

A dark teal rectangular logo with white text that reads "ME AND EARL AND THE DYING GIRL".

The New York Times | <http://nyti.ms/1GVZgAY>

The Opinion Pages | OP-ED CONTRIBUTOR

At the Supreme Court, a Win for Direct Democracy

By **RICHARD H. PILDES** JUNE 29, 2015

IN 2000, voters in Arizona adopted a state constitutional amendment that created an independent commission to draw congressional districts. But the commission immediately faced a legal challenge: the United States Constitution gives the power to state legislatures (and to Congress) to regulate national elections — not to the voters. Can the word “legislature” in the Constitution mean voters themselves?

That question eventually came before the Supreme Court, which on Monday ruled, in a 5-to-4 decision, that the Constitution permits states to let their voters use “direct democracy” — popular votes on ballot measures, known as voter initiatives — to regulate the rules for national elections.

Ten states give commissions a role in congressional districting, though aside from Arizona, only California has a fully autonomous independent commission. But the stakes go beyond the design of election districts. In 21 states, voters can initiate legislation; in 18 states, they can initiate constitutional amendments.

In recent years, for example, voters in Washington and California have used this power to adopt a new form of primary election, known as the “top two” primary, designed to give voters more choices. If the Constitution permits

only state legislatures to enact such laws (or to refuse to enact them), these kinds of voter-initiated measures would be unconstitutional.

That's because the Constitution expressly gives power over elections to the legislatures. And in some parts of the Constitution, at least, the framers certainly meant "legislatures" to exclude direct popular decision making: The Constitution originally assigned the selection of senators to the state "legislatures," for the purpose of rejecting popular elections. It took the 17th Amendment to make direct election of senators possible.

So to uphold direct democracy as a constitutionally permissible tool for regulating elections, the court had to conclude that, when the Constitution uses the term "legislature," it does not (in its original formulation) permit the popular election of senators but does permit popular regulation of the election process. There is no easy answer, and that conundrum is what produced a legitimate 5-to-4 divide.

How did we arrive at a point at which, at least until the court's decision, it was unclear whether the Constitution required that the power to shape the election process be left with the most politically self-interested actors — state legislatures? The answer lies in the very success of the American Constitution.

Unlike most modern constitutions, such as those created after 1945, the American one does not create any specific, relatively unpoliticized institutions to oversee election ground rules. As the world gained more experience with constitutional democracy, societies recognized the need to take out of the hands of existing officeholders the power to control the rules under which they and their rivals compete for political power. But at the time the American Constitution was written, there was no discussion, or even any recognition, of the possibility of creating these kinds of institutions.

The failure of this system is what led the court eventually to step in during the 1960s to create the "one-vote, one-person" doctrine; before that, state legislatures were content, when it served their self-interest, to permit

enormous population inequalities across districts.

Constitutional law, however, cannot police all the risks of political self-entrenchment. The main, and best, justification for direct democracy is precisely the need for this kind of check, just as the voters in Arizona exercised, on the self-interested temptations of power when legislators regulate the political process itself.

Direct democracy is hardly a panacea or a pure expression of “the popular will,” whatever that means; voters must be organized and informed, which takes resources and organizational skill. Still, direct democracy remains an important means of policing the inevitable temptations those in power have to entrench themselves more securely in power.

On Monday the court rightly recognized that, when the Constitution assigned the elections clause power to the “legislatures,” the framers were not making a judgment about whether states could create direct democratic processes as another way to regulate the national election process. Unlike their rejection of popular Senate elections, the framers did not reject popular regulation of elections: They just never considered the idea. To reject it in their name, the court wisely concluded, would have been perverse.

The Supreme Court often surprises critics who see it in simplistically ideological terms. As this term and this decision confirm, the current court remains a pragmatically minded institution that interprets legal language with an eye toward the problems that language was created to address. As a result, direct democracy will remain available to constrain partisan gerrymandering and other ways legislatures seek to manipulate democratic purposes for self-serving reasons.

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A version of this op-ed appears in print on June 30, 2015, on page A23 of the New York edition with the headline: A Win for Direct Democracy.

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