STOPPING "STOP THE STEAL"
WHY ARTICLE II DOESN'T LET LEGISLATURES OVERTURN ELECTIONS

Benjamin Della Rocca[*]

The 2020 presidential race was hard fought—before Election Day, and after. The loser, Donald Trump, spent weeks pressuring state legislatures to overturn his defeats. His arguments hinged on Article II of the U.S. Constitution, which, his lawyers insisted, permitted legislatures to intervene. While no legislature did so in 2020, the specter of postelection legislative interference still threatens our elections and risks a constitutional crisis.

This Article explains why Article II permits no such thing. Specifically, it argues that Article II's grant of power—whatever its content—must be read as directed only toward pre-election legislatures, not postelection ones. This claim fills major gaps in the literature. First, previous scholarship assumes that Article II is silent, or ambiguous, on postelection interference. Blocking interventions would then depend on other authorities—like the Due Process Clause or state-constitutional provisions—ill-suited for the job. This Article shows, however, that Article II itself unambiguously bars postelection interference. Second, this Article sidesteps the debate about "independent state legislature" (ISL) theory—the focus of most scholarship on the 2020 election. Its argument holds, that is, regardless of what one believes about ISL doctrine. At the same time, this argument remains vital even after the Supreme Court snubbed ISL logic in Moore v. Harper*. That decision leaves ample room, this Article argues, for* Bush v. Gore*-style debacles that foil state courts in constraining rogue legislatures.*

To support its position, this Article advances four separate contentions, each sufficient to compel the above conclusion. The first contention analyzes Article II's text according to intratextualist principles. The second unpacks the Framers' original understanding of Article II. The third examines the original understanding behind Congress's election-timing statute, which gives effect to Article II, Section 1, Clause 4. The fourth analyzes constitutional purpose. Finally, this Article also explains why the original understanding of Congress's election-day statute—which let legislatures handpick presidential electors if their state "fail[ed]" to choose on Election Day—did not permit such handpicking after the 2020 election.

INTRODUCTION

The 2020 presidential election was a nail-biter. It wasn't just that the race hinged on a handful of mighty close swing states—though that did not help. The ultimate winner, President Joe Biden, eked out Pennsylvania by barely one percentage point, Wisconsin by six-tenths, Arizona by one-

[*] J.D. 2022, Yale Law School; B.A. 2016, Yale College. I am grateful to many for feedback and support, and particular thanks go to Akhil Reed Amar, whose seminar served as the starting point for this project. All views are my own and not necessarily those of any current or former employer.

third, and Georgia by one-fourth.[1] Nor was it that turnout, measured by the voting share of all eligible voters, was its highest in decades.[2] Rather, for many Americans, 2020 was an edge-of-your-seat election because it took days to figure out who won. Owing to the COVID-19 pandemic—which sparked a surge in mail-in voting,[3] causing thousands of eligible ballots to pour in after Election Day[4]—pivotal states like Pennsylvania, Georgia, Arizona, and Nevada needed extra time to tally votes.

The behavior of the eventual loser, former President Donald Trump, only raised the suspense. After Election Day, Trump refused to concede defeat. The former president and GOP leaders sought, instead, to unseat Biden's victory by spreading (baseless) allegations of voter fraud.[5] Trump himself persistently voiced such claims,[6] even coining a slogan: "STOP THE COUNT."[7] Republicans listened. In November 2020, barely one-fifth of GOP voters believed the election was "run and administered" even "somewhat" well; another third doubted their own votes were

---

1 Drew DeSilver, *It's Not Just 2020: U.S. Presidential Elections Have Long Featured Close State Races*, PEW RSCH. CTR. (Dec. 4, 2020), https://www.pewresearch.org/fact-tank/2020/12/04/its-not-just-2020-u-s-presidential-elections-have-long-featured-close-state-races/ [https://perma.cc/GV5T-YPDE].

2 Drew DeSilver, *Turnout Soared in 2020 as Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/ [https://perma.cc/VX9J-BK9W] ("Americans voted in record numbers in last year's presidential election, casting nearly 158.4 million ballots.").

3 Just fifty-four percent of voters reported voting in person in the 2020 election. Of this number, half voted on Election Day itself, and half on an earlier day. *See Sharp Division on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct*, PEW RSCH. CTR. 4 (Nov. 20, 2020), https://www.pewresearch.org/politics/2020/11/20/sharp-divisions-on-vote-counts-as-biden-gets-high-marks-for-his-post-election-conduct/ [https://perma.cc/22XT-G5JA].

4 For a fuller discussion of the causes of delay in ascertaining the 2020 election winner, see *US Election 2020: When Will We Know the Result?*, BBC (Nov. 4, 2020), https://www.bbc.com/news/election-us-2020-54096399 [https://perma.cc/TKH9-SBTA] (describing how many states faced challenges in accurately tabulating votes and certifying election results owing to high rates of mail-in voting and the COVID-19 pandemic).

5 *See, e.g.*, Olivia Beavers & Nicholas Wu, *1 Year Later, GOP Still Chained to Trump's Baseless Election Fraud Claims*, POLITICO (Nov. 3, 2021, 4:30 AM), https://www.politico.com/news/2021/11/03/gop-trump-baseless-election-fraud-claims-518603 [https://perma.cc/V4UQ-43EW].

6 *See, e.g.*, Linda Qiu, *Trump Has Amplified Voting Falsehoods in over 300 Tweets Since Election Night*, N.Y. TIMES (Nov. 16, 2020), https://www.nytimes.com/2020/11/16/technology/trump-has-amplified-voting-falsehoods-in-over-300-tweets-since-election-night.html [https://perma.cc/N2CD-Q54M] (describing President Trump's social-media posts alleging massive voter fraud in swing states).

7 DFRLab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SEC. (Feb. 10, 2021), https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/ [https://perma.cc/DVN8-NPYJ].

counted.[8] Roughly nineteen in twenty Democrats held opposite views.[9] Before long, "Stop the Steal"—a movement echoing Trump's original calls to exclude legally cast, disproportionately Democratic mail-in ballots—swelled in grassroots support.[10] And the Trump campaign, for its part, soon raised over $250 million for its purported work to "Stop the Steal."[11]

These allegations, to be clear, had no credible factual basis. Extensive postelection audits and investigations turned up scant evidence of misconduct.[12] Yet Trump doubled down in judicial chambers. By mid-December 2020, he had sued to reverse losses in seven states: Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin.[13] And conservative voices, including many from within Trump's campaign, exhorted Republican legislatures to overturn Biden's victories.[14]

---

8 PEW RSCH. CTR., *supra* note 4 at 3.

9 *Id.* ("Among Biden supporters, 94% say the elections were run and administered well.").

10 For a well-documented discussion of the origins of the Stop the Steal movement, and its relationship to President Trump's Stop the Count call and accompanying legal challenges, see, for example, DRFLab, *supra* note 87 (describing how Trump surrogate Roger Stone originally coined the term "Stop the Steal" during the 2016 election to refer to alleged malfeasance by the Republican political establishment aimed at halting Trump from becoming the party nominee).

11 Greg Farrell & Bill Allison, *Trump 'Stop the Steal' Funds Were a 'Rip-Off', Jan. 6 Committee Says*, BLOOMBERG (Dec. 23, 2022, 4:03 PM), https://www.bloomberg.com/news/articles/2022-12-23/jan-6-report-says-donald-trump-s-stop-the-steal-funds-diverted-in-rip-off [https://perma.cc/V4LV-NNCK] (discussing a report by the House Jan. 6 Committee that found that only $5,000 of the $250 million raised by the Trump to "Stop the Steal" actually went toward contesting the results of the 2020 election).

12 *See, e.g.*, Nick Corasaniti, Reid J. Epstein & Jim Rutenberg, *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 6, 2021), https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html [https://perma.cc/34H2-Y7AH] (finding no evidence of mass voter fraud after interviewing top election officials in over forty states, including those in closely contested swing states like Wisconsin and Pennsylvania).

13 George Petras, *A Quick Guide: Trump's Lawsuits Dispute Election Results as Presidency Is Called for Biden*, USA TODAY (Dec. 15, 2020, 10:45 AM), https://www.usatoday.com/in-depth/news/2020/11/16/trump-election-lawsuits-republicans-battleground-states-vote-count/6177538002/ [https://perma.cc/BDM2-RWHB] (describing the specific litigation filed by the Trump campaign and political allies in swing states, alleging widespread irregularities in voting tabulation). By this date, the Trump campaign dropped the lawsuit it had originally filed in Arizona after the election.

14 *See, e.g.*, Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election Results*, POLITICO (Nov. 21, 2020, 10:21 PM EST), https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031; Andrew Solender, *Trump Campaign Had Call Script to Pressure State Legislators on Election,* AXIOS (June 21, 2022), https://www.axios.com/2022/06/21/jan6-hearing-state-offiicials; *cf.* Barton Gellman, *The Election That Could Break America*, ATLANTIC (Sept. 23, 2020),

These tactics failed—that is, in 2020. No state legislature heeded Stop the Steal's calls; courts rebuffed virtually all Trump (or Trump-inspired) litigation.[15] Yet the larger threat persists. If anything, the events of 2020 only galvanized movements—like Stop the Steal—peddling all manner of legal theories that seek to help state-level partisans unseat election winners.[16] Some of these theories, in fact, caught prominent jurists' ears. Several Supreme Court Justices have, at least at various points, written opinions voicing sympathy to Stop the Steal's rhetoric.[17]

To be sure, a recent Court ruling has neutralized some such rhetoric. In June 2023, the Court handed down its decision in *Moore v. Harper*—which held that state courts may, as authorized by state constitutions, restrict legislatures' powers over congressional elections.[18] These powers are parallel to those that legislatures hold over presidential contests.[19] As explained below, however, *Moore* hardly delivers anything close to an airtight defense against state legislatures' postelection interventions.

This Article therefore seeks to rebut some of the central legal logic behind Stop the Steal and similar movements. It aims to quell future calls for illicit interference in concluded elections before those calls begin. The stakes, of course, could hardly be higher. Free and fair elections, rule of law, and American democracy generally hang in the balance.

---

https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/ [https://perma.cc/AYQ7-8EX7].

15 William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/ [https://perma.cc/JM7K-CLA7] (reporting that, as of January 2021, sixty-one of the sixty-two lawsuits filed by President Trump and his allies alleging voting irregularities were dismissed).

16 *See, e.g.*, Richard H. Pildes, *There's Still a Loaded Weapon Lying Around Our Election System*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/opinion/state-legislatures-electors-results.html [https://perma.cc/S6AP-UG75] (expressing concern that state legislatures might succumb to pressure by President Trump and appoint pro-Trump electors to the Electoral College).

17 *See, e.g.*, Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 36-41 (2022) (analyzing language to this effect in the opinions of Justices Kavanaugh, Alito, Thomas, and Gorsuch in cases involving judicial interventions to adjust voting procedures for the 2020 presidential election).

18 Hansi Lo Wang, *What the Supreme Court's rejection of a controversial theory means for elections,* NPR (June 30, 2023), https://www.npr.org/2023/06/28/1184631859/what-the-supreme-courts-rejection-of-a-controversial-theory-means-for-elections [perma.cc/5JQX-54NN].

19 *See infra* notes 93 & 94 and accompanying text; *see also* Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1062 (2021) ("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.").

To accomplish this task, this Article focuses on Trump's, Trump allies', and Stop the Steal's claims about Article II, Section 1 of the U.S. Constitution. To be sure, Trump advanced other arguments, relying on different constitutional provisions, which are also worth addressing. Trump-backed lawsuits sought, for example, to halt mail-in-ballot counting by relying (mistakenly[20]) on the Fourteenth Amendment's Equal Protection Clause.[21] This Article confines its scope to Article II, though, since the controversy surrounding that provision has especially high stakes. Article II, Section 1 is what animated calls for legislatures to *throw out* election results altogether.[22]

Other scholars have written about the 2020 election. Yet this Article fills significant gaps in the literature—which, so far, has not fully foreclosed Stop the Steal's legal arguments to justify overturning elections. In particular, this Article's argument has several characteristics that make it especially powerful for disarming Stop the Steal.

First, this Article's argument operates internally to Article II. It seeks to refute justifications for overriding elections on their own terms. In other words, Stop the Steal's position is wrong because it *misunderstands Article II*, not because it is barred by other provisions like the Due Process Clause (though, certainly, one can make that case). This approach closes a notable gap in scholarship. Some post-2020 scholarship appears to presume—mistakenly, this Article argues—that Article II itself poses *no* barrier to postelection state-legislative

---

[20] *See, e.g.*, Amar & Amar, *supra* note 17, at 2–13.

[21] *See, e.g.*, Verified Complaint for Declaratory and Injunctive Relief at 59–79, Trump v. Boockvar, No. 20-CV-02078-MWB (M.D. Pa. Nov. 9, 2020), ECF No. 1 (arguing that the Equal Protection Clause requires every county in Pennsylvania to enforce the same standards and procedures for an election); Complaint for Declaratory and Injunctive Relief at 5–6, Barnett v. Lawrence, No. 20-cv-05477-PBT (E.D. Pa Nov. 3, 2020), ECF No. 1 (claiming that the failure of the Board of Elections in Montgomery County to restrict canvas watchers and to pre-canvas mail-in and absentee ballots before Election Day runs afoul of the Equal Protection Clause); Memorandum Order at 15-17, Bognet v. Boockvar, No. 20-cv-00215-KRG (W.D. Pa. Oct. 28, 2020), ECF No. 77 (holding that counting mail-in votes without postmarks or with illegible postmarks after Election Day transgresses the Equal Protection Clause, but holding that injunctive relief for plaintiffs would be improper since it would lead to "significant voter confusion" only weeks before the 2020 election); Order Granting Defendant's Motion to Dismiss at 5–6, 43 Feehan v. Wis. Elec. Comm'n, No. 20-cv-1771-PP (E.D. Wis. Dec. 9, 2020), ECF No. 83 (holding that despite plaintiffs' claims that Wisconsin's alleged disparate treatment of mail-in and absentee ballots during the 2020 election violated the Equal Protection Clause, the court lacked subject-matter jurisdiction to hear the case).

[22] *See* Gellman, *supra* note 14, at 56.

interference, while other provisions pose only partial ones.[23] That position, were it true, would put election integrity in real jeopardy. As discussed below, election due-process jurisprudence is malleable and deferential to state courts.[24] Moreover, determined legislatures might do an end-run around the Due Process Clause—as prior scholarship acknowledges—by passing laws *before* elections that enable postelection meddling.[25] State-law protections, meanwhile, are also porous, especially if partisan state courts choose to construe them narrowly.[26]

This Article avoids these problems. Its argument shows why Article II, itself, must be interpreted so as not to grant legislatures the powers Stop the Steal says it does. This leaves no doctrinal wiggle room for federal courts to keep from striking down postelection interference.

Second, this Article's argument does *not* depend on debunking so-called independent-state-legislature (ISL) theory. This is a significant break from past scholarship, as nearly all scholars writing about the 2020 election disputes have focused on appraising ISL doctrine.[27]

According to ISL theory, when legislatures act regarding presidential elections, Article II *frees* them from legal constraints imposed by other authorities (like state constitutions, courts, or agencies). In 2020, Trump allies leveraged this idea to justify legislatures' overturning elections. These claims, to be sure, are important to debunk. And in fact, the Court's recent *Moore* holding seems to have done exactly that. So, trailblazing as a non-ISL attack on Stop the Steal might therefore be, what does it matter in a post-*Moore* world? The answer is twofold. For one, not all of Stop the Steal's Article II-related claims involved ISL reasoning. For another, *Moore* itself has gaps. Although it purports in theory to settle the ISL debate, it leaves ample room for federal courts, in practice, to block state courts from policing rogue legislatures in moments of supercharged political controversy. At other times, *Moore* risks under-

---

[23] *See, e.g.*, Levitt, *supra* note 19, at 1071 ("the Due Process Clause [of the Fourteenth Amendment] 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"); Ann Woolhandler, *State Separation of Powers and the Federal Courts,* 31 Wm. & Mary Bill Rts. J. 633, 664–65 (2023), https://scholarship.law.wm.edu/wmborj/vol31/iss3/2 [perma.cc/FL6C-JKLM] (suggesting that despite ISL Theory claims that state legislatures possess the sole authority to appoint electors, under procedural due process "state legislatures may lack the power to provide for an arbitrary decision by themselves or their delegees of the result of the popular vote").

[24] *See infra* notes 130–132 and accompanying text.

[25] *Id.*

[26] *See infra* notes 126–128 and accompanying text.

[27] *See infra* note 88 and accompanying text.

policing *state* courts that acquiesce to postelection interference. And the six-to-three *Moore* opinion, of course, might always be cabined or abrogated in future by ISL-sympathizing Justices.

This Article sidesteps these problems. It does so by showing that Article II's grant of power—*whatever* its content—is limited to pre-election legislatures, not postelection ones. Therefore, even if Article II *did* free legislatures from background legal constraints, it would still bar them from overturning concluded elections. And federal courts have no leeway to hand out a free pass.

As a final important characteristic, this Article grounds many of its contentions in originalism and textualism—or at least in terms jurists fashioning themselves as "originalists" would find persuasive. This matters because today's Supreme Court,[28] to say nothing of lower federal courts,[29] embraces originalism: the view that Founding Era constitutional understandings are substantive law.[30] Recent decisions treat originalism as the primary or exclusive method for resolving constitutional questions.[31]

---

[28] *See, e.g.*, David Cole, *The Supreme Court Embraces Originalism—and All Its Flaws*, WASH. POST, https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-originalism-constitution/ [perma.cc/7ECP-G9RB] (June 30, 2022) (highlighting the reversal of *Roe v. Wade* under the Supreme Court's holding in *Dobbs v. Jackson* as evidence of the current Court's emphasis on originalist jurisprudence).

[29] *See, e.g.*, William A. Kaplin, *The Process of Constitutional Interpretation: A Synthesis of the Present and a Guide to the Future* 42 RUTGERS L. REV. 983, 1006 (1990) (noting that "of all the interpretive approaches, the textual approach has the least disputed claim to legitimacy").

[30] Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORD. L. REV. 545, 560 (2013) (contrasting first-generation originalism with present-day neo-Originalists who rely on "the fundamental legal view that the constitutional law is determined by, or is entirely a function of, certain unchanging historical facts"); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1487, 1494 (2012) ("Contemporary originalists posit that original understanding is the only mode of interpretation that meets the criteria that any theory of constitutional adjudication must satisfy in order to possess democratic legitimacy.").

[31] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 580–92 (2008) (following an originalist approach to interpreting the Second Amendment in holding that the District of Columbia's handgun ban was unconstitutional). Other cases bear traces of this reasoning. Gamble v. United States, 139 S. Ct. 1960, 1965–66 (2019) (unpacking how "offence" in the Double Jeopardy Clause was "originally understood"); Zivotofsky v. Kerry, 576 U.S. 1, 12–14 (2015) (analyzing the meaning of the Reception Clause "[a]t the time of the Founding" and "during the ratification debates"); Janus v. Am. Fed. State, County & Mun. Emps., Council 31, 138 S. Ct. 2448, 2470 (2018) (rejecting defendants' claim that "public employees were understood to lack free speech protections" at the time of the Founding, instead endorsing the view that the First Amendment was interpreted to apply to public employees in the early days of the Republic). Some conservative Justices consistently invoke "original understanding" in their opinions. *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868, 1892–93 (2021); United States v. Vaello Madero, 142 S. Ct. 1539, 1544–52 (2022) (Thomas, J., dissenting).

Construing Article II correctly from originalist principles is thus a high-stakes proposition.

The arguments here, however, should convince nonoriginalists too. Even subscribers to living constitutionalism—that is, the idea that the Constitution's legal content evolves through time—give original understandings persuasive, if not definitive, interpretive weight.[32] Textual arguments, meanwhile, are compelling across the interpretive spectrum. "The terms of debate in American constitutional law," as Professor David Strauss once summed up, are, for better or for worse, "that principles of constitutional law must ultimately be traced to the text of the Constitution, and . . . that when the text is unclear the original understandings must control."[33]

To be sure, scholars quarrel over the finer points of what precisely is the "best" way to conduct originalist inquiry.[34] This Article cannot resolve those lengthy debates. But its analysis, which uses varied modalities[35] to reconstruct Article II's meaning, should be broadly persuasive to originalism's adherents.[36]

The rest of this Article proceeds as follows. Part I taxonomizes Stop the Steal's central Article II claims—the subject of this Article—and illustrates how some purport to justify postelection interference *without* leaning on ISL logic. Part II then describes previous rebuttals to claims made by Stop the Steal, including contentions dating back to the two-decade-old *Bush v. Gore* controversy. This Part, additionally, explains why past rebuttals are insufficient to neutralize the real-world threat of postelection state-legislative interference.

---

[32] *See, e.g.*, Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 165–66 ("It is hard to quarrel with the proposition that the views of the Framers are relevant to constitutional interpretation."); Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 648 (2016) ("[N]on-originalists almost invariably accord originalism some place in their methodologies."); *see also infra* note 278 and accompanying text.

[33] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 878 (1996).

[34] Originalism is a standard for what is right, but it does not, per se, prescribe a particular method or procedure as to *how* to discover the truth. *See* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 787–98 (2022). Originalists therefore have competing views on the "how" question, but the persuasiveness of the claims in this Article generally do not turn on these technical distinctions. For more discussion on this point, see *infra* note 175 and accompanying text.

[35] PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 5–8 (1982) (claiming that five broad types of constitutional argument, or "modalities," enter into judicial reasoning).

[36] *See infra* note 175 and accompanying text.

Part III then introduces this Article's main offensive argument. It shows that *regardless* of what one thinks about ISL theory, Article II categorically bars state legislatures from intervening after presidential elections to affect their outcomes (or override them). Specifically, it interprets Article II to empower only pre-election state legislatures, not postelection ones, to take election-related actions. All told, this Part makes four independent arguments for so construing Article II. The first analyzes Article II, Section 1's plain text; the second uses historical evidence to unpack the Framers' original understanding; the third examines how Congress's constitutionally authorized legislation setting the time of presidential elections circumscribes legislatures' Article II powers; the fourth argues from constitutional purpose, drawing again on historical evidence.

Part IV addresses a final Article II-related claim. It explains why Stop the Steal cannot leverage a statutory exception that lets post-Election Day legislatures pick presidential electors when voters have "failed" to make a "choice." To do so, this Part offers a novel historical analysis examining how the Election Day statute was originally understood.

I. STOP THE STEAL'S CONCLUSIONS AND REASONING

Why did Stop the Steal cry "stop counting"? Much of their argument centered on Article II, Section 1 of the Constitution. Dissecting what, precisely, Stop the Steal said about Article II is critical for evaluating its claims.

Article II, Section 1, Clause 2 contains the main operative language. With the following text, that Clause authorizes each state's legislature to "direct" the "[m]anner" of "appoint[ing]" presidential electors to the Electoral College:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[37]

Clause 2's grant of power looks strong on its face. Article II, Section 1, however, has another provision that puts at least some explicit limit on state legislatures' Clause 2 "manner" powers. That provision, Clause 4 of the same Section, reads as follows: "The Congress may determine the

---

[37] U.S. CONST. art. II § 1 cl. 2.

Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[38]

At first glance, then, these clauses seem to let state legislatures make nearly all decisions about how to "appoint" presidential electors. The only thing left out of their hands is the time for actually "chusing" appointees (chosen, of course, by whatever rules the legislature selects). Congress gets to pick the "chusing" date.

All of Stop the Steal's Article II arguments assert, in some form, that Clause 2 grants state legislatures sweeping power to "direct" elector selection's "manner." Since Article II singles out legislatures, and since it uses capacious terms like "manner" to describe their powers, state legislatures—Stop the Steal argues—enjoy vast leeway to act on presidential-election matters.

Despite these common themes, Stop the Steal makes several distinct Article II claims, which are nuanced, varied, and overlapping. To appraise these claims, one must understand them precisely. For this purpose, it is helpful to separate Stop the Steal's legal *conclusions*, on the one hand, from the Article II *reasoning* it used to support those conclusions, on the other.

Stop the Steal drew three legal *conclusions* that challenged election results by relying, at least in part, on Article II. In brief, those conclusions are the following. First, Stop the Steal condemned state agencies for implementing statutes so as to facilitate voting (e.g., waiving absentee-voting deadlines). Second, it urged legislatures to disregard election outcomes and handpick electors for the Electoral College. Third, it argued that some states' elections qualified—under the federal Election Day statute—as "fail[ing]" to choose electors.[39] When states "fail" per this statute, the statute explicitly lets their legislatures pick electors after Election Day.

According to Trump and Stop the Steal, all these conclusions, again, find at least some backing in Article II. Below, this Section will elaborate on each conclusion and give examples of them. But before that, consider the different modalities of Article II *reasoning*—that is, the actual interpretations, or analyses, of Article II—which Stop the Steal used to ground its conclusions. This "reasoning" can be grouped roughly into two categories: reasoning that involves independent-state-legislature

---

[38] *Id.* art. II § 1 cl. 4.

[39] 3 U.S.C. § 2.

theory, and reasoning that does not. Trump's supporters employed both types—at various times, and sometimes together—to support its conclusions above.

To begin with the first category, what exactly is ISL theory? While scholars' use of the term varies, it most commonly refers to the following idea: Because Article II names "Legislature[s]" in particular, states legislatures' Article II "manner" powers *insulate* them from legal authorities that normally restrain them.[40] (Hence, "independent" state legislatures.) Typically, the relevant constraining authorities are state constitutions, courts, or agencies. Courts and agencies impinge on legislatures' power, say ISL proponents, when they implement or interpret election laws using excessive discretion.

Adherents apply ISL principles with varying levels of rigidity. The staunchest ones hold that Article II lets legislatures "select electors free of *any* substantive or procedural constraints in state constitutions," as well as any "gubernatorial or state judicial interference."[41] Weaker versions of the doctrine go less far, yet they too have striking implications. Some use ISL logic to argue, for instance, that courts must construe states' election statutes with something like a "plain meaning canon."[42] Often, those holding this view would charge *federal* courts to review *state* courts' constructions of state election codes, and to enforce their own (hyper-textualist) readings.[43]

As stated above, some of Stop the Steal's Article II-backed conclusions draw on ISL reasoning. Other conclusions draw instead, or additionally, upon non-ISL readings of Article II. What are "non-ISL

---

[40] *See, e.g.*, Woolhandler, *supra* note 23, at 27 ("Although there are variations on the doctrine, its central tenet is that the two Clauses give state legislatures considerable independence from state constitutions and state judicial review in fashioning rules for federal elections."); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 505–06 (2021) (suggesting, however, that more "basic" versions of ISL theory might merely require "state and local officials to be able to point to some source of statutory authorization for the policies they adopt . . . . "); Amar & Amar, *supra* note 17, at 2 (criticizing the holding in *Bush v. Gore* and the ISL concepts it espouses); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. UNIV. L. REV. 731, 733–35 (2001) (summarizing the theoretical debate about whether Article II untethers legislatures from *all* such constraints, or merely some).

[41] Levitt, *supra* note 2019, at 1056 (emphasis added).

[42] *See, e.g.*, Morley, *supra* note 40, at 505.

[43] *See, e.g.*, Smith, *supra* note 40, at 732 n.7, 764 (arguing that Article II may be read to federalize disputes over states' authority to effectuate their own election codes); Amar & Amar, *supra* note 17, at 30 (describing "federal court second-guessing, de novo of, the 'real' meaning of state election law"); Levitt, *supra* note 20, at 1059 (describing how federal courts' authority to interpret state election law might contradict a state's legal traditions).

readings"? They include any appeal to Article II that does *not* involve trying to untether legislatures from constraining authorities, such as courts or constitutions.

To illustrate that difference, consider a hypothetical example. Suppose that New York's state constitution requires elections to permit votes by mail. However, for presidential races, the legislature bans mail-in voting. The legislature then asserts that New York's constitution, thanks to Article II, is powerless to stop it. Here, New York's legislature has *concluded* that it may ban mail-in voting, and its *reasoning* is ISL logic. It claims insulation from an authority which normally constraints it (i.e., the state constitution).

Now, instead, imagine that New York's constitution is *silent* on mail-in voting. The legislature, again invoking Article II powers, prohibits voting by mail for presidential contests. Defending itself, the legislature states simply that mail-in voting falls within its Article II "manner" authorities. Here, the legislature's legal conclusion is the same: that it may ban mail-in voting. But its reasoning, while still grounded in Article II, is not ISL logic. New York's legislature claims no protection against any particular constraining authority (since here, the state constitution poses no barrier).[44]

Why, though, does this distinction matter? It shows that rebutting Stop the Steal requires more than refuting ISL theory. Refuting it, that is, might disarm Stop the Steal's arguments that *are* rooted in ISL logic, but not those with different Article II grounding.

The rest of this Part, therefore, gives a taxonomy of Stop the Steal's three Article II-backed conclusions (summarized above) and the Article II reasoning that underlies each. A table at the end of this Part visually summarizes each conclusion/reasoning pair, with selected real-world examples. As a caveat, the proceeding taxonomy seeks for the sake of clarity to parse Stop the Steal's reasoning neatly along ISL/non-ISL lines—though at times, this boundary is blurry in practice. Trump supporters' particular statements about Article II sometimes crosspollinate ISL and non-ISL themes. At other times, Trump's allies express themselves imprecisely. Still, the following discussion illustrates, at a minimum, how

---

[44] In this second version of the hypothetical, New York's legislature also happens to be correct. Article II likely *would* let it ban mail-in voting without any state-constitutional requirement. Unlike the legislature in this hypothetical, Stop the Steal's non-ISL Article II arguments are incorrect—as this Article will show. For now, though, this difference is immaterial for the purpose of distinguishing ISL and non-ISL reasoning related to Article II.

both ISL and non-ISL reasoning imbue Stop the Steal's Article II-backed calls to overturn elections. Both types of reasoning are thus important to refute.

Stop the Steal's first set of conclusions condemned state agencies for implementing laws in ways that made voting easier.[45] These claims blamed courts, moreover, for letting agencies off the hook.[46] Shortly after the 2020 election, Trump's supporters filed litigation across swing states to level these accusations.[47] Generally, they attacked agencies' interpretations of certain election rules, such as officials' waivers of absentee-voting deadlines or excuse requirements.[48] They construed election laws hyperliterally and sought to enjoin agencies from taking these steps.[49]

Trump's team used Article II-related reasoning, as well as non-Article II reasoning, to support these conclusions. (The relevant non-Article II clauses, not analyzed here, include the Due Process Clause and Equal Protection Clause.[50]) When *Article II* reasoning underpinned these conclusions, that reasoning was ISL logic. Trump supporters said officials could not exercise so much discretion, since it constrained legislatures' exclusive freedom to act per Article II.[51]

This first set of conclusions—as a final clarification—generally did not involve explicit calls to disregard or throw out election results altogether.

---

45 *See, e.g.*, Complaint at 71–73, 77–79, 81–83, Donald J. Trump for President, Inc. v. Boockvar, 4:20-CV-02078 (M.D. Pa. 2020) (referring to the "Electors and Elections Clauses"); Amicus Brief for the Plaintiff at 7–13, Texas v. Pennsylvania, 592 U.S. __ (2020) (No. 815); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Election Clause*, 96 WASH. L. REV 997, 999 (2021) (noting that litigants had focused on the meaning of "legislature" and interpreted it to provide election-regulation authorities to elected state officials); Chris Kahn et al., *Stolen Election? Republican Lawmakers Paralyzed by Trump's False Fraud Claims*, REUTERS (Feb. 4, 2021, 7:55 PM ET), https://www.reuters.com/article/us-usa-trump-lawmakers-special-report/special-report-stolen-election-republican-lawmakers-paralyzed-by-trumps-false-fraud-claims-idUSKBN2A41CP.

46 *See, e.g.*, Sweren-Becker & Waldman, at 999-1000; Jake Whitney, *How Trump's Judges Stuck a Pin in the 'Stop the Steal' Balloon*, DAILY BEAST (Mar. 14, 2021, 5:07 AM EDT), https://www.thedailybeast.com/how-trumps-judges-stuck-a-pin-in-the-stop-the-steal-balloon (citing beliefs of many Republicans that judges rejecting Trump's voter-fraud allegations were "mired in the deep state" or "paid off.").

47 For a list of over 600 cases filed involving 2020 election laws, and their states of filing, *see COVID-Related Election Litigation Tracker*, STAN.-M.I.T. HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/cases [perma.cc/DT72-NYDR].

48 *See* sources cited *supra* note 45.

49 *See, e.g.*, Complaint, *supra* note 45, at 71–73, 77–79, 81–83; Amicus Brief for the Plaintiff, *supra* note 45, at 7–13.

50 *See supra* notes 20 & 21 and accompanying text.

51 *Id.*

Yet they are included here because, just as with the next two categories, Stop the Steal grounded them (partly) in Article II.

Stop the Steal's second set of conclusions called for overturning elections. Specifically, these conclusions urged swing-state Republican legislatures to ignore election results and handpick electors. Advocates insisted these moves would *uphold* the popular will by cutting through widespread fraud. These claims relied on Article II reasoning. That reasoning came in both ISL and non-ISL varieties—sometimes deployed overlappingly, with fuzzy dividing lines.[52]

As journalists document, Trump allies "pushed" ISL theory to justify appointing electors after Election Day.[53] For one example, take the email Pennsylvania Rep. Russ Diamond wrote in 2020 to Trump advisor John Eastman. "Because the US Constitution vests the authority to create election law in the state legislatures," reasoned Diamond, "the state legislature can exercise its plenary authority to appoint presidential electors, *regardless of restraints existing within Pennsylvania's constitution and statutes*."[54] Diamond, in archetypical ISL fashion, sought to untether legislatures from authorities normally constraining them (here, state constitutions and statutes). For Stop the Steal, this untethering was important. Nothing in the Constitution mandates picking electors by popular vote.[55] Therefore, in 2020, many of the biggest potential snags for election-overturning efforts might have emerged, in practice, from state statutes, state constitutions, and state-court litigation.

Trump allies also urged election overturning with non-ISL readings of Article II. These arguments, not grounded in ISL logic, did *not* seek actively to strip away legislatures' legal constraints. Many instead traded on the notion that Article II's broad language lets legislatures invoke "manner" powers, with at least some legal consequence, *after* Election Day. Typically, these non-ISL arguments arose in contexts where no

---

[52] For one example of ISL and non-ISL lines of argumentation being employed within one document, see, for example, Memorandum by Russ Diamond, Rep., Legislature of the Commonwealth of Pa. 3 (Dec. 4, 2020), https://www.politico.com/f/?id=00000180-b081-d3ee-a392-b19b26750000.

[53] Zach Montellaro, *GOP Pushes for an 'Earthquake in American Electoral Power'*, POLITICO (Mar. 9, 2022, 4:31 AM), https://www.politico.com/news/2022/03/09/gop-pushes-for-an-earthquake-in-american-electoral-power-00015402.

[54] Email from Russ Diamond, Rep., Legislature of the Commonwealth of Pa., to John Eastman, Prof., Univ. of Colo. (Dec. 4, 2020), https://www.politico.com/f/?id=00000180-b081-d3ee-a392-b19b26750000 (emphasis added).

[55] In early presidential elections, many states' legislatures did, in fact, choose electors themselves. *See infra* note 198 and accompanying text.

(non-Article II) authority clearly prohibited postelection interference. Journalists also document these arguments from Trump allies and staff.[56]

To take one specific example, such logic underpinned what Greg Jacob, legal counsel to Vice President Mike Pence, told the vice president on January 5, 2021. Jacob was advising Pence on his constitutional duty to "count" the electoral votes.[57] If any "State legislature . . . appoint[s an] alternate slate of electors" before the vice president's tally, wrote Jacob, then Article II arguably "places a firm thumb on the scale" in favor of recognizing those "alternate" electors.[58] Jacob's advice invokes Article II. But it lies outside the ISL universe. It does not appear to argue for untethering legislatures from state constitutions or courts, thereby freeing them to act. Rather, it endorses a decision rule for resolving disputes when multiple slates of electors claim that a state appointed them (disputes for which the Electoral Count Act sets out specific standards for resolving).[59] In 2020, legislatures did not actually appoint "alternate" electors. But if they had, they could have triggered just such a dispute.

For another example of non-ISL Article II reasoning, consider the appeals of former New York City mayor Rudy Giuliani, law professor Jenna Ellis, and other Trump lawyers to Arizona's Republican legislators. Over at least two meetings, this group entreated the legislators to overturn the Arizona election. They emphasized that Article II's text lets legislatures reclaim elector-choosing power at "any time."[60] As with the

---

[56] *See, e.g.*, Gellman, *supra* note 14.

[57] U.S. CONST. amend. XII ("[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted" during the certification of the Electoral College votes").

[58] Memorandum by Greg Jacob, Counsel to the Vice President, to Vice President Mike Pence 3 (Jan. 5, 2021) ("A reasonable argument might further be made that when resolving a dispute between competing electoral slates, Article II, Section 1 of the Constitution places a firm thumb on the scale on the side of the State legislature . . . . Here, however, no State legislature has appointed or certified any alternate slate of electors . . . .").

[59] Depending on the nature of the disagreement, the Electoral Count Act tasks either Congress or state governors with resolving such disputes by certifying the electors or making certain findings prescribed by the statute. *See* 3 U.S.C. § 15.

[60] Press Release, Ariz. House of Reps., Speaker Bowers Addresses Calls for the Legislature to Overturn 2020 Certified Election Results 2 (Dec. 4, 2020), https://www.azleg.gov/press/house/54LEG/2R/201204STATEMENT.pdf [https://perma.cc/98JZ-94CF]. To support this claim, Trump's legal team cited the case *McPherson v. Blacker*, which includes a statement to this effect. 146 U.S. 1, 35 (1892). ISL advocates also commonly cite this case, separately, to support ISL theory. *See* Part II *infra*. As a general note, it is widely agreed that legislatures *do* have the power to reclaim elector-choice competencies. *See, e.g.*, Levitt, *supra* note 19, at 1066–67 ("Article II poses no barrier to a legislature reclaiming for *itself*, as a body, the ability

example above, this reasoning seems to stress that Article II gives legal effect to legislatures' postelection actions, not that legislatures are immune from state constitutions or courts, per se. This non-ISL claim, if it were true, could justify postelection interference in contexts where state-law authorities arguably could not stop it. That is possibly the case with Arizona, where no state-constitutional election provisions clearly bear on postelection interference.[61] (By contrast, this is probably not so for Pennsylvania—the subject of Diamond's email invoking ISL theory. Pennsylvania's state constitution requires "*courts of law*" to resolve all controversies "involving questions submitted to the [people] at any election."[62])

Finally, Stop the Steal's third conclusion also urged discarding election results, but in a different sense than the previous claims. It held that Congress had empowered legislatures, already, to choose electors after Election Day in 2020. That is because Congress's Election Day statute—which implements Clause 4, above—contains an exception. It lets legislatures pick electors after the election if voters have "failed to make a choice" on that date.[63] The events of 2020,[64] Stop the Steal's argued, involved fraud so widespread that states met the criteria for "fail[ing]" to choose.[65] This claim involves Article II because it interprets Congress's statute enacted to implement Article II, Section 1, Clause 4. It says nothing, however, about legislatures' insulation from other authorities on presidential-election matters, putting it in the non-ISL category.

---

to select presidential electors . . . ."); Press Release, *supra*, at 2. And state law authorities generally have not purported to circumscribe *when* they may do so—making legislatures' independence from those authorities less important, here, than other interpretive questions about Article II.

61 *See* ARIZ. CONST. art. VII. State statutes, of course, might also have provisions bearing on postelection interference. But Stop the Steal might argue, at least, that state statutes alone are powerless to bind state legislatures owing to constitutional problems with legislative entrenchment. Under "conventional wisdom . . . one legislature cannot bind a future legislature." *See* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1775, 1775–77 (2003).

62 PA. CONST. art. VII § 13 (emphasis added).

63 3 U.S.C. § 2.

64 *See supra* notes 3–12 and accompanying text.

65 *See, e.g.*, Memorandum, *supra* note 52, at 4; Ankita Rao, *Fight to Vote: When a Loser Won't Concede*, GUARDIAN (Nov. 12, 10:00 AM), https://www.theguardian.com/us-news/2020/nov/12/fight-to-vote-newsletter-donald-trump-us-election-concede [https://perma.cc/HEB2-5JLV] (describing a "long-shot legal theory" used by Republicans positing that states can ignore the popular vote and appoint their own electors if they have "failed to make a choice" by the day the Electoral College meets).

The table below visually summarizes Stop the Steal's Article II-backed conclusions, along with the reasoning used to support them and real-world examples of each conclusion/reasoning pair. The next Part, then, introduces Article II-based rebuttals that have been deployed against Stop the Steal and explains why these rebuttals have significant gaps.

Table 1

	STS's Conclusion	STS's Reasoning	Selected Examples
1.	State courts and agencies impermissibly altered election laws	(a) Non-Article II (e.g., Due Process Clause)	State filings (e.g., *Trump v. Boockvar*)
		(b) Article II, ISL	State filings (e.g., *Trump v. Boockvar*)
2.	State legislatures may intervene or choose electors postelection	(a) Article II, ISL	Russ Diamond email
		(b) Article II, non-ISL	Greg Jacob; Giuliani & Ellis
3.	States "failed to make a choice"	Article II, non-ISL & 3 U.S.C. 2	John Eastman memo (see footnote)

II. THE ARTICLE II DEBATE—2000 AND TODAY

Stop the Steal's constitutional claims are varied and overlapping. Yet legal scholars' rejoinders center on just one thread of the tapestry: ISL theory. These rebuttals, further, rely on reading Article II together with extrinsic sources of law—which may not cover legislatures' particular conduct, and which state courts may not adequately enforce. This Part contextualizes the ISL debate and explains the gaps that this Article fills.

A. THE CONTROVERSY

The ISL controversy started years before Trump's defeat—in 2000, not 2020. That year, George W. Bush faced off with Al Gore for the presidency. The race was improbably close. In the end, the whole affair turned on a few-thousand-vote margin in Florida.[66] The U.S. Supreme Court ultimately decided the contest for Bush in *Bush v. Gore (Bush II)*, handed down on December 12. That decision vacated the Florida Supreme Court's four-day-old order to recount certain precincts' ballots.[67]

The *Bush II* per curiam decision sidestepped Article II. It held, in short, that Florida's recount violated the 14th Amendment's Equal Protection Clause by lacking "specific standards" to interpret ambiguous

---

[66] Bush v. Gore (*Bush II*), 531 U.S. 98, 100–03 (2000) ("[T]he Florida Division of Elections reported that petitioner Bush had received 2,909,135 votes, and respondent Gore had received 2,907,351 votes, a margin of 1,784 for Governor Bush.").

[67] *Id.* at 111.

ballot markings[68]—a ruling many have criticized.[69] But other *Bush II* opinions addressed ISL theory directly. Specifically, Justice Rehnquist's concurrence articulated the theory's basic case. His writing prompted two rebuttals: one, a *Bush II* dissent by Justice Breyer; the other, a separate ISL takedown advanced in later legal scholarship.

In his concurrence, Rehnquist reasoned that Article II "confers a power on a particular branch of a State's government"—namely, state legislatures.[70] And to "respect" that "power," the federal Supreme Court must "ensure that postelection state-court actions do not frustrate" legislatures' intentions.[71] Put differently, the U.S. Constitution insulates states' election statutes from state-court interpretations. Moreover, it tasks the Supreme Court with playing textualist policeman. Applying this paradigm to the 2000 election, Rehnquist condemned Florida's court-ordered recount for contravening (what he perceived as) the legislature's intentions *not* to count votes past early December.[72] Following *Bush II*, some conservative legal scholars coalesced around Rehnquist's Article II construction.[73]

Justice Steven's dissent delivered one rebuttal. According to Stevens, Article II might speak to state legislatures, but it "does not create" those

---

[68] *Id.* at 105–11.

[69] *See, e.g.*, AKHIL REED AMAR, THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC 157–58 (2015) [hereinafter AMAR, LAW OF THE LAND] (criticizing the *Bush II* majority for incorrectly applying the Fourteenth Amendment to the facts of the case); AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 185–88 (2012) (recounting the history of the Fourteenth Amendment and contrasting the *Bush II* decision with the Warren Court's interpretation of the Amendment); Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 CONST. COMMENTARY 571, 577–88 (2002) (excoriating Professor Nelson Lund's analysis of *Bush II*); Mark S. Brodin, Bush v. Gore*: The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563 (2012) (recounting the numerous shortcomings of the *Bush II* decision); Louis Michael Seidman, *What's So Bad About* Bush v. Gore*? An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 972–84 (2001) (condemning *Bush II* by comparing it to other cases).

[70] 531 U.S. at 112 (Rehnquist, J., concurring).

[71] *Id.* at 113.

[72] *Id.* at 121–22. Interpreting Florida's election-law scheme, Rehnquist believed that Florida's legislature intended, above all else, to certify its presidential-election in a timeframe that permitted it to receive "safe harbor" under the Electoral Count Act. Rehnquist further concluded that the Florida legislature, by demanding a recount on December 8, was foreclosing any chance of counting votes in time to meet the safe-harbor deadline. *Id.*

[73] *See, e.g.*, Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 9–10 (Bruce Ackerman ed., 2002) (applauding the *Bush II* Court for taking on the case because of the decision's importance); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 790 (2001) (arguing that *Bush II* aligned with the Court's jurisprudence over the last decade).

institutions "out of whole cloth."[74] It "rather takes them as they come—as creatures born of, and constrained by, their state constitutions."[75] And in this circumstance, Article V of Florida's state constitution subjects state statutes to judicial review.[76] So, for Stevens, Florida's Supreme Court had been *right* to interpret election laws in view of state-constitutional principles—which, according to Florida's justices, compelled the recount.[77] Left-leaning scholars, for their part, quickly voiced support for Stevens's Article II[78] (and Equal Protection[79]) analysis.

Scholars soon advanced a second argument for Stevens's conclusion, one for which Professor Akhil Amar advocated most vocally.[80] As Amar writes, *Florida's own legislature* had already subjected elections to state-constitutional dictates.[81] Years earlier, it had passed a statute empowering state courts to uphold state-constitutional rights in elections, even at the expense of other values.[82] And that choice is part of the Florida legislature's Article II-protected direction of election "manner."[83] In

---

74 531 U.S. at 123 (Stevens, J., dissenting).

75 *Id.*

76 *See id.* at 123–24 ("The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution[.]").

77 Seeing as he separately found no Fourteenth Amendment issue, Stevens would have upheld the recount under Article II. *Id.* at 123–29.

78 *See, e.g.*, Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. UNIV. L. REV. 661, 671–72 (2001) (explaining how the Framers' view of state constitutions and state legislatures aligned with Justice Stevens's argument).

79 *See, e.g.*, Jed Rubenfeld, *Not as Bad as* Plessy. *Worse.*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 27–32 (Bruce Ackerman ed., 2002) (arguing that the *Bush II* Court used the Equal Protection Clause to rationalize its unprecedented decision, in a way that contradicted the true conviction of certain justices); Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore?, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 117 (Bruce Ackerman ed., 2002) ("[T]he treatment of equal protection in Bush v. Gore is so out of touch with the prevailing principles that it is not a decision that follows (or reasonably extends) the law.").

80 *See, e.g.*, AMAR, LAW OF THE LAND, *supra* note 69, at 141–54 (detailing how the Florida Supreme Court decision aligned with historical practice and jurisprudence); Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 946–57 (2009) (offering a revised Florida Supreme Court opinion that would have clarified the Article II issue at hand); *see also* Akhil Reed Amar, *Should We Trust Judges?*, L.A. TIMES (Dec. 17, 2000, 12:00 AM PT), https://www.latimes.com/archives/la-xpm-2000-dec-17-op-1126-story.html [https://perma.cc/Z6RX-CWRN] (noting the flawed legal framework used to decide *Bush II*).

81 *See* AMAR, LAW OF THE LAND, *supra* note 69, at 147 (asserting that the legislature had delegated decision-making power regarding election to the judiciary).

82 *Id.* at 148.

83 The word "manner" is typically understood as having a broad definition. *See, e.g.*, *Manner*, MERRIAM WEBSTER (2022), https://www.merriam-webster.com/dictionary/manner [https://perma.cc/2VUZ-MU5X] (defining "manner" to cover any "mode of procedure or way of acting"). The word "manner," moreover, appears elsewhere in the Constitution, and these uses can

effect, the legislature had "designated the . . . judiciary as its chosen deputy" to "vindicate" state-constitutional values[84] (a role Florida judges have long fulfilled with rulings on all manner of vote-casting technicalities[85]). This setting of "initial election laws" deserves protection as much as the other state laws Rehnquist sought to uphold.[86] Other legal scholars, again, soon chimed in to support this line of reasoning.[87]

The 2020 election, of course, spurred new scholarship on ISL theory. Much of it specifically addresses *state-legislative* interference, which is not directly at issue in *Bush II*. But conceptually, these new arguments function similarly to those above.[88]

---

help to understand its meaning in Article II. *Cf.* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748–49 (1999) (describing "intratextualism"). For example, Article V of the Constitution prohibits constitutional amendments that, before the year 1808, affect "in any Manner" Article I's protections for the transatlantic slave trade. U.S. CONST. art. V; *see also id.* at art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . ."). Here, the word "[m]anner," paired with "any," is plainly used to emphasize the broad scope of potential constitutional-amendment actions that fall under this prohibition. That broad usage weighs in favor of construing it broadly elsewhere in the document. Other historical scholarship has shown that "manner" as used in Article I carried a broad original public meaning. *See* Sweren-Becker & Waldman, *supra* note 45, at 1026–29 (reviewing the definition of "manner" in relation to the Apportionment Act"). Further reflecting the common intuition that—in constitutional-law contexts—"manner" carries a broad meaning, Supreme Court case law interpreting the First Amendment permits the government to regulate the "time, place, and manner" of speech, despite the Amendment's prohibitions; such manner-regulation powers, in current jurisprudence, can encompass a broad range of regulations and procedures, so long as they do not work to discriminate speech by its substance. *See, e.g.*, William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 G.W. L. REV. 757, 758 (1986) (explaining that content-based regulations must be narrowly tailed to a compelling government interest, while content-neutral regulations of the "manner" of speech are subject to a less stringent test).

84 AMAR, LAW OF THE LAND, *supra* note 69, at 147–48. The Florida statute involving judicial review spoke about elections generally, rather than singling out presidential elections. But the category of "elections" includes presidential elections. Absent a clear statement to the contrary, the statute should apply with equal force to the state's presidential contests. *See* Amar & Amar, *supra* note 17, at 26–30 (arguing that state legislatures have incorporated state constitutions by reference).

85 AMAR, LAW OF THE LAND, *supra* note 69, at 149.

86 *Id.* at 151.

87 *See, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1415–25 (2001) ("A second problem with Rehnquist's argument is that the legislature seems to have delegated the task of interpreting Florida law to Florida executive officials . . . and, equally importantly, to the Florida judiciary."); Erwin Chemerinsky, *The Meaning of* Bush v. Gore*: Thoughts on Professor Amar's Analysis*, 61 FLA. L. REV. 969, 969 (2009) ("[Amar]. . . persuasively explains why the Florida Supreme Court's decision was . . . reasonable . . . .").

88 *See generally, e.g.*, Amar & Amar, *supra* note 17 (reviewing the *Bush II* precedent through the lens of the 2020 election challenges); Levitt, *supra* note 19 (examining election challenges through a state legislature's appointment of electors under 3 U.S.C. § 2); Carolyn Shapiro, *The Independent State*

For example, recent works turn to constitutional text, history, and structure to show that Article II does not free legislatures from background legal constraints (as Breyer, Amar, and others sought to do circa 2000). As scholars document, the Framers did not believe that Article II had this effect.[89] Indeed, states' own constitutions frequently bound legislatures on questions of election "manner." Some required votes by ballot, rather than *viva voce*.[90] Some subjected "manner" decisions to vetoes by other branches.[91] And some restricted the times, places, and manners for Article I-sanctioned congressional elections.[92] (Article I entrusts state legislatures to pick the times, places, and manners of congressional elections, mirroring Article II's "manner" language.[93] Intratextualist principles[94] make early Article I practices probative, therefore, of Article II's original understanding.[95]) All this historical evidence, as recent scholarship observes, comports with constitutional structure. The Article VI Supremacy Clause,[96] as well as the fact that constitutions *precede* legislatures,[97] further indicates that state constitutions bound legislatures' conduct.

Legislature Theory, Federal Courts, and State Law, 90 U. CHI. L. REV. 137 (2022) (asserting that ISL theory is an unprecedented intrusion into state election law).

89 *See, e.g.*, Amar & Amar, *supra* note 17, at 17–26 ("With all this in mind, the reader should now re-read the words of Article II with our emphasis added: 'Each *State shall* appoint, in such a Manner as the *Legislature* thereof *may* direct . . . .'"); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 135, 177 (2023) (arguing that the Elections Clause imposes additional checks on state legislatures); Shapiro *supra* note 88, at 148 (explaining that the historical context of the Articles of Confederation supports constraints upon a state legislature).

90 Amar & Amar, *supra* note 17, at 22–23; Shapiro *supra* note 88, at 149.

91 Amar & Amar, *supra* note 17, at 31.

92 *Id.* at 27–31.

93 *Compare* U.S. CONST. art. I § 4 ("The Times, Places and Manner of holding elections . . . shall be prescribed in each State by the Legislature thereof . . . ."), *with id.* art. II § 1 cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

94 *See* Amar & Amar, *supra* note 17, at 32, 36 (analyzing the common language of election-related clauses within Articles I and II); *cf.* Amar, *supra* note 83, at 748–49 (describing "intratextualism"). For a fuller discussion of intratextualism, *see infra* notes 145–148 and accompanying text.

95 This is especially so seeing as many states at the founding regulated presidential elections with the same rules as for other federal or state-level elections. Shapiro, *supra* note 88, at 141–42.

96 *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also* Amar & Amar, *supra* note 17, at 21 (observing that when a state legislature passes a bill violative of its state constitution, it lacks the force of law).

97 *See, e.g.*, Amar & Amar, *supra* note 17, at 20–21 (noting that state constitutions, derived from the people, have always prescribed both procedural and substantive rules to state legislatures).

Notably, other compelling textualist arguments also weigh against ISL logic—ones not discussed in recent scholarship. For example, consider the fact that the Constitution *does*, in certain places, untether institutions from backdrop legal constraints. Yet in these cases, it does not merely name those institutions, as Article II names "legislatures." It speaks in clear language. Take Article I, which empowers the Senate to try "all [i]mpeachments."[98] As a general matter, outside the impeachment context, actions taken by Congress and the Senate are reviewable in federal court.[99] Yet it is widely accepted that federal courts lack authority to review Senate impeachment proceedings[100]—and for good reason. The Constitution gives the Senate the "*sole* Power" to try impeachments.[101] That word—"sole"—signals that the Senate enjoys exclusive power over impeachment trials, diverging from the baseline scope of judicial review that normally constrains Senate authority. Article II, by contrast, lacks such exclusivity-connoting language, suggesting, by meaningful variation, that it does not unsettle the usual limits on state-legislative power.[102]

Constitutional conventions exercise the sovereign power of the people differently from legislatures. They are elected "directly and specifically" for the purpose of ratifying a constitution, which, once ratified, *constrains* the behavior of the future state legislature—a distinct institution from the convention itself. *See, e.g.*, Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 N.W. UNIV. L. REV. 65, 89–93 (2019) (recounting the historical basis of constitutional conventions as "deputiz[ing] and constrain[ing] public officials on behalf of the people"). Primary documents indicate that the original participants in state-constitutional conventions, as well as the Framers of the federal Constitution, understood this point clearly. *See, e.g.*, *id.* at 92 (citing a resolution of Concord, Massachusetts positing that "'the Supreme Legislative, either in their proper capacity, or in Joint Committee, are by no means a body proper to *form and establish* a Constitution, or form of Government'") (emphasis added). The possibility that state constitutions can be altered by the people through means *other* than state-legislative amendment. *See generally* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (highlighting the conceptual distinction between constitutional conventions and state legislatures).

98 U.S. CONST. art. I, § 3, cl. 6.

99 Generally, under the Constitution, the "judicial Power" of federal courts extends "to Controversies to which the United States shall be a Party." *See id.* art. III, § 2, cl. 1 (establishing the scope of judicial power established in the Constitution). Litigation related to Senate impeachment-trial proceedings typically falls within this category. *See* Nixon v. U.S., 506 U.S. 224 (1993). In practice, of course, federal courts hear all manner of cases litigating the constitutionality of statutes passed by Congress, though standing and political-question doctrines impose some limits on what they hear.

100 *See, e.g.*, *id.* at 228–30 (finding "a textually demonstrable constitutional commitment" from analyzing the word "sole," which introduces a "nonjusticiable . . . political question"); Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 747 n.192 (2008) (discussing *Nixon v. U.S.*).

101 U.S. CONST. art. I, § 3, cl. 6. (emphasis added).

102 *Cf.* Amar, *supra* note 69, at 761–63 (discussing the significance of the Constitution's word "*variation*," or the "*selective*" use of certain words in some places but not others). Another example comes from Article I's grant to Congress of the power to exercise "exclusive Legislation in all Cases whatsoever"

For several years after 2020, these analyses notwithstanding, the Supreme Court appeared poised to endorse ISL theory. Hints left by four sitting Justices—Brett Kavanaugh, Samuel Alito, Clarence Thomas, and Neil Gorsuch—indicated sympathy for Stop the Steal's side in that quarrel.[103] Then, the Court waded into the debate in 2022 by opting to hear *Moore v. Harper*, which addressed an Arizona state court's alleged overreach in congressional-election gerrymandering.[104] The ISL question, as Justice Kavanaugh reasoned to justify certiorari, "is almost certain to keep arising until the court definitively resolves it[.]"[105] But the following year, the Court handed down a decision in *Moore* that squarely rebuked ISL principles (relying in part on some of the historical evidence above).[106] "The Elections Clause," as Chief Justice Roberts wrote for a six-Justice majority, "does not insulate state legislatures from the ordinary exercise of state judicial review."[107]

The facts of *Moore*, which involved congressional elections, are not directly identical to the Stop the Steal controversy. But it has been widely viewed as putting an end to ISL theory writ large.[108] It mattered little that

---

over Washington, D.C. U.S. CONST. art. I, § 8, cl. 17. Owing to the word "exclusive"—reminiscent of "sole"—this provision is widely taken to confer upon Congress "plenary power" over the District. *See, e.g.*, Palmore v. U.S., 411 U.S. 389, 393, 397 (1973) (holding Congress has plenary power over the District of Columbia); Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797, 815–16 (2018) (recounting Congress's power over the District at the Founding, as well as its evolution); THE FEDERALIST NO. 43 (James Madison) (explaining the role of Congress and the federal government with respect to the District). Absent Congressional authorization, then, municipal institutions may not exercise D.C.-lawmaking powers, *see* THE FEDERALIST NO. 43, *supra*, and Article III courts have limited competencies to review District-specific laws (providing the national government with jurisdiction over the District of Columbia). *See* 411 U.S. at 410 ("Palmore's trial in the Superior Court was authorized by Congress' Art. I power to legislate for the District in all cases whatsoever."). Again, Article II lacks this sort of baseline-shifting language. Instead, it resembles the Constitution's standard, non-exclusivity-granting directives to various governmental actors.

103 *See* Barton Gellman, *Trump's Next Coup Has Already Begun*, ATLANTIC (Dec. 6, 2021), https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/ [https://perma.cc/FDP2-JCD2] (noting that four Justices "have already signaled support for a doctrine that disallows any such deviation from the election rules passed by a state legislature").

104 600 U.S. __ at 1–4 (2023).

105 Nick Corasaniti & Adam Liptak, *Supreme Court to Hear Case on State Legislatures' Power Over Elections,* NYT (June 30, 2022), https://www.nytimes.com/2022/06/30/us/politics/state-legislatures-elections-supreme-court.html [https://perma.cc/5RPH-Q56P].

106 600 U.S. __ at 24–26 (2023).

107 *Id.* at 15.

108 *See, e.g.*, Eliza Sweren-Becker & Ethan Herenstein, Moore v. Harper*, Explained*, BRENNAN CTR. FOR JUST. (June 27, 2023), https://www.brennancenter.org/our-work/research-reports/moore-v-

congressional elections were at issue, given the parallels in Article I and Article II's respective directives on "Manner" of elections.[109] And while the state court in *Moore* had overturned the actions of an independent commission—chartered by the state constitution, not the legislature—the holding extends to legislatures, too. The commission, wrote Roberts, wielded "lawmaking power" just as a legislature would.[110] The *Moore* decision therefore appeared to shut the door on ISL theory once and for all.

B. THE STAKES TODAY

All these arguments—those from Breyer; Amar; more recent scholarship; and, most recently, six Justices of the Supreme Court—deliver important rebuttals to Stop the Steal. But they are only partial rebuttals, at best. In fact, for at least three reasons, the foregoing arguments have gaps that could leave room for Stop the Steal's claims to gain traction in future elections.

First, as discussed in Part I, not all of Stop the Steal's Article II reasoning relies on ISL theory. Yet the takedowns above disarm only ISL-based reasoning. As for Stop the Steals' other calls to overturn elections, they are nonresponsive. The *Moore* majority and Stevens's *Bush II* dissent, for example, hold only that constitutions may constrain state legislatures. That will not silence lawyers who tell the Vice President, when tallying Electoral College votes, to put a "thumb on the scale" for postelection legislatures' "alternative" appointees.[111] Trump allies, moreover, have petitioned legislatures to intervene after elections based solely on ambiguity about "when," under Article II, they may exercise "manner" powers.[112]

Second, as definitive as *Moore* appears, it may be insufficient to curb legislatures' election overreach. Why? The answer involves the word

---

harper-explained [https://perma.cc/D5EM-NSXF] (discussing *Moore*'s holding and its implications for ISL theory).

109 *Supra* notes 93 & 94.

110 600 U.S. at 17–18.

111 *See supra* note 58 and accompanying text (discounting Professor John Eastman's alternate-electors theory).

112 *See, e.g.*, *supra* note 60 and accompanying text (advocating for broader state-legislature power under Article II); Gellman, *supra* note 14 at 56 (citing off-the-record conversations with Trump campaign officials).

"ordinary" in Roberts's opinion[113]—which, it turns out, does an extraordinary amount of work.

Consider the full implications of what Roberts writes. As he makes clear, "state courts do not have free rein" to overturn legislatures' actions regarding elections whenever they please.[114] Rather, courts' judgments must refrain from overmuch discretion, lest they "arrogate" to themselves the legislative power (though when they cross this line, exactly, Roberts does not tell us).[115] This boundary, however fuzzy, is one the Court plans to police carefully.[116] Roberts emphasizes, in a nod to *Bush II*, that the Court must "temper" its usual "deference" to state courts regarding state law given the "limit[]" in Article II—that is, its grant of "Manner" powers to legislatures alone.[117] In this sense, then, ISL logic may not be so "debunked"[118] as first apparent. After affirming in one breath that state courts can constrain legislatures, Roberts, in the next, carves ample room for federal courts to overrule state ones. His reason must be that Article II *does*, after all, involve something of an exclusive grant—a proposition any faithful ISL adherent would quickly affirm. If Article II made no such grant, then when state courts hear election disputes, they would enjoy the Supreme Court's ordinary deference on state law.[119] The Court wouldn't be in the business of probing whether *their* review was "ordinary" or not.

But thanks to *Moore*, today's Court *is* in this business. How the Supreme Court might review state courts for "ordinariness" is, of course, largely untested—save perhaps for *Bush II*. Regardless, *Moore*'s emphasis on scrutinizing state-court rulings raises the specter, at least, of state courts' being foiled in suppressing state-legislative election interference.

How so? See what the Justices themselves say. Although "ordinary judicial review" will "likely . . . be a forgiving standard in practice . . . there are bound to be exceptions," cautions Justice Thomas, critiquing Roberts for prescribing a federal review standard for state courts' state-election-

---

113 *See*, 600 U.S. __ at 26 (2023).

114 *Id.*

115 *Id.* at 26–29.

116 *Id.* at 28.

117 *Id.*

118 Sweren-Becker & Herenstein, *supra* note 108.

119 Restraint by the federal judiciary would be consistent with the Constitution's choice *not* to assign the Supreme Court, in general, an "adjudicatory role" in presidential elections. AMAR, LAW OF THE LAND, *supra* note 70, at 153-54 (describing the Supreme Court's overreach in *Bush v. Gore*).

law decisions.[120] These exceptions, he goes on, "will arise haphazardly, in the midst of quickly evolving, politically charged controversies,"[121] letting elections be decided by nine Justices' "expedited"—and perhaps politically motivated—judgments about what constitutes "ordinary judicial review."[122]

Thomas makes a fair point. As the events of 2020 showed—and those of 2000, for that matter—presidential elections can be prime vehicles for the "politically charged controversies" that so conduce to "haphazard[]" judicial review.[123] Rather than relying on *Moore* to stop Stop the Steal, then, far sturdier would be an unambiguous, *federal* constitutional bar against postelection interventions.

Even aside from *Bush II*-style controversies, *Moore* leaves other defensive gaps against Stop the Steal's ISL-backed arguments. For example, as both Justices Kavanaugh and Thomas note, *Moore* tees up what, under most circumstances, would likely be a deferential standard of federal-court review.[124] But sometimes, federal deference may *under*-police state courts that—for partisan or other reasons—permit legislative interventions in blatant transgression of state law. A nonnegotiable Article II prohibition, which would give federal courts no choice but to discipline state courts tolerating election interference, better plugs this gap. And of course, the possibility always remains that ISL-sympathizing Justices[125] engineer another about-face on *Moore*, or somehow distinguish its facts from *presidential* elections.

The need to go beyond debunking ISL doctrine is, in short, very much alive—notwithstanding (greatly exaggerated) reports of the doctrine's death.

Third, and relatedly, the above anti-ISL arguments still only halt postelection interference when two conditions are true. Other sources of law must independently forbid interference, *and* state authorities must be

---

120 600 U.S. at 27 (Thomas, J., dissenting).

121 *Id.*

122 *See id.*

123 *Id.*

124 *See id.* ("[T]his federalization of state constitutions will serve mainly to swell federal-court dockets with state-constitutional questions to be quickly resolved with generic statements of deference to the state courts."); *see also id.* at 2 (Kavanaugh, J., concurring) ("Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication.").

125 Shapiro, *supra* note 88, at 175 (referring to Justices Thomas, Alito, Gorsuch, and Kavanaugh as "ISLT-endorsing Justices[.]").

willing to enforce those laws accordingly. Refuting ISL theory, that is, creates *room* to constrain legislatures yet does not do the actual constraining. And some states may lack state-constitutional provisions, or other safeguards, that clearly bar postelection interventions.[126] Even when in place, such safeguards will only work when state authorities (in particular, courts) construe them fairly. Partisanship within state institutions[127] can therefore undermine these protections. Federal courts, moreover, would not likely swoop to the rescue when state courts let legislatures have their way—given the federal practice of leaving them "the final arbiters of state law."[128]

Some conjecture that other federal-constitutional provisions, like the Due Process Clause, could offer some measure of protection against postelection interference.[129] Due-process challenges *would* merit federal-court involvement, and to be sure, future litigants against Stop the Steal should not hesitate to raise such claims (in addition to those in Part III). Yet the Due Process defense stands on shaky footing. Besides being untested in this context—as scholars acknowledge[130]—Due Process analysis

---

[126] *See supra* note 61 and accompanying text (highlighting Arizona's lack of a postelection-intervention constitutional bar and positing the argument that no legislature can bind its successors).

[127] Empirical evidence has documented the effects of partisanship in state-court decision making, including from campaign contributions when judges win their positions by election. *See, e.g.*, Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1431–43 (2016) (containing an empirical study of judicial partisanship in election cases); *see also* Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship Between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. S161, S161–63 (2015) (finding that "party campaign contributions are associated with both measures of partisanship in judicial decision making by partisan-elected state supreme court judges"). *Cf.* Stef. W. Kight, *State Supreme Court Ideologies*, AXIOS (July 13, 2021), https://www.axios.com/2021/07/14/state-supreme-court-justices-republican-democrat [https://perma.cc/97TL-PRVK] (noting that as of June 2020, more than half of states' supreme courts are composed of a majority of justices associated with the Republican Party, which is a fact that influences outcomes in, for example, gerrymandering litigation).

[128] *See, e.g.*, J. Douglas Wilson, *State Law Independence and the Adequate and Independent State Grounds Doctrine After* Michigan v. Long, 62 WASH. U. L. REV. 547, 547 (1984) (observing the role of state courts as final arbiters of state law); *see also* 531 U.S. at 114 (Rehnquist, J., concurring) (writing that "this Court will have no cause to question the [state] court's actions" interpreting state law without applicable federal constitutional provisions).

[129] *See, e.g.*, Levitt, *supra* note 19, at 1071 (arguing that the Due Process Clause would "deny legislative Lucy any lawful authority to pull an electoral football away from the Charlie Brown electorate after the election has already begun").

[130] *See, e.g.*, *id.* (explaining that "no legislature has yet been so brazen" to replace the popular election process after the start of an election).

on elections can be malleable, subjective, and deferential to state law.[131] Moreover, Due Process optimists also concede that the clause likely would not stop certain types of interference—such as when legislatures pass laws *before* elections preauthorizing them to intervene afterward (a possibility discussed in Part III).[132] The Due Process Clause hardly mounts an airtight defense of American election integrity.

The arguments advanced below suffer none of these defects. As Part III describes, Article II, itself, must be read as forbidding postelection state-legislative interference. Such interventions contravene the Article's text, original understanding, and purpose. Part III's argument, then, sidesteps the ISL debate and neutralizes Stop the Steal's claims regardless of what one thinks of it. It does so, moreover, in clear and unambiguous terms. Rather than appealing to malleable standards like "due process," this Part shows—for the first time[133]—that Article II simply cannot be read to grant legislatures the powers Stop the Steal claims it does. And because this argument construes Article II of the *federal* constitution, federal courts can, and should, vigorously enforce it across all fifty states.

III. GETTING ARTICLE II RIGHT

Regardless of one's view on ISL doctrine, postelection interference violates Article II's clear meaning. The reason is that Article II—whatever authorities it grants—confers "manner" powers on *pre*-election legislatures alone. This Part explains why.

First, Section III.A analyzes constitutional text. It shows that the only sensible reading of Article II's text is as restricting "manner" powers to pre-election legislatures. Next, Section III.B examines the Constitutional Convention's original understanding of Article II, Section 1, Clause 2. It reveals how postelection state-legislative interventions would contravene the Framers' understanding and undermines the compromise they struck.

---

131 *See, e.g.*, Shapiro, *supra* note 88, at 200 ("[T]hese kinds of inquiries . . . require a much more deferential standard . . . ."); James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORD. L. REV. 423, 452–60 (2021) (discussing various Supreme Court cases and their standards of review). In practice, notably, courts have been unwilling "to tackle directly the transparently partisan motives underlying" election-administration decisions. Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principal for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 655 (2017).

132 Levitt, *supra* note 19, at 1071 n.76 (discussing Due Process implications of an Arizona bill passed before an election that gives the legislature express "power to ignore the popular vote and install its own presidential electors by simple majority").

133 *See id.* at 1,071 (surmising that Article II itself likely poses no bar on postelection interventions).

Section III.C reads Clause 2 in conjunction with Clause 4—and with Congress's 1845 Election Day statute pursuant to it. Doing so shows how Congress has exercised its constitutional "Time . . . determin[ation]" powers in a way that cabins states' "Manner . . . direct[ion]" powers. Finally, Section III.D unearths the broader purposes behind the Constitution's elector-appointment scheme. To the extent any ambiguity remains in Article II, purposive analysis pushes for resolving it against postelection interference.

A. CONSTITUTIONAL TEXT

At first glance, the text of Article II, Section 1, Clause 2 looks ambiguous,[134] or at the very least capacious.[135] Under Clause 2, state legislatures may pick the "Manner" of appointing electors. But that Clause says nothing about *when* they must do so.

Yet a straightforward textual analysis of Article II—in particular, one which reads Clause 2 in conjunction with Clause 4—dispels any apparent ambiguity. Article II's text, alone, compels interpreters to find postelection state-legislative interference unconstitutional.

Before embarking on this Section's main textual argument, it is useful to unpack the connection between Clauses 2 and 4. Clause 2 empowers state legislatures to "direct" the "Manner" of "*appoint[ing]*" presidential electors. Clause 4 empowers Congress to "determine" the "Time" of "*chusing*" them. How, then, does appointment relate to choice?

Notably, if Clause 2 "appoint[ing]" and Clause 4 "chusing" referred to the same thing, then that would clearly render postelection interference unconstitutional.[136] Congress's Election Day Act of 1845 has fixed one day in November as Election Day, or the Clause 4 "chusing" date. If *appointment* occurred then too, legislatures certainly could not exercise Clause 2 "manner" powers afterward. Intuitively, one cannot choose the

---

134 *See, e.g.*, Woolhandler, *supra* note 23, at 27 (discussing "indeterminacy" of the language within Article II Section 1).

135 *See, e.g.*, Gellman, *supra* note 14 (noting the room within Article II that Trump may "test").

136 *Cf.* Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CAL. L. REV. 1, 5 (2018) ("[T]ext, where clear, governs."); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 544 (1999) ("[E]ven the most paradigmatically practice-based theory must acknowledge that American constitutional practice has a text at its center. The question is never whether practice dictates a result other than that called for by the constitutional text. . . .").

manner—that is, the "procedure or way of acting"[137]—of performing an action *after* they have performed it.[138] Performance, itself, fixes the "manner" of executing the action.[139]

But "chusing" and "appoint[ing]" are (at least arguably) not the same thing—as ISL proponents point out.[140] Before formally appointing electors, states must certify voting results, and the procedures to do so take time.[141] In 2020, merely counting votes to find a winner took days for some states.[142] Of course, the concept of appointment—and Clause 2 "manner" powers generally—*encompasses* the rules for "chusing" (today, "electing") electors, in the Clause 4 sense.[143] But "manner" and "appoint[ment]" are broader than "chusing." They also include postelection processes like tallying and certifying votes once elections end.

This Section thus assumes that "chusing" and "appoint[ing]" electors are different—with the Clause 4 choice concluding before Clause 2 appointment. This interpretation is the most charitable toward Stop the Steal. Still, it changes nothing. Even granting that "appoint[ing]" may follow "chusing," a logical treatment of the Constitution's text[144] still bars

---

137 MERRIAM WEBSTER, *supra* note 83.

138 *Cf.* Kaplin, *supra* note 29, at 991 (observing that textualist constitutional interpreters hold that "[a]t least some words and phrases, it is argued, are sufficiently clear that almost everyone would agree on their meaning in at least some of their applications.").

139 To make the intuition concrete, imagine a legislature appointing electors by polling its *own* members, not citizens. Once the legislature casts ballots, counts them, and finalizes the appointment, nothing later can change "how" it did so. State legislatures, for what it's worth, once handpicked electors precisely this way. Roughly half of states followed this protocol in the 1789 presidential election. *See* Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 856–57 (2002) ("In the first presidential election . . . electors were chosen directly by the legislature in about half of the states . . . .") However, most moved away from this practice after the 1796 election. *See id.* (noting that after 1796 "most states moved toward choosing electors through some sort of popular vote"). No state has used a method besides popular vote to choose electors since 1876. *See* Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 197 n.7. (2004)

140 Morley, *supra* note 40, at 547 (discussing how states are required to appoint the electors based on the results of Election Day, but how the electors are not actually appointed on Election Day itself).

141 *See After Election Day: The Basics of Election Certification*, DEM. DKT. (Nov. 29, 2021), https://www.democracydocket.com/explainers/after-election-day-the-basics-of-election-certification/ [https://perma.cc/2EQ4-BFU2].

142 *See supra* notes 3 & 4 and accompanying text.

143 All parties joining the *Bush II* debate would seem to agree that election procedures, as a general matter, fall within state legislatures' Clause 2 "manner" powers. *See supra* Section II.A.

144 *Cf.* BOBBITT, *supra* note 35, at 25–38. Although this Section's argument is textual, it should still persuade originalists. Many originalists agree that interpreting a constitutional provision's original meaning turns—sometimes definitively—on "semantic meanings and syntax" separately from the

legislatures from exercising "manner" powers between Election Day and appointment. Clause 2's directive, in other words, must be understood as addressing pre-election legislatures alone.

Here, then, is the central textual argument. It proceeds in two steps. The first step holds the following: The presidential electors "ch[osen]" per Clause 4, at the "Time" Congress selects, must dictate *which* electors are "appoint[ed]" per Clause 2.

The reason for this proposition is simple—and straight from the text. In Clauses 2 and 4, the same word ("Electors") is the object of both "appoint[ing]" and "chusing." And in each case, "Electors" plainly refers to the same group of people—those voting for president in the Electoral College. When one word appears multiple times in the Constitution, within the same "overall context," each use presumably has the same meaning. This interpretive move, often termed intratextualism, is standard within constitutional scholarship.[145] And it is wholly appropriate with Clauses 2 and 4.[146] Both Clauses appear in Article II, which defines

---

"relevant context of constitutional communication." Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORD. L. REV. 453, 472 (2013) [hereinafter Solum, *Originalism*]; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 106–07 (2010). Indeed, nearly all scholarly interpreters of the Constitution, originalist or not, derive some interpretive value from constitutional text itself. *See* Fallon, Jr., *supra* note 135, at 544–45 ("[E]ven the most paradigmatically practice-based theory must acknowledge that American constitutional practice has text at its center.").

[145] Amar, *supra* note 69, at 801 nn.203–04; *see also* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1016–25 (2007) ("For an objective-meaning originalist, the best place to start" to understand "the term 'inferior' . . . in Article I and III of the Federal Constitution . . . is with evidence of usage drawn from elsewhere in the Constitution itself."); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1156 (2003) (describing "the apparent reasonableness of the presumption in favor of continuity of meanings"); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 673-76 (2004) (applying intratextualist principles to the Constitution's use of "courts" and "establish"); Solum, *Originalism*, *supra* note 143, at 465-66 (discussing "contextual enrichment" in constitutional communication); *cf.* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 572-73 (2013) (discussing the statutory-interpretation canon of "consistent usage," while observing its widespread state-level codification, use by Supreme Court Justices, yet less frequent adoption by congressional staffers). Ironically, at least one ISL supporter has leveraged the intratextualist approach when discussing separate aspects of ISL theory. Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 N.W. L. REV. 847, 855–63 (2015).

[146] A few scholars, to be sure, have criticized stronger versions of the intratextualist approach, arguing instead for only a "weak" presumption that words carry the same meaning throughout the Constitution. *See, e.g.*, Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730, 734–48 (2000) ("In these respects

executive power.[147] And, as the (now-obsolete) third clause of Section 1 makes clear, the "Electors" discussed in that Section "vote by Ballot" to the end of "chusing the President." Given this context, "Electors"—in each clause—can only mean states' Electoral College delegates.[148]

It follows, then, that Article II's text does not let legislatures *appoint* electors different from those *chosen* on the day Congress prescribes. The Clause 2 "Electors" are the same as those mentioned in Clause 4. Even prominent ISL advocates seem to acknowledge this point.[149]

Now consider the argument's second step. It posits the following: When *post*election legislatures use Clause 2 "manner" powers to swap out electors, the Clause 4-sanctioned "chusing" no longer dictates which electors are "appoint[ed]."

Here is why. As discussed, Congress has already fixed the time of "chusing" electors. That time is Election Day—the first Tuesday after the first Monday in November, in every fourth year.[150] Virtually no one contests this fact.[151] For Article II's purposes, then, the Clause 4 choice

---

Intratextualism proves normatively ungrounded."). But even these authors describe intratextualism as holding under certain circumstances, with the method's "liabilities" varying by context. *Id.* at 736, 738. Situations where critics contend that intratextualism deserves *less* weight include those where constitutional provisions are enacted at different times; involve significantly different subject matter or contexts; arise from different negotiation processes; produce "unexpected or obscure" meanings by intratextualist principles; would cause judicial confusion by such principles; involve extrinsic evidence that the Framers intended different meanings; or involve extrinsic evidence that the Constitution lacks "substantive coherence" on a particular issue. *See id.* at 742 n.6, 743, 746–50, 752–55. None of these factors apply to Article II, Section 1. That Section's provisions were enacted simultaneously and present a single scheme for electing the president, while other readings of "Electors"—beside the intratextualist one—would be nonsensical in context. *See infra* notes 147 & 148 and accompanying text.

147 *See generally* U.S. CONST. art. II. The first section of Article II, specifically, is dedicated to setting for rules for selecting the president and compensating the president for services. Its provisions include, inter alia, language that defines the president's citizenship requirements, fixes the president's compensation, and obligates the president to swear an oath before assuming office. *Id.* art. II § 1 cls. 5, 7, 8.

148 Constitutional scholars whose methods focus on textual interpretation emphasize that an interpreter's "infer[red]" "meaning" of one word or phrase in the Constitution's text must, in order to be valid, not be "falsified" by the context supplied by other provisions elsewhere in the Constitution. *See, e.g.*, Nourse, *supra* note 135, at 10–11, 15–18. Any use of "Electors" in Article II, Section 1 that did *not* refer to Electoral College members would be "falsified"—in the Noursean sense—by the Section's other provisions.

149 Morley, *supra* note 40, at 547 ("[E]ach state [must] appoint a slate of electors based on the results of an election that culminated on Election Day.").

150 Act of Jan. 23, 1845, 5 SOL 721 (1845) (codified as amended at 3 U.S.C. § 1).

151 For example, prolific ISL theorist Michael Morley, again, accepts this basic proposition. Morley, *supra* note 40, at 547 ("Congress enacted this law pursuant to its constitutional authority to 'determine the Time of chusing the Electors.'" (quoting U.S. CONST. art. II § 1 cl. 4)).

of electors is made by Election Day's end. The "chosen" electors are those meeting their state's selection criteria at the "Time of chusing" (i.e., winning the most election votes).

Why does the fixed timing of the Clause 4 choice matter? It means that if a legislature seeks to alter elector appointment after Election Day, then any new electors must *not* be those chosen per Clause 4. The legislature's intervention, which causes the new electors' appointment, is not part of the state's Clause 4 choice. It has come too late. By then, the "chusing" has already happened. The "chusing" concluded, as constitutionally required, with voting on Election Day. Conceptually, whenever any decisionmaker makes a choice, they might later *reverse* that choice—with a different, subsequent choice. But they cannot travel through time and change the fact of their *initial* choice.[152] Therefore, to the extent they influence appointment, postelection interventions sever the link between the "Electors" contemplated in Clauses 2 and 4.

That result makes postelection interventions unconstitutional. As already shown above, the Constitution requires the Clause 4 "chosen" electors to be the Clause 2 "appoint[ed]" ones. It permits no conduct violating that condition. Yet postelection interventions inherently sever the Clause 2 electors from the Clause 4 ones.

Postelection, elector-altering interventions, notably, encounter this sort of problem no matter what form the intervention takes. Consider some hypotheticals. To take an easy one, suppose Georgia's 2020 legislature, citing ballot-counting irregularities, passes a statute after Election Day purporting to pick that year's elector slate by fiat. That scenario, where legislators ignore the popular vote, clearly cuts all ties between the Election Day choice and eventual appointments—and thereby the link between Clause 2 "Electors" and the Clause 4 ones.

Subtler interventions meet the same problem. Imagine that Georgia's legislature, instead, passes a law (pretextually) to disqualify otherwise valid

---

[152] Philosophy scholarship, for example, has raised numerous objections to the possibility of time travel. *See, e.g.*, *Time Travel*, STANF. ENC. PHIL. (Mar. 23, 2018), https://plato.stanford.edu/entries/time-travel/ (summarizing the literature); *see also* Peter van Inwagen *The Incompatibility of Free Will and Determinism*, 27 PHIL. STUDS. 185, 191–93 (1975) (characterizing as "quite clear" the "general principle" that "[i]f Q is a true proposition that concerns only states of affairs that obtained before S's birth, and if S can render the conjunction of Q and R false, then S can render R false"). Scholars contending that time travel *could* be possible, moreover, defend a version of it that rules out any possibility of changing fixed events in the past. *See, e.g.*, David Lewis, *The Paradoxes of Time Travel*, 13 AM. PHIL. Q. 145, 146, 148–49 (1976) ("[T]he events of a past moment are not subdivisible into temporal parts and therefore cannot change.").

votes from Democratic strongholds. Based on "legal" votes, it declares Trump the victor. In fact, suppose the legislature even claims that ballot-counting irregularities *forced* it to step in. Fraud, it said, rendered the Election Day choice unknowable by the normal rules—so *the legislature* had to vindicate voters' "real" choice.[153] Constitutionally, this scheme is no sounder. Georgia's Clause 4 choice, made on Election Day, embedded all of its then-operative election rules. Those rules have procedures to handle voting disputes and discrepancies—as did Florida's in 2000[154]—and flow validly from legislative "manner" powers.[155] Even Trump's legal team admits as much,[156] as, for that matter, did Rehnquist in *Bush II*.[157] Whatever outcome those rules produce, then, is one and the same with Georgia's Clause 4 "choice." (And to repeat, the new rules, by contrast, could never be part of that choice, because they came after the choice was made.[158])

A final postelection-intervention scenario is important to address. Imagine that Georgia's legislature, anticipating Trump's defeat, acts *before* Election Day (invoking Clause 2) to let itself interfere *after* the election. For a concrete example, suppose it enacted the following statute in October 2020: "The state legislature, on a day following Election Day, may by a majority vote of its members alter Georgia's choice of presidential electors, notwithstanding citizens' voting on Election Day." One might call this the "preauthorized, postelection intervention" scenario.

---

153 For one example of this legal argument, made at the level of theory, see, for example, Morley, *supra* note 40, at 548 ("Under such circumstances, the legislature would likely argue that it is not violating the Act by holding a belated new election, but rather attempting to enforce the results of the election held in compliance with the Act.").

154 *See supra* Section II.B.

155 *See* AMAR, *supra* note 69, at 147–48 (discussing how the Florida legislature had delegated power to "manage disputed presidential elections in Florida to the Florida judiciary").

156 Email from Russ Diamond, Rep., Legislature of the Commonwealth of Pa., to John Eastman, Prof., Univ. of Colo. (Dec. 13, 2020, 12:22 EST), https://www.politico.com/f/?id=00000180-b081-d3ee-a392-b19b26750000 [https://perma.cc/WW36-88KL] ("Article II, Section 1, Clause 2 of the US Constitution empowers state legislatures to direct the manner of appointing electors for President and Vice President of the United States. The General Assembly has done so via the Pennsylvania Election Code.").

157 Bush v. Gore (*Bush II*), 531 U.S. 98, 113–14 (2000) (Rehnquist, J. concurring) ("[T]he legislature has delegated the authority to run the elections and to oversee election disputes . . . to state circuit courts.").

158 *See supra* notes 150–152 and accompanying text.

This case involves a more complex analysis. But its result is no different. No matter how one interprets it, the postelection vote authorized by Georgia's statute violates Article II.

To see why, observe first that Georgia's legislature has available two—and only two—mutually exclusive paths for justifying its preauthorized, postelection intervention. Conceptually, it might seek to construe its own postelection "vote" either as a Clause 4 choice (or part of such a choice), or as something else. Both routes produce unconstitutional results.

Start with the first one. If Georgia's legislature claims that its postelection "vote" is part of its Clause 4 "chusing," then that vote clearly violates Clause 4. Clause 4, again, explicitly directs Congress to pick the "Time of chusing," and Congress has picked Election Day. Any "chusing" that takes place later transgresses Clause 4—*whether or not* the legislature has used Clause 2 "manner" powers to "authorize" it in advance. Clause 4 limits what legislatures can do under Clause 2.[159]

What if Georgia's legislature—acknowledging the above—opts for the second route, claiming its preauthorized, postelection "vote" is something *separate from* the Clause 4 "chusing"?[160] It hits another dead end. If the

---

[159] To illustrate with a (possibly) more intuitive analogy, imagine that Georgia's hypothetical statute instead let "[t]he *people*, in a *special election* held on day following Election Day, by a majority vote alter Georgia's choice of presidential electors." This statute clearly violates Clause 4, and it does so for the same reason. Regardless of whether the act of "chusing" electors is a popular vote or state-legislative vote, Article II unambiguously prohibits the legislature from providing for it to happen after Election Day.

[160] Notably, the legislature might struggle to characterize this "vote" credibly as *not* a choice, in the Clause 4 sense. Consistent with standard philosophical accounts of agency, any choice can be conceived as an event accompanied by, or caused by, the intentions, beliefs, and other mental states of those making it. *Cf., e.g.*, Donald Davidson, *Agency*, *in* AGENT, ACTION, AND REASON 3, 7 (Robert Williams Binkley *et al.* eds., 1971) ("[A] man is the agent of an act if what he does can be described under an aspect that makes it intentional."); Donald Davidson, *Actions, Reasons, and Causes*, 60 J. PHILO. 685, 690–92 (1963) ("In the light of a primary reason, an action is revealed as coherent with certain traits . . . . [W]hen we explain an action, by giving the reason, we do redescribe the action."). In a similar vein, from a normative standpoint, divergent theories of election law appeal in various ways to voters' *mental states* (e.g., their "preferences") to justify elections. *See, e.g.*, Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 297–98, 304 (2014); Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 685-88 (2002). In the present example, the postelection "vote," then, empowers legislators to render a *de novo* decision on the question of which electors to appoint. This decision is the same as that which voters make on Election Day—except that *legislators'* own criteria, intentions, beliefs, and other mental states effect the outcome, rather than those of voters. The postelection "vote," therefore, seems best construed as a Clause 4 choice in its own right, at odds with the Election Day choice. Indeed, this construction appears the only one coherent with logic of Congress's original provision at 3 U.S.C. § 2—allowing legislators to make a *de novo* postelection "choice" when voters "fail" to choose. *See infra* Part IV. That is to say, if the postelection "choice" in 3 U.S.C. § 2 could be something *other than* Clause 4 "chusing," why, then,

postelection "vote" is *not* part of the "chusing," then the Election Day vote, alone, is all that is left to constitute the Clause 4 choice. So, the Clause 4 "Electors" must be whomever the voters picked (under the then-operative election rules, that is[161]). Therefore, if the postelection "vote" results in appointing different electors, it unconstitutionally[162] severs the Clause 2 "Electors" from the Clause 4 ones.[163] It is again of no consequence that legislature meant Clause 2 "manner" powers to preauthorize their "vote." Legislatures' "manner" powers cannot permit what Article II forbids.

Article II's wording, in any event, is consistent with just one conclusion. Only legislatures acting before Election Day can exercise constitutionally delegated "manner" powers. Anything else contradicts the basic terms of its text.

One last caveat is in order. Although this Section's analysis invalidates *post*election interventions, it cannot be used to preclude all *pre*-election vote rigging. Legislatures may still invoke Article II to dismantle elections

---

must Congress specially authorize it? The most logical answer, of course, is that Congress understood this kind of decision to be a Clause 4 choice, as described above. However, in order to address the "preauthorized, postelection vote" critique thoroughly, the alternative construction is nevertheless considered here.

161 *See supra* notes 153–158 and accompanying text.

162 *See supra* notes 150–153 and accompanying text.

163 Another way of making this point is by observing the following. For the Clause 4 choice to be made by Election Day, its contents must be fixed, deterministically, by Election Day's end. In other words, there must be no possibility that the will of another later changes the decision. And the choice's outcome must be discoverable merely by *applying* the election rules (as written on Election Day) to the election's facts (e.g., the ballots cast).

As previously discussed, some of this "applying" work might entail certain exercises of discretion. For example, judges or election officials may be required to make certain subjective judgments incidental to factfinding, administrative, or similar tasks—such as with judges presiding over ballot-eligibility hearings. *See infra* notes 80–87 and accompanying text; *cf., e.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 724–25 (1974) (contrasting procedural and substantive rules). But these minor exercises of discretion, "incidental" to the task of executing the law, are wholly distinguishable from a statute that authorizes a *de novo* judgment on the choice of electors. The salient point is that—for the Clause 4 choice to be "made," or "discoverable," by Election Day—it must be that no actor later exercises discretion directly on the first-order question of who the electors will be. Any such conduct would render the Election Day choice *in*complete. In the present example, the legislature's postelection "vote"—whatever it is, if not part of the Clause 4 "chusing"—introduces exactly this difficulty. The legislators would select electors directly, according to their *own* will, and not the electorate's—unlike with administrative tasks such as ballot counting, where counters aim to effectuate the electorate's will. *See infra* note 160. Therefore, the exercise of discretion in this example would do one of two things. It would either render the Clause 4 choice *in*complete on Election Day or, if the Election Day choice *can* be considered complete, entail that the electors chosen on Election Day are different from those ultimately appointed.

before they occur. For example, nearly all accept that legislatures, acting in advance, can abolish presidential elections outright. The Constitution does not mandate presidential elections, and for years, many states' legislatures picked electors.[164] Article II is also silent on blatantly unfair election rules (again, if passed ex ante). As an extreme example, it would let Georgia legislate, hypothetically, that "[a]ll Election Day votes for Democratic electors shall count for Republican ones." Still other gray areas remain. Suppose, for instance, that Georgia's legislature strips state courts' jurisdiction over elections and tasks *itself* with adjudicating voter fraud. When judging a fraud case, then, it knowingly misapplies the law (though pretends otherwise), disqualifies Democratic votes, and hands Trump the contest. These actions—though clearly unfair—might be said to respect Article II if framed (inaccurately) as applying, not deviating from, preexisting election laws.[165]

Again, these scenarios involve *pre*-election chicanery. While Stop the Steal might one day pursue these moves,[166] they are not postelection interventions invoking Article II—this Article's focus. It is worth observing, however, why maneuvers like these may be *less* worrisome than those Stop the Steal backed in 2020. First, most of them more obviously transgress non-Article II prohibitions. The last example above—where the legislature explicitly usurps judicial power—runs afoul of Fourteenth Amendment,[167] Guarantee Clause,[168] and state-

---

164 *See infra* notes 198 & 199 and accompanying text.

165 *Cf.* Bush v. Gore (*Bush II*), 531 U.S. 98, 113–15 (2000) (Rehnquist, J. concurring) (seeking to justify overturning Florida's supreme court on Article II grounds by excavating the intent behind previously enacted Florida election statutes).

166 To be sure, it is important to recognize that Stop the Steal and its sympathizers have also backed many state-legislative changes that compromise election security or work to disenfranchise voters work, even if they do not fully dismantle elections, like other the hypotheticals discussed in this Section. These actions include laws that create obstacles to voting, give partisan officials greater control over vote counting, or punish local election officials for taking certain actions. *See, e.g.*, Will Wilder, Derek Tisler & Wendy Weiser, *The Election Sabotage Scheme and How Congress Can Stop It*, BRENNAN CTR. FOR JUST. (Nov. 8, 2021), https://www.brennancenter.org/our-work/research-reports/election-sabotage-scheme-and-how-congress-can-stop-it [https://perma.cc/6VCV-RZSF]. This Article's focus, of course, is not voter disenfranchisement writ large. Nevertheless, the fact that this Article focuses on postelection actions to overturn elections does not imply that other actions, like voter disenfranchisement, should be overlooked.

167 Woolhandler, *supra* note 23, at 10; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 363–79 (2005) (discussing the history and original understanding of the Fourteenth Amendment).

168 *See, e.g.*, Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1715–18 (2010) (discussing the original understanding and enforceability of the Guarantee Clause); AMAR, *supra* note 164, at 363–79 (discussing the

constitutional[169] guarantees of republican government and separated powers. The prior example above, which involves effectively nullifying Democratic votes, would flunk strict scrutiny by the Supreme Court's prevailing First and Fourteenth Amendment jurisprudence.[170]

Second, pre-election corruption like this is less politically feasible. Each move above, on its face, blatantly undermines free elections. And elections are popular. Voters would almost certainly oppose measures to nullify or abolish them. Arizona Republicans' wholly unsuccessful legislative proposal to do just that, in 2021, illustrates this point.[171] Whereas Stop the Steal gained traction by purporting to redress past injustices, laws distorting elections *before* they start are harder to sell.[172] And, by virtue of their pre-election passage, such laws give voters more time to organize and express discontent than do postelection interventions.[173]

---

constitutional charge for states to have "genuine republican governments"); *cf.* U.S. CONST. art. IV § 4. *But see* Woolhandler, *supra* note 23, at 4 (observing that the Supreme Court has historically tended to treat the Guarantee Clause as nonjusticiable, notwithstanding scholars' arguments against this position).

169 *See, e.g.*, GA. CONST. art 1. § 2 para. 3 ("The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.")

170 *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted." (internal citations omitted)); Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights . . . . [W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" (quoting Norman v. Reed, 502 U.S. 279, 289 (1992))).

171 Louis Jacobson & Amy Sherman, *Are State Legislators Really Seeking Power to Overrule Voters?*, POLITIFACT (July 14, 2021), https://www.politifact.com/article/2021/jul/14/are-state-legislators-really-seeking-power-overrul/ [https://perma.cc/P9X3-DPY2] ("[House Bill 2720] didn't gain traction."); Woolhandler, *supra* note 23, at 30 n.172 (discussing the "proposed but unadopted" Arizona House bill); *A Democracy Crisis in the Making: How State Legislatures Are Politicizing, Criminalizing, and Interfering with Election Administration*, STATES UNITED DEMOCRACY CTR. 9–10 (Apr. 22, 2021), https://perma.cc/CMD2-RE96 (discussing three proposed Arizona bills that would allow legislators to dictate the results of elections).

172 *Cf.* Miles Parks, *Election Deniers Are Running to Control Voting. Here's How They've Fared so Far*, NAT'L PUB. RADIO (Aug. 18, 2022, 4:07 PM ET), https://www.npr.org/2022/07/29/1113707783/election-deniers-secretary-of-state-arizona-finchem [https://perma.cc/A5V6-M7VY] ("Even though polling data indicates a majority of Republican voters still believe fraud impacted the 2020 election, primary results this year suggest a more complicated picture, as a number of prominent election deniers have lost races running against more moderate candidates who did not spread misinformation about the 2020 results.").

173 *See, e.g.*, Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 300–01 (2022) (describing

This Section's textual argument, therefore, meaningfully restricts legislatures' broader election-overturning abilities by invalidating postelection interventions in particular.

B. ORIGINAL UNDERSTANDING

The historical record suggests that the Framers and Early Republic lawmakers understood the Constitution's text in precisely the manner above. Clause 2 enables only pre-election state legislatures to direct an election's "manner." This understanding undercuts the notion that legislatures can interfere with election results ex post.[174]

Participants at the Constitutional Convention, it seems, never explicitly considered the possibility of postelection state-legislative interference. But this is much of the point. The fact that the Framers never even imagined state legislatures swooping in to overturn election results—*after* authorizing the election—suggests that doing so exceeds Article II's authorities.[175] In fact, if the Framers had considered this

---

how "pushback from corporations, civic groups, nongovernmental organizations, and others can be helpful" in this context, such as in the case of a failed Texas statute that "would have lowered the legal standards for overturning election results in court based on claims of irregularities").

[174] Professor Michael Weingartner also briefly addresses this episode at the Constitutional Convention in a 2023 article. Weingartner, *supra* note 89, at 177–79. Weingartner observes some of the same facts about the Convention that this Section and Section III.D discuss. These include some delegates' concerns with popularly selecting electors, as well as the fact that Article II's final text represents a "compromise." *Id.* at 177–79. However, his writing draws a wholly separate conclusion from that in this Section and Section III.D. His analysis seeks to show simply that the Constitutional Convention does not provide affirmative support to the ISL theory (that is, state constitutions' and other authorities' ability to constrain legislatures). *Id.* at 177. This Part, of course, pointedly sidesteps ISL theory. Instead, this Section shows that the prospect of postelection interference, generally, would have rendered untenable the very "compromise" that Weingartner briefly references—meaning that postelection interference fell outside the original understanding.

[175] Originalists disagree about the level of abstraction at which interpreters should understand the Framers' "original meaning." Most famously, Ronald Dworkin distinguishes "expectations originalism"—which strives to give effect to specific legal consequences that the Framers envisioned—from "semantic originalism"—which seeks to discover the higher-level, abstract principles that the Framers intended to serve via concrete constitutional provisions. Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 119 (1997); *see also* Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 201–07 (2000) (discussing Dworkin's interpretation of originalism); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENTARY 427, 432–36 (2007) (arguing that living constitutionalists object to "original *expected application*" but not "original *meaning*"). This Section's argument should persuade adherents of either school (or their respective offshoots). The claim that the Framers neither envisioned nor meant to permit postelection state-legislative interventions—a specific, concrete outcome—is fundamentally an expectations-originalist claim. *See infra* notes 185 & 186 and accompanying text.

possibility, it would have rendered their Article II-elector debate nonsensical.

To see why, consider the Framers' arguments for and against various proposals for how, exactly, to select Electoral College electors. The Convention debated that question over the summer of 1787 (alongside the separate question of whether to use an Electoral College, at all, to pick the national executive in the first place).[176] As scholars document, a central issue was whether states should choose electors by popular vote or have their legislature appoint them directly.[177] Until early September, the Convention was split. Oliver Ellsworth of Connecticut first proposed state-legislative appointment on July 19, and his motion gained supermajority support.[178] But then, Elbridge Gerry's condemnation of popular electors selection seemed to sway the group.[179] Throughout the Convention, Gerry had stressed that ordinary citizens were too "uninformed" and easily "misled" to choose electors wisely; popular elections, moreover, might weaken state ties to the national government, versus alternative systems.[180]

But here, unlike with some other constitutional questions, semantic-originalist principles compel the same conclusion. The semantic-expectations approach "decide[s] what [abstract] propositions a text contains by assigning semantic intentions to those who made the text . . . attempting to make the best sense . . . of what they did when they did it" based on empirical facts. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1258–60 (1997) [hereinafter Dworkin, *Arduous Virtue*]. Postelection interference disserves the abstract anticorruption purposes which, as the historical record shows, are embedded within Article II. *See infra* Section III.D.

Originalists disagree, too, about how the Framers' specific intentions factor into constitutional interpretation. Some—original-intention originalists—hold that their intentions *determine* constitutional meaning, while others—original-meaning originalists—consider the original "public meaning" of the Constitution's words definitive. Balkin, *supra*, at 442–54. Although this Section argues from original intention, its historical evidence should still persuade original-meaning interpreters. "Today's original meaning originalists often view original expected applications as very strong evidence of original meaning, even (or perhaps especially) when the text points to abstract principles or standards." *Id.* at 449.

176 The Convention took up debate on this question beginning on July 19. Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. UNIV. L. REV. 731, 750 (2001).

177 *Id.* at 752 ("[T]he Framers were faced with a choice between popular election of electors (popular electors) and appointment of electors by the state legislatures (legislative electors).").

178 *Id.* at 750 ("Ellsworth's motion for appointment of electors by state legislatures then passed by a vote of 8 to 2.").

179 *Id.* at 752–54 ("Absent other evidence, Gerry's two reasons to prefer legislative electors . . . might explain why the Framers decided to give legislatures the power to 'direct' the 'manner' of appointing electors.").

180 *Id.* at 748–752.

The Convention set the matter aside until Governeur Morris proposed, on August 4, that "the people of the several States" choose electors.[181] Why? If state *legislatures* picked them, he reasoned, tyranny could result from the national executive being insufficiently accountable to the people.[182] "The Executive [would be] interested in Courting popularity in the [state] Legislature," Morris feared, rather than courting the people themselves.[183] Morris's logic convinced his colleagues. Though weeks earlier they had overwhelmingly backed Ellsworth's proposal, the delegates now failed just narrowly to pass Morris's motion—by virtue of a tie vote.[184]

A way forward emerged on September 4, when a committee chaired by David Brearley proposed the method which ultimately became Article II's elector-selection mechanism.[185] The proposal—and Article II's final language—was a compromise between these views. In the end, the Convention chose not to prescribe a one-size-fits-all "manner" for states to pick electors. It let state legislatures decide for themselves.

To the extent that this compromise made legislatures *precommit* ex ante to one elector-selection method—that is, to a popular vote or state-legislative handpicking—it was a logical one. The delegates were at an impasse. So why not let each state make up its own mind? But this bargain would make little sense if delegates believed state legislatures, after precommitting to popular elections, could later undo their voters' choices. That would simply amount to letting legislatures handpick the winner.

An agreement empowering *post*election legislatures, moreover, would do nothing to assuage Governeur Morris and his backers' concerns. The national executive would be accountable to legislatures—not citizens—since legislatures, even after elections, would still hold all the cards. The president would surely petition them to override elections and appoint friendly delegates. In fact, if anything, this scenario would *exacerbate* Morris's fears, compared to mandatory state-legislative handpicking. The prospect of postelection intervention would shroud

---

181 *Id.* at 751.

182 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 403–04 (Max Farrand ed., 1911) ("If the Legislature have the Executive dependent on them, they can perpetuate & support their usurpations by the influence of tax-gatherers & other officers . . . . Cabal and corruption are attached to that mode of election.").

183 *Id.* at 404.

184 *Id.*

185 *See id.* at 493–94.

legislatures' backroom dealings from the public eye. That is to say, statewide elections might signal (falsely) to citizens that *they*, not their statewide representatives, have the final say on electors. Citizens, therefore, might elect legislators without regard for which national executive they would back.

It remains conceivable that, during the late-summer Brearley committee debates, Ellsworth simply won Morris's camp to his side. But it is unlikely. If proponents of the popular vote had capitulated, why did Brearley's committee not advance Ellsworth's original proposal? Why not enshrine state-legislative selection in the national Constitution?[186] The committee, and the Convention as a whole, opted instead for a middle route. Article II's second and fourth clauses, then, reflect a compromise which makes sense only by reading Article's grant of power to be directed at pre-election legislatures, to the exclusion of subsequent ones.

C. CONGRESS'S EXERCISE OF CLAUSE 4 POWERS

This Section presents a third sufficient reason to conclude Article II, Section 1, Clause 2 speaks only to pre-election legislatures. It is that Congress, in exercising its Article II "Tim[ing]" authority, has defined elector-choice timing so as to restrict legislatures' timeframe for acting under Clause 2. Congress's elector-choice timing statute, implementing Clause 4, was originally seen to have this effect—as this Section's legislative-history analysis shows. The analysis also shows, simultaneously, that the enacting Congress understood Article II *itself* not to permit postelection interference anyhow. Lawmakers' perceptions in the 1840s thus match the Framers' own understanding decades earlier—bolstering Section III.B's argument, as well.[187]

Before canvassing the history, one general point bears clarification. On the level of principle, it is plain that constitutional provisions *outside* Clause 2, including Clause 4 of the same Section, might properly

---

[186] The Convention delegates, importantly, knew how to delegate such choices to state legislatures when they wanted to. They did just that for Senate elections. The original language of Article I provided that the Senate would be "composed of two Senators from each State, *chosen by* the Legislature thereof." U.S. CONST. art. I § 3 cl. 1 (emphasis added). The fact that Article II, Section 1, Clause 2 charges state legislatures only on elector-selection "manner"—as Clause 4, meanwhile, invokes the power to "chuse" electors *without* mentioning legislatures—only further underscores how the Convention didn't intend to commit the choice permanently to legislatures.

[187] *Cf.* Printz v. United States, 52 U.S. 898, 918 (1997) ("The[] persuasive force [of opposing arguments] is far outweighed by almost two centuries of apparent congressional . . . practice.").

circumscribe legislatures' Clause 2 powers. Elsewhere, too, the Constitution delegates overlapping powers to multiple institutions, forcing them "to work together on certain joint tasks."[188] Actions by one institution can constrain how others execute their charges.[189] This arrangement is especially appropriate when *Congress*, working with *state* legislatures, does the constraining. That scenario accords with the Supremacy Clause's lexical hierarchy, whereby federal statutes trump state statutes.[190]

To illustrate, take the Twelfth Amendment, which replaced Article II, Section 1, Clause 3's original rules for presidential electors to cast Electoral College ballots.[191] The Twelfth Amendment stipulates no date for the College vote. But Congress, inevitably, has closed that gap with legislation. To implement the Amendment's directives, Congress picked a date for the ballot casting.[192] And, by choosing that date, Congress has effectively restricted legislatures' room for exercising Clause 2 powers. Legislatures cannot "direct" electors' "manner" of appointment *after* they've been selected *and* cast their votes.[193] The evidence from Part II, further, illustrates this same principle. As it explained, lower authorities on the Constitution's lexical totem pole, like state constitutions, also cabin legislatures' Clause 2 powers.[194] Other examples, including less obscure ones, exist throughout the Constitution—among them, the President's (limited) veto powers over Congress, and the President's and Senate's joint treaty-ratification authorities.[195]

In this vein, then, Congress has "determine[d]" a "Time of chusing" electors that restricts *when* legislatures may act under Article II.[196] It limits the exercise of Clause 2 powers to pre-election legislatures. Here is why.

---

188 AMAR, *supra* note 164, at 190 (writing, of the processes for "the making of statutes, treaties, and appointments," that "[alt]hough America's executive and legislative branches might generally wield different powers and stand on separate electoral bases, the Constitution obliged them to work together on certain joint tasks").

189 Scholars employing divergent methods of constitutional interpretation broadly agree with this proposition. *Compare, e.g.*, *id.*, *with* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1248–49, 1256 (1995) ("[E]ach of the Constitution's numerous grants of power must be interpreted in light of the others.").

190 *See supra* notes 96–97 and accompanying text; Amar & Amar, *supra* note 17, at 21.

191 U.S. CONST. amend. XII.

192 3 U.S.C. § 7.

193 *See supra* Section III.A.

194 *See supra* Section II.A.

195 *See* AMAR, *supra* note 164, at 190.

196 U.S. CONST. art. II § 1 cl. 4.

Congress implemented Clause 4 with an 1845 Act, which establishes Election Day on one fixed day in November. When enacted, the statute's text embedded the understanding that any and all state-legislative "manner" directing must conclude before Election Day. Said differently, with the 1845 Act, Congress used its Clause 4 authority to define the "Time of chusing" electors as sometime *following* legislatures' Article II-authorized processes of directing election "manner." And, because Congress's Act *also* sets that "Time of chusing" to a fixed day (i.e., Election Day), it confines legislatures to using their Clause 2 powers before elections happen. By implementing Clause 4, that is, Congress spoke in a way that narrows which legislatures may execute Clause 2.

The 1845 Act's legislative history makes this original understanding of the statute's effects plain. The statute emerged from debates over presidential-election timing that raged in the early 1840s.[197] States' elector-selection practices had shifted markedly since the Founding—when roughly half picked electors by legislative appointment.[198] By the 1840s, all but South Carolina relied on popular vote.[199] Before 1845, however, Congress also let states hold elections at any time within a thirty-four-day period, ending in early December.[200] That system produced the controversial 1840 election (discussed in more depth *infra*), in which states' staggered election dates spurred widespread fraud.[201] Following that election, momentum built in Congress to mandate a single date for presidential contests.

The story therefore begins in early December 1844, when the Twenty-Eighth Congress began its second session.[202] The House of Representatives finalized committee assignments by December 9.[203] On that day, Rep. Alexander Duncan from Ohio brought before the chamber

---

197 CONG. GLOBE, 28th Cong., 2d Sess. 29 (1844) (statement of Rep. Haralson) ("[C]learly . . . a majority of th[e] House were for passing some bill that would guard against these election frauds that had been so loudly complained of."). *See generally, e.g.*, Ronald P. Formisano, *The New Political History and the Election of 1840*, 23 J. INTERDISC. HIST. 661 (1993).

198 *See* William Logan Martin, *Presidential Electors: Let the State Legislatures Choose Them*, 44 AM. BAR ASS'N J. 1182, 1185–87 (1958).

199 *See* Walter L. Hawley, *The Part of the People and of the States in Choosing the President*, 171 N. AM. REV. 273, 277 (1900).

200 Act of Mar. 1, 1792, ch. 8, § 1, 1 Stat. 239; *see also* CONG. RSCH. SERV., R46413, ELECTION DAY: FREQUENTLY ASKED QUESTIONS 2 (2023).

201 *See infra* Part IV.

202 *Dates of the Sessions of Congress*, U.S. SEN., https://www.senate.gov/legislative/DatesofSessionsofCongress.htm [https://perma.cc/LV5G-NE68].

203 CONG. GLOBE, 28th Cong., 2d Sess. 13 (1844).

a bill to "establish a uniform time of holding elections for electors of President and Vice President."[204] The "details of the bill," he insisted, "were very simple," enabling all members to "examin[e]" it without a subcommittee.[205]

Duncan's bill was the precursor to the Election Day Act of 1845. It proposed to fix the dates of presidential elections to one particular day in November.[206] But it also contained provisions absent from the ultimate Election Day Act. Section 3 is the important one. Section 3 explicitly barred state legislatures from legislating *after* Election Day to change the "manner" of holding past elections or counting their votes. Its operative language is as follows.

> *And be it further enacted*, That the places and *manner* of holding elections . . . in the several States of the Union, together with the notifications that the same are to be held, and the *returns of the votes taken at the same*, shall be specified, regulated, and governed by the laws of the respective States in force *at the time of the holding of each such election*.[207]

This language, if it carried legal force today, would unambiguously bar Stop the Steal's attempted interventions. It purports to keep legislatures from exercising all Clause 2 "manner" powers any time past "the time" they "hold . . . [the] election."[208] Importantly, Article II's *only* grant of power to legislatures is to "direct" elector selection's "manner."[209] Therefore, this text—again, if legally operative—would leave no grounding for postelection interference.

Of course, this language is not in the Election Day Act. By omitting it, did Congress mean to *tolerate* postelection "manner" regulation? Quite the opposite. As subsequent legislative history shows, lawmakers culled it precisely *because* they thought it superfluous. Already, the

---

204 *Id.* at 14. Rep. Duncan, specifically, introduced his bill to the House Committee of the Whole on the State of the Union—a standing committee consisting of all House members, convened to consider the President's annual state-of-the-union message. *Id.* at 13–14.

205 *Id.*

206 In Rep. Duncan's original bill, this day was the first Tuesday of November, rather than the first Tuesday after the first Monday in November, as provided in the eventual Election Day Act. *Compare id. with* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (1845) (establishing the day on which electors of President and Vice President are to be appointed).

207 CONG. GLOBE, 28th Cong., 2d Sess. 14. (1844)

208 *Id.*

209 *Compare* U.S. CONST. art. II § 1, *with id.* art. I § 4 (delegating to state legislatures more far-ranging powers over the "Times, Places and Manner" of "Elections for Senators and Representatives").

Constitution didn't permit what Section 3 prohibited. And in any event, a statute fixing Election Day's date couldn't be construed as authorizing such actions.[210]

Consider the events just after December 9. On December 13, Rep. Duncan moved for the House to take up his bill, but Rep. George Dromgoole of Virginia proposed an amendment rewriting it.[211] It rephrased almost the entire text, though the substantive meaning was largely unchanged.[212] The new draft designated an identical day in November for Election Day.[213] And like Rep. Duncan's proposal, it had language letting states appoint electors on a "subsequent day" should they "fail" to make an election-day choice.[214] However, it omitted Section 3 altogether.[215]

Yet despite the omission, House members—including Rep. Duncan—considered Rep. Dromgoole's draft *identical* in meaning. Excising Section 3, in other words, would preserve for state legislatures no authorities which the Constitution then afforded them. Nor did cutting it purport to authorize any new powers. "The amendment now proposed

---

[210] *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988) (writing that legislative inaction has "[g]enerally" held meaning for the Supreme Court when there is "specific legislative consideration of the issue and, either implicitly or explicitly, [evidence] indicates that Congress's failure to act *bespeaks a probable intent to reject the alternative(s)*" (emphasis added)). To find that intent, courts examine "the legal process context of the legislative enactment in each case." *Id.* at 90. This treatment of legislative inaction extends to rejected legislative proposals. *See, e.g.*, *id.* at 84–89. As the rest of this Section makes clear, such an intent "to reject the alternative" did not obtain with Duncan's proposal. *Cf.* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–95 (1978) (declining to credit rejected-proposal arguments when Congress rejected the proposal in for reasons unrelated to the interpretive question it was considering).

Some scholars, like Professor Eskridge, have argued that legislative inaction might be better understood, instead, as a decision rule about "presumed, rather than actual, legislative intent"—in other words, a sort of "policy presumption" that courts might use to construe a statute. Eskridge, *supra*, at 70. Yet under that understanding, too, this "policy presumption"—like any presumption about what statutes mean—"can be rebutted by clear evidence" about the "statutory language and policies" and "legal process context," including "deliberat[ions]." *Id.* at 70–71, 84, 90. The deliberative process and policy considerations discussed in this Section make it untenable for courts—even ones that conceive of legislative inaction this way—to form any presumption about postelection interventions from the 28th Congress's rejection of Duncan's proposal.

[211] CONG. GLOBE, 28th Cong., 2d Sess. 28 (1844).

[212] *See id.*

[213] *Id.*

[214] *Id.*

[215] Another substantive element from Rep. Duncan's original text that the new draft excised was a provision in Section 2 requiring any "special election" to select the president outside a "regular" election year—something that has never taken place in American history—to occur on a uniform date. *Id.* at 14, 28.

by the gentleman from Virginia," as Rep. Duncan himself said, "was precisely what the bill was as it passed the Committee of the Whole"—that is, the bill he had introduced days earlier to the full chamber.[216] The amendment had merely pruned "two or three provisions," including Section 3, that had "no necessity . . . at all."[217] As a colleague put it, "[t]he difference between the two bills . . . was a mere matter of taste"—or, more colorfully, that "between tweedle dum and tweedle dee."[218]

This debate reveals Congress's belief that the Election Day Act—notwithstanding anything in Article II—does not permit postelection "manner" directing. For this reason, Rep. Duncan's Section 3 had no consequence. Underscoring the provision's redundancy, Rep. Duncan later assured his colleagues that the original draft "consisted of a simple naked proposition to fix a uniform day"[219]—and nothing more. All other text was mere surplusage.[220]

Why, in that case, did Rep. Dromgoole bother rewriting the bill at all? Simply put, it was drafted inartfully. Its twisted phraseology disobeyed the "logical rules" of good writing.[221] This was so with substance as well as style. One representative blasted Duncan's draft, for instance, for seeking to fix a date for "special" presidential "election[s]" happening outside normal election years.[222] That provision—coherent on its face—"was founded on the idea that . . . there [c]ould be a special election" for president to start with.[223] Yet that premise "was a mistake," the critic reasoned, given the Constitution's charge for quadrennial elections.[224] Rep. Duncan, for his part, consistently poked fun at his own lack of "skill" in "parliamentary matters" (i.e., drafting), while praising Rep. Dromgoole for the same.[225]

---

216 *Id.* at 28.

217 *Id.*

218 *Id.* The speaker here, in Rep. Hannibal Hamlin of Maine, considered that one possible exception lay in the Dromgoole amendment's use of the phrase "shall not be chosen" in lieu of "failed to make a choice," which conceivably created a loophole where a state could choose not to hold an Election Day election and thereby appoint electors on a later date. *Id.*

219 *Id.*

220 Rep. Duncan spoke about Section 3 in similar teams, even, when introducing it on December 9, saying it was "designed simply to secure to the States the powers which they now possess under laws existing in the respective States" to regulate their own elections. *Id.* at 14.

221 *Id.* at 28 (statement of Rep. Hamlin).

222 *Id.* at 14 (statement of Rep. Lucius Elmer).

223 *Id.*

224 *Id.*

225 *Id.* at 28.

On this understanding, the House adopted Rep. Dromgoole's amendment unanimously.[226] They approved the bill on December 16, with no further changes and one dissenting vote.[227]

Today, Congress's rules for elector-selection timing embed this same understanding: that Election Day must follow Clause 2 "manner" direction. The 1845 Election Day law saw no amendments until 1872. And no amendments, in 1872 or later, ever altered Congress's substantive Clause 4 pronouncement. The 1872 Congress passed an amendment applicable *only* to that year's presidential election, not future ones. By that amendment, if any state's 1872 presidential election "shall be required to be continued for more than one day," then its elector-selection "Time"[228] may extend to "the number of days required by [its] laws."[229] This amendment, in fact, only confirms the above analysis of original understanding. Historical records suggest that the public understood the 1872 statute to permit extensions pursuant only to *existing* state laws.[230] In other words, legislatures couldn't vote *after* Election Day to extend elections retroactively. All that implies that Congress's original Clause 4 statute—that is, the Election Day Act—did not, itself, let legislatures retroactively change elections' "manner."[231] Nor, for that matter, did Article II grant any similar power.

Since 1872, the Election Day Act has seen no changes involving elector-choice timing. The next amendment came in 1874, during

---

[226] *Id.* at 28, 31. Rep. Dromgoole put forth his substitute bill as an amendment to Rep. Duncan's original election-day bill before the Committee of the Whole. Following debate over other matters, such as whether to explicitly exempt South Carolina from this bill until it opted to select electors by popular vote, *id.* at 29–30, lawmakers assented to this amendment "without a division," *id.* at 31.

[227] *Id.* at 35.

[228] *See* U.S. CONST. art. II § 1 cl. 4.

[229] *See* Act of May 23, 1872, 17 Stat. 157. This fix mattered in 1872, of course, because following the Civil War, reintegration and Reconstruction, and Black Americans' enfranchisement in 1870, see U.S. CONST. amend. XV., precincts in former Confederate states lacked the election infrastructure to handle one-day voting, see CONG. GLOBE, 42d Cong., 2d Sess. 3407–08 (1872) (statements of Reps. Bingham, Beck, and Giddings).

[230] *See, e.g.*, *Proceedings in Congress*, JASPER WEEKLY COURIER, Apr. 26, 1872, at 3 (referring to the act as providing "that *if by the existing laws*" any state is required to continue their election beyond one day, then the state may do so pursuant to such existing laws (emphasis added)). Constitutional scholars with divergent interpretive philosophies nevertheless consider subsequent historical practice probative of the constitutionality of government actions. *See, e.g.*, Tribe, *supra* note 189, at 1250; DAVID A. STRAUSS, THE LIVING CONSTITUTION 36–37 (2010); Dworkin, *Arduous Virtue*, *supra* note 175, at 1254 ("[A]ny strategy of constitutional argument . . . must search for answers that mesh well enough with our practices and tradition," weighing "the answers that others . . . have given to them in the past.").

[231] U.S. CONST. art. II § 1 cls. 2, 4.

Thomas Jefferson Durant's congressionally requested revisions to the U.S. Statutes at Large.[232] The latest substantive changes adjusted the presidential order of succession and rules for holding elections with no sitting president or vice president.[233] Congress's 1845 pronouncement on "Tim[ing]" therefore remains law today.

D. CONSTITUTIONAL PURPOSE

The foregoing Sections use text and original understanding—involving Clauses 2 and 4 of Article II, Section 1—to prove postelection state-legislative interventions unconstitutional. Should any doubt remain, analyzing constitutional purpose supports the same conclusion. The Framers designed Article II's elector-selection provisions, the historical record shows, to minimize fraud, corrupt dealings, and partisan brinksmanship. (Similar concerns underpinned the Election Day Act,[234] discussed above, not to mention separate constitutional provisions.[235]) Intrigue of this sort, they feared, would undermine the popular will.[236] Postelection interference embodies exactly that sort of intrigue which the Framers contemplated. Considerations of purpose, therefore, counsel reading the Constitution to forbid such interference—to the extent any ambiguity remains.

By way of clarification, the Electoral College *itself* originated from different concerns. The Constitutional Convention adopted the College, in the first place, as a compromise to appease slaveholding states. (Other scholarship documents that bargaining process in detail.[237]) The Electoral College system benefited slaveholding states because it calculated states' voting shares proportionally to their populations. And at the Founding, the Constitution defined states' populations to include nonvoting slaves, weighted at three-fifths their total number.[238]

---

232 *See* 18 Stat. 114 (authorizing the publication of Durant's revision).

233 *See* Act of Jan. 19, 1886, 24 Stat. 2, ch. 4 § 3 (repealing sections 146 through 149 of the revised statutes). In a similar vein, the presidential-succession protocol was updated again six decades later.

234 *See infra* Part IV.

235 Other scholars have observed that the objective of "protecti[ng] ... the people against self-interested government" undergirds a myriad of other significant constitutional provisions, including the Bill of Rights. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991).

236 *See id.* at 1162 (describing the Framers' desire for "participation and community spirit among ordinary citizens at the grass roots").

237 *See, e.g.*, AMAR, *supra* note 167, 154–59.

238 *See* U.S. CONST. art. I, § 2 cl. 3.

Nevertheless, once the Framers settled on the College generally, they had to choose who, exactly, would occupy it. Their fears of corruption led them to fill it with *independent* electors appointed by *state legislatures'* rules. Importantly, the Convention's delegates could have chosen otherwise. For instance, they could have let House and Senate members fill the College's seats—thereby retaining states' current voting weights. At first, the delegates planned to do just that.[239] Yet concerns over partisan corruption, brinksmanship, and intrigue dissuaded them.[240]

The problem with that plan was twofold. The first was presidential accountability. As Justice Joseph Story's commentaries document, a central "motive" of the Framers was to let "the sense of the people operate in the choice of the" president.[241] But Congress, as delegate James Wilson put it, was too "remove[d]" from "the people" for this purpose.[242] (Recall that Senators, in particular, were not picked by popular vote until many years later.[243]) Convention delegates also thought federal lawmakers, "selected for the general purposes of [national-level] legislation," might poorly channel constituents' presidential preferences compared to nonpoliticians.[244] And "[t]he president would," delegates feared, "become the mere tool of the dominant party in Congress" if selected by national legislators.[245]

The second—and likely more pressing—motive was corrupt dealing.[246] National legislator-electors would have incentives to bargain over the choice of president. If Congress filled the College, then, the presidency might turn on all kinds of political considerations—hashed out in opaque,

---

239 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 313, § 1449 (1833); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 77, 81 (Max Farrand ed., 1966).

240 Evidence for this proposition is discussed *infra* notes 241–251 and accompanying text. For Justice Joseph Story's statement of his conclusion to this effect, see STORY, *supra* note 239, at 313–14, § 1450.

241 3 STORY, *supra* note 239, at 313–14, § 1450.

242 2 ELLIOT'S DEBATES 512 (Jonathon Elliot ed., 1836); *see also* 2 FARRAND'S RECORDS, *supra* note 182, 500 ("Many [at the Convention] were anxious even for an immediate choice by the people.").

243 *See* U.S. CONST. amend. XVII.

244 3 STORY, *supra* note 239, at 314 § 1450. Congressional lawmakers' seat in *national* politics, in particular, might draw their focus away toward other affairs and deprive them of "information[] and discernment" needed to choose the most qualified candidate. *Id.* at 315 § 1451. James Wilson argued, relatedly, that a lesser role for the national legislature in presidential selection would "produce more confidence among the people." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 239, at 80.

245 3 STORY, *supra* note 239, at 314 § 1450; 2 ELLIOT'S DEBATES, *supra* note 237, at 512.

246 3 STORY, *supra* note 239, at 314 § 1450.

backroom dealings[247]—rather than the people's preference. Politicians' mutual "promises and expectations" would dictate the matter.[248] The President might feel beholden to those who empowered him, constraining his behavior.[249] The inevitable result? "Cabal—intrigue—corruption—every thing bad," according to Wilson.[250] This would be especially likely given Congressmembers' longstanding relationships with many presidential contenders.[251]

The Convention thus abandoned the notion of slotting Congress into the College. Still, states could have cast College votes by "various other modes"—such as by popular referendum, or by state-legislative fiat.[252] Why create an *independent* body of electors?

The answer lies in similar core values. Partisan brinksmanship and corruption, after all, could easily arise with any "pre-existing body of men"—including state legislatures.[253] Newly convened elector slates, though, have no occasion for corrupt dealings before College votes.[254] Conversely, letting the people *themselves* bind College votes—without intermediary decisionmakers—threatened partisan intrigue by other means. States' citizens, feared delegates like Elbridge Gerry, would be "too little informed of" candidates' "personal characters" and "liable to deceptions."[255] They might lack the "discernment" to choose wisely, leaving them susceptible to manipulation.[256] These arguments trounced

---

247 *See id.* at 316 § 1451 (discussing the prospect of "heats and ferments" in hypothetical meetings of national-legislator electors "convened at one time in one place," which might not "be communicated from them to the people").

248 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 235, at 80 (statement of Elbridge Gerry).

249 *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 179, at 502 (statement of Governeur Morris) (noting that the President's reliance on the Senate for reappointment may affect his conduct).

250 2 ELLIOT'S DEBATES, *supra* note 237, at 512; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 179, at 500 (statement of Governeur Morris).

251 Delegates at the convention believed, for instance, that the Senate was more likely to exhibit corrupt "influence & faction" given its relative "permanence" compared to the House, whose composition is "so often changed." *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note179, at 502 (statement of James Wilson).

252 3 STORY, *supra* note 235, at 315, § 1451.

253 *Id.* at 316, § 1451.

254 This is especially so seeing as the Framers opted to exclude "senators, and representatives, and other persons holding offices of trust or profit under the United States" from serving as Electoral College electors. *Id.*

255 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 235, at 80.

256 3 STORY, *supra* note 235, at 315, § 1451.

competing concerns[257] that bodies of independent electors were cumbersome and inexpedient.

Corruption considerations also informed the Convention's vote-timing choice—that is, the *College* vote's timing. Delegates at first assumed that future Congresses would "undoubtedly" require electors to cast ballots on the same day.[258] But by the Convention's end, they had enshrined that same-day principle within Article II, Section 1.[259] With the nation's electors voting simultaneously, reasoned Governeur Morris, "[i]t would be impossible . . . to corrupt them.[260] Uniform election timing therefore intertwines with the Framers' anticorruption aims.

Postelection state-legislative interference—perhaps needless to say—contravenes the anticorruption, anti-partisan-intrigue objectives so evident from the historical record. *State legislatures* coordinating with presidential contenders[261] to rig elections is hardly less corrupt than *Congress* doing so. [262] Even scholarly supporters of ISL theory concede this point. Legislatures' "partisan maneuver[s]" to override elections under false pretexts of fraud, writes one such academic, are, at a minimum, "prudentially problematic."[263]

It is significant,[264] too, that these very concerns motivated Congress's 1845 Election Day Act. Before the Act's passage, states held presidential elections on different dates.[265] Staggered elections introduced ample opportunity for fraud and intrigue. In particular, they let partisan coalitions shepherd people across states to cast multiple ballots—most

---

257 *See, e.g.*, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 235, at 81 (statement of Delegate Williamson).

258 3 STORY, *supra* note 235, at 316, § 1451.

259 2 ELLIOT'S DEBATES, *supra* note 237, at 512; *see also* U.S. CONST. art. II § 1 cl. 4.

260 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 179, at 500 (statement of Governeur Morris).

261 For a real-life example of a presidential candidate's plans to engage in such coordination, see Gellman, *supra* note 14.

262 Insofar as state-legislative cabals undermine the anticorruption effects of the Electoral College's particular institutional structure, this argument also appeals to structural modalities. BOBBITT, *supra* note 35, at 7.

263 Morley, *supra* note 40, at 549. Prudential considerations—around which this Section's argument can be reframed—are another interpretive modality to which courts and scholars commonly appeal. *See* BOBBITT, *supra* note 35, at 59–73.

264 *Cf.* Tribe, *supra* note 189, at 1250 (discussing the role of subsequent historical practice in constitutional interpretation).

265 CONG. RSCH. SERV., *supra* note 200, at 2.

notoriously in the 1840 election.[266] By then, the practice had grown so widespread that it was nicknamed "pipelaying," after an 1838 incident where hordes of out-of-state voters snuck into New York's polls disguised as "pipelayers."[267] The Election Day Act, therefore, shared the Founders' anticorruption purpose. As one Representative summed up, the Act flowed directly from both parties' recent accusations that the other had perpetrated "great frauds."[268] This higher antifraud purpose, which has spanned Article II-related debates from the Constitutional Convention to the 1840s, counsels resolving any constitutional ambiguity against postelection "manner" direction.

IV. WHEN DO STATES FAIL TO CHOOSE?

The previous Part explains why the Constitution, together with Congress's Election Day Act of 1845, lets only pre-election legislatures direct presidential elections' manner. Yet in 2020, Stop the Steal made one last appeal to Article II. A narrow exception within Congress's election-timing statute, they argued, permitted postelection interventions even if nothing else did.

The Election Day Act's language applies different election-timing rules to states that have "*failed* to make a choice" on Election Day. Those states may "appoint[]" electors "on a subsequent day," in a "manner" to be directed by the state legislature.[269] Trump allies widely invoked this loophole after the 2020 election. According to them, states experiencing (alleged) voter fraud, or other election irregularities, qualified as "failed" by the language of Election Day Act.[270] (These advocates typically referred

---

266 *See, e.g.*, Weekly Globe, 463–64 ("The Senate must know very well that the want of [a uniform-timing] provision . . . had rendered the election of 1840 the most corrupt, perhaps, that had ever taken place in any age or country . . . . Why has nothing been done to prevent pipe-laying in the future?"); CONG. GLOBE, 28th Cong., 2d Sess., at 350; JACK MASKELL, CONG. RSCH. SERV., RL32623, POSTPONEMENT AND RESCHEDULING OF ELECTIONS TO FEDERAL OFFICE CRS-3 (2004).

267 For one account of the history of this term, see GERARD T. KOEPPEL, WATER FOR GOTHAM 258–59 (2011).

268 CONG. GLOBE, 28th Cong., 2nd Sess. 29 (1845) (statement of Rep. Haralson).

269 3 U.S.C. § 2 (repealed 2022) (emphasis added).

270 *See, e.g.*, Kendall Karson & Meg Cunningham, *GOP Leaders Brush off Idea to Hand Trump Election by Replacing Electors*, ABC NEWS (Nov. 18, 2020, 8:02 PM), https://abcnews.go.com/Politics/gop-state-leaders-brush-off-idea-hand-trump/story; Michael Kranish, *Inside Ted Cruz's Last-Ditch Battle to Keep Trump in Power*, WASH. POST (Mar. 28, 2022, 6:00 AM EDT), https://www.washingtonpost.com/politics/2022/03/28/ted-cruz-john-eastman-jan6-committee/ (describing Senator Cruz's efforts to overturn the 2020 Presidential Election).

to the relevant language as part of the Electoral Count Act, reflecting its current placement next to that Act's text in Title 3 of the U.S. Code.[271]) By this argument, federal law itself let their legislatures pick electors after November 3rd. And postelection interventions would therefore be *consistent* with Congress's Clause 4 "Tim[ing]" choice. The big question, then, is what exactly Congress meant by "fail[ure] to make a choice."[272]

Some legal scholars have expressed sympathy to Stop the Steal's logic.[273] Most, including Amar and Richard Pildes, have dismissed it.[274] In 2020, politicians largely took the latter view.[275] Even so, Stop the Steal shone a spotlight on the Election Day Act's "failed . . . choice" language.[276] And—to this author's knowledge—no previous scholarship has articulated concrete reasons, grounded in text or original understanding, as to why Stop the Steal's interpretation is wrong. (Indeed, as discussed below, scholarship that *has* written on these questions appears to misconstrue the original understanding of "failed" choice.[277]) This Part therefore examines the historical record to adjudicate, in full, the failed-choice debate.[278]

A "failed" choice, the record shows, does not mean a "close" election, or an election with an uncertain outcome, or even one subject to fraud. Rather, a "failed" choice is an election that, legally speaking, is *incapable* of producing a winner. Here, an illustration is useful.[279] Suppose that Georgia's legislature decides (using pre-election Article II powers) to

---

271 Genevieve Nadeau, *Here's What Electoral Count Act Reform Should Look Like*, PROTECT DEM. (Oct. 27, 2022), https://protectdemocracy.org/work/about-the-electoral-count-act/ [https://perma.cc/C3VF-RBWJ].

272 3 U.S.C. § 2 (repealed 2022).

273 Professor Morley, for instance, has argued in academic work that Congress intended the "failed to make a choice" proviso to kick in to let states postpone elector selection in the event of disasters, or other events that make elections hard to administer. Morley, *supra* note 40, at 547–48. Defining what qualifies as a "disaster," of course, would involve at least some measure of interpretation and subjective judgment, meaning that Morley's account implies more leeway for states to avail themselves of 3 U.S.C. § 2 than the historical record bears out.

274 *See, e.g.*, AMAR, LAW OF THE LAND, *supra* note 69, at 152 (arguing the "failed election" provision applies only to circumstances where an election failed to occur); Pildes, *supra* note 16. (arguing that Trump's push for legislatures to appoint alternative slates of electors had no legal basis).

275 *See, e.g.*, Karson & Cunningham, *supra* note 270 (observing that most elected Republican officials did not, in fact, decide to attempt picking electors after Election Day under cover of the "failed . . . choice" provision).

276 Pildes, *supra* note 16.

277 *See infra* notes 300–306 and accompanying text.

278 *Cf.* Balkin, *supra* note 175, at 429–30 (writing, as one who nevertheless subscribes to "living constitutionalism," that "we normally try to interpret the statutory terms according to the concepts the words referred to when the statutes were first enacted").

279 For similar illustration and accompanying explanation, see AMAR, LAW OF THE LAND, *supra* note 69, at 152.

appoint electors pledged to the Election Day vote winner. However, it further stipulates that the "winner" is the candidate receiving a *majority* of popular votes—not a plurality.[280] For a two-way race, that decision rule won't cause difficulty. But with third-party candidates, it is entirely possible that the vote fractures and *no* one exceeds a plurality. This scenario is a "failed" election. Under Georgia's hypothetical rules, no person meets the criteria for appointment, and no one ever will.

Legislative history shows that Congress originally understood "failed to make a choice" this way.[281] (In fact, it contemplated exactly the above hypothetical.) The "failed . . . choice" provision emerged from the same proceedings that produced the Election Day Act of 1845, which Section III.C discussed.[282]

"[F]ailed" elections were first mentioned on December 9, 1844—when Congress debated Rep. Duncan's election-timing bill.[283] Then, Duncan's draft did not address any scenario where states failed to elect electors.[284] So, during debate, his colleague interjected. Duncan's bill was "deficient," protested Rep. John B. Hale of New Hampshire, since "it made no provision for an election, if the people should *fail* to elect on the day designated."[285] In New Hampshire, Hale went on, "a majority of all the votes cast was required to elect the electors of President and Vice President."[286] And if no candidate garnered a majority, "no choice might be made."[287] Indeed, past victors in *other* states' presidential elections, Hale underscored, had sometimes won only by plurality (albeit only in states that recognized plurality winners).[288]

Rep. Hale's words persuaded Rep. Duncan, who revised the bill. Duncan introduced new text, on December 11, that let states appoint

---

280 In earlier periods of the country's existence, this sort of decision rule was common for presidential elections. *See, e.g.*, *infra* note 286 and accompanying text. No state employs a rule like this for presidential elections today. Georgia still holds runoff elections for statewide elections in which no candidate receives a majority, *except* in elections to select the presidential electors. In such elections, a plurality of the vote is sufficient to declare a winner. GA. CODE ANN. § 21-2-501 (2021).

281 Other scholarship has shown that the modern 3 U.S.C. § 2, containing today's "failed to make a choice" provision, is best understood as carrying substantially the same meaning as the text of the 1845 Act, with any changes attributable to editorial revisions undertaken to produce the Revised Statutes at Large. *See, e.g.*, Levitt, *supra* note 19, at 1079–83.

282 *See supra* Part III.C.

283 CONG. GLOBE, 28th Cong., 2nd Sess. 14.

284 *See id.*

285 *Id.* (emphasis added).

286 *Id.*

287 *Id.*

288 *Id.*

electors after Election Day if they both "held an election" and "*fail[ed]* to make a choice."[289] The "fail[ure]" language, of course, precisely matches Hale's floor speech.[290] And, two days later, Hale praised the revisions for addressing his concerns. "[E]xceptions hav[e] been made," he said, "in favor of these States that require a majority vote to elect their electors."[291]

Others in the chamber understood the text similarly. For example, on December 13, Rep. Dromgoole introduced an amendment that rephrased Rep. Duncan's "fail to make choice" language. It read as follows: Nothing shall prevent the states from "providing for the appointment of electors on some other subsequent day"—after Election Day—"in case the electors . . . shall *not be chosen* at the time herein determined."[292] Dromgoole's text was wordier than Duncan's (and ultimately was not adopted[293]). Yet it discussed the same concept[294]: states whose decision rules logically could not produce a winner in their election. And in debate, one Representative speculated that its "shall not be chosen" provision might "induce[]" political factions to "to defeat an election by a division of votes among various candidates."[295] This worry only makes sense, of course, when understanding that provision to address Rep. Hale's majority-vote-winner concerns.

Throughout all this debate, not once did lawmakers appear to equate "failed" elections with uncertain ones, or even fraudulent ones. Nor did they consider "failed" elections to include those hampered by logistical roadblocks, like natural disasters. Some have contended otherwise, however, by relying on remarks by Rep. Samuel Chilton of Virginia.[296] These arguments have even caused the perception that "failed" elections include disaster-ridden ones to spread well beyond the academy.[297] Yet this position is not compelling.

---

289 *Id.* at 21 (emphasis added).

290 Rep. Hale used the word "elect" instead of "make a choice," of course, see *id.* at 14., but Rep. Duncan's use of the word choice aligns with the Constitution's word "chuse" to refer to the timing of states presidential-elector selections, see U.S. CONST. art. II § 1 cl. 4.

291 CONG. GLOBE, 28th Cong., 2nd Sess. 31 (1845).

292 *Id.* at 28.

293 *Id.* at 29, 31.

294 Rep. Dromgoole, in fact, takes pains to explain to Rep. Hamlin—who misconstrues the effects of Rep. Dromgoole's "shall not be chosen" language—that his rewritten text would yield exactly the same results, in practice, as Rep. Duncan's "fail to make a choice" language. *Id.* at 28.

295 *Id.* at 30 (statement of Rep. Bidlack).

296 *See, e.g.*, Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH & LEE L. REV. ONLINE 179, 188–90 (2020).

297 *See, e.g.*, Nadeau, *supra* note 271.

The remarks in question occurred on December 9, 1844. Then, Chilton urged his colleagues "that some provision be made" for Virginia.[298] Virginia, he reminded them, was "mountainous and intersected by large streams of waters," and "all [of its] votes were not polled in one day."[299] Drawing upon these remarks, Professor Michael Morley, for one, has claimed that Rep. Duncan's December 11 bill[300] responded to *Chilton*'s objection, in addition to Hale's, since its language "was broad enough to address both."[301]

Yet upon further consideration, the legislative record gives little reason to think so. First, Chilton never said that Virginia's issues with voter accessibility created "failed" elections. "[F]ailed" was Hale's word.[302] Rather, Chilton was lamenting a different problem—not "failed" elections, but disenfranchised citizens and individual rights. "[S]urely" the "design" of "this bill," Chilton mused, was not that "those who were entitled to vote . . . be denied of this privilege."[303] Natural obstacles that make it challenging for some people to vote, while clearly problematic, do not render an entire election unsuccessful (nor, indeed, have they historically been thought to[304]).

Moreover, Chilton never framed these problems as a strike against Duncan's bill at all. Despite Virginia's particular challenges, Chilton said in the same breath, he was still "an advocate for having these elections at the *same time* over the United States."[305] The fact that Chilton pledged to support the bill *anyway* hardly supports the inference that Duncan's "failed . . . choice" amendment reflected his concerns. Duncan had no need to win Chilton over. If anything, in fact, the "failed . . . choice" language would have been counterproductive for Chilton's main concern—that is, about holding "elections at the same time." The "failed . . . choice" provision *creates* flexibility on the Clause 4 "Time of chusing," cutting against what Duncan ultimately said he wanted.

Reinforcing this analysis, lawmakers less than thirty years later viewed this question the same way. The 1872 Congress passed a special law permitting legislatures extend that year's elections beyond Election Day—

---

298 CONG. GLOBE, 28th Cong., 2nd Sess. 15 (1845).

299 *Id.*

300 *See supra* notes 289–291 and accompanying text.

301 Morley, *supra* note 296, at 189.

302 CONG. GLOBE, 28th Cong., 2nd Sess. 14 (1845).

303 *Id.* at 15.

304 *See infra* note 306 and accompanying text.

305 CONG. GLOBE, 28th Cong., 2nd Sess. 15 (emphasis added).

as discussed in Section III.C—given the logistical challenges from Reconstruction and Black Americans' enfranchisement.[306] Such logistical challenges were hardly different, in their effects, from those years earlier in Virginia, which Rep. Chilton discussed. And, by 1872, Congress's "failed . . . choice" provision had been law for decades. So, in 1872, if logistically complex elections with ballot-counting difficulties *had* qualified as "failed" elections, then states could have extended elections *without* new congressional authorization. In other words, the 1872 Congress's special law would have been irrelevant. Yet Congress did pass the special law. It passed the law, of course, because it knew such elections were not "failed."

CONCLUSION

To the extent it strikes again, Stop the Steal must be stopped. In the wake of the 2020 election, those who sought to overturn elections threatened American democracy and rule of law. What's more, they also brandished nonsensical legal arguments. Stop the Steal, in short, peddled an assortment of bogus legal theories—from daydreams of "independent" state legislatures, to misreadings of 3 U.S.C. Section 2, to other Article II fantasies—which have snowballed in the two decades since *Bush v. Gore*. And it used these theories to urge state legislatures to subvert their own elections, based on the flimsiest of fraud allegations.

Following *Bush v. Gore*, legal scholars; dissenting Justices; and, most recently, the *Moore* majority have worked to correct some of these misconceptions—namely, ISL theory. Yet as seen, all this may not be enough. With Stop the Steal's rise—and its risks of resurging in future—it is critical to marshal constitutional text, structure, original understanding, and historical practice to refute all arguments for postelection interference. This Article tries to do precisely that. It is up to legislatures, courts, and the public, however, to do the hard work defending the rule of law in elections to come.

---

[306] *See supra* notes 228–231 and accompanying text.