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## *ESSAY*

### MAIL-IN BALLOTS AND CONSTRAINTS ON FEDERAL POWER UNDER THE ELECTORS CLAUSE

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*Crisis often begets crisis, and the COVID-19 pandemic has proven to be no exception. With rising concerns over crowding at the polls, many states during the 2020 elections opted to allow voters to use mail-in ballots to vote in the general election. The Trump administration, nevertheless, proactively enacted policy changes to hamper the United States Postal Service’s (“USPS”) ability to effectively handle the rise in mail-in voting. Some states sued the Trump administration in response, raising a variety of claims in their lawsuits. One of the lesser discussed claims is that the executive’s actions violated Article II, § 1, cl. 2, otherwise known as the “Electors Clause.” This clause confers upon the states the exclusive power to appoint their electors “in such Manner as the Legislature thereof may direct.” Thus, the Electors Clause is unique in that it provides states one of their few enumerated constitutional powers—it is a power that may not be preempted by federal action. But when the federal government uses its own powers, such as the executive’s delegated authority over USPS, to undermine a state’s chosen manner of appointing its electors, such as popular vote by mail-in ballots, a conflict of powers arises. This Essay attempts to*

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*resolve this conflict of power, ultimately concluding that within the Electors Clause exists an implied obligation on the federal government to not deliberately undermine a state's choice to use mail-in ballots in a presidential election.*

#### INTRODUCTION

Crisis often begets crisis, and the COVID-19 pandemic has proven to be no exception. With rising concerns over crowding at the polls, many states during the 2020 elections opted to allow voters to use mail-in ballots to vote in the general election. Then-President Trump, nevertheless, came out openly against mail-in ballots, and beginning in April 2020 his administration proactively enacted policy changes to hamper the United States Postal Service's ("USPS") ability to effectively handle the anticipated rise in mail-in voting. In response, a variety of states sued the Trump administration.

These states raised a variety of claims in their lawsuits, some constitutional and some statutory. One of the lesser discussed claims, though, is that the executive's actions violated the "Electors Clause," which confers upon the states the *exclusive* power to appoint their electors "in such Manner as the Legislature thereof may direct."<sup>1</sup> Thus, the Electors Clause is unique in that it provides states one of their few enumerated constitutional powers—it is a power that may not be preempted by federal action. But when the federal government uses its own powers, such as the executive's delegated authority over USPS, to undermine a state's chosen manner of appointing its electors during a presidential election, such as popular vote by mail-in ballots, a conflict of powers arises. Federal power clashes with state power. The COVID-19 pandemic has therefore elucidated a vertical separation-of-powers crisis that cannot be ignored.

This Essay attempts to resolve this conflict of power, ultimately concluding that within the Electors Clause exists an implied obligation on the federal government to not deliberately undermine a state's choice to use mail-in ballots in a presidential election. The Essay proceeds as follows: Part I overviews the 2020 mail-in ballot crisis in the United States. Part II discusses the Electors Clause and what makes the clause a unique state power. Finally, Part III introduces the concept of the Electors Clause providing some constraints on using federal powers to influence

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<sup>1</sup> U.S. Const. art. II, § 1, cl. 2.

presidential elections, thus supplying a vital check on an executive or congressional attempt to sabotage mail-in voting.<sup>2</sup>

### I. THE 2020 MAIL-IN BALLOT CRISIS

What is worse than a pandemic? A pandemic in an election year. Such was the case of 2020, where COVID-19 forced the majority of states to reevaluate how they planned to have their citizens vote in the 2020 general election. Prior to the pandemic, only three states used widespread mail-in ballots in their elections.<sup>3</sup> By November 2020, forty-five states (and D.C.) permitted voters to either request a mail-in ballot or automatically receive one,<sup>4</sup> hoping to avoid mass crowds—and thus mass spreading of the coronavirus—at the polls. Accordingly, an unprecedented percentage of voters (about 46%) this past general election decided to vote by mail.<sup>5</sup>

The federal government, however, was less than supportive of this state-led exodus to mail-in voting. Rather, examples abound of outright hostility and obstruction from the executive. Since the beginning of the pandemic, former President Trump had expressed open contempt toward

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<sup>2</sup> It should be noted that this Essay does not cover the post-election litigation that former President Trump instigated to overturn the 2020 presidential election results. This is because such litigation did not present a vertical separation-of-powers conflict, as Trump was bringing forth such litigation as a candidate rather than using any executive power to overturn the results in Wisconsin, Georgia, Pennsylvania, Arizona, and Michigan. For a summary of such cases that were decided on the merits, see *Compiling the Truth: A Resource to Refute Trump's "Stolen Election" Lies*, Campaign Legal Ctr. (Mar. 1, 2021), <https://campaignlegal.org/update/compiling-truth-resource-refute-trumps-stolen-election-lies> [<https://perma.cc/CG2S-W6KJ>].

<sup>3</sup> David Roberts, *Voting by Mail Is Fair, Safe, and Easy. Why Don't More States Use It?*, Vox (May 27, 2017, 12:16 PM), <https://www.vox.com/policy-and-politics/2017/5/27/15701708/voting-by-mail> (Washington, Oregon, and Colorado).

<sup>4</sup> See Benjamin Swasey, *Map: Mail-In Voting Rules by State—And the Deadlines You Need*, NPR (last updated Oct. 14, 2020, 3:00 PM), <https://www.npr.org/2020/09/14/909338758/map-mail-in-voting-rules-by-state> [<https://perma.cc/WDA9-5EE4>].

<sup>5</sup> Pew Rsch. Ctr., *Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct* 19 (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/N8FP-B39F>]. This helped to create the highest voter turnout in a U.S. presidential election in over a century. See Kevin Schaul, Kate Rabinowitz & Ted Mellnik, *2020 Turnout Is the Highest in over a Century*, Wash. Post (last updated Dec. 28, 2020, 4:29 PM), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/> [<https://perma.cc/9U2U-5UPW>].



constitutional to statutory, and at least three courts issued preliminary injunctions barring USPS from further implementing its policy changes.<sup>12</sup> The crisis, nonetheless, raises two important questions: Does the federal government have a proper grant of power to manipulate USPS in a manner that undermines mail-in voting, and if so, how? With usage of mail-in ballots likely to remain prevalent in the future, it will be important to answer these questions so that states can shield themselves from further political federal encroachment in forthcoming presidential elections. Accordingly, this Essay seeks to explore these questions, finding the ultimate answer to be that it depends on the federal government's motive. For now, though, it is enough to say that the executive and Congress wield a wide range of legitimate powers that generally grant them the ability to fund and run USPS as they see fit.<sup>13</sup>

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<sup>12</sup> See *New York v. Trump*, No. 20-cv-2340 (EGS), 2020 WL 5763775, at \*13 (D.D.C. Sept. 27, 2020); *Jones v. USPS*, No. 20 Civ. 6516 (VM), 2020 WL 5627002, at \*28–29 (S.D.N.Y. Sept. 21, 2020); *Washington v. Trump*, No. 1:20-cv-03127-SAB, 2020 WL 5568557, at \*6–7 (E.D. Wash. Sept. 17, 2020).

<sup>13</sup> The federal government's subsidization and regulation of USPS is rooted in at least five federal powers—two legislative and three executive:

1. The Postal Clause – The Constitution empowers Congress “[t]o establish Post Offices and post Roads.” U.S. Const. art. I, § 8, cl. 7. The Postal Clause grants Congress the power to regulate “the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.” *Ex parte Jackson*, 96 U.S. 727, 732 (1877). Thus, when Congress established USPS, it was vested exclusive control over “the processing, transmission[,] and delivery” of mail shipped through USPS. See *Commonwealth v. Nat’l Fed’n of the Blind*, 335 A.2d 832, 838 (Pa. Commw. Ct. 1975). Moreover, the Postal Clause allows Congress to control the administration of USPS. See, e.g., Sarah Anderson, Scott Klinger & Brian Wakamo, *How Congress Manufactured a Postal Crisis — And How to Fix It*, Inst. for Pol’y Stud. (July 15, 2019), <https://ips-dc.org/how-congress-manufactured-a-postal-crisis-and-how-to-fix-it/> [<https://perma.cc/4PET-7UF4>] (examining how Congress has used its power to control USPS through its retirement funding).

2. The Appropriations Clause – The power to fund USPS—and all federal agencies—is vested in Congress under the Appropriations Clause, establishing that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7. Consequently, the Appropriations Clause accords Congress the “power of the purse” to, for instance, grant USPS a \$25 billion relief package. See Sean M. Stiff, Cong. Rsch. Serv., R46417, *Congress’s Power over Appropriations: Constitutional and Statutory Provisions 1* (2020), <https://crsreports.congress.gov/product/pdf/R/R46417> [<https://perma.cc/LE9R-SWET>].

3. The Presentment Clause – The President has the power to veto “[e]very [b]ill” passed by Congress, including an appropriations bill. See U.S. Const. art. I, § 7, cl. 2. Under this power, the President may veto a \$25 billion USPS relief package, as Trump

This Essay, nevertheless, does not concern itself with *which* federal power is implicated. This does not matter. Rather, as Part II will demonstrate, so long as the federal government is using *any* of these powers to undermine a state’s decision to use mail-in ballots—which it has<sup>14</sup>—then a vertical separation-of-powers problem arises between said federal powers and the states’ exclusive power under the Electors Clause to choose the manner of appointing electors.

## II. THE ELECTORS CLAUSE: A UNIQUE EXCLUSIVE STATE POWER

The Constitution explicitly enumerates very few *exclusive* state powers. Rather, powers not delegated within the Constitution exclusively to the federal government are either *reserved* to the states,<sup>15</sup> or run *concurrent* between the federal and state governments.<sup>16</sup> One of the few exclusive state powers that exists, however, resides in Article II, § 1, cl. 2, known by some scholars as the Electors Clause.<sup>17</sup> Accordingly, this clause grants states a unique defense against federal encroachment into elections, or at the very least presidential elections. This Part will overview this power, its relationship to mail-in voting, and its seeming collision with the federal powers implicated in the 2020 mail-in ballot crisis.

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threatened during his Presidency. See Riechmann & Izaguirre, *supra* note 10. Congress would need a two-thirds majority to override said veto.

4. The Vesting & Take Care Clauses – Many scholars would agree that the executive has the power—if not duty—to faithfully execute powers delegated to it by Congress. See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 *Colum. L. Rev.* 277, 280–81 (2021). The Constitution, after all, vests “[t]he executive Power” in “a President of the United States,” and states that the executive “shall take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. Congress delegates much rulemaking authority to the Postmaster General. See, e.g., 18 U.S.C. § 3061(c)(4)(A) (2018). Thus, nondelegation doctrine concerns aside, the Postmaster General—wielding executive power—may “faithfully execute” their congressionally assigned role by “promulgat[ing] regulations generally as to the conduct of [USPS],” including policy changes such as refusing to treat election-related mail as First-Class Mail. See Daniel L. Pines, *The Central Intelligence Agency’s “Family Jewels”’: Legal Then? Legal Now?*, 84 *Ind. L.J.* 637, 672 n.306 (2009) (quoting *Ex parte Willman*, 277 F. 819, 821 (S.D. Ohio 1921)).

Naturally, one may be able to point to other powers, but the preceding five seem to be most relevant, at least in the context of mail-in voting.

<sup>14</sup> See *supra* notes 7–10 and accompanying text.

<sup>15</sup> See U.S. Const. amend. X.

<sup>16</sup> See, e.g., *infra* section III.A.

<sup>17</sup> See, e.g., Nathaniel F. Rubin, *The Electors Clause and the Governor’s Veto*, 106 *Cornell L. Rev. Online* 57, 60 (2021).

*A. The Electors Clause*

Article II, § 1, cl. 2 of the Constitution provides that “[e]ach 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.”<sup>18</sup> This does not mean state legislatures carry *some* of the power to choose the manner of appointing their state’s electors, but *all* of the power to do so.<sup>19</sup> As of 2020, all states have chosen to appoint their electors by some method of popular vote, and all but two states have chosen to do this through a traditional winner-take-all method based on state-wide results.<sup>20</sup> In doing so, the states have exercised their Electors Clause power—the “manner” chosen by the state legislature is a popular vote, which then determines whether a Democratic slate of electors or Republican slate of electors will be appointed to vote for the President and Vice President.

The importance of the exclusivity of a state’s power under the Electors Clause cannot be overstated. Compare the clause with the Elections Clause, which governs congressional elections. The Elections Clause says that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,” somewhat mirroring the Electors Clause; however, the Elections Clause goes on to say that “Congress may at any time by Law make or alter such Regulations.”<sup>21</sup> In other words, states may regulate congressional elections, but Congress may preempt said regulations. This preemptive power was illustrated recently in *Arizona v. Inter Tribal Council*, in which the Supreme Court held that the National Voter Registration Act’s (NVRA) requirement for states to “accept and use” a Federal Form to register voters for congressional elections preempted Arizona’s additional evidence-of-citizenship requirement for

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<sup>18</sup> U.S. Const. art. II, § 1, cl. 2.

<sup>19</sup> Cf. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (asserting that the language of the Vesting Clause “does not mean *some of* the executive power, but *all of* the executive power”); see also Robert G. Natelson, *The Enumerated Powers of States*, 3 Nev. L.J. 469, 470 n.11 (2003) (listing the Electors Clause as one of the few exclusive state powers enumerated in the Constitution).

<sup>20</sup> The two exceptions being Maine and Nebraska, which appoint two electors based on the statewide vote and the rest based on results within each congressional district. Meilan Solly, *Why Do Maine and Nebraska Split Their Electoral Votes?*, *Smithsonian Mag.* (Nov. 5, 2020), <https://www.smithsonianmag.com/smart-news/why-do-maine-and-nebraska-split-their-electoral-votes-180976219/> [<https://perma.cc/7AMV-MVK6>].

<sup>21</sup> U.S. Const. art. I, § 4, cl. 1.

registration.<sup>22</sup> If, however, Arizona’s evidence-of-citizenship requirement had hypothetically been limited to registration for the presidential election, the Court might have come to a different conclusion.<sup>23</sup> Unlike the Elections Clause, the Electors Clause grants no express preemptive powers to Congress—or any federal branch—thus showcasing the unique power it confers upon the states.<sup>24</sup>

### B. *The Electors Clause & Mail-In Ballots*

This power is not only uniquely exclusive, but broad in scope—broad enough to cover a state’s choice to appoint electors by popular mail-in voting. Last year, the Supreme Court provided a rare analysis of the Electors Clause in *Chiafalo v. Washington*, which upheld state laws fining faithless electors. The *Chiafalo* Court began by describing the Electors Clause as “‘conveying the *broadest* power of determination’ over who becomes an elector.”<sup>25</sup> As Justice Kagan states, “[t]he Constitution is barebones about electors.”<sup>26</sup> Consequently, a state may appoint its electors “in whatever way it likes.”<sup>27</sup> And if, according to the Court, a state’s choice to punish faithless electors is covered by the Electors Clause, surely a state’s choice to use popular voting by combination of in-person and mail-in ballots (or exclusively mail-in, as is the case in states like Oregon<sup>28</sup>) as its manner of appointing electors also falls under the clause’s protection.<sup>29</sup> Some may, nevertheless, point out that the decision to implement mail-in ballots has often been made by state

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<sup>22</sup> See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13–15 (2013).

<sup>23</sup> See *infra* Part III.A.

<sup>24</sup> See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 Nw. U.L. Rev. Online 103, 108 (2017) (noting that there is “a strong textual basis for believing that Congress’s authority over presidential elections is limited to its powers to enforce the constitutional right to vote and under the Spending Clause”).

<sup>25</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (emphasis added) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Sen. Ron Wyden, *Opinion, Oregon Has Used Vote by Mail Since Electing Me in 1996. Those Who Say It Can’t Work Are Lying.*, NBC News (Apr. 30, 2020, 9:00 AM), <https://www.nbcnews.com/think/opinion/oregon-has-used-vote-mail-electing-me-1996-those-who-ncna1195646> [<https://perma.cc/PU6T-PWTV>].

<sup>29</sup> Cf. *Oregon v. Mitchell*, 400 U.S. 112, 291 (1970) (Stewart, J., concurring in part and dissenting in part) (noting that hosting a “popular election” qualifies as a “manner” of appointing electors).

election commissions rather than the legislature. However, even when this is the case, courts have suggested that this falls under “Manner.”<sup>30</sup>

Therefore, when the President or Congress uses their own powers to undermine a state’s decision to utilize mail-in ballots in a presidential election (e.g., vetoing USPS funding), the result appears to be a conflict of powers between the federal and state governments. The next section will discuss this in more detail.

### *C. When Powers Collide*

Let us begin with a realistic hypothetical: The Pennsylvania General Assembly is severely concerned about an ongoing pandemic and wants to avoid crowding during the presidential election. The Assembly thus passes a bill requiring mail-in ballots to automatically be sent to every registered voter in Pennsylvania—said ballots include the presidential candidates. Concerned that swing states moving to mail-in voting will hurt his reelection chances, the president vetoes an appropriations bill that includes USPS funding, and orders the Postmaster General to have USPS no longer treat election-related mail as First-Class Mail. Due to the President’s actions, hundreds of thousands of Pennsylvanians are not able to receive or send in their ballot in time, and thus may not vote in the presidential election (among other elections).

Pennsylvania sues the president’s administration, arguing that its actions violate Pennsylvania’s exclusive power under the Electors Clause to appoint its electors in a manner chosen by its legislature: mail-in voting.<sup>31</sup> The president’s administration responds by asserting that it has the power under the Presentment Clause and Take Care Clause to do what it did. Who wins here? There is, as of now, no clear answer, for it took the COVID-19 pandemic to highlight that this conflict of powers even exists.

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<sup>30</sup> See, e.g., *Trump v. Wis. Elections Comm’n*, 983 F.3d 919, 926–27 (7th Cir. 2020) (citing *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring)) (“Chief Justice Rehnquist suggested that the proper inquiry under the Electors Clause is to ask whether a state conducted the election in a manner substantially consistent with the ‘legislative scheme’ for appointing electors.”).

<sup>31</sup> Two states in fact raised this argument in lawsuits leading up to the 2020 general election. See Complaint at 7, 63, *Pennsylvania v. DeJoy*, No. 2:20-cv-04096 (E.D. Pa. filed Aug. 21, 2020); Complaint at 107–08, *Washington v. Trump*, No. 1:20-cv-03127 (E.D. Wash. filed Aug. 18, 2020).

Perhaps some may argue that Pennsylvania has no real claim because the federal government never had to create USPS in the first place,<sup>32</sup> meaning Pennsylvania is not entitled to its service. This Essay submits that the answer is not so simple though. For example, suppose a traveler comes across a river and is told she has two choices to cross said river: a bridge or a boat. She is affirmed by, of all people, the boat's owner that this choice is hers alone to make. The traveler ultimately chooses the boat. Moments before the traveler enters the boat, however, the boat owner dismantles the engine, rendering the boat inoperable. The traveler exclaims, "Hold on, I thought you said that *I* had the power to choose how to cross the river?" The boat owner responds, "Yes, you had the power to choose how to cross the river, but I have the power as the boat's owner to dismantle its engine. Now you must use the bridge!" Are we to pretend that the traveler really had a choice here? That does not feel right. Sure, the boat owner had no obligation to provide the boat in the first place, but it is nevertheless there. And so long as it is there, and travelers are told that they have the power to choose to use it to cross the river, it seems disingenuous to claim that they really have this power if the boat owner can make the boat unusable at any moment to disrupt a traveler's choice.

Likewise, USPS exists. Perhaps it does not need to exist,<sup>33</sup> but it does. And so long as it exists, the states have the exclusive power to choose to use popular vote by mail-in ballots as their manner of appointing electors. Otherwise, if we accept the notion that the federal government can use its powers to deliberately sabotage a state's choice to use mail-in ballots in the presidential election, then the Electors Clause is essentially made null. It would not convey the "broadest power of determination" to the states.<sup>34</sup>

With this said, the question then becomes how to balance the states' exclusive power under the Electors Clause to run their presidential elections by mail-in ballot with the federal government's powers to fund and manage USPS. The Supreme Court itself has no clear or consistent

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<sup>32</sup> But see John Nichols, *Congress Has a Constitutional Duty to Preserve and Promote the Post Office*, Nation: Budgets Blog (Mar. 22, 2013), <https://www.thenation.com/article/archive/congress-has-constitutional-duty-preserve-and-promote-post-office> (arguing that the Postal Clause creates a congressional "responsibility" to establish a post office).

<sup>33</sup> See Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 *Nw. U.L. Rev.* 785, 827–28 (1995) ("The postal power included the power not to establish post offices and post roads."). But see Nichols, *supra* note 32.

<sup>34</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

method for determining when one constitutional provision takes precedent over another.<sup>35</sup> Part III posits, nevertheless, that the solution rests within the very subtext of our Constitution.

### III. CONSTRAINTS ON FEDERAL POWER UNDER THE ELECTORS CLAUSE

In one corner of the ring, we have the federal government. In the other corner, we have the states. Both claim authority over the power to control the use of mail-in ballots in presidential elections. Perhaps, though, there is no need for such a fight. Perhaps the solution to this conflict can be solved easily by simply reframing the issue. This Part does just that. Instead of viewing the mail-in ballot crisis as a conflict between powers, this Part asserts that these powers should be recognized as concurrent. That is, both the federal government and states have legitimate claims to power over the use of mail-in ballots in presidential elections. When framed this way, it becomes possible to look to constitutional doctrines that arise in other instances of concurrent powers, such as the Dormant Commerce Clause, to conclude that within the Electors Clause exists an inferred restraint on federal powers that can be used to balance the competing interests of the federal government and the states in the case of mail-in ballots. This Part lays out such a theory and then goes into said theory's implications and potential critiques.

#### *A. The Theory*

The theory is this: If the federal government uses its powers to discriminate against a state's power under the Electors Clause to determine the manner in which its electors are appointed, the federal government's action is per se unconstitutional. If the federal government, nevertheless, uses a legitimate power in a manner that only incidentally impacts a state's appointment of electors, then this action is permissible so long as the burden is not excessive. Now, how do we get here?

The first step is to recognize that when, say, the president vetoes an appropriations bill to fund USPS, and state X's legislature votes to conduct its 2020 elections—including the presidential election—entirely by mail-in voting, the two constitutional powers implicated in these decisions are not entirely exclusive. Rather, imagine a Venn diagram,

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<sup>35</sup> Andrew M. Hetherington, Comment, Constitutional Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause, 9 Mich. Telecomm. Tech. L. Rev. 457, 485 (2003).

where one bubble is the president's Presentment Clause power and the other is state X's Electors Clause power. For the most part, these bubbles do not overlap; however, there is a tiny sliver where the bubbles touch, and in this sliver, it states, "Determining whether mail-in ballots will be a viable form of voting for state X's citizens in the presidential election." Thus, within that tiny sliver, the federal government's power to fund and manage USPS and the states' power to determine the manner of appointing their electors transform from being exclusive powers into what can best be described as concurrent.

When we accept this concurrent nature, we can look to how the Supreme Court has historically resolved state–federal power conflicts in which the powers were exclusive in some ways but "concurrent . . . [in] other ways."<sup>36</sup> For instance, we can look to the Dormant Commerce Clause, which arises in cases in which a state's action impacts interstate commerce. The Commerce Clause confers upon Congress the power to, among other things, "regulate Commerce . . . among the several States."<sup>37</sup> This power has, however, been deemed "not absolutely exclusive," given the clause's silence on the states' power to regulate interstate commerce.<sup>38</sup> Faced with this uncertainty, the Supreme Court laid out the following standard that has become known as the Dormant Commerce Clause: When a state statute intentionally discriminates against interstate commerce, the statute is per se unconstitutional, and will only survive if demonstrated that there is "no other means to advance a legitimate local purpose."<sup>39</sup> If, however, said statute's effects on interstate commerce are "only incidental," the statute will only be struck down if it imposes an undue burden on interstate commerce.<sup>40</sup>

Given the uncertainty surrounding how federal and state powers interact in situations like the 2020 mail-in ballot crisis, it seems only reasonable to turn to the Dormant Commerce Clause as a helpful doctrinal analogy to provide guidance on navigating through this state–federal powers conflict. And in doing so, we arrive at the following conclusion:

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<sup>36</sup> See Commerce Clause Limitations on State Regulation, UMKC, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/statecommerce.htm> [<https://perma.cc/5L7E-E6XZ>] (last visited Mar. 22, 2021).

<sup>37</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>38</sup> See Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* 41 (2009).

<sup>39</sup> *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338–39 (2007). This is, needless to say, an extraordinarily high bar to meet.

<sup>40</sup> See *id.* at 346 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

The federal government may not use its federal powers to purposefully discriminate against the states' choosing of a manner of appointing electors; it may, however, generally use its federal powers in a way that only incidentally impacts the states' Electors Clause powers.

There is, naturally, one key difference between the Dormant Commerce Clause and the Electors Clause, in that the former resolves a conflict between an enumerated federal power and an implied state power, whereas the latter is intended to resolve a conflict between two enumerated powers. This is why this Essay is not claiming there to be a "Dormant Electors Clause"; rather, the constraint on federal powers is derived from the explicit structure of the U.S. Constitution. This is also why it seems necessary to include a disclaimer that this Essay's theory could presumably work in reverse: A state may not use its Electors Clause power to discriminate against the practice of a federal power (though one may need to get extra creative to imagine what such a scenario might look like). Regardless, turning to the Dormant Commerce Clause jurisprudence for guidance to develop a doctrinal framework in these Electors Clause cases appears to be the fairest and most constitutionally sound method to respect both federal and state government interests while resolving the conflicts of power that have arisen in the mail-in ballot crisis.

### *B. The Implications*

If a court were to recognize and apply this federal constraint, at least two important implications would follow for mail-in voting. First, the federal government could not use its powers over USPS to deliberately undermine a state's decision to use mail-in ballots in a presidential election. Accordingly, when then-President Trump openly stated that he was vetoing an appropriations bill to fund USPS specifically because he did not want the funding to assist mail-in voting, he behaved unconstitutionally. Conversely, if, say, Congress defunded USPS for some neutral reason (e.g., obsession with free market values) that only incidentally made it harder to vote by mail, this would almost assuredly be permissible. Of course, the question then becomes how courts would remedy a violation. It seems quite unlikely, for instance, that they could enjoin the President from vetoing a bill. At the very least, the lawsuits against the Trump administration suggest that courts could enjoin USPS

from instituting policy changes aimed at making mail-in voting more difficult.<sup>41</sup>

Furthermore, this federal constraint could indirectly preserve mail-in voting for other elections beyond the presidential one. As noted in Part II.A, the Elections Clause grants Congress exclusive preemptive authority over the regulation of congressional elections, meaning states would have a tougher time arguing that Congress, and the executive by delegation, violated the Constitution by making it more difficult to use mail-in ballots in congressional elections. These elections, however, do not exist on separate ballots. Typically, a ballot will contain all elections relevant to a voter, including presidential, congressional, gubernatorial, etc. Consequently, if a court enjoined the federal government from certain actions negatively impacting mail-in voting because it found discrimination against states' Electors Clause powers, this would mean that all elections on a ballot containing the presidential election would be protected by proxy.<sup>42</sup>

### *C. The Critiques*

One critique of this Essay's theory could be that it violates the Supremacy Clause. It seems odd, after all, to claim that a state action can displace a federal action. The Supremacy Clause, however, has no relevance here, since the Electors Clause is part of the enumerated Constitution, and thus part of the "supreme Law of the Land."<sup>43</sup> And since the Supreme Court rejects any hierarchy of constitutional provisions, the Electors Clause may not be preempted.<sup>44</sup>

Another critique may point to the fact that the Supreme Court has previously held that Congress has some regulatory powers over presidential elections. In *Burroughs v. United States*, for example, the Court upheld an act requiring candidate committees, including those for presidential candidates, to keep account of all contributions received or donated by them.<sup>45</sup> The *Burroughs* Court reasoned that Congress

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<sup>41</sup> See *supra* text accompanying note 12.

<sup>42</sup> Midterm elections would naturally not benefit from this though, since there would be no presidential election on the ballot.

<sup>43</sup> U.S. Const. art. VI, cl. 2.

<sup>44</sup> See Ken Hyle, When Constitutional Rights Clash: *Masterpiece Cakeshop's* Potential Legacy, 9 *ConLawNOW* 200, 202 (2018).

<sup>45</sup> 290 U.S. 534, 548 (1934).

possessed the power to preserve the integrity of presidential elections.<sup>46</sup> As Professors Dan Coenen and Edward Larson note though, there is a difference between controlling the manner in which electors are appointed (e.g., popular vote by mail-in ballots) and adopting electoral procedures necessary to implement said manner (e.g., campaign finance laws to quell the possibility of corruption within a popular election).<sup>47</sup> Hence, *Burroughs* does not support any notion that the federal government may encroach on the states' Electors Clause powers.

#### CONCLUSION

The Covid-19 pandemic revealed a conflict of federal and state powers that shook the 2020 election to its core. And while the 2020 election has passed, the practice of mail-in voting will likely remain prevalent in the future. Moreover, unforeseeable future crises could further change up how states choose to conduct their elections. Consequently, this conflict must be resolved, and this Essay argues that restraining federal powers from being used to discriminate against states' Electors Clause powers is a fair and constitutional means of doing so.

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<sup>46</sup> See *id.* at 544–45.

<sup>47</sup> 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, 904 (2002) (“Ballot-and-equipment laws simply do not control systems for selecting electors, substantive selection criteria, or candidates who might qualify as proper electors. Rather such laws concern only the implementing *procedures* to be used if one available substantive manner of selection—that is, the election manner—is chosen by the state.”).