TEXAS V. PENNSYLVANIA AND THE POLITICAL-QUESTION DOCTRINE

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In the wake of the 2020 presidential election, Texas sued four other states in an original action in the U.S. Supreme Court arguing that those states violated, among other constitutional provisions, the Electors Clause. One issue the Supreme Court did not reach in the case—and has never reached before—was the impact of the political-question doctrine on claims under the Electors Clause. This short essay takes up that issue. Analyzing the applicability of the political-question doctrine to the Electors Clause, I conclude that the political-question doctrine operates as only a narrow constraint on Electors Clause claims. Applying those principles, I conclude that Texas's claims were not barred by the political-question doctrine, though portions of the relief Texas sought may have been.

I. INTRODUCTION

In the wake of the 2020 presidential election, in which Joe Biden defeated Donald Trump, lawsuits proliferated.[1] The most prominent was a lawsuit by the state of Texas, which had certified Trump as the winner of its electoral votes, against four Defendant States—Pennsylvania, Wisconsin, Michigan, and Georgia, all of which certified Biden as the winner of their electoral vote—in an original action in the U.S. Supreme Court.[2] Texas alleged, among other claims, that those states' election conduct violated the Electors Clause of U.S. Constitution.[3]

The Supreme Court summarily denied Texas's motion for leave to file its action "for lack of standing under Article III"[4] but that standing defect simply denied Texas the ability to bring the Electors Clause challenge. Different

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1. Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, BUS. INSIDER (Feb. 22, 2021), https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11 [https://perma.cc/F3HG-GERH].

2. Bill of Complaint, Texas v. Pennsylvania, No. 155, 2020 WL 7296814 (U.S. Dec. 11, 2020).

3. The Bill of Complaint also asserted claims under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. *Id.*

4. Justices Alito and Thomas would have allowed the Bill of Complaint on grounds that the Court's original jurisdiction is nondiscretionary but would not have granted other relief. Texas v. Pennsylvania, No. 155, 2020 WL 7296814, at *1 (U.S. Dec. 11, 2020). The Court also dismissed all other motions filed in the case as moot. *Id.*

plaintiffs might have had standing to bring an Electors Clause challenge in federal court.[5] Further, because states need not conform to the standing requirements of Article III, a range of potential plaintiffs could bring such a challenge in state court.

Clearing the standing hurdle would present a new hurdle: the political-question doctrine. That doctrine deems inappropriate for judicial resolution certain questions that, instead, should be resolved by the political branches. Does the political-question doctrine deny courts the ability to resolve claims under the Electors Clause? Relying on the seminal case of *Baker v. Carr*,[6] Texas argued no, but the question has not been answered by courts or commentators, and the Supreme Court, in rejecting Texas's suit, did not reach the issue.

This short essay interrogates the issue of whether Electors Clause challenges raise nonjusticiable political questions. The analysis is far more complicated than Texas made out, but Texas's answer was basically correct. The political-question doctrine does not prevent courts from hearing and adjudicating a variety of Electors Clause challenges, including the challenges advanced in *Texas v. Pennsylvania*. The doctrine, however, does prevent both state and federal courts from using their remedial powers to appoint a state's electors in a manner contrary to the state legislature's directives.[7] Thus, some of Texas's own proposed remedies would have violated the political-question doctrine.

II. TEXAS'S CLAIMS

The Electors Clause provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[8] Texas argued that the Defendant States' judiciaries and executive officials acted in ways contrary to how their legislatures directed the appointment of their electors.[9]

For example, Texas asserted that Pennsylvania's Secretary of State, Kathy Boockvar "unilaterally abrogated several Pennsylvania statutes requiring signature verification for absentee or mail-in ballots" when she settled a lawsuit challenging those provisions and issued "revised guidance" stating Pennsylvania law

5. The state legislatures would likely have standing to bring Electors Clause challenges. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 793 (2015) (holding that a state legislature had standing to assert an Elections Clause challenge); Bognet v. Secretary, 980 F.3d 336, 349–50 (3d Cir. 2020) (suggesting that the legislature would have standing to assert an Electors Clause claim). In addition, some, but not all, courts have held the losing candidate and the losing-party electors would have standing. *Compare* Trump v. Wis. Elections Comm'n, F. Supp. 3d (E.D. Wis. 2020) (holding Trump to have standing), *and* Carson v. Simon, 978 F.3d 1051, 1057–59 (8th Cir. 2020) (per curiam) (holding that losing-party electors had standing), *with Bognet*, 980 F.3d at 349–52 (holding that the losing congressional candidate did not have standing to bring Electors Clause challenges), *and* Bowyer v. Ducey, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020) (holding that losing-party electors did not have standing).

6. 369 U.S. 186 (1962).

7. *See generally* U.S. CONST. art. II, § 1, cl. 2.

8. *Id.*

9. Bill of Complaint, *supra* note 2, at 4 ("State officials . . . announced new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote."); *id.* ¶ 13 ("By purporting to waive or otherwise modify the existing state law in a manner that was wholly ultra vires and not adopted by each state's legislature, Defendant States violated . . . the Electors Clause.").

did not "authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections."[10] Texas also contended that the Supreme Court of Pennsylvania, based on the Pennsylvania Constitution's Free Elections Clause,[11] extended the statutory deadline for timely ballots. Texas made similar allegations that state executive officials and judges in Georgia, Michigan, and Wisconsin issued rules and rulings contrary to their respective state statutory provisions governing elections.[12]

Texas argued that because these actions of state officials were contrary to legislative directives, and thus violations of the Electors Clause, electors appointed as a result of the violations "cannot cast constitutionally valid votes for the office of President."[13]

Texas sought declarations that the Defendant States "administered the 2020 presidential election in violation of the Electors Clause" and that "any electoral college votes cast by such presidential electors appointed in Defendant States . . . are in violation of the Electors Clause . . . and cannot be counted."[14] Texas also sought an order

- "[e]njoin[ing]" the Defendants States from "[using] the 2020 election results for the Office of President to appoint presidential electors to the Electoral College,"
- "authoriz[ing], pursuant to the Court's remedial authority, the Defendant States to conduct a special election to appoint presidential electors,"
- "direct[ing] such States' legislatures . . . to appoint a new set of presidential electors in a manner that does not violate the Electors Clause . . . or to appoint no presidential electors at all," and
- "[e]njoin[ing] the Defendant States from certifying presidential electors."[15]

Anticipating objections to its Electors Clause claims on political-question grounds, Texas filed a brief arguing that the political-question doctrine did not bar its claims. That brief, however, commits barely 150 words to addressing the political-question doctrine. Texas argued, in full:

> The "political questions doctrine" does not apply here. Under that doctrine, federal courts will decline to review issues that the Constitution delegates to one of the other branches—the "political branches"—of government. While picking electors involves political rights, the Supreme Court has ruled in a line of cases beginning with Baker that constitutional claims related to voting (other than claims brought under the Guaranty Clause) are justiciable in the federal courts. As the Court held in Baker [v. Carr], litigation over political rights is not the same as a political question:

10. *Id.* at 14–15.
11. PA. CONST. art. I, § 5, cl. 1; Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).
12. Bill of Complaint, *supra* note 2, at 20–22 (Georgia); *id.* at 24–27 (Michigan); *id.* at 30–35 (Wisconsin).
13. *Id.* at 37.
14. *Id.* at 39.
15. *Id.* at 40.

> We hold that this challenge to an apportionment presents no nonjusticiable "political question." The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words."
>
> *Baker*, 369 U.S. at 209. This is no political question; it is a constitutional one that this Court should answer.[16]

Texas's argument is woefully insufficient. While it is true political rights do not *necessarily* give rise to a political question, they *can* give rise to political questions, and it is untrue that "constitutional claims related to voting (other than claims brought under the Guaranty Clause) are justiciable."[17] In *Rucho v. Common Cause*, a blockbuster decision from 2019 written by Chief Justice John Roberts, the Court held that Elections Clause, First Amendment, and Equal Protection Clause challenges to excessively partisan-gerrymandered voting districts presented nonjusticiable political questions.[18] It appears that Texas was not banking on Roberts's vote.

Texas instead should have confronted the two well-established guideposts for the political-question doctrine. Does the Constitution assign the question to a branch other than the federal courts?[19] And does answering the question involve the application of standards that are not judicially discoverable and manageable?[20] Those are more difficult analyses whose resolutions go well beyond a generic citation to *Baker v. Carr*.[21] I take up those analyses next.

III. THE ELECTORS CLAUSE AND THE POLITICAL-QUESTION DOCTRINE

The Electors Clause instructs states to appoint electors in the manner directed by the state legislature.[22] This provision assigns to the states the power to appoint electors.[23] Absent some constitutional delegation of this power by the states, federal courts cannot purport to appoint electors themselves. The Electors Clause also assigns to the state legislatures the power to prescribe the manner of appointment.[24] Again, absent some constitutional delegation of this power by the state legislatures, federal courts cannot purport to prescribe the manner for appointing electors.

This conclusion is strongly supported by *Gilligan v. Morgan*,[25] which involved Due Process Clause challenges to the negligent training of National

16. Brief in Support of Motion for Leave to File Bill of Complaint at 19–20, Texas v. Pennsylvania, No. 155, 2020 WL 7296814 (U.S. Dec. 11, 2020).

17. *Id.*

18. 139 S. Ct. 2484 (2019).

19. Nixon v. United States, 506 U.S. 224, 228 (1993).

20. *Id.*

21. 369 U.S. 186 (1962). For a deeper exposition of the political-question doctrine, see Scott Dodson, *Article III and the Political-Question Doctrine*, 116 NW. U. L. REV. (forthcoming 2021).

22. U.S. CONST. art. II, § 1, cl. 2.

23. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) (describing Section 1 of Article II as an "express delegation[] of power to the States").

24. U.S. CONST. art. II, § 1, cl. 2.

25. 413 U.S. 1 (1973).

Guard reservists, and which asked the federal courts to "establish standards for the training" of the National Guard.[26] The Militia Clause vests in Congress the power to "provide for organizing, arming, and disciplining, the Militia," and which vests in the states "the Authority of training the Militia according to the discipline prescribed by Congress."[27] Based on this language, the Court held that the Militia Clause assigns oversight and training functions of the National Guard exclusively to nonjudicial decisionmakers, and thus the lawsuit claims requiring judicial oversight and training presented nonjusticiable political questions.[28] Analogizing to *Gilligan*, Electors Clause claims seeking to involve the federal courts in the states' appointment of electors or the state legislatures' manner of appointing electors would similarly involve nonjusticiable political questions.

It is possible the Electors Clause's assignments of those powers to the states could be delegated by the states to the federal courts. The Constitution expressly allows congressional delegation of the power to appoint inferior officers,[29] and Congress has so delegated this power, including to the federal judiciary.[30] Although the Constitution contains no express authorization of delegation of Electors Clause powers, delegation can, under certain circumstances, be implied,[31] and the Court has endorsed the possibility of congressional delegation to the federal courts of some kinds of political questions otherwise nonjusticiable under the Guaranty Clause.[32] With respect to the Electors Clause, although some state legislatures have delegated Electors Clause responsibilities to state agencies,[33] it does not appear that any states have delegated Electors Clause authority to the federal courts.

Even with some constitutional delegation, federal courts could only appoint electors or prescribe the manner for appointing electors if doing so involves judicially discoverable and manageable standards.[34] If the task involves political, rather than judicial, standards, then the task is "beyond the competence of the

26. *Id.* at 4–6.

27. U.S. CONST. art. I, § 8, cl. 16.

28. Gilligan v. Morgan, 413 U.S. 1, 6–7 (1973).

29. *See* U.S. CONST. art. II, § 2, cl. 2 ("But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

30. *E.g.*, 28 U.S.C. § 152(a) (delegating the appointment of bankruptcy judges); § 631(a) (delegating the appointment of magistrate judges).

31. To be fair, the scope of implied delegation is subject to vigorous ongoing debate. *See* Gundy v. United States, 139 S. Ct. 2116 (2019) (featuring divergent opinions from the justices about the scope of congressional authority to delegate legislative powers).

32. *See* Luther v. Borden, 48 U.S. 1, 43 (1849) (stating that Congress "might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere"). *Cf.* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1969 (2015) ("[C]ourts and commentators in the nineteenth century assumed that Congress could transform a 'political question' into a 'judicial question' by asking courts to decide the issue.").

33. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 113–14 (2000) (Rehnquist, C.J., concurring) ("In Florida, . . . the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State . . . and to state circuit courts.").

34. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2492–94 (2019).

federal courts" and outside their authority under Article III.[35] The task of appointing electors or prescribing a manner of appointment, without more guidance, presents only political questions. The Court has interpreted the appointment power to grant "the broadest power of determination" with a wide range of permissible methods.[36] Choosing among them involves political, not legal, standards. Perhaps a delegation of authority could specify judicially manageable standards for implementation, but an unfiltered delegation of Electors Clause powers to the federal courts would likely present political questions outside of their authority to resolve under Article III.

For these reasons, based on the Supreme Court's precedent, the appointing of electors and the prescription of the manner for appointing electors are nonjusticiable political questions that federal courts cannot adjudicate.

These political questions are narrow, however. The Electors Clause does not commit all matters involving electors and their selection to the states. If an Electors Clause claim involves matters outside the Electors Clause—such as if the challenged non-legislative actions do not comprise part of the "manner" of appointing electors—a federal court could so declare—and then dismiss the claim on the merits under Rule 12(b)(6) for failure to state an Electors Clause claim.[37]

Even matters within the scope of the Electors Clause but ancillary to the Electors Clause's political questions could be adjudicated by federal courts. In particular, federal courts can interpret the scope of the Electors Clause's assignment of power, as long as the federal courts do not usurp that assigned power for themselves. In *Chiafalo v. Washington*,[38] for example, the Supreme Court held, on the merits, that a state could include, as part of its appointment of electors, an enforceable penalty for an elector's failure to vote as directed by law.[39] The issue in *Chiafalo* was justiciable because it involved an interpretation of the scope of the Electors Clause powers rather than the Court performing the task of actually appointing electors.[40]

Similarly, federal courts can enforce other constitutional provisions that impose restrictions on the states' exercise of Electors Clause authority. In *Williams v. Rhodes*,[41] for example, the Court confronted an Equal Protection Clause challenge to state election laws rendering it "virtually impossible" for presidential candidates of political parties other than the Democratic Party or the

35. *Id.* at 2500 (internal quotation marks omitted).

36. McPherson v. Blacker, 146 U.S. 1, 27 (1892).

37. *Cf.* Zivotofsky v. Clinton, 566 U.S. 189, 195–96 (2012) (contrasting the potentially nonjusticiable question of whether Jerusalem is part of Israel with the justiciable question of whether a congressional statute purporting to recognize Jerusalem as a part of Israel unconstitutionally invades the President's powers).

38. 140 S. Ct. 2316 (2020).

39. *Id.* at 2320.

40. *Cf.* Powell v. McCormack, 395 U.S. 486, 522 (1969) (rejecting the political-question doctrine and construing the scope of the House of Representative's power to refuse to seat a member under the Qualifications Clause). *See also* Nixon v. United States, 506 U.S. 224, 237 (1993) ("The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to what these qualifications consisted of was not.").

41. 393 U.S. 23 (1968).

Republican Party "to be placed on the state ballot to choose electors."[42] The state defended on the ground that the Electors Clause gives the state unfettered discretion to manage the process of selecting electors[43] and asserted that the political-question doctrine barred the Supreme Court's adjudication of the claim.[44] The Supreme Court rejected the application of the political-question doctrine,[45] held that the Fourteenth Amendment limits state discretion under the Electors Clause,[46] and found that the state's election laws violated the Equal Protection Clause.[47]

Finally, the political-question doctrine does not bar a federal court from protecting the state or the state legislature's prerogatives under the Electors Clause from encroachment or usurpation by other actors.[48] In *Bush v. Palm Beach County Canvassing Board*,[49] for example, the Supreme Court considered whether the Florida Supreme Court violated the Electors Clause by changing the Florida legislature's manner of appointing electors.[50] Although the Court ultimately declined to rule on the merits of that issue, its opinion indicates that the Court was prepared to reverse the Florida Supreme Court if the state court had unconstitutionally invaded the powers of the Florida legislature under the Electors Clause.[51]

So, in sum, the political-question doctrine prevents a federal court from appointing electors and from prescribing the manner for appointing electors. Those responsibilities are committed to the state entities assigned in the Constitution absent redelegation. Federal courts retain authority to hear election-law cases outside of the Electors Clause, to adjudicate issues regarding the scope of state authority under the Electors Clause, to hear claims involving other provisions of the Constitution that are justiciable, and to protect the prerogatives of the state assignees under the Electors Clause.

IV. APPLYING THE DOCTRINE TO *TEXAS V. PENNSYLVANIA*

These principles inform the political-question analysis of the Electors Clause claim in *Texas v. Pennsylvania* and lead to several conclusions about the political-question doctrine at issue in the case.

42. *Id.* at 24.
43. *Id.* at 26.
44. *Id.* at 28.
45. *Id.*
46. *Id.* at 28–29.
47. *Id.* at 34.
48. *Cf.* Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) ("If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislat[ure].").
49. 531 U.S. 70 (2000) (per curiam).
50. *Id.* at 73.
51. *Id.* at 76–77. On a subsequent appeal in the same case, three justices joined an opinion finding that the Florida Supreme Court had usurped the legislature's prerogatives under the Electors Clause. *See* Bush v. Gore, 531 U.S. at 116–22 (Rehnquist, C.J., concurring) (finding that the Florida Supreme Court unconstitutionally departed from the legislative scheme).

The primary conclusion is that Texas's liability claim that various non-legislative state actors in the four Defendant States violated the Electors Clause was justiciable. Adjudicating that claim would not have required the Supreme Court to either appoint electors or prescribe the manner of appointing electors. Rather, the claim would have required the Court to construe the scope of the legislative authority under the Electors Clause and, if necessary, protect that authority from encroachment by non-legislative state actors. All of those tasks are allowed under the political-question doctrine.

That the political-question doctrine would not have barred judicial adjudication of Texas's Electors Clause claim does not mean that the Supreme Court would have found for Texas on the merits. The Court may very well have rejected Texas's Electors Clause claim because, among other possible reasons, (a) the statutes at issue were not part of the "[m]anner" of appointing electors as assigned by the Electors Clause or (b) any actions by the non-legislative state actors did not amount to unconstitutional usurpation of the legislatures' prerogatives under the Electors Clause.[52]

With respect to the latter possibility, two additional issues are worth noting. First, the Court previously has suggested that the state legislature's authority under the Electors Clause is subject to the state constitution.[53] Thus, state-court invalidations of legislative manners of appointing electors, if invalidated pursuant to the mandates of the state constitution, could be consistent with the Electors Clause.[54] Second, the legislatures in the Defendant States may have delegated some of their Electors Clause authority to non-legislative state actors, including those very actors whom Texas accused of usurping legislative authority. If so, then their interpretations of the election laws, if done in furtherance of legislative intent, may have been consistent with—even required by—the Electors Clause.

One remaining political-question issue works against Texas. Texas sought various remedies. The declaratory relief Texas sought—declarations that the Defendant States administered the election in violation of the Electors Clause and that any electoral votes cast were in violation of the Electors Clause[55]—are within the authority of the federal courts. But the injunctive relief Texas sought is problematic. Texas sought an order enjoining the Defendant States from using the election results to appoint electors, authorizing the Defendant States to conduct a special election, directing the state legislatures to appoint a new set of

52. *See* Trump v. Wis. Elections Comm'n, No. 20-CV-1785-BHL, 2020 WL 7318940, at *12 (E.D. Wis. Dec. 12, 2020) (distinguishing between constitutional manner of appointing electors and "mere administration of a general election"); *id.* at *13 ("If 'Manner' in the Elections Clause is read to include legislative enactments concerning election administration, the term necessarily also encompasses the Wisconsin Legislature's statutory choice to empower the WEC to perform the very roles that plaintiff now condemns.").

53. *See* McPherson v. Blacker, 146 U.S. 1, 25 (1892) (stating that the legislative prerogatives under the Electors Clause are cabined by limitations imposed by the state constitutions). *Cf.* Smiley v. Holm, 285 U.S. 355, 367 (1932) (holding the legislature's prerogatives under the Elections Clause are subject to the state constitutional requirement of gubernatorial assent).

54. That appears to have been the case in Pennsylvania. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

55. Bill of Complaint, *supra* note 2, at 39.

electors, and enjoining the states from certifying the electors.[56] Each of these requests asks the Supreme Court to set standards for the appointment or the manner of appointing electors. It is not clear that the Court could do so consistent with the political-question doctrine.

V. CONCLUSION

This essay has tackled the application of the political-question doctrine to the Electors Clause, especially in light of the lawsuit initiated by Texas challenging the 2020 presidential election. The assignment of constitutional powers to the states is uncommon but not unique to the Electors Clause; several other provisions assign specific powers to states and state governmental institutions.[57] Yet the political-question doctrine has focused on constitutional assignments to Congress or the President. This essay may therefore help expand the character of the political-question doctrine beyond the separation of powers at the federal level and offer purchase for analyzing the implications of the political-question doctrine in a wider range of constitutional assignments, including those allocating power to states.

56. *Id.* at 40.

57. *E.g.*, U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ."); U.S. CONST. art. I, § 8, cl. 16 ("reserving to the States respectively, the Appointment of the Officers" of the state militias); U.S. CONST. amend. XVII, § 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.").