

FAILED ELECTIONS AND THE LEGISLATIVE SELECTION OF PRESIDENTIAL ELECTORS

JUSTIN LEVITT*

Questions about the state legislative role in determining the identity of presidential electors and electoral slates, and the permissible extent of a departure from regular legislative order, have recently reached peak prominence. Much of the controversy, including several cases to reach the Supreme Court, has concerned the constitutional delegation of power over pre-election rules. But a substantial amount of attention has also focused on the ability of state legislatures to appoint electors in the period between Election Day and the electors' vote.

An asserted legislative role in the post-election period has two ostensible sources: one constitutional and one statutory. The constitutional provision—the portion of Article II allowing states to appoint electors in the manner the legislature directs—has received substantial scholarly and judicial attention. In contrast, there has been no prominent exploration of the federal statute, 3 U.S.C. § 2, despite text similar to the constitutional provision. This piece is the first to explore that federal statute as an ostensible basis for a legislature's appointment of electors beyond the normal legislative process, in the aftermath of an election that has “failed to make a choice.” After reviewing the constitutional controversy, the Essay canvasses the history of the statute and its context. And it discovers a previously unreported historical anomaly, which might well affect construction not only of the statutory text, but also the constitutional predicate, in the event of a disputed presidential election.

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INTRODUCTION

Discussions of (wildly) improbable presidential electoral scenarios reached fever pitch in the 2020 elections. Pre-election, reporters anticipated scenarios in which one candidate did not receive an Electoral College majority and the election would be resolved by

* Copyright © 2021 by Justin Levitt, Professor of Law and Gerald T. McLaughlin Fellow, Loyola Law School, Los Angeles. I am grateful to Jim Blumstein, Ned Foley, Rick Hasen, Marty Lederman, Richard Pildes, William Popkin, Cameron Schroeder, Laurence Tribe, the faculty of the Washington University in St. Louis School of Law, and particularly Michael Morley for their helpful comments and suggestions, and to Lexi Ibrahim for her research assistance. All errors, of course, are my own. Nothing herein should be construed to reflect the views of any organization or government agency with which I am, or have been, affiliated.

the House of Representatives;¹ scenarios around a partisan tie in control of state delegations in the House, with the election to be resolved by the Senate;² and a number of other scenarios less likely still. Then, in the immediate aftermath of the election—in which ballots counted, canvassed, and confirmed via the normal institutional process produced a substantial Electoral College majority—there were half-baked suggestions, more prominent than they should have been, seeking to derail that majority in favor of the more esoteric fallback dispute resolution procedures not pertinent to the contest at hand.³

Some of the pre-election punditry and post-election armchair strategy was likely the inevitable product of a popular rediscovery of some of the more unusual nooks and crannies of our electoral system, and fascination with the less familiar procedural mechanics at the margins. Some was likely the product of black-swan focus on the election of 2000—resolved by the sort of contestation that accompanies a 537-vote margin in a single, pivotal state—and the fear or hope that 2000-level combat might bear fruit in an election not nearly as close.⁴ Some was likely created by a curious view of both electoral litigation and the tallying of votes as subvariants of magical realism, in which legitimate electoral expression could be nullified by the mere incantation of a legal catchphrase. Some was likely simply a projection

¹ See U.S. CONST. amend. XII (providing, in the event that one presidential candidate failed to secure an Electoral College majority, for the House of Representatives to select the President from the top three Electoral College contenders, with each state's delegation having one vote); John Bresnahan, Kyle Cheney & Heather Caygle, *Pelosi Begins Mustering Democrats for Possible House Decision on Presidency*, POLITICO (Sept. 27, 2020, 7:17 PM), <https://www.politico.com/news/2020/09/27/pelosi-mobilizes-democrats-house-decision-on-presidency-422359>.

² See Ed Kilgore, *Pelosi Makes Plans for House Election of President*, N.Y. MAG.: INTELLIGENCER (Sept. 28, 2020), <https://nymag.com/intelligencer/2020/09/pelosi-makes-plans-for-house-election-of-president.html>. Mechanically, in the event that no Presidential candidate received a majority of Electoral College votes, and the event that no majority of state delegations in the House chose the President, and the event that no Vice-Presidential candidate received a majority of Electoral College votes, the Senate would choose a Vice President to act as President. U.S. CONST. amend. XII.

³ See, e.g., Complaint for Expedited Declaratory and Emergency Injunctive Relief at 5, *Gohmert v. Pence*, No. 20-cv-00660 (E.D. Tex. Dec. 27, 2020) (claiming that when a state submits two or more presidential electoral slates, the Vice President exercises sole authority to determine which if any of those slates to count—in the context of an election in which no authorized state body submitted more than one presidential electoral slate).

⁴ The undue focus on a contested election along the lines of the 2000 election was likely also fueled by President Trump's contention that the sprint to confirm Justice Amy Coney Barrett was necessary in part to resolve disputes over the coming election. See Peter Baker, *Trump Says He Wants a Conservative Majority on the Supreme Court in Case of an Election Day Dispute*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/elections/trump-supreme-court-election-day.html>.

of generalized anxiety or discontent over a deeply divisive election process.⁵

Questions about state legislatures' role in determining the identity of presidential electors and electoral slates have been quite prominent in this mix. Some of the controversy has concerned the constitutional delegation of power over pre-election rules: when and to what degree election procedures set before Election Day apply to the selection of presidential electors, when those procedures are made or shaped by an entity other than the legislature, like an administrative actor or a state court.⁶ But a substantial amount of attention has also focused on the ability of state legislatures to appoint electors in the period between Election Day and the electors' vote.⁷

An asserted legislative role in the post-election period has two ostensible sources: one constitutional and one statutory. The constitutional provision—the portion of Article II allowing states to appoint electors in the manner the legislature directs—has received substantial scholarly and judicial attention. In contrast, there has been no promi-

⁵ See, e.g., Justin McCarthy, *Confidence in Accuracy of U.S. Election Matches Record Low*, GALLUP (Oct. 8, 2020), <https://news.gallup.com/poll/321665/confidence-accuracy-election-matches-record-low.aspx> (stating low confidence in election processes rising in part from concerns that differed across partisan lines); CRAIG M. BURNETT, KALIKOW SCHOOL POLL AT HOFSTRA UNIVERSITY: EXECUTIVE SUMMARY AND ANALYSIS 7–9 (2020), <https://www.hofstra.edu/pdf/academics/colleges/hclas/gov-policy-international/kalikow-poll-0920.pdf> (describing concern about foreign influence and mail-in voting, belief in rates of fraud, and acceptance of election results if the results are not clear on November 3). See generally *Voter Confidence*, MIT ELECTION DATA + SCI. LAB, <https://electionlab.mit.edu/research/voter-confidence> (last updated Apr. 2, 2021) (reviewing factors that influence voter confidence and noting that political outcomes can influence people's confidence in elections).

⁶ See, e.g., Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari at 21–22, *Scarnati v. Boockvar*, 141 S. Ct. 644 (2020) (No. 20A53), 2020 WL 5898732 (arguing that state court interpretations of statutes passed by the Pennsylvania State Legislature are not binding in determining rules for federal elections); Justin Levitt, *Pennsylvania Legislators Invite Some Extra SCOTUS Chaos This Election Season*, TAKE CARE (Sept. 29, 2020), <https://takecareblog.com/blog/pennsylvania-legislators-invite-some-extra-scotus-chaos-this-election-season> (reviewing the significant downstream consequences of exempting state legislatures from state constitutional constraints for purposes of federal elections); *Carson v. Simon*, 978 F.3d 1051, 1059–60 (8th Cir. 2020) (finding that a consent decree issued by a state court at the request of the Secretary of State, to settle litigation concerning a statute passed by the Minnesota State Legislature, is not binding for purposes of federal elections).

⁷ See, e.g., Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors to Vote for Trump? Not Likely*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/article/electors-vote.html>; Barton Gellman, *The Election That Could Break America*, ATLANTIC (Sept. 23, 2020), <https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424>; Charles L. Zelden, *Guest Opinion: Legislatures Picking Electors to the Electoral College: It Could Not Only Happen, It Almost Did*, USA TODAY (Sept. 28, 2020, 6:01 AM), <https://www.news-press.com/story/opinion/2020/09/28/electoral-college-presidential-election-2020-trump-biden-charles-zelden/3537063001>.

ment exploration of the federal statute, 3 U.S.C. § 2, despite text similar to the constitutional provision. This piece represents the first examination of that federal statute as an ostensible basis for a legislature's appointment of electors beyond the normal legislative process, in the aftermath of an election that "has failed to make a choice."⁸ After reviewing the constitutional controversy in Part I, the Essay in Part II canvasses the history of the statute and its context. It unearths a previously unreported historical anomaly that should affect construction of the statutory text. Indeed, as discussed in Part III, a proper understanding of the nineteenth-century statute at issue here might also shed new light on the nineteenth-century jurisprudence purportedly relevant to the determination of the constitutional question in the event of another disputed presidential election.

I

THE CONSTITUTION

First, an abbreviated review of the constitutional controversy, much of which has been discussed in more detail in other fora.⁹ Article II provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct," electors for President.¹⁰

⁸ 3 U.S.C. § 2.

⁹ See, e.g., Memorandum from Grace Brososky, Michael C. Dorf & Laurence H. Tribe, *State Legislatures Cannot Act Alone in Assigning Electors* (Sept. 25, 2020), <https://drive.google.com/file/d/109FpcfXzXwcpJL43pgaTBmh-PD9pgDLx/view> [<https://perma.cc/EX4F-AALD>] [hereinafter Brososky, Dorf & Tribe Memorandum] (discussing the independent state legislature doctrine); Grace Brososky, Michael C. Dorf & Laurence H. Tribe, *State Legislatures Cannot Act Alone in Assigning Electors*, DORF ON LAW (Sept. 25, 2020), <http://www.dorfonlaw.org/2020/09/state-legislatures-cannot-act-alone-in.html> (presenting an abbreviated version of the same); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020) [hereinafter Morley, *Independent State Legislature*] (discussing the independent state legislature doctrine); Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO STATE L.J. 689 (2016) (same); Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 HARV. J.L. & PUB. POL'Y 341 (2016) (same); Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847 (2015) [hereinafter Morley, *Intratextual Independent Legislature*] (same); Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q. 599 (2008) (same); Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. STATE U. L. REV. 811 (2001) (same); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. STATE U. L. REV. 731 (2001) (same); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in Bush v Gore Defended*, 68 U. CHI. L. REV. 613 (2001) (same); RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001) (same); James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495 (1962) (same).

¹⁰ U.S. CONST. art. II, § 1, cl. 2.

The claim for legislative priority imagines this text as a direct and irrevocable grant of federal authority to a specified state body, purportedly allowing the legislative body plenary dispensation to designate whichever electors it wishes. The strong version of this “independent state legislature” notion imagines the legislature empowered by its federal constitutional designation to select electors free of any substantive or procedural constraints in the state constitution, wholly independent from gubernatorial or state judicial interference.¹¹

A weaker version of the doctrine—capturing the attention of three Justices in *Bush v. Gore*¹²—imagines that it prioritizes state statutes, as the embodiment of the will of the legislature, over some but not all interpretations of the state courts.¹³ For example, some variants of this form of the doctrine assert that Article II does not free legislatures from procedural constraints in the state constitution (like

¹¹ See, e.g., *Carson*, 978 F.3d at 1060 (“In fact, a legislature’s power in this area is such that it ‘cannot be taken from them or modified’ even through ‘their state constitutions.’” (quoting *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (quoting S. REP. NO. 43-395, at 9 (1874)))); Smith, *supra* note 9, at 734.

¹² See 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring). Specifically, Rehnquist asserted that

the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State . . . and to state circuit courts In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida’s executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court’s actions. But, with respect to a Presidential election, the court must be both mindful of the legislature’s role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate. . . . [We would] hold that the Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.

Id. at 114–15.

¹³ See, e.g., Smith, *supra* note 9, at 734–35 (noting that a weaker version of the doctrine might allow state constitutions to place “minimal” restrictions on the legislature, but not “more intrusive” ones); Epstein, *supra* note 9, at 619–20 (proposing a version of the doctrine permitting renderings of state statutes “within the boundaries of acceptable interpretation” but not “gross deviation[s]” from a statutory scheme, but giving short shrift to the role of a state constitution in that balance); Friedman, *supra* note 9, at 834–41 (articulating a version of the doctrine allowing state constitutions to impose procedural rules but not substantive ones, and granting the state judiciary “substantial deference” to interpret state statutes in all but “clearly implausible” ways); Morley, *Intratextual Independent Legislature*, *supra* note 9, at 866 (arguing for a version of the doctrine that does not subject state legislatures to the substantive constraints of a state constitution, thereby implying procedural constraints still apply); Morley, *Independent State Legislature*, *supra* note 9, at 24–25, 69, 91–92 (explaining a version of the doctrine subjecting state legislatures to ordinary lawmaking procedure, exempting legislatures from state constitutional substantive constraints, and holding courts to a “super-strong plain meaning approach” in construing legislative text).

quorum rules or presentation to the governor), but does immunize procedurally proper statutes concerning presidential electors from any substantive state constitutional limits.¹⁴ Other variants might bind state legislatures for Article II purposes to a subset of substantive state constitutional provisions articulated with some degree of specificity (e.g., ballots must be received by a particular enumerated date), but not judicial interpretations of state constitutional provisions that are more vague (e.g., elections must be free and fair).

Extracting state legislatures from their state constitutional context for purposes of setting the rules for presidential elections creates deep problems not far beneath the surface of the text. The strong version of the doctrine, nullifying *all* state limits on the legislature as a body, seems to create a philosophical quandary. A state legislature acting in a legislative capacity derives its existence and shape from its state constitution. Without those limits, it may have the same component legislators, but it is not the same lawmaking institution.¹⁵ If you gather the musicians of the Los Angeles Philharmonic Orchestra and randomly assign their instruments—or remove them from their instruments altogether, as when they play in a softball game—what you have is not the anticipated orchestral manifestation of “the Los Angeles Philharmonic,” but merely an assembly of the members of the Los Angeles Philharmonic, acting in a different way with different capacities. Remove the constituent members from the context in which their familiar institutional identity is shaped, and what you have is a fundamentally distinct entity.¹⁶

¹⁴ See, e.g., Kirby, *supra* note 9, at 503–04 (arguing that state legislatures are limited by procedural but not substantive provisions of the constitution); Morley, *Independent State Legislature*, *supra* note 9, at 25–27, 41–45, 69, 91–92 (urging this view, and chronicling support in several nineteenth-century state supreme court decisions, and in several Reconstruction Congress evaluations of congressional elections).

¹⁵ The procedural and substantive limitations that a state constitution places on its own legislature might, in this context, be seen as “nonseverable” components of the power the legislature is granted to act as the state’s legislative organ; they are the commitments upon which the authority to act as a legislature is predicated.

¹⁶ The Court has held that different constitutional delegations to the “Legislature” have different referents dependent on their context, and the distinct constitutional function fulfilled. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015) (“[T]he meaning of the word ‘legislature,’ used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise.” (alterations in original) (quoting *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 434 (1932))). But cf. Morley, *Intratextual Independent Legislature*, *supra* note 9 (arguing that the referents should be the same). Article I, § 4 calls for a regulatory function, and so the Court has held that the constitutional provision refers to the entities entrusted by state law with lawmaking. See *infra* text accompanying notes 29–38 and note 35. Article I, § 3 and Article V call for electoral functions (the selection of Senators and the ratification of

The strong version of the doctrine also presents extremely difficult jurisprudential questions for any federal court asked to resolve the rules of a presidential election, including questions about the degree to which a legislature with exclusive state authority over presidential elections may permissibly delegate more granular policymaking to administrative entities, or empower state courts to bind future state legislatures via state constitutional provisions the legislature itself has passed. Consider also the intractable questions of statutory interpretation in federal courts divining the meaning of state statutory text passed in light of a background understanding of the requirements of the state constitution or the common law, suddenly cut loose from that state judicial context.¹⁷ Freeing state statutory text from the requirements of the state constitution in the context of regulations for presidential elections involves the use of a decoding system different from the encoding engine the legislature used in the first place, with similar potential for errant translation.

The strong version of the doctrine yields profoundly disruptive practical consequences as well: Bills that were passed and vetoed, statutes superseded by initiative, and statutes struck down by a state court would suddenly be live for purposes of a presidential race but not for state offices.¹⁸ And the commands of these otherwise-invalid legislative vehicles would have to be reconciled with valid statutes that were passed on the assumption that the prior invalid text had no legal effect. Some of these zombie requirements could potentially be handled by separating presidential ballots from ballots for other offices,

amendments, respectively), and so the Court has held that these constitutional provisions refer to the legislators acting as an exclusive collective body. *See infra* note 35.

The electoral manifestation of the “Legislature”—a legislature acting to select Senators or ratify amendments—is an unusual function for a body more normally tasked with generally applicable regulation. To extend the analogy in the text, it asks something different of “the members of the Los Angeles Philharmonic” than the normal way in which the orchestra produces a musical performance. This is not particularly troublesome as a matter of linguistic practice. In referring to “the Supreme Court,” we understand that the institution has certain rules when it is acting in its usual judicial capacity, and count on normal practice for the granting of certiorari and handing out opinions—even as we understand that those rules may not govern when “the Supreme Court” orders lunch or appears at dignitary events.

¹⁷ *See* Jack Michael Beermann & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) About Counting Electoral Votes* 6, 35–36 (Bos. Univ. Sch. of L., Pub. L. & Legal Theory Paper No. 21-07, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3795421 (noting that a strictly textualist reading of a statute abstracted from context may—or may not—comport with any particular state legislature’s preferred legislative approach to statutory interpretation).

¹⁸ *See, e.g.,* Nathaniel F. Rubin, *The Electors Clause and the Governor’s Veto*, 106 *CORNELL L. REV. ONLINE* 57, 69–70 (2021) (noting the disruptive impact of revived vetoed bills).

with (perhaps) different rules for eligibility and completing the ballot—and attendant complexities for election administrators and confusion for voters. But other limitations would be even more confounding. Imagine a statutory five-minute mandatory time limit on remaining in the voting booth, construed by state courts based on state constitutional principles to be hortatory.¹⁹ When that rule is resurrected for presidential races but not for state contests, on the understanding that neither state courts nor state constitutions may constrain legislative action in regulating presidential elections, is a voter breaking the law or not breaking the law at minute six?

The weaker forms of the “independent state legislature” doctrine avoid some of the philosophical and procedural conundrums, but many of the same substantive interpretive and practical concerns remain. Federal courts would be repeatedly called to evaluate when state court application of state constitutional principles or interpretation of state statutes differed too greatly from what the *federal* court thought the state legislature had done, premised on interpretive methodologies that may or may not represent how the state legislature would interpret its own statute (even assuming state legislators agreed on the interpretation of text otherwise representing political compromise). It would be surprising if the federal second-guessing did not begin to colonize state law with federal conceptions of nondelegation doctrine or federal canons of statutory interpretation that might or might not find hospitable terrain in the state’s own legal traditions. This federal judicial review of a state court’s interpretation of the state’s own legal principles would occur without any legitimacy conferred by the state or accountability to elected state actors or to state voters directly. And inevitably, federal courts arriving at conclusions distinct from their state counterparts would normally amount to a disfavored federal determination that state courts had gotten state law wrong.

Professor James Blumstein offers an intriguing reading of the constitutional text that distinguishes liability from remedy. In his view, Article II accepts the state legislature as it exists within the state constitutional context, subject to procedural and substantive constraints: In regulating presidential elections as in all other legislation, a state

¹⁹ Cf. *Stuart v. Anderson Cnty. Election Comm’n*, 300 S.W.3d 683, 688, 689–92 (Tenn. Ct. App. 2009) (construing the votes of those exceeding Tennessee’s mandatory five-minute time limit to be something other than illegal votes, and thereby affirming the decision of a lower court that had reached that conclusion in part because of the state constitution).

legislature may not exceed its capacity under state law.²⁰ That is, Article II would not prevent a state court from striking down state legislation regulating presidential elections as inconsistent with state constitutional constraints. Presumably, Article II would not prevent a state court from construing or interpreting state legislation regulating presidential elections. But in the event that the state constitution required invalidation of a statute, Article II *would* prevent a state court from creating an affirmative remedy, reserving to the legislature the capacity to author a solution.²¹ This version of the doctrine would resolve some questions articulated above. However, when the absence of a remedial replacement for a state statutory provision created federal statutory or constitutional concerns, this version of the doctrine would also notably shift interim remedial authority from state courts to their federal counterparts.²² And this need for federal court intervention to repair a newly created concern is likely to arise in a hurry in the context of a pending election, leaving the federal courts in a posture the Supreme Court has repeatedly told them to avoid.²³

Perhaps with at least an eye to these consequences, majority opinions of the Supreme Court lean in a different direction, declining to recognize a doctrine of state legislative regulation interdependent on other state institutions for most purposes but uniquely “independent” of those other institutions for federal elections.²⁴ The “State,” not the “Legislature,” is the body to whom the clear text of Article II grants authority to appoint electors.²⁵ And the Court’s decisions suggest that when this text instructs the state to exercise its appointment power “in such Manner as the Legislature thereof may direct,”²⁶ what

²⁰ See Letter from Professor James F. Blumstein, Vanderbilt L. Sch., to Hon. Keenan Keller, Senior Couns., House Comm. on the Judiciary (Sept. 12, 2019) (submitted for *Discriminatory Barriers to Voting: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 116th Cong. (2019)), <https://docs.house.gov/meetings/JU/JU10/20190905/109887/HHRG-116-JU10-20190905-SD001.pdf> (suggesting such an interpretation in the context of congressional apportionment and the Elections Clause).

²¹ See *id.*; cf. *infra* note 27.

²² But see *Grove v. Emison*, 507 U.S. 25, 33–34 (1993) (urging state court priority over federal courts in the context of congressional apportionment).

²³ See, e.g., *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring in denial of application to vacate stay) (reprimanding a federal trial court for “interven[ing] in the thick of election season” to issue an injunction remedying a violation of federal law, and implying that federal court “intrusion” raised enhanced concerns in this context).

²⁴ See, e.g., *Morley, Independent State Legislature*, *supra* note 9, at 22, 41–45 (noting the approach of the Supreme Court throughout much of the twentieth century, and contrasting that approach with state judicial examples of the nineteenth century).

²⁵ U.S. CONST. art. II, § 1, cl. 2 (“*Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .*” (emphasis added)).

²⁶ *Id.*

it means is that the manner of appointing electors is to be determined through the exercise of the normal lawmaking power in that state, defined by state law. That is, to the extent that the legislature is empowered to regulate the choice of the state's electors, it is empowered to do so in the same ways that it is empowered to provide for all regularized policymaking: through law, subject to the guardrail constraints of substantive and procedural state constitutional provisions (including gubernatorial veto, if the state constitution provides for one).²⁷

To be fair, the Court has not yet directly confronted this precise question in the context of presidential electors. But the Court *has*, on several occasions, construed the Elections Clause of Article I, which has similar text and is best understood in similar fashion. Article II allows each state to appoint presidential electors “in such Manner as the Legislature thereof may direct.”²⁸ The Elections Clause of Article I directs that at least in the first instance (subject to congressional override), the manner of congressional elections “shall be prescribed in each State by the Legislature thereof.”²⁹ Both provisions tell the legislature to “direct” or “prescribe[]” the rules.

In *Smiley v. Holm*, the Supreme Court determined that the Elections Clause reference to the “Legislature” was, effectively, synecdoche: a reference to the regular lawmaking process rather than a specific body.³⁰ In that case, the question was whether the Elections Clause granted a state legislature plenary power to draw congressional district lines as an independent body, ignoring a gubernatorial veto built in to the normal state legislative process.³¹ The Court said no. The state legislature's function in regulating the manner of congressional elections is a regulatory lawmaking function, and must be pursued in accordance with the lawmaking process designated by the

²⁷ See Brosofsky, Dorf & Tribe Memorandum, *supra* note 9. It is conceivable that the federal constitutional textual delegation to the legislature, as a proxy for the process of regular lawmaking, would (for example) preclude a state court from simply arrogating to itself, without any reasonable state constitutional or statutory delegation of such an authority, a state common-law right to select electors. Friedman, *supra* note 9, at 837. But the notion that some arrogations of non-legislative authority might amount to a violation of Article II does not imply that Article II grants plenary power to the legislature as a body to ignore the normal legislative process.

²⁸ U.S. CONST. art. II, § 1, cl. 2.

²⁹ *Id.* art. I, § 4.

³⁰ 285 U.S. 355, 365–66 (1932). Synecdoche is a linguistic or semiotic term denoting the use of a part to refer to the whole, or the use of the whole to refer to a part. Depending on the context, for example, references to “the Crown” may mean a particular monarch, the government led by a monarch, a monarchical system, a state ruled by monarchy, or the realm under a monarch's control, in addition to a particular piece of headgear.

³¹ *Id.* at 361–62.

state constitution.³² Similarly, in *Ohio ex rel. Davis v. Hildebrant*, sixteen years earlier, the Court had decided that if a state included in its lawmaking power the process of popular referendum, the Elections Clause provided no special federal dispensation for the state legislature as a body to ignore a referendum in regulating the manner of congressional elections.³³ And in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, eighty-three years later, the Court decided that if a state delegated its lawmaking power to an independent commission for redistricting purposes, the Elections Clause provided no special federal dispensation for the state legislature as a body to ignore that state constitutional delegation in regulating the manner of congressional elections.³⁴

What is true of the delegation to the “Legislature” for determining the manner of congressional elections should also be true of the similar delegation for determining the manner of appointing presidential electors. The Article II delegation, like that of the Elections Clause, describes a lawmaking function.³⁵ And this is distinct from other functions that the Constitution assigns to state legislatures—like the directly electoral function originally contemplated for the state legislatures in selecting Senators.³⁶ The functional distinction between regulatory or lawmaking functions and direct electoral functions is present in the text. The provision for selecting Senators in the

³² *Id.* at 367–68 (“We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted.”). Of course, if a state’s constitution does not provide for a gubernatorial veto in the lawmaking process, *Smiley* does not require one. Nor does it preclude a state from establishing in its state constitution one lawmaking process for some subjects, and a distinct lawmaking process for others. *See, e.g.,* N.C. CONST. art. II, § 22 (establishing a default process for lawmaking, and then establishing a distinct lawmaking process for certain enumerated subjects).

³³ 241 U.S. 565, 569–70 (1916).

³⁴ 576 U.S. 787, 807–08, 816–18 (2015).

³⁵ *See, e.g.,* *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (“There, of course, can be no question but that [Article II, § 1] does grant extensive power to the States to *pass laws* regulating the selection of electors.” (emphasis added)); *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 804–05 (1995) (noting the parallel “delegations of power to the States” in both clauses).

³⁶ The process by which legislatures directly elected Senators, established in Article I, Section 3, was superseded by the Seventeenth Amendment’s instruction that Senators be elected by the people, instead. The Court similarly held that the function of state legislatures in ratifying constitutional amendments is distinct from the lawmaking function. *See, e.g.,* *Hawke v. Smith*, 253 U.S. 221, 230–31 (1920); *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *Arizona State Legislature*, 576 U.S. at 805–08; *see also* Seth Barrett Tillman, *Sometimes “People” = “Legislature,”* ORIGINALISM BLOG (May 24, 2016), <https://originalismblog.typepad.com/the-originalism-blog/2016/05/sometimes-people-legislatureseth-barrett-tillman.html> (citing founding-era documents discussing distinctions in the referent for “the Legislature” based on function).

Constitution of 1789 provides that two Senators from each state would be “chosen by the Legislature thereof”: the legislature, directly, does the choosing.³⁷ Article II, in contrast, provides that the “State” appoints presidential electors, “in such Manner as the Legislature thereof may direct”; Article I similarly determines that the manner of holding congressional elections “shall be prescribed in each State by the Legislature thereof.”³⁸ In these latter provisions, the legislature directs or prescribes procedures rather than making an unmediated choice. We’ve got a modern word for how a legislature directs or prescribes procedures for others to follow. It’s the process of lawmaking.³⁹

Proponents of the theory that Article II grants, in appointing electors, special legislative dispensation to ignore the normal lawmaking process or substantive state constitutional constraints look primarily to two cases beyond the Elections Clause cases above. The first is *McPherson v. Blacker*.⁴⁰ *McPherson* concerned a Michigan statute appointing two presidential electors based on the plurality winners of two districts each comprising half of the state, and the remaining electors based on the plurality winners of each congressional district; the claim in the case was that the state could not appoint electors by district rather than based on plurality totals statewide (because only statewide totals ostensibly represented the appointment of “the state”).⁴¹ That is, *McPherson* did not confront the question whether the legislature had authority to appoint electors outside of the lawmaking process, or whether it could ignore substantive state constitutional constraints in so doing.⁴² The Michigan legislature had passed a

³⁷ U.S. CONST. art. I, § 3, cl. 1.

³⁸ U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. I, § 4, cl. 1.

³⁹ Nathaniel Rubin makes the further compelling argument that just as the Constitution assigns regulatory authority for the manner of selecting presidential electors to the state “Legislature,” the Constitution frequently assigns regulatory powers or responsibilities to “Congress.” But when the Constitution grants “Congress” the power or responsibility to act in a lawmaking manner, it does so subject to all other substantive and procedural constitutional constraints, and not as a body excised from (or shielded against) its constitutional context. Rubin, *supra* note 18, at 66–67. That is, the Constitution specifies that “Congress” has the power to regulate interstate commerce, U.S. CONST. art. I, § 8, cl. 3. If that power is subject to the normal constraints on congressional lawmaking—including procedural constitutional requirements like an executive veto and substantive constitutional requirements like compliance with the Equal Protection Clause—it stands to reason that a specification that the state “Legislature” has the power to regulate the manner of selecting presidential electors is similarly subject to the normal constraints on state legislative lawmaking.

⁴⁰ 146 U.S. 1 (1892).

⁴¹ *Id.* at 4–5, 24–25.

⁴² See Smith, *supra* note 9, at 775–76 (recognizing the limits of the claim in *McPherson*).

statute that was under attack. And the Court asked whether the Constitution placed any federal geographic limits on the state's power to appoint electors (through its regular lawmaking process), or whether the Constitution guaranteed the state free rein to appoint electors (through its regular lawmaking process) as it wished.

The Court determined that the *state's* power under Article II was not subject to federal court second-guessing, unless the state's choices had violated another provision of the federal constitution.⁴³ But this holding does not mean that the Constitution granted the state *legislature* plenary power as a distinct body, beyond the lawmaking process.

To be sure, *McPherson* also contains passages in dicta that, excised from context, support the claim that the Court granted plenary power over electors to the state legislature as a body, distinct from the power granted to the state through the lawmaking process.⁴⁴ But the Court also cited, with approval, federal statutes directing the selection of electors by law rather than legislative fiat, and without any intimation that those statutes might intrude on a constitutional privilege.⁴⁵ The absence of such commentary would have been quite odd had the Court been addressing the purported issue of legislative supremacy beyond the regular lawmaking process. Rather than determining that Article II settled the locus of legislative power within the state—which was not at issue in the case—the better read of *McPherson* is that it determined that Article II settled the *state's* authority to provide for the appointment of electors as it wished.

The second case to which proponents of an independent state legislature doctrine turn is *Bush v. Palm Beach County Canvassing Board*.⁴⁶ It also does not stand up to the weight that doctrine proponents would have it carry. The case, arising out of the 2000 election, was prompted by the Florida Supreme Court's construction of a Florida statute in light of the Florida Constitution. Petitioners raised a question about purported plenary legislative authority: specifically, the degree to which the Florida Constitution could constrain the Florida legislature when the legislature was regulating the appointment of presidential electors.⁴⁷ And the U.S. Supreme Court flagged the argument, noting that the Florida Supreme Court may not have

⁴³ *McPherson*, 146 U.S. at 35, 37.

⁴⁴ See, e.g., *id.* at 25, 27, 29; *id.* at 34–35 (citing a congressional committee report for a failed constitutional amendment); see also Smith, *supra* note 9, at 775–79 (explaining the history leading to these passages).

⁴⁵ See *McPherson*, 146 U.S. at 40–41 (citing multiple acts of Congress addressing elector votes).

⁴⁶ 531 U.S. 70 (2000).

⁴⁷ *Id.* at 73, 75, 76–77.

considered whether it might have exceeded its authority to constrain the state legislature under Article II—a flag that itself implies the federal Constitution *might* impose a relevant limit.⁴⁸ Proponents of the independent state legislature doctrine find great import in this passage.⁴⁹ But though the U.S. Supreme Court mentioned the potential issues, at considerable grammatical distance, it did not resolve them. After a bit of throat-clearing, the Court remanded to the Florida Supreme Court to better explain the degree to which its opinion was consistent with *whatever* power was granted to the Florida legislature under Article II.⁵⁰ The Court specifically “decline[d] at this time to review the federal questions asserted to be present”—that is, it declined to review the extent to which Article II granted power to the legislature as a body, free from state constitutional limits—until after remand.⁵¹ The Florida Supreme Court returned a new opinion, relying more extensively on the legislature’s statutory text.⁵² But in the meantime, *Bush v. Gore* interceded,⁵³ and a Court majority never returned to the Article II question.⁵⁴

⁴⁸ *Id.* at 77 (“There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, ‘circumscribe the legislative power.’” (quoting *McPherson*, 146 U.S. at 25)).

⁴⁹ *E.g.*, Morley, *Independent State Legislature*, *supra* note 9, at 80–82.

⁵⁰ *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 78.

⁵¹ *Id.* It is unusual for the Supreme Court to vacate a state court opinion and remand for further clarification, without first finding error or recognizing an interceding legal development. But it is not unknown for the Court to do so, even simply to receive the benefit of the views of the state court on a pending question the Court is not yet prepared to answer. *See, e.g.*, *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (vacating and remanding a West Virginia Supreme Court of Appeals decision on a federal *Brady* claim); *see also* Aaron-Andrew P. Bruhl, *The Supreme Court’s Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711, 718 (2009) (discussing elucidatory grant, vacate, remand orders). *But see Youngblood*, 547 U.S. at 870–72, 874 (Scalia, J., dissenting) (protesting the practice). And in this instance, the Court complained that it could not determine the extent to which the Florida Supreme Court’s opinion was premised on an interpretation of the state statutes (which might have deprived the Supreme Court of jurisdiction), or an interpretation of the state statutes in light of the state constitution and/or 3 U.S.C. § 5 (which might have implicated an Article II question, even if the answer revealed no error). *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 78; *cf.* Bruhl, *supra*, at 718 n.23 (noting the *Bush v. Palm Beach County Canvassing Board* decision was similar to other “GVRs,” but different in that it was made after the certiorari stage).

⁵² *Palm Beach Cnty. Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1281, 1283–84 (Fla. 2000).

⁵³ 531 U.S. 98 (2000).

⁵⁴ Chief Justice Rehnquist’s concurring opinion in *Bush v. Gore*, joined by Justices Scalia and Thomas, articulated a somewhat weak form of the “independent state legislature” doctrine, and is also held up as support for the idea. *Id.* at 112–13 (Rehnquist, C.J., concurring). It claimed that Article II’s delegation to the legislature warranted federal review of a “significant departure from the legislative scheme for appointing Presidential electors.” *Id.* at 113. The opinion acknowledged that this review required second-guessing

Since these two opinions, the Court has not spoken as a whole.⁵⁵ Individual Justices have offered initial thoughts in the context of denials of certiorari or emergency applications to issue or vacate equitable stays or expedite briefing.⁵⁶ The Eighth Circuit also entered the discussion in 2020, in a similarly emergent and preliminary posture.⁵⁷ And while the court of appeals panel majority cited *McPherson* and *Palm Beach County Canvassing Board*, it did not confront the context of the cases, the precedent construing the Article I Elections Clause, the textual parallels between the Article I and Article II cases, or the jurisprudential or practical difficulties attending its strong version of the legislature's exclusive role.⁵⁸ The constitutional reading more consistent with precedent, and less prone to radical upheaval, considers Article II's delegation to the legislature in the context of the regular lawmaking power.

To be sure, the Constitution preserves ample discretion for the deployment of this lawmaking power. The Supreme Court has made clear that Article II allows the selection of electors by means other than a popular election, if state law provides for means other than a popular election.⁵⁹ And it is equally clear that Article II poses no bar-

the state court's interpretation of state law, *id.* at 114, but although it engaged in extensive reading of the relevant state statutes, it gave short shrift to the state constitutional provisions shaping the permissible outer bounds and proper construction of those statutes. And the concurrence did not explain how a reading of state statutes passed with the expectation that those statutes would be construed consistent with the state constitution in all other elections also followed legislative expectations when construing the statute to ignore the state constitution in a presidential election. *Id.* at 111–22.

⁵⁵ The Court's most recent flirtation with the doctrine was a denial of certiorari in a 2020 election dispute over Pennsylvania's deadline for submitting absentee ballots. *See* *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732 (2021). The case presented the question whether the Pennsylvania Supreme Court had trodden on any protected federal constitutional ground in holding that 2020's extraordinary circumstances—including the pandemic and significantly delayed postal delivery—required state statutory deadlines temporarily to yield, in modest fashion, to state constitutional protections for voters. *Id.* at 732–33 (Thomas, J., dissenting from denial of certiorari). The ballots in dispute would not have determined the outcome of any relevant election, and the Court denied certiorari, but three Justices, dissenting, would have heard the case. *Id.*; *id.* at 738 (Alito, J., joined by Gorsuch, J., dissenting from denial of certiorari).

⁵⁶ *See id.* at 733 (Thomas, J., dissenting from denial of certiorari); *id.* at 738–39 (Alito, J., dissenting from denial of certiorari); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J.).

⁵⁷ *Carson v. Simon*, 978 F.3d 1051, 1051, 1054, 1059–60 (8th Cir. 2020) (finding, upon cursory analysis in a decision rendered five days before election day, that plaintiffs had likely established that a state court violated Article II by recognizing a state-law consent decree's exception to a statutory absentee ballot deadline during the extraordinary circumstances of 2020).

⁵⁸ *Id.* at 1059–60.

⁵⁹ *Bush v. Gore*, 531 U.S. at 104.

rier to a legislature reclaiming for *itself*, as a body, the ability to select presidential electors—as long as it does so through the regular law-making process.⁶⁰ Indeed, in the first presidential election, South Carolina did exactly that: the state legislature exercised its lawmaking power, allocating the legislature as a body the right to choose presidential electors directly.⁶¹ New Jersey determined, by statute, that the governor and upper legislative chamber would choose electors.⁶² Five other states determined that some form of popular vote would determine presidential electors.⁶³ Massachusetts determined that the pop-

⁶⁰ See *id.*; *McPherson v. Blacker*, 146 U.S. 1, 28–33 (1892) (reviewing the “various modes” by which states determined the appointment of electors, including several different procedures by which statutes granted legislatures direct selection power).

⁶¹ See An Act for Prescribing on the Part of this State, the Times, Places, and Manner of Holding Elections for Representatives in the Congress, and the Manner of Appointing Electors of a President of the United States, § 4 (1788), reprinted in *THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA* 462, 462–63 (John Faucheraud Grimke, ed., Philadelphia, R. Aitken & Son, 1790), <https://archive.org/details/publiclawsofstat1790john/page/462/mode/2up>.

⁶² See An Act for Carrying into Effect, on the Part of the State of New-Jersey, the Constitution of the United States, Assented to, Ratified and Confirmed by this State, ch. 241, § 8, (1788), in *ACTS OF THE THIRTEENTH GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY* 477, 477–82 (Trenton, Isaac Collins 1788), <https://njlaw.rutgers.edu/cgi-bin/diglib.cgi?collect=NJleg&file=013&page=0477>.

⁶³ See An Act Directing the Time, Places and Manner of Holding Elections for Representatives of this State in the Congress of the United States and for Appointing Electors on the Part of this State for Choosing a President and Vice-President of the United States, ch. 1373 (1788) (appointing as electors the ten people receiving the most votes, with each voter casting ten votes), in *13 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801*, at 140, 140–45 (Harrisburg Publishing Co. 1908), <https://www.palrb.us/statutesatlarge/17001799/1788/0/act/1373.pdf>; An Act Directing the Time, Places, and Manner, of Holding an Election for a Representative of this State in the Congress of the United States; and for Appointing Electors, on the Part of this State, for Choosing a President and Vice-President of the United-States (1788) (appointing as electors the three people receiving the most votes, with each voter casting one vote), in *LAWS OF THE DELAWARE STATE* 3, 3–6 (Frederick Craig & Co. 1788); An Act, For Carrying into Effect an Ordinance of Congress of the Thirteenth of September Last, Relative to the Constitution of the United States (1788) (appointing as electors the five people receiving the most votes, with each voter casting five votes), in *THE PERPETUAL LAWS OF THE STATE OF NEW HAMPSHIRE* 473, 473–76 (John Melcher ed. 1789); An Act for the Appointment of Electors to Choose a President Pursuant to the Constitution of Government for the United States, ch. 1, § 2 (1788) (appointing as electors the person receiving the most votes in each of twelve districts, with each voter casting one vote in their district), in *ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA* 3, 3–4 (Richmond, Dixon, Davis & Nicolson 1788); An Act Directing the Time, Places and Manner, of Holding Elections for Representatives of this State in the Congress of the United States, and for Appointing Electors on the Part of this State for Choosing a President and Vice-President of the United States, and for the Regulation of the Said Elections, ch. X (1788) (appointing as electors five people receiving the most votes from a western district and three receiving the most votes from an eastern district, with each voter casting five votes for candidates from the western district and three for candidates from the eastern district), in *LAWS OF MARYLAND* 326, 326–29 (Annapolis, Frederick Green 1788),

ular vote would put forward two candidates from each congressional district, and that the legislature would choose from among those two candidates.⁶⁴ In each of these states, the regular lawmaking process—different in each state, according to the different procedures in each state’s constitution⁶⁵—set forth the manner in which electors would be appointed.⁶⁶

Now, of course, each state has a statute in place providing that electors will be appointed based on the result of a popular vote. In forty-eight states, the plurality winner of the statewide popular vote wins all of the states’ electoral votes.⁶⁷ In Maine and Nebraska, the plurality winner of the statewide popular vote wins two of the states’ electoral votes, and the plurality winner of each congressional district wins the additional electoral vote associated with that district.⁶⁸ These are not the only available options: Article II would impose no obstacle if a legislature were to pass a statute modifying that process. And Article II does not speak to internal state lawmaking procedure: If a state’s constitution granted its legislature lawmaking power for presi-

<http://aomol.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/003181/html/m3181-0321.html>.

⁶⁴ Resolve for Organizing the Federal Government, ch. 49 (1788), in *ACTS AND RESOLVES OF MASSACHUSETTS, 1788–89*, at 256, 256–58 (Wright & Porter Printing Co. reprinted 1894) (Boston, Adams & Nourse 1788), <https://archive.org/details/actsresolvespass178889mass/page/256/mode/2up>. See generally Smith, *supra* note 9, at 759–60.

⁶⁵ For example, at the time, only New York and Massachusetts provided for the possibility of a veto (in New York, by the executive/judicial Council of Revision, and in Massachusetts, by the governor) in the regular state lawmaking process. Smith, *supra* note 9, at 759–60; Rubin, *supra* note 18, at 67–68. Both states respected the role of this veto in the regular lawmaking process in fulfilling responsibilities of the state “Legislature” under Articles I and II. Smith, *supra* note 9, at 759–60; see also *Smiley v. Holm*, 285 U.S. 355, 369–70 (1932) (holding that Article I’s delegation to the “Legislature” included an executive veto procedure where state law provided for the possibility of an executive veto in regular lawmaking). Professor Michael Morley notes that a few decades later, in debates at Massachusetts’s Constitutional Convention of 1820, state delegates successfully argued against *substantive* state constitutional constraints on the state legislature on the premise that those substantive constraints would violate Articles I and II. See Morley, *Independent State Legislature*, *supra* note 9, at 38–40 (discussing the debate over the proposed constraints).

⁶⁶ Connecticut and Georgia were the two remaining states participating in the 1788 election; the legislature chose electors directly in those states, albeit beyond the normal statutory process (and in Georgia, at least, in somewhat more haphazard fashion). See Brososky, Dorf & Tribe Memorandum, *supra* note 9, at 7–8 (discussing how the two states chose electors). Still, it appears that each legislature chose electors in a manner permitted by the respective state’s constitution, and not in defiance of state constitutional constraints. See *id.* at 7–8, 7 n.9 (commenting that both the Connecticut and Georgia legislatures appear to have acted within the bounds of their constitutions).

⁶⁷ *Distribution of Electoral Votes*, NAT’L ARCHIVES, <https://www.archives.gov/electoral-college/allocation> (Mar. 6, 2020).

⁶⁸ *Id.*; ME. STAT. tit. 21-A, § 802; NEB. REV. STAT. § 32-710.

dential selection outside of the statutory process, by concurrent resolution or some alternative process, Article II would similarly impose no barrier. But by the same token, Article II does not affirmatively authorize an express lane (or secret loophole) for a legislature to rewrite the rules for selecting presidential electors outside of the state's own designated lawmaking procedure.

The discussion above considers and responds to claims that federal law affirmatively *authorizes* a state's legislature to appoint electors, outside of (and despite) a state's regular lawmaking process. It concludes that Article II grants plentiful power to the state to modify the terms by which presidential electors are appointed if that modification proceeds via a state's regularized lawmaking process, and no authorization to pursue an appointment beyond that lawmaking process. But it seems worth a reminder that regardless of whether Article II grants states normal lawmaking discretion or delegates extraordinary discretion to a legislative body ripped from normal context, the discretion granted by Article II is not plenary. Like any other delegation of power in the 1789 Constitution, it is also constrained by further constitutional developments and federal statutes passed under the authority of those Amendments. For example, a state statute (passed by normal means) that changed the appointment process to weight some votes within a state more heavily than others might be entirely consistent with Article II but violate the Equal Protection Clause of the 14th Amendment. Similarly, a state statute providing for the appointment of presidential electors from designated districts might be consistent with Article II but run afoul of the Equal Protection Clause or the Voting Rights Act if those districts were drawn in racially discriminatory fashion.

The notion that state legislatures might seek to appoint electors *after* Election Day raises similar constitutional concerns—concerns that became particularly salient during the 2020 election.⁶⁹ In the fall and winter of 2020, there were an alarming number of public musings about the capacity of legislative bodies to simply appoint slates of electors, claiming authority under Article II.⁷⁰ Recently disclosed

⁶⁹ In addition to the constitutional concerns, some commentators have suggested that a legislature's appointment of its own electoral slate after Election Day would violate 3 U.S.C. § 1, the federal statute establishing a uniform day for the appointment of electors, on the first Tuesday after the first Monday in November. NAT'L TASK FORCE ON ELECTION CRISES, A STATE LEGISLATURE CANNOT APPOINT ITS PREFERRED SLATE OF ELECTORS TO OVERRIDE THE WILL OF THE PEOPLE AFTER THE ELECTION 2 (2020), https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f625c790cef066e940ea42d/1600281722253/State_Legislature_Paper.pdf.

⁷⁰ See, e.g., Gellman, *supra* note 7 (discussing the possibility that the Trump campaign might marshal legislatures in Republican states to appoint their own preferred electors);

emails now reveal that there were alarming private musings as well, including a renegade plan by a top Department of Justice official to encourage legislatures to act unilaterally.⁷¹ These fears did not come to fruition. Every state has a structure, set by the state constitution, state statute, or both, for determining the state's presidential electors through the outcome of a popular vote. And no legislative house took steps in 2020 after Election Day to appoint electors outside of that structure, whether by purported legislative resolution or through the regular legislative process.⁷² Indeed, several state legislative leaders publicly declared that they had no such lawful power and wanted no part of antidemocratic rumormongering to the contrary.⁷³

Maggie Haberman, Jim Rutenberg, Nick Corasaniti & Reid J. Epstein, *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/us/politics/trump-michigan-election.html> (discussing Trump's efforts to do the same).

⁷¹ E-mail from Jeffrey Clark, Assistant Att'y Gen., Env't and Nat. Res. Div., U.S. Dep't of Just., to Jeffrey Rosen, Acting Att'y Gen., U.S. Dep't of Just., and Richard Donoghue, Acting Deputy Att'y Gen., U.S. Dep't of Just. (Dec. 28, 2020) [hereinafter Assistant Att'y Gen. Clark E-mail] (internal DOJ email containing draft DOJ letter to Georgia officials, proposed by Jeffrey Clark), <https://www.scribd.com/document/518696576/DOJ-docs>. The plan was thoroughly rejected by the acting Attorney General and Deputy Attorney General. E-mail from Jeffrey Rosen, Acting Att'y Gen., U.S. Dep't of Just., to Richard Donoghue, Acting Deputy Att'y Gen., U.S. Dep't of Just. (Jan. 2, 2021), <https://www.scribd.com/document/518696576/DOJ-docs>.

⁷² The closest any state legislature came to such an appointment of electors was not particularly close. On December 14, 2020, several sitting Arizona legislators and a legislator-elect signed a purported "joint resolution." The finished product explicitly requested that Arizona's eleven "electoral votes be accepted for to [sic] Donald J. Trump." Complaint at Exhibit A, *Gohmert v. Pence*, No. 20-cv-00660 (E.D. Tex. Dec. 27, 2020). This document is not, however, a document of the state legislature: it was not signed or passed by a majority of either state legislative house, was signed by a legislator-elect with no authority to act on behalf of the state at the time, and does not appear to have been submitted through the legislative process since it has no bill number or date of introduction. A later version of the resolution appears in the 2021 legislative session as Ariz. S. Con. Res. 1002, first read in the state legislature more than six months later; it has not been put to a vote of any legislative chamber. See S. Con. Res. 1002, 55th Leg., Reg. Sess. (Ariz. 2021); *Bill History for SCR1002*, ARIZ. LEGISLATURE, <https://apps.azleg.gov/BillStatus/BillOverview/74333> (last visited Sept. 23, 2021). Whatever the capacity of the "legislature" to act to appoint electors, there is no reason to believe that a subset of legislators without authorization by the body possesses any power to act on the legislature's behalf.

⁷³ See, e.g., Sen. Jake Corman & Rep. Kerry Benninghoff, *Pennsylvania Lawmakers Have No Role to Play in Deciding the Presidential Election*, CENTRE DAILY TIMES (Oct. 19, 2020, 8:00 AM), <https://www.centredaily.com/opinion/article246527648.html>; Press Release, Senate and House Republican Leadership Announce Plans to Restore Confidence in Voting System (Dec. 3, 2020), <https://www.pasenategop.com/blog/senate-and-house-republican-leadership-announce-plans-to-restore-confidence-in-voting-system>; Press Release, Rusty Bowers, Speaker, Arizona House of Representatives, Speaker Bowers Addresses Calls for the Legislature to Overturn 2020 Certified Election Results (Dec. 4, 2020), <https://www.azleg.gov/press/house/54LEG/2R/201204STATEMENT.pdf>; Press Release, Brian P. Kemp, Governor, State of Georgia, Gov. Kemp, Lt. Gov. Duncan

Constitutional constraints provide a rationale supplementing these legislators' normative republican commitments. Whatever the object of Article II's delegation, the Due Process Clause would be implicated in any attempt to replace, after the election had begun, the popular election processes currently authorized by statute with another means of elector selection.⁷⁴ And while it is difficult to definitively rule out the notion that there might exist some post-election legislation able to overcome due process concerns, an effort to replace the known outcome of a popular vote—after that vote has already been held—with some entirely different process of appointing electors would involve the sort of fundamentally unfair upsetting of settled expectations that signify due process violations.⁷⁵ Though untested (because no legislature has yet been so brazen), the Due Process Clause would seem to deny legislative Lucy any lawful authority to pull an electoral football away from the Charlie Brown electorate after the election has already begun.⁷⁶

II THE STATUTE

For the reasons mentioned above, the best reading of precedent, practice, and judicial prudence is that Article II grants no federal legal

Issue Statement on Request for Special Session of General Assembly (Dec. 7, 2020), <https://gov.georgia.gov/press-releases/2020-12-07/gov-kemp-lt-gov-duncan-issue-statement-request-special-session-general>; *House Speaker Lee Chatfield Issues Statement on 2020 Presidential Election*, UPNORTHLIVE (Dec. 14, 2020), <https://upnorthlive.com/news/local/house-speaker-lee-chatfield-issues-statement-on-2020-presidential-election>.

⁷⁴ See, e.g., *Roe v. Alabama*, 43 F.3d 574, 580–81 (11th Cir. 1995) (reviewing alleged post-election changes for “fundamental unfairness”); Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 696, 710–11 (2001) (discussing the due process violation decided in *Roe*); cf. Angela J. Scott, *Advocate’s Report*, 107B A.B.A. SEC. CIV. RTS. & SOC. JUST. REP. (2021), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/107b-midyear-2021.pdf> (adopting an ABA resolution urging states to recognize that the laws and regulations in effect at the time of voting should be dispositive for the selection of electors in that election).

⁷⁵ See, e.g., *Roe*, 43 F.3d at 580–82.

⁷⁶ A new Arizona bill introduced in 2021 presents a curious twist challenging the bounds of due process: by statute passed *before* an election, a popular vote would still be held for presidential electors, but the legislature would expressly retain the power to ignore the popular vote and install its own presidential electors by simple majority. See H.B. 2720 § 3, 55th Leg., Reg. Sess. (Ariz. 2021). That is, the public would know, well before the popular vote, that its vote was essentially advisory. Is it still a due process violation if Lucy expressly tells Charlie Brown, before the attempted placekick, that she reserves the power to pull the football away at the last minute? The notion that settled expectations might nevertheless be upset despite an express disclaimer of reliance on any settled expectations represents an intriguing constitutional conundrum beyond the scope of this article. Cf. *Perry v. Sindermann*, 408 U.S. 593, 599–603 (1972) (finding the potential for reasonable expectations in continued employment despite an expressly finite contractual term).

imprimatur to action by the legislature as a body, outside of the law-making process, to designate the manner in which electors are to be chosen. But Article II is not the only provision of federal law likely to attract attention if state legislators become excitable in a post-election context.

3 U.S.C. § 2 provides: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” This language reflects the language of Article II, albeit in the specific context of electoral “failure.” And to the extent that—contrary to the analysis above—Article II is found to reserve plenary authority for a state legislature to appoint electors free from normal lawmaking process, 3 U.S.C. § 2 obviously would not (and could not) stand in the way of that constitutional command.

If, however, the constitutional command is not so absolute, a textual examination of the progenitors of 3 U.S.C. § 2 firmly fights against the notion that the statute provides any independent source of federal authority for a state legislature to act on its own. It is no break-glass-in-case-of-emergency provision empowering state legislators to take control beyond the lawmaking process if a state’s election process should fail to yield a reliable answer.⁷⁷ Indeed, a careful review of the textual origins of 3 U.S.C. § 2 reveals that the mid-nineteenth-century Congress that passed the statute empowered the state to act only through its regular lawmaking process. And in so doing, this history provides something of a counterpoint to the pur-

⁷⁷ Supporters of such a reading have raised the policy argument that the legislature is an appropriate body to fill this backup role because the legislature is a representative body and can represent the voice of the people when the people are otherwise unable to express their preference. See FLA. J. OF THE H. REP., 1st Special Sess., at 24 (Dec. 12, 2000) (statement of Rep. Hogan), <http://www.leg.state.fl.us/data/session/2001/house/journals/pdf/bound/hj1212a.pdf> (emphasizing, in urging support for legislative selection of Florida’s presidential electors in the disputed 2000 election, that the legislators “were elected by the people of [their] respective districts to represent their interest and to vote on their behalf on issues that impact their communities, the State of Florida and the Nation”); *id.* at 42 (statement of Rep. Kyle) (noting that the legislators were not purporting to act on behalf of the Bush campaign but on behalf of Florida voters). Given the Supreme Court’s determination that the federal courts are unavailable to confront even extreme partisan gerrymandering of legislative district seats, see *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding “that partisan gerrymandering claims” are “beyond the reach of the federal courts”), the degree to which the partisan composition of a state legislature actually reflects the partisan preferences of voters in a statewide contest will vary significantly from state to state. The preference of a statewide elected official may be at least as valid a proxy for the preferences of a statewide electorate.

ported congressional support cited in *McPherson v. Blacker* for the notion of a strong “independent state legislature” doctrine.⁷⁸

Before turning to the entities empowered to act under the statute, it is first worth a short discussion of the conditions under which the statute empowers action. This must begin with a note that should be obvious: 3 U.S.C. § 2 *cannot* mean that a state legislature is empowered to change the appointment process for presidential electors whenever the outcome is unclear at the end of Election Day.⁷⁹ The triggering text of the statute refers to the state’s failure to “make a choice” on Election Day—through the voters participating in the election—but there is no suggestion that the identity of that choice must be immediately apparent. If I choose an object behind door number three, I have made a choice at the moment I expressed my preference, even if I don’t find out what lies behind door number three until much later. Each state has a series of processes for tallying votes and canvassing vote tallies along the way to certification; those processes all linger long beyond Election Day (and have done so since the first popular votes for presidential electors). No state has yet thought that this fact triggered any incremental authority or responsibility under 3 U.S.C. § 2. It cannot be that each of our elections has “failed” in the sense of 3 U.S.C. § 2 just because the choice was not formally confirmed until after Election Day itself.⁸⁰

Other federal laws also confirm that 3 U.S.C. § 2 cannot plausibly demand a result on Election Day. 3 U.S.C. § 5—the infamous “safe harbor” provision much examined in *Bush v. Gore*—provides that a state’s determination of electors shall be conclusive if the laws enacted prior to Election Day, and the tally process and dispute resolution system embodied in those laws, yield a final result at least “six days prior to [the] time of meeting of the electors.”⁸¹ The meeting of the electors is currently set (again, by federal law) to be several weeks after Election Day—in 2020, that date was December 14.⁸² In 2020,

⁷⁸ See sources cited *supra* note 44 and accompanying text.

⁷⁹ Cf. Trip Gabriel, *This Is Democrats’ Doomsday Scenario for Election Night*, N.Y. TIMES, (Sept. 3, 2020), <https://www.nytimes.com/2020/09/02/us/politics/voting-election-day.html> (noting that some suggested this possibility in 2020); Donald Trump @realDonaldTrump, TWITTER (Jul. 30, 2020, 1:22 PM), <https://web.archive.org/web/20200730202309/https://twitter.com/realdonaldtrump/status/1288933078287745024> (“Must know Election results on the night of the Election, not days, months, or even years later!”).

⁸⁰ See, e.g., Friedman, *supra* note 9, at 816 (arguing that 3 U.S.C. § 2 cannot be read to mean that a state legislature can intervene and choose electors if the election result takes a long time to determine).

⁸¹ 3 U.S.C. § 5.

⁸² See 3 U.S.C. § 1 (establishing Election Day as the “Tuesday next after the first Monday in November”); *id.* § 7 (establishing the meeting of the electors as “the first Monday after the second Wednesday in December”).

the 3 U.S.C. § 5 “safe harbor” date was December 8. That is, 3 U.S.C. § 5 expressly contemplated that a state in 2020 might have encountered a dispute about the nature of the choice made on November 3, and expressly guaranteed exclusive congressional respect for the state’s dispute resolution process as long as the dispute was resolved by December 8. Section 5 and section 2 must be read together.⁸³ A state cannot have “failed to make a choice” on Election Day for purposes of federal law, based solely on the absence of a known answer on Election Day, if federal law also affirmatively protects that choice after the resolution of disputes yields a final answer several weeks later.

So 3 U.S.C. § 2 does not plausibly demand a result on Election Day.⁸⁴ However, as the meeting of the electors approaches, if the state dispute resolution process does not produce a final certified answer, there will be growing pressure to declare that the state has held an election but failed to make a choice.

Some state laws expressly contemplate this sort of turmoil and provide—by laws established well before Election Day itself, mitigating any Due Process concern—for a release mechanism. In North Carolina, for example, if the State Board of Elections has not proclaimed a winner by the federal “safe harbor” deadline, state statutes specifically authorize the legislature (as a body) to appoint electors through a special legislative session, convened with the support of sixty percent of the members of each state legislative chamber,⁸⁵ and acting “in accord with their best judgment of the will of the electorate.”⁸⁶ If the legislature has not acted by noon of the day before the meeting of the electors, the statutes specifically authorize the Governor to appoint electors instead, “in accord with [her] best judgment of the will of the electorate.”⁸⁷ And if the State Board of Elections returns a winner, under the normal dispute resolution process, before noon on the day the electors actually meet, *that* proclamation controls, even if the Governor or legislature has already appointed alternatives.⁸⁸

⁸³ See, e.g., *Branch v. Smith*, 538 U.S. 254, 281 (2003) (Scalia, J., plurality opinion) (explaining the canon that statutes relating to the same subject, in *pari materia*, ought to be construed together).

⁸⁴ See Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 209 (2020).

⁸⁵ N.C. CONST. art. II, § 11 (specifying the procedure for calling an “extra session” of the legislature).

⁸⁶ N.C. GEN. STAT. ANN. § 163-213(a), (c) (West 2019).

⁸⁷ *Id.* § 163-213(b)–(c).

⁸⁸ *Id.* § 163-213(d); see *id.* § 163-210.

But that structure—all set by statute, through the regular law-making process, and in place well before Election Day—does not exist in many states. North Carolina is the only state of which I am aware that expressly references 3 U.S.C. § 2 in its authorized process for selecting presidential electors.⁸⁹ And it is likely that an absence of specific procedures in state law could generate claims that 3 U.S.C. § 2 provides affirmative federal authorization for unilateral legislative action as the meeting of the electors approaches.⁹⁰

Given this context, then, it is worth examining exactly which state entities 3 U.S.C. § 2 does and does not empower. Prior examination of this statute has seemed to revolve around what it means for a state to have held an election but failed to make a choice. In 2000, for example, the Florida House passed a concurrent resolution on December 12, citing 3 U.S.C. § 2 and purporting to appoint electors when no conclusion to the litigation battles appeared forthcoming on the date of the 3 U.S.C. § 5 “safe harbor” deadline.⁹¹ The debate in the Florida House revolved primarily around whether the state had failed to make a choice for purposes of the federal statute. The Florida House seemed simply to assume that if the state *had* failed to make a choice, the legislature had the power under the federal statute to appoint electors by concurrent resolution.⁹² That assumption was never validated by the Florida Senate, and there was never significant debate about the sorts of additional procedures that might or might not be legally required. To the extent that concurrent resolution procedures in Florida depart from the regular state lawmaking procedure, the text of the federal statute does not unequivocally support such a reading—and a textual examination of its origins leans decidedly in the opposite direction.

If the state holds an election but fails to make a choice on Election Day—or, at least, if the state fails to make a choice on

⁸⁹ Michigan law, for example, provides that in the event that two candidates for federal, statewide, or state office spanning more than one county receive an equal number of votes, or if the determination of the state board of canvassers “is contested, the legislature in joint convention” decides the winner. MICH. COMP. LAWS § 168.846. But it does not mention 3 U.S.C. § 2 or otherwise rely on a claim that the election has “failed.”

⁹⁰ See Assistant Att’y Gen. Clark E-mail, *supra* note 71 (attaching a draft DOJ letter to Georgia officials that relies on 3 U.S.C. § 2).

⁹¹ See FLA. J. OF THE H. REP., 1st Special Sess., at 20–21 (Dec. 12, 2000), <http://www.leg.state.fl.us/data/session/2001/house/journals/pdf/bound/hj1212a.pdf>.

⁹² See, e.g., *id.* at 32, 42, 52 (debating a concurrent resolution that would purport to appoint electors on grounds that the public had failed to make a choice); cf. Bruce Ackerman, Opinion, *As Florida Goes . . .*, N.Y. TIMES (Dec. 12, 2000), <https://www.nytimes.com/2000/12/12/opinion/as-florida-goes.html> (assuming that the legislature, presumably as an independent body, would have appointment power in the event of electoral failure).

Election Day that can eventually be discerned—3 U.S.C. § 2 provides that the electors may be appointed “in such a manner as the legislature of such State may direct.”⁹³ That language directly reflects the constitutional authority of Article II, authorizing the state to appoint electors “in such Manner as the Legislature thereof may direct.”⁹⁴ To the extent that the constitutional provision reflects an understanding that the ability to select electors depends upon the exercise of a regular lawmaking power (via regular lawmaking process, subject to regular lawmaking constraints), the federal statute goes no further. Put differently: If the Constitution does not affirmatively authorize a legislature to ignore state process in appointing electors, neither does 3 U.S.C. § 2.

Indeed, the origins of 3 U.S.C. § 2 reveal that Congress did not intend the legislature, as a body, to have special appointment authority for presidential electors outside of the regular legislative process. 3 U.S.C. § 2 is derived from an 1845 statute.⁹⁵ That statute’s text, in full, is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed: Provided, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote: And provided, also, when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide.*⁹⁶

Professor Michael Morley has written the most comprehensive treatment of the history behind this statute’s passage, and I agree with his conclusion that the legislation was largely designed to establish a uniform election date, while also accommodating individual state idiosyncrasies and emergency conditions.⁹⁷ Some states—like New Hampshire, for example—had majority-winner requirements for

⁹³ 3 U.S.C. § 2.

⁹⁴ U.S. CONST., art. II, § 1.

⁹⁵ Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

⁹⁶ *Id.*

⁹⁷ See Morley, *supra* note 84, at 185–91, 193–94 (discussing the legislative history). Different federal election days in different states had created concern over voters who could vote in one state on one day and then travel to another state to vote on another day. See *id.* at 185–86, 186 n.33 (discussing alleged fraud in the election of 1840).

appointing electors.⁹⁸ It was certainly possible that one candidate's electoral slate could win a majority on a single national Election Day. But it was also possible that a candidate's slate would win only a plurality, requiring a runoff under state law at a later date. And Virginia's legislature had been forced to extend elections in the past, when flooding made passage to the polls impracticable on the principal designated day.⁹⁹ Congress wanted to allow states the flexibility to address these and similar quirks without defeating the point of the uniform election day.¹⁰⁰

In sum, the statute set a single Election Day for the country. But the mandate for a single federal Election Day would not preclude the state from providing for contingencies for an alternative process, if a state held an election on that day and for some reason that election failed to yield a choice under state law. In most of the legislative debate, the focus was not on *who* should make the rules, or *how* they should do so, but on *when* votes for the presidential electors should be cast (and when votes cast for electors should be authorized when cast beyond the national Election Day).¹⁰¹

⁹⁸ CONG. GLOBE, 28th Cong., 2d Sess. 14 (1844) (statement of Rep. Hale). For a summary of these sorts of majority-win provisions (in various states, for various offices), see Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. (forthcoming Oct. 2021) (manuscript at 128–43), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3563257.

⁹⁹ CONG. GLOBE, 28th Cong., 2d Sess. 15 (1844) (statement of Rep. Chilton).

¹⁰⁰ See, e.g., *id.* at 30 (statement of Rep. Elmer); see also Friedman, *supra* note 9, at 815–17 (discussing Congress's intent regarding the 1845 statute). There are, of course, other conditions that might be said to lead to electoral "failure" in a particular state, with no indicia that Congress contemplated these conditions in this 1845 statute. I do not include colloquial "failures" that represent public dissatisfaction with the results, like a lack of faith in a resolution of the electoral contest conducted pursuant to adequate legal process, or simply modest delay in the delivery of results. See *supra* text accompanying notes 80–85. But it is conceivable that, for example, a widespread destruction of ballots might render results not only undetermined, but indeterminable. Such a circumstance might amount to failure in the sense intended by the text, if not expressly contemplated by the 1845 Congress.

¹⁰¹ In the legislative debate, there were several amendments offered (and rejected) that, inter alia, assigned authority to "the legislatures of the several States" to "direct[] the appointment of electors" in the event of electoral failure or electors' vacancy. E.g., CONG. GLOBE, 28th Cong., 2d Sess. 14 (1844) (statement of Rep. Elmer); *id.* at 28 (statement of Rep. Dromgoole). But these amendments were largely offered for the substance of what to do in the case of vacancy or electoral failure, and not who should be authorized for the doing; there was little to no discussion indicating that these amendments were designed to designate a body (or process) distinct from the general lawmaking process of the state. Indeed, the few fleeting references to legislative authority seemed to confirm that the proper path to legislative selection of electors was through a statute making that designation, precisely as South Carolina had done. See, e.g., *id.* at 30 (statement of Rep. Elmer) (noting the States whose "laws now authorized their choice of electors by the legislature").

That said, the original 1845 statute was unequivocal in its assignment of the authority to rectify a failed election. “[W]hen any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day *in such manner as the State shall by law provide.*”¹⁰² This was the same as the process designated for replacing unavailable presidential electors, settled in the statute’s previous sentence, and which remains in the statute to this day: “[E]ach State may *by law* provide for the filling of any vacancy or vacancies”¹⁰³

The “State” was the body empowered to fill vacancies or compensate for a failed Election Day, choosing make-up electors as provided *by law*.¹⁰⁴ And, indeed, that delegation to the state through the regular statutory process reflects consistent state practice at the time. In 1844, the South Carolina legislature chose its own electors, and all other states chose electors through popular elections—but every state (even South Carolina) established its process through a statute.¹⁰⁵ There was no suggestion in the 1845 federal statute that the state legislature had any authority whatsoever beyond its capacity as a law-making body, unless state law assigned it that role. Indeed, had the Constitution reserved special power to the state legislature to act outside of the regular legislative process in fulfilling an Article II role, the 1845 delegation to the state to act “by law” would have been unconstitutional.¹⁰⁶ Had Congress understood the Constitution in this way in 1845, one might have expected the conflict between the statutory text and the purported constitutional mandate to have occasioned at least one pertinent objection in debate. The legislative record reveals none.

The language of the “failed election” provision changed by the mid-1870s, when the statute took its present form, providing that electors may be appointed “as the legislature of such State may direct.”¹⁰⁷ But there is little contemporaneous evidence that the change was intended to reflect a considered alteration in the body empowered to

¹⁰² Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721 (emphasis added).

¹⁰³ *Id.*; see also 3 U.S.C. § 4 (“Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.”).

¹⁰⁴ See, e.g., CONG. GLOBE, 28th Cong., 2d Sess. 21 (1844) (statement of Rep. Duncan) (suggesting an amendment wherein the States, by law, would fill vacancies).

¹⁰⁵ E.g., An Act for Prescribing on the Part of this State, the Times, Places, and Manner of Holding Elections for Representatives in the Congress, and the Manner of Appointing Electors of a President of the United States § 4 (1788), *supra* note 61 (South Carolina).

¹⁰⁶ Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

¹⁰⁷ 3 Rev. Stat. § 134 (1875).

choose electors. Instead, the change appears to have been a codifier's revision, altered without explanation.

In 1866, Congress authorized the first codification of the United States statutes promulgated to date, appointing a three-person commission to "revise, simplify, arrange, and consolidate" the statutory substance.¹⁰⁸ Before 1866, the statutes had been assembled only chronologically, and it was quite difficult to determine which had been modified, or repealed, or superseded; the codification was an attempt to bring order to the whole.¹⁰⁹ The commissioners turned over their work product in 1873 to a joint congressional committee, but Congress rejected the draft: "It was the opinion of the joint committee that the commissioners had so changed and amended the statutes that it would be impossible to secure the passage of their revision."¹¹⁰

Thomas Jefferson Durant took over the codification process,¹¹¹ with the task of "cutting out all amendments and restoring the bill to the original law, when it passed."¹¹² While his monumental work was an improvement, it was not a perfect success. Even after he had submitted his revised proposed codification, hundreds of errors were discovered.¹¹³ Per the pithy description of renowned law librarians J. Myron Jacobstein and Roy M. Mersky: "As is noted in all standard treatises on legal bibliography, this revision caused much dissatisfaction because of many errors as well as suspicion that the revisors had frequently exceeded their authority."¹¹⁴ And although Durant apparently presented a report on the changes he had made to Congress, there appears to be no extant copy of that report.¹¹⁵

Nevertheless, Durant's revision—now known as the Revised Statutes of 1873—was enacted into law on June 22, 1874.¹¹⁶

¹⁰⁸ Act of June 27, 1866, ch. 140, 14 Stat. 74.

¹⁰⁹ Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012–13 (1938).

¹¹⁰ *Id.* at 1013.

¹¹¹ *Id.* at 1013–14.

¹¹² 65 CONG. REC. 639 (1924) (statement of Rep. Little).

¹¹³ Dwan & Feidler, *supra* note 109, at 1014; Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, IN CUSTODIA LEGIS: L. LIBRS. CONG. (July 2, 2015), <https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code>.

¹¹⁴ J. Myron Jacobstein & Roy M. Mersky, *Introduction* to 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, at iii (Washington, D.C., Gov't Printing Off. 1981) (1872).

¹¹⁵ *Id.* at v.

¹¹⁶ Dwan & Feidler, *supra* note 109, at 1012; *Wright v. United States*, 15 Ct. Cl. 80, 86 (1879). It appears that after the Revised Statutes of 1874 were passed, in part due to the various errors therein, Congress rarely adopted or enacted revised compilations of the code. See Dwan & Feidler, *supra* note 109, at 1014–23 (chronicling this dynamic and noting, as rare exceptions, the Criminal Code and Judicial Code, enacted in 1909 and

Section 5596 of those Revised Statutes repealed all prior statutes embraced in part in the 1874 Revision.¹¹⁷ That repeal, of course, includes repeal of the 1845 statute providing for the appointment of electors if the state failed to make a choice on Election Day.¹¹⁸ The 1845 statute is no longer operative. But to the extent that the revised text is ambiguous, courts and commentators have routinely looked to the progress of legislation from before 1874 to interpret the text in the revision.¹¹⁹

It appears that the language of the 1845 statute that would become 3 U.S.C. § 2 changed in the process of the mid-1870s revisions. Recall that the original statute had three clauses:

[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed:

[2] *Provided*, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote:

[3] *And provided, also*, when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide.¹²⁰

The pre-Durant revision of 1873, rejected by Congress as exceeding the revision commissioners' authority, brings the 1845 statute into three separate codified sections. The first clause of the statute, setting the first Tuesday after the first Monday in November as Election Day, appears relatively unscathed as Title III, chapter 1, section 1: "[T]he electors of President and Vice-President shall be appointed, in each State, on the Tuesday next after the first Monday in

1911). Instead, later Congresses were more likely to provide that codifications could constitute *prima facie* evidence of law, but that the original enactments remained law in the event of any discrepancy. *Id.*

¹¹⁷ 74 Rev. Stat. § 5596 (1875); *United States v. Claflin*, 97 U.S. 546, 548 (1878); Dwan & Feidler, *supra* note 109, at 1014–15.

¹¹⁸ Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

¹¹⁹ *E.g.*, *Wright*, 15 Ct. Cl. at 87 ("In case of ambiguous language in the Revised Statutes, or uncertainty as to the true construction to be given to the words of any section, previous acts on the same subject may be referred to and examined for light on the object and intent of Congress as shown by the course of legislation, in the same manner as statutes *in pari materia* relating to the same subject may always be taken, compared, and construed together."); Dwan & Feidler, *supra* note 109, at 1015.

¹²⁰ Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

November, in every fourth year succeeding every election of a President and Vice-President.”¹²¹

The second clause of the statute appears almost verbatim as Title III, chapter 1, section 3: “Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.”¹²²

But the third clause, appearing in Title III, chapter 1, section 4, is changed to resemble its current form: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct.”¹²³

The commissioners tasked with revision gave no indication of any reason for making the change from “in such manner as the State shall by law provide”¹²⁴ to “in such manner as the legislature of such State may direct.”¹²⁵ In several other portions of the code—including immediately subsequent portions of the code relating to the conduct of presidential electors—the commissioners annotated substantive changes that they had made and that apparently felt sufficiently momentous to warrant annotation.¹²⁶ There are no such annotations accompanying the relevant change here.

It is also difficult to believe that the change was made for substantive reasons, as a deliberate choice to remove the power to appoint electors from the state’s lawmaking process and reassign it to the purported plenary power of the legislature as a body. Had the commissioners believed that the legislature enjoyed such an exclusive appointment privilege—from the Constitution or simply as a matter of federal policy—there would be no reason to make the modification in one instance of appointing electors and not another. They made the change for electoral failure, but not for the previous sentence, governing vacancies. That is, there is no apparent reason to deliberately grant the legislature (as a body, independent of the lawmaking process) exclusive authority to appoint electors when the state fails to

¹²¹ 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 61.

¹²² *Id.*

¹²³ *Id.* at 62.

¹²⁴ Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

¹²⁵ 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 62.

¹²⁶ *See, e.g., id.* at 62–67 (providing annotations to §§ 8, 10–11, 14–16, 18, 20).

make a choice on Election Day (§ 4), but to deny such privilege to the legislature when appointing electors to fill vacancies (§ 3).¹²⁷

Instead, given the absence of any explanation for the change, and the absence of any logical distinction between the instances where the change was made and those where it was not, it is more likely that the change reflects a stylistic choice rather than a substantive one. That is, it is more likely that the revision commissioners believed that the manner of appointing electors that a “legislature . . . may direct”¹²⁸ is simply another way of describing the manner of appointing electors provided by a “[s]tate . . . by law.”¹²⁹ Occam’s razor suggests that the two phrases provide the same rule. The appointment of electors is given by federal statute to the state lawmaking process.

These changes, introduced in the pre-Durant revision of 1873, persisted in Durant’s edition of the Revised Statutes of 1873 ultimately enacted by Congress. The relevant portions of Title III, ch. 1, § 1 of the pre-Durant revision became, verbatim, § 131 of the Revised Statutes.¹³⁰ Title III, ch. 1, § 3 of the pre-Durant revision became, verbatim, § 133 of the Revised Statutes.¹³¹ And the statute of interest here—Title III, ch. 1, § 4 of the pre-Durant revision—became, with the exception of the addition of an irrelevant indefinite article, § 134 of the Revised Statutes.¹³² And each has been retained in precisely the same form in the modern United States Code.¹³³

¹²⁷ Similarly, there is no indication that the approach to the particular governmental body entrusted with remedying electoral failure had changed notably since 1845. In 1872, Congress passed a similar provision providing for the contingency of “a failure to elect” a congressional representative upon the single election date then established for federal congressional elections. Act of Feb. 2, 1872, Pub. L. No. 42-11, § 4, 17 Stat. 28, 29 (codified as amended at 2 U.S.C. § 8(a)). As mentioned above, Article I provides that the rules for congressional elections “shall be prescribed in each State by the Legislature thereof.” U.S. CONST. art. I, § 4, cl. 1. And yet, when providing for a failure to elect congressional representatives on the single day designated by federal law, Congress allowed the states to provide another election to resolve the vacancy, not at any time preferred by the legislature (beyond the lawmaking process), but “at such time as is or may be provided by [state] law.” § 4, 17 Stat. at 29. That is, the 1872 Congress seemed to have the same approach to the body empowered to resolve electoral failure for congressional representatives that the 1845 Congress had to resolve electoral failure for presidential electors.

¹²⁸ 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 62.

¹²⁹ Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

¹³⁰ 3 Rev. Stat. § 131 (1875).

¹³¹ *Id.* § 133.

¹³² *Id.* § 134. Section 134 reads: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” *Id.* (emphasis added).

¹³³ Compare *id.* § 131, with 3 U.S.C. § 1; compare 3 Rev. Stat. § 133, with 3 U.S.C. § 4; compare 3 Rev. Stat. § 134, with 3 U.S.C. § 2.

In sum, 3 U.S.C. § 2 now authorizes, in the event that a state fails to choose electors in the election held on the federally mandated presidential election date, the appointment of electors on some later day “in such a manner as the legislature of such State may direct.”¹³⁴ But that statute began as a provision authorizing, in the event of failure, the appointment of electors “in such manner as the State shall by law provide.”¹³⁵ The textual change was made in the course of an error-laden 1873 codification project, without any contemporaneous recognition that the change was intended to be substantive (or, indeed, in any way remarkable). A neighboring statutory provision, also concerning the selection of electors, retained the original direction to appoint electors “by law,” without any indication that the lawmaking process would be thought to intrude on the unique prerogative of the state legislature as a body empowered to act beyond lawmaking.¹³⁶

The most natural implication is that the textual change in the statute that became 3 U.S.C. § 2 was not meant to connote any difference in meaning: that the manner in which a state provides for the appointment of electors “by law” is simply another way to describe the manner by which a state legislature “directs” how electors are to be appointed. And at the least, if the text of 3 U.S.C. § 2 is ambiguous with respect to its reference to either a regular lawmaking power or to a special source of power in the legislature beyond the lawmaking process, the 1845 precursor ought to inform any modern reading of the statute.

III

THE STATUTE AS AN INTERPRETIVE DEVICE FOR THE CONSTITUTION

Indeed, the historical precursors of 3 U.S.C. § 2 canvassed above might—in an unusual way—shed some light on the best reading of the constitutional provision. Of course, the extent to which post-ratification history may be relevant—here, specifically, the extent to which nineteenth-century statutes may provide interpretive guidance for the construction of eighteenth-century constitutional provisions—

¹³⁴ 3 U.S.C. § 2.

¹³⁵ Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

¹³⁶ 3 U.S.C. § 4. In addition to the instruction in 3 U.S.C. § 4 that elector vacancies be resolved “by law,” other portions of the statutes providing for delivery of elector results further support the notion that those results are to be obtained through procedures determined by normal lawmaking process and not by the legislature as a distinct body. For example, 3 U.S.C. § 6 requires the state executive to deliver to the United States Archivist a certificate of the electors appointed once the identity of those electors has been ascertained—and provides that this ascertainment is to take place “under the laws of such State,” not pursuant to the unilateral direction of the state legislature. 3 U.S.C. § 6.

is a matter of abiding dispute in constitutional theory. This essay neither engages that voluminous literature nor takes sides in the debate. But Part I, above, mentioned *McPherson v. Blacker*, and its seeming influence on at least some readings of the Article II delegation. *McPherson*, in turn, relies heavily on a nineteenth-century congressional committee report in explaining Article II.¹³⁷ The origins of 3 U.S.C. § 2, above, may help put the most frequently cited passage of *McPherson* in some perspective.

McPherson's discussion of any legislative role in prescribing the manner of appointing electors distinct from the normal legislative process is, as explained above, dicta.¹³⁸ The case concerned a statute, passed through the normal legislative process, and there was no claim that this statute was in any way in conflict with state courts or the state constitution. But within the dicta of the case, several statements suggest a more robust Article II role for the legislature than the normal legislative process provides. The starkest articulation of this theory—a full-throated strong version of the “independent state legislature” notion—appears in *McPherson*'s citation of an 1874 Senate committee report on a (failed) proposed constitutional amendment to effectuate a popular vote for presidential electors.¹³⁹ The complete passage is as follows:

[O]n the 28th of May, 1874, a report was made by Senator Morton, chairman of the senate committee on privileges and elections, recommending an amendment dividing the states into electoral districts, and that the majority of the popular vote of each district should give the candidate one presidential vote, but this also failed to obtain action. In this report it was said: “The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the state, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legisla-

¹³⁷ *Supra* Part I.

¹³⁸ *Supra* text accompanying notes 42–45; Smith, *supra* note 9, at 775–76.

¹³⁹ *McPherson v. Blacker*, 146 U.S. 1, 34–35 (1892).

ture to resume the power at any time, for it can neither be taken away nor abdicated.”¹⁴⁰

This committee report asserts that state legislatures cannot for these purposes be bound by any state limitations, including the state constitution—thereby requiring Senator Morton’s constitutional amendment to make a presidential popular vote durable.

In *McPherson*, the citation of this report is the culmination of a lengthy passage about the history of state flexibility to choose districted elections, at-large elections, or some other mechanism to appoint electors (which was, of course, the actual issue in the case).¹⁴¹ But much has been made of the rhetorical swell at the close, quoting a report singling out the state legislature for a special role free of state constitutional context. When proponents of a strong “independent state legislature” notion cite *McPherson*, this is the muscular language they cite.¹⁴²

It is not clear why a congressional committee report from a failed constitutional amendment promulgated in 1874 should be particularly persuasive in assessing the meaning of an Article II delegation to the states. And Hayward Smith has documented the ways in which the author of that committee report—with, *inter alia*, a stake in aggrandizing the need for his proposed constitutional amendment—may be a particularly unreliable representative narrator.¹⁴³ But if we take the *McPherson* method seriously, it implies that mid-nineteenth-century congressional views should be meaningful in construing the constitutional provision. And if that premise bears weight, the historical progression of statutory text discussed in this article provides far stronger evidence that Congress as a whole did *not* seem to believe in an independent state legislature doctrine allowing the legislature as a body free reign to act beyond regular state lawmaking procedures.¹⁴⁴

¹⁴⁰ *Id.* (quoting S. REP. NO. 43-395, at 9 (1874)).

¹⁴¹ *Id.* at 28–35.

¹⁴² *See, e.g.,* Carson v. Simon, 978 F.3d 1051, 1060 (8th Cir. 2020) (“Simply put, the Secretary has no power to override the Minnesota Legislature. In fact, a legislature’s power in this area is such that it ‘cannot be taken from them or modified’ even through ‘their state constitutions.’” (quoting *McPherson*, 146 U.S. at 35)).

¹⁴³ Smith, *supra* note 9, at 777–79.

¹⁴⁴ Professor Morley has catalogued several other examples of nineteenth-century articulations of this principle in several state supreme courts and a few instances in which Congress acted in its role to resolve the elections of its members. Morley, *Independent State Legislature*, *supra* note 9, at 38–45, 69. These other examples seem, at best, to show nineteenth-century support for a weaker form of the “independent state legislature” doctrine, holding the state legislative process to state constitutional procedural requirements while freeing it of some or all substantive constraints. None exhibits the full-throated articulation of plenary authority asserted in the committee report *McPherson* cites.

In 1845, as shown above, Congress passed a statute authorizing the State, in the event that the state failed to make a choice on Election Day, to provide the manner of appointing electors—by law.¹⁴⁵ No member of Congress suggested that this mode of appointing electors—regular statutory procedure, under regular state constitutional constraints—was in any way improper or unconstitutional.¹⁴⁶ The legislative history reveals various alternative, rejected, proposals that more closely mirrored the constitutional text (allowing the “legislature” to “direct” the appointment of electors), but no member of Congress remarked on that distinction as reflecting a choice of decisionmaker different from the designation “by law” in the final statute.¹⁴⁷ The implication is that, at least in 1845, Congress thought that allowing states to direct the manner of appointing electors by law, and allowing the state legislature to direct the manner of the appointment of electors, amounted to the same thing: normal state lawmaking power and constraint.¹⁴⁸ And that both were perfectly consistent with Article II.

By 1873, the 1845 text providing for the appointment of electors in the event that the state had failed to make a choice on Election Day had changed.¹⁴⁹ But the text providing for the states to fill vacancies among the electors—by law—had not.¹⁵⁰ The argument in Part II above suggests that the textual change in the provision to become 3 U.S.C. § 2 was inadvertent, and should not be read as particularly meaningful.¹⁵¹ But independent of the merits of that argument, the *absence* of a change in the vacancies portion of the statute shows that Congress, when it passed the Revised Statutes in 1874, still apparently believed that states could provide for the filling of electors’ vacancies “by law,”¹⁵² and that this was in no way inconsistent with the role of the state legislatures under Article II. Indeed, that delegation, reliant on the normal lawmaking process of the state, remains in the code today.¹⁵³

¹⁴⁵ See *supra* text accompanying notes 96, 102–04.

¹⁴⁶ See *supra* text accompanying notes 104–06.

¹⁴⁷ See *supra* note 101.

¹⁴⁸ See *supra* note 101.

¹⁴⁹ See *supra* text accompanying note 123.

¹⁵⁰ See 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 61.

¹⁵¹ See *supra* text accompanying notes 132–36.

¹⁵² 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 61.

¹⁵³ 3 U.S.C. § 4; *cf.* 2 U.S.C. § 8(a) (allowing state law, not “the legislature,” to prescribe the time for holding a congressional election to fill a vacancy, following an 1872 statute with the same language).

It is not my intention to overstate the significance of this argument. The views of a mid-nineteenth-century Congress may offer some guidance, but do not likely hold particularly magical import, for the proper interpretation of Article II's designation of the power to direct the manner of appointing electors. But the dicta in *McPherson* seems to be surprisingly potent in present discourse. And to the extent that this *McPherson* dicta takes its strength from the expression of the views of a lone committee report from 1874, the actual contemporary congressional work-product, manifest in statutes, suggests a very different congressional assessment of the legal merits of state legislative action to appoint electors divorced from the regular lawmaking process.