

Originally published in

# New York Law Journal

## Commentary

May 26, 2020

### 2020 Election Sidebar: No Voters Need Apply?

*This is the second article in Jerry Goldfeder's series titled 2020 Election Sidebar, which explores salient legal issues of the 2020 election.*

**With only several months before Election Day, a change from popular voting to legislative fiat even in one state would be an egregious break from 145 years of history, custom and expectation, and modern constitutional jurisprudence.**



By [Jerry H. Goldfeder](#)

There is some [rumbling](#) that President Trump's supporters may attempt to deny Americans the right to vote in the presidential election. I am not referring to the vigorous [efforts to limit mail-in ballots](#) or even the GOP's [\\$20 million campaign to recruit 50,000 volunteers to challenge "suspicious" voters at polling places around the country](#). Nor am I referring to the [President canceling or postponing the election, neither of which he can do](#).

I am talking about the [arcane U.S. constitutional provision](#) that refers to state legislatures' authority to decide who picks presidential electors—the folks who ultimately elect the president. Let me explain.

As Hillary Clinton and Al Gore can attest, it is the Electoral College that chooses the president, not the voters, and the [federal constitution gives Congress the right to schedule](#) when they meet. Congress has set this date as the [first Monday after the second Wednesday in December](#), Dec. 14

this year. But who chooses the electors? [For the first 100 years of our history, voters sometimes went to the polls to do so, but usually states gave this decision to their legislature or governor.](#) In fact, in the early days, states routinely changed procedures depending upon how they thought their favorite presidential candidate might fare under one method or another. Since 1876, however, each state has empowered its voters to choose the electors, on Election Day—this year, Nov. 3. This has not changed in 145 years.

In 2000, during the extended recount in Florida, [Gov. Jeb Bush and his legislative allies almost departed from this long history and began the process of naming a slate of electors pledged to George Bush—even after the voters had gone to the polls.](#) This extraordinary gambit, rendered unnecessary by the Supreme Court’s decision in *Bush v. Gore*, is a cautionary tale for 2020.

Can the states try to bypass the voters this year? Currently, there are [29 state legislatures controlled by Republicans](#), totaling 302 Electoral College votes—32 more than the 270 required to elect a president. If these states decided to re-write their laws to allow the legislature to directly choose electors, they could simply hand the election to Trump. Of these 29 states, however, eight have Democratic governors, who would presumably veto any attempt to circumvent the voters. This brings the potential game-changing switches to 21 states, totaling only 214 electoral college votes, including several swing states, such as Florida (29 electoral votes), Texas (38), Georgia (16), Arizona (11) and Ohio (18).

With only several months before Election Day, a change from popular voting to legislative fiat even in one state would be an egregious break from 145 years of history, custom and expectation, and modern constitutional jurisprudence. True, the [U.S. Supreme Court ruled](#) that states can choose whatever method they want to pick electors, but it did so in 1892, which preceded [modern voting rights legislation and court decisions](#) that protect voters from being disenfranchised.

Thus, it is highly doubtful that such a change in the 21st century would pass muster. But who is to say that worried supporters of the president wouldn’t try to upend political and constitutional norms in this way? While there is already sufficient concern about voter suppression without thinking about such unheard-of scenarios, voters—and all those who cherish voting rights—should, nevertheless, be watchful.

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