SUPREME COURT OF THE UNITED STATES

No. 99–929

REBECCA MCDOWELL COOK, PETITIONER *v.*
DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

JUSTICE KENNEDY, concurring.

I join the opinion of the Court, holding §15 *et seq*. of Article VIII of the Missouri Constitution violative of the Constitution of the United States. It seems appropriate, however, to add these brief observations with respect to Part III of the opinion. The Court does not say the States are disabled from requesting specific action from Congress or from expressing their concerns to it. As the Court holds, however, the mechanism the State seeks to employ here goes well beyond this prerogative.

A State is not permitted to interpose itself between the people and their National Government as it seeks to do here. Whether a State's concern is with the proposed enactment of a constitutional amendment or an ordinary federal statute it simply lacks the power to impose any conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, §4. As the Court observed in *U. S. Term Limits, Inc.* v. *Thornton,* 514 U. S. 779 (1995), the Elections Clause is a "grant of authority to issue procedural regulations," and not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.,* at 833–834. The Elections Clause thus delegates but limited power over federal elections to the

States. *Id.*, at 804. The Court rules, as it must, that the amendments to Article VIII of the Missouri Constitution do not regulate the time or place of federal elections; rather, those provisions are an attempt to control the actions of the State's congressional delegation.

The dispositive principle in this case is fundamental to the Constitution, to the idea of federalism, and to the theory of representative government. The principle is that Senators and Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside. The Constitution was ratified by Conventions in the several States, not by the States themselves, U. S. Const., Art. VII, a historical fact and a constitutional imperative which underscore the proposition that the Constitution was ordained and established by the people of the United States. U. S. Const., preamble. The idea of federalism is that a National Legislature enacts laws which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office. If state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred, with the legislators having the excuse of saying that they did not act in the exercise of their best judgment but simply in conformance with a state mandate. As noted in the concurring opinion in *Thornton*, "[n]othing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." 514 U. S., at 842. Yet that is just what Missouri seeks to do through its law— to wield the power granted to it by the Elections Clause to handicap those who seek federal office by affixing pejorative labels next to their names on the ballot if they do not pledge to support the State's preferred

position on a certain issue. Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it. For these reasons Article VIII is void.

This said, it must be noted that when the Constitution was enacted, respectful petitions to legislators were an accepted mode of urging legislative action. See W. Miller, Arguing About Slavery 105–107 (1995). This right is preserved to individuals (the people) in the First Amendment. Even if a State, as an entity, is not itself protected by the Petition Clause, there is no principle prohibiting a state legislature from following a parallel course and by a memorial resolution requesting the Congress of the United States to pay heed to certain state concerns. From the earliest days of our Republic to the present time, States have done so in the context of federal legislation. See, *e.g.*, 22 Annals of Cong. 153–154 (1811) (reprinting a resolution by the General Assembly of the Commonwealth of Pennsylvania requesting that the charter of the Bank of the United States not be renewed); 2000 Ala. Acts 66 (requesting targeted relief for Medicare cuts); 2000 Kan. Sess. Laws ch. 186 (urging Congress to allow state-inspected meat to be shipped in interstate commerce). Indeed, the situation was even more complex in the early days of our Nation, when Senators were appointed by state legislatures rather than directly elected. At that time, it appears that some state legislatures followed a practice of instructing the Senators whom they had appointed to pass legislation, while only requesting that the Representatives, who had been elected by the people, do so. See 22 Annals of Cong. 153–154 (1811). I do not believe that the situation should be any different with respect to a proposed constitutional amendment, and indeed history bears this out. See, *e.g.*, 13 Annals of Cong. 95–96

(1803) (reprinting a resolution from the State of Vermont and the Commonwealth of Massachusetts requesting that Congress propose to the legislatures of the States a constitutional amendment akin to the Twelfth Amendment). The fact that the Members of the First Congress decided not to codify a right to instruct legislative representatives does not, in my view, prove that they intended to prohibit nonbinding petitions or memorials by the State as an entity.

If there are to be cases in which a close question exists regarding whether the State has exceeded its constitutional authority in attempting to influence congressional action, this case is not one of them. In today's case the question is not close. Here the State attempts to intrude upon the relationship between the people and their congressional delegates by seeking to control or confine the discretion of those delegates, and the interference is not permissible.

With these observations, I concur in the Court's opinion.