THE INDEPENDENT STATE LEGISLATURE DOCTRINE

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The U.S. Constitution grants authority to both regulate congressional elections and determine the manner in which a state chooses its presidential electors specifically to the legislature of each state, rather than to the state as an entity. The independent state legislature doctrine teaches that, because a legislature derives its power over federal elections directly from the Constitution in this manner, that authority differs in certain important respects from the legislature's general police powers that it exercises under the state constitution. Although the doctrine was applied on several occasions in the nineteenth century, it largely fell into desuetude in the years that followed. During the 2020 presidential election cycle, however, several Justices issued opinions demonstrating an interest in recognizing and enforcing the doctrine.

This Article contends that the doctrine is best understood as a general principle that gives rise to a range of different potential corollaries, each of which is supported by somewhat differing lines of precedent, reasoning, historical practice, and prudential considerations. Each of these potential implications of the doctrine may be assessed separately from the others; the doctrine need not be accepted or repudiated wholesale. The fact that a court or commentator may accept or reject certain applications of the doctrine does not mean that other aspects, or the doctrine as a whole, must be similarly embraced or jettisoned. This Article unpacks the independent state legislature doctrine, exploring and offering a normative perspective on each of its possible corollaries.

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INTRODUCTION

The 2020 presidential election was the most litigated in American history. Prior to Election Day, plaintiffs across the nation had collectively filed over 400 federal and state challenges to various election-related rules and procedures.[1] Many of these cases alleged that states had not done enough to ensure that people could vote safely despite the ongoing global COVID-19 pandemic.[2] Following the election, President Donald J. Trump and his supporters filed dozens of additional federal and state lawsuits, unsuccessfully attempting to challenge the election's results.[3]

One issue that arose in some of these cases was the viability of the "independent state legislature doctrine." This doctrine teaches that a state legislature's power to regulate federal elections does not arise from its state

1. *See COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/ [https://perma.cc/EM99-9UYD] (last visited Sept. 17, 2021); *see also* Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS FRONTLINE (Oct. 28, 2020), https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/ [https://perma.cc/6B7X-L8QX].

2. *See, e.g.*, Memphis A. Phillip Randolph Inst. v. Hargett, 977 F.3d 566 (6th Cir. 2020) (declining to stay an injunction against a state law that required people who registered to vote online or by mail to cast their first ballot in person); Common Cause R.I. v. Gorbea, 970 F.3d 11 (1st Cir. 2020) (per curiam) (declining to stay a consent decree suspending witness requirements for mail-in ballots), *stay denied sub nom.* Republican Nat'l Comm. v. Common Cause R.I., 141 S. Ct. 206 (2020) (mem.), *appeal dismissed*, No. 20-1753, 2020 WL 8299593 (1st Cir. Aug. 17, 2020).

3. *See* William Cummings et al., *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/PT7H-VWD2]; Jim Rutenberg et al., *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html [https://perma.cc/EL7W-HR3B].

constitution (like most of the legislature's other powers) but rather from an independent grant of authority directly from the U.S. Constitution. The doctrine is rooted in the fact that states lack inherent authority to regulate federal elections; their only power over such elections comes from the U.S. Constitution.[4]

Rather than delegating power to regulate federal elections to each state as an entity, the U.S. Constitution confers it specifically upon each state's legislature. The Article I Elections Clause provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof," although Congress may "make or alter" such rules "at any time."[5] Likewise, the Article II Presidential Electors Clause states, "Each State shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors" to select the president.[6] One might say that the Elections Clause and Presidential Electors Clause "pierce the veil" of statehood, conferring certain powers on a particular organ of state government rather than the state as an entity.

The question then arises: what, if any, significance should we attribute to this constitutional language? The independent state legislature doctrine provides that, because a legislature derives its authority over federal elections from the U.S. Constitution, such authority differs in certain important respects from the legislature's general police powers under its state constitution. Commentators strenuously disagree over the precise nature of any such differences and, indeed, whether they exist at all.[7]

It appears that the Framers neither expressly considered the independent state legislature doctrine nor addressed the potential significance of their use of the term "legislature" in the Elections Clause and Presidential Electors Clause.[8] The doctrine was nevertheless invoked on multiple occasions in the nineteenth century by the chambers of Congress, state supreme courts, and even the U.S. Supreme Court.[9] Additionally, the doctrine was endorsed by Michigan Supreme Court Justice Thomas M. Cooley in his treatise on

4. *See* Cook v. Gralike, 531 U.S. 510, 523 (2001); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995).

5. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

6. *Id.* art. II, § 1, cl. 2 (emphasis added).

7. *See, e.g.*, Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 672 (2001) (arguing that the doctrine "does not rest on firm foundations of text, precedent, or history"); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 764–75 (2001) (arguing that the independent state legislature doctrine lacks a valid historical foundation); *see also infra* note 121 (collecting sources); *cf.* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1041, 1074 (2000) (contending that Article V allows a state's citizens to prevent agency problems by restricting or directing the institutional legislature's actions concerning federal constitutional amendments).

8. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 27–37 (2020).

9. *See id.* at 8–9, 37–69.

constitutional law[10] and emphasized by Justice Joseph Story at the Massachusetts constitutional convention of 1820.[11]

Though some courts continued to apply the doctrine into the early twentieth century,[12] it fell into desuetude, its historical background minimized or forgotten.[13] One strand of the doctrine, however, played a critical role in the ratification of the Nineteenth Amendment,[14] which extended the franchise to women.[15] A unanimous Supreme Court invoked another aspect of the doctrine in the course of resolving the 2000 presidential election,[16] while at least four Justices recognized its validity in separate opinions in *Bush v. Gore* itself.[17] In recent years, the U.S. Supreme Court has adopted inconsistent views toward the doctrine. The Court's hotly contested 5–4 ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[18] repudiated the doctrine (albeit arguably partly in dicta).[19] Several Justices subsequently issued opinions embracing it in cases arising from the 2020 presidential election.[20]

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10. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 754 n.1 (6th ed. 1890).

11. JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 109–12 (Boston Daily Advertiser rev. ed. 1853) [hereinafter MASS. JOURNAL]; *see also* Morley, *supra* note 8, at 38–40 (discussing the debate at the convention).

12. *See, e.g.*, State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 285–87 (Neb. 1948) (holding that the court need not consider whether state laws establishing ballot access requirements for presidential candidates violated the state constitution because the state constitution did not apply to laws concerning the appointment of presidential electors); Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694–96 (Ky. 1944) (holding that the state constitution likely could not restrict the state legislature's power to allow members of the military to cast absentee ballots in presidential elections); Parsons v. Ryan, 60 P.2d 910, 912 (Kan. 1936) ("We are not persuaded by the argument that the enactment of election laws, being an exercise of police power, is subject to [state] constitutional restrictions which prevent the Legislature from limiting the right of candidates to have their names on the general ballot. As has been shown, the Federal Constitution commands the state Legislature to direct the manner of choosing electors.").

13. *See* Morley, *supra* note 8, at 9 n.24.

14. U.S. CONST. amend. XIX.

15. *See* Leser v. Garnett, 258 U.S. 130, 137 (1922) (holding that a state legislature's ratification of the Nineteenth Amendment was valid pursuant to its authority under Article V of the U.S. Constitution, despite the state constitution's purported restrictions); *cf.* Hawke v. Smith, 253 U.S. 221, 227, 230–31 (1920) (invoking the independent state legislature doctrine to uphold the validity of the ratification of the Eighteenth Amendment, which established Prohibition).

16. *See* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam).

17. 531 U.S. 98 (2000) (per curiam); *see infra* notes 112–20 and accompanying text.

18. 576 U.S. 787 (2015).

19. *Id.* at 824.

20. *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732–33 (2021) (mem.) (Thomas, J., dissenting from denial of certiorari) ("The Constitution gives to each state legislature authority to determine the 'Manner' of federal elections. Yet both before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules instead." (internal citation omitted)); *id.* at 738 (Alito, J., dissenting from denial of certiorari); Republican Party of Pa. v. Boockvar (*Boockvar II*), 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite consideration of petition for certiorari) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the

This Article seeks to unpack the independent state legislature doctrine, explaining the range of distinct possible implications to which courts, commentators, and advocates have claimed it gives rise. Importantly, these possible corollaries of the doctrine are largely independent of each other, supported by somewhat different lines of reasoning and authority. Although these theories arise from the same constitutional principle, each may be assessed separately from the others; the doctrine need not be accepted or repudiated wholesale. The fact that a court or commentator may reject certain potential implications of the doctrine does not mean that other possible applications, or the doctrine as a whole, must also be jettisoned. This Article also offers a normative perspective on each of these possible implications, assessing the extent to which each is historically supported, legally sound, and pragmatically desirable.

Part I focuses on the independent state legislature doctrine's potential implications for state statutes. Most basically, because the doctrine emphasizes the Constitution's grant of authority over federal elections to state legislatures, a few courts have interpreted the doctrine as requiring state and local officials to be able to point to some source of statutory authorization for the policies they adopt or restrictions they enforce for such elections. Under this approach, when election officials act without, or contrary to, statutory authorization regarding federal elections, they not only violate state law but also intrude on the legislature's prerogatives under the U.S. Constitution. This aspect of the doctrine simply adds an additional—and, critics might charge, unnecessary—federal overlay to the question of whether election officials are acting ultra vires under state law.

A more consequential potential implication is that the doctrine may impose a plain meaning canon of interpretation for state laws governing federal elections, and may allow federal courts to review state courts' interpretations of such provisions to prevent substantial unexpected departures from their text. This prong of the doctrine provides that, because the Constitution grants state legislatures the authority to regulate federal elections, election officials and courts must follow the rules the legislature establishes. Under this approach, since a legislature adopts only the text of a statute, the Constitution requires election officials and courts to apply that text, even if they ordinarily would take into account extrinsic considerations like the state constitution,

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authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."); Moore v. Circosta, 141 S. Ct. 46, 47–48 (2020) (Gorsuch, J., dissenting from denial of injunction pending appeal) (opining that a state board of elections had violated the Elections Clause and Presidential Electors Clause by executing a consent decree in state court that barred enforcement of a law recently enacted by the legislature to regulate elections during the COVID-19 pandemic); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29–30 (2020) (mem.) (Gorsuch, J., concurring in denial of application to vacate stay) (declining to vacate a stay of a federal district court order extending the deadline for the receipt of absentee ballots by election officials because "[t]he Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules").

substantive canons of interpretation, or their own judgments about sound policy or fairness.

At a minimum, this aspect of the doctrine would place outer bounds on the ability of state officials and courts to unexpectedly interpret a state law governing federal elections in a way that materially deviates from the apparent meaning of that law's text. In particular, a state court would be unable to effectively change the rules of an election—especially after the votes have been cast and the beneficiaries of various possible rulings are known—by interpreting and applying the election code in dubious and unpredictable ways. Although the *Erie* doctrine generally requires federal courts to accept state courts' interpretations of state statutes,[21] the Supreme Court has recognized multiple exceptions to that principle, particularly when important federal interests are involved.[22] A unanimous Supreme Court appears to have applied this aspect of the doctrine in *Bush v. Palm Beach County Canvassing Board*,[23] and at least four Justices acknowledged it, albeit to varying extents, in *Bush v. Gore*.[24]

This part concludes by explaining how a few federal courts have erroneously held that, under the political question doctrine, the Elections Clause and Presidential Electors Clause preclude them from adjudicating certain kinds of constitutional challenges to state laws regulating federal elections. Those constitutional provisions, however, do not speak to the jurisdiction of the federal courts. This potential application of the doctrine is among the most easily rejected.

Part II turns to the independent state legislature doctrine's possible implications for state constitutions. During the nineteenth century, the doctrine was invoked on multiple occasions to establish that, because a state legislature receives its authority to regulate federal elections exclusively from the U.S. Constitution, a state constitution is incapable of imposing substantive restrictions on the scope of that power.[25] When a state legislature regulates federal elections, it is bound by the implicit restrictions of the Elections Clause and Presidential Electors Clause;[26] the explicit restrictions of the U.S. Constitution's Bill of Rights (as incorporated through the Fourteenth Amendment), Reconstruction amendments,[27] and other voting

21. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

22. *See infra* notes 135–87 and accompanying text.

23. 531 U.S. 70 (2000) (per curiam); *see infra* notes 96–110 and accompanying text.

24. *See* 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring); *id.* at 129–35 (Souter, J., dissenting); *see also infra* notes 112–20 and accompanying text (discussing the Rehnquist and Souter opinions' analyses).

25. *See* Morley, *supra* note 8, at 9–10; *see also supra* note 12 (collecting cases).

26. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995) (holding that the Elections Clause does not empower states to adopt laws that "dictate electoral outcomes, . . . favor or disfavor a class of candidates, or . . . evade important constitutional restraints"); *see, e.g.*, Cook v. Gralike, 531 U.S. 510, 523 (2001) (enforcing the Elections Clause's implicit limitations recognized in *Thornton*); *see also* Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (noting that states may enact "generally applicable and evenhanded restrictions that protect the integrity and reliability of the [federal] electoral process itself").

27. *See, e.g.*, U.S. CONST. amend. XIV, § 1 (Due Process and Equal Protection Clauses); *id.* amend. XV, § 1 (prohibiting denial or abridgement of the right to vote on account of race).

rights amendments;[28] and federal laws such as the Voting Rights Act of 1965[29] and National Voter Registration Act of 1993.[30] This prong of the independent state legislature doctrine specifies that a legislature is not similarly bound by substantive constraints in its state constitution. Since most state constitutional provisions concerning voting rights either have analogues in the U.S. Constitution or state law, or are construed substantively similarly to more general provisions in the U.S. Constitution (like the Due Process or Equal Protection Clauses),[31] this principle typically would have limited effect.[32] One important consequence would be the preclusion of voters from challenging alleged political gerrymanders for the U.S. House of Representatives under state constitutions.

Even if the doctrine precludes state constitutions from limiting the substantive content of the laws that legislatures enact to regulate federal elections, state constitutions still may regulate the *process* by which legislatures enact those measures into law. Historically, bills concerning federal elections were subject to the possibility of rejection through a gubernatorial veto[33] or public referendum.[34]

Part III focuses on the doctrine's potential impacts on the legislature itself. Historically, some legislatures exercised their authority under the Presidential Electors Clause by directly appointing presidential electors.[35] This part begins by assessing claims that legislatures may continue to assert such power, despite the transition to popular presidential elections. Strong arguments can be made under the Constitution and federal law that, once a legislature establishes a process to choose electors by popular vote, it may not supersede that process by directly appointing its own slate of electors in violation of its own laws—at least absent a major disaster such as Hurricane Katrina that prevents a popular election from being conducted or completed. Moreover, a legislature's attempt to assert such authority would be dangerously destabilizing to the electoral process.

Turning to a different potential application of the doctrine, this part then examines whether it prevents states from enacting measures governing federal elections through mechanisms outside the institutional legislature, such as a public initiative process.[36] This part goes on to assess the related

28. *See, e.g.*, *id.* amend. XIX (prohibiting sex discrimination with regard to voting rights); *id.* amend. XXIV, § 1 (abolishing poll taxes for federal elections); *id.* amend. XXVI, § 1 (prohibiting discrimination on account of age, for people at least 18 years old, with regard to voting rights); *see also id.* amend. XVII (providing for the popular election of U.S. senators).

29. Pub. L. No. 89–110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

30. Pub. L. No. 103–31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511 and in scattered sections of 39 U.S.C.).

31. *See* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 204 (2014).

32. *See* Morley, *supra* note 8, at 90–92.

33. *See* Smiley v. Holm, 285 U.S. 355, 372–73 (1932).

34. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).

35. *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE 59 (2020).

36. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015).

issue of whether states may partly or completely strip their institutional legislatures of authority to regulate federal elections.[37] At a minimum, the doctrine suggests that, even if such alternate legislative methods presumptively may be used to regulate federal elections, they may not limit the institutional legislature's authority under the U.S. Constitution to adopt its own preferred policies. Finally, this part rejects the notion that the independent state legislature doctrine prevents state legislatures from delegating their constitutional authority to other entities, such as election officials.

A brief conclusion follows, explaining how standing requirements may hinder attempts by candidates, voters, and most other potential plaintiffs to invoke the independent state legislature doctrine.[38] Much of the legal and academic debate over the doctrine has been complicated by the fact that it has a range of potential applications. The doctrine's validity, however, does not hinge on any particular application. And not all of those potential corollaries are consistent with the way the doctrine has historically been implemented or pragmatically beneficial. This Article seeks to provide a descriptive taxonomy of the doctrine's possible applications, with a normative assessment of their relative merits.

I. THE DOCTRINE AND STATE STATUTES

The independent state legislature doctrine arises from the fact that the Constitution grants authority to regulate the "Manner" of conducting congressional elections[39] and appointing presidential electors[40] specifically to the "Legislature" of each state rather than to the state as a whole. Since the Constitution singles out state legislatures, it is helpful to begin by considering whether it requires any special treatment for state laws governing federal elections that a legislature enacts. This part begins by explaining how some courts have held that it is unconstitutional for state or local election officials to purport to regulate federal elections without statutory authorization. It then explores how the doctrine has been applied to impose outer bounds on courts' ability to interpret state laws governing federal elections in surprising ways that materially depart from their text. From this perspective, the greater the inconsistency between a statute's text and a court's interpretation of it, the greater the risk that the court is imposing its own preferences rather than faithfully implementing the legislature's directives and respecting the legislature's constitutional prerogatives.

37. *Cf. id.*

38. *See* Lance v. Coffman, 549 U.S. 437, 442 (2007) (per curiam) (holding that private citizens lacked standing to bring a challenge under the Elections Clause to a state court's order concerning congressional redistricting, because they could assert only an "undifferentiated, generalized grievance").

39. U.S. CONST. art. I, § 4, cl. 1.

40. *Id.* art. II, § 1, cl. 2.

A. Requiring State Law Authorization for Other Branches' Actions

The most basic potential implication of the independent state legislature doctrine is that state and local officials must be able to point to some source of statutory authorization to impose measures regulating federal elections. Under this approach, the Constitution grants power over federal elections specifically to the state legislature. Election officials may therefore adopt rules or procedures concerning such elections only if the legislature has authorized them to do so. And officials may not take it upon themselves to suspend or ignore state law. An election official who purports to act without some delegation of authority from the legislature or attempts to adopt rules that suspend or contradict a legislative enactment is not only acting ultra vires under state law but also intruding on the legislature's sole constitutional prerogatives, as well.

For example, in *Libertarian Party v. Dardenne*,[41] the final statutory deadline for recognized political parties to file their nominees with the Louisiana secretary of state was September 5.[42] Hurricane Gustav had hit the state only a few days earlier, however, and the secretary's office "was officially closed" from September 2 through September 7.[43] When the office reopened on September 8, the secretary announced that he was extending the filing deadline until the end of that day.[44] Because the Libertarian Party was unable to submit its completed paperwork until two days later, the secretary declared that he would be excluding the party's candidate for president from the ballot.[45]

Applying the independent state legislature doctrine, the U.S. District Court for the Middle District of Louisiana held that the secretary had violated the Presidential Electors Clause by unilaterally establishing a new deadline without any statutory basis.[46] The court began by noting that "only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office."[47] Accordingly, only the legislature—and not the secretary of state—was "vested with the power to create new deadlines for federal elections."[48] The legislature had not passed a law either extending the deadline or authorizing the secretary to do so. The secretary had therefore "exceeded his authority when he extended the deadline for submission of the qualifying papers."[49]

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41. No. 08-582-JJB, 2008 WL 11351516, at *2 (M.D. La. Sept. 25, 2008), *stay granted*, 294 F. App'x 142 (5th Cir. 2008), *preliminary injunction vacated as moot*, 308 F. App'x 861 (5th Cir. 2009).

42. *Id.* State law established the initial deadline as September 2 but specified that if the central committee of a recognized state party failed to meet that deadline, the party's national chair could file the required paperwork within the next 72 hours. *Id.* at *1 & n.4.

43. *Id.* at *2.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at *3.

49. *Id.*

The court went on to hold that the First and Fourteenth Amendments barred the state from enforcing the original statutory deadline due to "[t]he hardships and the extreme circumstances faced by those seeking to file their party's qualifying papers, in the midst of a natural disaster like Hurricane Gustav and the resulting power outages and impediments in many avenues of communication."[50] It therefore ordered the secretary to accept the Libertarian Party's belated filing.[51] The Fifth Circuit stayed this ruling, however, on the grounds that the record was "devoid of any evidence" that the Libertarian Party would have been able to file its completed paperwork on time "had Hurricane Gustav not occurred."[52] It also pointed out that, despite the closure of nonessential state offices due to the hurricane, "the election filing office of the Secretary of State of Louisiana remained open."[53] The Fifth Circuit did not comment on the district court's application of the independent state legislature doctrine. The case was later dismissed as moot.[54]

One unacknowledged consequence of the district court's ruling, which purportedly enforced the legislature's prerogatives, is that the legislature did not ultimately determine the new deadline. Because the court concluded that it would have been unconstitutional to enforce the statutory deadline under the circumstances, the court imposed its own extended deadline, rather than allowing the secretary to decide how to address the emergency.[55]

Another example arose following a ruling by the Sixth Circuit that Ohio's ballot access requirements for third-party candidates were unconstitutional.[56] The Ohio General Assembly had subsequently failed to amend the invalidated statute, "leaving no lawful, statutory criteria to be followed by the Secretary of State or the various Boards of Election of each county."[57] The Ohio secretary of state attempted to fill this gap by issuing a directive specifying the number of signatures required for third-party ballot access petitions, as well as the filing deadline for such petitions.[58] The Libertarian Party failed to fulfill the directive's requirements and challenged the resulting exclusion of its candidates from the ballot.[59]

The court, as in *Dardenne*, began by noting that the Constitution grants the legislature the power to regulate federal elections.[60] The secretary's directive did not interpret or clarify any provisions of Ohio law, but rather

50. *Id.* at *4.
51. *Id.* at *5.
52. Libertarian Party v. Dardenne, 294 F. App'x 142, 145 (5th Cir. 2008), *preliminary injunction vacated as moot*, 308 F. App'x 861 (5th Cir. 2009).
53. *Id.* at 144.
54. Libertarian Party v. Dardenne, 308 F. App'x 861 (5th Cir. 2009).
55. *Dardenne*, 2008 WL 11351516, at *5.
56. Libertarian Party of Ohio v. Blackwell, 462 F.3d 579 (6th Cir. 2006).
57. Libertarian Party of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1009 (S.D. Ohio 2008).
58. *Id.* at 1010.
59. *Id.*
60. *Id.* at 1011 ("Plaintiffs correctly contend that only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office.").

"establishe[d] a new structure for minor party ballot access, a structure not approved by the Ohio legislature."[61] The legislature, however, had not delegated authority to the secretary to adopt any such rules.[62] The secretary pointed to a state law authorizing her to issue directives to boards of election and "[p]repare rules and instructions for the conduct of elections."[63] The court held that this power did not "extend to filling a void in Ohio's election law caused by the legislature ignoring a judicial pronouncement declaring a state statute unconstitutional."[64] The secretary's directive therefore violated the U.S. Constitution and was void.[65] The court directed the secretary to include the Libertarian Party's candidates on the ballot because the "'available evidence' establishe[d] that the party ha[d] 'the requisite community support.'"[66]

The Eighth Circuit invoked this aspect of the doctrine during the 2020 presidential election in *Carson v. Simon*.[67] In *Carson*, Minnesota law specified that absentee ballots were valid only if election officials received them by the close of polls on Election Day.[68] Minnesota's secretary of state entered into a consent decree in state court with a private group agreeing to refrain from enforcing this requirement due to the COVID-19 pandemic.[69] The consent decree further specified that ballots received within five business days of Election Day would be counted so long as they were either postmarked before Election Day or lacked a postmark.[70]

Two Republican candidates for presidential elector from Minnesota sued in federal court, arguing that the secretary's consent decree violated the Presidential Electors Clause.[71] The Eighth Circuit held that their claim was likely to succeed.[72] The court explained, "[O]nly the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota . . . . [I]t is not the province of a state executive official to re-write the state's election code, at least as it pertains to selection of presidential electors."[73] Accordingly, the court entered a preliminary injunction ordering the secretary of state to segregate

61. *Id.* at 1012.

62. *Id.* ("[T]here is no evidence that the state legislature has specifically delegated its authority to [the secretary] to direct the manner in which the state of Ohio [conducts federal elections].").

63. *Id.* (citing OHIO REV. CODE ANN. § 3501.05(B)–(C) (West 2021)).

64. *Id.*

65. *Id.* at 1013. The court also held, in the alternative, that the ballot access requirements the secretary adopted were unconstitutionally burdensome. *Id.* at 1013–14.

66. *Id.* at 1015 (quoting McCarthy v. Briscoe, 429 U.S. 1317, 1323 (1976)).

67. 978 F.3d 1051 (8th Cir. 2020) (per curiam).

68. Id. at 1055 (citing MINN. STAT. § 203B.08, subd. 3 (2020)).

69. *See id.* at 1055–56.

70. *See id.* at 1056. The consent decree allowed election officials to reject unpostmarked ballots, however, if the preponderance of the evidence demonstrated that they were mailed after Election Day. *Id.* There was no indication of what sort of evidence would be sufficient to meet that standard. *See id.*

71. *Id.* at 1054.

72. *Id.* at 1059.

73. *Id.* at 1060.

any absentee ballots received after the statutory deadline to allow them "to be removed from vote totals" in the event a court later issued a final order to that effect.[74]

In *Moore v. Circosta*,[75] another case arising from the 2020 election, the Supreme Court, by a 5–3 vote, declined without opinion to enjoin a similar consent decree executed by the North Carolina State Board of Elections to extend the deadline for absentee ballots;[76] newly appointed Justice Barrett did not participate in the vote.[77] Justice Gorsuch, dissenting from the Court's refusal to enjoin the consent decree, suggested that it was "egregious" for "a state court and the Board [to] work[] together to override a carefully tailored legislative response to COVID."[78] He added, "[E]fforts like these . . . offend the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators . . . ."[79] Moreover, "[s]uch last-minute changes by largely unaccountable bodies . . . invite confusion, risk altering election outcomes, and in the process threaten voter confidence in the results."[80]

Cases like *Brunner*, *Dardenne*, and *Carson* are rare because most of the directives and policies that election officials promulgate are designed to implement some underlying statute.[81] Election officials seldom act ultra vires or otherwise directly contrary to state law; those who do are typically responding to unusual circumstances, such as a natural disaster.[82] Courts properly reject challenges under the doctrine when officials can point to statutory authorization for their actions.[83]

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74. *Id.* at 1062–63.

75. 141 S. Ct. 46 (2020) (mem.) (declining to grant injunction pending appeal).

76. *Id.* Justice Thomas voted to enjoin the consent decree without issuing an opinion. *Id.* Justice Gorsuch, joined by Justice Alito, issued a written dissent from the court's ruling. *Id.* (Gorsuch, J., dissenting from denial of injunctive relief pending appeal).

77. *See* 141 S. Ct. 46 (2020) (mem.).

78. *Id.* at 47 (Gorsuch, J., dissenting from denial of injunctive relief pending appeal).

79. *Id*. at 48.

80. *Id.*

81. For other examples of judges invoking the doctrine during the 2020 election, see Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 150 (5th Cir. 2020) (Ho, J., concurring) ("Under the Constitution, it is the state legislature—not the governor *or* federal judges—that is authorized to establish the rules that govern the election of each state's Presidential electors . . . ."); Wise v. Circosta, 978 F.3d 93, 104 (4th Cir. 2020) (Wilksinson, J., dissenting) ("The Constitution does not assign these powers holistically to the state governments but rather pinpoints a particular branch of state government—'the Legislatures thereof.' Whether it is a federal court . . . or a state election board—as it is here—does not matter; both are unaccountable entities stripping power from the legislatures." (quoting U.S. CONST. art. I, § 4, cl. 1)), *injunction pending appeal denied*, 141 S. Ct. 658 (2020) (mem.).

82. Several states have election emergency laws that authorize election officials to modify the rules of the electoral process as necessary to respond to such crises, thereby alleviating potential concerns under the independent state legislature doctrine. *See* Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 610–13 (2018).

83. *See, e.g.*, Green Party v. Hargett, 700 F.3d 816, 826 (6th Cir. 2012) (rejecting challenge under the independent state legislature doctrine because the state legislature "prescribed the key substantive regulations governing minor-party nominating petitions, including the 2.5% signature provision and 119-day filing deadline, while expressly delegating

This aspect of the independent state legislature doctrine may allow plaintiffs to circumvent the *Pennhurst* doctrine, which provides that state sovereign immunity generally precludes litigants from suing in federal court to compel state officials to comply with state law requirements.[84] Typically, even when a litigant pursues a colorable federal claim in federal court against a state official, the *Pennhurst* doctrine bars them from simultaneously pursuing pendent state law claims against the official, as well.[85] This prong of the independent state legislature doctrine may allow right-holders to couch at least some alleged state law violations in terms of the Elections Clause or Presidential Electors Clause, allowing them to circumvent the *Pennhurst* bar.[86]

Since the constitutional question under this theory ultimately turns on the extent of an election official's power under state law, one might argue that a state judge would be better equipped than a federal court to adjudicate the underlying issue. A person's views on this will likely turn, in part, on their attitude toward judicial parity more broadly.[87] An unelected federal judge might be better situated to objectively assess the legal basis for a secretary of state's decisions than an elected state judge—one who might later have to run in elections overseen by the secretary. A federal judge also may be further removed from the state's political scene and therefore better able to objectively adjudicate a case that is likely to have partisan consequences.[88]

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to the coordinator of elections the administrative task of establishing the petition's form"); *see also* Iowa Voter All. v. Black Hawk County, No. C20-2078-LTS, 2020 WL 6151559, at *3 (N.D. Iowa Oct. 20, 2020) (rejecting Elections Clause challenge to counties' acceptance of private grants to subsidize additional resources for the 2020 election because no state law "forbids counties from accepting private grants to fund an election"); *cf.* Baldwin v. Cortes, 378 F. App'x 135, 138–39 (3d Cir. 2010) (rejecting plaintiffs' Presidential Electors Clause challenge to "the Secretary [of State's] 1984 entry into the consent decrees" changing the deadline for candidates to file ballot access petitions, due to "the Pennsylvania legislature's explicit delegation of authority to the Secretary of the Commonwealth to administer the state election scheme").

84. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 124–25 (1984) ("[F]ederal courts lack[] jurisdiction to enjoin . . . state officials on the basis of . . . state law.").

85. *Id.* at 121 (holding that the prohibition against federal court injunctions against state officials for violating state law "applies as well to state-law claims brought into federal court under pendent jurisdiction"); *see also* Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 540–42 (2002) (holding that the federal supplemental jurisdiction statute, 28 U.S.C. § 1367, does not alter *Pennhurst*'s proscription of federal court injunctions against state officials on the basis of pendent state law claims).

86. *See, e.g.*, Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-CV-457, 2020 WL 6589362, at *2 (M.D.N.C. Oct. 2, 2020) ("[T]his court intends to address whether the North Carolina State Board of Elections, by and through its most recent Memo 2020-19, has, through Executive action, unconstitutionally modified the North Carolina legislative scheme for appointing Presidential electors. That is a constitutional question, not a question of state law."), *amended on reconsideration*, 2020 WL 6591367 (M.D.N.C. Oct. 5, 2020) (amending briefing requirements).

87. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state courts do not necessarily enforce constitutional rights as effectively as federal courts).

88. Professor Rick Pildes suggests that there may not be a single universally correct answer to questions such as this; the relative merits of federal and state courts as venues for adjudicating whether election officials have acted ultra vires may vary by state and even judge,

Even if litigants are able to challenge allegedly ultra vires actions under the Elections Clause or Presidential Electors Clause in federal court, the federal court may choose to allow the state judiciary to resolve the issue, instead, when the scope of an election official's authority under state law is unclear. A federal court may abstain under *Railroad Commission of Texas v. Pullman Co.*[89] to avoid the possibility of unnecessarily adjudicating federal constitutional claims under the Elections Clause or Presidential Electors Clause.[90] For example, invoking *Pullman*, a Pennsylvania federal district court abstained from addressing the Trump campaign's claims under those provisions that the Pennsylvania secretary of state's orders concerning absentee ballots and poll watchers were contrary to the plain text of state law.[91] Thus, even if federal courts recognize this strand of the independent state legislature doctrine, many disputes over the scope of election officials' power still may be initially channeled to state court.

As discussed further in Part I.B, once the state judiciary interprets the state laws at issue, a federal court might claim the authority to assess whether the state courts exceeded permissible bounds of interpretation.[92] That possibility implicates a different strand of the independent state legislature doctrine, however, and need not be accepted as a component of the ultra vires claims discussed here. As suggested earlier,[93] one other potential objection to this aspect of the doctrine is that it simply substitutes one surrogate decision-maker for another. When a federal court determines that an election official's policy violates the Elections Clause or Presidential Electors Clause because it is unauthorized by, or directly contrary to, state law, the court often must adopt an interim replacement policy to govern that aspect of the electoral process until the legislature steps in.[94] Thus, the matter is still not governed by the legislature. Moreover, the ostensibly expert determination of specialized election officials is displaced by the ruling of a generalist federal court that is further removed from the inner workings of the state's election administration system.

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and may change over time. *See* Richard Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 7–9; *cf.* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 256 (1988) ("[T]he issue of parity is an empirical question for which no empirical measure is possible.").

89. 312 U.S. 496 (1941).

90. *See, e.g.*, Miller v. Campbell, No. 3:10-cv-0252-RRB, 2010 WL 5071599, at *1–2 (D. Alaska Nov. 19, 2010) (declaring, in a case alleging that the "Division of Elections has, among other things, violated the Alaska Legislature's prerogative by counting votes in a manner contrary to the legislative directive," that "prudence, propriety, principles of judicial restraint, and a desire to avoid unnecessary constitutional adjudication lead this Court to abstain from resolving the current dispute and refer the parties to the appropriate State tribunal" (citing *Pullman*, 312 U.S. 496) (footnote omitted)).

91. Donald J. Trump for President, Inc. v. Boockvar, 481 F. Supp. 3d 476, 503 (W.D. Pa. 2020), *modification denied*, No. 2:20-cv-966, 2020 WL 5407748 (W.D. Pa. Sept. 8, 2020).

92. *See infra* Section I.B.

93. *See supra* note 55 and accompanying text.

94. *See, e.g.*, Libertarian Party of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1012 (S.D. Ohio 2008).

In conclusion, a few courts have held that the Constitution's grants of authority over federal elections specifically to the legislature make it unconstitutional for other state or local actors to purport to establish rules, procedures, or requirements for such elections absent statutory authorization or delegation, or otherwise contrary to state law. This potential corollary of the independent state legislature doctrine does not alter election officials' obligations or responsibilities, however, but instead simply opens up a federal forum for enforcing them. Even then, federal courts may choose to abstain from adjudicating the underlying state law issues. And they are likely to construe the doctrine narrowly in this context, to prevent transmuting every dispute over the meaning of a state election law or validity of an administrative issuance relating to federal elections into a federal constitutional issue.[95]

B. Interpreting State Laws Governing Federal Elections

A more significant question is whether the independent state legislature doctrine impacts how courts must interpret state laws governing federal elections. One of the doctrine's potential implications is that courts must construe state election laws that apply to presidential and congressional elections consistently with their plain text, avoiding unexpected interpretations that appear contrary to that text. Under this view, since the Constitution confers authority over federal elections specifically on the state legislature, courts must take special care to ensure that such elections are conducted according to the rules that the legislature establishes. Those rules are set forth in the statutes that the legislature enacts. Depending on how this approach is applied, courts may have to avoid considering the sorts of extrinsic factors, like the state constitution or substantive canons of construction, that may ordinarily guide their interpretation of state statutes.

The Supreme Court's unanimous per curiam opinion in *Bush v. Palm Beach County Canvassing Board*, which arose from the 2000 presidential election, appears to recognize this aspect of the doctrine as a constraint on statutory interpretation.[96] The Florida Supreme Court had held that the Florida secretary of state could reject the results of manual ballot recounts that counties submitted after the statutory deadline only under certain narrow

95. *See, e.g.*, West v. Wis. Elections Comm'n, No. 20-C-1348, 2020 WL 5253844, at *1–2 (E.D. Wis. Sept. 3, 2020) (refusing to exercise jurisdiction over a challenge under the Presidential Electors Clause to election officials' refusal to accept Kanye West's candidacy papers for president, where his submission was logged as received at 5:00.14 because the doors to the Commission's building had been locked, and state law required the papers to be filed "not later than 5 p.m.").

96. *See* 531 U.S. 70, 75–78 (2000) (per curiam); *see also* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 666 (2001) (arguing that *Palm Beach County Canvassing Board* "was a powerful warning to the state court that the U.S. Supreme Court . . . was prepared to intervene if it appeared that the state court were twisting or distorting state law").

circumstances.[97] The court's reasoning "relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution."[98]

The U.S. Supreme Court unanimously reversed and remanded.[99] It began by acknowledging that, "[a]s a general rule, this Court defers to a state court's interpretation of a state statute."[100] The Court emphasized, however, that when a legislature passes laws regulating presidential elections, it acts pursuant to "a direct grant of authority made under [the Presidential Electors Clause]."[101] Quoting *McPherson v. Blacker*,[102] the Court explained that the Presidential Electors Clause's "insertion" of an express reference to the legislature "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power."[103] In other words, a state may not limit its legislature's authority under the U.S. Constitution to regulate federal elections.

The Court went on to express "considerable uncertainty as to the precise grounds for the [Florida Supreme Court's] decision."[104] It said it was concerned that the "Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under [the Presidential Electors Clause]."[105] The Court pointed out that the lower court's opinion alluded to various state constitutional provisions concerning voting rights.[106] The Florida Supreme Court's consideration of the state constitution apparently called into question the validity of its statutory interpretation. Consequently, the U.S. Supreme Court vacated the lower court's judgment and remanded the case for further proceedings.[107]

The Court's unanimous ruling in *Palm Beach County Canvassing Board* is an important precedent for this strand of the independent state legislature doctrine in several respects. First, rather than simply accepting the Florida Supreme Court's interpretation of state law at face value, the Court looked behind the lower court's ruling to assess its reasoning. The Court acknowledged that, although it would generally accept a state court's

97. *See Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 74–75.
98. *Id.* at 75.
99. *Id.* at 78.
100. *Id.* at 76.
101. *Id.*
102. 146 U.S. 1 (1892).
103. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76 (quoting *McPherson*, 146 U.S. at 25).
104. *Id.* at 78 (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 555 (1940)).
105. *Id.*; *see also id.* at 77 (noting that the Florida Supreme Court's opinion contained "expressions . . . that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with [the Presidential Electors Clause], 'circumscribe the legislative power'" (quoting *McPherson*, 146 U.S. at 25)).
106. *See id.* at 77.
107. *See id.* at 78. On remand, the Florida Supreme Court issued essentially the same opinion, but omitted any references to the state constitution. *See generally* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000); *see also* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 644 (2001) ("[T]he Florida Supreme Court came to precisely the same ruling as it had initially, but was duly chastened from ever mentioning its own state constitution." (footnote omitted)).

interpretation of state law as dispositive, state laws enacted under the Presidential Electors Clause warranted a different approach.[108] Additionally, the primary reason for the remand was to give the Florida Supreme Court the opportunity to clarify whether the state constitution was influencing its interpretation of the election code.[109] The reasonable inference is that, when construing laws enacted under the Presidential Electors Clause, a court must focus specifically on the text, rather than on extrinsic considerations like the state constitution.[110]

A total of four Justices joined in opinions providing further support for this theory in *Bush v. Gore*.[111] Chief Justice William H. Rehnquist's three-Justice concurrence is most closely associated with it.[112] The concurrence declared that, because the Presidential Electors Clause delegates authority specifically to the legislature, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[113] It further noted that "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[114] To determine whether a state court has made such an unconstitutional departure, the U.S. Supreme Court "necessarily must examine the law of the State as it existed prior to the action of the [state] court."[115] The Supreme Court must "undertake an independent, if still deferential, analysis of state law."[116]

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108. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76.

109. *Id.* at 78.

110. *See* Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 364–65 (2003) ("The implication was that if the Florida court had relied on state constitutional law, the decision would be struck down on the Article II basis."); *see also* McConnell, *supra* note 96, at 666.

Palm Beach County Canvassing Board also appears to reaffirm a separate potential aspect of the independent state legislature doctrine: the notion that a state constitution may not impose substantive constraints on the scope of a legislature's authority to regulate federal elections. *See* David A. Strauss, Bush v. Gore*: What Were They Thinking*, 68 U. CHI. L. REV. 737, 748 (2001) (explaining that *Palm Beach County Canvassing Board* "was generally viewed as resolving—not just raising—the question whether [the Presidential Electors Clause] precludes state constitutional limits on legislative action"). That is a separate issue from whether the doctrine impacts the proper interpretation of state laws governing federal elections, however, and will be discussed in a subsequent section. *See infra* Part II.A.

111. 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring); *id.* at 129–35 (Souter, J., dissenting); *see also* Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 493, 502 (2002) ("Both the concurring and dissenting opinions accept[] the premise that [the Presidential Electors Clause] prohibits state courts from changing the manner in which presidential electors are selected.").

112. *See Bush*, 531 U.S. at 111 (Rehnquist, C.J., concurring).

113. *Id.* at 113.

114. *Id.* The concurrence later elaborated that "with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate." *Id.* at 114.

115. *Id.*

116. *Id.*; *see also id.* at 115 (reiterating that, due to "the explicit requirements of Article II," the Court must assess whether a state court "has actually departed from the statutory meaning" of state laws governing presidential elections).

Justice David Souter's dissent also appears to accept the premise that the Presidential Electors Clause empowers the U.S. Supreme Court to review a state court's interpretation of a state statute governing presidential elections, albeit with great deference. In his view, "the issue is whether the judgment of the State Supreme Court has displaced the state legislature's provisions."[117] A federal court must determine whether "the law as declared by the [state] court [is] different from the provisions made by the legislature, to which the National Constitution commits responsibility for determining how each State's Presidential electors are chosen[.]"[118] Souter concludes that the Florida Supreme Court's rulings were "within the bounds of reasonable interpretation, and the law as declared is consistent with Article II."[119] His opinion accordingly implies that, had the state court's ruling gone beyond the bounds of reasonable interpretation, it would have violated the legislature's prerogatives under Article II.[120]

Despite its lengthy array of critics,[121] several commentators have endorsed this interpretation of Article II, including Professors Michael L. Wells,[122]

117. *Id.* at 130 (Souter, J., dissenting).

118. *Id.*

119. *Id.* at 131.

120. The other dissents, in contrast, flatly rejected this aspect of the independent state legislature doctrine. *See id.* at 124 (Stevens, J., dissenting) (declaring that Article II does not "grant[] federal judges any special authority to substitute their views for those of the state judiciary on matters of state law"); *id.* at 142 (Ginsburg, J., dissenting) ("Article II does not call for the scrutiny undertaken by this Court . . . . Federal courts defer to a state high court's interpretations of the State's own law."); *id.* at 147–48 (Breyer, J., dissenting) ("I cannot agree that THE CHIEF JUSTICE's unusual review of state law in this case is justified by reference . . . to Art. II . . . ." (internal citation omitted)). Justices Kennedy and O'Connor, who joined in the majority opinion but not Chief Justice Rehnquist's concurrence, did not discuss the issue. *Cf.* Ann Althouse, *The Authoritative Lawsaying Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush-Gore Litigation*, 61 MD. L. REV. 508, 513 (2002) ("Justices Souter and Breyer did not disagree with the proposition that it is possible for the state court to distort statutory interpretation to the point where it should be seen as displacing the state legislature."); Laurence H. Tribe, Erog v. Hsub *and its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 191–92 (2001) ("Plainly then, Justices Ginsburg and Souter . . . and Justice Breyer . . . would have to concede that a proper function for the Supreme Court is to police a state's highest court's interpretation of state law, whether judge- or legislature-made, to ensure compliance with governing federal constitutional norms, unless the political question doctrine renders the case nonjusticiable.").

121. *See, e.g.*, Michael Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1736 (2001) (calling this interpretation of the Presidential Electors Clause "almost laughable"); Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609, 626 (2002); Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1377 (2010); Richard Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 726–27 (2002); Schapiro, *supra* note 7, at 662; Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89, 97 (2002) ("[N]either the language of Article II, nor the limited cases prior to *Bush v. Gore* interpreting Article II, supports the concurrence.").

122. *See* Michael L. Wells, *Were There Adequate State Grounds in* Bush v. Gore*?*, 18 CONST. COMMENT. 403, 405 (2001) ("The existence of a federal constraint on state court authority, such as article II, is sufficient to justify [federal judicial] intervention."); *see also* Michael L. Wells & Jeffry M. Netter, *Article II and the Florida Election Case: A Public*

Michael McConnell,[123] Richard D. Friedman,[124] and several others,[125] as well as Judge Richard Posner.[126] Even Professor Laurence Tribe, who served on Vice President Al Gore's legal team before the U.S. Supreme Court and is generally a harsh critic of *Bush v. Gore*,[127] acknowledged that "Article II's explicit delegation of authority" to state legislatures "seemingly authorize[s]" a federal court to "disagree[]" with a state supreme court's interpretation of state law.[128] He declared that it is "entirely proper" for federal courts to engage in "some degree of second-guessing" of state courts' interpretations of state laws regulating presidential elections.[129] Federal courts, he explained, have "the institutional function of checking the state court's

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Choice Perspective, 61 MD. L. REV. 711, 725 (2002) ("[T]he rules-of-the-game norm demonstrates that Article II imposes on state courts an obligation to give considerable weight to the rules embodied in statutory texts and prior cases.").

123. *See* McConnell, *supra* note 96, at 661 (arguing that the Presidential Electors Clause "departs from the usual principle of federal constitutional law, which allows the people of each state to determine for themselves how to allocate power among their state governing institutions," and "puts the federal court in the awkward and unusual posture of having to determine for itself whether a state court's 'interpretation' of state law is an authentic reading of the legislative will").

124. *See* Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 839–40 (2001) (arguing that the rules for a presidential election "should not be changed during the determination process in such a way that leads to declaration of another slate as the winners . . . and this prohibition should apply whether the change in law is effected by the legislature or by the courts").

125. *See, e.g.*, Krent, *supra* note 111, at 511 ("[C]oncerns for predictability and accountability support the Supreme Court's decision to review state court interpretation of state law in the presidential elector setting."); Peter Berkowitz & Benjamin Wittes, *The Lawfulness of the Election Decision: A Reply to Professor Tribe*, 49 VILL. L. REV. 429, 463–80, 483 (2004) (defending the application of this aspect of the independent state legislature doctrine in the *Bush v. Gore* concurrence); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 620 (2001) (arguing that if "the state courts or state executive officials have failed properly to apply the state scheme, resulting in a gross deviation from the legislature's directives, then a federal court can review the matter under Article II"); *see also* Althouse, *supra* note 120, at 574 (stating, in reference to *Bush v. Gore*, that "there must be some limit to the extremes to which a state court can go in calling things state law"); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 344, 347 (2002) (arguing that the Supreme Court's review of "purportedly state-law based decisions" in cases arising from the 2000 election "was unremarkable, given precedent," because the Court may review a state-law ruling "that itself was alleged to violate the Federal Constitution").

Professor Henry Paul Monaghan argues that, if the Presidential Electors Clause in fact limits a state court's interpretive authority over state election law, then Chief Justice Rehnquist's concurrence should have gone even further by reviewing the Florida Supreme Court's interpretation de novo. *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1934 (2003).

126. RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 153–56 (2001).

127. *See* Tribe, *supra* note 120, at 185.

128. *Id.*

129. *Id.* at 192; *see also id.* at 185–86 (cautioning against "reading [the Presidential Electors Clause] out of the Constitution" and declaring that federal courts may review state courts' interpretations of state election laws "in appropriate circumstances").

construction of state election legislation to ensure that federal constitutional ground rules (here, those of Article II) are followed."[130]

One of the main objections to this potential implication of the independent state legislature doctrine is that it is inconsistent with the *Erie* doctrine,[131] which generally requires federal courts to abide by state courts' interpretations of state laws.[132] Critics argue that federalism-related principles bar federal courts from second-guessing a state supreme court's contemporaneous interpretation of state law. State judges are not only better positioned than federal judges to construe state election codes[133] but also have the authority to issue dispositive rulings about their meaning.[134]

Notwithstanding the *Erie* doctrine, however, there are several contexts in which the Supreme Court will independently review or adjudicate a state law issue for itself, at least to some extent.[135]

First, the Supreme Court will review a state supreme court's interpretation of state law under the Due Process Clause to determine whether a statute's language, read in light of precedent, was enough to give a criminal defendant fair notice of what the law meant. When a state court's interpretation unexpectedly and materially deviates from statutory language and precedent, the Due Process Clause prohibits the state from retroactively applying that new interpretation to the defendant in the case pending before it. In *Bouie v. City of Columbia*,[136] for example, South Carolina's trespass law prohibited "*entry* upon the lands of another" after the owner or tenant had given a notice

130. *Id.* at 193; *see also id.* at 188 ("Plainly, the federal judiciary . . . must ensure compliance with Article II and every other provision of the federal Constitution that in some way constrains the process for choosing presidential electors.").

131. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

132. *See, e.g.*, Schapiro, *supra* note 121, at 91 ("[T]he interpretive approach of the concurrence hearkens back to the Supreme Court's attitude toward state law in the period before *Erie Railroad v. Tompkins* overruled *Swift*." (footnote omitted)); Louis Michael Seidman, *What's So Bad About* Bush v. Gore*?: An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 992–93 (2001); *cf.* Issacharoff, *supra* note 107, at 642 (asserting, in discussing *Palm Beach County Canvassing Board*, that "[p]erhaps not since *Erie v. Tompkins* overruled *Swift v. Tyson* has a decision turned so heavily on the question of the source of state law" (footnotes omitted)).

133. *See* Schapiro, *supra* note 7, at 682; *cf.* Michigan v. Long, 463 U.S. 1032, 1039–40 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . ."); Klarman, *supra* note 121, at 1735 (discussing the lack of "any functional justification for affording state legislatures federal judicial protection from their own state judiciaries").

134. *See* Fid. Union Trust Co. v. Field, 311 U.S. 169, 177 (1940); *see also* Althouse, *supra* note 120, at 517 ("The Florida Supreme Court can infuse the statutory text with values about the sanctity of the vote . . . and, because of its final interpretive authority, that is what state law is.").

135. *See* Monaghan, *supra* note 125, at 1968 (describing lines of precedent in which the Court has exercised its independent judgment when evaluating state law issues in federal cases); Krent, *supra* note 111, at 495 (same); *see also* Mitchell, *supra* note 121, at 1338 (discussing "the Supreme Court's already-established prerogative to reject state supreme court interpretations of state law in cases where the justices wish to *enforce* federal rights against the states").

136. 378 U.S. 347 (1964).

"prohibiting such entry."[137] African American civil rights protestors were convicted for violating the law by holding a sit-in at a racially segregated lunch counter.[138] The South Carolina Supreme Court affirmed their convictions, ruling that the statute prohibited people from *remaining* on another's property after being asked to leave.[139]

In reversing the defendants' convictions, the U.S. Supreme Court did not contend that the South Carolina Supreme Court's interpretation of state law was erroneous. Rather, the Court held that the state court's interpretation was such an "unforeseeable judicial enlargement" of the statute's text that the Due Process Clause barred the state from applying that understanding retroactively to the protestors.[140] The statutory text did not "give fair warning of the conduct that it makes a crime."[141]

Some commentators, echoing Justice Ruth Bader Ginsburg,[142] have objected to the use of precedents such as *Bouie* on the grounds that they were responses to pervasive racial discrimination during the civil rights era by southern court systems that twisted state laws to subordinate African Americans.[143] But these due process, fair notice protections go beyond civil rights era precedent.[144]

Second, when a state court holds that a federal claim has been waived, has been forfeited, or is otherwise procedurally barred or defaulted on state law grounds, the Supreme Court will review the "adequacy" of those grounds,[145]

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137. *Id.* at 349–50 (emphasis added).
138. *Id.* at 348–49.
139. *Id.* at 350.
140. *Id.* at 353.
141. *Id.* at 350.
142. *See* Bush v. Gore, 531 U.S. 98, 140–44 (2000) (Ginsburg, J., dissenting).
143. *See* Larry Catá Backer, *Race, the Race, and the Republic: Re-conceiving Judicial Authority After* Bush v. Gore, 51 CATH. U. L. REV. 1057, 1101–03, 1103 n.158 (2002) (arguing that *Bouie* and *Patterson* "are limited to their historical and racialized context out of which broader application is inappropriate"); Seidman, *supra* note 132, at 1006–09; *see also* Pildes, *supra* note 88, at 11; Schapiro, *supra* note 121, at 101.
144. *See, e.g.*, Douglas v. Buder, 412 U.S. 430, 432 (1973) (holding that the Due Process Clause barred the state from revoking the petitioner's probation for failing to report a traffic citation, since he had been required to report any "arrest" and "no prior Missouri decisional law . . . support[s] the contention that a traffic citation has ever before been treated as the equivalent of an arrest"); Rabe v. Washington, 405 U.S. 313, 315 (1972) (per curiam) (reversing obscenity conviction because, due to the state supreme court's interpretation of the statute, the defendant's conviction was "affirmed under a statute with a meaning quite different from the one he was charged with violating"). *But see* Krent, *supra* note 111, at 521 ("*Bouie* is best understood as a means of limiting judicial vindictiveness rather than protecting offenders' reliance interests or ensuring repose.").
145. Howlett v. Rose, 496 U.S. 356, 366 (1990) ("The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review de novo."); *see also* Mitchell, *supra* note 121, at 1356 ("It is now well settled that the Supreme Court may review and set aside a state supreme court's interpretation of state law that lacks 'fair and substantial' or 'adequate' support when state courts use their interpretive powers over state law to thwart litigants' efforts to vindicate their federal rights."); *see, e.g.*, E. Brantley Webb, Note, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1213–16 (2011) (collecting cases).

both on direct appeal and in the context of a collateral challenge.[146] The Court will not allow a state court's spurious or dubious interpretation of a state law procedural requirement to preclude review of an underlying federal question. In determining the "adequacy" of state law grounds, the Court will consider several factors, including whether the procedural barrier is novel, state courts have consistently applied the barrier, and the barrier furthers valid state interests.[147] This doctrine does not necessarily require a federal court to assess whether the state court's interpretation or application of a state law procedural doctrine was correct. Rather, a federal court will determine whether the state court's ruling was generally consistent with state law and practice prior to that point.[148]

In *James v. Kentucky*,[149] for example, a criminal defendant asked a state trial judge to issue an "admonition" to the jury that the defendant's refusal to testify should not be held against him; the judge refused.[150] On appeal, the state supreme court held that the defendant had waived his underlying Fifth Amendment claim by requesting an "admonition" rather than an "instruction."[151] The U.S. Supreme Court reversed, holding that the defendant's failure to couch his request in precisely the right language was not a valid basis for refusing to consider his federal constitutional claim.[152] The Court explained that the procedural rule that the state supreme court had invoked was "not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights."[153] The state supreme court's insistence that defendants use the term "instruction" rather than "admonition," the Court continued, was an "arid ritual of meaningless form" that "further[ed] no perceivable state interest."[154]

146. *See* Coleman v. Thompson, 501 U.S. 722, 729–30 (1991) ("We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions.").

147. Ford v. Georgia, 498 U.S. 411, 423–24 (1991) ("[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." (quoting James v. Kentucky, 466 U.S. 341, 348 (1984))); *see, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233–34 (1969) (holding that the Virginia Supreme Court's precedents "do not enable us to say that the Virginia court has so consistently applied its notice requirement as to" render it an adequate basis for precluding adjudication of a federal claim); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (rejecting the state supreme court's ruling that a general objection was insufficient to preserve the defendant's federal claim because that court had recently adjudicated several issues that had been preserved through general objections).

148. *See* Radha A. Pathak, *Incorporated State Law*, 61 CASE W. RSRV. L. REV. 823, 838 (2011).

149. 466 U.S. 341 (1984).

150. *Id.* at 348–49.

151. *Id.* at 344.

152. *Id.* at 351–52.

153. *Id.* at 348–49.

154. *Id.* at 349 (internal citations omitted); *see also* Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

Third, in a wide variety of contexts, the Court will assess substantive state law issues that are antecedent to federal questions, such as claims under the U.S. Constitution or federal treaties.[155] For example, the Contracts Clause prohibits states from "impairing the Obligation of Contracts."[156] In cases arising under the Contracts Clause, the Court is not bound by a state court's determinations as to the existence or contents of an alleged contract.[157] Rather, the Court will decide for itself "whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."[158]

The extent to which the Court would defer to a state court's antecedent rulings in this context has varied over time. In the mid-nineteenth century, the Court reviewed such issues de novo, "routinely second-guess[ing] state court findings" about whether the parties had formed a contract.[159] By the end of that century, however, its review had become more deferential.[160] Some precedents declare that the Court will uphold a state court's resolution of contract-related issues unless it is "manifestly wrong"[161] or "palpably erroneous."[162] Currently, the Court will simply "accord respectful consideration and great weight to the views of the State's highest court."[163]

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155. *See* Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1052 (1977) (discussing the Supreme Court's "ancillary jurisdiction to consider the state question" when a federal issue "turns on a logically antecedent finding on a matter of state law"). One commentator suggests that, when the Court claims to be determining whether a state court had "fair support" for its antecedent state law conclusions in such cases, it is instead considering whether the state court attempted to evade federal rights. Webb, *supra* note 145, at 1206, 1208. Professor Monaghan offers a different interpretation, stating that the existence of "property" or a "contract" for purposes of a federal constitutional claim is really a federal issue that the Supreme Court may assess independently of state law. *See* Monaghan, *supra* note 125, at 1941–42.

156. U.S. CONST. art. I, § 10.

157. *See* Michael G. Collins, *Reconstructing* Murdock v. Memphis, 98 VA. L. REV. 1439, 1455–56 (2012).

158. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938); *see also* Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992).

159. Collins, *supra* note 157, at 1456. For examples of cases that reflect this tendency, see Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 443 (1862) (holding that the Court may "decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States"); Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 392 (1854) (declaring that the Court is "called upon to exercise our own judgments in the case" as to whether a contract exists for purposes of the Contracts Clause).

160. *See* Collins, *supra* note 157, at 1457 n.73. For examples of cases that demonstrate the Court's more deferential approach in this period, see Given v. Wright, 117 U.S. 648, 655–57 (1886) (assessing whether the state court's ruling that the landowners had "surrendered" their contractual exemption from taxation was "well grounded"); University v. People, 99 U.S. 309, 322–23 (1879) (according "deference" to the state court's rulings on state-law issues in Contracts Clause cases).

161. Hale v. State Bd. of Assessment & Rev., 302 U.S. 95, 101 (1937).

162. Phelps v. Bd. of Educ., 300 U.S. 319, 323 (1937).

163. *Brand*, 303 U.S. at 100; *accord Romein*, 503 U.S. at 187.

Likewise, on direct review in Takings Clause cases, the Court may assess for itself whether the plaintiff's claimed property interest was valid.[164] In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[165] the plurality declined to accord any deference to the state court's determination of whether the plaintiff was challenging the deprivation of an "established property right."[166] Florida law had granted the owners of beachfront land certain property interests extending to the mean high-water line, including the rights to access the water, have an unobstructed view of the water, and retain any accretions and relictions.[167] A statute provided that, when a locality carried out a project to remediate erosion by depositing new sand onto a beach, the rights of landowners within the remediation zone were pushed back from the mean high-water line to the "erosion control line."[168] Affected landowners would lose their right to accretions and relictions between that new erosion control line and the former mean high-water line.[169]

A group of landowners who owned beachfront property within a remediation zone sued, arguing that this law authorized unconstitutional takings of their property interests.[170] The Florida Supreme Court rejected the landowners' claim on the grounds that they held only a contingent future interest in accretions and relictions rather than a vested right subject to constitutional protection.[171] The landowners appealed to the U.S. Supreme Court, arguing that the state court's ruling was itself a "judicial taking" in violation of the U.S. Constitution.[172] According to the landowners, the Florida Supreme Court's ruling reduced the nature of their interest in accretions and relictions to a mere unvested contingency.[173] The Court concluded that it had to review Florida law de novo to determine whether the Florida Supreme Court had unconstitutionally eliminated the plaintiffs' property interests.[174] "The plurality's standard of review accords no deference to state court interpretations of antecedent state property law; instead, it conducts an independent assessment of state law."[175]

The Court has applied similarly aggressive review where a state law issue is antecedent to enforcing rights under a treaty. *Fairfax's Devisee v. Hunter's*

164. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 726 n.9 (2010) (plurality opinion).
165. 560 U.S. 702, 725 (2010).
166. *Id.* at 726 n.9. The Court went on to note, however, that "[a] property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court." *Id.*
167. *Id.* at 708. "Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes." *Id.*
168. *Id.* at 711–12.
169. *Id.* at 709–11.
170. *Id.* at 711–12.
171. *Id.* at 712.
172. *See id.* at 711–12.
173. *See id.*
174. *Id.* at 726 n.9.
175. Webb, *supra* note 145, at 1231.

Lessee,[176] for example, was a suit over whether the Commonwealth of Virginia had violated treaties between the United States and Great Britain by seizing certain land in Virginia's Northern Neck that a previous owner, the late Lord Fairfax, had devised to a British subject, Denny Fairfax.[177] The Court held that it need not determine whether the seizure violated a treaty, however, because the Virginia Court of Appeals had erred in concluding that the Commonwealth had validly taken title to the land under state law.[178] In another early case alleging treaty violations, the Court similarly claimed the power to ascertain the "true construction" of state law to determine whether the plaintiff had still owned certain land at the time the peace treaty with Great Britain went into effect.[179] In these early cases, the Court appeared to review de novo the state law issues that were antecedent to the plaintiffs' claims under treaties.[180]

The U.S. Supreme Court has gone so far as to review a state supreme court's interpretation of its own state constitution in cases involving interstate compacts. In *West Virginia ex rel. Dyer v. Sims*,[181] West Virginia had joined an interstate compact establishing an interstate commission to control pollution in the Ohio River.[182] West Virginia's auditor later refused to pay the state's share of the commission's expenses.[183] In a mandamus action brought against the auditor, the West Virginia Supreme Court held that the compact was unenforceable because the West Virginia legislature had lacked authority to approve it under the state constitution.[184] The U.S. Supreme Court reversed.[185] Construing the West Virginia Constitution for itself,[186] the Court concluded that the legislature had authority to enter into the compact, despite the state supreme court's ruling to the contrary.[187]

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176. 11 U.S. (7 Cranch) 603 (1813).

177. *Id.* at 606–13.

178. *Id.* at 626–27 (holding that, because the Commonwealth's title to the land was "inchoate and imperfect," it was "wholly unnecessary" to consider whether the Commonwealth's purported seizure of the land violated the peace treaty between the United States and Great Britain); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 357–58 (1816) (reiterating that the Court could not "decide whether a title [to land] be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity").

179. Smith v. Maryland, 10 U.S. (6 Cranch) 286, 305 (1810) (holding that it was "necessary . . . to inquire whether the confiscation, declared by the state laws, was final and complete, at the time the treaty was made," to determine whether the state had violated the plaintiff's rights under the treaty).

180. *See* Collins, *supra* note 157, at 1455.

181. 341 U.S. 22 (1951).

182. *Id.* at 24.

183. *Id.* at 25.

184. *Id.* at 26.

185. *Id.* at 32.

186. *Id.* at 28 ("[W]e are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.").

187. *Id.* at 32 ("[W]e conclude that the obligation of the State under the Compact is not in conflict with . . . the State Constitution."); *cf.* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206–07 (1864) (rejecting a state supreme court's interpretation of its state's constitution, before the adoption of the *Erie* doctrine).

Opponents also assert that applying the independent state legislature doctrine to state statutory interpretation issues would unnecessarily federalize virtually every aspect of federal elections.[188] When states grant their courts jurisdiction over election-related disputes, they necessarily authorize those courts—not federal courts—to act as the primary expositors of state law,[189] according to whatever tools of statutory interpretation those courts typically apply.[190] State courts have the same authority over state election law as they have in other contexts, including the "power to make a novel post-election construction of forum election law."[191]

Conversely, "[c]onstitutional grants of power to legislatures do not ordinarily give rise to special constitutional rules of statutory interpretation."[192] The Presidential Electors Clause takes the legislatures as it finds them: "as institutions embedded in a whole state government, a system that would necessarily include a constitution and a judicial system."[193] Moreover, as a practical matter, applying the independent state legislature doctrine in this respect may require courts to interpret laws governing federal elections using a different methodology than those courts apply to the rest of the election code, potentially leading to inconsistent and unpredictable results.[194]

On the other hand, allowing federal courts to enforce broad outer boundaries on how state courts interpret state election laws may contribute

188. *See* Issacharoff, *supra* note 107, at 646–47 ("[F]ederal constitutional review of changed state election procedures would in turn require that every local and state election procedure be subject to federal judicial scrutiny."); *see also* Schapiro, *supra* note 121, at 116 ("The Article II theory federalizes any state-law challenge to such [election] procedures."); *cf.* Friedman, *supra* note 124, at 841 ("Article II should not become a tool to federalize state law concerning disputes in determining the results of the state's election for presidential electors by depriving state courts of the usual leeway to decide difficult cases."); Pildes, *supra* note 121, at 719 (emphasizing the need to "avoid turning every disputed state election law ruling into a federal constitutional question").

189. *See* Seidman, *supra* note 132, at 995–96 ("Since the legislature clearly contemplated a state judicial role in the contest procedures and was silent concerning an analogous federal role, it seems plausible to assume that it meant for state, rather than federal judges to have the final word on disputed issues of state law." (footnote omitted)); *see also* Klarman, *supra* note 121, at 1735–36.

190. *See* Schapiro, *supra* note 121, at 98 (arguing that the Presidential Electors Clause "could constitute a reference to state law, as that law commonly is made, involving the usual interplay of state statutes, the state constitution, and judicial interpretations"); Seidman, *supra* note 132, at 995 ("What counts as 'ordinary' construction is, itself, a matter for state law."). Professor Michael Klarman also points to the lack of evidence "that the Framers of Article II intended to bolster the role of state legislatures in the selection of presidential electors by constraining state courts adjudicating contests arising out of presidential elections in their ability to resolve ambiguities in the meaning of state election law." Klarman, *supra* note 121, at 1735.

191. Weinberg, *supra* note 121, at 626.

192. Wells & Netter, *supra* note 122, at 714; *see also* Weinberg, *supra* note 121, at 625 ("Nothing in the Constitution requires a state election code or its administration to be unmediated in these usual ways by courts.").

193. Althouse, *supra* note 120, at 519; *see also* Schapiro, *supra* note 7, at 663 ("Without an understanding of a particular state's system, it is impossible to comprehend the appropriate relationship between state courts and state legislatures.").

194. *See* Schapiro, *supra* note 121, at 115.

to election integrity.[195] Requiring judges to follow the plain meaning of election laws and avoid major departures from text and precedent prevents them from changing the rules of an election after the Rawlsian veil of ignorance has been lifted and the beneficiaries of different potential approaches are known.[196] In contrast, allowing state judges to make substantial, unexpected deviations from the apparent meaning of state election laws creates the inevitable "danger that a rule will be adopted because it will produce a particular result, and then rationalized on other grounds."[197] Providing an additional check on state judges—many of whom are themselves elected—can deter such departures from preexisting rules, especially in high-stakes contexts such as a hotly contested presidential election. As Professor Rick Pildes explains, "mak[ing] state law completely autonomous would give too little weight . . . to a legitimate constitutional interest in ensuring the integrity of electoral processes."[198]

Applying the independent state legislature doctrine in this manner may also bolster predictability, consistency, and stability, which are essential principles for an election.[199] Unpredictable changes in state election law—or the apparent meaning of an election-related statute—can undermine the perceived legitimacy of the electoral process.

Additionally, federal courts are responsible for enforcing the U.S. Constitution's structural grants of authority to particular governmental entities. As Professor Tribe has argued, when the Constitution specifies "how a decision otherwise internal to a state's system of governance should be made, that provision's enforcement is a matter for the federal judiciary, and ultimately the Supreme Court, subject to the political question doctrine."[200] James Madison expressly recognized during the constitutional convention that "[t]he State Judiciarys [sic] had not & he presumed wd. not be proposed as a proper source of appointment" of the presidential

195. *See* Wells & Netter, *supra* note 122, at 712 ("Article II serves as a guarantee that election rules are put in place before the election, so as to minimize the problem of self-dealing by partisan officials (whatever posts they hold) who know how their rulings will affect the outcome."); *cf.* Issacharoff, *supra* note 107, at 639 (arguing that "the Court may well have been justified in its desire to expand constitutional scrutiny to cover on-the-run, post hoc alterations of electoral practices" but that "institutional actors" other than the Supreme Court are capable of enforcing such constraints).

196. Krent, *supra* note 111, at 496 ("State court judges might alter state law in a way that favors their own political leanings or futures."); McConnell, *supra* note 96, at 662 ("A legislative code is enacted behind a veil of ignorance; no one knows (for sure) which rules will benefit which candidates . . . . Courts and executive officials making judgments after the fact operate behind no such veil of ignorance."); Wells & Netter, *supra* note 122, at 724–25. Professor Pildes makes the important point that, to the extent a federal court's goal is to prevent a state court from making unexpected changes to state election law, it might reasonably choose to consider not only "written legal texts but . . . longstanding judicial and administrative practices consistent with those texts." Pildes, *supra* note 121, at 708.

197. McConnell, *supra* note 96, at 662.

198. Pildes, *supra* note 121, at 694.

199. Krent, *supra* note 111, at 496, 508.

200. Tribe, *supra* note 120, at 188.

electors.[201] To the extent the Constitution vests authority over federal elections specifically in the state legislature, a state court cannot be free to override or nullify the legislature's prerogatives by imposing its own preferred policy or outcome under the guise of interpretation.[202]

Professor Harold J. Krent suggests that the Framers may have chosen to delegate such power to the legislature because it "is directly accountable to the electorate and arguably is less likely subject to presidential influence than a governor hoping for a cabinet position (or other influence) or than a state judge hoping for elevation to the federal bench (or other position)."[203] Professor McConnell adds that the Presidential Electors Clause's delegation of authority specifically to the legislature "ensures that the manner of selecting electors will be chosen by the most democratic branch of the state government."[204] Regardless of the reason for the Constitution's use of this term—or whether the Framers' choice of language was purposeful and deliberate—allowing some limited degree of federal review of state courts' interpretations of laws governing federal elections may be a reasonable way of enforcing that allocation of authority. From this perspective, it is entirely appropriate for federal courts to "see that all state actors stay within the original constitutional scheme" due to "the strong federal interest in the selection of the President."[205]

Any such review would have to be deferential to the state courts,[206] however, to ensure that federal courts do not simply substitute their own judgment for that of state courts concerning ambiguous language or reasonably debatable interpretations of state laws.[207] Commentators have disagreed, however, over the degree of deference required. Justice Rehnquist's *Bush v. Gore* concurrence claims that Article II requires the Court to assess whether a state court has "impermissibly distorted" state law "beyond what a fair reading required."[208] Some commentators have adopted

201. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 110 (Max Farrand ed., 1911).

202. Krent, *supra* note 111, at 533–34.

203. *Id.* at 509.

204. McConnell, *supra* note 96, at 661.

205. Epstein, *supra* note 125, at 620; *see also* Pildes, *supra* note 121, at 693 (explaining that the "force" of the constitutional right to vote is "at its strongest when it comes to national elections—particularly elections for the Presidency").

206. *See* Tribe, *supra* note 120, at 193 ("Some degree of deference, within an outer perimeter whose definition is, of course, a federal question, is required notwithstanding the presence of a controlling federal norm."); Friedman, *supra* note 124, at 837 ("[T]he interpretations of the state supreme court are entitled to substantial deference."). *But see* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 88–89 (2002) (arguing that the Supreme Court should overturn state courts' rulings on state law questions that are antecedent to federal claims only when there is a "concrete indication that the state court has deliberately manipulated state law to thwart federal law and then evade Supreme Court review"); Monaghan, *supra* note 125, at 1934 (arguing that Supreme Court review of state courts' rulings concerning state law issues should be de novo).

207. *Cf.* Pildes, *supra* note 121, at 710 (noting the "real danger that federal courts will simply substitute their own judgment about the proper meaning of state law").

208. Bush v. Gore, 531 U.S. 98, 115 (2001) (Rehnquist, C.J., concurring).

a similar approach, calling on federal courts to assess whether state law offered "fair support" for the state court's interpretation of the statutes at issue.[209] This standard reflects Supreme Court precedents allowing the Court to "review and set aside a state supreme court's interpretation of state law that lacks 'fair and substantial' or 'adequate' support when state courts use their interpretive powers over state law to thwart litigants' efforts to vindicate their federal rights."[210]

Professor Krent contends that the *Bush* concurrence was not sufficiently deferential to the Florida Supreme Court's interpretation of the state election code, however.[211] He suggests that a federal court may step in only when "the state court's construction is both unsupportable by reference to conventional textual analysis and relevant precedents and, in addition, threatens to gut the legislature's control of the process to select presidential electors."[212] Other commentators likewise propose that Article II is violated only when the state court's interpretation of state law is "clearly implausible,"[213] "manifestly unreasonable,"[214] or "a gross deviation from the scheme outlined in the statute."[215] Of course, however the standard is articulated, statutory interpretation unavoidably involves a degree of subjectivity and uncertainty,[216] posing challenging questions about when a state court's interpretation of state election laws is "too wrong."

Some courts have held that the Due Process Clause imposes somewhat comparable restrictions on courts' interpretations of laws governing elections.[217] In *Roe v. Alabama* (*Roe I*),[218] for example, an Alabama statute required that absentee ballots be witnessed or notarized.[219] A state court nevertheless ordered election officials to count ballots that did not meet these requirements.[220] The leading candidates in two very close races, as well as

209. *See* Webb, *supra* note 145, at 1198; Pildes, *supra* note 88, at 10.

210. Mitchell, *supra* note 121, at 1356; *see also* Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944) (holding that the Court must consider whether a state court's "non-federal grounds" for denying a federal constitutional claim "rest[ed] upon a fair or substantial basis").

211. *See* Krent, *supra* note 111, at 496–97.

212. *Id.* at 533.

213. Friedman, *supra* note 124, at 841.

214. Tribe, *supra* note 120, at 193.

215. Epstein, *supra* note 125, at 619; *see also* Wells & Netter, *supra* note 122, at 728 (suggesting that a federal court must assess whether a state court "brought about a major change in the rules as they existed before the election").

216. *See* Epstein, *supra* note 125, at 634; *see also* Backer, *supra* note 143, at 1074 ("The difference between interpretation and legislation is merely a matter of degree.").

217. *See* Pildes, *supra* note 121, at 702–06; *cf.* Issacharoff, *supra* note 107, at 641–42 n.21 (arguing that constitutional protection against "after-the-fact alterations of electoral processes in a potentially outcome-determinative fashion" should not "be limited to presidential elections alone" under Article II but rather arise from "a more central constitutional command").

218. 43 F.3d 574 (11th Cir. 1995).

219. *See id.* at 577.

220. *Id.* at 578.

a voter who supported them, sued in federal court, claiming that this change in vote counting rules violated their due process rights.[221]

The Eleventh Circuit certified a question about the proper interpretation of the statute at issue to the Alabama Supreme Court,[222] which responded that unsigned, unnotarized ballots were valid and could be counted.[223] The Eleventh Circuit ultimately concluded that adopting and applying such an unexpected departure from both the plain text of the statute and the state's past practice after the election had already concluded was fundamentally unfair and violated due process.[224] It explained that, if Alabama candidates and voters had known before the election that absentee ballots need not be witnessed and notarized, "campaign strategies would have taken this into account and supporters of [the plaintiff candidates] who did not vote would have voted absentee."[225]

Similarly, in *Griffin v. Burns*,[226] Rhode Island election officials had permitted voters to cast absentee and shut-in ballots in primary elections for local offices.[227] After the elections were over, one of the losing candidates sued, and the Rhode Island Supreme Court ordered the invalidation of all absentee and shut-in ballots because state law did not authorize their use in primary elections.[228] The exclusion of those ballots changed the outcome of a race for the Democratic Party's nomination for Providence city council.[229]

Voters who had cast absentee and shut-in ballots sued in federal court, claiming that the retroactive application of the Rhode Island Supreme Court's unexpected new interpretation of state law violated their constitutional rights.[230] They pointed out that the state had authorized the use of absentee and shut-in ballots in primary elections over the previous seven years.[231] The First Circuit held that the plaintiffs' right to vote had been violated because election officials had "sanctioned the use of certain ballots" that the state supreme court "quashed after the results of the election were in."[232] Retroactively applying such a material change in the rules governing an election "fail[ed] on its face to afford fundamental fairness."[233]

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221. *Id*. at 578–79.
222. *Id.* at 583.
223. *See* Roe v. Alabama (*Roe II*), 68 F.3d 404, 406 (11th Cir. 1995).
224. *Id*. at 408 (stating that the evidence in favor of the plaintiffs' claim was even "stronger" than the court "could have expected"); *see also Roe I*, 43 F.3d at 581 (stating that counting absentee ballots that were neither witnessed nor notarized "implicate[s] fundamental fairness and the propriety of the two elections at issue").
225. *Roe I*, 43 F.3d at 582. The court further explained that counting votes which failed to satisfy statutory requirements "would dilute the votes of those voters who met the [statutory] requirements . . . as well as those voters who actually went to the polls on election day." *Id.* at 581.
226. 570 F.2d 1065 (1st Cir. 1978).
227. *Id.* at 1067.
228. *Id.* at 1068.
229. *Id.*
230. *Id.* at 1068–69.
231. *Id.* at 1079.
232. *Id*. at 1078–79.
233. *Id.* at 1078.

Thus, the Due Process Clause already empowers federal courts to determine whether a state court's ruling effectively changed the rules of an election by unexpectedly and materially departing from a statute's apparent meaning or a jurisdiction's past practice—at least where voters had acted (or refrained from acting) in reasonable reliance on a particular understanding of the rules.[234] The Elections Clause and Presidential Electors Clause may similarly prevent a state court from effectively changing the rules of an election in ways that can unfairly impact the outcome, even with regard to issues that do not implicate voters' reliance interests.

Miller v. Treadwell[235] provides a good example of how the independent state legislature doctrine can be applied in this manner. That case arose from U.S. Senator Lisa Murkowski's successful write-in campaign in the 2010 Alaska Senate election.[236] Alaska law specified that a write-in vote is valid only if it contains the name of a candidate "as it appears on the write-in declaration of candidacy."[237] The Alaska Supreme Court held that write-in votes in which a candidate's name had apparently been misspelled—and therefore did not match the name on any declaration of candidacy—were nevertheless valid.[238] A losing candidate challenged the results of the Senate race in federal court, arguing that counting misspelled write-in votes violated the Elections Clause because it was inconsistent with the plain text of the underlying statute.[239] The district court determined that the Alaska Supreme Court's interpretation was not "clearly contrary to the face of the statute and its findings were entirely consistent with the State's past practice of making voter intent a priority."[240] Thus, after deferentially reviewing the state supreme court's interpretation of state law, the federal district court rejected the Elections Clause claim.[241]

Particularly for presidential elections, allowing federal courts to police the outer boundaries of state courts' interpretations of state election laws may also deter far more potentially destabilizing responses by other governmental actors. On the one hand, Congress might attempt to reject a state's electoral votes if it concludes that the electors were appointed based on a state court's material deviation from state law.[242] Or a legislature may attempt to appoint

234. *See* Schapiro, *supra* note 121, at 104–05 (emphasizing that *Roe II* and *Griffin* vindicated voters' reliance interests).

235. 736 F. Supp. 2d 1240 (D. Alaska 2010).

236. William Yardley, *Murkowski Wins Alaska Senate Race*, N.Y. TIMES (Nov. 17, 2010), https://www.nytimes.com/2010/11/18/us/politics/18alaska.html [https://perma.cc/7QMY-7H67].

237. *Miller*, 736 F. Supp. 2d at 1242 (quoting ALASKA REV. STAT. § 15.15.360(a)(11) (repealed 2011)).

238. *Id.*

239. *Id.*

240. *Id.* at 1243.

241. *Id.*; *cf.* Moore v. Hosemann, No. 3:08cv573, 2008 WL 11439423, at *1–2 (S.D. Miss. Sept. 29, 2008) (assessing whether the Mississippi secretary of state's actions were a "significant departure from, or go beyond a fair reading of, state election laws" in a challenge under the Presidential Electors Clause).

242. *See* 3 U.S.C. §§ 5, 15 (regulating Congress's process for counting electoral votes).

its own competing slate of electors based on its interpretation of state law.[243] Allowing the federal judiciary to reaffirm the reasonableness of a state supreme court's ruling—or to provide a judicial remedy for a patently unreasonable ruling—might reduce the likelihood that Congress or a legislature would attempt to resort to such extraordinary measures that seem much more likely to undermine public confidence in the electoral process.

C. Barring Federal Review Under the Political Question Doctrine

During the 2020 election cycle, a few federal courts concerningly held or suggested that the Elections Clause and Presidential Electors Clause barred them from adjudicating certain types of constitutional challenges to state election laws. Under this problematic view, the Constitution's grants of authority to legislatures to regulate federal elections preclude federal courts from reviewing at least some types of legislative action concerning such elections under the political question doctrine. This reasoning rests in large part on the U.S. Supreme Court's ruling in *Rucho v. Common Cause*,[244] which cited the Elections Clause in support of its conclusion that political gerrymandering claims are nonjusticiable.[245]

The Eleventh Circuit's ruling in *Jacobson v. Florida Secretary of State*,[246] for example, held that a challenge to Florida's seventy-year-old ballot-order statute was nonjusticiable.[247] The law specified that, for each office, the candidate belonging to the incumbent governor's political party must be listed first on the ballot, followed by the candidate of whichever party received the second-highest number of votes in the most recent gubernatorial election.[248] After holding that the plaintiffs lacked standing to challenge the statute,[249] the court went on to declare that their claims also raised nonjusticiable political questions.[250]

The Eleventh Circuit explained that the plaintiffs did not contend that the ballot-order statute prevented anyone from voting or made it unduly burdensome for them to do so.[251] Instead, they argued that the law "confers an unfair partisan advantage" on candidates of the governor's party.[252] The complaint asked the court "to pick among various conceptions of a politically 'fair' ballot order that have no basis in the Constitution."[253] The court opined that, under *Rucho*, it was constitutionally inappropriate for a federal court to determine whether an election-related rule confers an unfair advantage on

243. *See* Wells & Netter, *supra* note 122, at 715; *see also infra* Part III.A.
244. 139 S. Ct. 2484 (2019).
245. *Id.* at 2506 ("The only provision in the Constitution that specifically addresses the matter [of political gerrymandering] assigns it to the political branches." (citing U.S. CONST. art. I, § 4, cl. 1)).
246. 974 F.3d 1236 (11th Cir. 2020).
247. *Id.* at 1242.
248. *See* FLA. STAT. § 101.151 (2020).
249. *Jacobson*, 974 F.3d at 1252.
250. *Id.* at 1260–69.
251. *Id.* at 1262.
252. *Id.*
253. *Id.* at 1261.

any particular political party.[254] Citing the Elections Clause, the court later added, "Our founding charter never contemplated that federal courts would dictate the manner of conducting elections—in this lawsuit, down to the order in which candidates appear on a ballot."[255] Accordingly, the case presented "nonjusticiable political questions."[256] Some other courts have already applied *Jacobson*'s political question holding.[257]

Jacobson's conception of the political question doctrine in this context is quite narrow. *Jacobson* readily acknowledges that the doctrine is inapplicable where a plaintiff alleges that a law "make[s] it more difficult for individuals to vote . . . or to choose the candidate of their choice."[258] Rather, under *Jacobson*, courts are barred from engaging in a subjective, ad hoc analysis of whether aspects of the election that do not impose burdens or restrictions on voters are fair. As a practical matter, it seems likely that any case subject to dismissal as nonjusticiable under *Jacobson* could alternatively have been dismissed for failure to state a claim, due to the lack of an underlying constitutional restriction for the court to enforce.[259] Treating the issue as a question of justiciability has some ancillary consequences, however. For example, a court could consider a potential justiciability-related deficiency in a plaintiff's claims sua sponte—and even for the first time on appeal.

The U.S. District Court for the Northern District of Georgia's ruling in *Coalition for Good Governance v. Raffensperger*[260] adopted an even broader conception of the political question doctrine, declining jurisdiction over a sweepingly broad range of claims.[261] The plaintiffs had brought a constitutional challenge to Georgia's impending 2020 primary election.[262] They asked the district court to postpone the election, require the use of paper ballots instead of touchscreen ballot-marking devices, extend the deadline for the return of completed absentee ballots, and revise the instructions and internal processes for absentee voting.[263]

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254. *See id.* at 1262.
255. *Id.* at 1269.
256. *Id.*
257. *See, e.g.*, Mecinas v. Hobbs, 468 F. Supp. 3d 1186, 1209 (D. Ariz. 2020) (holding that a challenge to Arizona's ballot-order statute raised a "nonjusticiable political question"), *appeal docketed*, No. 20-16301 (9th Cir. July 6, 2020); S.P.S. *ex rel.* Short v. Raffensperger, 479 F. Supp. 3d 1340, 1344 (N.D. Ga. 2020) (refusing to grant a preliminary injunction against Georgia's ballot-order statute because "*Jacobson* found that Plaintiffs' alleged injury of vote dilution based on an average measure of partisan advantage is legally insufficient to establish standing to challenge the constitutionality of the ballot order statute"). *But see* Nelson v. Warner, 472 F. Supp. 3d 297, 312–13 (S.D.W. Va. 2020) (holding that a challenge to West Virginia's ballot-order statute was justiciable).
258. *Jacobson*, 974 F.3d at 1261 (citations omitted).
259. *Cf. id.* at 1264 ("One possible response to the preceding analysis is that because the voters and organizations have not alleged any burden on voting rights, their complaint fails on the merits though it remains justiciable.").
260. No. 1:20-cv-1677-TCB, 2020 WL 2509092 (N.D. Ga. May 14, 2020), *appeal dismissed*, No. 20-12362-BB, 2020 WL 5753330 (11th Cir. Aug. 17, 2020).
261. *Id.* at *1, *3.
262. *Id.* at *1.
263. *Id.*

The district court held the case was nonjusticiable and dismissed it for lack of subject matter jurisdiction.[264] It explained, "The Framers of the Constitution did not envision a primary role for the courts in managing elections, but instead reserved election management to the legislatures . . . . [C]ourts should not substitute their own judgments for state election codes."[265] The court added that no "judicially discoverable and manageable standards" existed for determining whether state officials had done enough to respond to the risks of the COVID-19 pandemic.[266] *Coalition for Good Governance* reflects a much broader understanding of the political question doctrine than *Jacobson*, invoking it even where plaintiffs challenged laws that they claimed unconstitutionally burdened their ability to vote.

Likewise, in *Mi Familia Vota v. Abbott*,[267] the plaintiffs argued that Texas's election laws were unconstitutionally burdensome due to the ongoing COVID-19 pandemic and asked the federal district court to order a panoply of more than a dozen reforms.[268] Pointing out that the Constitution grants authority to the legislature to determine the "Manner" in which federal elections are conducted, the court held that the political question doctrine barred it from exercising jurisdiction over the plaintiffs' claims.[269] The court explained that the plaintiffs were impermissibly asking it to "mandate and implement its own judgment about the proper administration of elections, thereby encroaching upon the 'constitutional commitment' of the administration of elections to the state legislatures and to Congress."[270]

The Fifth Circuit reversed in relevant part, holding that the plaintiffs' claims alleging racial discrimination in violation of the Constitution and Voting Rights Act were justiciable and did not constitute political questions.[271] It did not address the justiciability of the plaintiffs' other constitutional challenges under the First and Fourteenth Amendments because it concluded they were properly dismissed on other grounds.[272] Other courts have likewise properly rejected such political question arguments.[273]

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264. *Id.* at *3–4.

265. *Id.* at *3.

266. *Id.*; *see also id.* ("[W]hether the executive branch has done enough is a classic political question involving policy choices.").

267. 484 F. Supp. 3d 435 (W.D. Tex. 2020), *rev'd in part and remanded*, 977 F.3d 461 (5th Cir. 2020).

268. *Id.* at 440.

269. *Id.* at 448.

270. *Id.* at 444 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

271. 977 F.3d 461, 467 (5th Cir. 2020); *see also* Texas Democratic Party v. Abbott, 961 F.3d 389 (5th Cir. 2020) (exercising jurisdiction over a constitutional challenge alleging that Texas's rules for absentee voting were unduly burdensome as applied in the context of the COVID-19 pandemic).

272. *Mi Familia Vota*, 977 F.3d at 467.

273. *See, e.g.*, Harding v. Edwards, 484 F. Supp. 3d 299, 306–07 (M.D. La. 2020); People First of Ala. v. Merrill, 467 F. Supp. 3d 1179, 1205 (N.D. Ala.), *stay denied*, 815 F. App'x 505 (11th Cir.), *stay granted*, 141 S. Ct. 190 (2020); Middleton v. Andino, 488 F. Supp. 3d 261, 292 (D.S.C.), *stay granted*, No. 20-2022, 2020 WL 5739010 (4th Cir. Sept. 24, 2020) (order), *vacated and reh'g en banc granted*, 976 F.3d 403 (en banc) (mem.) (4th Cir.), *stay*

As *Rucho* demonstrates, certain aspects of the political question doctrine blur the line between nonjusticiability and failure to state a claim. The Elections Clause and Presidential Electors Clause, however, do not purport to limit the federal judiciary's jurisdiction. The Bill of Rights, Reconstruction Amendments, and subsequent voting rights amendments cut across those clauses, limiting the scope of power they convey.[274] When plaintiffs allege a violation of their constitutional rights or federal voting-related statutes, they raise a federal question appropriate for judicial resolution.[275] Of course, a plaintiff's allegations may not actually amount to a constitutional or statutory violation, or a plaintiff may challenge a policy decision within the legislature's constitutional discretion. But the proper response should generally be to dismiss the claim on the merits rather than to hold that the court lacks power to even consider it in the first place.

II. THE DOCTRINE AND STATE CONSTITUTIONS

One of the independent state legislature doctrine's most controversial potential applications is allowing legislatures to regulate federal elections "independently" of state constitutions. As discussed above,[276] under this claimed corollary to the doctrine, a legislature's authority to regulate federal elections remains restricted by the implicit limitations of the Elections Clause and the Presidential Electors Clause; the express limitations of the Bill of Rights, Reconstruction Amendments, and other constitutional amendments protecting voting rights; and federal statutes.[277] Legislatures are also subject to the state constitution's procedural requirements governing the lawmaking process.[278] Under this theory, however, the state constitution may not impose additional substantive limits or restrictions on the scope of the authority that the Elections Clause and Presidential Electors Clause grant specifically to the state legislature to regulate federal elections.

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denied, 990 F.3d 768 (4th Cir.) (en banc) (mem.), *stay granted*, 141 S. Ct. 9 (mem.), *appeal dismissed as moot*, No. 20-2022, 2020 WL 8922913 (4th Cir. Dec. 17, 2020); Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158, 192 (M.D.N.C.), *amended on reconsideration*, 2020 WL 6591367 (M.D.N.C. Oct. 5, 2020) (amending briefing requirements); *see also* New Ga. Proj. v. Raffensperger, 484 F. Supp. 3d 1265, 1287 n.18 (N.D. Ga.), *stay granted*, 976 F.3d 1278 (11th Cir. 2020), *appeal dismissed*, No. 20-13360-DD, 2020 WL 4128939 (11th Cir. Mar. 9, 2021).

274. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995) (holding that the Elections Clause does not empower the legislature to "evade important constitutional restraints").

275. *See* 28 U.S.C. § 1331.

276. *See supra* notes 26–30 and accompanying text.

277. *See* Morley, *supra* note 8, at 16–21 (discussing in greater detail the limits to which state legislatures are subject when regulating elections).

278. *See infra* Part II.B.

A. Substantive Restrictions on Legislatures' Authority

In earlier work, I detailed the history of this aspect of the independent state legislature doctrine,[279] so this section presents only a brief summary. There does not appear to be any indication that the Framers specifically considered whether legislatures would be bound by the substantive constraints of their state constitutions, either at the Constitutional Convention or during the ratification debates.[280] The earliest known example of the doctrine's invocation appears to be the Massachusetts Constitutional Convention of 1820.[281] Justice Joseph Story successfully argued against a proposal to include a provision in the Massachusetts Constitution that would require the state to appoint members of Congress and presidential electors from individual districts rather than at-large.[282] He explained that the proposed amendment was "plainly a violation of the [U.S.] [C]onstitution," because the Convention did not "have a right to insert in our [state] constitution a provision which controls or destroys a discretion . . . which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States."[283]

On three known occasions in the nineteenth century, state supreme courts issued advisory opinions concerning conflicts, or potential conflicts, between a state statute (or piece of proposed legislation) and the state constitution with regard to federal elections. In each of those matters, the court concluded that the legislative measure would be enforceable, even if it were contrary to a state constitutional provision.[284] For example, in *In re Plurality Elections*,[285] the Rhode Island Constitution required candidates to receive a majority of votes to win an election, while a state law allowed congressional candidates to win with only a plurality.[286] The Rhode Island Supreme Court questioned whether that state constitutional provision applied to congressional elections.[287] To the extent it did apply to such races, however, that provision was "of no effect, except in so far as it may be voluntarily deferred to by the general assembly as an indication of the popular will."[288] The court went on to reiterate that, if the state constitution's majority-vote requirement were "construed to extend" to congressional elections, then it would be "in conflict

279. *See* Morley, *supra* note 8, at 27–37. For competing views that question the doctrine's historical foundation, see Hayward H. Smith, Revisiting the History of the Independent State Legislature Doctrine (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923205 [https://perma.cc/83Y9-CPG7]; Smith, *supra* note 7.

280. *See* Morley, *supra* note 8, at 27–32.

281. MASS. JOURNAL, *supra* note 11, at 38–40.

282. *Id.* at 109–13. Congress had not yet enacted the federal statute requiring states to elect U.S. Representatives by congressional district. *See* 2 U.S.C. § 2c.

283. MASS. JOURNAL, *supra* note 11, at 109–10 (statement of Story); *see also* Morley, *supra* note 8, at 38–40.

284. *See In re* Plurality Elections, 8 A. 881, 882 (R.I. 1887); Opinion of the Justices, 45 N.H. 595, 596, 599 (1864); Opinion of the Judges, 37 Vt. 665, 677 (1864).

285. 8 A. 881 (R.I. 1887).

286. *Id.* at 882.

287. *Id*.

288. *Id.*

with" the Elections Clause because it would "impose a restraint upon the power of prescribing the manner of holding such elections which is given to the legislature by the constitution of the United States without restraint."[289] The court applied the same reasoning with regard to presidential elections and the Presidential Electors Clause.[290]

The doctrine was invoked during the nineteenth century by both the U.S. House and U.S. Senate in resolving multiple election contests, as well.[291] In *Baldwin v. Trowbridge*,[292] for example, the state constitution required people to cast their votes in person at their precinct, while a state law allowed military voters serving in the Union Army to cast absentee ballots.[293] The independent state legislature doctrine was repeatedly invoked throughout debates in the House concerning those absentee ballots.[294] The House concluded that the absentee ballots at issue were valid because a state constitution could not limit the legislature's power to regulate federal elections.[295]

The U.S. Supreme Court likewise discussed the doctrine approvingly. In the 1892 case *McPherson v. Blacker*,[296] in the course of upholding a Michigan law awarding presidential electors by congressional district, the Court quoted a U.S. Senate report for the proposition that the authority conferred by the Presidential Electors Clause

> cannot be taken from [state legislatures] or modified by their State constitutions any more than can [their] power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[297]

The Court went on to apply this aspect of the doctrine in cases dealing with Article V's delegation of authority specifically to state legislatures to ratify federal constitutional amendments.[298] Most notably, in *Leser v. Garnett*,[299] litigants challenged the validity of the Nineteenth Amendment's ratification on the grounds that some state constitutions barred their legislatures from

289. *Id.*
290. *Id.*
291. *See* Morley, *supra* note 8, at 45–65; *see also* U.S. CONST. art. I, § 5, cl. 1 (specifying that each chamber of Congress is the sole judge of its members' "Elections, Returns and Qualifications").
292. H.R. REP. NO. 39-13 (1866) (majority report), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).
293. *Id.* at 3.
294. *See* Morley, *supra* note 8, at 50 & n.249.
295. CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).
296. 146 U.S. 1 (1892).
297. *Id.* at 34–35 (quoting S. REP. NO. 43-395 (1874)).
298. *See, e.g.*, Hawke v. Smith, 253 U.S. 221, 225 (1920) (holding that a legislature's ratification of the Eighteenth Amendment was not subject to public referendum); *see also* Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it.").
299. 258 U.S. 130 (1922).

ratifying such an amendment.[300] Rejecting that argument, the Court held that ratification of federal constitutional amendments "is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."[301]

In 2015, however, the 5–4 majority in *Arizona State Legislature v. Arizona Independent Redistricting Commission* tersely rejected this corollary of the doctrine.[302] The Court declared, "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."[303] It rejected any comparison to Article V precedents like *Leser* on the grounds that the ratification of constitutional amendments differed from redistricting and passing laws to regulate federal elections.[304] The Court likewise dismissed *Baldwin v. Trowbridge* as base partisan politics, without acknowledging the other occasions on which the doctrine was applied throughout the nineteenth century.[305]

During the 2020 election cycle, several Justices indicated their openness to this strand of the independent state legislature doctrine. The Pennsylvania legislature had enacted a statute, Act 77, to modify the rules governing the state's elections in response to the COVID-19 pandemic.[306] That law permitted the entire electorate to vote by mail, but "unambiguously required that all mailed ballots be received by 8 p.m. on election day."[307] The statute also had a nonseverability clause, specifying that if the deadline were held unconstitutional, most of the law—including the establishment of universal no-excuse absentee voting—would be void, as well.[308] The Pennsylvania Supreme Court ruled that this deadline violated the state constitution as applied during the pandemic.[309] It held that absentee ballots would be valid so long as they were postmarked by Election Day and received by election officials within the following three days.[310] Absentee ballots without postmarks were likewise deemed valid so long as they were received within three days after Election Day.[311] The court did not implement the nonseverability provision.[312]

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300. *Id.* at 135–36.
301. *Id.* at 137.
302. 576 U.S. 787, 817–18 (2015).
303. *Id.*
304. *See id.* at 807–08.
305. *See id.* at 818; *see also supra* notes 281–91 and accompanying text.
306. *See Boockvar II*, 141 S. Ct. 1, 1 (2020) (Alito, J., concurring in denial of motion to expedite consideration of petition for certiorari) (citing 25 PA. STAT. AND CONS. STAT. ANN. §§ 3146.6(c), 3150.16(c) (West 2020)).
307. *Id.*
308. *Id.* (citing Act 77, 2019 Pa. Laws 552).
309. *Id.*
310. *Id.*
311. *Id.*
312. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 397 n.4 (Pa. 2020) (Donohue, J., concurring in part and dissenting in part) (opining that the court's holding does not "trigger[] the draconian consequence" of the statute's non-severability provision).

In mid-October 2020, one week before Justice Barrett was confirmed to the U.S. Supreme Court,[313] the Court denied a motion to stay the Pennsylvania Supreme Court's ruling by a 4–4 vote, allowing that ruling to remain in effect.[314] The Pennsylvania Republican Party then asked the Court to resolve the case on an expedited basis, but the Court unanimously denied that request.[315] Justice Alito wrote a concurring opinion in which Justices Thomas and Gorsuch joined, agreeing that there was "simply not enough time at this late date to decide the question before the election."[316] The three Justices opined, however, that "there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution."[317] They explained that the Elections Clause and Presidential Electors Clause "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."[318]

About a week later, the Court ordered all Pennsylvania county boards of election to segregate any absentee ballots received within the three-day period following Election Day.[319] When there turned out to be far too few such ballots to affect the outcome of Pennsylvania's election, the Supreme Court denied certiorari in the case.[320] Justices Thomas and Alito both dissented from the denial of certiorari, reiterating their support for this aspect of the independent state legislature doctrine and emphasizing the need to resolve the issue in advance of future federal elections.[321] Thus, there is a reasonable potential basis in text, history, and precedent for the Court to conclude that state constitutions may not impose substantive restrictions on state laws regulating federal elections.

Though this strand of the independent state legislature doctrine has received some academic support,[322] numerous commentators have come out

313. Justice Barrett was confirmed on October 26, 2020. Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/5ZH2-J64T].

314. *See Boockvar I*, 141 S. Ct. 643 (2020) (mem.).

315. *Boockvar II*, 141 S. Ct. at 1.

316. *Id.* at 2 (Alito, J., concurring in denial of motion to expedite consideration of petition for certiorari).

317. *Id.*

318. *Id.*

319. Republican Party of Pa. v. Boockvar (*Boockvar III*), 208 L. Ed. 2d 293 (2020) (mem.).

320. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021).

321. *Id.* at 733 (Thomas, J., dissenting from denial of certiorari) ("Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections, petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding 'the clearly expressed intent of the legislature.'" (quoting Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring))); *id.* at 738 (Alito, J., dissenting from denial of certiorari) (reiterating earlier language denying power of state supreme courts to invalidate laws governing federal elections under state constitutions).

322. *See* Morley, *supra* note 8, at 13 n.36 (citing sources).

against it,[323] while others have expressed doubts.[324] For example, Professor Robert A. Schapiro has forcefully argued that this approach "extract[s] the state legislature from its constitutional setting . . . . [T]he relationship among state courts, state legislatures, and state constitutions can be conceived of as cooperative, rather than adversarial."[325] Professor James Gardner adds that there is "little reason . . . to think that the people of any state would be particularly inclined to trust their state legislature to perform the critical task of selecting presidential electors completely free of popular guidance and constraints applied by constitutional means."[326] He notes that "there is a long American history of popular distrust of state legislatures and of corresponding efforts to use state constitutions to curb undesirable legislative behavior."[327]

As mentioned earlier, even if the Court were to accept this potential implication of the independent state legislature doctrine, state legislatures would still be constrained in a variety of ways. For example, the Supreme Court has held that the Elections Clause implicitly prohibits a state from "dictat[ing] electoral outcomes, . . . favor[ing] or disfavor[ing] a class of candidates, or . . . evad[ing] important constitutional restraints."[328] Since the Elections Clause and Presidential Electors Clause are often construed in pari materia, these restrictions likely carry over to presidential elections, as well. Legislatures would also remain subject to the U.S. Constitution's express restrictions, such as the Bill of Rights as incorporated through the Fourteenth Amendment, the substantive restrictions of the Fourteenth Amendment itself, and subsequent voting rights amendments.[329] Many state constitutional provisions either have analogues in the U.S. Constitution or have been construed materially similarly to the U.S. Constitution, so the consequences of imposing this restriction would be limited.[330] Additionally, legislatures would remain bound by the restrictions of federal laws, such as the Voting Rights Act of 1965.[331] The Court might minimize potential disruptions by applying this aspect of the doctrine prospectively, allowing continued

323. *See, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1414 (2001) ("The legislature only *is* the legislature because the [state] [c]onstitution creates it as such."); Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 591 (2001) ("There is no reason to suppose that nineteenth-century state legislatures would view themselves as receiving powers from the federal government that were denied them by their own state constitutions.").

324. *See* Strauss, *supra* note 110, at 748 ("It is far from clear what the relationship is between a state's constitution and the power that a state 'legislature' may exercise under [the Presidential Electors Clause] to 'direct' the 'manner' in which electors are appointed . . . . Determining the ways in which a state constitution may and may not limit the legislature's decisions about presidential electors will, therefore, be a difficult and complex task.").

325. Schapiro, *supra* note 7, at 678–79.

326. James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 641 (2001).

327. *Id.*

328. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995).

329. *See* Issacharoff, *supra* note 107, at 643.

330. *See* Morley, *supra* note 31, at 204.

331. *See supra* notes 29–30 and accompanying text.

enforcement of existing state constitutional provisions that regulate federal elections as default sources of law, unless and until a state legislature enacts a contrary statute.

Thus, rather than dangerously unshackling legislatures, one of the main consequences of this aspect of the independent state legislature doctrine may be to promote predictability in federal elections by preventing state supreme courts from changing the rules and potentially impacting outcomes based on new, unexpected applications of broad or vague provisions of state constitutions. An accompanying drawback, however, is that such interpretations of state constitutions would remain enforceable with regard to state and local elections, leading to different sets of rules governing elections for different offices.

B. Procedural Restrictions on Legislatures' Authority

Even if state constitutions are incapable of imposing substantive restrictions on the power that the U.S. Constitution confers upon state legislatures to regulate federal elections, they still may regulate the process by which legislatures enact such laws. Conceptually, the fact that the Constitution grants a legislature the authority to enact laws regulating federal elections does not suggest that the legislature is exempt from its ordinary legislative process when exercising that power.[332]

Historically, the independent state legislature doctrine was not applied to exempt state laws governing federal elections from the ordinary legislative process.[333] To the contrary, in the years following the Constitution's adoption, the two governors that held a veto power decided whether to approve or reject state laws regulating federal elections.[334]

The Supreme Court has recognized this principle for over a century, as well. In *Smiley v. Holm*,[335] the Court held that state laws governing federal elections may be subject to gubernatorial veto.[336] It explained that, because the Elections Clause grants legislatures authority "for the purpose of making laws for the State, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the

332. Conversely, as explained in the preceding section, one might reasonably conclude that a state constitution may not limit the scope of substantive authority and discretion that a legislature receives from the federal Constitution to determine how best to regulate elections. *See supra* Part II.A.

333. *See, e.g.*, *California Contested-Election Cases*, H.R. REP. NO. 49-2338, at 1, 4–5 (1886) (resolving an election contest among candidates for California's delegation to Congress by invoking a decision of the California Supreme Court, *People ex rel. Leverson v. Thompson*, 9 P. 833 (Cal. 1885), which held that the California legislature had not violated rules of legislative procedure imposed by the state constitution when it adopted the state's congressional districts), *resolution proposed by committee report adopted*, 17 CONG. REC. 4381 (1886).

334. *See* Smith, *supra* note 7, at 759–61.

335. 285 U.S. 355 (1932).

336. *Id.* at 367.

method which the State has prescribed for legislative enactments."[337] Likewise, the Court interprets its ruling in *Ohio ex rel. Davis v. Hildebrant*[338] as allowing state legislative bills concerning federal elections, including congressional redistricting maps, to be subject to a public referendum before taking legal effect.[339] Thus, even if the Court were to revitalize portions of the independent state legislature doctrine, it need not exempt state laws regulating federal elections from the ordinary legislative process. Regardless of whether state constitutions may limit the content of such laws, state constitutions may regulate the process through which legislatures adopt them.

III. THE DOCTRINE AND STATE LEGISLATURES

A. Direct Legislative Appointment of Presidential Electors

One of the most significant potential implications of the independent state legislature doctrine concerns the scope of a state legislature's power to directly appoint presidential electors. The Supreme Court has recognized that the Presidential Electors Clause grants a legislature "plenary" authority over the manner in which its state's electors are appointed.[340] In *Bush v. Gore*, the Court reiterated that a legislature "may, if it so chooses, select the electors itself."[341] Some legislatures directly appointed presidential electors without a popular vote during the first century of our nation's history.[342] Those precedents confirm the constitutional prerogative of a legislature to decide, well in advance of an election cycle, to directly appoint presidential electors itself instead of holding a popular election. Given the central role of popular presidential elections in American political culture, however, a legislature is unlikely to exercise this option today.

The more difficult issue is whether the Presidential Electors Clause empowers a legislature to directly appoint a slate of presidential electors when state law specifies that electors must be appointed based on the results

337. *Id.*; *see also id.* at 367–68 ("We find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted.").

338. 241 U.S. 565 (1916). *Davis* did not actually address the merits of the plaintiffs' Elections Clause claim, however. Rather, the Court inexplicably transmuted that claim into a challenge under the Guarantee Clause and rejected it as nonjusticiable. *Id.* at 569 (declaring that the argument that the Elections Clause forbids states from subjecting state laws governing federal elections to public referenda "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which . . . in effect annihilates representative government and causes a State where such condition exists to be not republican in form"); *see also* Morley, *supra* note 8, at 72–74.

339. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 805 (2015) (discussing *Davis*); *Smiley*, 285 U.S. at 371–72 (same).

340. McPherson v. Blacker, 146 U.S. 1, 35 (1892) ("[F]rom the formation of the government until now the practical construction of the [Presidential Electors Clause] has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

341. 531 U.S. 98, 104 (2000) (per curiam).

342. *See* FOLEY, *supra* note 35, at 59 tbl. 4.3.

of a popular election and authorizes only an executive official, such as the governor or secretary of state, to certify the election results and resulting appointments. This is not a purely hypothetical question. In 2000, as disputes over the presidential election wound their way through the courts, the Florida House of Representatives voted to appoint a slate of Republican electors to support then-candidate George W. Bush.[343] The legislature did not proceed with the plan because the U.S. Supreme Court ruled in Bush's favor before the Florida Senate had the opportunity to consider the issue.[344] Following the 2020 election, President Trump's campaign sought to persuade Republican legislators in states where he had lost the popular vote to appoint competing slates of Republican electors, based on unsubstantiated allegations of voter fraud.[345] Despite such pressure, "no legislative house took steps in 2020 after Election Day to appoint electors [directly] . . . whether by purported legislative resolution or through the regular legislative process."[346]

Legislatures might attempt to directly appoint electors for a variety of reasons. The strongest normative grounds for direct legislative appointment is if a major unexpected disaster such as Hurricane Katrina strikes on, or shortly before, Election Day, making it impossible to conduct the election or determine the results.[347] The Constitution requires all presidential electors to cast their electoral votes on the same day,[348] which Congress has set in mid-December.[349] Congress meets in joint session shortly thereafter, the following January 6, to count the electoral votes,[350] and the new president's term begins on January 20.[351] If a natural disaster prevents a substantial portion—and potentially even a majority—of a state's electorate from voting on Election Day, it may be impossible for that state to simply reschedule its election or switch to an all-mail election at the last minute.[352]

As discussed below, federal law contemplates the possibility that a catastrophe might require legislatures to appoint electors at some point after

343. Jeffrey Gettleman, *Florida House OKs Slate of Electors Beholden to Bush*, L.A. TIMES (Dec. 13, 2000, 12:00 AM), https://www.latimes.com/archives/la-xpm-2000-dec-13-mn-64909-story.html [https://perma.cc/82WD-V6Q8].

344. *Id.*

345. Deanna Paul, *Trump Campaign Wants States to Override Electoral Votes for Biden. Is That Possible?*, WALL ST. J. (Nov. 21, 2020, 10:48 AM), https://www.wsj.com/articles/trump-campaign-wants-states-to-override-electoral-votes-for-biden-is-that-possible-11605973695 [https://perma.cc/JJ2W-QY7P].

346. Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. (forthcoming 2021) (manuscript at 18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3714294 [https://perma.cc/843U-AAW7].

347. *See* Morley, *supra* note 82, at 559–63 (explaining how Hurricane Katrina required cancellation of local and parish-level elections).

348. U.S. CONST. art. II, § 1, cl. 4.

349. 3 U.S.C. § 7.

350. *Id.* § 15; *see* U.S. CONST. art. II, § 1, cl. 3, *amended by id.* amend. XII.

351. U.S. CONST. amend. XX, § 1.

352. *See* Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 194–95 (2020).

Election Day.[353] Ideally, each state should enact an election emergency law to authorize its legislature to appoint electors in the unlikely event that such extreme circumstances arise, to ensure the state is able to cast its electoral votes. Such express statutory authorization would avoid unnecessary uncertainty as to the scope of the legislature's power.

A legislature might also claim authority to appoint a slate of electors in the extreme case where a state is unable to finish tallying and canvassing the results of the popular election in time to certify a slate of electors pursuant to the statutory process. This was a concern in the 2020 election cycle; states faced historically high numbers of absentee ballots due to COVID-19, yet a few swing states' laws did not allow their election officials to begin reviewing such ballots until Election Day.[354] During the primaries that summer, New York took approximately a month and a half to determine the results of two congressional races, which involved only a fraction of the ballots that would be cast in the presidential race.[355] Again, to the extent states conclude that an emergency fallback mechanism is necessary, the best alternative is to provide statutory authorization for the direct legislative appointment of electors in the rare, extreme case where the state, despite its best efforts, is unable to complete the ordinary statutory certification process. North Carolina has adopted such a law.[356] One potential concern about such a statute, however, is that it may incentivize state officials or candidates to seek to delay or derail the ballot-counting process to allow a friendly legislature to determine which electors to appoint. A possible, though highly imperfect, way of attempting to address such concerns would be for the statute to specify that the legislature's appointments must reflect its good-faith assessment of the apparent will of the state's electorate, taking into account any completed tallies, as well as reasonable estimates of uncounted votes.

More controversially, a legislature might also attempt to assert the right to appoint its own slate of electors without statutory authorization as an

353. *See* 3 U.S.C. § 2; *see also* Morley, *supra* note 352, at 185–91 (discussing 3 U.S.C. § 2's legislative history); Levitt, *supra* note 346, at 24 ("The mandate for a single federal Election Day would not preclude the state from providing for contingencies for an alternative process, if a state held an election on that day and for some reason that election failed to yield a choice under state law.").

354. *See* Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/ [https://perma.cc/7QLJ-BBD5]; *see also* Nick Corasaniti & Denise Lu, *How Quickly Will Your Absentee Ballot Be Counted? A State-by-State Timeline*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/interactive/2020/us/politics/when-votes-counted-tonight-election.html [https://perma.cc/ANV5-DXD4] (describing absentee ballot processing procedures in each state).

355. *See* Jesse McKinley et al., *After 6 Weeks, Victors Are Declared in 2 N.Y. Congressional Primaries*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/08/04/nyregion/maloney-torres-ny-congressional-races.html [https://perma.cc/8LFC-EV4W].

356. N.C. GEN. STAT. § 163-213(a) (2021) ("[W]henever the appointment of any Presidential Elector has not been proclaimed . . . before noon on the date for settling controversies specified by 3 U.S.C. § 5 . . . the General Assembly may fill the position of any Presidential Electors whose election is not yet proclaimed.").

institutional self-defense mechanism. The Presidential Electors Clause empowers a state's legislature to determine the "Manner" in which the state's electors will be appointed.[357] A legislature might contend that, when state officials or courts depart from the apparent meaning of state laws governing presidential elections to reach unexpected, atextual results, they infringe on the legislature's constitutional prerogative to determine how such elections must be conducted.[358] In *Bush v. Palm Beach County Canvassing Board*, for example, the U.S. Supreme Court unanimously stepped in to seek clarity about whether the Florida Supreme Court was adhering to the Florida Election Code rather than implementing extrinsic authorities such as the state constitution.[359]

Certiorari is purely discretionary, however, and the Court typically does not intervene in litigation solely to correct errors.[360] A legislature might contend that the Presidential Electors Clause empowers it to appoint a slate of electors reflecting the election's results based on the plain meaning of laws it enacted, instead of having to rely on the Supreme Court to enforce those laws and prevent state officials or judges from implementing their own preferences or idiosyncratic interpretations instead. This appears to be the Florida legislature's rationale for taking steps to appoint the Republican slate of electors as litigation concerning the 2000 presidential election proceeded.[361] To the extent the federal judiciary in general or the Supreme Court in particular is available to act as a potential check against patently unreasonable interpretations of state laws governing federal elections, however, such judicial review would be far preferable to the extraordinary, disruptive, and unavoidably partisan possible alternative of a legislature's attempted direct appointment of its own slate of electors. Moreover, if the Constitution's grants of authority over federal elections to the "Legislature" do not impose any enforceable limits on how state officials or courts may interpret state laws governing such elections,[362] then a legislature would have no basis for attempting to enforce such limits by appointing its own electors. In any event, as discussed below, substantial legal obstacles exist to direct legislative appointment under such circumstances.

Finally—and most disturbingly—a legislature might attempt to claim power to simply disregard the results of a popular presidential election and appoint a slate of electors reflecting its own partisan preferences. Such a step would be historically unprecedented, fly directly in the face of our democratic traditions, and likely destabilize the entire presidential election. Once a legislature has made the decision to award presidential electors based on a popular vote and the election has been conducted, it would be both

357. U.S. CONST. art. II, § 1, cl. 2.

358. *See supra* Part I.B.

359. 531 U.S. 70, 76–78 (2000) (per curiam).

360. *See* Cavazos v. Smith, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 5.12(c)(3) (9th ed. 2007)).

361. *See* Gettleman, *supra* note 343 ("Republican lawmakers have argued that the election court battles 'tainted' Florida's electoral votes . . . .").

362. *See supra* Part I.B.

unjustifiable and disastrous for the legislature to unilaterally decide to ignore the will of the people.

Whatever the rationale, several major legal impediments exist to a legislature's direct appointment of its own slate of electors pursuant to the Presidential Electors Clause. First, in nearly every state, direct appointment by the legislature would violate state law and potentially the state constitution.[363] A legislature might claim, however, that *McPherson v. Blacker* allows it to appoint its own electors regardless of the certification process set forth in state law. *McPherson* states that a legislature's "plenary" power to appoint electors "can neither be taken away nor abdicated," regardless of "[w]hatever provisions may be made by statute, or by the state constitution."[364] Under this potential view of the independent state legislature doctrine, state-level legal provisions governing a state's presidential election process cannot constrain the legislature's authority under the U.S. Constitution to appoint its own slate of electors.

McPherson need not be read, however, as granting legislatures authority to appoint their own slates of electors in the face of state laws establishing a different certification process. Most basically, the Court's sweeping assertion was dicta. *McPherson* was not addressing whether a legislature may directly appoint electors outside of the statutory process that the legislature itself has established to govern presidential elections. To the contrary, the Court was considering the constitutionality of Michigan's system of appointing electors by district rather than on a statewide basis.[365]

Furthermore, although *McPherson* acknowledged that a state legislature has inalienable plenary authority to determine the manner in which electors are appointed, it did not address how the legislature must exercise that power. *McPherson* is consistent with the notion that, once a legislature has enacted laws requiring electors to be appointed based on the outcome of the popular vote as certified by state election officials, the legislature must amend or repeal those laws—subject to the possibility of gubernatorial veto—if it wishes to directly appoint electors rather than attempt to act in contravention of those provisions pursuant to the Presidential Electors Clause.[366]

Finally, from a pragmatic perspective, a competing slate of electors selected by a state legislature would likely destabilize the presidential election—especially if it was potentially dispositive in the Electoral College.

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363. *See, e.g.*, FLA. STAT. §§ 102.111, 103.111 (2021). Michigan has a statute which appears to allow the legislature to review the results of statewide elections, including presidential elections, in certain circumstances. *See* MICH. COMP. LAWS § 168.846 (2021) ("When the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected."). Additionally, as noted earlier, North Carolina authorizes direct appointment by the legislature when the state has been unable to certify its electors through the ordinary statutory process. *See supra* note 356 and accompanying text.

364. McPherson v. Blacker, 146 U.S. 1, 35 (1892) (quoting S. REP. NO. 43-395 (1874)).

365. *Id.* at 25 ("If the legislature possesses plenary authority to direct the manner of appointment, . . . it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts.").

366. *See* Levitt, *supra* note 346, at 11–12.

Congress would have to decide which of the state's competing slates to count under 3 U.S.C. § 15.[367] If both presidential candidates could plausibly claim to have won a majority of electoral votes based on competing slates of electors from a state, the public would be far less likely to accept the election's results. The January 6, 2021, Capitol riot frightfully demonstrates how even unsubstantiated allegations about the purported invalidity of a presidential election can instigate violence.[368]

Federal law further constrains a legislature's ability to directly appoint electors outside the statutory process for certifying election results. The Presidential Election Day Act[369] specifies that electors "shall be appointed" on Election Day (that is, the first Tuesday after the first Monday in November).[370] Congress enacted this law pursuant to its constitutional authority to "determine the Time of chusing the Electors."[371] The statute cannot be taken completely at face value. Electors are not actually appointed, and many votes are not even necessarily cast, on Election Day itself.[372] Nevertheless, the statute requires each state to appoint a slate of electors based on the results of an election that culminated on Election Day.[373] A state legislature cannot simply decide that it dislikes the candidate the people elected and, after Election Day, appoint the other candidate's slate of presidential electors. Such a competing slate of electors would be divorced from, and even contrary to, the results of the election held on Election Day in compliance with federal law. A legislature's appointment of electors under such circumstances would amount to an illegal new election, held after the day specified in federal law.

The Presidential Election Day Act provides an important exception. It specifies that when a state has held an election but "failed to make a choice" on Election Day, electors "may be appointed on a subsequent day in such a manner as the legislature . . . may direct."[374] This provision was adopted in part to allow states to hold their elections at a later date if a natural disaster prevents voting on Election Day.[375] Thus, if a state were unable to hold or complete a popular vote for president due to a massive disaster, such as Hurricane Katrina, the Presidential Election Day Act would not preclude the

367. 3 U.S.C. § 15 governs the counting of electoral votes in Congress.

368. *See* Ted Barrett et al., *US Capitol Secured, 4 Dead After Rioters Stormed the Halls of Congress to Block Biden's Win*, CNN POLITICS (Jan. 7, 2021, 3:33 AM), https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html [https://perma.cc/2JL9-AR8P].

369. Pub. L. No. 28-2, 5 Stat. 721 (1845) (codified as amended at 3 U.S.C. §§ 1–2).

370. 3 U.S.C. § 1.

371. U.S. CONST. art. II, § 1, cl. 4.

372. *See* Morley, *supra* note 352, at 208–09 ("So long as a state holds an 'authentic general election' on Election Day, it may allow voting to occur beforehand, as well." (quoting Public Citizen, Inc. v. Miller, 813 F. Supp. 821, 830 (N.D. Ga. 1993), *aff'd per curiam*, 992 F.2d 1548 (11th Cir. 1993))); *see also* Levitt, *supra* note 346, at 21.

373. *See* Foster v. Love, 522 U.S. 67, 72 & n.4 (1997).

374. 3 U.S.C. § 2.

375. *See* Morley, *supra* note 352, at 188–89 (citing CONG. GLOBE, 28th Cong., 2d Sess. 15 (1844) (statement of Rep. Chilton)); Levitt, *supra* note 346, at 24.

legislature from directly appointing electors at a later date, so long as it is before the day when the electors cast their electoral votes.[376]

It is less clear whether the Presidential Election Day Act bars a legislature from appointing a slate of electors based on its view of the legally correct results of the election that culminated on Election Day.[377] 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. The Presidential Election Day Act was enacted pursuant to Congress's authority to regulate the "Time" of presidential elections.[378] It is uncertain whether the Act is violated when the "wrong" entity under state law purports to determine the election's results and certify a corresponding slate of electors. Of course, as a practical matter, it may often be difficult to determine whether a legislature is actually attempting to implement the results of a presidential election based on its interpretation of state law or instead imposing its partisan preferences by appointing electors to vote for its preferred candidate. And, as noted before, one might reject the notion that the Presidential Electors Clause implicitly restricts how state courts or officials may interpret state laws governing federal elections.

A third barrier to a legislature's direct appointment of electors in violation of state law is the U.S. Constitution's Due Process Clause. In *Bush v. Gore*, the Supreme Court held that, once a state decides to award its electors based on a popular vote, the constitutional right to vote attaches.[379] As discussed earlier,[380] several circuits have held that the Fourteenth Amendment's Due Process Clause prohibits states from changing the rules of an election after voters have already acted in reliance on them.[381] A legislature's decision to appoint its own slate of electors after an election has already been held would obviously be a substantial after-the-fact change in the rules governing the election that would likely violate the constitutional right to vote.

A legislature might attempt to argue in response, however, that these due process cases apply only where voters acted in reasonable reliance on a particular interpretation of state law.[382] It may be challenging for voters to plausibly claim that they would have made different voting-related decisions if they had known that the legislature, rather than state election officials, would be determining the validity of the votes cast and deciding the

376. *See* 3 U.S.C. § 7.

377. *See supra* notes 343–44, 361 and accompanying text (discussing the steps that the Florida legislature took during the 2000 presidential election to appoint its own slate of electors).

378. *See* Morley, *supra* note 352, at 182–93 (examining the legislative history of the Presidential Election Day Act).

379. Bush v. Gore, 531 U.S. 98, 104 (2000).

380. *See supra* notes 217–34 and accompanying text.

381. *See, e.g.*, Roe v. Alabama, 43 F.3d 574, 581 (11th Cir. 1995); Griffin v. Burns, 570 F.2d 1065, 1075 (1st Cir. 1978).

382. *See supra* note 234 and accompanying text (arguing that reliance is an essential element of due process challenges to state officials' changes in the rules governing elections).

election's outcome. Moreover, a legislature might claim to be defending the right to vote, to the extent it seeks to prevent state officials or courts from changing the rules of the election after votes have been cast through unexpected interpretations of state law.

In conclusion, direct legislative appointment of presidential electors despite state laws providing for a popular election is an extreme measure that raises serious risks of undermining the public's willingness to accept the results of a presidential election. It flies in the face of the democratic tradition of popular presidential elections and creates a substantial risk that partisan manipulation will override the will of the people. Direct legislative appointment of electors is most defensible only as a response to a major disaster that would otherwise prevent a state from casting electoral votes in a presidential election.[383] To alleviate any doubts about the validity of such measures, states should enact election emergency laws that clearly specify the narrow circumstances under which the legislature may exercise such extraordinary authority.

Conversely, direct legislative appointment is patently impermissible when a legislature seeks to appoint its own preferred electors as a partisan maneuver without regard to the popular vote. A legislature's direct appointment of electors is also both legally and prudentially problematic if used as a means of allowing the legislature to override a state official's or court's unexpected, purportedly incorrect interpretations or applications of state election laws. Such a legislatively sanctioned competing slate of electors would likely exacerbate tensions over a hotly contested election. The federal judiciary, and the U.S. Supreme Court in particular, could reduce or eliminate any potential perceived need for legislatures to engage in such self-help measures by enforcing boundaries on the ability of state courts and officials to interpret state laws governing federal elections in unexpected, atextual ways.[384] And when a federal court affirms the reasonableness of the state official's or court's interpretation of a disputed state law, the legislature would no longer have a colorable basis for asserting a need to protect either its constitutional prerogatives or the voting rights of the state's citizens. At the very least, as a matter of norms and political culture, presidential candidates, legislators, and their supporters must avoid resorting to consideration of direct legislative appointment of competing slates of electors as a means of resolving electoral disputes or overcoming disappointing electoral results.

B. Regulating Federal Elections Outside of Institutional Legislatures

Another potential implication of the independent state legislature doctrine is that it may preclude states from regulating federal elections through legislative processes outside of the institutional legislature, such as a public initiative. Since the Elections Clause and Presidential Electors Clause

383. *See supra* notes 374–76 and accompanying text (discussing 3 U.S.C. § 2).

384. *See supra* Part I.B; *see, e.g.*, Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000) (per curiam).

specifically delegate authority to regulate federal elections to the "Legislature" of each state, this question turns on the meaning of the term "Legislature."

The Constitution includes several vague terms that allude to broad principles, such as "due process of law" and "equal protection of the laws."[385] Other constitutional concepts appear to call for the exercise of at least some degree of judgment, such as "necessary and proper."[386] The term "Legislature," in contrast, seems definite, specific, and concrete. Based on the Constitution's references to the term "Legislature" apart from the Electors Clause and Presidential Electors Clause,[387] it appears that the term refers to a "representative body which ma[kes] the laws of the people."[388] Moreover, "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives."[389] Indeed, the Supreme Court adopted this interpretation of the term for purposes of Article V of the Constitution,[390] which empowers the "Legislature" of each state to ratify constitutional amendments.[391] Thus, from a plain meaning, original understanding, and intratextual approach,[392] a state's institutional legislature is the only state entity that may regulate federal elections without relying on a statutory delegation of authority.[393]

In *Arizona Independent Redistricting Commission*, however, a sharply divided 5–4 Court rejected this interpretation of "Legislature."[394] Drawing on precedent, the Court held that the term has a different meaning as used in the Elections Clause (and, by extension, the Presidential Electors Clause) than it does in the rest of the Constitution.[395] The Court explained that

385. *See* U.S. CONST. amend. XIV, § 1.

386. *Id.* art. I, § 8, cl. 18.

387. *See* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 138–40 (2015) (listing constitutional provisions).

388. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting) (quoting Hawke v. Smith, 253 U.S. 221, 227 (1920)) (alteration in original).

389. *Id.* at 828 (quoting Morley, *supra* note 387, at 147 & n.101 (alteration removed)).

390. U.S. CONST. art. V.

391. Leser v. Garnett, 258 U.S. 130, 137 (1922) (holding that a legislature's authority to ratify a federal constitutional amendment "is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State"); *Hawke*, 253 U.S. at 227 (holding that a legislature's authority under Article V to ratify amendments to the U.S. Constitution cannot be subject to a public referendum, explaining that "[t]he language of the article is plain, and admits of no doubt in its interpretation"); *see also* Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it.").

392. "Intratextualism counsels that the Constitution's use of 'strongly parallel language [in different places] is a strong (presumptive) argument for parallel interpretation' of that language." Morley, *supra* note 387, at 135 (quoting Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999)).

393. *Cf. infra* Part III.D (explaining that legislatures may delegate their power under the Elections Clause and Presidential Electors Clause).

394. 576 U.S. 787, 808 (2015).

395. *Id.* ("[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon

"Legislature" means any power or process that is authorized to make laws within a state.[396] Although it cited some Founding Era dictionaries, the Court primarily applied a purposivist interpretation of the Elections Clause.[397] It explained that "[t]he dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation."[398] The Framers could not have intended for the Elections Clause to prohibit states from regulating federal elections through the public initiative process, since that process had not yet been developed at the time of the Constitution's adoption.[399] Accordingly, the majority held that the Elections Clause should not be read to hinder the people's ability to govern themselves through direct democracy.[400] The Court concluded that, because the Arizona constitution allows the state's electorate to legislate through a public initiative process, that process qualifies as a "Legislature" for purposes of the Elections Clause.[401] The people of Arizona may therefore use the initiative process to enact laws regulating federal elections.

The *Arizona Independent Redistricting Commission* majority did not address the fact that, throughout their debates at the constitutional convention, the Framers consistently distinguished "between a state legislature and direct collective action by the people of a state."[402] This distinction is reflected in the Constitution's text and structure. As originally adopted, the Constitution required Representatives to be directly elected by the people, while senators were to be appointed by state legislatures.[403] Moreover, the majority provided no evidence from the Constitution's text, drafting history, or ratification history to support the implausible notion that the Framers used the term "Legislature" to mean different things at different points in the document, surreptitiously changing its meaning from clause to clause. Thus, the majority's purposivist reasoning appears to rest on shaky ground.

In short, a strong argument can be made that the only entity within a state that may adopt laws governing federal elections is the institutional legislature. The legislature may delegate rulemaking authority to election

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the character of the function which that body in each instance is called upon to exercise." (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932))).

396. *Id.* at 813 (citing several Founding Era dictionaries).

397. *See* Michael T. Morley, *The New Elections Clause*, NOTRE DAME L. REV. ONLINE 79, 87–90 (2016).

398. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 814–15.

399. *Id.* at 816; *see also id.* at 824 ("[T]he Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes.").

400. *Id.* at 816 ("The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands.").

401. *Id.* at 817 ("We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process.").

402. *See* Morley, *supra* note 8, at 32.

403. *Compare* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."), *with id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . .").

officials, or even statutorily authorize an independent redistricting commission to develop nonpartisan congressional maps.[404] Under this approach, when state or local officials purport to regulate federal elections, they must be able to point to some grant of authority specifically from the institutional legislature; a state's electorate may not adopt laws regulating federal elections through a public initiative process.[405]

Importantly, if the Court were to adopt this interpretation, it need not apply its ruling retroactively to invalidate existing election laws that had been enacted via an initiative process or otherwise apart from the institutional legislature.[406] Rather, the Court may make its ruling prospectively applicable only in the case before it and as to future state statutes. And even if the ruling were retroactively applicable, a legislature would remain free to immediately readopt any provisions of state law that had been enacted through an improper channel.

Current Supreme Court doctrine, however, rejects any variation of this potential application of the independent state legislature doctrine.[407] Under *Arizona Independent Redistricting Commission*, a state may use any lawmaking process authorized by the state constitution, such as a public initiative, to regulate federal elections.[408]

C. Stripping Institutional Legislatures of Authority to Regulate Federal Elections

A closely related issue under the independent state legislature doctrine is whether a state may partly or completely strip its institutional legislature of authority to regulate federal elections and transfer that power exclusively to some other entity. Under this potential aspect of the doctrine, the term "Legislature" as used in the Elections Clause and Presidential Electors Clause must, *at the very least*, include a state's institutional legislature, regardless of whether it also includes other processes and entities.[409] Accordingly, an institutional legislature may not be excluded from regulating federal elections, or certain aspects of those elections, even if the state constitution may place side constraints on that power.[410]

Professor Derek Muller has forcefully advocated this position.[411] He points out that adoption of the Seventeenth Amendment[412] was necessary to authorize popular elections for U.S. Senators because "neither a popular initiative nor a legislative act" could stop a legislature from "exercis[ing] its

404. *See infra* Part III.D.
405. *See supra* Part I.A.
406. *See* Morley, *supra* note 8, at 90–91.
407. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015).
408. *Id.*
409. *See supra* Part III.B.
410. *See supra* Part II.A.
411. Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 718 (2016).
412. U.S. CONST. amend. XVII.

own judgment and final authority in senate elections."[413] In other words, prior to the Seventeenth Amendment, a state could neither strip an institutional legislature of its authority under the U.S. Constitution to decide who to appoint to the U.S. Senate, nor transfer such authority to the exclusive discretion of some other body—including the people themselves.[414] This history can be informative in understanding legislatures' prerogatives concerning modern federal elections.

Professor Muller further explains that the Elections Clause grants Congress the same authority to regulate congressional elections as it confers on state legislatures.[415] Congress's power under that provision cannot be irrevocably transferred to some other entity; the Constitution's grants of authority to state legislatures should be afforded the same protection.[416]

Yet again, the majority in *Arizona Independent Redistricting Commission* rejected this interpretation. The Court held that a state constitution may completely exclude the state's institutional legislature from drawing congressional district lines and instead confer that authority exclusively on an independent redistricting commission.[417] In other words, a state constitution may not only limit how an institutional legislature regulates federal elections,[418] but completely prohibit the legislature from exercising such power at all. Although *Arizona Independent Redistricting Commission* dealt solely with the power to establish congressional district boundaries, the Court's reasoning would extend equally to all other aspects of federal elections.[419] "Nothing in the opinion turned on the fact that the commission was empowered to determine congressional district boundaries, as opposed to regulating other aspects of federal elections."[420] The Court's ruling appears to allow a state constitutional amendment—including amendments adopted through the public initiative process[421]—completely transferring responsibility for determining the "Times, Places and Manner" of congressional elections, as well as the "Manner" of appointing presidential electors, from the institutional legislature to some other newly created entity.

Thus, under current law, a state constitution may partly or completely exclude the institutional state legislature from regulating federal elections. This is another aspect of *Arizona Independent Redistricting Commission* that

413. Muller, *supra* note 411, at 724–25; *see also id.* at 722–25 (discussing authorities from before the Seventeenth Amendment's adoption).

414. *See id.*

415. *See id.* at 738.

416. *See id.*

417. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015) ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.").

418. *Cf. id.* at 817–18 ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provision of the State's constitution.").

419. *See* Morley, *supra* note 397, at 87 ("[T]he Court's ruling contains no limiting principle.").

420. *Id.*

421. *See supra* Part III.B.

is hard to square with the Constitution's delegation of authority over federal elections specifically to the "Legislature" of each state.

D. Delegation of Legislative Authority over Federal Elections

A final potential implication of the doctrine—though one without merit—is that the institutional legislature cannot choose to delegate its authority to regulate federal elections. Under this interpretation, because the Constitution grants power to regulate federal elections specifically to the legislature, the legislature itself—however that term is defined[422]—must exercise that authority, rather than granting executive officials or others the authority to establish rules for federal elections. This approach is inconsistent with how the Court has consistently construed other grants of constitutional authority.

Under the "nondelegation doctrine," when the Constitution grants legislative authority to Congress, Congress may delegate power to promulgate regulations to executive officials. The only constitutional constraint is that Congress must provide an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform."[423] This forgiving standard is satisfied so long as Congress "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[424] Moreover, "well-defined practices" and "well-known and generally accepted standards" may implicitly guide and limit otherwise standardless grants of discretion.[425] Throughout our nation's history, the Court has invalidated only two grants of legislative authority to the executive branch, both in 1935.[426] Since then, the Court has upheld a wide range of extraordinarily vague delegations to executive agencies, including the authority to determine whether granting a broadcasting license was in the "public interest, convenience, or necessity";[427] commodity prices were "generally fair and equitable";[428] and price caps[429] or railroad leases[430] were in the "public interest."

Courts should interpret the grants of authority to state legislatures through the Elections Clause and Presidential Electors Clause the same way they interpret the Constitution's grants of legislative authority to Congress.[431]

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422. *See supra* Part III.B–C.

423. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)) (alterations in original).

424. Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); *accord* Mistretta v. United States, 488 U.S. 361, 372–73 (1989) (discussing the Court's flexible application of the intelligible principle test).

425. Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (upholding the Home Owners' Loan Act's delegation of power to promulgate standards governing savings and loan associations).

426. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (striking down § 3 of the National Industrial Recovery Act of 1933 (NIRA)); Panama Refining Co. v. Ryan, 293 U.S. 388, 406, 414–16 (1935) (striking down § 9(c) of NIRA).

427. Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

428. Yakus v. United States, 321 U.S. 414, 420 (1944).

429. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397 (1940).

430. N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

431. *See* Muller, *supra* note 411, at 738.

Indeed, Congress's authority under the Elections Clause is coextensive with legislatures' power.[432] Legislatures should have the same prerogative as Congress to delegate the powers that the Constitution grants them, subject only to the outer bounds of the nondelegation doctrine. Numerous state constitutions generally apply stricter nondelegation doctrines to their legislatures.[433] The U.S. Constitution's more flexible nondelegation doctrine, rather than this stricter standard, should apply to state laws that solely govern congressional or presidential elections, since such laws are enacted under the Elections Clause and Presidential Electors Clause rather than the state constitution. State laws that broadly apply to elections for offices at all levels of government, in contrast, should have to satisfy both federal and state nondelegation standards.[434] Thus, most state election laws would have to satisfy both federal and state nondelegation standards.

In *Arizona Independent Redistricting Commission*, the Court properly recognized that state legislatures may delegate their authority over federal elections.[435] Many lower courts have likewise held that legislatures may delegate power to regulate various aspects of the electoral process, particularly when faced with emergency situations like the COVID-19 pandemic.[436] The independent state legislature doctrine should not be construed as precluding revokable delegations of legislative authority to executive officials to faithfully implement the legislature's standards and directives.

CONCLUSION

If courts were to adopt or reinvigorate certain aspects of the independent state legislature doctrine, procedural hurdles would inevitably arise. For

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432. *See* Smiley v. Holm, 285 U.S. 355, 366–67 (1932).

433. *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1189–90 (1999) ("[I]n the states, unlike the federal system, the nondelegation doctrine [was] alive and well in the late 1990s. Many states require the legislature to provide specific standards to guide agency discretion in the statute delegating authority to an agency . . . . The overwhelming majority of modern state constitutions contain a strict separation of powers clause."); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 585 (2000) ("A majority of state constitutions contain nondelegation doctrines, some very strict.").

434. *See* Michael T. Morley, *Dismantling the Unitary Electoral System?: Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 111 (2017).

435. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015) ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.").

436. *See, e.g.*, Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 833–34 (D. Mont. 2020) (upholding governor's executive order issued pursuant to the state's election emergency law); Singh v. Murphy, No. A-0323-20T4, 2020 WL 6154223, at *7 (N.J. Super. Ct. Oct. 21, 2020) ("[I]n issuing Executive Order 144 while the public health crisis caused by COVID-19 escalated, the Governor lawfully acted pursuant to his legislatively-assigned responsibilities vested in him by two statutes . . . ."); Abbott v. Anti-Defamation League Austin, Sw. & Texoma Regions, 610 S.W.3d 911, 917–18 (Tex. 2020) (per curiam); *cf.* Paher v. Cegavske, 457 F. Supp. 3d 919, 932–33 (D. Nev. 2020) (holding that a general delegation of rulemaking authority to the secretary of state was sufficient to justify an order switching the primary to an all-mail election due to the risks of COVID-19).

example, the Supreme Court held in *Lance v. Coffman*[437] that individual plaintiffs generally lack standing to challenge election officials' actions on the grounds they violate the Elections Clause.[438] The ruling arose in a challenge to the Colorado Supreme Court's decision to replace a congressional redistricting plan adopted by the state legislature with one that had been previously crafted by a state court.[439] Four Colorado citizens sued in federal court, claiming that the Colorado Supreme Court's order violated the Elections Clause, which grants to the state legislature, rather than to the state judiciary, the authority to draw congressional districts.[440]

The U.S. Supreme Court, in a terse but unanimous per curiam opinion, held that the plaintiffs lacked standing to pursue their claim.[441] The Court explained that the Colorado Supreme Court's alleged violation of the Elections Clause gave rise only to an "undifferentiated, generalized grievance about the conduct of government."[442] It further noted that previous cases which it had adjudicated under the Elections Clause had been "filed by a relator on behalf of the State rather than private citizens acting on their own behalf."[443] Several lower courts invoked *Lance* to dismiss as nonjusticiable challenges concerning the 2020 election that were brought under the Elections Clause and Presidential Electors Clause.[444]

The *Lance* Court may have adopted an unduly parsimonious view of standing. In *FEC v. Akins*,[445] the Court properly recognized that an injury does not become a generalized grievance simply because it simultaneously harms numerous people in the same way.[446] Rather, a harm is relegated to the status of a generalized grievance only when it is "of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'"[447] The Elections Clause not only protects the institutional prerogatives of state legislatures, but also allocates authority for regulating federal elections. Being assigned to what a person believes is a disadvantageous congressional district or being required to follow undesirable election procedures by the act of a governmental official or entity

437. 549 U.S. 437 (2007) (per curiam).
438. *Id.* at 441–42.
439. *See id.* at 438 (citing People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1231 (Colo. 2003)).
440. *See id.*
441. *Id.* at 442.
442. *Id.*
443. *Id.*
444. *See, e.g.*, Bognet v. Sec'y of Pa., 980 F.3d 336, 349, 356 (3d Cir. 2020), *vacated as moot sub nom.* Bognet v. Degraffenreid, 209 L. Ed. 2d 544 (2021); Bowyer v. Ducey, 506 F. Supp. 3d 699, 708–12 (D. Ariz. 2020); King v. Whitmer, 505 F. Supp. 3d 720, 735–37 (E.D. Mich. 2020); Tex. Voters All. v. Dallas Cnty., 495 F. Supp. 3d 441, 452, 461–62, 470 (E.D. Tex. 2020); Feehan v. Wis. Elections Comm'n, 506 F. Supp. 3d 596, 611–12 (E.D. Wis. 2020).
445. 524 U.S. 11 (1998).
446. *Id.* at 24 ("[T]he fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes.").
447. *Id.* at 23 (quoting L. Singer & Sons v. Union Pac. R. Co., 311 U.S. 295, 303 (1940)).

that lacks proper authority to adopt such measures constitutes a particularized and concrete injury sufficient to confer standing.[448]

In *Bond v. United States*,[449] the Court held that a person has standing to challenge a federal law on the grounds that, "by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States."[450] The Court explained that individuals who have suffered injury from governmental action have standing to contend that such action was taken in violation of the Constitution's structural principles like federalism[451] and separation of powers.[452] These structural concepts protect the prerogatives of certain governmental entities not for their own sake, but as a means of protecting individual rights.[453] From this perspective, the Elections Clause and Presidential Electors Clause protect not only the prerogative of state legislatures to regulate federal elections but also the right of the people to vote in federal elections structured by their duly elected representatives, whether in the state legislature or Congress.[454] The Eighth Circuit embraced this view in *Carson v. Simon*,[455] though as mentioned earlier, other courts adjudicating challenges to the 2020 presidential election disagreed.[456]

When a justiciable case arises, the Court will have to decide whether and how to recognize the independent state legislature doctrine. As this Article demonstrates, the doctrine is not a single, unitary concept but rather a basic principle that has a range of potential applications. As an initial matter, the Court should refuse to view the doctrine as imposing a jurisdictional limit on federal courts that renders certain types of constitutional challenges to election laws nonjusticiable political questions.[457] Consistent with current precedent, the Court should likewise reject claims that the doctrine prevents state constitutions from regulating the legislative process through which institutional state legislatures adopt laws governing federal elections,[458] such as by subjecting such measures to the possibility of a gubernatorial veto[459]

448. *See* Bond v. United States, 564 U.S. 211, 220–23 (2011); *see also* Collins v. Yellen, 141 S. Ct. 1761, 1780 (2021) ("[W]henever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge.").

449. 564 U.S. 211 (2011).

450. *Id.* at 214.

451. *See id.* at 220 (holding that a person, "in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines"); *see also id*. at 223–24.

452. *Id.* at 223 ("[I]t is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balance constraints . . . .").

453. *Id.* at 221–22.

454. *See supra* notes 200–05 and accompanying text.

455. 978 F.3d 1051, 1058–59 (8th Cir. 2020) (per curiam) (holding that candidates for presidential elector had standing to challenge the secretary of state's use of an allegedly invalid consent decree to accept votes in violation of state law).

456. *See supra* note 444 and accompanying text.

457. *See supra* Part I.C.

458. *See supra* Part II.B.

459. *See* Smiley v. Holm, 285 U.S. 355, 372–73 (1932).

or public referendum.[460] And, as *Arizona Independent Redistricting Commission* recognized,[461] a legislature may delegate its authority to other entities to assist in regulating elections.[462]

It is reasonably debatable, however, whether the Constitution's grants of power specifically to the "Legislature" to regulate federal elections refer exclusively to the institutional legislature[463] or may also include other sources of legislative power that a state constitution recognizes, like the public initiative process.[464] At a minimum, the Constitution's express grants of authority to the legislature of each state[465] should mean that a state may not completely exclude its institutional legislature from regulating federal elections, or even particular aspects of such elections like congressional redistricting.[466] Likewise, state officials must be able to point to some statutory source of authority when promulgating rules or procedures concerning federal elections.[467]

The doctrine's final potential implications are likely the most controversial. The Constitution's delegation of authority specifically to the "Legislature" may impose outer limits on the extent to which state courts can adopt unexpected, implausible interpretations of state election laws governing federal elections.[468] When a state court's interpretation of an election-related statute substantially deviates from the provision's text, particularly after votes have been cast, there is a risk that the court is effectively changing the rules of the process rather than merely interpreting them. Federal courts may have a role in reviewing—deferentially—such interpretations to ensure that state courts do not usurp the legislature's constitutional authority.

Additionally, because state legislatures receive their authority to regulate federal elections directly from the U.S. Constitution, it may be that state constitutions are incapable of imposing substantive limits on that power.[469] Under this view, state legislatures would remain subject to the implicit limitations of the Elections Clause and Presidential Electors Clause, the Constitution's express restrictions such as the Bill of Rights and voting rights amendments, and federal laws such as the Voting Rights Act.[470] Since many state constitutional provisions either have analogues in the U.S. Constitution, or have been construed materially similarly to the U.S. Constitution, the practical consequences of this doctrine would be limited.[471] The Court could

460. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).
461. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015).
462. *See supra* Part III.D.
463. *See supra* Part III.B.
464. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 808.
465. U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2.
466. *See supra* Part III.C; *cf. Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 817–18.
467. *See supra* Part I.A.
468. *See supra* Part I.B.
469. *See supra* Part II.A.
470. *See supra* notes 26–30 and accompanying text.
471. *See supra* notes 31–32 and accompanying text.

further minimize any potential disruption of adopting this approach by treating state constitutional provisions as presumptively valid and enforceable with regard to federal elections unless and until a legislature chooses to adopt a conflicting statute.

Finally, the independent state legislature doctrine may impact a legislature's ability to directly appoint presidential electors. As the Supreme Court noted in *Bush v. Gore*, a legislature may decide to change state law in advance of a presidential election so that electors are appointed by the legislature itself rather than through a popular election.[472] The more problematic issue is whether a legislature may appoint its own slate of electors even without repealing state laws that provide for popular presidential elections and establish a process for certifying the results. The Presidential Electors Clause, as construed in *McPherson v. Blacker*, grants the legislature inalienable plenary power to decide how electors will be appointed.[473] Neither that clause nor *McPherson* need be read, however, as authorizing a legislature to circumvent or contravene the very laws that the legislature itself has enacted to regulate the process of appointing electors by adopting its own "competing" slate of electors in addition to the state's statutorily certified slate. Both the Presidential Election Day Act and the Constitution's Due Process Clause stand as additional barriers to a legislature's extra-statutory appointment of electors.[474] Moreover, if a legislature purported to submit a slate of electors in violation of state law, Congress could reject it under the federal law governing the counting of electoral votes.[475]

A strong normative case for direct legislative appointment of electors exists only when a major disaster, such as Hurricane Katrina, makes it impracticable or impossible to conduct, complete, or determine the results of a popular presidential election. The Presidential Election Day Act authorizes states to appoint electors after Election Day under such extreme circumstances.[476] In such rare cases, direct legislative appointment of electors may be the only alternative to the state's complete exclusion from the presidential election process.[477] Even then, states should avoid unnecessary uncertainty and legal disputes by adopting an election emergency statute—well in advance of the election—that authorizes the legislature to directly appoint electors in such emergencies.

Thus, the Constitution's reference to the state "Legislature" in the Elections Clause and Presidential Electors Clause has a range of potential implications. Some of those claimed implications are erroneous, unsupported by history, and prudentially inadvisable. Other possible applications of the independent state legislature doctrine appear reasonably

472. 531 U.S. 98, 104 (2000) (per curiam).
473. *See* 146 U.S. 1, 34–35 (1892).
474. *See supra* notes 369–73, 379–82 and accompanying text.
475. *See* 3 U.S.C. § 15.
476. *See supra* notes 374–76 and accompanying text.
477. *See* Levitt, *supra* note 346, at 24.

debatable, while still others may be a persuasive interpretation of the Constitution's text, consistent with historical practice, and normatively desirable. Rather than viewing the doctrine as a unitary whole, courts and commentators should separately assess the validity of each potential individual strand.