendment, while the latter, on the disqualification from office based on religion, was adopted after two amendments and a motion to adjourn on its account failed.[96] Then, the fifth section was taken under consideration.[97]

First rose not a Pennsylvanian, but Timothy Pickering, a son of Massachusetts.[98] A former county judge and officer in the Revolutionary War, Pickering had moved to Pennsylvania and taken

[90] VOL. 2 COLLECTED WORKS, *supra* note 76, at 833.
[91] *Id.*
[92] MINUTES OF THE GRAND COMMITTEE OF THE WHOLE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA 85 (1790) [hereinafter PENNSYLVANIA MINUTES].
[93] *See id.*
[94] *Id.* at 84–85.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 85.
[98] *See* Jeffrey P. Brown, *Pickering, Timothy (1745–1829) in* 2 BLOOMSBURG ENCYCLOPEDIA OF THE AMERICAN ENLIGHTENMENT 811 (Mark G. Spencer, ed., 2014); PENNSYLVANIA MINUTES, *supra* note 92, at 85.

part in the 1787 convention to ratify the Federal Constitution.[99] He would later go on to serve as Secretary of State under the country's first two presidents and become a prominent figure in the Federalist Party.[100] Pickering's motion was to strike out the words "and equal."[101]

Next, the delegates heard from the sitting Chief Justice of the Commonwealth, Thomas McKean.[102] A leading voice for republicanism, he had served in the Continental Congress and as President of Delaware, and he would later serve three terms as Governor of Pennsylvania.[103] McKean moved to add to the end of the section the words "to every person entitled to vote."[104]

Finally, an amendment came from another adoptive Pennsylvanian in Albert Gallatin.[105] Hailing from Switzerland, Gallatin had settled in the western part of the state and was in the early stages of his long political career.[106] He would go on to represent Pennsylvania in both the House and the Senate, and later serve in the executive branch, most notably as the Secretary of the Treasury.[107] Gallatin proposed a second sentence in its entirety to be inserted after the words "and equal," that would read "[a]nd that all freemen, having a sufficient common interest in, and attachment to, the community, be entitled to vote."[108]

These rejected amendments are notable not only because of the personnel responsible for them—all of whom were of significant stature at the time and whose notoriety would only increase in the coming decade—but because of the meaning reflected by their rejection. In preserving the inclusion of "and equal" over Pickering's motion, a likely conclusion would be that those words were not extraneous or merely poetic to its drafters, but meaningful, substantive additions. Meanwhile, both McKean's proposal and Gallatin's proposal would have pointed the clause in another

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[99] *See* Brown, *supra* note 98, at 811.
[100] *See id.* at 812.
[101] PENNSYLVANIA MINUTES, *supra* note 92, at 85.
[102] *See* David Capper, *McKean, Thomas (1734–1817)*, *in* 2 BLOOMSBURG ENCYCLOPEDIA OF THE AMERICAN ENLIGHTENMENT 700 (Mark G. Spencer, ed., 2014).
[103] *See id.* at 701.
[104] PENNSYLVANIA MINUTES, *supra* note 92, at 85.
[105] Wilson J. Moses, *Gallatin, Albert (1761–1849)*, *in* 1 BLOOMSBURG ENCYCLOPEDIA OF THE AMERICAN ENLIGHTENMENT 470 (M. Spencer, ed., 2014).
[106] *Id.* at 470–72.
[107] *Id.* at 470.
[108] PENNSYLVANIA MINUTES, *supra* note 92, at 85.

direction; it would have been a clause about *who* can vote, rather than a clause about *how* elections should be conducted and evaluated.

To frame it in Wilson's own language, the goal of representation is to locate sovereignty in "the moral person, known by the name of the state."[109] This concept appears in the same lecture cited above, in which he describes the process of "the people form[ing] an artificial person or body politick, the highest and noblest that can be known."[110] Any of the three proposed amendments, if accepted, would have undermined what Wilson found necessary to achieve this goal. Without the ability to freely cast a ballot, how could society cohere into that "moral person?" Without the guarantee that elections are equal—in other words, that the "moral person" formed from them is an accurate representation of the electorate—how could any state action be understood as legitimate?[111] Pickering's amendment would have brushed this second question aside entirely, while McKean's and Gallatin's would have buried it between protections aimed at the first.

Though his amendment failed outright, Gallatin would write nearly half a century later that there was never a "'public act . . . more universally approved' than the 1790 Constitution."[112] And though the Pennsylvania charter would go through several revisions,[113] the text of Article IX, section 5 would remain intact until its treatment in *League of Women Voters*.[114] Beginning with a radically democratic, widely unpopular, largely unworkable constitution, Wilson and others had managed to preserve its principles of popular sovereignty, through provisions like Section 5, and institute a structure that was more conducive to governance. The following section will examine how Wilson's language went on to appear in one third of all state constitutions.

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[109] VOL. 2 COLLECTED WORKS, *supra* note 76, at 833. Wilson defines this "moral person" as the "complete body of free natural persons, united together for their common benefit" and writes that "to this moral person, we assign . . . the dignified appellation of *state*." *Id.* at 831.

[110] *Id.* at 831.

[111] *See generally* Patrick Peel, *The Populist Theory of the State in Early American Political Thought*, 71 POL. RSCH. Q. 115 (2018) (discussing how early Americans "defined the state as the people themselves" and examining the work of a number of Framers on this subject, including Wilson, Adams, and Madison).

[112] Foster, *supra* note 38, at 139.

[113] Pennsylvania would adopt new constitutions in 1838, 1874, and 1968. *See* PA CONST. of 1838; PA CONST. of 1874; PA CONST. of 1968.

[114] *See infra* Appendix 2: Table of U.S. State Constitutions with a "Free and Equal," "Free and Open," or "Free" Elections Clause.

II. MIGRATION

The "free and equal" elections clause that Pennsylvanians drafted in 1790 spread to sixteen other state constitutions.[115] First, this Part will examine the earliest state constitutions into which the language was transplanted, with a focus on Delaware and Kentucky. These episodes in the clause's story may serve to show that the language itself was less controversial to the legal minds of the day than one might expect. Next, it will briefly consider the reasons behind the clause's wide-ranging success. Finally, it will justify the treatment of "free and open" election clauses as descending from Wilson and Pennsylvania's 1790 Constitution.

A. Early Adopters, John Dickinson, and Delaware

After Pennsylvania, the first two states to adopt the "free and equal" elections clause were Kentucky and Delaware, both in 1792.[116] The former had severed itself from Virginia and been admitted into the Union the previous year, becoming the fifteenth state. Tracing the clause from Philadelphia to Danville is a relatively straightforward exercise in that the Kentucky convention lacked political experience and essentially assigned one man, George Nicholas (one of only two lawyers present), as its principal draftsman.[117]

A Virginian, Nicholas was a friend and correspondent of James Madison.[118] That he modeled Kentucky's new state constitution after Pennsylvania's system adopted two years prior can hardly be argued. Seventy-five of the 107 sections adopted in April 1792 were taken verbatim or substantially from the Pennsylvania charter.[119] With regards to the Bill of Rights, that ratio increases to twenty-seven of

[115] *See infra* Appendix 1: Map of "Free and Equal" Elections Language in U.S. State Constitutions; *see also infra* Appendix 2: Table of U.S. State Constitutions with a "Free and Equal," "Free and Open," or "Free" Elections Clause. These states are, in chronological order of adoption, as follows: Delaware, Kentucky, Tennessee, Indiana, Illinois, Missouri, Arkansas, New Mexico, Oregon, South Carolina, Colorado, Washington, Montana, South Dakota, Wyoming, Oklahoma, and Arizona.

[116] *See* KY. CONST. of 1792 art. XII, § 5; DEL. CONST. of 1792 art. I, § 3.

[117] *See* Paul B. Willingter, A History of the Danville Conventions, 1784–1792, 120–21 (1941) (M.A. dissertation, University of Louisville) (on file with Univ. of Louisville's Institutional Repository); Michael J. Herrick, Kentucky and Slavery: The Constitutional Convention of 1792, at 92 (Nov. 22, 2010) (Master's thesis, Dalhousie University).

[118] *See* ROBERT M. IRELAND, THE KENTUCKY STATE CONSTITUTION: A REFERENCE GUIDE 2 (G. Alan Tarr ed., 1999).

[119] *See id.*

the twenty-eight sections adopted.[120] Debates being minimal and the convention minutes constituting only a few pages,[121] Kentucky offers little guidance in terms of the substantive meaning of the clause.

Delaware, which would meet just two months later to strengthen its 1776 Constitution,[122] provides a more interesting case. Like Kentucky, much of the resulting framework resembled the document that had been introduced just miles up the river. Randy Holland, an expert in state constitutional law who spent three decades as a Justice of the Delaware Supreme Court, makes particular note of the Bill of Rights section "closely follow[ing]" that of Pennsylvania.[123] Furthermore, he posits that the presence of John Dickinson at both conventions "certainly must have had some role in explaining the strong resemblance."[124]

Dickinson was the most well-known and influential delegate at the Delaware convention that convened in 1791.[125] In the 1770's and 1780's, he had served as a member of the Continental Congress, first from Pennsylvania and then from Delaware; he would also serve as President of Delaware and Governor of Pennsylvania.[126] Dickinson was a widely recognized name for his written contributions to the Revolutionary Era[127] and numbered among the nation's most well-known draftsmen. He had served as president of the Annapolis Convention in 1786 and represented Delaware in the 1787 convention;[128] to put it lightly, he was a natural choice to chair the effort at revising the state's constitution.[129] He was certainly the

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[120] *See id.*

[121] *See* JOURNAL OF THE FIRST CONSTITUTIONAL CONVENTION OF KENTUCKY, HELD IN DANVILLE, KENTUCKY (1792).

[122] *See generally*, Paul Dolan, *The Constitution of Delaware*, 59 DICK L. REV. 75 (1954).

[123] RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE 7 (G. Alan Tarr ed., 2002).

[124] *Id.* at 7.

[125] *See id.* at 5; *see generally* WILLIAM MUNCHISON, THE COST OF LIBERTY: THE LIFE OF JOHN DICKINSON 172 (2013).

[126] *See* HOLLAND, *supra* note 123, at 6. In a controversial episode of his political history, Dickinson held both presidencies concurrently, from November 1782 to January 1783, when he officially resigned as the Delaware executive. *See* MUNCHISON, *supra* note 125, at 174.

[127] Dickinson was responsible for the Letters from a Farmer in Pennsylvania, most of the 1774 Petition to the King, the Olive Branch Petition, and the first draft of the Articles of Confederation, among other works. HOLLAND, *supra* note 123, at 6.

[128] *See id.* at at 5–6.

[129] After the drafting stage of the convention, Dickinson stepped down as president, citing poor health. He continued to attend sessions and remained "heavily involved." *Id.* at 6.

most influential on the Committee of Nine[130] responsible for proposing and composing revisions.

Students of Dickinson and his views about democracy might be puzzled by the "free and equal" clause's inclusion in the 1792 state Constitution. Though Wilson had studied law under him,[131] the two men differed greatly in their views. Even those who would not go so far as to define Dickinson by staunch conservatism[132] would have no trouble locating examples of him occupying a position that was directly antithetical to Wilson's. It was Dickinson, along with Edward Rutledge, who proposed the idea to the federal convention that representation in Congress should depend on the "actual contribution" of the states—that is, what they contributed to the national government in terms of taxes and resources.[133] He indicated that he favored limiting the franchise to freeholders, warning of the "dangerous influence of those multitudes without property [and] without principle."[134] He has been described as having "a horror of any changes brought about by any revolutionary means."[135] In his *Fabius* letters, he warned against an excess of democracy.[136] Dickinson refused to justify the French Revolution and spoke of the danger the country faced as a result of a "flood of atheism and democracy."[137] In short, if Wilson had been the most zealous advocate for direct, unadulterated democratic representation at the 1787 convention, Dickinson had been among the least.

There are two plausible explanations for Dickinson's implicit endorsement of the "free and equal" elections clause in 1792, which are not mutually exclusive. One would simply ascribe his comments at the federal convention to his role as a representative of Delaware's interests as a state. His position in Philadelphia came with "specific,

130 *See* PROCEEDINGS OF THE HOUSE OF ASSEMBLY OF THE DELAWARE STATE 1781-1792 AND OF THE CONSTITUTIONAL CONVENTION OF 1792, 837–38 (Claudia L. Bushman et al. eds., 1988).
131 *See* VOL. 1 COLLECTED WORKS, *supra* note 60, at xvi.
132 *See, e.g.,* MUNCHISON, *supra* note 125, at 106. For a critical response to Munchison, see Jane E. Calvert, *Myth-Making and Myth-Breaking in the Historiography of John Dickinson*, 34 J. EARLY REPUBLIC 467 (2014).
133 *See* FARRAND'S RECORDS I, *supra* note 70, at 207.
134 *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS II].
135 CHARLES J. STILLÉ, THE LIFE AND TIMES OF JOHN DICKINSON, 1732-1808, VOLUME 2, 43 (1891).
136 *See* Gregory S. Ahern, *The Spirit of American Constitutionalism: John Dickinson's Fabius Letters*, CTR. FOR CONSTITUTIONAL STUD. (Sept. 8, 2017), https://css.cua.edu/humanitas_journal/spirit-american-constitutionalism-john-dickinsons-fabius-letters/ [https://perma.cc/UQ37-LUFN].
137 STILLÉ, *supra* note 135, at 282.

tangible interests, most notably a desire to obtain a share . . . of western lands"[138] and to ensure that the smaller states would not be dwarfed by the larger states in the new national government. He may have seen a considerable distinction, and understandably so, between representation in national government and representation in state and local government. Furthermore, though Dickinson's language warns time and again of excessive, plebiscite democracy,[139] it is difficult to come across a quote of his that is actively *anti*-democratic. The best understanding may be that Dickinson favored democratic representation and recognized the utility of free and equal elections in achieving that goal, but did not place in them the same central importance that his pupil, Wilson, did.

Another, related explanation might be that there was nothing inherently controversial about the clause, even to a careful and experienced draftsman like Dickinson. That elections should be free and equal was a fairly obvious principle. As the Pennsylvania Supreme Court acknowledged in *League of Women Voters*, the state had struggled with underrepresentation as early as the 1750's.[140] None other than Dickinson was the leader of the Proprietary Party in the 1764 Assembly elections, when the undercounting of growing western counties was a major point of contention.[141] According to at least one historian, cited in Justice Todd's majority opinion, gerrymandering was regarded at the time of the convention as "one of the most flagrant evils and scandals of the time, involving notorious wrong to the people and open disgrace to republican institutions."[142] It would stand to reason that Dickinson have no objection to a provision aimed at remedying not only a known evil, but one against which he personally had struggled.

The Framers, according to the *Rucho* majority, were not only "aware of electoral districting problems," they had "considered what to do about them . . . [and] settled on . . . assigning the issue to the state legislatures . . . balanced by the Federal Congress."[143] In light of the clause's experience in Delaware and Kentucky in the years

[138] Forrest McDonald, *Most Underrated Founder: John Dickinson*, IMAGINATIVE CONSERVATIVE (Jun. 18, 2012), https://theimaginativeconservative.org/2012/06/most-underrated-of-all-founders-john.html [https://perma.cc/4EL5-AGVP].
[139] *See* Ahern, *supra* note 136.
[140] *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 805–06 (Pa. 2018).
[141] *See* JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 49 (2003).
[142] *League of Women Voters*, 178 A.3d at 740, 815 (citing THOMAS RAEBURN WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 192 (1907)).
[143] Rucho v. Common Cause, 139 S. Ct. 2484, 2496 (2019).

immediately following its conception, this seems to be a bit of an overstatement. Two of the era's most influential minds had seemingly recognized the risk of "assigning the issue to the state legislatures"[144] and introduced language into state constitutions so that the judiciary could check that risk. By 1796, that language had been added to the constitutions in four of the sixteen new states.[145]

B. Westward Expansion

Perhaps most notable about the "free and equal" clause's journey from coast to coast is how little it was actually noted. After the three failed amendments proposed in Pennsylvania in 1790,[146] the clause entered constitution after constitution without amendment or debate.[147] In one sense, the lack of any consideration of this language is itself remarkable, and perhaps, bears its own legal significance. After Kentucky, the clause spread without opposition or alteration to Tennessee, Indiana, Illinois, Arkansas, Oregon, and Arizona,[148] among others.

The ease with which convention after convention ratified Wilson's language might be explained by the simple fact that state constitution-making is often an unoriginal process. Delegates and draftsmen in frontier states regularly relied on the charters of established eastern states to guide their decisions.[149] Indiana's 1816 Constitution, for instance, is "[r]emarkable for its lack of originality," to the point that only ten percent of it was composed by its convention.[150]

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[144] *See supra* text accompanying notes 117–122, 138–142.

[145] *See infra* Appendix 2: Table of U.S. State Constitutions with a "Free and Equal," "Free and Open," or "Free" Elections Clause.

[146] *See* PENNSYLVANIA MINUTES, *supra* note 92.

[147] *See* WILLIAM BLOUNT & WILLIAM MACLIN, TENNESSEE CONSTITUTIONAL CONVENTION, JOURNAL OF THE PROCEEDINGS OF A CONVENTION 28 (1796) (no debate or discussion of the clause at adoption); WILLIAM HENDRICKS, JOURNAL OF THE CONVENTION OF THE INDIANA TERRITORY 63 (1816) (no debate or discussion of the clause at adoption); Richard V. Carpenter & J.W. Kitchell, *The Illinois Constitutional Convention*, 6 J. OF ILL. STATE HIST. 327, 392 (1818) (no debate or discussion of the clause at adoption); JOHN WILSON & C.P BERTRAND, JOURNAL OF THE PROCEEDINGS OF THE CONVENTION MET TO FORM A CONSTITUTION AND SYSTEM OF STATE GOVERNMENT FOR THE PEOPLE OF ARKANSAS 44 (1836) (no debate or discussion of the clause at adoption); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OREGON 63–64 (1857) (no debate or discussion of the clause at adoption); MINUTES OF THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF ARIZONA 391 (1910) (no debate or discussion of the clause at adoption).

[148] *Id.*

[149] *See* Peter S. Onuf, *Democracy, Empire, and the 1816 Indiana Constitution*, 111 IND. MAG. OF HIST. 5, 5 (2015).

[150] *Id.*

The clause's spread might also have been made easier by the reputation of the 1790 Constitution and by the presence of Pennsylvanians themselves. Kentuckians "leaned heavily" on the document, viewing it as a mitigation of the radically democratic 1776 scheme of government and a means of "contain[ing] the swiftly moving democratic currents of the early republic."[151] Eight Pennsylvanians were present at the Tennessee convention in 1796,[152] including Judge Joseph Anderson, who played a prominent role and assisted in drafting the Bill of Rights,[153] in which the "free and equal" clause would appear. Some of the earliest settlers of the modern-day American Midwest were Pennsylvanians, encouraged by federal grants and the promise of fertile land.[154] Later transmission might also be ascribed to simple geographic proximity—the first citizens of a new state were often formerly citizens of a neighboring state and looked across the nearest borders for inspiration. [155]

This migration, however, was not entirely uninterrupted. One minor, though important, alteration, would be introduced in the wake of the Civil War.

C. "Free and open"

Two states have adopted and subsequently altered the "free and equal" elections clause in their constitutions.[156] Missouri included the language in its inaugural 1820 document,[157] but it would change slightly to "free and open" in the 1865 iteration and remain that

[151] Matthew Schoenbachler, *A New Nation Votes, American Election Returns 1787–1825*, TUFTS UNIV., https://elections.lib.tufts.edu/?f%5Belection_type_sim%5D%5B%5D=General&f%5Boffice_id_ssim%5D%5B%5D=ON060&f%5Bparty_affiliation_id_ssim%5D%5B%5D=A03&f%5Bstate_name_sim%5D%5B%5D=Kentucky&per_page=10&sort=title_ssi+asc%2C+date_isi+asc [https://perma.cc/24UA-9AVF].

[152] *See* John D. Barnhart, *The Tennessee Constitution of 1796: A Product of the Old West*, 9 J. OF SOUTHERN HIST. 532, 539–40 (1943).

[153] *See id.* at 543–44; *Charles H. Anderson, Pioneer Federal Judge and Classic 'Roman' Senator: Joseph Inslee Anderson*, 43 TENN. BAR J. 18, 20 (2007).

[154] *See* New World Encyclopedia Contributors, *Midwestern United States*, NEW WORLD ENCYCLOPEDIA (Feb. 25, 2020), https://www.newworldencyclopedia.org/entry/Midwestern_United_States [https://perma.cc/DU2Q-SN53] ("The Ulster-Scots Presbyterians of Pennsylvania . . . were among the earliest pioneers to Ohio and the Midwest.").

[155] *See infra* Appendix 1: Map of "Free and Equal" Elections Language in U.S. State Constitutions.

[156] *See* MO. CONST. OF 1820 art. XIII, § 6; MO. CONST. OF 1865 art. I, § 14; MO. CONST. art. 1, § 25; N.M. CONST. OF 1850 art. I, § 8; N.M. CONST. OF 1872 art. II, § 18; N.M. CONST. OF 1889 art. 2.

[157] MO. CONST. OF 1820 art. XIII, § 6.

way.[158] Similarly, New Mexico's proposed constitutions in 1850 and 1872 guaranteed "free and equal" elections."[159] In its 1889 proposal, however, no version of the clause appeared.[160] Upon its eventual admission into the Union in 1912, the clause resurfaced as "free and open" and remains in that form today.[161]

In all, four state constitutions include "free and open" language that can be traced back to Wilson's clause—Missouri, New Mexico, Colorado, and Montana.[162] This modified clause's path originates in Missouri, whose 1875 Constitution was "closely studied" by the delegates of Colorado's convention in 1876.[163] Montana's 1889 Constitution was, in turn, "largely based" upon the product of Colorado's convention.[164] Though there is no established academic link when it comes to New Mexico's 1912 document, the influences of that same Colorado constitution are apparent from a straightforward comparison of the rights sections language in the two documents.[165]

What can explain this change? Furthermore, what, if anything, justifies the treatment of these four clauses as the progeny of Wilson's thinking? Though these questions likely invite more extensive, localized research of their own, the remainder of this section is dedicated to briefly answering them.

To the first question, the most straightforward theory that explains the change from "equal" to "open" relates to the voting rights of recently freed slaves. Missouri's first constitution had been "quite

[158] MO. CONST. OF 1865 art. I, § 14; MO. CONST. art. 1, § 25.

[159] N.M. CONST. OF 1850 art. I, § 8; N.M. CONST. OF 1872 art. II, § 18.

[160] *See* N.M. CONST. OF 1889 art. 2.

[161] NM. CONST. art. II, § 8.

[162] *See* MO. CONST. art. I, § 25; N.M. CONST. art. II, § 8; CO. CONST. art. II, § 5; MONT. CONST. art. II, § 13. Though South Carolina's state constitution, enacted in 1889, includes an identical provision that "elections shall be free and open," there is no apparent connection to the 1790 Pennsylvania convention, nor any of the states with "free and open" provisions derived therefrom. *See* S.C. CONST. art. I, § 5.

[163] David Kopel, *The Colorado Constitution and the Eternal Truths of the Declaration of Independence*, REASON: THE VOLOKH CONSPIRACY (Jul. 4, 2018), https://reason.com/2018/07/04/the-colorado-constitution-and-the-princi/# [https://perma.cc/QH69-Y99H].

[164] *See* Hannah Tokerud, Comment, *The Right of Suffrage in Montana: Voting Protections Under the State Constitution*, 74 MONT. L. REV. 417, 418 (2013).

[165] *Compare* N.M. CONST. art. II, § 7, *with* COLO. CONST. art. II, § 21 (identical language on the suspension of habeas corpus); *compare* N.M. CONST. art. II, § 10, *with* COLO. CONST. art. II, § 7 (identical language on rights against search and seizure); *compare* N.M. CONST. art. II, § 16, *with* COLO. CONST. art. 2, § 9 (identical language defining treason); *compare* N.M. CONST. art. II, § 9, *with* COLO. CONST. art. II, § 22 (identical language on the military being subject to civil power); *compare* N.M. CONST. art. II, § 23, *with* COLO. CONST. art. II, § 28 (identical language on reserved rights); *compare* N.M. CONST. art. II, § 13, *with* COLO. CONST. art. II, § 20 (identical language on excessive bail and unusual punishment).

brief," drafted for the purposes of its admission into the Union as part of the Compromise that also bore its name.[166] The 1865 "Drake" Constitution and its 1875 companion, by contrast, were wrought in the wake of the Civil War and, therefore, rich with competing interests. To Reconstruction politicians, intent on restricting the bloc of newly emancipated voters,[167] "free and open" may have sounded like a more manageable and realistic standard to adhere to than "free and equal." An election being "open" goes to access, whereas an election being "equal" relates to the weight and influence of those votes. This distinction could explain its failure when one delegate proposed that they return to the latter in 1875.[168]

As far as its treatment being similar to "free and equal" clauses elsewhere in the country, only the Missouri Supreme Court has offered conclusive guidance, treating that similarity as obvious. On more than one occasion, that tribunal has recognized the likeness of its clause, and held the provision to be "substantially the same."[169] One judge went so far as to call it "so nearly the same" in meaning as to be a "distinction without a difference."[170] Similarly, New Mexico's high court has indicated in *dicta* that the principle behind "free and equal" clauses should "guide" its interpretation of "free and open."[171] Barring any analysis from courts in Colorado or Montana, suggesting that this similarity does not warrant identical treatment, and given its position as the origin point for this branch of altered clauses, it is reasonable to view Missouri's reading as persuasive (and perhaps even highly persuasive).

The "free and equal" elections clause travelled well. From coast to coast, convention after convention enshrined James Wilson's words in their states' foundational documents. As the next Part will explain, this clause has lain dormant in these sixteen states for many years as far as gerrymandering is concerned; after *League of Women*

[166] RICHARD FULTON & JERRY BREKKE, UNDERSTANDING MISSOURI'S CONSTITUTIONAL GOVERNMENT 10 (2010).
[167] *See generally Constitution of 1865 – Drake Constitution*, MO. HIST. MUSEUM, http://www.civilwarmo.org/educators/resources/info-sheets/constitution-1865-drake-constitution (last visited Apr. 30, 2020) [https://perma.cc/C3LD-T7BJ] ("The Constitution did more than emancipate slaves and restrict voting rights.").
[168] *See* DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 69 (Isidor Loeb & Flyod C. Shoemaker eds., 1938).
[169] *Cf.* Preisler v. Calcaterra, 243 S.W.2d 62, 64 (Mo. 1951).
[170] State *ex rel.* Dunn v. Coburn, 168 S.W. 956, 962 (Mo. 1914) (Brown, J., dissenting) (equating the clause to the "free and equal" clause in the state constitution of Illinois).
[171] *See* Gunaji v. Macias, 31 P.3d 1008, 1016 (N.M. 2001).

Voters and *Rucho*, however, this state of affairs is likely to change in the near future.

III. FUTURE APPLICATIONS

In view of the clause's authorship and migration from Pennsylvania to as many as sixteen other constitutions, the question must be asked: will state courts across the country follow the example of *League of Women Voters*? No comparable discussion, much less an application, of Wilson's language in the context of partisan gerrymandering exists.[172] Some states have applied it in the context of voter ID laws[173] or voter disenfranchisement[174] or access to primary elections.[175] Illinois construes the clause to broadly require that votes of qualified electors be "equal in . . . influence" but has not applied it to the problem of gerrymandering specifically.[176]

The clause's lack of treatment in this context is to be expected for three states on the list—Delaware, South Dakota, and Wyoming are all represented by at-large districts,[177] eliminating any risk of a partisan gerrymander, at least when it comes to federal representation. In many others, though, there is not only the potential for a reading like Pennsylvania's, but similar representational injuries that invite future litigation.

In the 2018 House elections in Indiana, Republicans won just 55% of the statewide popular vote, but captured seven of nine (78%)

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[172] *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 813 n.71 (Pa. 2018) ("While those states whose constitutions have identical 'free and equal' language to that of the Pennsylvania Constitution have not addressed the identical issue before us today, they, and other states, have been willing to consider and invigorate their provisions similarly . . . .").

[173] *See* Martin v. Kohls, 444 S.W.3d 844, 853 (Ark. 2014) (Hudson Goodson, J., concurring) (referencing the "free and equal" clause in finding that a voter identification law violated the state constitution).

[174] *See* Wallbrecht v. Ingram, 175 S.W. 1022, 1026–27 (Ky. 1915) (holding voters who had been denied their right to cast a ballot by a ballot shortage had been deprived of a "free and equal" election).

[175] *See* Ladd v. Holmes, 66 P. 714, 721–23 (Or. 1901) (upholding the Lockwood Act which contained restrictions to primary ballots).

[176] *See* People *ex rel.* Breckon v. Bd. of Election Comm'rs, 77 N.E. 321, 322 (Ill. 1906), *overruled on other grounds by* People *ex rel.* Lindstrand v. Emmerson, 165 N.E. 217, 224 (Ill. 1929).

[177] Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 747 n.250 (1997) (further citation omitted). Montana was represented by an at-large district for many years but grew in population and will be represented by two districts again beginning in January 2023. *See* Shaylee Ragar, *Montana GOP Pushes for More Redistricting Power After State Gains Congressional Seat*, NPR (May 7, 2021), https://www.npr.org/2021/05/07/994415306/montana-gop-pushes-for-more-redistricting-power-after-state-gains-congressional- [https://perma.cc/5WB2-7UXS].

seats.[178] That year in Oregon, Republican candidates earned 39.8% of the statewide popular vote, but came away with only one of five (20%) seats.[179] According to a 2019 study, Arkansas, Oklahoma, Kentucky, and Tennessee all rank among the top ten worst partisan state legislative gerrymanders in the country.[180] "In Kentucky, only 57.9% of . . . voters chose the Republican candidates for state senate in 2018, but Republicans won 89.5% of the state senate seats up for election [that year]."[181] One analysis, based upon the influential efficiency gap metric, shows a partisan advantage worth one House seat in at least three states with "free and equal" clauses.[182] Where political avenues to reform the redistricting process fail, organizers in states whose constitutions bear Wilson's words may well look to the courts and to the example of *League of Women Voters* for remedy.

The following section will offer three possible readings of the clause: (1) the robust view, taken by the majority in *League of Women Voters*; (2) the fractured view, in which each state would determine whether and to what extent the intellectual history of the clause may guide their interpretation; and (3) the inkblot view, which finds little, if any, substantive effect in the clause. It will weigh each of these.

A. The Robust View

On June 9, 1787, as William Paterson and the small states assailed the Virginia Plan and the Constitutional Convention "exploded" into conflict,[183] James Wilson said:

> [T]he Doctrine of Representation is this—first the representative ought to speak the Language of his

[178] JOHN X. EGUIA, ARTIFICIAL PARTISAN ADVANTAGE IN REDISTRICTING 13, 18 (Mich. State Univ., 2019), https://scholar.harvard.edu/files/jeguia/files/apa20woa.pdf [https://perma.cc/JP2N-CT8Z].

[179] *Id.* at 13, 19.

[180] CHRISTIAN R. GROSE ET AL., THE WORST PARTISAN GERRYMANDERS IN U.S. STATE LEGISLATURES 2 (U.S.C. Schwarzenegger Inst., 2019) https://files.elfsight.com/storage/c98035dd-59ef-4b06-8e5b-c8d4dd555d9d/7f88292d-d6df-4f1c-9f0c-5f52e9d61a9e.pdf [https://perma.cc/66ND-TML6].

[181] *Id.* at 9.

[182] *See* Daniel McGlone & Esther Needham, *The Most Gerrymandered States Ranked by Efficiency Gap and Seat Advantage*, AZAVEA (Jul. 19, 2017) https://www.azavea.com/blog/2017/07/19/gerrymandered-states-ranked-efficiency-gap-seat-advantage/ [https://perma.cc/XT6P-PE7B]; *infra* Appendix 1: Map of "Free and Equal" Elections Language in U.S. State Constitutions.

[183] DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 65 (2007).

> Constituents, and secondly that his language or vote [should] have the same influence as though the Constituents gave it—apply this principle and it concludes in favor of an equality of Representation & [against] the present System[.][184]

Considering this statement alongside his assertion that free and equal elections are the "original fountain"[185] of all legitimate government and "essentially necessary" for "true representation"[186] (as discussed above), the incompatibility of modern partisan gerrymandering and the thinking behind the "free and equal" elections clause is apparent. When legislators draw districts to choose their constituents or intentionally dilute the voting strength of a competing party, they interrupt the proper process of representation. They invert the relationship by imposing a "language" upon their constituents, rather than learning it from them. They impede true representation of the whole electorate by increasing the influence of some voters upon the "moral person," who can act legitimately as the state, and decreasing the influence of others.[187]

Though it came to this conclusion without tying the language directly to Wilson and his *Law Lectures*, the Pennsylvania Supreme Court reasoned as much in *League of Women Voters*.[188] It found, based upon expert testimony, that the "2011 Plan subordinated the goals of compactness and political subdivision integrity to other considerations," in the process denying some voters an "equal opportunity to translate their votes into representation."[189] Practically speaking, the map had packed Democrats into a minority of districts and strategically spread out Republicans to sustain a 13-

[184] FARRAND'S RECORDS I, *supra* note 70, at 185.
[185] VOL. 2 COLLECTED WORKS, *supra* note 76, at 833.
[186] *Id.* at 837.
[187] *Id.* at 833. This is not to suggest that partisan gerrymanders operate by merely increasing the weight of votes going to Party A and decreasing the weight of votes going to Party B—rather, the idea that underlies "packing" and "cracking" is to position voters belonging to the map drawer's party in districts to maximize that party's influence. The map-drawer for Party A inherently imparts value and influence to the Party A voter who is added to a swing district to make it more competitive and decreases the importance of the Party B voter who is packed into a B+25 district. *See* Michael Wines, *What Is Gerrymandering? And How Does It Work?*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/gerrymander-explainer.html [https://perma.cc/GZ3R-GT4X].
[188] League of Women Voters v. Commonwealth, 178 A.3d 737, 818 (Pa. 2018). "An election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not 'free and equal.'" *Id.* at 821.
[189] *See id.* at 818, 804.

5 seat distribution in their favor—one that could not be explained statistically by geographic advantages.[190]

The Pennsylvania case suggests that tracing the clause in any of the constitutions in which it appears all the way back to Wilson's *Law Lectures* and broad declarations of democratic principle is actually far from necessary to arrive at such conclusions. A plain text reading of the clause would invalidate maps drawn with the express purpose of catering to the interests of a certain class of voters (that is, members of a certain political party) and disadvantaging others, because any election conducted under such a map would no longer be "free and equal." When legislators carefully carve districts to produce certain outcomes and enhance their party's influence, they inherently impede what would otherwise be organic electoral results and ensure that the interests of the population are unequally represented.

Even if a skeptic were to contest the notion that the plain meaning of "free and equal" implicates partisan gerrymandering, they would inevitably turn to some combination of original intent, original meaning, and the history of the clause—and they would arrive at the same conclusion. They would find very little in the way of individualized commentary and discussion in convention debates or drafting history. Rather, these hypothetical skeptics would find relative silence going back to the 1790 convention, the *Law Lectures*, and Wilson's principles of representation.

The interpreter who mistrusts original intent and seeks original public meaning instead would struggle to find contemporary uses of "free and equal" that provide any alternate meaning. In the context of elections, the most notable use of the phrase comes from amendments that the ratifying conventions of Massachusetts and New Hampshire proposed to the Federal Constitution.[191] Both recommended limiting the new Congress's Article I, Section 4 power to make laws regulating the "Times, Place, and Manner" of holding elections.[192] This power should have only been available, the conventions suggested, in those instances where a state refused to make regulations at all, or made regulations "subversive of the rights of the People to a free & equal representation in Congress."[193] This use of "free and equal" presents no conflict of meaning with Wilson's.

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190 *Id.* at 774.

191 *See* 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1469 (John P. Kaminski et. al., ed., 2000) (emphasis added) [hereinafter DHRC]; 28 DHRC 377 (John P. Kaminski et. al., ed., 2000).

192 6 DHRC 1469 (John P. Kaminski et. al., ed., 2000).

193 *Id.* (emphasis added).

Other contemporaneous uses of "free and equal" are largely in the context of two other nouns—governments[194] and men[195]—and do not present a conflict of meaning either. In applying these modifiers to elections, Wilson stands alone. His meaning should therefore predominate.[196]

As in *League of Women Voters*, application of this robust view by state courts should be accompanied by separation of powers analyses.[197] That redistricting is a primarily legislative process is not in question. That the judiciary has a legitimate and pressing responsibility to intervene in cases where political processes are unwilling or unable to fulfill the promises of their state's constitution should not be either. For those who find the involvement of judges in this process troublesome or the clause itself unwieldy, as the *Rucho* majority reminds us, constitutional amendment and political processes are always at their disposal.[198]

As it stands, however, the "free and equal" elections clause lays dormant in twelve state constitutions, as far as partisan gerrymandering is concerned. Moreover, it presents the most promising counteroffensive to that practice in those states after *Rucho*. While it may not provide an objective benchmark or an empirical threshold for elections to meet, the clause in context functions to raise a constitutional suspicion of maps where traditional redistricting principles are subordinated to partisan interests. Courts that adopt this robust view of the clause will find ample support in its uncomplicated migration and in Wilson's elaboration of the democratic principles that influenced its drafting.

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[194] *See, e.g.*, *Essays of Brutus, I (Oct. 18, 1787)*, *in* 2 THE COMPLETE ANTI-FEDERALIST 358, 372 (Herbert J. Storing ed., 1981) ("foundation upon which a free and equal government must rest . . . "); *Letters from The Federal Farmer No. 5 (Nov. 8, 1787)*, *in* 2 THE COMPLETE ANTI-FEDERALIST 214, 253 (Herbert J. Storing ed., 1981) ("an evident dislike to free and equal government . . . "); 20 DHRC 943, *A Plebeian: An Address to the People of the State of New York* (Apr. 17, 1788) (noting that "[a] Pennsylvanian" in the June 11 edition of the Pennsylvania Gazette chided a Plebeian for using a pseudonym "in a free and equal government, which rejects every preposterous distinction of blood or title").

[195] *See, e.g.*, MASS. CONST. art. 1, § 1 ("All men are born free and equal."); First Article, Declaration of the Rights of Man and of the Citizen ("Men are born and remain free and equal in rights.").

[196] Furthermore, it is difficult to imagine a more influential datapoint in any analysis of the original public meaning of "free and equal" in 1790 than Wilson's *Law Lectures*, an authoritative review of the principles underlying American law, delivered by one of the nation's first law professors and an inaugural Justice of the Supreme Court, in front of most of the state and federal government, part of which was published as a pamphlet and circulated to the population. *See* Hall, *supra* note 77, at 64.

[197] *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 821–24 (Pa. 2018).

[198] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2490 (2019).

B. The Fractured View

Uniformity of interpretation across state courts, however, may not be expected or even warranted. The definition of a "free and equal" election may vary from Pennsylvania to Kentucky to New Mexico to Oregon. A fractured approach to the clause's interpretation, wherein state courts may downplay the persuasive value of *League of Women Voters*, has its strengths and weaknesses.

The central strength of a state-by-state approach to interpreting the "free and equal" clause is that individual states may have even more proximate, and therefore more defensible, touchstones for its meaning. Litigants in New Mexico, for instance, may be better served by conducting their own analysis of founding documents and convention minutes than they would be by grounding a ruling in a provision that comes to them by way of three other states and over the course of a century. Not every state constitution was born in part out of questions over representation, like Pennsylvania's was in 1790. Rather than imparting Wilson's meaning to the clause, these hypothetical litigants might find more convincing meaning in sources from the Progressive Era or their state's cultural development.

Should courts take this individualized route, though, it is unclear what treatment would be ascribed to the choice of convention after convention to adopt Wilson's language. Lack of legal or political experience aside, the choices of these conventions and their delegates are regularly given great weight and meaning. To cast them aside on the presumption that they were unaware of the implications of adopting that language may undermine any number of other precedents. At the very least, litigants and judges favoring a fractured view would face a challenge in establishing that Oklahoma's "free and equal" is different from Kentucky's "free and equal," lacking any primary source or precedent distinguishing the two. Therein lies its weakness.

C. The Inkblot View

Some state courts may take the view, named in the style of Judge Robert Bork's famous comments about the Ninth Amendment,[199] that the clause is an inkblot, carrying little meaning, or even none at all.

[199] *See The Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary*, 100th Cong., 1st Sess. 249 (1987) (statement of Robert H. Bork).

Proponents of this view may concentrate on the broad and ubiquitous qualities of the words that make up the clause—"free" and "equal." Each of these words has been used widely and dynamically in American jurisprudence, and neither of them regularly in conjunction with the concept of elections.[200] Should state courts really be expected to embark upon an examination of their meaning relative to the state constitution with every new congressional map and population change? Giving this clause weight and settling on a definition of what constitutes a "free and equal" election may be neither possible nor prudent.

Proponents of this idea might find support in the fact that "free and equal" clauses generally appear in the Declaration of Rights section of a state constitution, rather than the section on Suffrage and Elections.[201] While those arguing for its application might find this distinction weightless, the inkblot interpreter may point to this section as the home of broad, poetic, less consequential language. These sections often include sweeping proclamations about the nature of citizens and government, not unlike the federal Preamble. Each constitution spills considerable ink detailing the qualifications of electors, the manner of elections, and the terms for which elected officials will serve. If the "free and equal" clause were meant to impose some workable standard, why not situate it there?

Adopting this view, however, would present a number of difficulties, not the least of which being that it would undermine the logic of *Rucho*. The majority opinion there not only argues but is *premised upon* the idea that a remedy exists elsewhere.[202] What, then, for the voter who suffers injury from an explicitly hyper-

[200] One example of an adjective that is more commonly used in conjunction with elections might be "fair."

[201] *See infra* Appendix 1: Map of "Free and Equal" Elections Language in U.S. State Constitutions; *infra* Appendix 2: Table of U.S. State Constitutions with a "Free and Equal," "Free and Open," or "Free" Elections Clause. Twelve states with "free and equal" clauses place it in their Bill of Rights or Declaration of Rights section—they are Arizona, Colorado, Delaware, Kentucky, Missouri, Montana, New Mexico, Pennsylvania, South Dakota, Tennessee, Washington, and Wyoming. See *infra* Appendix 1. Five states with "free and equal" clauses place it in a separate section on Suffrage and/or Elections—they are Arkansas, Illinois, Indiana, Oklahoma, and Oregon. *Id.*

[202] *See Rucho*, 139 S. Ct. at 2494 ("This Court's partisan gerrymandering cases have left unresolved the question whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere.") (emphases in original). Even if it is correct that an appropriate legal right or manageable legal principles do not exist at the federal level, the existence of a "free and equal" clause in a state constitution should at least foreclose the possibility that a remedy exists only in the political arena. Otherwise, the clause would be a nullity, and disfavored political groups could never find relief in the courts.

partisan legislature, turns to the state constitution for remedy and is told that this clause carries no meaning? Moreover, there is a consensus that state constitutions and state governments play an important role in the formation and protection of rights,[203] especially political rights.[204] Casting aside the implied right to participate in "free and equal" elections, though readily conceivable, would rest on the judicial acrobatics of someone intent on setting aside a great deal of history and doctrine, as well as a certain amount of judicial lethargy when it comes to challenging questions of constitutional interpretation.

CONCLUSION

In 2020, voters elected "more than 5,000 state lawmakers in 35 states who [played] a significant role in crafting or passing new maps . . . ."[205] These maps have determined the contours of House districts and state legislative districts across the country. One Democratic operative commented that "the next 10 years of politics [were] at stake," while a Republican counterpart stressed the importance of pouring money into these campaigns as a form of "long-term investment."[206] Both parties committed tens of millions of dollars more than they have in previous cycles to this goal.[207] Elections on the eve of redistricting have always carried heightened

[203] *See, e.g.*, *James Madison, House of Representatives Debates (June 8, 1789)*, *in* THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1032 (Bernard Schwartz ed., 1971) ("[T]he greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people's liberty."); THE FEDERALIST PAPERS: NO. 28 (Alexander Hamilton) ("It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.").

[204] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91 (2014) (discussing the lack of any federal guarantee to the right to vote and directing the inquiry to state constitutions, which generally do); *see also* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982) ("[T]he Constitution does not confer the right of suffrage upon anyone . . . the right to vote, per se, is not a constitutionally protected right.") (internal quotations and citations omitted).

[205] David A. Lieb, *Redistricting Power at Stake in 2020 Legislative Elections*, ASSOCIATED PRESS (Jan. 11, 2020), https://apnews.com/article/legislature-census-2020-state-legislature-elections-voting-17fd67ea6c27bcc62ca234e545029cfd [https://perma.cc/UM8R-655V]; *see also* Miles Parks, *Expert Warns of 'Real Festival of Partisan Gerrymandering' in 2021*, NPR (Apr. 19, 2020), https://www.npr.org/2020/04/19/836260800/expert-warns-of-real-festival-of-partisan-gerrymandering-in-2021 [https://perma.cc/ZD5R-Z32V].

[206] *See* David A. Lieb, *Redistricting Power at Stake in 2020 Legislative Elections*, L.A. TIMES (Jan. 11, 2020), https://www.latimes.com/politics/story/2020-01-11/redistricting-2020-elections [https://perma.cc/S5AX-SUDT].

[207] *See id.*

importance. The 2020 contests, though, are poised to prove even weightier in the long run for the simple reason that they represent the first instance of this phenomenon taking place in the wake of *Rucho*.

For decades, the fight over partisan gerrymandering was waged almost exclusively at the Supreme Court, in amicus briefs and mathematical studies, with an audience of one. Just eleven months after Justice Kennedy retired, that theater closed abruptly and for the foreseeable future. The *Rucho* dissenters, led by Justice Kagan, wasted no time in pointing to the next theater, where the fight may continue—state courts.

The "free and equal" elections clause is an exceedingly promising tool for opponents of partisan gerrymandering as they continue this fight. Litigants will find it present in some form in a third of all state constitutions. They will find *League of Women Voters* as persuasive, replicable precedent and volumes of theory on democratic representation from the works of James Wilson, in which they might base their arguments. In connecting the language to the most democratic Framer and his philosophy, new life can be breathed into a clause that has laid largely untouched in these states.

This Article favors the adoption of a robust view, in which the clause is more than a statement of principle. Rather, it connects its adopters to an expansive collection of political thought at the time of the Founding, with a focus on sovereignty and democratic legitimacy and republicanism. However, this project does not aim to offer a singular, comprehensive, authoritative reading of the clause. Rather, its intended contribution is to expand upon the Pennsylvania Supreme Court's ruling in *League of Women Voters* by ascribing authorship of the clause to James Wilson, to present a preliminary theory about the clause's spread, and to invite further scholarship and discussion. At its base, an expansive reading of the clause is possible for originalists of all stripes, textualists, legal realists, and living constitutionalists alike.

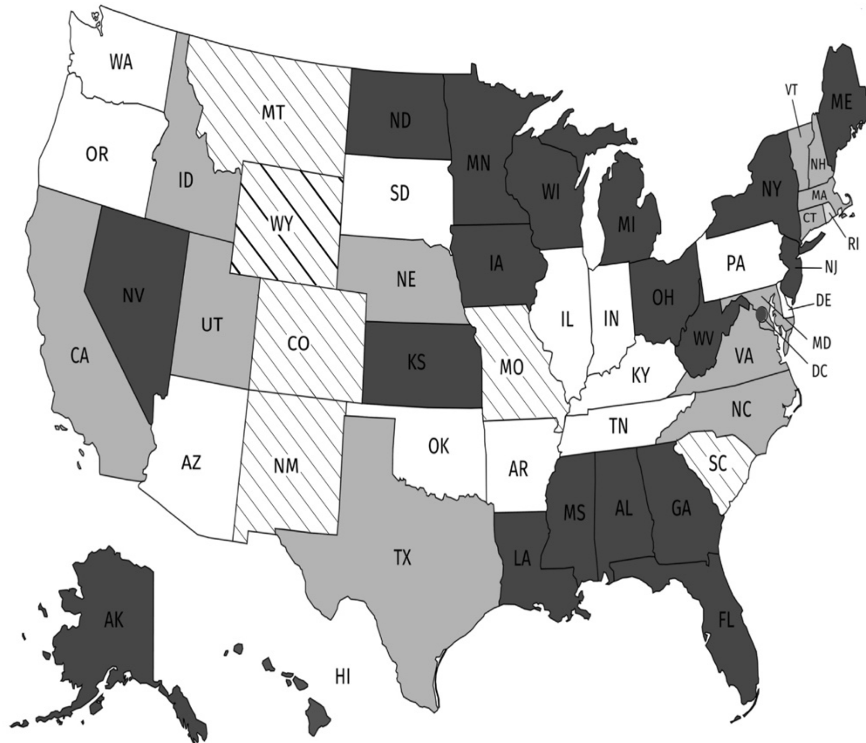
It will be up to voting rights advocates on the ground where this clause appears to dive deeper into their own state's constitutional history and precedents. The vicious combination of hyper-partisanship and astronomical, rising levels of political spending make prognostication that was once possible appear unthinkable. It is difficult to argue, though, that a tremendous fight—or, more likely, a long, tedious series of fights—over partisan gerrymandering is

brewing in state courts.[208] In preparation, both sides would do well to embark on a study of Wilson, his clause, and its migration from coast to coast.

[208] An underlying assumption of this position, of course, is that the Supreme Court does not adopt the independent state legislature theory, consideration of which is pending at the time of this Article's publication. *See* Moore v. Harper, 142 S. Ct. 2901 (2022) (granting certiorari on the question of whether the Elections Clause of the federal Constitution furnishes state legislatures with absolute authority over election regulation, to the exclusion of state courts and executive officers); *see also* Vikram D. Amar & Akhil R. Amar, *Eradicating Bush-League Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1 (2022) (lambasting the theory).

APPENDICES

Appendix 1: Map of "Free and Equal" Elections Language in U.S. State Constitutions



Key

- "Free and equal"
- "Free and open"
- "Open, free and equal"
- "Free"
- No relevant clause

Appendix 2: Table of U.S. State Constitutions with a “Free and Equal,”

“Free and Open,” or “Free” Elections Clause

State	Current Citation	Text	Constitutions
Arizona	art. II, § 21	“All elections shall be f**ree and equal**, . . . ”	1912
Arkansas	art. 3, § 2	“Elections shall be **free and equal**.”	1836, ~~1861~~, 1864, ~~1867~~, 1874
California	art. II, § 3	“The Legislature shall . . . provide for . . . **free** elections.”	~~1849~~, 1879
Colorado	art. II, § 5	“[A]ll elections shall be **free and open** . . . ”	1876
Connecticut	art. VI, § 4	“Laws shall be made to support the privilege of **free** suffrage, . . . ”	1818, 1965
Delaware	art. I, § 3	“All elections shall be **free and equal**.”	~~1776~~, 1792, 1831, 1897
Idaho	art. I, § 19	“No power, . . . shall at any time interfere with or prevent the **free** and lawful exercise of the right of suffrage.”	1890

Illinois	art. III, § 3	"All elections shall be **free and equal**."	1818, 1848, 1870, 1970
Indiana	art. 2, § 1	"All elections shall be **free and equal**."	1816, 1851
Kentucky	§ 6	"All election shall be **free and equal.**"	1792, 1799 1850, 1891
Maryland	art. 7	"elections ought to be **free** and frequent . . . "	1776, 1851, 1864, 1867
Massachusetts	art. IX	"All elections ought to be **free** . . . "	1780
Missouri	art. I, § 25	"That all elections shall be **free and open** . . . "	~~1820~~, ~~1865~~, 1875, 1945
Montana	art. II, § 13	"All elections shall be **free and open . . .** "	1889, 1972
Nebraska	art. I, § 22	"All elections shall be **free** . . . "	1875
New Hampshire	art. 11	"All elections are to be **free . . .** "	~~1776~~, 1784
New Mexico	art. II, § 8	"All elections shall be **free and open**…"	(1850), (1872), ~~1889~~, 1912
North Carolina	art. I, § 10	[1776, 1868] "All elections ought to be **free**." [1971] "All elections shall be **free**."	~~1776~~, 1868, 1971

Oklahoma	§ III-5	"All elections shall be **free and equal**."	1907
Oregon	art. II, § 1	"All elections shall be **free and equal**."	1857
Pennsylvania	art. I, § 5	"Elections shall be **free and equal** . . . "	~~1776~~, 1790, 1837, 1874, 1968
South Carolina	art. I, § 5	"All elections shall be **free and open** . . . "	~~1776~~, ~~1778~~, ~~1790~~, ~~1861~~, ~~1865~~, 1868, 1895
South Dakota	art. VII, § 1	"Elections shall be **free and equal** . . . "	1889
Tennessee	art. I, § 5	"That elections shall be **free and equal . . .** "	1796, 1835, 1870
Utah	art. I, § 17	"All elections shall be **free . . .** "	1895
Vermont	ch. 1, art. 8	"That all elections ought to be **free** and without corruption . . . "	1793
Virginia	art. I, § 6	"That all elections ought to be **free** . . . "	~~1776~~, ~~1830~~, 1851, ~~1864~~, 1870, 1902, 1971
Washington	art. I, § 19	"All Elections shall be **free and equal** . . . "	1889
Wyoming	art. I, § 27	"Elections shall be open, **free and equal . . .** "	1889

Legend

2020 – This iteration of the state constitution includes the text as it currently appears
~~2020~~ – This iteration of the state constitution does not include the text as it currently appears
(2020) – This iteration of the state constitution used “free and equal” language, but subsequent versions have altered the clause to read “free and open”

**For each state in this table, all ratified constitutions are listed.*