

ESSAY

THE ELECTORS CLAUSE AND THE GOVERNOR'S VETO

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This Essay examines whether the United States Constitution allows a governor to veto a state legislature's bill governing presidential elections. The Constitution does not support this seemingly intuitive proposition directly, and on its face appears to vest control over presidential elections solely in the hands of state legislatures: while Article II of the Constitution explicitly provides for the "Legislature" of each state to control the "manner" in which electors are chosen, it makes no mention of state governors. This vagary in the Constitution's text takes on particular import in light of political polarization over election administration in recent years. Moreover, the COVID-19 pandemic has prompted numerous states to make emergency modifications to their election systems, including delaying elections or attempting to cancel marginally competitive presidential primaries. Commentators have even expressed fear that a state legislature may eventually attempt to exercise its plenary authority to determine how presidential electors are appointed under Article II, Section 1 of the Constitution to choose electors without holding a popular vote. This Essay answers these concerns by arguing that a state governor can veto state legislatures' bills governing presidential elections on the same terms as any other legislation. Although the Constitution may not explicitly provide for a state governor's role, the Supreme Court's precedents and longstanding practice strongly suggest that a state governor has the same powers over bills governing presidential elections as over other state legislation. This conclusion has further implications for other potential conflicts between state legislatures and governors over presidential elections, including rules for absentee balloting, awarding electors by

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congressional district, using ranked-choice voting, or entering the National Popular Vote Interstate Compact.

INTRODUCTION

In an environment where election administration is politically polarized, it is increasingly likely that disputes will pit state legislatures against state governors. Indeed, given the changes and controversies over voting prompted by the coronavirus pandemic, many commentators have recently expressed concern that a state legislature might attempt to assign a state's presidential electors directly, even when such a step would certainly be vetoed by the governor.¹ These disputes could arise if a state's legislature passed and its governor vetoed a bill assigning the state's electors by congressional district (as in Nebraska and Maine),² choosing electors via ranked-choice voting,³ or joining a compact assigning the state's electoral votes to the national popular vote winner.⁴

¹ See Jerry H. Goldfeder, *2020 Election Sidebar: No Voters Need Apply*, N.Y.L.J. (May 22, 2020), <https://www.law.com/newyorklawjournal/2020/05/22/2020-election-sidebar-no-voters-need-apply/> (reprinted at <https://www.stroock.com/uploads/JerryGoldfederElectionSidebar2-0526.pdf>) [https://perma.cc/V82A-MM9E] (“If these states decided to re-write their laws to allow the legislature to directly choose electors, they could simply hand the election to Trump.”); Jeffrey Davis, *How Donald Trump Could Steal the Election*, THE ATLANTIC (Mar. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-election/608989/?fbclid=IwAR2MHgWwEQm369pyqy4ZB8naYbDgzyqdg4CLC_xLQUPEDuUg0Bgf-qA-oFg [https://perma.cc/3R9E-U46T] (“If Trump were to ask states to appoint electors instead of having an election, they certainly might follow his request If only a few states allowed their legislators to appoint electors, or postponed electoral selection indefinitely, the November election could result in no candidate receiving a majority of electoral-college votes.”); Mark Joseph Stern, *Trump Can't Cancel the Election. But States Could Do It for Him*, SLATE (Mar. 13, 2020), <https://slate.com/news-and-politics/2020/03/trump-cancel-election-day-constitution-state-electors-coronavirus.html> [https://perma.cc/LUM6-7P9U] (“Put simply, it is perfectly constitutional for a state legislature to scrap statewide elections for president and appoint electors itself.”); Mark Joseph Stern (@mjs_DC), TWITTER (July 30, 2020, 9:23 AM), https://twitter.com/mjs_DC/status/1288827480313335809 [https://perma.cc/NDL3-QXWD] (“I expect the GOP-controlled legislatures in MI, PA, and WI to declare Trump the winner and assign their electoral votes to him.”).

² See J. Miles Coleman, *The Electoral College: Maine and Nebraska's Crucial Battleground Votes*, U. VA. CTR. FOR POL. (Jan. 9, 2020), <https://centerforpolitics.org/crystalball/articles/the-electoral-college-maine-and-nebraskas-crucial-battleground-votes/> [https://perma.cc/PV97-YZ6Q].

³ See Scott Thistle, *Maine Secretary of State Rejects Petition to Repeal Ranked-Choice Voting*, PORTLAND PRESS HERALD (July 16, 2020), <https://www.pressherald.com/2020/07/15/maine-secretary-of-state-rejects-ranked-choice-voting-repeal-effort/> [https://perma.cc/J4Z7-S42R].

⁴ See *infra* notes 67–69 and accompanying text.

Intense battles between state government branches are familiar in only slightly different contexts. In just the past two years, state high courts in North Carolina and Wisconsin have resolved partisan disputes between state executives and legislatures over powers including appointments and litigation authority.⁵ And despite commentators' fear that legislators might try to assign electors for partisan reasons,⁶ such a decision could be taken in plausibly good faith: the coronavirus pandemic has already prompted numerous states to change primary election dates, and led New York to try to cancel its marginally contested presidential primary.⁷

Although the gubernatorial veto is intuitive and familiar, the Constitution at first blush appears to favor state legislatures. Article II of the Constitution provides that a state's presidential electors are appointed "in such Manner as the Legislature thereof may direct."⁸ It is settled that Article II does not require states to hold popular elections for president,⁹ and the Constitution's plain text does not mention any role for a state governor's approval or veto in determining whether or how a state chooses its presidential electors via popular vote.

This Essay argues that despite the Constitution's committing the appointment of electors to "the Legislature," a state governor's veto can, constitutionally, stop a state legislature from acting alone to govern how a state assigns or chooses that state's electors. Part I offers an overview of Article II, Section 1's text, and the basis on which a legislature might claim the authority to direct the selection of a state's electors over a governor's veto. Part II contends that current Supreme Court precedent does not grant legislatures any power to override a governor's veto they would not otherwise have under state law—both because of how the Court defines "legislature," and because of how the Court understands a legislature to act. Part III argues that affording legislatures an unusually privileged role in assigning electors would be inconsistent with

⁵ See *Cooper v. Berger*, 822 S.E.2d 286, 290 (N.C. 2018) (upholding legislature's restrictions on governor's appointments); *League of Women Voters of Wis. v. Evers*, 929 N.W.2d 209, 213 (Wis. 2019) (upholding special legislative session limiting governor's powers).

⁶ See Goldfeder, *supra* note 1; Davis, *supra* note 1; Stern, *supra* note 1.

⁷ See *Yang v. Kosinski*, 960 F.3d 119, 124–25 (2d Cir. 2020) (describing legislation and executive authority attempting to cancel presidential primary vote); *2020 State Primary Election Dates*, NAT'L CONF. ST. LEGIS. (May 19, 2020), <https://www.ncsl.org/research/elections-and-campaigns/2020-state-primary-election-dates.aspx> [<https://perma.cc/UFY6-E8JX>].

⁸ U.S. CONST. art. II, §1, cl. 2 (emphasis added).

⁹ *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

states' longstanding practice since the Founding, and would create substantial doubt about states' modern legal regimes for conducting presidential elections.

I

Both the Constitution's text and subsequent interpretation give state legislatures a significant role in choosing the President. American presidential elections' current structure rests on how legislatures have exercised this authority, as well as on certain federal statutes governing the transmittal and tabulation of electoral votes.¹⁰

Presidential elections depend on the Electoral College.¹¹ While the Constitution helps clarify the Electoral College's powers and organization, the document says little on how electors are chosen. Article II, Section I allows Congress to set when states choose electors, and at Clause 2 (the "Electors Clause"), provides that "Each State shall appoint" its electors "in such Manner as the Legislature thereof may direct."¹² Beyond some explicit caveats about who may serve as an elector, the Constitution's text provides no further guidance.¹³

The Supreme Court has repeatedly emphasized that this scheme gives state legislatures broad authority. The Court first recognized state legislatures' "plenary power" to determine the appointment of electors in the 1892 case *McPherson v. Blacker*,¹⁴ and famously did so again in the *Bush v. Gore* litigation arising from the 2000 presidential election.¹⁵ The Court very recently reaffirmed this understanding when it upheld "faithless elector" statutes in *Chiafalo v. Washington*, citing *McPherson* and noting that the Electors Clause grants states "far-reaching authority over presidential electors."¹⁶

¹⁰ See generally, e.g., 3 U.S.C. §§ 1–18 (governing procedures for choosing electors and tabulating electoral votes).

¹¹ U.S. CONST. amend. XII.

¹² U.S. CONST. art. II, §1, cl. 2.

¹³ *Id.*

¹⁴ 146 U.S. 1, 35 (1892).

¹⁵ 531 U.S. 98, 104–05 (2000) (per curiam).

¹⁶ No. 19-465, slip op. at 1–2, 9 (U.S. July 6, 2020); see also *Colo. Dep't of State v. Baca*, No. 19-518, slip op. at 1 (U.S. July 6, 2020) (per curiam) (same). Interestingly, the Supreme Court's opinion avoids citing *Bush v. Gore*, despite *Bush v. Gore*'s holding being directly apposite. See Rick Hasen (@rickhasen), TWITTER (July 6, 2020, 10:27 AM), <https://twitter.com/rickhasen/status/1280146453436829696> [https://perma.cc/M82C-YDTG] ("Setting a near perfect record at the Supreme Court . . . the Court has managed to avoid citing *Bush v. Gore* on an issue where that case was EXACTLY on point"). The Court's opinion also consistently refers to "States" as the authority governing electors, rather than "legislatures." See,

Of course, as the Supreme Court also recognized in *Bush v. Gore*, “[h]istory has now favored the voter.”¹⁷ States have, through their legislatures, universally provided for the popular election of presidential electors, enacting statutory schemes governing presidential elections.¹⁸ And in every state, the ordinary legislative process subjects legislation to gubernatorial approval or veto before becoming law.¹⁹ So while the Constitution has vested a great deal of authority in state legislatures, legislatures have in turn vested that authority with their states’ publics.

But given politics, pandemic, or disaster, a legislature might try taking back or reallocating that authority.²⁰ Because extant statutes prescribe how to hold a presidential election, the legislature would need to pass a bill repealing those statutes and implementing its new preferences. And typically, such a bill would need the governor’s approval to become law.

Here, however, legislators would have a straightforward argument from the text of the Constitution that the bill would become law immediately upon passage by the legislature. The Electors Clause prescribes that the state “Legislature” shall direct the appointment of presidential electors and does not mention a state’s governor or any other body. The Supreme Court has reinforced this apparent autonomy by emphasizing a state legislature’s plenary ability to direct the appointment of electors, and has gone so far as to suggest that state laws

e.g., *Chiafalo*, No. 19-465, slip. op. at 9–10. Whether this is an intentional maneuver to downplay the role of state legislatures relative to a state’s broader constitutional structure is not immediately clear and beyond the scope of this Essay.

¹⁷ 531 U.S. at 104.

¹⁸ *See, e.g.*, MICH. COMP. LAWS § 168.42 (2020) (“The candidates for electors of president and vice-president who shall be considered elected are those whose names have been certified to the secretary of state by that political party receiving the greatest number of votes for those offices at the next November election.”); WIS. STAT. § 8.25 (2020) (“By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress.”).

¹⁹ *Governors’ Powers & Authority*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/governors/powers-and-authority/> (last visited July 3, 2020) [<https://perma.cc/HZ2Y-EKQJ>]. Some governors’ vetoes are more powerful than others. States typically follow the federal model and require a two-thirds vote of the state legislature to override a veto, but some states require only simple majorities or smaller supermajorities. *See* COUNCIL OF STATE GOV’TS, THE BOOK OF THE STATES 2019 at 110 tbl. 4.4 (2019), <http://knowledgecenter.csg.org/kc/system/files/4.4.2019.pdf> [<https://perma.cc/RJU7-JF47>]. Alaska uniquely has a three-fourths override requirement. *Id.*

²⁰ *See* Goldfeder, *supra* note 1; Davis, *supra* note 1; Stern, *supra* note 1.

governing presidential elections are made under federal constitutional authority above state constitutional law.²¹ Accordingly, the legislature could argue, all it needed to do to make new law was have each legislative chamber pass the bill, with no need for any other government actor to be involved. This is the argument that has prompted concern that state legislatures could attempt to assign a state's electors without holding an election, even over a governor's veto.²²

It is true that a state legislature might face certain other difficulties in enacting such a plan. Setting aside whether such a bill would be politically unpopular, Edward Foley points out a legislature may not legally be able to pass a bill purporting to choose electors *after* election day, when a state's voters have already done so.²³ Similarly, both Foley and Jason Harrow have argued that 3 U.S.C. § 15, which governs Congress's electoral vote tabulation, resolves disputes between otherwise valid elector slates in favor of the slate a state's governor certifies.²⁴ All the same, if a legislature can ensure that it acts before the election to attempt to assign electors, there is no guarantee that a dispute between a legislature and governor would ultimately result in competing electoral slates requiring 3 U.S.C. § 15's resolution,²⁵ and 3 U.S.C. § 15 is itself open to

²¹ See *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76–77 (2000) (per curiam) (noting that “in the case of a law enacted by a state legislature applicable . . . to the election of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2 of the Constitution,” and remanding to consider whether “the Florida Constitution could, consistent with Art. II, § 1, cl. 2, ‘circumscribe the legislative power.’”). Justice Rehnquist’s concurrence in *Bush v. Gore* would make this principle even more explicit: “[I]n ordinary cases, the distribution of powers among the branches of a State’s government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government. This is one of them.” 531 U.S. at 112 (citation omitted).

²² See Goldfeder, *supra* note 1; Davis, *supra* note 1; Stern, *supra* note 1.

²³ See Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 *LOY. U. CHI. L.J.* 309, 319 (2019).

²⁴ See *id.* at 330–31; Jason Harrow, *Red State Legislatures Cannot Cancel the Upcoming Presidential Election*, TAKE CARE (Mar. 17, 2020), <https://takecareblog.com/blog/red-state-legislatures-cannot-cancel-the-upcoming-presidential-election> [<https://perma.cc/J8WP-D43C>].

²⁵ 3 U.S.C. § 15’s gubernatorial tiebreaker applies when the Senate and House of Representatives disagree over which of two slates of electors should be counted. There are many reasons why a dispute between a state legislature and a governor may not progress this far. For instance, both the legislature and governor may try to litigate their dispute to a resolution before any election. Alternatively, a governor may choose not to certify a competing slate of electors

multiple interpretations.²⁶ Therefore, a dispute between a legislature and governor would likely still require determining the constitutional effect of the governor's veto.²⁷

II

Fortunately, a governor's veto remains a constitutionally valid check on a legislature's ability to assign electors in light of Supreme Court case law defining the meaning of a "legislature," as well as precedents suggesting the necessary conditions for a state legislature to have made law.

i. Recent case law from the Supreme Court suggests that "Legislature" as defined in the Constitution extends beyond the institutional body of a state's legislative houses. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, Arizona's House and Senate challenged as unconstitutional a ballot initiative placing the boundaries of Arizona's congressional districts in a nonpartisan commission's hands, leaving the Arizona House and Arizona Senate with no say in the congressional redistricting process.²⁸ The legislators argued that the initiative and commission violated Article I, Section 4 of the Constitution (the "Elections Clause"), which provides that the "Times, Places and Manner" of Congressional elections "shall be prescribed in each State by the Legislature thereof."²⁹

The Court held that "Legislature" within the meaning of the Elections Clause referred to a state's legislative power, rather than the institutional chambers of a state legislature.³⁰ The Court distinguished the Elections Clause as referring to a legislature's lawmaking functions—"to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto"—rather than the ratifying role legislatures play with respect to

for fear of further contentiousness, or the House and Senate might reach an agreement over which slate's votes to count.

²⁶ See Foley, *supra* note 23, at 331–32.

²⁷ This Essay addresses the role of the gubernatorial veto as a constitutional legal question. The Constitution and U.S. Code, however, give political actors like the Senate and governors a role in tabulating electoral votes and certifying electoral slates. See, e.g., U.S. CONST. amend. XII. Although these actors may be motivated by political considerations beyond the legal issues a court would consider, this Essay presumes that a legal assessment of the constitutionality of a gubernatorial veto would also be a relevant consideration for the political branches of government.

²⁸ 576 U.S. 787, 796–800 (2015).

²⁹ *Id.* at 790–811; U.S. CONST. art. I, § 4, cl. 1.

³⁰ 576 U.S. at 813–15.

constitutional amendments.³¹

Under this precedent, the same result is likely true for the meaning of “Legislature” within the Electors Clause. Chief Justice Roberts’s dissenting opinion in *Arizona State Legislature* compares the two clauses directly.³² Observers of the Supreme Court’s election law jurisprudence have noted the parallels between each provision.³³ And although no extensive case law considers the definition of “Legislature” within the Electors Clause *per se*, the two provisions have close textual similarities, with the Elections Clause providing that legislatures shall “prescribe[]” the “Manner” of electing members of Congress, and the Electors Clause providing that legislatures may “direct” the “manner” in which electors are appointed.³⁴ As a result, just as the Court in *Arizona State Legislature* concluded that the Elections Clause governs a legislative function, so too does the Electors Clause.

ii. Admittedly, *Arizona State Legislature* may not be long for this world. But even if the Supreme Court were to revisit its decision, the remainder of the Supreme Court’s Elections Clause jurisprudence makes it unlikely it would do so in a way that unsettles the role of a governor’s veto.

It is true that the Supreme Court’s composition has changed meaningfully since *Arizona State Legislature* was decided: Justice Ginsburg wrote for a five-Justice majority that included herself, Justice Kennedy, and Justices Breyer, Sotomayor, and Kagan.³⁵ Chief Justice Roberts led the

³¹ *Id.* at 808.

³² *Id.* at 839 (Roberts, C.J., dissenting) (explaining that Electors Clause has “considerable similarity” to Elections Clause).

³³ See Richard L. Hasen, *Supreme Court Avoids Bush v. Gore II in Ducking Pennsylvania Redistricting Controversy*, HARV. L. REV. BLOG (Mar. 22, 2018), <https://blog.harvardlawreview.org/supreme-court-avoids-bush-v-gore-ii-in-ducking-pennsylvania-redistricting-controversy/> [https://perma.cc/C4YY-REDM] (“The Article II argument in the *Bush v. Gore* concurrence neatly parallels the Article I argument in [*Turzai v. League of Women Voters of Pennsylvania*, 138 S. Ct. 1323 (2018)] and in the *Arizona State Legislature* case.”); Vikram David Amar, *What the Supreme Court’s Arizona Redistricting Ruling Means for Presidential (Not Just Congressional) Election Reform*, JUSTIA VERDICT (July 8, 2015), <https://verdict.justia.com/2015/07/08/what-the-supreme-courts-arizona-redistricting-ruling-means-for-presidential-not-just-congressional-election-reform> [https://perma.cc/7J7K-AALG] (“Indeed the text of Article II and that of the Elections Clause are very close, and both provisions are concerned with empowering and obligating states making general rules to govern an election, rather than making a binary decision about ratification.”); see also Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 759–64 (2001) (considering Elections Clause and Electors Clause alongside each other in context of first federal elections).

³⁴ U.S. CONST. art. I, § 4, cl. 1; *id.* at art. II, § 1, cl. 2.

³⁵ *Ariz. St. Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787,

dissenters.³⁶ Justices Kennedy and Ginsburg have since left the Court, and although Chief Justice Roberts’s subsequent opinion in *Rucho v. Common Cause* suggested state redistricting commissions as a tool to curb partisan gerrymandering, the Chief Justice indicated that the majority “express[ed] no view on any of these pending proposals.”³⁷ Accordingly, there may be five votes to revisit *Arizona State Legislature*’s conclusion.³⁸

All the same, even without the Court’s *Arizona State Legislature* holding, case law still suggests a governor’s veto would still constrain a legislature’s ability to “direct” the appointment of electors.³⁹ Most significant is the Supreme Court’s 1932 decision in *Smiley v. Holm*, a case which addressed a governor’s veto power over a state legislature’s redistricting plan under the Elections Clause.⁴⁰ The *Smiley* Court held there to be “nothing in Article 1, [S]ection 4, which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.”⁴¹

Neither the *Arizona State Legislature* majority nor dissenters expressed interest in overturning *Smiley*.⁴² Although the majority understood *Smiley* to support a functional view of what constitutes a legislature, the Chief Justice’s dissent read the case differently—supporting *Smiley*’s ultimate conclusion as “true, so far as it goes,” but understanding *Smiley* to “allow[] a State to *supplement* the legislature’s role in the legislative process,” rather than “permitting the State to *supplant* the legislature altogether.”⁴³ Thus, so long as the parallels between the Elections and Electors Clauses hold, both opinions in *Arizona State*

790 (2015).

³⁶ *Id.*

³⁷ 139 S. Ct. 2484, 2508 (2019).

³⁸ See Hasen, *supra* note 33 (“[I]f there is a retirement of Justice Kennedy or one of the Court’s liberals in the near future, it would not be a surprise to see [the *Arizona State Legislature*] issue come back.”). All the same, it is also possible that any revisit of *Arizona State Legislature* would see at minimum the Chief Justice uphold the decision simply as a matter of *stare decisis*. See June Med. Servs. v. Russo, No. 18-1323, slip. op. at 47–49 (U.S. June 29, 2020) (Roberts, C.J., concurring in the judgment).

³⁹ U.S. CONST. art. II, § 1, cl. 2.

⁴⁰ 285 U.S. 355 (1932).

⁴¹ *Id.* at 372–73 (capitalization altered).

⁴² 576 U.S. at 806–09 (opinion of Ginsburg, J.); *id.* at 839–42 (Roberts, C.J., dissenting).

⁴³ *Id.* at 841 (emphasis in original).

Legislature confirm what *Smiley* suggests: that a governor's veto is a permissible constraint on a state legislature, even when only the word "legislature" appears in the Constitution itself.⁴⁴

Chief Justice Roberts's *Arizona State Legislature* dissent also offers an intratextual analysis that provides additional support for this result. The Chief Justice argues for an institutional view of state legislatures under the Elections Clause by discussing several constitutional provisions that reference a legislature on an institutional rather than functional basis.⁴⁵ Under that reasoning, just as significant is how the Constitution treats the relationship between the federal legislature and the federal executive veto power. The Constitution sets out the President's veto power entirely within Article I, Section 7, which prescribes how bills from Congress become law.⁴⁶ At the same time, the Constitution's text sets forth what "Congress may" do on seven different occasions,⁴⁷ and what "Congress shall" do on five.⁴⁸ None of these grants of congressional power—which include the creation of lower courts,⁴⁹ the power to dispose of federal property,⁵⁰ and all the powers contained in Article I, Section 8⁵¹—contain any proviso for the President's signature or veto. Rather, the President's veto power is part of how Congress makes any sort of law.⁵²

⁴⁴ The Supreme Court's very recent stay orders in *Republican Party of Pennsylvania v. Boockvar*, No. 20A54 (Oct. 19, 2020), and *Scarnati v. Boockvar*, No. 20A53 (Oct. 19, 2020), also support this proposition. The applicants in both cases asked the Court to stay a Pennsylvania Supreme Court decision regarding the November 2020 general election on, *inter alia*, the ground that the lower court had usurped the legislature's authority to determine the "manner" of federal elections under the Elections and Electors Clauses. See Emergency App. for Stay at 10, 25–28, *Scarnati*, No. 20A53 (Sept. 28, 2020); Emergency App. for Stay at 1–3, 22–27, *Rep. Party of Pa.*, No. 20A54 (Sept. 28, 2020). The Court denied both applications, with Chief Justice Roberts voting with Justices Breyer, Sotomayor, and Kagan to do so. The Chief Justice's vote is consistent with the view that other state constitutional actors may constrain a legislature, and should not necessarily be read—as some scholars suggest—as purely motivated by institutional concerns. See Richard H. Pildes, *John Roberts Put the Country Before Politics*, CNN (Oct. 20, 2020, 12:21 PM), <https://www.cnn.com/2020/10/20/opinions/john-roberts-country-before-politics-pildes/index.html> [<https://perma.cc/2UBA-KUJV>].

⁴⁵ 576 U.S. at 830–32.

⁴⁶ U.S. CONST. art. I, § 7, cls. 2–3.

⁴⁷ *Id.* at art. I, § 4, cl. 1; art. II, § 1, cl. 4; art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV; art. II, § 2, cl. 2; art. III, § 1; art. III, § 2, cl. 3; art. IV, § 1.

⁴⁸ *Id.* at art. I, § 4, cl. 2; art. I, § 8, cl. 1; art. III, § 2, cl. 2; art. III, § 3, cl. 2; art. IV, § 3, cl. 2.

⁴⁹ *Id.* at art. III, § 1.

⁵⁰ *Id.* at art. IV, § 3, cl. 2.

⁵¹ *Id.* at art. I, § 8, cl. 1.

⁵² *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Hence, an intratextual reading of the Constitution—one that “urges a reader interpreting ‘a contested word or phrase that appears in the Constitution’ to consider its meaning as it appears in other passages”—suggests that in omitting any mention of a state executive in the text of the Electors Clause, the Framers did not mean to proscribe a state executive role.⁵³ Accordingly, a governor’s signature is simply a condition for the legislature to “prescribe” or “direct” in the same way as the President’s signature is a condition for an act of Congress to take effect.

As such, both the Constitution’s structure and the Supreme Court’s precedents interpreting the document favor subjecting a state legislature’s bill directing the appointment of electors to a governor’s signature or veto. This is fortunate, because so too does states’ longstanding practice.

III

Subjecting legislative directives on appointing electors to gubernatorial presentment is consistent with centuries of states’ practice and could create significant legal confusion if abrogated.

Executive vetoes over state legislatures were rare at the Constitution’s creation. Only two states—Massachusetts and New York—had implemented vetoes by the time of the 1788-89 presidential election.⁵⁴ How the 1789 election unfolded in those states is telling. In Massachusetts, the legislature

⁵³ Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 NW. U. L. REV. ONLINE 847, 852 (2015). In recent weeks, several scholars have advanced a similar reading based on the Constitution’s use of the word “direct” itself. See Richard L. Hasen, *Three Pathologies of American Voting Rights Illustrated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 271 & n.13 (suggesting that while *Arizona State Legislature* and *Smiley* counsel in favor of a broad reading of legislature, “direct” refers to legislating); David H. Gans, *The Trump Plan for Legislatures to Appoint Electors Would Be a Blatant Attack on Democracy*, SLATE (Oct. 29, 2020 3:07 PM), <https://slate.com/news-and-politics/2020/10/trump-plan-legislature-appoint-electors-end-democracy.html> [<https://perma.cc/Y3ME-72AR>] (arguing, *inter alia*, that the power to “direct” is the power to control the process of appointing electors, but not to choose electors themselves); Grace Brososky, Michael C. Dorf and 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> [<https://perma.cc/9FF5-FBH9>] (arguing, *inter alia*, that the use of the term “direct” is associated specifically with legislative activity).

⁵⁴ See John A. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473, 474–75 (1917). Gubernatorial vetoes became more common at the same time it became more common for states to hold popular elections for presidential electors. See *id.* at 475–77; see also *McPherson v. Blacker*, 146 U.S. 1, 29–33 (1892) (discussing early history of selecting electors).

provided for a procedure that saw voters in several districts nominate electors, with the legislature naming one of each of the top two vote-getters from each district as a member of Massachusetts's electoral college.⁵⁵ Once the legislature had devised this method, Governor Hancock approved the measure with his signature, and it became law.⁵⁶ Similarly, New York required that bills pass not only the houses of the state legislature, but also a Council of Revision that included the Governor, the Chancellor, and justices of the Supreme Court of Judicature.⁵⁷ New York did not participate in the first presidential election because its legislature could not agree on how to choose electors.⁵⁸ The New York Assembly and Senate did, however, agree on a bill under the Elections Clause governing the election of New York's Representatives.⁵⁹ That bill went before the Council of Revision, which approved the bill and allowed it to become law.⁶⁰ So in light of the similarities between the Elections Clause and Electors Clause, both states' practices at the time of the Constitution and immediately afterwards suggests a similar understanding that a state legislature's setting procedures for federal elections remained subject to gubernatorial approval.

This practice has continued into the present. Governors vetoed legislation concerning presidential election administration in the early 20th Century,⁶¹ and both Maine and Nebraska lawmakers treated explicit or implicit gubernatorial approval as necessary for the bills allocating their states' electoral votes on a district-by-district rather than winner-take-all basis.⁶² More recently still, legislators in California and Hawaii voted multiple times to join the National

⁵⁵ *McPherson*, 146 U.S. at 29.

⁵⁶ Smith, *supra* note 33, at 760.

⁵⁷ *Id.*

⁵⁸ *McPherson*, 146 U.S. at 30.

⁵⁹ Smith, *supra* note 33, at 760.

⁶⁰ *Id.* at 760–61.

⁶¹ See, e.g., COMMONWEALTH OF PA., VETOES BY THE GOVERNOR OF BILLS AND RESOLUTIONS PASSED BY THE LEGISLATURE SESSION OF 1915 at 449–50 (1915) (vetoing bill that would rearrange order of presidential candidate names on general election ballot).

⁶² See Marlee Schwartz, *Nebraska's Vote Change*, WASH. POST (Aug. 7, 1991), <https://www.washingtonpost.com/archive/politics/1991/04/07/nebraskas-vote-change/4ef16f69-1158-4e39-9556-4e65a666d735/> [<https://perma.cc/H8NT-DS8L>]; James Melcher, *Electing to Reform: Maine and the District Plan for Selection of Presidential Electors* (Conf. Paper: N. Engl. Pol. Sci. Ass'n Ann. Meeting 2004), https://www.researchgate.net/publication/274710557_Electing_to_Reform_Maine_and_the_District_Plan_for_Selection_of_Presidential_Electors [<https://perma.cc/R6VA-YSAE>].

Popular Vote Interstate Compact—which would under certain conditions award their states’ electoral votes to the national popular vote winner.⁶³ Each state’s governor vetoed the legislature’s initial bill, and rather than treat the veto as ineffective, Hawaiian legislators eventually overrode the governor’s veto, while Californian legislators passed a bill that a new governor signed.⁶⁴

The long history of gubernatorial approvals and vetoes over state legislatures’ bills suggests that that governors’ roles are legally sanctioned as, if nothing else, a matter of established practice rising to the level of constitutional interpretation.⁶⁵ But so too does what Justice Kavanaugh labeled during *Chiafalo’s* oral argument “the ‘avoid chaos’ principle of judging.”⁶⁶

If gubernatorial vetoes over laws that regulate presidential elections became legal nullities, significant confusion would ensue. In 2019, for example, the Nevada legislature passed a bill to join the National Popular Vote Interstate Compact which the governor vetoed.⁶⁷ Would nullifying governors’ vetoes mean that Nevada had, in fact, joined the compact already? That same year, the Maine’s governor allowed a bill to become law that implemented ranked-choice voting for the general presidential election, but held onto the bill long enough that it would not be effective for Maine’s presidential primary.⁶⁸ If the

⁶³ See 36 *Legislative Chambers in 23 States Have Now Passed National Popular Vote Bill*, NAT’L POPULAR VOTE!, <https://www.nationalpopularvote.com/36-legislative-chambers-23-states-have-now-passed-national-popular-vote-bill> [https://perma.cc/Q3CP-Q29R]. See also generally Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007) (describing generally the terms of the NPVIC).

⁶⁴ See *Hawaii*, NAT’L POPULAR VOTE!, <https://www.nationalpopularvote.com/state/hi> [https://perma.cc/8UT6-SL6Z]; *National Popular Vote*, NAT’L CONF. OF ST. LEGIS., <https://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx> [https://perma.cc/DJ3K-8YSF].

⁶⁵ See *Chiafalo v. Washington*, No. 19-465, slip op. at 13 (U.S. July 6, 2020) (“‘Long settled and established practice’ may have ‘great weight in a proper interpretation of constitutional provisions.’” (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 8–13 (2019) (discussing principles of constitutional liquidation generally); see also *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (similar).

⁶⁶ Transcript of Oral Argument at 33, *Chiafalo v. Washington*, No. 19-465.

⁶⁷ Benjamin Fearnow, *Nevada’s Democratic Governor Vetoes Bill to Reject Electoral College in Favor of National Popular Vote Winner*, NEWSWEEK (May 30, 2019), <https://www.newsweek.com/nevada-governor-electoral-college-popular-vote-1439796> [https://perma.cc/V23P-UQMC].

⁶⁸ See Jacob Posik, *Governor Mills Lets RCV for Presidential Elections Become Law Without Her Signature*, ME. WIRE (Sept. 8, 2019), <https://www.themainewire.com/2019/09/governor-mills-lets-rcv-for->

bill had never needed the governor's approval, voters and candidates might be forced to litigate whether legislature's directives under the Electors Clause apply to primary as well as general elections,⁶⁹ let alone which procedure the secretary of state should use to tabulate votes. Nor does the potential confusion end there. Questions would arise over old and forgotten bills that governors had long ago vetoed, as well as whether vetoed bills purporting to govern all elections would, in fact, govern the conduct of presidential races.

This is not to say that states cannot modify how they choose presidential electors. Indeed, should a governor agree with his or her state legislature that a new wave of coronavirus infections—or any other crisis—was reason enough to cancel a popular vote for presidential electors, he or she would be fully able to sign into law a bill doing so. But there is no reason to think that a governor holds anything less than his or her ordinary powers of office when it comes to a legislature's attempts to choose electors.

CONCLUSION

In an environment where partisanship runs high, trust in institutions runs low, and election administration is politicized, the fear that institutions will attempt to exercise their full constitutional authority to work radical changes in democratic practices is understandable. At the same time, it is important to understand where that authority's limits lie. So, while the coronavirus may be the electoral challenge of the present and there will surely be future crises to pose challenges, we can nonetheless rest easy that state constitutional checks and balances remain in place.

presidential-elections-become-law-without-her-signature/
[<https://perma.cc/4AUC-NUMG>].

⁶⁹ This question, while intriguing, is beyond the scope of this Essay.