

A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election

The president is chosen by the Electoral College, which is composed of electors from each state. The Constitution delegates to Congress the choice of *when* presidential electors must be appointed, and to state legislatures the power to choose the *manner* of appointing these electors. In carrying out these constitutionally delegated powers, Congress has designated Election Day as “the Tuesday after the first Monday in November,” and for more than a century, all states have selected their electors based on the popular vote.

Although the power to choose the manner in which electors are appointed means that state legislatures theoretically could reclaim the ability to appoint electors directly *before* Election Day,¹ they may not substitute their judgment for the will of the people by directly appointing their preferred slate of electors *after* Election Day. Nor may they use delays in counting ballots or resolving election disputes as a pretext for usurping the popular vote. Doing so would violate federal law and undermine fundamental democratic norms, and it could also jeopardize a state’s entitlement to have Congress defer to its chosen slate of electors.

FOR MORE THAN A CENTURY, ALL 50 STATES HAVE FOLLOWED THE DEMOCRATIC PRACTICE OF APPOINTING THEIR ELECTORS BASED ON POPULAR ELECTIONS

When Americans cast their votes for president, they do not do so directly. They instead vote for electors who, in turn, choose the president and vice president. This process is governed by provisions in the U.S. Constitution and federal and state laws.

The Constitution provides that each state “shall appoint” its slate of electors for president “in such Manner as the Legislature thereof may direct.”² The legislature in each state therefore has plenary power to determine how the state will select its electors.³ The electors selected by each state must “meet in their respective states and vote by ballot for President and Vice President,” then transmit lists of all their votes to the President of the Senate for counting “in the presence of the Senate and House of Representatives.” U.S. Const. amend XII.

While the Constitution gives states, through their legislatures, the power to choose the manner for appointing electors, it delegates to Congress the power “to determine the time of chusing Electors.” U.S. Const. art II, § 1, cl. 4. Congress, in turn, has provided that all states must appoint their electors on the “Tuesday after the first Monday in November, in every fourth year succeeding every election of a President and Vice President”—which falls on November 3rd this year. 3 U.S.C. § 1.

That November day is widely known to Americans as Election Day, but this has not always been the case. In the earliest days of the Republic, some state legislatures chose to select electors directly, without holding popular elections.⁴ The practice of state legislatures directly appointing electors has long since been abandoned, and

¹ For ease of reference, we refer to “Election Day” throughout this paper. However, all states have some form of early and/or absentee voting that begins before Election Day. Many of the limitations on states exercising their Article II powers to appoint electors directly apply whenever voting has started in accordance with existing state law.

² The slate of electors from each state is equal in number to the Senators and Representatives that state has in Congress. See U.S. Const. art. II, § 1, cl. 2.

³ See, e.g., *McPherson v. Blacker*, 146 U.S. 1, 26 (1892) (holding that the “whole subject” of presidential elector appointment is “committed” to state legislatures).

⁴ See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2321 (2020) (“In the Nation’s earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College.”); see also *Bush v. Gore*, 531

“history has now favored the voter.” *Bush v. Gore* 531 U.S. 98, 104 (2000). By 1832, every state in the union except for South Carolina had enacted laws providing for the selection of electors through a popular election,⁵ and for well over a century, laws in every state have provided for the selection of electors through a popular election.⁶ Indeed, “by the early 20th century, citizens in most States voted for the presidential candidate himself; ballots increasingly did not even list the electors.” *Chiafalo*, 2020 WL 3633779, at *3.⁷ This longstanding practice has persisted unbroken since then, and today, every state selects its presidential electors through a popular vote.⁸

For more information on the law governing the presidential election, see the Task Force paper, *The Electoral Count Act & the Process of Electing a President*.

WHEN A STATE HAS HELD AN ELECTION, THE LEGISLATURE MAY NOT SUBSTITUTE ITS JUDGMENT FOR THE WILL OF THE PEOPLE

A State Legislature Usurping the Popular Vote Would Violate Federal Law

The United States’ long history of selecting presidential electors through a popular vote has established an important and fundamental democratic norm of citizens participating in choosing the president.⁹ Once a state has held an election, a state legislature’s post-Election Day appointment of its own preferred slate of electors not only would contravene this fundamental democratic norm; it would also violate federal law requiring that all states must appoint their electors on Election Day, *i.e.*, the “Tuesday after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” 3 U.S.C. § 1.

A state legislature’s attempt to substitute its preferred electors for those chosen through a popular election held pursuant to state law would also deprive the state of protections in federal law that require Congress to honor the state’s chosen electors. The Electoral Count Act (“ECA”) includes a “safe harbor” provision that treats as “conclusive” a state’s chosen slate of electors if two criteria are satisfied: (1) the electors must be chosen under laws enacted *prior to Election Day*, and (2) the selection process, including final resolution of any disputes, must be completed at least six days prior to the meetings of the electors. 3 U.S.C. § 5. This year, the ECA “safe harbor” deadline is December 8, 2020. A post-Election Day appointment of a state legislature’s preferred slate of electors would almost always deviate from the legal process for appointing electors established by the state prior to Election Day.¹⁰ Although the ECA safe harbor criteria are not mandatory, the consequences of failing to adhere to

U.S. 98, 104 (2000) (noting that that direct appointment of electors “was the manner used by state legislatures in several states for many years after the framing of our Constitution”).

⁵ Ruth C. Silva, *State Law on the Nomination, Election, and Instruction of Presidential Electors*, 42 Am. Pol. Sci. Rev. 523, 523 (Jun. 1948).

⁶ Thomas H. Neale, *The Electoral College: How It Works in Contemporary Presidential Elections*, Congressional Research Service (May 15, 2017),; William Logan Martin, *Presidential Electors: Let the State Legislatures Choose Them*, 44 A.B.A. J. 1182, 1185-87 (Dec. 1958).

⁷ See *Chiafalo*, 140 S. Ct. at 2328 (describing “a tradition more than two centuries old” in which state laws require electors “to vote for the candidate whom the State’s voters have chosen”).

⁸ See Thomas H. Neale, *supra* n. 6. All but two states use a winner-take-all method of apportioning electoral votes. Nebraska and Maine appoint electors by congressional district (the winner of the popular vote in each district gets that district’s electoral vote), with the remaining two electoral votes (one for each Senator) going to the winner of the statewide vote. For a summary of the laws governing the selection of electors in each state, see *Summary: State Laws Regarding Presidential Electors*, Nat’l Ass’n of Secretaries of St. (Nov. 2016).

⁹ “Our whole experience as a Nation” points in the direction of requiring electors to respect the will of the people who appointed them. *Chiafalo*, 140 S. Ct. at 2326-28 (citations omitted).

¹⁰ North Carolina is a possible exception. In 2001, in response to Florida’s experience during the 2000 presidential election, the North Carolina General Assembly amended state law to provide for the General Assembly to meet in a special session and

them are significant. Losing the safe harbor protection leaves Congress to decide which electors to count from a state, without mandatory deference to the preferences of either the state's voters or legislature.¹¹

A State Legislature Substituting Its Preferences for the Will of the Voters Raises Constitutional Concerns

Finally, a state legislature's post-Election Day substitution of its own preferences for those of voters raises constitutional concerns.¹² The Supreme Court has explained that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental," and is subject to constitutional due process and equal protection guarantees. *Bush*, 531 U.S. at 104-05. The due process clause, in particular, protects citizens' reasonable reliance on the expectation under state law that they will be able to meaningfully exercise their fundamental right to vote.¹³ Even though this due process interest has most commonly been recognized in the context of protecting economic interests or preventing retroactive application of punitive laws, "the principle is broad enough to encompass changes in voting rules that inappropriately unsettle reasonable expectations concerning the operation of the voting process," as a post-Election Day legislative usurpation of the popular vote would surely do.¹⁴

name North Carolina's electors itself if "by the sixth day before the electors are to meet, the election of electors has not been certified by the State Board of Elections," or if the Governor has not named the electors "for some other reason." N.C. Gen. Stat. § 163-213(a) (2001). Even in this scenario, North Carolina law requires that the electors be named "in accord with [the legislature's] best judgment of the will of the electorate." *Id.* § 163-213(c). This statute has never been used and its legality has therefore never been tested.

¹¹ Daniel P. Tokaji, *An Unsafe Harbor: Recounts, Contests, and the Electoral College*, 106 Mich. L. Rev. First Impressions 84, 86 (2008). In resolving election disputes, the Supreme Court has assumed a state's intention to rely on the ECA safe harbor, in order to ensure that its electoral votes are counted. See *Bush*, 531 U.S. at 120 (Rehnquist, C.J., concurring).

¹² As the Supreme Court recently observed in *Chiafalo*, "Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, *absent some other constitutional constraint*." 140 S. Ct. at 2324 (emphasis added). The Court elaborated that "[c]hecks on a State's power to appoint electors . . . can theoretically come from anywhere in the Constitution," including, for example, the Equal Protection Clause. *Id.* at 2324 n.4.

¹³ Similarly, once a state has granted its citizens the right to vote on equal terms, "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)); see U.S. Const. amend. XIV, § 1, cl. 2 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986) ("[I]f the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). Yet there is at least a reasonable argument that a state legislature's appointment of its own slate of electors *after* voters have cast their ballots would raise equal protection concerns by effectively elevating the preferences of some voters over others.

¹⁴ See Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. Chi. L. Rev. 655, 731 (2017).

AN ACTUAL ELECTION FAILURE WOULD BE EXTRAORDINARY AND WOULD NEED TO INVOLVE CIRCUMSTANCES WELL BEYOND DELAYS OR DISPUTES REGARDING VOTE COUNTING TO JUSTIFY LEGISLATIVE INTERVENTION

Congress has exercised its authority to decide when states must appoint their electors by designating a uniform federal Election Day.¹⁵ A single, narrow exception to that statutory mandate provides that where a “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 state’s electors may be appointed on a later date “in such a manner as the legislature of such State may direct.” 3 U.S.C. § 2 (emphasis added). Congress has never expressly defined what would constitute an election failure, but it is clear from the structure of 3 U.S.C. §§ 1 and 2, that delays in a state’s completion of its vote tally or in resolving related disputes do not amount to a “failure to make a choice.”¹⁶ Given that “[t]he essential point” of these provisions, originally enacted in 1845, “was to create a uniform national election day,” it would yield an absurd result contrary to Congress’s intent to interpret section 2 as authorizing a state legislature to nullify an election and appoint the state’s electors itself whenever an election contest cannot be resolved quickly.¹⁷ Indeed, there is an important distinction between casting and counting votes. Section 2 was enacted in anticipation of the possibility that states might have difficulty completing the *casting* of votes on Election Day.¹⁸ Counting votes is an entirely different matter.

The ECA’s safe harbor provision makes this even clearer: states may take up to five weeks to determine the final outcome of their elections, including by resolving any disputes, and still have their election results treated as “conclusive” by Congress as long as the electors were chosen under state laws enacted prior to Election Day.¹⁹ (States then have another six days before the Electoral College meets.²⁰) In other words, “the statute cannot reasonably be understood to have meant that if a state holds an election on Election Day but it turns out that the result is really, really close and takes some time to resolve, then the Legislature may step in and choose a slate of electors without regard to what happened on Election Day.”²¹ An overly broad reading of section 2 would

¹⁵ That does not mean that states cannot allow for early or absentee voting, of course, as all do in some form. Rather, it means that, pursuant to the ECA, the election must be held (and the casting of votes generally must be completed) on Election Day. See also *supra* n. 1.

¹⁶ Indeed, state election laws not only provide for electors to be appointed based on the popular vote, they also establish various procedures, including post-election contest procedures, for resolving disputes related to presidential elections. See, e.g., Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 Ind. L. J. 1, 29-34 (2013) (cataloguing states’ procedures for resolving election contests involving presidential electors).

¹⁷ Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 Fla. St. U. L. Rev. 811, 817 (2001). It is a well-settled principle that “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); see also, e.g., *Clinton v. City of New York*, 524 U.S. 417, 429 (1998).

¹⁸ The legislative history makes clear that Congress crafted 3 U.S.C. § 2 in order to accommodate various possible reasons that an election might not be completed in a single day. During the House deliberations, for example, a representative from New Hampshire noted that the election procedure in his state could take multiple days to complete because of a procedural requirement to hold a runoff election if no candidate secures a majority of the votes in the first round of voting. Congressional Globe, 28th Cong., 2d Sess., at 14 (Dec. 9, 1844). And a representative from Virginia noted that live voice voting in his state frequently took more than one day to conduct. *Id.* at 15. Further, in a “mountainous” state like Virginia, “intersected by large streams of water,” the logistical difficulties of traveling to the polls in inclement weather led to regular extensions of elections when “a considerable number of voters” would otherwise be disenfranchised. *Id.* See also Michael Morley, *Postponing Federal Elections Due to Election Emergencies* (June 4, 2020), at 4-9 (detailing the legislative history).

¹⁹ 3 U.S.C. § 5.

²⁰ 3 U.S.C. § 7.

²¹ Friedman, *supra* n. 17 at 816. As Friedman observed, the fact that the winner “has not been determined conclusively by midnight on Election Day, only a few hours after the polls close, or even by a much later time, does not mean the state has

transform Congress's narrow exception for true election *failures* into a loophole that allows state legislatures to usurp the popular vote any time it appears likely to yield a result that a state legislature views as unfavorable.²² In short, the continuation of post-election disputes up to (or even past) the safe harbor deadline alone cannot, by definition, constitute a failure that would permit state legislatures to invoke section 2 to appoint electors directly.

Our historical experience confirms the narrow scope of section 2. Even during previous national crises, the presidential election has proceeded as scheduled.²³ Indeed, the United States has held elections amidst the Civil War, the 1918 Influenza Pandemic, the Second World War, and Hurricane Sandy, among other crises. Despite the challenges these events presented to the electoral process, the United States was able to complete the elections in each instance.

CONCLUSION

A state legislature's post-Election Day substitution of its own preferences for those of voters would violate federal law. Even if circumstances delay the final determination of the *results* of a state's election beyond Election Day, a state legislature may not usurp the electoral process under the pretext of declaring a failed election. Absent a true election failure—something the country has not experienced in modern history—federal law requires states to appoint electors on Election Day. A state legislature's attempt to override the will of voters would also violate fundamental democratic norms, jeopardize the state's entitlement to ensure that Congress defers to its chosen slate of electors, and raise significant constitutional concerns.

About the National Task Force on Election Crises

The National Task Force on Election Crises is a diverse, cross-partisan group of more than 50 experts in election law, election administration, national security, cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. The mission of the nonpartisan National Task Force on Election Crises is to ensure a free and fair 2020 presidential election by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except an election that is free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all members and therefore do not fully reflect any individual Task Force member's point of view—they are collective recommendations for action. More information about the Task Force, including its members, is available at <https://www.electiontaskforce.org/>.

failed to make a choice on that day. It only means that the responsible state officials have not yet ascertained what choice the people of the state made on Election Day." *Id.* At a minimum, Congress's establishment, in 3 U.S.C. § 5, of a safe harbor date five weeks after Election Day means that states have at least that much time to determine the winner.

²² And conversely, "if § 2 were deemed to authorize a legislature to pick a slate of electors whenever the election was too close to call, any time that a legislature purported to exercise this authority supporters of the losing candidate would be sure to contend that the decision was a usurpation of power, because the winner of the election might yet have been determined in good order." Friedman, *supra* n. 17 at 816.

²³ Jacob D. Shelley, *Postponing Federal Elections and the COVID-19 Pandemic: Legal Considerations*, Cong. Research Serv. (2020); see also Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* 152 (2015).