THE SUPREME COURT SUMMONS THE GHOSTS OF *BUSH V. GORE*: HOW *MOORE V. HARPER* HAUNTS STATE AND FEDERAL CONSTITUTIONAL INTERPRETATION OF ELECTION LAWS

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INTRODUCTION

When the United States Supreme Court granted certiorari in *Moore v. Harper*,[1] early warning systems went off in state supreme courts around the country, announcing the potential this case had to eliminate state constitutional review of state voting rights legislation that in any way implicated federal elections.[2] Recognizing that almost all state elections are inextricably interconnected with federal elections and the threat therefore posed to state courts' core functions, the chief justices of all fifty states joined in an amicus brief criticizing the Independent State Legislature Theory (ISLT) as an upheaval of our federal and state constitutional structure.[3]

Fortunately, the decision issued by a divided court was not as obviously destructive of state constitutional review as the chief justices and others feared. The Court rejected the broader interpretation of the ISLT, endorsed by three of the justices,[4] that would have essentially precluded state constitutional review altogether.[5] Nonetheless, it is the thesis of this article that the decision that was issued continues to pose great dangers. The Supreme Court, drawing on the reasoning of *Bush v. Gore*,[6]

1. 143 S. Ct. 2065 (2023).

2. *Id.* at 2081.

3. *See* Brief for Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 7–8, Moore v. Harper, 143 S. Ct. 2065 (2023) (No. 21-1271) (explaining how state court review of state election laws is mandated by state constitutional design and our federal structure). The Conference of Chief Justices "is comprised of the Chief Justices or Chief Judges of the courts of last resort in all 50 states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands." *Id.* at 1.

4. *Moore*, 143 S. Ct. at 2102 (Thomas, J., dissenting) (citations omitted) (rejecting substantive state-law limitations on state legislatures when they perform the "federal function" of making rules for federal elections). Justice Gorsuch, and not Justice Alito, joined the referenced part of Justice Thomas's dissent, though Justice Alito has indicated support for the ISLT in other opinions. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) [hereinafter *Boockvar III*] (Alito, J., concurring in denial of motion to expedite) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the 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.").

5. *Moore*, 143 S. Ct. at 2081.

6. 531 U.S. 98 (2000).

particularly the vague and controversial[7] version of the ISLT first articulated by Chief Justice Rehnquist in his concurrence, held that state supreme courts' interpretations of their state election laws are subject to review in federal court when they "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[8]

This standard of review is disturbingly unclear. The decision creates substantial uncertainty, not only for future elections but also for the overall division of authority between the state and federal courts that is essential to the design of federalism.[9] Unless it is further defined and confined, as recommended in this article, this standard of review will distort the division of authority between state and federal courts that is part of our dual constitutional structure.[10] As the Supreme Court has fundamentally shrunk and supplanted historic state constitutional authority in a similar fashion in other contexts, and even done so by first relying on and then widely expanding seemingly modest decisions,[11] the holding of *Moore* and its apparent resurrection of the *Bush v. Gore* Rehnquist concurrence standard of review over state courts remains a grave concern.

In our view, the original and best understanding of the Elections Clause provides for a very limited form of federal oversight. The provision does not authorize the Supreme Court to substitute its judgment for state courts' on the meaning of state election statutes or state constitutions as Chief Justice Rehnquist did in *Bush v. Gore*. Nor does it authorize an open-ended inquiry into what it means to transgress the ordinary standards of judicial review, as there is no consensus on the Supreme Court or other courts on what that means. It also does not prevent state courts from providing greater protection

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7. *See, e.g.*, Henry Paul Monaghan, *Supreme Court Review of State Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1919 (2003) ("*Bush v. Gore* received a harsh reception from much of the legal academy.").

8. *Moore*, 143 S. Ct. at 2089. *See Bush*, 531 U.S. at 112–13 (Rehnquist, C.J., concurring).

9. *Cf.* Leah Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1258 (2022); Richard Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News*, N.Y. TIMES (June 28, 2023), https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html ("The court actually endorsed a weaker version of [the Independent State Legislature Theory], and this version will loom over—and potentially affect—the 2024 elections.").

10. *See* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115, 135 (2022) (explaining that an "independent approach to state constitutional interpretation" is "part of the overall design of our dual constitutional structure").

11. *See infra* text accompanying notes 381–89.

of voting rights than that provided by state legislatures or the federal Constitution when the state constitution grants such rights. Nor does it impose a particular interpretive methodology on state courts in interpreting their constitutions or the federal constitutional conception of separation of powers or *stare decisis*. It only prevents state courts from performing the function of state legislatures, as the state legislatures are expressly responsible under the federal Constitution for prescribing the times, places, and manner of elections subject to state constitutional review. Justice Souter's dissent in *Bush v. Gore* encapsulates the overreach at issue.[12] State courts may not create new election laws untethered to the legislative acts and state constitutional requirements in question. Such fundamental rewriting of the election laws and usurpation of the legislative function is forbidden by the Elections Clause.

I. THE INDEPENDENT STATE LEGISLATURE THEORY: TEXT, HISTORY, AND ITS MODERN MANIFESTATION

The Supreme Court grounded its legal analysis in *Moore v. Harper* in the Elections Clause of the Constitution. This section first delves into the text and history of that clause. Then, we explain how the Court interpreted the provision in *Moore*, *Bush v. Gore*, and other litigation during the 2020 election in order to develop the ISLT. Afterwards, we examine recent orders and decisions to explore the possible implications of *Moore*.

A. The Elections Clause

The text of the 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; but the Congress may at any time by Law make or alter such Regulations."[13]

Its historical background is informative to its interpretation. Here, we emphasize three important considerations. First, as expressly referenced by the court in *Moore* and more fully explained below, the Framers understood that state legislatures were creatures of—and governed by—state constitutions.[14] Numerous state constitutions in effect at the time of the Framing had express provisions to that effect, providing that legislative acts that were incompatible or repugnant to rights protected by the state constitution were invalid.[15] By the time of the Constitutional

12. *Bush*, 531 U.S. at 135–36 (Souter, J., dissenting).

13. U.S. CONST. art. I, § 4, cl. 1.

14. *See* Moore v. Harper, 143 S. Ct. 2065, 2079–80 (2023).

15. At least four state constitutions then in existence provided that the common law or statutory law passed before the constitution would remain in effect until altered by the legislature, "such parts only excepted as are repugnant to the rights and privileges contained in this constitution." DEL. CONST. of 1776,

Convention, a number of state courts had also held state laws unconstitutional.[16] In the Virginia case of *Commonwealth v. Caton*,[17] Judge Wythe wrote that "if the whole legislature . . . should attempt to overleap the bounds, prescribed to them by the people, I, . . . pointing to the constitution, will say, to them, here is the limit of your authority; and hither, shall you go, but no further."[18] As the Court in *Moore* summarized, "Since early in our Nation's history, courts have recognized their duty to evaluate the constitutionality of legislative acts. . . . [S]tate court decisions provided a model for James Madison, Alexander Hamilton, and others who would later defend the principle of judicial review."[19]

At the time of the Framing, there were also no federal courts in place besides the Supreme Court, with Congress left to decide whether to create "inferior" federal courts. Thus, the Framers "had little doubt that state courts would enforce federal and state constitutional rights," thereby demonstrating at least some "faith in state courts as protectors of liberty."[20] More specifically, challenges

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art. XXV. For similar language, see N.Y. CONST. of 1777, art. XXXV; MASS. CONST. of 1780, part II, ch. 6, art. VI; N.J. CONST. of 1776, §§ XXI–XXII. State constitutions also expressly precluded legislatures from passing laws that were "repugnant" to the constitution, GA. CONST. of 1777, art. VII cl. 1; MASS. CONST. of 1780, part II, ch. 1, § 1, art. IV; PA. CONST. of 1776, part II, § 9; or provided that the rights in the constitution could not be changed, MD. DECL. OF RIGHTS of 1776, art. XLII; N.C. CONST. of 1776, § XLIV.

16. *See, e.g.*, Bayard v. Singleton, 1 N.C. (Mart.) 48, 50 (1787) (explaining that a legislative "act must of course . . . stand as abrogated and without any effect" if in violation of the constitution, "the fundamental law of the land"). Other examples include the *Ten-Pound Act Cases* in New Hampshire, in which several lower state courts struck down a law purporting to allow certain actions to be tried without a jury, in violation of the state constitution, and *Trevett v. Weeden*, in which a Rhode Island court struck down a state statute that established paper money and included criminal penalties without a jury trial. *See* William M. Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 475–78 (2005). *See also* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 325 (2d ed. 2023) ("[J]udicial review itself was a phenomenon of state law well before *Marbury v. Madison*.").

17. 8 Va. (4 Call) 5 (1782).

18. *Id.* at 8.

19. *Moore*, 143 S. Ct. at 2079–80.

20. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 180 (2018); Brief for State Constitutional Historians Lawrence Friedman and Robert F. Williams as Amici Curiae in Support of Respondents at 21, Moore v. Harper, 143 S. Ct. 2065 (2023) (No. 21-1271) [hereinafter Friedman & Williams Brief]. *See also* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 149 (2022) ("[N]ot only did state constitutions regulate federal elections beginning at the Founding, but they have consistently done so ever since, and state courts have routinely adjudicated and enforced these provisions.").

to conducting state and federal elections, including those involving interpretation of state statutes, would necessarily be brought in state court, as there were no "inferior" federal courts at the time. State courts would also continue to be responsible for reviewing challenges to state election laws governing federal elections after the creation of lower federal courts.[21]

The second important historical consideration is the Framers' understanding of state legislatures. Although not discussed by the majority in *Moore*, the Framers had a healthy skepticism of state legislatures. As historians have demonstrated, there was much concern about overreaching by state legislatures at the time of the Framing.[22] In 1787, James Madison criticized the "injustice" of state laws, explaining that a majority of state legislators "join in a perfidious sacrifice" of the "public good" to "ambition" and "personal interest" against their constituents' interests.[23] Madison's position reflected the views of other Framers, and in part, the Constitutional Convention was convened to address such problems. At the Convention, Gouverneur Morris of Pennsylvania explained, in arguing for an independent Senate, "Every man of observation had seen in the democratic branches of the State Legislatures . . . excesses ag[ain]st personal liberty[,] private property & personal safety."[24] Edmund Randolph, from Virginia, worried that the "chief danger [to the future of the union] arises from the democratic parts of [state] constitutions"—that is, legislatures.[25] Indeed, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[26] the Supreme Court explained that the Elections Clause reflected a concern for potential abuses by state legislatures, not confidence in them: "The dominant purpose of the Elections Clause, the historical

21. *See* Shapiro, *supra* note 20, at 151.

22. *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 306–89 (1998); WILLIAMS & FRIEDMAN, *supra* note 16, at 85 ("Among the most influential delegates at the Constitutional Convention, Madison, Randolph, Wilson, and Morris saw the existing state constitutions . . . as unable to provide checks against wide-ranging assaults on liberty and property by the relatively unfettered state legislatures."); WILLIAMS & FRIEDMAN, *supra* note 16, at 280–81 (describing the "range of highly visible legislative abuses in the late 1770s," which led to reform of state legislatures).

23. James Madison, *Vices of the Political System of the United States* (April 1787), *reprinted in* FOUNDERS ONLINE, National Archives, https://founders.archives.gov/documents/Madison/01-09-02-0187. *See also* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 240 (M. Farrand ed. 1911) [hereinafter RECORDS] (statement of James Madison) ("The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices.").

24. RECORDS, *supra* note 23, at 512.

25. *Id.* at 26.

26. 576 U.S. 787 (2015).

record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation."[27]

Third, given the Framers' skepticism of state legislatures, the delegation to them of responsibilities of prescribing the times, places, and manner of federal elections would appear to be more of an administrative decision than a declaration of trust in state legislatures. As state legislatures performed this role for state elections and, under the Articles of Confederation, for federal elections as well,[28] and no such federal infrastructure was in place to perform this role, tasking the state legislatures with this responsibility simply made administrative and bureaucratic sense. As explained in an amicus brief in *Moore* by historians of the Founding Era: "[W]hile the Convention could have considered proposing uniform national regulations for the conduct of congressional elections, it defaulted that responsibility to the state legislatures. . . . [for] good reasons."[29] Not only did the states have "their own conventions about conducting elections," but "[m]ore importantly, because the existing models of representation within the States could not be translated nationally, into one uniform system of national representation, some period of experimentation was essential before one could decide whether national uniformity was desirable."[30] In arguing against a proposal to strike Congress's authority to overrule election rules from the Elections Clause,[31] Madison indicated that giving the role to state legislatures in the first place was more a matter of convenience than principle:

> It seemed as improper in principle—though it might be less inconvenient in practice, to give to the State Legislatures this great authority over the election of the Representatives of the people in the Gen[era]l Legislature, as it would be to give to the

27. *Id.* at 814–15; *see also id.* at 815 ("The clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate."); U.S. Term Limits v. Thornton, 514 U.S. 779, 808–09 (1995) ("The Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places and Manner' of elections.").

28. ARTICLES OF CONFEDERATION of 1781, art. V ("For the more convenient management of the general interests of the [U]nited [S]tates, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress . . . .").

29. Brief for Amici Curiae Scholars of the Founding Era in Support of Respondents at 28, Moore v. Harper, 143 S. Ct. 2065 (2023) (No. 21-1271).

30. *Id.*

31. U.S. CONST. art. I, § 4, cl. 1 ("[T]he Congress may at any time by Law make or alter such Regulations . . . .").

> latter a like power over the election of their Representatives in the State Legislatures.[32]

The end result was a compromise of sorts, with state legislatures prescribing the times, places, and manner of federal elections but with Congress expressly empowered to alter any such rule that state legislatures prescribed. Thus, no particular trust or respect for state legislatures was intended by this assignment of responsibility. As we have seen, the opposite was true.[33]

B. Development of the ISLT

Having introduced the text and history of the Elections Clause, we now turn to the theory that has sprung from the clause. Although some commentators earlier in American history interpreted the Elections Clause to confer a special power on state legislatures,[34] the modern version of the theory essentially "traces back to the litigation over the 2000 presidential election," particularly the concurrence by Chief Justice Rehnquist.[35]

ISLT proponents focus, in the first instance, on the bare text of the Elections Clause (and Electors Clause, for cases involving

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32. RECORDS, *supra* note 23, at 241. Likewise, responding to a question about Congress's Elections Clause authority during the debates over ratification, Madison explained that the scheme was a second-best option, done essentially for pragmatic reasons: "it was thought that the regulation of time, place, and manner of electing the Representatives, should be uniform throughout the Continent," but "[i]t was found impossible to fix" such uniform rules "in the Constitution." 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1260 (Kaminsky et al., eds., 1993). Instead, "[i]t was found necessary to leave the regulation of these, in the first place, to the State Governments, as being best acquainted with the situation of the people, subject to the control of the General Government." *Id.*; *see also* THE FEDERALIST No. 59 (Alexander Hamilton) (explaining that the Elections Clause "authorizes the national legislature to regulate, in the last resort, the election of its own members," but that a first cut at election regulation was given "to the local administrations" because "in ordinary cases, and when no improper views prevail, [it] may be both more convenient and more satisfactory").

33. *See supra* notes 20–25; *see also* Rosemarie Zagarri, *The Historian's Case Against the Independent State Legislature Theory*, 64 B.C. L. REV. 637, 653 (2023) (explaining that the Elections Clause was "explicitly designed to ensure that the states would not be able to manipulate federal elections in a manner that Congress deemed inappropriate or unjust").

34. For example, Joseph Story argued that a proposed amendment to the Massachusetts Constitution, which would have required the state legislature to redraw Congressional districts only after a reapportionment, violated the Elections Clause by taking away the legislature's constitutional authority. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 39–40 (2020); *Moore*, 143 S. Ct. at 2087–88.

35. Litman & Shaw, *supra* note 9, at 1239.

Presidential elections). They argue that the Constitution assigns these powers expressly to state *legislatures* and not other state institutions.[36] Therefore, when state legislatures are making rules for federal elections or choosing electors, they are exercising an exclusive federal power and are thus subject to fewer constraints than they would be when undertaking ordinary state lawmaking or no constraints at all.[37] In its most vigorous formulation, the ISLT supports the conclusion that state legislatures are not bound by any constraints in state constitutions, including procedural steps to passing ordinary legislation, like a governor's veto,[38] or substantive limits, such as the state constitutional provisions at issue in *Moore v. Harper*.[39] That said, state legislatures would still be bound by federal constitutional requirements, such as equal protection and due process, and other federal election laws.[40]

Indeed, Justices Gorsuch, Alito, and Thomas appear to have adopted a purely textual reading that precludes most, if not all, state constitutional review.[41] Although these three justices can be expected

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36. *Id.* at 1236.

37. *Id.* at 1236–38.

38. *See* Vikram D. Amar & Akhil R. Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent State Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 18 (2021) (criticizing the proponents of the theory and questioning, "Can a 'legislature' include a veto-pen-wielding governor? Can it consist of an independent agency, or the people themselves engaged in direct democracy via initiatives and town meetings?"); Brief for The Claremont Institute's Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners at 18, Moore v. Harper, 143 S. Ct. 2065 (2023) (No. 21-1271) (arguing that state "legislatures were given authority to act unilaterally" via a number of constitutional provisions including the Elections Clause, without their decisions "being subjected to a gubernatorial veto"). *But see* Smiley v. Holm, 285 U.S. 355, 372–73 (1932) ("[T]here is nothing in [the Elections Clause] which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.").

39. *See* Amar & Amar, *supra* note 38, at 18 ("Another aspect is whether the 'legislature,' however defined, can override state constitutional directives on how elections must be run."); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 535 (2021) ("[T]he state constitution may not impose additional substantive limits or restrictions on the scope of the authority that the Elections Clause and the Presidential Elector Clause grant specifically to the state legislature to regulate federal elections.").

40. *See* Morley, *supra* note 39, at 506–07.

41. *See* Moore v. Harper, 143 S. Ct. 2065, 2100 (2023) (Thomas, J., dissenting) (explaining that "state-constitutional limits on the times, places, and manners of holding congressional elections that 'the Legislature' of the State has the power to prescribe" are impermissible under the Elections Clause because the state legislature is exercising a federal power conferred on it by the federal Constitution); Moore v. Circosta, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief) ("[T]he [state election] [b]oard's

to continue to support such an interpretation based on the opinions they have issued so far, the majority of the court has not adopted such an interpretation. In *Moore*, the majority drew instead, at least in part, on the original understanding of the Framers and the reasoning in Chief Justice Rehnquist's concurrence in *Bush v. Gore* to sketch the outlines of a new standard of review.[42]

1. Moore v. Harper

In *Moore v. Harper*, the Supreme Court rejected the most vigorous version of the ISLT, holding instead that state courts can exercise their ordinary powers of judicial review and apply substantive restrictions in their state constitutions to state laws regarding federal elections.[43] The North Carolina Supreme Court had struck down a congressional district map as a partisan gerrymander in violation of the state constitution's Free Elections Clause,[44] as well as state constitutional rights of equal protection, free speech, and free assembly.[45] The Supreme Court rejected the argument that this judicial action violated the Elections Clause. In his majority opinion, Chief Justice John Roberts explained that because state legislatures "are the mere creatures of State Constitutions," they "cannot be

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constitutional overreach . . . offend[s] the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators . . . ."); *Boockvar III*, 141 S. Ct. 1, 1 (2020) (Alito, J., concurring in denial of motion to expedite) ("The Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office."). Justice Thomas would hold that because state constitutions define the legislative process in the state in the first place, they may impose procedural limitations like a governor's veto, but not substantive ones. *Moore*, 143 S. Ct. at 2103 (Thomas, J., dissenting). *See infra* text accompanying notes 72–74.

42. *Moore*, 143 S. Ct. at 2087; Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

43. *Moore*, 143 S. Ct. at 2081.

44. *See* N.C. CONST. art. I, § 10 ("All elections shall be free.").

45. See *Moore*, 143 S. Ct. at 2074; Harper v. Hall, 868 S.E.2d 499, 321508–509 (N.C. 2022) [hereinafter *Harper I*] ("We hold that our constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter."). Then, after a judicial election in which the composition of the court changed, the North Carolina Supreme Court reversed its own decision, concluding that partisan gerrymandering was a political question under state constitutional law, as it is under federal law. *See* Harper v. Hall, 886 S.E.2d 393, 401 (N.C. 2023) [hereinafter *Harper II*] ("[W]e hold that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution."); *id.* at 450 (Earles, J., dissenting) ("Today's result was preordained on 8 November 2022, when two new members of this Court were elected to establish this Court's conservative majority.").

greater than their creators."[46] He relied on the Framers' background understanding that judicial review would constrain state legislatures.[47] "The legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the legislature's exercise of power."[48]

However, in rejecting the most vigorous version of the ISLT, the Court resurrected *Bush v. Gore*, placing particular emphasis on Chief Justice Rehnquist's reasoning in his concurrence (discussed in greater detail below), which applied an exacting review of state court decisions regarding federal elections.[49] The Court in *Moore* held: "Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein."[50] Rather, in this context, "[a]s in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law."[51]

The Court then analogized the Elections Clause to the Takings Clause, the Contract Clause, and the adequate and independent state grounds doctrine. It explained that as in the Elections Clause context, "[s]tates may not sidestep the Takings Clause by disavowing traditional property interests."[52] For the Contract Clause, the Court will "decide for ourselves whether a contract has been made" so "that the constitutional mandate may not become a dead letter," while, of course, "accord[ing] respectful consideration and great weight to the views of the State's highest court."[53] Likewise, the Court stated that "the question whether adequate and independent grounds exist to support a state court judgment involves a similar inquiry."[54] Relying, as did Chief Justice Rehnquist,[55] on *NAACP v. Alabama*,[56] a case involving state court resistance to the Civil Rights movement, the Court emphasized that in determining whether adequate state grounds exist to support a decision, it must consider "whether a state court opinion below adopted novel reasoning to stifle the 'vindication in state courts of . . . federal constitutional rights.'"[57]

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46. *Moore*, 143 S. Ct. at 2083 (quoting RECORDS, *supra* note 23, at 88).
47. *Id.* at 2079–81.
48. *Id.* at 2084.
49. Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).
50. *Moore*, 143 S. Ct. at 2088.
51. *Id.*
52. *Id.* (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998)).
53. *Id.* (quoting Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938)).
54. *Id.* at 2088.
55. Bush v. Gore, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring).
56. 357 U.S. 449 (1958).
57. *Moore*, 143 S. Ct. at 2088 (quoting *NAACP*, 357 U.S. at 457–58).

Then, the Court specifically referenced *Bush v. Gore*, explaining that "[m]embers of this Court last discussed the outer bounds of state court review in the present context in *Bush v. Gore*."[58] The Court quoted from Chief Justice Rehnquist's concurrence and Justice Souter's dissent. Drawing on the Rehnquist concurrence, the Court stated there are "areas in which the Constitution requires the court to undertake an independent, if still deferential, analysis of state law." The Court also specifically referenced Chief Justice Rehnquist's application of this test to the Florida election laws in which he "declined to give effect to interpretations of Florida election laws by the Florida Supreme Court that 'impermissibly distorted them beyond what a fair reading required.'"[59] More briefly, the Court quoted from Justice Souter's dissent in which he "considered whether a state court interpretation 'transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the "legislature" within the meaning of Article II.'"[60] However, after surveying these opinions, the *Moore* Court concluded, "We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause," saying only that the "questions presented in this area are complex and context specific."[61] The Court held "only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[62] The Court did not even reach the issue of whether the North Carolina Supreme Court's interpretation of the North Carolina Constitution to preclude partisan gerrymandering was an example of such circumvention, nor did it address whether the North Carolina court's reversal of its own position after a judicial election constituted such an arrogation of power.[63]

Justice Kavanaugh, concurring, agreed with the majority and addressed the question it left unanswered: How are federal courts to determine when a state court's interpretation has gone too far?[64] Justice Kavanaugh recognized that the Court would eventually need to create "a more specific standard" for "federal court review of state court decisions in federal election cases."[65] He suggested adopting Chief Justice Rehnquist's proposed rule from *Bush v. Gore*, describing it as "straightforward": "whether the state court 'impermissibly

58. *Id.* at 2089.

59. *Id.* (quoting *Bush*, 531 U.S. at 114–15 (Rehnquist, C.J., concurring)).

60. *Id.* (quoting *Bush*, 531 U.S. at 133 (Souter, J., dissenting)).

61. *Id.* at 89–90.

62. *Id.* at 90.

63. *Id. See Harper II*, 886 S.E.2d 393, 401 (N.C. 2023) (describing the North Carolina Supreme Court's reversal of its decision).

64. *Moore*, 143 S. Ct. at 2090 (Kavanaugh, J., concurring).

65. *See id.* at 2091.

distorted' state law 'beyond what a fair reading required,'" considering the law "as it existed prior to the action of the [state] court."[66] Yet Justice Kavanaugh recognized that other proposed rules, such as Justice Souter's standard of "whether the state court exceeded 'the limits of reasonable' interpretation of state law"[67] or, as the solicitor general proposed in *Moore*, "whether the state court reached a 'truly aberrant' interpretation of state law"[68] would yield similar results.[69]

Justice Thomas dissented, joined by Justice Alito and Justice Gorsuch (although Justice Alito did not join the portion of the decision discussing the ISLT).[70] Justice Thomas would not have reached the merits due to a standing issue, as the North Carolina Supreme Court's reversal of its position, in his view, mooted the question presented, but nevertheless disagreed with the majority's interpretation of the Elections Clause as well.[71] Adopting the more vigorous interpretation of the ISLT rejected by the majority, Justice Thomas explained that because the power to create rules for elections is a federal power conferred on state legislatures by the federal Constitution, the people of a state cannot impose any restrictions on the exercise of such power in their state constitutions.[72] According to Justice Thomas, courts would still need to determine what a given state's legislature *is*, by "look[ing] to a State's written constitution to determine the constitutional actors in whom lawmaking power is vested."[73] Thus, according to Justice Thomas, "state constitutions may specify *who* constitutes 'the Legislature' and prescribe *how* legislative power is exercised, but they cannot control *what* substantive laws can be made for federal elections."[74] In other words, a governor could veto an election law, as the veto is part of the lawmaking power created by the state constitution, but a court could not strike down a partisan gerrymander or extend a deadline on the basis of a state constitution.

In addition, consistent with some of the critiques outlined below, Justice Thomas worried that the contours of the federal review

66. *Id.* at 2090–91 (quoting Bush v. Gore, 531 U.S. 98, 114–15 (2000) (Rehnquist, C.J., concurring)).

67. *Id.* at 2090 (quoting *Bush*, 531 U.S. at 117 (Souter, J., dissenting)).

68. *Id.* (quoting Brief for United States as Amicus Curiae Supporting Respondents at 27, Moore v. Harper, 143 S. Ct. 2065 (2023) (No. 21–1271)).

69. *Id.* ("[A]ll three standards convey essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication.").

70. *Id.* at 2091 (Thomas, J., dissenting).

71. *Id.* at 2094, 2100.

72. *Id.* at 2102.

73. *Id.* at 2101.

74. *Id.* at 2103.

required by the majority were too indefinite and would cause difficulty in the federal courts:

> [T]he majority's advice invites questions of the most far-reaching scope. What are 'the bounds of ordinary judicial review'? What methods of constitutional interpretation do they allow? Do those methods vary from State to State? And what about stare decisis—are federal courts to review state courts' treatment of their own precedents for some sort of abuse of discretion? The majority's framework would seem to require answers to all of these questions and more. . . . In the end, I fear that this framework will have the effect of investing potentially large swathes of state constitutional law with the character of a federal question not amenable to meaningful or principled adjudication by federal courts.[75]

Thomas explained that constitutional interpretation is much more open-ended than the statutory interpretation he had signed on to when he joined Chief Justice Rehnquist's concurrence in *Bush v. Gore*, making oversight of state courts more difficult.[76] And the federal oversight might go quite far indeed: if the Supreme Court had agreed that the North Carolina Constitution could be interpreted to forbid partisan gerrymandering (a question it did not reach in *Moore*), the Court "would presumably have needed to ask next whether it exceeded the bounds of ordinary judicial review in North Carolina to find that the specific congressional map *here* violated those prohibitions."[77]

2. Bush v. Gore

The resurrection of *Bush v. Gore*, particularly the Rehnquist concurrence, raises all kinds of bright red flags for those concerned about federalism, respect for state courts, and overreaching by the Supreme Court. This case—which, as discussed below, had long been considered a one-off or even a dead letter[78]—is now the focal point for determining the meaning of *Moore v. Harper*. A closer examination of the Rehnquist concurrence and the dissenting opinions in that case demonstrates just how problematic that may be.

In *Bush v. Gore*, a majority of the Supreme Court reversed the Florida Supreme Court's order of a recount in several counties, holding it violated federal equal protection and due process rights.[79] In the *per curiam* decision, the Court determined that the recount would have resulted in "equal protection and due process" violations, arising from various counties' differing "standards for accepting or

75. *Id.* at 2105–06.
76. *Id.* at 2104–05.
77. *Id.* at 2105.
78. *See infra* note 118.
79. Bush v. Gore, 531 U.S. 98, 106, 110 (2000).

rejecting contested ballots."[80] The Court cautioned that this analysis was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[81] It is not, however, this aspect of *Bush v. Gore* that most interested the Court in *Moore*, but rather the concurring opinion of Chief Justice Rehnquist.

In his concurring opinion, Chief Justice Rehnquist—joined by Justice Scalia and Justice Thomas—began with, then departed from, foundational principles of federalism. "In most cases," he wrote, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns."[82] Then, he carved out his ISLT exception, explaining that "there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government."[83] For this proposition, he cited the Electors Clause, as well as the Court's decision in *McPherson v. Blacker*,[84] where, in upholding a Michigan law that allocated the state's electoral votes by congressional district,[85] the Court explained that the Electors Clause "'leaves it to the legislature exclusively to define the method' of appointment" of presidential electors.[86] Although Chief Justice Rehnquist cited the Electors Clause and not the Elections Clause in *Bush v. Gore*[87] (because the case involved disputed election statutes in the context of the choice of President rather than congressional representatives) and Chief Justice Roberts writing for the majority cited the Elections Clause and not the Electors Clause in *Moore,*[88] both clauses involve delegation of certain powers over federal elections directly to state

80. *Id.* For example, there was no single standard for determining whether a ballot was properly perforated—the famous "hanging chad." *See id.* at 105; *When Your Chads Hang, That Isn't a Good Thing. Here's a Look Back at Election Day 2000*, MIAMI HERALD (Oct. 19, 2020), https://www.miamiherald.com/news/politics-government/election/article246536838.html.

81. *Bush*, 531 U.S. at 109.

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

83. *Id.*

84. 146 U.S. 1 (1892).

85. *Id.* at 42.

86. *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring) (quoting *McPherson*, 146 U.S. at 27). In *Moore*, the Court explained that *McPherson* "had nothing to do with any conflict between provisions of the Michigan Constitution and action by the State's legislature—the issue we confront today." Moore v. Harper, 143 S. Ct. 2065, 2084 (2023). Rather, it concerned whether "Michigan's Legislature itself directly violated the Electors Clause" by vesting the appointment of electors in "separate districts" rather than the state as a whole. *Id.*

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

88. *Moore*, 143 S. Ct. at 2074.

legislatures, thereby triggering application of the ISLT. Neither Chief Justice discussed whether there were any meaningful differences in the application of the theory to the two different clauses. As we explain below, we conclude that the same analysis applies to Electors and Elections Clause cases when disputed election statutes and state judicial review of such statutes are at issue.[89]

In his application of the ISLT, Chief Justice Rehnquist then identified several problems with the Florida Supreme Court's decision via a quite technical analysis of Florida law. First, he explained that the court's broad remedy (a manual recount of ballots that failed to register a vote for President via machine tabulation) ignored the Florida Election Code's allocation of responsibility to county canvassing boards to decide whether to recount ballots and to the Secretary of State to decide whether to extend election-related deadlines.[90] Second, the Florida Supreme Court's interpretation of the statutory term "legal vote" to include ballots that were incorrectly filled out "plainly departed from the legislative scheme."[91] Third, Chief Justice Rehnquist explained that the Florida Election Code evinced a legislative intent for the state to complete counting ballots by the "safe harbor" date in the federal Electoral Count Act,[92] and that the Florida Supreme Court's remedy would endanger that "legislative wish."[93] To support his rejection of the Florida Supreme Court's interpretation of state law, he relied on a few exceptional cases—*Fairfax's Devisee v. Hunter's Lessee*,[94] *NAACP v. Alabama*,[95] and *Bouie v. City of Columbia*[96]—and the Takings Clause comparison discussed above.[97]

The dissenters in *Bush v. Gore* strongly disagreed with Chief Justice Rehnquist's view that the Supreme Court should subject state courts' interpretations of state election law to non-deferential

89. *See infra* Part III.D.

90. *Bush*, 531 U.S. at 119.

91. *Id.* at 118.

92. Under federal law at the time, a state's resolution of election disputes would be "conclusive" if such disputes were resolved (1) at least six days before presidential electors vote and (2) according to a dispute-resolution procedure that existed before that date. *See* 3 U.S.C. § 5 (2021). *Cf.* Shapiro, *supra* note 20, at 157. This law was amended in 2022. *See* Pub. L. No. 117-328, div. P, tit. 1, 136 Stat. 5234.

93. *Bush*, 531 U.S. at 120–21 (Rehnquist, C.J., concurring).

94. 11 U.S. (7 Cranch) 603 (1813).

95. 357 U.S. 449 (1958).

96. 378 U.S. 347 (1964).

97. *Bush*, 531 U.S. at 114 & n.1 (citing *NAACP*, 357 U.S. at 456–57, *Bouie v. City of Columbia*, 378 U.S. 347, 361–62 (1964), and *Fairfax's Devisee*, 11 U.S. at 623).

review.[98] In his dissent, Justice Souter addressed and rejected the argument that the Florida court's interpretation of state law "was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative Act in question."[99] After canvassing the interpretations from the Florida decision, he concluded that "none of the state court's interpretations is unreasonable to the point of displacing the legislative enactment."[100]

Justice Stevens, Justice Ginsburg, and Justice Breyer each explained that state judicial review of state legislatures' enactments is simply part of state constitutional structure, incorporated by the delegation in the Electors Clause to state legislatures.[101] They also all vehemently rejected Chief Justice Rehnquist's conclusion that the Florida Supreme Court had exceeded its authority. Justice Stevens explained, as the Court would eventually state in *Moore*, that the Electors Clause "does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions."[102] Thus, Justice Stevens and his fellow dissenters concluded, "legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution."[103] Justice Stevens further fleshed out *McPherson*, on which the Chief Justice had relied, explaining that in that case, the Court "observed that 'the [State's] legislative power is the supreme authority except as limited by the constitution of the State.'"[104] Quoting Justice Holmes, he also stressed that "as a general matter, the 'interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.'"[105] In conclusion, he firmly rejected the Court's "endorsement" of a position that implied a "lack of confidence in the impartiality and capacity of [ ] state judges," stressing that it is "confidence" in those who "administer the judicial system that is the true backbone of the rule of law."[106] Indeed, he wrote, the Court's own decision in *Bush v. Gore* would undermine

98. The dissenters also vigorously disagreed with the merits of his interpretation of Florida law and the relief ordered by the majority, a halt to the recount.

99. *Bush*, 531 U.S. at 131 (Souter, J., dissenting).

100. *Id.* (Souter, J., dissenting). *Cf. id.* at 152 (Breyer, J., dissenting).

101. *Bush*, 531 U.S. at 123 (Stevens, J., dissenting).

102. *Id.*

103. *Id.* at 123–24.

104. *Id.* at 123 (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

105. *Id.* at 126 (quoting Bain Peanut Co. of Tex. v. Pinson, 282 U.S. 499, 501 (1931)).

106. *Id.* at 128.

"the Nation's confidence in the judge as an impartial guardian of the rule of law."[107]

Justice Ginsburg's dissent criticized the majority's decision as a violation of republican and federalist principles. Foreshadowing the *Moore* Court's discussion of the historical role of state judicial review,[108] she criticized Chief Justice Rehnquist's approach as a violation of republican principles because, "in a republican government, the judiciary [is to] construe the legislature's enactments."[109] Justice Ginsburg also explained that the review of state supreme courts proposed in the concurrence was inconsistent with federalism. She stated that a "basic principle" of federalism is "that a State may organize itself as it sees fit," including by providing for judicial review of legislation, free of "disrupt[ion]" from the federal judiciary.[110] She criticized the second-guessing of a state court's interpretation of state law as inconsistent with the Court's precedents, practice, and other related doctrines.[111] She emphasized that, "[i]n deferring to state courts on matters of state law, we appropriately recognize that the Court acts as an 'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction.'"[112]

Justice Ginsburg also distinguished the cases which Chief Justice Rehnquist had relied on to justify heightened federal review. As she explained, these cases arose in contexts of extreme resistance to federal power—"vociferous States' rights attacks on the Marshall Court['s]" enforcement of a federal treaty, ignored by state courts, protecting the property rights of Loyalists after the American Revolution in *Fairfax's Devisee*, and "Southern resistance to the civil rights movements" in *NAACP* and *Bouie*.[113] Federal courts'

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107. *Id.* at 129.

108. *See* Moore v. Harper, 143 S. Ct. 2065, 2080 (2023) ("Although judicial review emerged cautiously, it matured throughout the founding era" via "state court decisions" which "provided a model for James Madison, Alexander Hamilton, and others").

109. *Bush*, 531 U.S. at 141 (Ginsburg, J., dissenting).

110. *Id.*

111. *Id.* at 137 ("Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court.").

112. *Id.* at 138 (quoting Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (alteration in original)).

113. *Bush*, 531 U.S. at 140 (Ginsburg, J., dissenting). Moreover, the Supreme Court arguably engaged in state-law interpretation in those cases not to determine whether the state court was *incorrect* on the state law issue, but rather to determine if, in the particular context under review, the interpretation resulted in a violation of superseding federal law. In *Fairfax's Devisee v. Hunter's Lessee*, the Supreme Court overruled the Virginia Court of Appeals' determination that the state could confiscate land from a Loyalist during the war.

overruling of state-law interpretation had been reserved for the most extreme cases; the Florida Supreme Court in the year 2000 "surely should not be bracketed with state high courts of the Jim Crow South."[114]

Justice Breyer also rejected the concurrence's approach. "I do not see how one could call [the Florida court's] plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the State legislature."[115] Rather, its resolution of plain conflicts in the language of different statutes was entitled to deference.[116] Like Justice Ginsburg, he also asserted that the Court was substituting its judgment for state courts in areas requiring, or at least benefiting from, knowledge of the jurisdiction: He critiqued the majority for "find[ing] facts [relating to how much time it would take for election officials to act] outside of the record on matters that state courts are in a far better position to address."[117]

For many years after it was decided, *Bush v. Gore* remained essentially like the Harry Potter character, a Case-That-Must-Not-Be-Named (or cited).[118] Its dramatic resurrection, however, raises significant concerns. But before addressing the dangers of this resurrection in *Moore*, we first examine how the ISLT manifested itself in the opinions of individual justices in other 2020 election cases, and in the single Supreme Court order applying *Moore* so far, as they provide further clues of how the justices will interpret and apply the modified ISLT in this context.

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11 U.S. (7 Cranch) 603, 618–19, 628 (1813). The Virginia court's decision effectively refused to give effect to a federal treaty. *See id.* at 627 ("[W]e are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax . . . ."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 360 (1816) (explaining that "at the time of the decision [in *Fairfax's Devisee*] in the court of appeals," a "treaty . . . must have been the supreme law of the land"). In *NAACP v. Alabama*, the Supreme Court ruled that it violated the right of association to compel the NAACP to disclose its membership list. 357 U.S. 449, 466 (1958). In *Bouie v. City of Columbia*, the Court ruled that a criminal conviction for trespass for a lunch counter sit-in violated due process by retroactively criminalizing conduct, because the trespass statute had not been interpreted in that way previously. 378 U.S. 347, 363 (1964).

114. *Bush*, 531 U.S. at 141 (Ginsburg, J., dissenting).

115. *Id.* at 152 (Breyer, J., dissenting).

116. *Id.*

117. *Id.* at 146.

118. *See* Adam Cohen, *Has Bush v. Gore Become the Case That Must Not Be Named?*, N.Y. TIMES (Aug. 15, 2006), https://www.nytimes.com/2006/08/15/opinion/15tues4.html; Chad Flanders, *Please Don't Cite This Case!: The Precedential Value of* Bush v. Gore, 116 YALE L.J. POCKET PART 141 (2006), http://yalelawjournal.org/forum/please-dona8217t-cite-this-case-the-precedential-value-of-bush-v-gore.

3. Other 2020 litigation

Aside from *Moore v. Harper*, individual justices referenced the ISLT in several other cases involving the 2020 election.[119]

In a Wisconsin case, *Democratic National Committee v. Wisconsin State Legislature*,[120] a federal district court had extended the deadline to receive absentee ballots by six days in light of the COVID-19 pandemic and unanticipated delays with the postal service.[121] The Seventh Circuit then stayed the court order, and the Supreme Court refused to vacate the stay.[122] Two justices penned concurrences relying on the authority of state legislatures to make election rules as a rationale for the order, even though the district court had ruled based on the federal constitutional right to vote, not state law.[123] Justice Gorsuch, joined by Justice Kavanaugh, stated: "The 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."[124] In a separate concurrence that previewed his concurrence in *Moore*, Justice Kavanaugh endorsed the ISLT as articulated in Justice Rehnquist's concurrence in *Bush v. Gore*.[125] He explained that even though his reasoning in the order before him focused on federal courts, state courts were not off the hook either because "state courts do not have a blank check to rewrite state election laws for federal elections."[126]

In another North Carolina case, *Moore v. Circosta* (*Circosta II*),[127] a state court had entered a consent decree in a case between a group of plaintiff organizations and the state Board of Elections that extended the deadline for receipt of mail-in ballots, again, due to COVID-19 and mail delays.[128] The Fourth Circuit and the Supreme Court refused to issue an order blocking the consent decree from going

119. For an extensive discussion of the development of the ISLT in litigation over the 2020 election, see Shapiro, *supra* note 20, at 162–176.

120. 141 S. Ct. 28 (2020).

121. *See id.* at 40 (Kagan, J., dissenting).

122. *Id.* at 41.

123. *Id.* ("In the court's view, the discarding of so many properly cast ballots would severely burden the constitutional right to vote."). *Cf.* Morley, *supra* note 34, at 20 ("[L]aws enacted by state legislatures pursuant to either the Elections Clause or Presidential Electors Clause are subject to the restrictions of both the U.S. Constitution and federal statutes.").

124. *Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay).

125. *Id.* at 34 n.1 (Kavanaugh, J., concurring) (citing Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring)).

126. *Id.*

127. 141 S. Ct. 46 (2020).

128. *See* Wise v. Circosta, 978 F.3d 93, 96–97 (4th Cir. 2020) [hereinafter *Circosta I*], *aff'd sub nom. Circosta II*, 141 S. Ct. 46 (describing state court litigation); Shapiro, *supra* note 20, at 167–70.

into effect.[129] Justice Gorsuch dissented, referencing his concurrence in the Wisconsin case.[130] Again, he emphasized that "under the Federal Constitution, only the state 'Legislature' and 'Congress' may prescribe '[t]he Times, Places and Manner of holding Elections'"[131] and "that the North Carolina Constitution expressly vests all legislative power in the General Assembly, not the Board or anyone else."[132] "So," he concluded, "we need not go rifling through state law to understand the Board's permissible role in (re)writing election laws."[133] Justice Gorsuch also rejected an interpretation of state law that the legislature had delegated some of its authority to the Board.[134] Although a state court had interpreted the law to provide for such delegation,[135] Justice Gorsuch did not mention the decision, apparently interpreting the law de novo.

Finally, in *Pennsylvania Democratic Party v. Boockvar* (*Boockvar I*),[136] the Pennsylvania Supreme Court clarified the application of several provisions of a recently-passed election law in light of the pandemic, the delays with the postal service, and the Pennsylvania Constitution's Free and Equal Elections Clause.[137] The decision extended the deadline for receipt of mail-in ballots.[138] The Supreme Court denied a stay of the Pennsylvania court's decision, as well as a

129. *Circosta I*, 978 F.3d at 95; *Circosta II*, 141 S. Ct. at 46. The Supreme Court also refused to stay the consent judgment in a direct appeal from the North Carolina courts. Berger v. N.C. State Bd. of Elections, 141 S. Ct. 658, 658 (2020). Justice Thomas, Justice Alito, and Justice Gorsuch would have granted the stay, though they did not issue written opinions. *Id.*

130. *Circosta II*, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief).

131. *Id.* (quoting U.S. CONST. art. I, § 4, cl. 1).

132. *Id.* (citing N. C. CONST. art. II, § 1 and N.C. CONST. art. I, § 6).

133. *Id.*

134. *Id.* ("[E]ven assuming the North Carolina General Assembly could delegate its Elections Clause authority to other officials, its representatives contend before us that it has not authorized the deadline extension here, and understandably so.").

135. *See* State All. for Retired Ams. v. State Bd. of Elections, 20 CVS 8881, 2019 N.C. Super. LEXIS 406, at *7 (N.C. Super. Ct. Jan. 3, 2019) (determining that the agency's statutory authority included explicit "emergency powers to conduct an election" during a "natural disaster" and that the "COVID-19 pandemic constitutes a natural disaster within the meaning of the statute" (quoting N.C. GEN. STAT. § 163-27.1(a))).

136. 238 A.3d 345 (Pa. 2020), *cert. denied sub nom.*, Republican Party v. Degraffenreid, 141 S. Ct. 732 (2021).

137. *Id.* at 371–72. *See* PA. CONST. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

138. *Boockvar I*, 238 A.3d at 371.

motion to expedite a petition for certiorari.[139] Justice Alito wrote separately, joined by Justice Thomas and Justice Gorsuch. He explained that there was not enough time for the Supreme Court to act but that the Pennsylvania Supreme Court had nonetheless "squarely alter[ed] an important statutory provision" enacted by the state legislature, likely in violation of the Electors Clause and the Elections Clause.[140] Justice Alito also ordered that county boards in Pennsylvania segregate the ballots received after election day, acting as circuit justice for the Third Circuit.[141]

After the election, the Court denied the petition for certiorari as moot.[142] Too few ballots were received after election day to change the election result.[143] Justice Thomas dissented, stating, "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.'"[144] Justice Thomas seemed troubled by the fact that the Pennsylvania Supreme Court "could extend the deadline" because of the Free and Equal Elections Clause, a common provision in state constitutions across the country,[145] which he nonetheless characterized as merely a "vague clause in the State Constitution."[146] Justice Thomas explained that he would have reviewed the issue under the "capable of repetition, yet evad[ing] review" exception to mootness, as it is important to clarify election

139. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 643 (2020) [hereinafter *Boockvar II*] (stay denied); *Boockvar III*, 141 S. Ct. 1, 2 (2020) (motion to expedite denied).

140. *Boockvar III*, 141 S. Ct. at 1 (Alito, J., concurring in denial of motion to expedite); *id.* at 2 ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the 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.").

141. *See* Republican Party v. Boockvar, No. 20A84, 2020 WL 6536912, at *1 (U.S. Nov. 6, 2020).

142. Republican Party v. Degraffenreid, 141 S. Ct. 732, 732 (2021).

143. *Id.* at 733 (Thomas, J., dissenting from denial of certiorari).

144. *Id.* (quoting Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring)).

145. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 103 (2014) ("[T]wenty-six states include a provision in their constitutions stating that elections shall be 'free,' 'free and equal,' or 'free and open.'").

146. *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari). *But cf.* Moore v. Harper, 143 S. Ct. 2065, 2105 (Thomas, J., dissenting) ("[I]t is still a general feature of constitutional text that 'only its great outlines should be marked.'" (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819))).

rules in advance.[147] Justice Alito also dissented, joined by Justice Gorsuch, and likewise explained why the case was reviewable notwithstanding mootness.[148] He, too, was troubled that "a state constitutional provision guaranteeing 'free and equal' elections gives the Pennsylvania courts the authority to override even very specific and unambiguous rules adopted by the legislature."[149] He also opined on what he considered to be the special dangers imposed by expanded mail-in voting, namely, a higher risk of fraud and more complicated judicial review.[150]

Importantly, in none of these decisions did the justices consider the fact that the election rules at issue applied to a single election for both state and federal offices, as such elections are almost always, if not always, conducted together.[151] Each case was about whether a deadline for mail-in ballots could be extended, and there is no dispute that the U.S. Constitution does not displace state courts' authority over state laws for *state* elections. Of course, a typical ballot contains entries for state and federal positions. Thus, the orders that Justices Kavanaugh, Alito, Gorsuch, and Thomas would have issued would have required ballots received after election day to be counted for state offices, but not federal offices. At best, this would have resulted in increased administrative costs and voter confusion.[152]

Indeed, in Justice Thomas's dissent from the denial of certiorari in the Pennsylvania case, he seemed particularly concerned that in another election case, the Pennsylvania Supreme Court had "nullified the legislative requirement that voters write the date on mail-in

147. *Degraffenreid*, 141 S. Ct. at 737 (Thomas, J., dissenting from denial of certiorari).

148. *See id.* at 739 (Alito, J., dissenting from denial of certiorari).

149. *Id.*

150. *Id.* at 735–36.

151. *See* Shapiro, *supra* note 20, at 164.

152. *See id.* at 177, 185 (discussing confusion that the ISLT may cause if it results in different rules for state and federal elections when the same election laws govern both). Though data inconsistencies make it difficult to tally up election costs (for one thing, "states and localities differ in how election functions are accounted for in budgets"), the total nationwide spending on elections has been estimated to be around $4-6 billion in a normal election year, and perhaps was up to $10 billion during 2020 because of the added burden of COVID-19. Charles Stewart III, *The Cost of Conducting Elections*, MIT ELECTION DATA + SCI. LAB 3, 4 (2022), https://electionlab.mit.edu/research/cost-of-conducting-elections. The costs of individual elections are estimated to be about half of this total (other expenses are ongoing administrative costs or capital expenses). *Id.* at 3. In Massachusetts, additional early voting, required by the state legislature as a COVID-19 related measure, cost the state nearly an extra $3 million, which does not even account for the full costs, as the federal government, other state entities, and nonprofits supplied part of the funding. Letter from Suzanne M. Bump, Auditor of the Commonwealth of Mass. to Representative Daniel J. Ryan & Senator Barry R. Finegold, Joint Comm. on Election L. (May 19, 2021), https://www.mass.gov/doc/early-voting-testimony-may-19-2021/download.

ballots," potentially resulting in the wrong candidate winning an election for Senate—*state* senate, that is.[153] As even under the most extreme version of the ISLT, state courts retain the authority to construe laws regarding state elections, it is concerning for federalism purposes that at least Justice Thomas was prepared to emphasize an issue of purely state authority.

C. Decisions in Wake of Moore*: Possible Implications of the ISLT*

1. Neiman v. LaRose

The unknown extent of *Moore* is illustrated by the Court's disposition of an Ohio partisan gerrymandering case, *Neiman v. LaRose*.[154] Unlike the restriction on partisan gerrymandering at issue in *Moore*, which came from the more open-ended language of the state constitution's Free Elections Clause and the rights of assembly, speech, and equal protection,[155] the Ohio Constitution sets out a very specific redistricting procedure intended to avoid partisan gerrymandering. If the legislature does not pass a redistricting plan on a bipartisan basis, its plan is reviewable in court for compliance with a number of requirements, including that it not "unduly favor[] or disfavor[] a political party or its incumbents."[156] Then, if the legislature's plan is struck down and it does not pass a valid plan by a certain date, a redistricting commission must pass a plan to "remedy any legal defects in the previous plan identified by the court."[157] The Ohio Supreme Court struck down a legislatively-created redistricting plan for unduly favoring the Republican Party,[158] and then, in *Neiman*, struck down the commission's subsequent plan because it did not fix the problems with the legislature's plan.[159]

The Supreme Court vacated *Neiman* in light of *Moore* but without providing any explanation why.[160] The Ohio Supreme Court dismissed the case when the challenges to the redistricting plan were

153. *See Degraffenreid*, 141 S. Ct. at 735 (Thomas, J., dissenting from denial of certiorari). The Pennsylvania Supreme Court construed the date requirement as "directory," rather than "mandatory," relying on long-standing principles of state law. *In re* Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1071 (Pa. 2020) ("Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." (quoting Appeal of Norwood, 116 A.2d 552, 554–55 (Pa. 1955))).

154. 207 N.E.3d 607 (Ohio 2022), *vacated sub nom*. Huffman v. Neiman, 143 S. Ct. 2687 (2023).

155. *See Harper I*, 868 S.E.2d 499, 510–11 (N.C. 2022).

156. OHIO CONST. art. XIX, § 1(C)(3)(a); *id.* § 3 (procedures for court review).

157. *Id.* § 3(B)(1).

158. *Neiman*, 207 N.E.3d at 609 (citing Adams v. DeWine, 195 N.E.3d 74 (Ohio 2022)).

159. *Id.* at 623.

160. Huffman v. Neiman, 143 S. Ct. 2687 (2023).

withdrawn after a change in the membership of the Ohio Supreme Court.[161] However, had the case not been dismissed, the Ohio Supreme Court would have been required to revisit its analysis but without any guidance from the Supreme Court on how a state court's interpretation of a detailed state constitutional provision directed at the particular problem of partisan gerrymandering could "transgress the ordinary bounds of judicial review."[162] The Ohio court's decision implicated not only its authority to interpret state law but also its expertise in examining the political conditions and climate within its own state. This is exactly the concern identified by Justice Breyer in his dissent in *Bush v. Gore*.[163] Vacating the Ohio court's decision also appears inconsistent with Chief Justice Roberts's reasoning in *Rucho v. Common Cause*,[164] where he left partisan gerrymandering to state courts enforcing state constitutions.[165] In sum, *Neiman* raises even more questions about how to apply *Moore*.

2. What does it mean for a court to act extrajudicially?

The only standard that the Supreme Court gave state supreme courts in *Moore* is that they may not "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[166] Yet recent decisions cast doubt on the notion that the Supreme Court has a shared understanding what it might mean for a court to act outside "the ordinary bounds of judicial review"—even among the Justices who signed on to *Moore*.

For example, in *Biden v. Nebraska*,[167] the student debt case, Chief Justice Roberts and Justice Kagan traded blows regarding what it means for a court to act extrajudicially. In her dissent, Justice Kagan criticized the Court for acting too politically: "[T]he Court is

161. Neiman v. LaRose, 216 N.E.3d 686 (2023) (order dismissing case). *See also* Rachel Selzer, *Ohio Supreme Court Dismisses Lawsuits Over Congressional Map*, DEMOCRACY DOCKET (Sept. 7, 2023), https://www.democracydocket.com/news-alerts/ohio-supreme-court-dismisses-lawsuits-over-congressional-map/.

162. Moore v. Harper, 143 S. Ct. 2065, 2089 (2023).

163. *See* Bush v. Gore, 531 U.S. 98, 146 (2000) (Breyer, J., dissenting) ("The majority finds facts outside of the record on matters that state courts are in a far better position to address.").

164. 139 S. Ct. 2484 (2019).

165. *See id.* at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" in policing partisan gerrymandering); *Moore*, 143 S. Ct. at 2105 (Thomas, J., dissenting) (explaining that the majority's approach may require reviewing partisan gerrymandering claims despite the Court's previous holding that "federal courts are not equipped to judge partisan-gerrymandering questions" (citing Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019))).

166. *Moore*, 143 S. Ct. at 2089.

167. 143 S. Ct. 2355 (2023).

supposed to stick to its business—to decide only cases and controversies . . . , and to stay away from making this Nation's policy about subjects like student-loan relief."[168] She stated, "To decide the case is to exceed the permissible boundaries of the judicial role."[169] She also emphasized that the statute clearly delegated the right to waive the student debt payments, and therefore, the Court had once again "substitute[d] itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation's most important, as well as most contested, policy decisions."[170] Chief Justice Roberts hit back in his majority opinion: "It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary."[171] He countered that the majority had in fact "employed the traditional tools of judicial decision making."[172] A third justice in the majority in *Moore*, Justice Barrett, also felt compelled to concur and emphasize that the "major questions doctrine" that Justice Kagan described as a "get-out-of-text-free card[]" was actually consistent with the textualist approach to constitutional interpretation she champions.[173]

Similar charges of transgressing ordinary standards of judicial review appear in a number of other recent cases. Chief Justice Roberts, for example, essentially accused another member of the *Moore* majority, Justice Kavanaugh, as well as Justices Alito, Thomas, and Gorsuch, of engaging in such behavior in the COVID-19 cases when the Court intruded on state police powers to maintain public health. He explained, "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," and that these determinations "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."[174] Justice Kagan doubled down on this same point, explaining that the majority "defies

168. *Id.* at 2397 (Kagan, J., dissenting).

169. *Id.* at 2386.

170. *Id.* at 2391.

171. *Biden*, 143 S. Ct. at 2375.

172. *Id.*

173. *See id.* at 2376 (Barrett, J., concurring) (citing West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting)).

174. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 545 (1985)).

our caselaw, exceeds our judicial role, and risks worsening the pandemic."[175]

These tensions also surfaced in the affirmative action case, *Students for Fair Admissions v. President and Fellows of Harvard College*.[176] Chief Justice Roberts criticized the dissent's view that race-based classifications may be used to remedy the effects of societal discrimination as going beyond the proper role of judges and even tantamount to pre-Civil War racial hierarchy. He wrote: "That [judges can allow the remedial use of racial classifications] is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo."[177]

In Justice Gorsuch's concurrence, he also labelled some judging as outside the bounds of appropriate judicial review because it strayed, in his view, beyond textualism.[178] He explained that in two of the separate opinions in *Regents of the University of California v. Bakke*,[179] justices had acted extrajudicially by applying an analysis from the Equal Protection Clause to the statutory question (about Title VI of the Civil Rights Act) at issue in the case. "The moves made in *Bakke* were not statutory interpretation. They were judicial improvisation. Under our Constitution, judges have never been entitled to disregard the plain terms of a valid congressional enactment based on surmise about unenacted legislative intentions."[180] Justice Gorsuch wrote that "[w]hen judges disregard these principles and enforce rules 'inspired only by extratextual sources and [their] own imaginations,' they usurp a lawmaking function 'reserved for the people's representatives.'"[181]

Likewise, the lead dissent in *Students for Fair Admissions* criticized the majority for not acting like a court. Justice Sotomayor criticized the majority's departure from precedent without acknowledging it was doing so. She labeled it a "disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*" but rather

175. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (Kagan, J., dissenting from grant of application for injunctive relief).

176. 143 S. Ct. 2141 (2023).

177. *Id.* at 2175. The "Second Founding" refers to the Civil War and Reconstruction. *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

178. *See Students for Fair Admissions*, 143 S. Ct. at 2219–21 (Gorsuch, J., concurring).

179. 438 U.S. 265 (1978).

180. *Students for Fair Admissions*, 143 S. Ct. at 2220 (Gorsuch, J., concurring).

181. *Id.* at 2221 (quoting Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020)).

"disguise[d] its ruling as an application of established law."[182] She explained that when the Court overrules precedent merely because the "proponents of [certain] arguments" are "greater now in number on the Court, . . . it betrays an unrestrained disregard for precedent" and fosters suspicion in "the integrity of our constitutional system of government."[183] "In the end," she wrote, "the Court merely imposes its preferred college application format on the Nation, not acting as a court of law applying precedent but taking on the role of college administrators to decide what is better for society."[184]

The originalists on the Court have likewise accused other members of the Court of such extra-judicial interpretation in other contexts. In *New York State Rifle & Pistol Ass'n v. Bruen*,[185] for example, Justice Thomas, writing for the Court, criticized "any 'judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'"[186] Anything beyond text and history was essentially extra-judicial. Making the same point more harshly, Justice Alito, in his concurrence, suggested that "the real thrust of today's dissent [by Justice Breyer] is that guns are bad and that States and local jurisdictions should be free to restrict them essentially as they see fit."[187] However, Justice Breyer's dissent discussed in great detail not only the problems of modern day gun violence in this country, but also "the extent to which [the history and case law of] the Second Amendment restricts different States (and the Federal Government) from working out solutions to these problems through democratic processes."[188] As Justice Breyer explained: "The primary difference between the Court's view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence."[189]

All of this suggests a distinct lack of consensus on the Court of what *Moore* means when it prevents state judges from transgressing the ordinary standards of judicial review. A "majority . . . cobbled together among conservative and liberal justices" apparently agreed to reject the more extreme theory of the ISLT, which would have banned state constitutional review of federal election legislation altogether.[190] But besides that, the Court gave us little to no

182. *Id.* at 2239 (Sotomayor, J., dissenting) (quotation omitted).
183. *Id.* at 2245 (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).
184. *Id.* at 2252.
185. 142 S. Ct. 2111 (2022).
186. *Id.* at 2129 (quoting District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008)).
187. *Id.* at 2160–61 (Alito, J., concurring).
188. *Id.* at 2168 (Breyer, J., dissenting).
189. *Id.*
190. Pildes, *supra* note 9.

guidance, and there are deep divisions lurking below the surface. To understand just how unsettling this may be, we turn to state election law cases, the state constitutional provisions at issue there, and what has historically been considered "ordinary" or even extraordinary standards of judicial review.

II. STATE SUPREME COURTS' PROTECTION OF VOTING RIGHTS

State supreme courts have provided greater protection of the right to vote under state constitutions than the Supreme Court provides under the federal Constitution. They have done so based on specific and generally worded provisions in their constitutions. In so doing, they have provided meaning to unclear and inconsistent statutory provisions, filled in gaps in statutes, and declared parts of statutes unconstitutional. In crafting remedies in particularly extreme situations, they have also allowed deviation from statutory requirements. All of this is generally within their interpretive authority, unless they are making policy decisions and rewriting statutes in the guise of statutory and constitutional interpretation. *Moore*, however, appears to blur the line between interpretation of laws and usurpation of the legislative role.

A. The Right to Vote Under the Federal Constitution

Numerous commentators have emphasized that federal courts enforcing the federal Constitution have been reluctant to provide robust protection of the right to vote, especially recently.[191] The U.S. Constitution, at least as originally drafted, had no explicit "right to vote, *per se*[.]"[192] Rather, federal courts generally protect the right to vote via other constitutional provisions, especially the Equal

191. *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN L. REV. 69, 98 (2009) ("[E]ven the broadest of these [voting rights] protections, the Equal Protection Clause, has not been fully enforced by the Supreme Court."); Douglas, *supra* note 145145, at 98 ("[F]ederal courts analyzing restrictions on voting have narrowed the protection of the right to vote . . . ."); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CAL. L. REV. 2323, 2347 (2021) ("The current Supreme Court has retreated from the proposition that restrictions on voting rights should be subjected to some form of heightened judicial skepticism."); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 160 (2019) ("The Roberts Court has . . . never nullified a law making it harder to vote."); Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 168 (2015) ("Arguably, the Court's current methodology has been harmful to voting rights, but oddly, its deferential approach derives from cases that were extremely protective of the right to vote.").

192. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) (explaining that "the right to vote, *per se*, is not a constitutionally protected right," but there is a right "to participate in state elections on an equal basis with other qualified voters"); *see also* Douglas, *supra* note 145, at 95–98.

Protection Clause.[193] As the Supreme Court explained in *Bush v. Gore*: "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses" to implement a statewide election, yet "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[194]

The federal standard for evaluating restrictions on voting is the *Anderson*/*Burdick*[195] framework. To evaluate an equal protection challenge to a state voting regulation, a federal court "must weigh 'the character and magnitude of the asserted injury' . . . against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'"[196] If voting rights are severely burdened, then the voting regulation is subject to strict scrutiny: The regulation "must be 'narrowly drawn to advance a state interest of compelling importance.'"[197]

Commentators have criticized the *Anderson*/*Burdick* test as making it quite difficult for plaintiffs to establish a severe burden on voting.[198] For example, in *Crawford v. Marion County Election Board*,[199] the Supreme Court rejected a facial constitutional challenge to Indiana's voter ID law, which required voters to show a photo ID

193. In addition to equal protection, the Constitution provides that the right to vote "shall not be denied . . . on account of race, color, or previous condition of servitude"; "on account of sex"; "by reason of failure to pay poll tax or other tax"; or "on account of age" for citizens "eighteen years of age or older[.]" U.S. CONST. amends. XV § 1, XIX § 1, XXIV § 1, XXVI § 1.

194. Bush v. Gore, 531 U.S. 98, 104–05 (2000).

195. Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992).

196. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). In *Burdick*, the Court approved a state ban on write-in candidates. *Id.* at 441–42.

197. *Id.* at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

198. *See* Hasen, *supra* note 191, at 100 (arguing that as the *Anderson/Burdick* framework is applied by the Court, "the state need not provide any evidence supporting the state interests it posits as justifying its law[,]" even though "plaintiffs challenging the law need to provide hard evidence that the statute imposes a heavy burden on them"); Tolson, *supra* note 191, at 172 (explaining that in *Crawford*, the Court "demand[ed] little evidence from Indiana to corroborate its asserted interest in preventing fraud through its voter identification law[,]" showing that "*Burdick*'s watered down balancing test is ill-suited to protect . . . political participation"); *see also* Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 528 (2008) (arguing that *Crawford* and other election cases give judges "massive discretion to pick" how to resolve the case).

199. 553 U.S. 181 (2008).

at the polling place in order to be eligible to vote.[200] In a plurality opinion, the Court found that the state interest in preventing voter fraud was compelling based on general concerns about voter fraud, despite the fact that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."[201] In evaluating the burden on the right to vote, the Court emphasized, however, that there was no "concrete evidence of the burden imposed on voters who currently lack photo identification."[202] The Court then concluded the law survived federal constitutional scrutiny "on the basis of the record that ha[d] been made in this litigation, [as] we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters."[203]

While it is merely difficult to present a successful challenge to a state voting regulation in federal court, it is impossible to challenge a state partisan gerrymander under the federal Constitution. In *Rucho v. Common Cause*, the Supreme Court determined that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."[204] However, as shown above, the Court indicated that such claims could still be heard in state courts: "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."[205]

B. The Right to Vote Under State Constitutions

Although federal courts are limited in the remedies they can provide for protection of voting rights because of the structure of the U.S. Constitution and recent Supreme Court precedent, state courts, relying on their state constitutions, can and do provide more robust protections for the right to vote.

Compared to the federal Constitution, state constitutions have more explicit constitutional text regarding voting rights, via voter qualifications provisions and free elections clauses.[206] Every state constitution sets forth qualifications for voters.[207] For example, the Colorado Constitution provides that "a citizen of the United States who has attained the age of eighteen years, has resided in this state for such time as may be prescribed by law, and has been duly

200. *Id.* at 189.
201. *Id.* at 194, 196.
202. *Id.* at 201.
203. *Id.* at 202 (quoting Storer v. Brown, 415 U.S. 724, 738 (1974)).
204. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).
205. *Id.* at 2507.
206. *See* Douglas, *supra* note 145, at 101–02; Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021) ("In contrast to the federal Constitution, . . . state constitutions expressly confer the right to vote and to participate in free and equal elections, and they devote entire articles to electoral processes.").
207. *See* Douglas, *supra* note 145, at 101–02.

registered as a voter if required by law shall be qualified to vote at all elections."[208]

In addition, state constitutions protect the electoral process itself. Twenty-six state constitutions include some version of a free elections clause, providing "that elections shall be 'free,' 'free and equal,' or 'free and open.'"[209] The Pennsylvania provision that was interpreted in *Boockvar I*[210] states: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[211] Similarly, the Massachusetts Constitution provides: "All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."[212]

In the following subsections, we discuss decisions in which state courts have evaluated state-law restrictions on the ballot under these constitutional standards to provide more explicit and greater protection of voting rights than the federal Constitution. In so doing, state courts have clarified ambiguous state election statutes, declared parts of such statutes unconstitutional, and even required modified application of state statutory requirements in extreme circumstances.

1. Interpretation of state statutes

In light of the guarantees of voting rights in their state constitutions, state supreme courts have regularly interpreted ambiguous state election statutes in ways that allow more votes to be counted. Professor Richard Hasen has termed this "the Democracy Canon" of statutory construction—that there is "a thumb on the scale

208. COLO. CONST. art. VII, § 1.

209. Douglas, *supra* note 145, at 103. Some state constitutions even privilege voters from arrest on election day, except for certain crimes. *See* UTAH CONST. art. IV, § 3; ARIZ. CONST. art. VII, § 4.

210. 238 A.3d 345 (Pa. 2020).

211. PA. CONST. art. I, § 5.

212. MASS. CONST. pt. I, art. IX. This clause has been read to protect not only voting rights per se, but to provide a "right to equal ballot access" for those who seek elective office. Glovsky v. Roche Bros. Supermarkets, Inc., 17 N.E.3d 1026, 1029–30 (Mass. 2014). The Massachusetts Supreme Judicial Court ruled that a prospective candidate had a constitutional right "to solicit nominating signatures on the private property outside" a supermarket, explaining that the Free Elections Clause "protects the 'fundamental right' of equal access to the ballot, a 'basic right' that is 'of fundamental importance in our form of government because through the ballot the people can control their government.'" *Id.* at 1029, 1032 (citation omitted) (quoting Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590 (Mass. 1983)); *see also* N.H. CONST. pt. I, art. XI ("Every inhabitant of the state, having the proper qualifications, has equal right to be elected into office."); N.C. CONST. art. VI, § 6 ("Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office.").

in favor of voter enfranchisement, which c[an] be overcome only by clear statutory language to the contrary or strong competing policy reasons."[213] Professor Hasen traces the Democracy Canon back to *Owens v. State*,[214] a Texas case from 1885, before the advent of state-printed uniform ballots.[215] In that case, the Texas Supreme Court refused to disqualify ballots that were printed with extraneous text, despite a state statute that arguably precluded any "mark" from appearing on the ballot besides the candidates' names.[216] The court explained that the "prohibition" had to be read narrowly: "All statutes tending to limit the citizen in his exercise of this right should be liberally construed in his favor."[217] The canon has been followed in numerous other states for over a century.[218]

The Democracy Canon may have even earlier origins. In *Henshaw v. Foster*,[219] a Massachusetts case from 1830, the Massachusetts Supreme Judicial Court overruled the rejection of a printed ballot.[220] The court interpreted a state statute that required "written" votes to allow "printed" votes as well.[221] In doing so, the court articulated a version of the Democracy Canon, explaining that the statute (and a parallel constitutional provision) must be interpreted in light of the constitutional right to vote:

> In construing so important an instrument as a constitution, especially those parts which affect the vital principle of a republican government, the elective franchise, or the manner of exercising it, we are not, on the one hand, to indulge ingenious speculations, which may lead us wide from the true sense and spirit of the instrument; nor on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it. We are to suppose that the authors of such an instrument had a thorough knowledge of the force and extent of the words they employ, that they had a beneficial end and purpose in view, and that more especially in any apparent restriction upon the mode of exercising the right

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213. Hasen, *supra* note 191, at 71.

214. 64 Tex. 500 (1885).

215. Before states adopted the "Australian ballot" system of official, state-printed ballots, voters typically used tickets printed by political parties or candidates. Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 697 (2016).

216. *Owens*, 64 Tex. at 509. *See* 1879 Tex. Rev. Civ. Stat. tit. XXXIV, ch. 5, art. 1697 note ("[A]ll ballots shall be written or printed on plain white paper, without any picture, sign, vignette, device or stamp, or mark, except the writing or printing, in black ink or black pencil, of the names of the candidates, and the several offices to be filled, and except the name of the political party whose candidates are on the ticket.").

217. *Owens*, 64 Tex. at 509.

218. *See* Hasen, *supra* note 191, at 76 & nn.24–26 (collecting cases).

219. 26 Mass. (9 Pick.) 312 (1830).

220. *Id.* at 322.

221. *Id.* at 317, 322.

> of suffrage, there was some existing or anticipated evil which it was their purpose to avoid.[222]

Further, the court explained that the constitution's framers "had the wisdom to adapt their language to future as well as existing emergencies," so that the constitution could "be extended to other relations and circumstances which an improved state of society may produce."[223] Because the "object in requiring '*written* votes'" was just to preclude the "hand vote" or voice vote generally used at town meetings, there were no grounds to exclude printed votes.[224]

A more recent example, with an expansive Democracy Canon-influenced interpretation, can be found in *New Jersey Democratic Party v. Samson*.[225] In this case, the Democratic candidate for Senate withdrew his name from the ballot "thirty-four days before the election."[226] The Democratic Party sought to fill the vacancy, but the express terms of the relevant statute included a mechanism for filling vacancies only if they arose forty-eight days or more before the election[227]—the natural implication being that because the statute did not provide a mechanism to fill a vacancy created at a later date, it was not allowed.[228] However, the New Jersey Supreme Court refused to read the statute in that manner: "Nothing in [the statute] addresses the precise question whether a vacancy that occurs between the forty-eighth day and the general election can, in that circumstance, be filled."[229] The court relied on the robust Democracy Canon in New Jersey, explaining that, without an even more explicit statutory requirement, the court would assume that the legislature "intend[ed] that the law will be interpreted 'to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day.'"[230] Because under those particular circumstances,

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222. *Id.* at 317.

223. *Id.*

224. *Id.* at 319–20.

225. 814 A.2d 1028 (N.J. 2002). For more discussion of this case, see Hasen, *supra* note 191, at 106–10.

226. *Samson*, 814 A.2d at 1042.

227. *Id.* at 1037 ("A selection made pursuant to this section shall be made not later than the 48th day preceding the date of the general election." (quoting N.J. STAT. ANN. § 19:13-20 (West 2009))).

228. *See* Hasen, *supra* note 191, at 109 ("To reach the conclusion that the statute barred a party from filling a vacancy in a time shorter than forty-eight days before the election, one had to (at least implicitly) apply the expressio unius linguistic canon of construction: the inclusion of one thing (the right to fill vacancies at least forty-eight days before the election) indicated the exclusion of the other (no right to fill vacancies in forty-eight days or fewer). . . . [T]his is the most natural reading of the statute purely as a linguistic matter.").

229. *Samson*, 814 A.2d at 1037.

230. *Id.* at 1036 (quoting Catania v. Haberle, 588 A.2d 374, 379 (N.J. 1990)).

there was "sufficient time before the general election to place a new candidate's name on the ballot," the court ruled that the vacancy could be filled.[231]

During the 2020 election, the Pennsylvania Supreme Court relied on the Democracy Canon in *Boockvar I*. In addition to extending the deadline for receipt of mail-in ballots, leading to the Supreme Court orders discussed above,[232] the court addressed a requirement in the election code that mail-in ballots could be delivered "in person to said county board of election."[233] The litigants disagreed about whether this provision allowed the county boards to set up "as many secure and easily accessible locations to deliver personally their mail-in ballots as each board deems appropriate," including "unmanned drop-boxes," or whether ballots could only be accepted at a board's official location.[234] The court found that the provision was ambiguous.[235] Relying on its version of the Democracy Canon that "election laws . . . will be construed liberally in favor of the right to vote," as well as the "clear legislative intent" of the election code "to provide electors with options to vote outside of traditional polling places," the court determined that the statute permitted county boards to set up drop-boxes to receive ballots.[236]

2. Determining constitutionality

In protecting state constitutional voting rights, courts have not only adopted saving constructions of statutes that would have otherwise restricted voting rights in violation of state constitutions, as discussed above. They have also declared certain statutory provisions to be unconstitutional. Of course, these determinations are highly state-specific, based on the text, precedent, and judicial philosophy in the state at issue.

State voter ID laws, approved as constitutional under the federal Constitution by the Supreme Court,[237] have been a particularly bitterly fought battleground of state constitutional litigation. In *Weinschenk v. State*,[238] the Missouri Supreme Court addressed a statute "requiring registered voters to present certain types of state- or federally-issued photographic identification in order to cast regular ballots."[239] In deciding the case, the court turned to the state

231. *Id.* at 1039, 1042.
232. *See supra* text accompanying notes 120–53.
233. 25 PENN. STAT. AND CONST. STAT. ANN. § 3150.16(a) (2020).
234. *Boockvar I*, 238 A.3d 345, 357, 359 (2020).
235. *Id.* at 360.
236. *Id.* at 361 (quoting Shambach v. Bickhart, 845 A.2d 793, 798 (Pa. 2004)).
237. *See supra* text accompanying notes 199–203.
238. 203 S.W.3d 201 (Mo. 2006).
239. *Id.* at 204.

constitution's Free and Open Elections Clause[240] and the express provision in the constitution defining voter qualifications.[241] "Due to the[se] more expansive and concrete protections of the right to vote under the Missouri Constitution, [the court concluded that] voting rights are an area where our state constitution provides greater protection than its federal counterpart."[242] The court then found that the voter ID requirements failed strict scrutiny. Given the burdens it imposed in terms of time, money, and the "ability to navigate bureaucracies," the voter ID requirement in the statute was not narrowly tailored to meet the state interest of combatting voter fraud.[243] However, as is often the case in state constitutional law, the court did not have the last word. Voter ID was ultimately imposed in Missouri, but only after it was permitted via an amendment to the state constitution.[244]

The North Carolina Supreme Court ruled that a voter ID law was unconstitutional under the state constitution in *Holmes v. Moore*.[245] The court was faced with two state constitutional provisions: the state equal protection clause and a recent constitutional amendment permitting the state to enact a voter ID law.[246] The court affirmed the trial court's factual findings that the specific legislation implementing the amendment was "formulated with an impermissible intent to discriminate against African-American voters in violation of the North Carolina Constitution," even though the "ruling does not mean that any voter ID law enacted in North Carolina would violate the equal protection guarantee."[247] Applying the federal *Arlington Heights* standard,[248] the court pointed to the

240. MO. CONST. art. I, § 25 ("That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

241. *Weinschenk*, 203 S.W.3d at 212.

242. *Id.* at 212, 219.

243. *Id.* at 214, 217.

244. *See* MO. CONST. art. VIII, § 11 ("A person seeking to vote in person in public elections may be required by general law to identify himself or herself . . . by providing election officials with a form of identification, which may include valid government-issued photo identification.") (adopted Nov. 8, 2016); David Lieb, *Missouri Enacts Photo Voter ID Law Before November Elections*, AP NEWS (June 29, 2022), https://apnews.com/article/2022-midterm-elections-voting-missouri-government-and-politics-342663e72a921cb9a5f55657d87a0910.

245. *Holmes I*, 881 S.E.2d 486, 510 (N.C. 2022), rev'd, *Holmes II*, 886 S.E.2d 120 (N.C. 2023).

246. *Id.* at 492.

247. *Id.* at 491.

248. *See id.* at 494 (explaining that "the United States Supreme Court identified a non-exhaustive list of factors relevant to analyzing whether a law was passed with discriminatory intent[,]" including "(1) '[t]he impact of the [law]' and 'whether it bears more heavily on one race than another'; (2) the law's 'historical background'; (3) '[t]he specific sequence of events leading up to the

disparate impact of the law on African-American voters, the history of race-based voter suppression in the state, and the legislative history of the law, which involved a rushed process apparently intended to be completed before Republicans lost a supermajority and which did not include attempts to address racial disparities with the law.[249] In so ruling, the court parted ways with the Fourth Circuit, which, in parallel litigation, had found that the same law survived an equal protection challenge, although on a pre-trial record rather than after a full trial.[250]

However, as in Missouri, this result was short-lived. After a judicial election that changed the composition of the court, it reversed its prior decision[251]—just as it had reversed the partisan gerrymandering case in *Harper II*.[252] The court announced a new standard for equal protection challenges under the state constitution, explaining that "[s]tate supreme courts are not bound by federal courts when interpreting their state constitutions" and that the *Arlington Heights* standard "allows challengers to succeed . . . by proffering evidence that is by its very nature speculative, subjective, and thus, insufficient to meet the well-established burden of proof."[253] The court held that instead, "the challenger must prove beyond a reasonable doubt that: (1) the law was enacted with discriminatory intent on the part of the legislature, and (2) the law actually produces a meaningful disparate impact along racial lines."[254] The court determined that analyzing under either standard—as it was required to, because its new standard could allow a claim to succeed under the federal standard but fail the state standard—the law did not violate the plaintiffs' equal protection rights.[255] For the federal standard, the court found that the lower court erred in its application of *Arlington*

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challenged decision'; (4) 'departures from the normal procedural sequence'; (5) '[s]ubstantive departures' from the normal process; and (6) the 'legislative or administrative history' of the decision" (alterations in original) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977))).

249. *Id.* at 497, 501, 508.

250. *See* N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 311 (4th Cir. 2020) (explaining that the district court incorrectly "considered the North Carolina General Assembly's past conduct to bear so heavily on its later acts that it was virtually impossible for it to pass a voter-ID law that meets constitutional muster" and that "the remaining evidence in the record fails to meet the Challengers' burden"); *Holmes I*, 881 S.E.2d at 500 ("*Raymond* is not instructive because even though *Raymond* reviewed the same voter ID law, S.B. 824, and determined the law was not passed with racially discriminatory intent, it is impossible to know if the Fourth Circuit would have reached the same conclusion with the benefit of the record before the trial court in this case.").

251. *Holmes II*, 886 S.E.2d at 144.

252. Harper v. Hall, 881 S.E.2d 156, 181 (N.C. 2022).

253. *Id.* at 130, 132.

254. *Id.* at 132.

255. *Id.* at 131–32.

Heights to the voter ID law because it had placed too much weight on history and the brevity of the legislative process,[256] thus bringing the North Carolina courts' analysis of the state statute under federal constitutional law in line with the Fourth Circuit's.[257] Then, under the new state standard, the court determined that the challengers' evidence was too speculative to prove that there would be a racially disparate impact.[258]

Other state supreme courts have also approved voter ID laws under their own constitutions. For example, the Georgia Supreme Court approved a state voter ID law in *Democratic Party of Georgia, Inc. v. Purdue*.[259] The court first determined that the legislature had not added an additional voter qualification to the qualifications enumerated in the state constitution because voters could avoid the ID requirement via voting absentee.[260] Then, the court addressed an equal protection challenge to the law. The court explained that "the Georgia clause is generally 'coextensive' with and 'substantially equivalent' to the federal equal protection clause."[261] Applying the federal *Anderson*/*Burdick* test and referencing *Crawford*, the court determined the "photo ID requirement . . . to be a minimal, reasonable, and nondiscriminatory restriction which is warranted by the important regulatory interests of preventing voter fraud."[262]

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256. *Id.* at 137.

257. *See* N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 311 (4th Cir. 2020). *Cf. Holmes II*, 886 S.E.2d at 127 ("[T]he [*Holmes I*] majority claimed to apply federal precedent but declined to follow the Fourth Circuit's guidance from *Raymond*, the federal case which found that [the state law] did not violate the federal Equal Protection Clause.").

258. *Holmes II*, 886 S.E.2d at 141.

259. 707 S.E.2d 67, 75 (Ga. 2011).

260. *Id.* at 73 ("[A] qualified elector is guaranteed the fundamental right to vote provided he or she uses one of the procedures put forth by the legislature, assuming those procedures do not offend the constitution."); *see also* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 311 (Wis. 2014) ("[W]e conclude that being required to present . . . photo identification prior to voting is not an elector qualification in addition to those set out in . . . the Wisconsin Constitution; but rather, it is a mode of identifying those who possess constitutionally required qualifications.").

261. *Purdue*, 707 S.E.2d at 74 (citation omitted).

262. *Id.* at 75; *see also In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 463 (Mich. 2007) (adopting *Anderson*/*Burdick* test to state constitutional challenge to voter ID law and finding law is constitutional); *Walker*, 851 N.W.2d at 315 ("[The] requirement to present photo identification is a reasonable regulation that could improve and modernize election procedures, safeguard voter confidence in the outcome of elections and deter voter fraud."); City of Memphis v. Hargett, 414 S.W.3d 88, 106 (Tenn. 2013) (determining that the "compelling interest in protecting the ballot box against the risk of voter fraud justifies the imposition of such inconveniences" as the "time and expense of . . . obtain[ing] a photo ID").

State supreme courts have also had to address the constitutionality of more generous voting procedures enacted in the wake of COVID-19, such as no-excuse mail-in voting. Many state constitutions have explicit provisions allowing absentee voting in specified circumstances.[263] State supreme courts have had to determine whether these provisions set out the *exclusive* circumstances under which voting by mail is allowed or if the legislature is constitutionally permitted to expand the categories. State supreme courts have differed on this issue, depending on state-specific constitutional provisions and precedent. In *Lyons v. Secretary of the Commonwealth*,[264] the Massachusetts Supreme Judicial Court upheld a new universal mail in voting law.[265] In so doing, the court rejected a "negative implication" argument that the express authorization of absentee voting in three particular contexts in the state constitution implied a rejection of mail-in voting in general.[266] The court relied on other explicit voting rights provisions in the state constitution, particularly the state's Free Election Clause providing that "[a]ll elections ought to be free"[267] and the voter qualifications provision.[268] The court also referenced *Henshaw v. Foster*,[269] the state court precedent which set forth the Democracy Canon.[270] The court held:

> Voting is a fundamental right, and nothing in [the absentee ballot provision of the constitution], or in other parts of the Constitution . . ., prohibits the Legislature, which has plenary constitutional powers, including broad powers to regulate the process of elections and even broader powers with respect to primaries, from enhancing voting opportunities. This is particularly true with respect to the universal early voting provisions in the VOTES act, which, in stark contrast to the narrow and discrete absentee-voting provisions of art. 45, enhance voting opportunities equally for all voters.[271]

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263. *See, e.g.*, MASS. CONST. amend. XLV (amended 1976); DEL. CONST. art. V, § 4A (amended 1993).

264. 192 N.E.3d 1078 (Mass. 2022).

265. *Id.* at 1096 ("[T]he plaintiffs have failed to sustain their burden of establishing that universal early voting for biennial State elections . . . is repugnant or contrary to the Constitution.").

266. *Id.* at 1093 ("The amendment grants authority to the Legislature to provide for absentee voting to voters who can satisfy any of the three specified criteria but makes no mention of limiting the Legislature's plenary authority to provide for other forms of voting or otherwise restricting voting to in person on election day.").

267. MASS. CONST. art. IX.

268. 192 N.E.3d at 1090 & n.17 (citations omitted).

269. 26 Mass. (9 Pick.) 312 (1830).

270. *Lyons*, 192 N.E.3d at 1091 (quoting *Henshaw*, 26 Mass. at 317).

271. *Id.* at 1082.

In contrast, the Delaware Supreme Court struck down a universal mail-in voting law in *Albence v. Higgin*.[272] Like Massachusetts, the Delaware Constitution has a provision that allows absentee voting under certain conditions.[273] But unlike the Supreme Judicial Court in Massachusetts, the Delaware Supreme Court interpreted the absentee voting provision to set out the *exclusive* conditions under which voters could vote by mail, which could only be expanded upon via constitutional amendment. The court explained that "we consider mail-in voting to be a form of absentee voting" because "it is voting away from one's regular polling place."[274] Based on the "overwhelming weight of our history," the court held that "the legislature is impliedly prohibited from either abridging or enlarging" on "the categories of voters identified in Section 4A," the absentee voting provision.[275] The court then walked through that state constitutional history. The absentee voting provision was initially adopted as an amendment in 1943, after the Delaware Supreme Court found that *all* absentee voting was unconstitutional.[276] The amendment allowed only "public servants, disabled voters, and certain persons in the work force" to vote absentee, "on the condition that they were unable to appear in person at their polling places."[277] The court explained that expansion of these categories had always required specific constitutional authorization and that the legislature had acceded to that interpretation.[278] The constitution was amended again three times to allow more voters to vote absentee—"voters on vacation," "persons with qualifying religious reasons," and "spouses and dependents of those in service of the state or of the United States."[279] In 2020, the legislature passed a statute to allow temporary universal vote-by-mail during the pandemic, but in that situation, the legislature had separate constitutional authorization to do so—its constitutional emergency powers.[280] Delaware history and precedent showed that

272. 295 A.3d 1065 (Del. 2022).

273. *Id.* at 1080–81 (citing DEL. CONST. art. V, § 4A (1993)).

274. *Id.* at 1091.

275. *Id.* at 1092.

276. *See id.* at 1091.

277. *Id.* at 1092.

278. *Id.* at 1093 ("The General Assembly continued to adhere to this traditional understanding of Section 4A even after the expiration of the 2020 act.").

279. *Id.* at 1080; *see also id.* at 1093 ("Each time the General Assembly sought to expand the categories of voters entitled to vote absentee, they attempted to do so by means of constitutional amendment—successfully in 1977, 1983, and 1993.").

280. *Id.* at 1093 ("In 2020, the General Assembly explicitly found—in an effort to authorize universal absentee voting ahead of the 2020 election through the legislature's emergency powers—that '[t]he list of reasons for absentee voting [in

the legislature was "constitutionally prohibited from enlarging upon" the classifications for mail-in voting via a statute.[281]

In *Albence*, the Delaware Supreme Court also struck down a statute allowing same-day voter registration, again relying on the text and structure of the Delaware Constitution. Specifically, the state constitution requires a period for voter registration which must end "not . . . less than ten days before" the election and allows appeals of decisions "granting or refusing registration, or striking or refusing to strike a name or names from the registration list" to state court.[282] Although the trial court had interpreted the registration period as a minimum that does not expressly preclude an *additional* registration period, the state supreme court explained that same-day registration would be inconsistent with the appeal rights: "Because Section 4 [of the Delaware Constitution] creates appeal rights and the Same-Day Registration Statute interferes with those rights, the statute violates Section 4."[283]

In sum, state supreme courts have long exercised their traditional powers to review election statutes for constitutionality under state constitutions. Although state constitutions often provide more voting rights than the federal Constitution, the contours of the right are different in each state. Relying on the constitutional text and history in their specific states, state supreme courts have reached different conclusions on these issues, depending on the text and history of these provisions as well as their conception of the Democracy Canon more broadly, as it is reflected in their constitutions.[284]

3. Judicial Relief from Statutory Requirements

In this subsection, we consider the extent of state supreme courts' authority to provide relief that allows deviation from statutory requirements. This is the type of state judicial action that vexed the Supreme Court in the 2020 election cases leading up to *Moore*. It is this type of relief, we conclude, that presents the most difficulty in distinguishing judicial interpretation from judicial usurpation. In authorizing such relief, courts must hew as closely as possible to the existing statutory scheme, requiring only changes compelled by the constitution.

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the state constitution] is exhaustive.'" (quoting H.B. 346, 150th Gen. Assemb. (Del. 2020))).

281. *Id.* at 1094.

282. Del. CONST. art. V, § 4.

283. *Albence*, 295 A.3d at 1096.

284. *See* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 124–25 (2021) ("Different words often lead to different meanings . . . . State constitutional law respects and honors these nationwide differences in culture, history, and geography by allowing state courts to account for local conditions in interpreting their own charters.").

The New Mexico Supreme Court confronted the question of the appropriate scope of such relief in *Gunaji v. Macias*.[285] Sixty-six voters in a particular precinct had been given incorrect ballots with the wrong candidates listed for a state election—and that number of votes could have swung the election.[286] The state election code provided that all votes in a precinct should be disregarded when the precinct board failed to comply with the code, but in this case, the error was the county clerk's, not the board's.[287] The New Mexico court found that, despite not being a statutory violation, the error violated the state constitution's Free and Open Elections Clause[288] because the ballot did not "allow[] the voter to choose between the lawful candidates for that office."[289] The court determined that as a remedy for the constitutional violation, it would order the statutory remedy for errors from the precinct board: disregarding all the votes in the precinct.[290] It explained that courts can look to legislative enactments for guidance, even when they do not control, and here, "the legislature believed rejection was the proper way of handling a situation where the votes in a precinct are tainted and the 'sanctity of the ballot' is threatened."[291] Thus, the court adhered as closely as possible to the statutory scheme, even though the legislature had not foreseen this contingency.

In *State ex rel. Olson v. Bakken*,[292] faced with a similar situation in which voters received the wrong ballots so their votes could not be counted, the North Dakota Supreme Court affirmed a trial court's order of a new election.[293] The court determined that "the precise issue involved here was not specifically covered" by the "comprehensive" election statute.[294] Yet the court must fill gaps in statutes in the manner most compatible with the statutory scheme:

> [E]xperience tells us that neither a statute, rule, nor regulation can pragmatically cover every situation that may arise, and as a result the official body required to act or make a decision or fashion a remedy must fill the interstices in accordance with those legal concepts, principles, or objectives which may apply

285. 31 P.3d 1008 (N.M. 2001).
286. *Id.* at 1010.
287. *Id.* at 1012.
288. N.M. CONST. art. II, § 8 ("All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").
289. *Gunaji*, 31 P.3d at 1016.
290. *Id.* at 1017.
291. *Id.*
292. 329 N.W.2d 575 (N.D. 1983).
293. *Id.* at 582.
294. *Id.* at 580 ("The Legislature in 1981 enacted a comprehensive set of laws . . . but the precise issue involved here was not specifically covered.").

> to the situation and that are in harmony and legally compatible with the rule, regulation, or statute.[295]

Applying these principles in light of the "fundamental constitutional right to vote" and the scope of "equitable relief courts may provide," the court affirmed the order of a new election.[296]

The New Jersey Supreme Court also had to evaluate the scope of equitable relief in an extreme situation in *Samson*,[297] the vacancy case discussed above. After interpreting the election statute not to *preclude* a late vacancy from being filled,[298] the court had to determine whether, in fact, to allow it. The court's approach was equitable balancing of the public harms and benefits:

> What must be assessed is the actual impact on the administration of the election of allowing the substitution at this point in time; the cost and feasibility of printing and, when necessary, mailing new ballots; and, more particularly, the effect of carrying out those activities on overseas civilian and military absentee ballots.[299]

Because the court determined that it was "administratively feasible to replace Senator Toricelli's name on the ballot," it ordered the Attorney General to send "revised ballot[s]"; "ordered military and civilian absentee ballots to be given first priority"; "required plaintiffs to bear the costs of implementing the necessary election activities"; and ordered the trial court judge to set "the schedule for the mailing of revised ballots."[300]

The COVID-19 epidemic stimulated widespread litigation requesting remedial relief from particular statutory requirements. In *Goldstein v. Secretary of the Commonwealth*,[301] the Massachusetts Supreme Judicial Court determined that during the pandemic (1) election signature requirements for candidates for the primary election would be reduced by 50%; (2) deadlines for signature collection would be extended; and (3) collection of electronic signatures, rather than wet-ink signatures, would be permissible.[302]

The Supreme Judicial Court based the decision on the state constitution's Free Elections Clause.[303] The court concluded that

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295. *Id.* at 580.

296. *Id.* at 580, 582. For more discussion of judicial remedies in the context of failed elections, see Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 277–88 (2007).

297. New Jersey Democratic Party, Inc. v. Samson, 814 A.2d 1028 (N.J. 2002).

298. *Id.* at 1038.

299. *Id.* at 1039.

300. *Id.* at 1039–40.

301. 142 N.E.3d 560 (Mass. 2020).

302. *Id.* at 564.

303. MASS. CONST. art. IX ("All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall

"under the circumstances arising from th[e] pandemic, we should apply strict scrutiny to the minimum signature requirements."[304] It then held that the signature requirements during COVID-19 "impose a severe burden on . . . a candidate's right to gain access to the . . . ballot, and the government has not advanced a compelling interest for why those same requirements should still apply under the present circumstances."[305] The court then imposed the changes discussed above pursuant to its remedial powers.[306] The court recognized that this power was not unlimited. In the majority opinion, the court wrote, "[W]here . . . extraordinary circumstances require us to make policy judgments that, in ordinary times would be best left to the Legislature, our remedy must be 'no more intrusive than it ought reasonably be to ensure the accomplishment of the legally justified result.'"[307] In a concurring opinion written by one of the authors of this article, this point was further qualified:

> When we declare an act unconstitutional, we must do so in the least intrusive and most judicious manner possible. . . . Even as these extraordinary circumstances require us to fashion judicial remedies for such constitutional violations, we must do our utmost to avoid making policy decisions that are the responsibilities of other branches of government.[308]

More particularly, "[o]ur duty is to do the minimum of what is necessary to conform those statutes to the Massachusetts Constitution, and not to rewrite those statues more extensively."[309] In applying that test, the concurring opinion concluded that the "least intrusive remedy to this constitutional deficiency would be one that carves out the in-person [signature] requirement and replaces it with its nearest equivalent: electronic signatures."[310]

Likewise, in *Boockvar I*, the Pennsylvania Supreme Court addressed the implications of COVID-19 for the state's election code. Besides the interpretation allowing county boards to set up drop boxes described above,[311] the court addressed an as-applied challenge to the statutory requirement that mail-in ballots be returned by election day. Due to postal delays, voters who timely requested mail-in ballots would not receive them in time to return them by the

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establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.").

304. *Goldstein*, 142 N.E.3d at 569.

305. *Id.* at 571.

306. *Id.* at 575.

307. *Id.* at 571–72 (quoting Perez v. Bos. Hous. Auth., 400 N.E.2d 1231, 1247 (Mass. 1980)).

308. *Id.* at 575 (Kafker, J., concurring).

309. *Id.*

310. *Id.* at 576.

311. See *supra* text accompanying notes 232–36.

deadline.[312] The court determined that in light of the Free and Equal Elections Clause and the historic power of the courts to fashion relief in emergencies (including in the elections context), the court "can and should act to extend the received-by deadline for mail-in ballots to prevent the disenfranchisement of voters."[313] To "protect[] voters' rights while being least at variance with Pennsylvania's permanent election calendar," the court granted a "three-day extension," rather than the petitioners' requested seven-day extension.[314]

However, limiting the relief granted, the court rejected an argument that the Free and Equal Elections Clause required county boards of elections to provide a "notice and opportunity to cure" procedure for voters whose ballots were rejected for technical deficiencies but could still be completed before the deadline.[315] The court explained that this was a legislative judgment: "While the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature."[316] Mandating such a procedure would require resolution of "open policy questions . . . including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots."[317] In addition, the court interpreted the code to forbid ballots from being counted if they were not placed in the statutorily-required "secrecy envelope," because to interpret the requirement as non-mandatory would violate the legislature's clearly expressed intent.[318] The court also affirmed that a statute imposing a county residency requirement for poll watchers was constitutional.[319]

C. Limitations on State Supreme Courts

As the state voting rights cases discussed above show, state supreme courts have interpreted their state constitutions to provide

312. *See Boockvar I*, 238 A.3d 345, 371 (Pa. 2020).

313. *Id.* The court also relied on state court precedent for adjusting deadlines in the context of natural disasters, *see In re* General Election–1985, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987) (concluding that state law "implicitly grants the court authority to suspend voting when there is a natural disaster or emergency"), as well as the broad legislative grant to trial courts "on the day of an election, to decide 'matters pertaining to the election as may be necessary to carry out the intent' of the Election Code." *Boockvar I*, 238 A.3d at 370 (quoting 25 PA. STAT. AND CONS. STAT. § 3046 (West 2020)).

314. *Boockvar I*, 238 A.3d at 372; *id.* at 365 (petitioner's requested extension).

315. *Id.* at 372.

316. *Id.* at 374.

317. *Id.*

318. *Id.* at 380 ("[T]he Legislature signaled beyond cavil that ballot confidentiality up to a certain point in the process is so essential as to require disqualification.").

319. *Id.* at 386.

greater protections than the federal Constitution. They have relied on specific and broadly worded provisions in their constitutions, a democracy-promoting canon of interpretation, and broad powers of remedial relief, at least in extraordinary circumstances. They have also done so recognizing that they must not intrude on policy judgments to be made by state legislatures unless such intrusions are constitutionally compelled and the relief they provide is narrowly tailored to address the constitutional violation.

We recognize, however, that when state courts order extensive relief requiring multiple changes in statutory requirements, that they are approaching, or even possibly exceeding, their constitutional powers. State courts are not empowered to substitute their policy judgments for state legislatures or to redraft state statutes for those purposes.[320] "There are limits to what can be explained as constitutional law," as Oregon Supreme Court Justice Hans Linde memorably stated.[321] "A long buried grub surprisingly metamorphoses into a butterfly and remains the same insect, and an underwater tadpole turns into an airbreathing frog; but some decisions have made butterflies grow from tadpoles."[322]

Indeed, this was a particularly difficult balance to achieve in the context of the remedies ordered during the COVID-19 pandemic, such as extended deadlines and lowered signature requirements. Yet as long as state supreme courts are responding to constitutional violations and ordering remedies that fill gaps in the statutory schemes—that is, addressing unanticipated problems by ordering remedies that deviate as little as possible from the statute—state supreme courts are acting within their traditional powers.[323] Indeed,

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320. *See, e.g.*, Scott v. Benson, 529 P.3d 319, 328 (Utah 2023) ("Nor can we use the [constitutional avoidance] canon to 'break faith with the statute's text' and 'rewrite the statute' to save an unconstitutional statute." (quoting State v. Garcia, 424 P.3d 171, 185 (Utah 2017))); State v. Holl, 966 N.W.2d 803, 812 (Minn. 2021) ("[W]e are not permitted to 'rewrite a statute' or add additional statutory language." (quoting Laase v. 2007 Chevrolet Tahoe, 776 N.W.2d 431, 438 (Minn. 2009))); State v. Arevalo, 470 P.3d 644, 647 (Ariz. 2020) ("The presumption of constitutionality may require us to interpret a statute to give it a constitutional construction if possible, but we will not rewrite a statute to save it."); *see also* Aptheker v. Sec'y of State, 378 US. 500, 515 (1964) (explaining the difference between interpreting a statute to avoid constitutional problems and rewriting the statute).

321. Hans A. Linde, *E Pluribus–Constitutional Law Theory and State Courts*, 18 GA. L. REV. 165, 196 (1984).

322. *Id.*

323. *See* Goldstein v. Sec'y of the Commonwealth, 142 N.E.3d 560, 571–72 (Mass. 2020) (citations omitted) (explaining that the court must craft the least "intrusive" remedy to cure the constitutional violation while achieving the "basic legislative purpose" of the statutory requirements to ensure "a candidate demonstrate a certain level of support" before being placed on the ballot); *Boockvar I*, 238 A.3d at 371–72 (ruling that "the received-by deadline for mail-in

the U.S. Supreme Court applies these same principles.[324] The difficult question, upon which reasonable minds may differ, is whether a particular remedy is truly "the minimum of what is necessary," or whether it goes beyond the minimum.

All of this leads inevitably to the question of how to correct state court overreaching. Expert commentators have a variety of responses, separate and apart from the Elections Clause, discussed below. Professor Hasen suggests that state legislatures, not federal courts, are "the better institutional check on state court judicial overreaching."[325] Faced with state courts aggressively interpreting state election laws, state legislatures could clarify the laws: "A legislature worried about judicial overreaching could pass election statutes that not only clearly state their mandatory and non-waivable nature, but also indicate that such statutes should be strictly construed against expansive voter rights."[326] In *Samson*, the New Jersey vacancy case, the New Jersey Supreme Court noted that if the state legislature disagreed with its interpretation, it could simply amend the law to explicitly prohibit vacancies from being filled close to an election.[327] The problem with this approach is that while state legislatures can respond to future judicial overreaches by passing new laws, they cannot, due to time constraints, correct state court judicial overreaching that has already occurred in a given election. The same is true for judicial elections and state ballot initiatives.

Federal statutory law provides another check on state supreme courts (and state law more generally). A number of federal statutes establish standards that states must meet with regard to elections.

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ballots" must be extended by only three days in order to "protect[] voters' rights while being least at variance with Pennsylvania's permanent election calendar, which we respect and do not alter lightly, even temporarily."); State *ex rel.* Olson v. Bakken, 329 N.W.2d 575, 580 (N.D. 1983) ("[A] remedy must fill the interstices in accordance with those legal concepts, principles, or objectives which may apply to the situation and that are in harmony and legally compatible with the rule, regulation, or statute."); *see also* William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 5 (2023) ("What is the combined legal effect of the Constitution and one or more statutory provisions when there is a conflict between them? It is partly a question of constitutional law—the Constitution tells us what the law cannot be. And it is partly a question of statutory or sub-constitutional law—these materials fill out what the law is.").

324. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1986 (2021) ("'[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem' by disregarding the 'problematic portions while leaving the remainder intact.'" (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–29 (2006))); Baude, *supra* note 323, at 52–53 (discussing *Arthrex*).

325. *See* Hasen, *supra* note 191, at 119.

326. *Id.* at 122.

327. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1039 (N.J. 2002) ("If that is not what the Legislature intended, we anticipate that it will amend Section 20 accordingly.").

Aside from the Voting Rights Act,[328] which combats discrimination in voting on the basis of race, these include the Uniformed and Overseas Citizens Absentee Voting Act,[329] which "requires states to transmit ballots to military and overseas voters in time for those voters to cast their ballots"; the National Voter Registration Act,[330] which "requires states to offer voter registration opportunities at certain state offices" including departments of motor vehicles; and the Help America Vote Act,[331] which "requires states to adopt voting machine technology and ensure accessibility."[332] Yet commentators have argued that the structure of many of these laws, involving imposing requirements on states that are then delegated to local governments, makes them hard to enforce, which leads to widespread noncompliance.[333] Moreover, they are not targeted to the problem of state supreme courts overreaching their authority.

Ultimately, neither state legislatures nor federal statutory law, standing alone, would be sufficient to check state supreme courts exceeding their judicial powers in cases involving federal elections. The Supreme Court is required to intervene to address certain forms of state judicial overreaching, as there is no other timely alternative. This raises the question left unresolved in *Moore*: what standard should the Supreme Court apply when reviewing a state supreme court decision to determine whether it has transgressed the authority provided by the state constitution? To answer that question we must first widen the scope of our analysis of state constitutional law beyond election cases to take into account the fundamental principles of judicial review, particularly judicial review involving overlapping state and federal constitutional rights, as designed by our dual constitutional structure.

III. THE POTENTIAL OF *MOORE* TO UNDERMINE FUNDAMENTAL PRINCIPLES OF OUR DUAL CONSTITUTIONAL STRUCTURE

In light of state supreme courts' fundamental responsibility to protect voting rights under state constitutions, we now turn to the implications of *Moore*. First, this section explains how *Moore* could result in deep tension with this and other fundamental principles of federalism, if it is read to permit or even require expansive federal

328. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437, 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–10314).

329. Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99–410, 100 Stat. 924, 925 (1986) (codified as amended at 52 U.S.C. §§ 20301–20311).

330. National Voter Registration Act of 1993, Pub. L. No. 103–31, 107 Stat. 77, 78 (1993) (codified as amended at 52 U.S.C. §§ 20501–20511).

331. Help America Vote Act of 2002, Pub. L. No. 107–252, 116 Stat. 1666, 1668–70 (2002) (codified as amended at 52 U.S.C. §§ 20901–21145).

332. Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 749–50 (2016).

333. *Id.* at 764.

review of state supreme courts' interpretation of state election laws. Looking to Justice Souter's dissent from *Bush v. Gore*, as well as similar language in Justice Breyer's dissent in the same case, this section proposes a test to identify the difference between state court decisions that respect and those that transgress the different responsibilities assigned to state courts and state legislatures via the Elections Clause. Next, this section interprets *Moore* in the context of other recent Supreme Court decisions that have shrunk or supplanted state constitutional review in state courts, raising questions about the Supreme Court's own conception of federalism. Finally, we explain that our analysis applies in the same manner to presidential elections under the Electors Clause, because state legislatures have chosen to assign electors via statewide elections.

A. Moore *and our Dual Constitutional Structure*

To understand the distinct limitations imposed on state courts by the Elections Clause, and the conception or potential misconception of those limitations in *Moore*, we believe we must incorporate into the analysis certain fundamental principles underlying our dual constitutional structure. First and foremost, a double protection of election rights is perfectly permissible, and when states provide greater protection of the constitutional right in question, there is no need for federal intervention. Indeed, a double protection of rights is central to our dual constitutional structure.[334] Voting rights, as well as numerous other rights in our constitutional system, are protected by both the state and the federal constitutions. These rights include criminal defendants' rights, civil rights such as free speech and the free exercise of religion, gun rights, contract and property rights, and the right to equal protection, just to name a few.

It is also not unusual, for example, particularly since the 1970s and the advent of the New Judicial Federalism, for state courts to find that state constitutions provide greater protections for the right at issue than the federal Constitution.[335] Indeed, it was a U.S. Supreme Court Justice, William Brennan, who stimulated the search for such additional protections under analogous provisions of state

334. *See* THE FEDERALIST NO. 51, at 270 (James Madison) (Gideon Ed., 2001) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments . . . . Hence a double security arises to the rights of the people."); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); Kafker, *supra* note 10.

335. *See* WILLIAMS & FRIEDMAN, *supra* note 16, at 138 (explaining that the New Judicial Federalism "dates from the early 1970s" and "describes the fact that state judges in numerous cases have interpreted their state constitution rights provisions to provide *more* protection than the national minimum standard guaranteed by the federal Constitution").

constitutions in a famous law review article he wrote in 1977.[336] When criminal, civil, or due process rights are fully protected by the state constitution, that is usually the end of the inquiry for federal courts. As explained by Justice Linde, "When the state court holds that a given state law, regulation, ordinance or official action is invalid and must be set aside under the state constitution then the state is not violating the fourteenth amendment."[337] Greater protection of the criminal, civil, or due process right at issue by a state constitution is not a federal concern. That includes the power of state courts to declare state statutes and regulations unconstitutional under the state constitution, even if such a statute or regulation is constitutional under the federal Constitution. The Ninth and Tenth Amendment's reservation of rights to the people and the states and U.S. Supreme Court case law make clear that states can provide greater protection of individual rights under analogous provisions of state constitutions, without in any way violating federal constitutional rights.[338] The federal Constitution is implicated only when the state constitution provides less and not more protection for the individual right, or protects a distinct and different interest.[339]

This fundamental principle of federalism, although not analyzed in *Moore*, sheds some further light on some of the discussion in *Moore*. For example, in explaining that it has "an obligation to ensure that state court interpretations of [state] law do not evade federal law," the court in *Moore* referenced the Fifth Amendment protection that "'private property' shall not 'be taken for public use without just compensation.'"[340] It then emphasized that states "may not sidestep the Takings Clause by disavowing traditional property interests."[341] That is, of course, true, but if the state court fully protects the property right under its state constitution, providing greater protection than under the federal Constitution, there is not a federal constitutional violation, or there is at least an adequate and

336. *See* Brennan, *supra* note 334.

337. *See* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133 (1970).

338. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *id.* at amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Massachusetts v. Upton, 466 U.S. 727, 737–38 (1984) (Stevens, J., concurring) (explaining that the Massachusetts Supreme Judicial Court ignored the Ninth Amendment when it "permitted the enumeration of certain rights in the Fourth Amendment to disparage the rights retained by the people of Massachusetts under Art. 14 of the Massachusetts Declaration of Rights").

339. *See* Linde, *supra* note 337, at 133.

340. Moore v. Harper, 143 S. Ct. 2065, 2088 (2023) (quoting U.S. CONST. amend. V.).

341. *Id.* (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998)).

independent ground for the state court decision, making federal constitutional review unnecessary.[342]

The same is true for the other example raised by the court, the Contracts Clause, which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[343] If a case is brought in state court, and the state court declares the law impairing the contract to be unconstitutional based on the state constitution and provides full compensation for the impairment, there is no impairment or federal case.[344]

The interpretative methodology of the state supreme court in finding such greater protection of the right under its own constitution, including when it declares a state statute unconstitutional, also does not present a federal constitutional question, unless the state court blurs federal and state constitutional analysis.[345] So long as the state is interpreting its own constitution to provide greater protection of the right in question, it may do so by whatever constitutional

342. We recognize that plaintiffs may go directly to federal court and not await a decision when confronted with a state statute authorizing a taking of their property. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019). The difficult issue raised in *Moore* regarding the Elections Clause, however, is not the constitutionality of the law itself or its application, but a state court decision arguably changing the state election law. In the Takings Clause context, if a plaintiff goes to state court, federal review would only be implicated if the state court does not protect the property right. For example, in *Lucas v. South Carolina Coastal Council*, the case relied on by Chief Justice Rehnquist, the state supreme court's ruling "preclude[d], both practically and legally, any takings claim with respect to Lucas's *past* deprivation, *i.e.,* for his having been denied construction rights during the period before the 1990 amendment." 505 U.S. 1003, 1011 (1992). The state supreme court also ruled against the property owner in *Webb's Fabulous Pharmacies Inc. v. Beckwith*, one of the two cases relied on by the majority in *Moore* for its Taking Clause discussion. 449 U.S. 155, 158 (1980). The other case, *Philips v. Washington Legal Foundation*, was brought directly in federal court. 524 U.S. 156, 163 (1998).

343. U.S. CONST. art. I, § 10, cl. 1.

344. In the cases cited by the Court in *Moore*, the federal Contracts Clause claim alleged by the petitioners had been rejected by the state supreme court. *See* Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 98 (1938). Again, we note that as with Takings Clause claims, Contracts Clause claims can be brought directly in federal court. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 478 (1987) (petitioners requested an injunction in federal court against state officials under the Contracts Clause). *Cf.* Watters v. Bd. of Sch. Dirs., 975 F.3d 406, 413 & n.2 (3d Cir. 2020) (noting a circuit split regarding whether a Contracts Clause claim for damages can be brought under 42 U.S.C. § 1983 but "assum[ing] for purposes of this appeal" that it can). Yet suits in federal court do not raise like issues regarding whether a state supreme court's decision in the case changed preexisting law.

345. *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

methodology it chooses to employ, again, so long as it does not violate another federal constitutional provision.[346]

The adequate and independent ground doctrine, precluding federal constitutional review when there is an adequate and independent basis for the decision, is another fundamental principle of our dual constitutional structure.[347] In discussing this principle, *Moore* strangely focuses on the rare exceptions to this doctrine, not the rule, as did Chief Justice Rehnquist in his *Bush v. Gore* concurrence upon which *Moore* relies. The court in *Moore* stated that in "[c]ases raising the question whether adequate and independent grounds exist to support a state court judgment[,]" it has "considered whether a state court opinion . . . adopted novel reasoning to stifle the 'vindication in state courts of . . . federal constitutional rights,'" citing *NAACP v. Alabama*, a 1958 case dating back to the era of state resistance to the Civil Rights movement.[348] This case, as well as *Bouie*, from the same era of Southern state court resistance, were the only support Chief Justice Rehnquist cited.[349] These exceptional cases prove the rule: the Court will step in when state courts are warping their own law to resist or flout federal law, not when they are interpreting their own statutes or constitutions in the ordinary course. In her dissent in *Bush v. Gore*, Justice Ginsburg makes this point emphatically:

> The Chief Justice's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said the Constitution impelled us to train a skeptical eye on state court portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold.[350]

Discerning "nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court," she stated that the "ordinary principle . . . reflect[ing] the core of federalism" of "defer[ence] to state high courts' interpretations of their states' own law" should apply.[351]

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346. *See* Murdock v. Memphis, 87 U.S. (1 Wall.) 590, 626 (1874) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."); *see also* Litman & Shaw, *supra* note 9, at 1258 ("One foundational and enduring principle of federalism is that state courts are supreme when it comes to the meaning of state law."); SUTTON, *supra* note 284, at 123 ("State courts have independent authority to construe their constitutions.").

347. *See Long*, 463 U.S. at 1041 ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.").

348. Moore v. Harper, 143 S. Ct. 2065, 2088 (2023) (quoting NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 457–58 (1958)).

349. Bush v. Gore, 531 U.S. 95, 114–15 (2000) (Rehnquist, C.J., concurring).

350. *Id.* at 140 (Ginsburg, J., dissenting).

351. *Id.* at 141–42.

The state court is also not bound by the federal understanding of *stare decisis* when interpreting its own constitution.[352] Whether that would be changed by *Moore* in election cases, particularly if the Rehnquist concurrence standard in *Bush v. Gore* is ultimately adopted, remains unclear. In that concurrence, Chief Justice Rehnquist stated, "In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court."[353] The same passage was quoted by Justice Kavanaugh in his concurrence in *Moore* recommending the adoption of the Rehnquist concurrence.[354] This passage would appear to include changes in judicial interpretations of statutes and constitutional interpretation resulting in changes in state law. That would raise the question, recognized by Justice Thomas in his dissent in *Moore*,[355] about whether the court would be reviewing state courts' own *stare decisis* principles or imposing its own federal *stare decisis* standard, which is in flux after *Dobbs v. Jackson Women's Health Organization*,[356] to say the least.[357]

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352. *See, e.g.*, People v. Novotny, 320 P.3d 1194, 1202 (Colo. 2014) ("*[S]tare decisis*, the common-law principle requiring adherence by courts to decided cases, has never been an immutable law or inexorable command. . . . Whether the highest court of any jurisdiction will choose to follow or depart from its own prior decisions must ultimately remain a matter of discretion."); *Harper II*, 886 S.E.2d 393, 445 (N.C. 2023) ("When adhering to the doctrine would 'perpetuate error,' however, this Court has never hesitated to refuse to apply it.") (citation omitted).

353. *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring).

354. *Moore*, 143 S. Ct. at 2091 (Kavanaugh, J., concurring).

355. See *id.* at 2106 (Thomas, J., dissenting) ("And what about *stare decisis*—are federal courts to review state courts' treatment of their own precedents for some sort of abuse of discretion?").

356. 142 S. Ct. 2228 (2022).

357. *See id.* at 2264 ("Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision."); *id.* at 2301 (Thomas, J., concurring) ("[W]e should reconsider all of this Court's substantive due process precedents. . . . Because any substantive due process decision is 'demonstrably erroneous.'" (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring))); *id.* at 2306–07 (Kavanaugh, J., concurring) ("Adherence to precedent is the norm, and stare decisis imposes a high bar before this Court may overrule a precedent."); *id.* at 2316 (Roberts, J., concurring) (explaining that due to "basic principles of *stare decisis*," he would have "resolve[d] the case on . . . narrower grounds"); *id.* at 2319 (Kagan, J., dissenting) (criticizing "[t]he majority's cavalier approach to overturning this Court's precedents" and explaining "that things decided should stay decided unless there is a very good reason for change"); *see also* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 342 (2023) (Sotomayor, J., dissenting) ("It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*."); Jones v. Mississippi, 141 S. Ct. 1307, 1337 (2021) (Sotomayor, J., dissenting) ("[T]he Court

The two North Carolina Supreme Court decisions in *Moore* themselves raise all sorts of questions about *stare decisis* under state constitutional law. The court completely reversed itself after a judicial election changed its composition. Whether that is a gross violation of *stare decisis* or a respect for the democratic process is an important, contested question under state constitutional law.[358] As Professor Leah Litman explained:

> Many state courts, unlike their federal counterparts, are elected and subject to elections. That system provides one mechanism for democratic feedback between state courts and the people; the anti-novelty version of [the ISLT, requiring the court to consider state law prior and after the state court review and closely scrutinize changes in that law] could thwart or undermine democracy if it prevents people from using judicial elections to try and change the direction of the law and the direction of the state courts.[359]

Conversely, other commentators have criticized the politicization of state supreme courts, arguing elected judges follow the election returns, not the law.[360] Thus, there is wide disagreement among state courts and state constitutional commentators on how stare decisis should apply in state courts. There is certainly no uniform standard.

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is willing to overrule precedent without even acknowledging it is doing so, much less providing any special justification.").

358. *Compare Harper II*, 886 S.E.2d 393, 444 (N.C. 2023) ("It is not uncommon that rehearing of a case coincides with a change in personnel on the Court who provide a fresh legal perspective."), *with id.* at 450 (Earls, J., dissenting) ("Today's result was preordained on 8 November 2022, when two new members of this Court were elected to establish this Court's conservative majority. . . . The merits of Plaintiffs' arguments do not matter.").

359. Leah Litman & Rick Hasen, *Litman: "Anti-Novelty, the Independent State Legislature Theory in Moore v. Harper, and Protecting State Voting Rights*," ELECTION L. BLOG (July 3, 2023, 7:42 AM), https://electionlawblog.org/?p=137239.

360. *See* Alan Greenblatt, *Exploring the Dangers of a Purely Partisan Judiciary*, GOVERNING (May 11, 2023), https://www.governing.com/politics/exploring-the-dangers-of-a-purely-partisan-judiciary ("At both the state and federal levels, judges are increasingly seen as nakedly partisan, determining cases not based on the law but the policy outcome their side prefers."); Editorial, *Wisconsin Supreme Court Race Shows Folly of Electing Judges*, WASH. POST (Mar. 29, 2023, 5:40 PM), https://www.washingtonpost.com/opinions/2023/03/29/wisconsin-supreme-court-judge-election/ ("This Editorial Board has argued for decades against the perverse practice of electing judges. . . . A jurist's job is to fairly apply the law, not to serve an ideology or donors."); Joe Lancaster, *Progressive-Backed Candidate Wins Seat on Wisconsin's Supreme Court*, REASON (Apr. 5, 2023, 1:00 PM), https://reason.com/2023/04/05/progressive-backed-candidate-wins-seat-on-wisconsins-supreme-court/ ("The ideal forum for hashing out differences over legislation is in the actual legislature, not in running judicial candidates who are most likely to rule on those laws in the way you prefer.").

If the propriety of the North Carolina Supreme Court's reversal of its own position is unclear under state *stare decisis* principles, it is even less clear how the U.S. Supreme Court would analyze it after *Moore*, under a to-be-determined federal standard. The effect of the change in judicial interpretation by the North Carolina Supreme Court was to reverse its earlier decision that had required a substantial change in legislation. Did *Harper I*, the first decision by the North Carolina Supreme Court violate the new *Moore* standard? *Harper II*? Neither or both? Unfortunately, the court in *Moore* did not address whether either decision violated the new standard it was establishing. *Harper I* arguably violated the standard because it resulted in a change in the redistricting legislation based on state constitutional reasoning that the North Carolina court would itself subsequently conclude to be ill-considered. *Harper II* may have violated *Moore* because it appeared to violate *stare decisis* principles and did not reinstate the original legislative plans, even though it did allow the legislature "the opportunity to enact a new set of legislative and congressional redistricting plans, guided by federal law, the objective constraints in … [the North Carolina Constitution], and this opinion."[361] At least under the standard proposed by Chief Justice Rehnquist, none of this is clear. In sum, as Justice Thomas suggested,[362] *Moore* raises lots of questions about whether the Supreme Court will be seeking to impose its own views of *stare decisis* on state courts' interpretation of state election statutes and state constitutional provisions governing elections.

Another fundamental principle of our dual constitutional structure that *Moore* puts into question is state separation of powers. The separation of powers between the legislative, judicial, and executive branches (including administrative agencies) under state constitutions may be different from the separation of powers under the federal Constitution. State courts interpreting state constitutions are not bound by the principles or precedents of federal separation of powers.[363] The Supreme Court has expressly so ruled on numerous

361. *Harper II*, 886 S.E.2d at 448.

362. Moore v. Harper, 143 S. Ct. 2065, 2106 (2023) (Thomas, J., dissenting).

363. *See* Prentis v. Atl. Coast Line Co., 211 U.S. 210, 225 (1908) ("We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."); *see also* Robert A. Shapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 92 (1998) ("[U]nlike federal individual rights precedent, federal separation of powers doctrine does not apply to the states."); WILLIAMS & FRIEDMAN, *supra* note 16, at 271 ("[S]tate courts need not, nor should they necessarily, follow federal constitutional separation of powers doctrine."); Litman & Shaw, *supra* note 9, at 1252 ("[A]s the United States Supreme Court has acknowledged, separation-of-powers dynamics are entirely distinct in the states." (citing Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (plurality opinion))).

occasions.[364] Absent the Elections Clause, the Supreme Court has no right to impose its own conception of separation of powers on the state when state supreme courts interpret their own statutes and state constitutions.[365]

B. Interpreting Moore *to Serve the Purposes of the Elections Clause and Federalism*

We assume that *Moore* should be read with these fundamental principles of federalism in mind. The question then becomes: how does the Elections Clause limit these important federalism principles? What distinct federal interest does it protect? More specifically, how does the federal constitutional provision that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"[366] reshape these principles?

The court's rejection of the most vigorous interpretation of the ISLT puts to rest the notion that a state supreme court has no power to conclude that the statute that the state legislature drafted for the election for senators and representatives violates state constitutional protections of the electoral process. However, the Court's caveat is confusing to say the least. State courts may review legislation, but they "may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[367] What does it mean for state courts to "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures" to "prescribe 'the Times, Places and Manner of' federal elections"[368] when state courts still retain their power to review state legislation for consistency with the state constitution, and state constitutions define and control the exercise of the legislative powers?

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364. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 719 (2010) ("This Court has held that the separation-of-powers principles that the Constitution imposes upon the Federal Government do not apply against the States." (citing Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902))); Crowell v. Benson, 285 U.S. 22, 57 (1932) ("A State may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to State authority."); *Prentis*, 211 U.S. at 225.

365. *See* Litman & Shaw, *supra* note 9, at 1254 ("The [federal] separation of powers principles undergirding textualism do not map neatly onto the states, and they accordingly do not justify a requirement that states adhere to textualism as an interpretive methodology . . . .").

366. U.S. CONST. art. I, § 4, cl. 1.

367. Moore v. Harper, 143 S. Ct. 2065, 2089 (2023).

368. *Id.* at 2089; *id.* at 2074 (citing U.S. CONST. art. I, § 4, cl. 1).

The historic understanding of the Elections Clause described above can help resolve this question.[369] Indeed, in evaluating this issue, we can expect the majority of the Supreme Court to continue to employ its originalist and/or textualist approach to the Elections Clause, as it has done in other areas of federal constitutional law, and state courts will of course be bound by that interpretation of a federal constitutional provision. As explained above, the Framers were highly skeptical of state legislatures; indeed, state legislatures' overreaching was an important concern motivating the convening of the Constitutional Convention.[370] The Framers also understood that state courts could review state statutes to determine whether they complied with state constitutional requirements and the Framers further had at least some "faith in state courts as protectors of liberty."[371]

In addition, as explained above, there were important practical administrative purposes served by delegating the conducting of federal elections to state election officials that had nothing to do with any type of special trust or confidence in state legislatures. The Elections Clause reflects a decision to piggyback the federal election process on the state election process, subject to congressional oversight. There was not a federal elections infrastructure in place or a set of uniform federal requirements for conducting such elections. Rather, the states were entrusted by the Elections Clause with conducting federal elections. This was a matter of administrative convenience, as Madison and Hamilton have explained.[372] The states would do so as prescribed by state legislatures, subject to state constitutions and state constitutional review by state courts. As there were no inferior federal courts in place at the time, state courts interpreting state election laws and state constitutional voting rights protections were therefore necessary to ensure the integrity of the federal, as well as the state, election process, with only the U.S. Supreme Court available to review the state court decisions for federal statutory and constitutional violations.[373] Once federal lower courts were created, state courts would continue to perform their historic role of interpreting state statutes governing federal elections.

So, with this understanding of the origins and purpose of the Elections Clause, what does it mean for a state court to transgress the ordinary bounds of judicial review such that it arrogates to itself the power vested in the state legislatures to prescribe the times, places, and manner of federal elections, as provided in the Elections

369. *See supra* notes 22–27 and accompanying text.

370. *See supra* pp. 105–07.

371. *See* SUTTON, *supra* note 20, at 180; Friedman & Williams Brief, *supra* note 20, at 21.

372. *See* RECORDS, *supra* note 23, at 241; THE FEDERALIST NO. 59 (Alexander Hamilton).

373. *See supra* text accompanying note 23.

Clause? In our view, the Elections Clause has a limited purpose and effect. It does not interfere with the ordinary powers state courts have to review and interpret their own election laws, including those governing both federal and state elections, and to ensure that they comply with their state constitutions. It does not impose a particular philosophy of judicial review or *stare decisis* or a federal conception of separation of powers on the state judiciary in performing such review.[374] It also does not in any way preclude states, or state courts interpreting their constitutions, from providing greater protections of the right to vote than the federal Constitution. Nor does it require uniformity in the conduct of elections unless Congress intervenes. Rather, it reflects the Framers' decision to adopt and employ the state electoral processes for the conduct of the federal elections. State legislatures would prescribe the times, places, and manner of federal elections, as they did state elections, with the assistance of other state and local actors, all subject to review by state courts, and ultimate oversight by Congress and the Supreme Court. There was no special respect for or deference to state legislatures, as the Framers were highly skeptical of their overreaching.[375] Other federal constitutional requirements and federal statutes would impose additional important oversight on the election process, but those are different from those imposed by the Elections Clause itself.

Properly understood, the Elections Clause should not invite an open-ended inquiry into whether a state court has transgressed the ordinary standards of judicial review. As explained above, there is no consensus on the Court at this time on what that means generally. There was also no agreement in *Bush v. Gore* about what that meant in general either.[376] If that is the standard the Court is going to apply, it will invite the Supreme Court and lower federal courts to substitute their judgments on state courts' interpretation of state statutes and state constitutions in election cases across the country.[377] It will invite them to do so even though the Framers intended states to conduct federal elections as they conducted their state elections, and the federal courts lack the knowledge and expertise on state election law and the state election process possessed by state courts, as recognized by Justice Ginsburg and Justice Breyer in their dissents

374. *See also* SUTTON, *supra* note 284, at 125 (suggesting that state supreme courts ought to use different methods of interpretation than the Supreme Court).

375. *See supra* text accompanying notes 22–28.

376. Bush v. Gore, 531 U.S. 98, 110–11, 135–36 (2000).

377. Lower federal courts and not just the Supreme Court may be involved because, as noted by Professor Hasen, litigants could potentially challenge the decisions of state election administrators directly in federal court. Rick Hasen, *Expect Many More Lawsuits in Federal Court Against the Actions of State and Local Election Officials after Moore v. Harper*, ELECTION L. BLOG (June 28, 2023, 5:51 PM), https://electionlawblog.org/?p=137176. In contrast, decisions by state supreme courts would be reviewed by the Supreme Court itself.

in *Bush v. Gore*.[378] All of this ignores the fundamental principles of federalism and the limited purposes of the Elections Clause, as discussed above.

The Rehnquist concurrence in *Bush v. Gore* is particularly troubling in this regard. The Chief Justice read the state statute differently from the state supreme court and his colleagues; nonetheless, he concluded that the Florida Supreme Court transgressed the standards of ordinary judicial review.[379] As Justice Thomas pointed out in his dissent in *Moore*, there is even greater room for differences of opinion when it comes to constitutional interpretation, making the meaning of transgressing the standards of ordinary judicial review even more difficult to define in this context.[380]

We conclude that it is a distinct type of transgression that is prohibited by the Elections Clause. The foundation for that type of transgression was sketched out in Justice Souter's dissent in *Bush v. Gore*.[381] Although the majority in *Moore* and Justice Kavanaugh in his concurrence roughly equated the two opinions,[382] they are significantly different. As Justice Souter explained, "Bush does not, of course, claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the provision and violate Article II."[383] Rather, what was being argued, as Justice Souter understood it, was that "the interpretation of [the statute] was so unreasonable as to transcend the accepted bounds of statutory interpretation, *to the point of being a nonjudicial act and producing a new law untethered to the legislative Act in question*."[384] Similar language also appears in Justice Breyer's dissent, when he explained that he could not see how the Florida Supreme Court's interpretation of statutory language was "so misguided as no longer to qualify as judicial interpretation," but rather "as a usurpation of the authority of the State legislature."[385]

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378. *Bush*, 531 U.S. at 138 (Ginsburg, J., dissenting); *id.* at 146–47 (Breyer, J., dissenting); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) ("Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues" for education).

379. *Bush*, 531 U.S. at 120 (Rehnquist, C.J., concurring).

380. Moore v. Harper, 143 S. Ct. 2065, 2105 (2023) (Thomas, J., dissenting).

381. *Bush*, 531 U.S. at 130 (Souter, J., dissenting).

382. *Moore*, 143 S. Ct. at 2089 (quoting the Rehnquist and Souter tests from *Bush v. Gore*); *id.* at 2090 (Kavanaugh, J., concurring) ("As I understand it, Justice Souter's standard, at least the critical language, is similar" to Chief Justice Rehnquist's).

383. *Bush*, 531 U.S. at 130 (Souter, J., dissenting).

384. *Id.* at 131 (emphasis added).

385. *Id.* at 152 (Breyer, J., dissenting).

We agree that such a fundamental rewriting and transformation of an election statute is what is required for a state court to arrogate to itself the legislative right to prescribe the times, places, and manner of elections. U.S. Supreme Court intervention is also necessary to address such state court judicial overreaching because the state supreme court itself is the one that has exceeded its own powers, and its overreaching cannot otherwise be timely corrected. Such state judicial overreaching, however, is different in kind, not degree, from interpreting the meaning of unclear election provisions or declaring parts of Elections Clause statutes unconstitutional, which are core state judicial functions. Although a closer question, it is also different from a constitutionally compelled remedial change to a statute's application imposed by the state judiciary, at least when the statutory modifications are narrowly tailored to address the constitutional violation.

As explained by the U.S. Supreme Court itself, such remedial changes may be permissible in certain limited circumstances. A good example is in *Growe v. Emison*,[386] in which the Court stated:

> [T]he District Court's December injunction of state-court [congressional and legislative redistricting] proceedings . . . was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts. Thus, the January 20 deadline the District Court established was described as a deadline for the Legislature, ignoring the possibility and legitimacy of state *judicial* redistricting. And the injunction itself treated the state court's provisional legislative redistricting plan as 'interfering' in the reapportionment process. But [prior Supreme Court precedent] prefers *both* state branches to federal courts as agents of apportionment.[387]

Nonetheless, this is not an open-ended license to rewrite statutes. As the Supreme Court has stated: "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute or judicially rewriting it."[388] When performing this remedial function, it is the "duty" of state courts "to do the minimum of what is necessary to conform those [election] statutes to the [state] Constitution, and not to rewrite those statutes more extensively."[389]

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386. 507 U.S. 25 (1993).

387. *Id.* at 34.

388. Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964) (quotation omitted).

389. Goldstein v. Sec'y of the Commonwealth, 142 N.E.3d 560, 575 (Mass. 2020) (Kafker, J., concurring). See also the Pennsylvania Supreme Court's decision in *Boockvar I*, discussed *supra* notes 315–19, where the court attempted to draw such lines.

C. The Roberts Court's Reluctance to Share Constitutional Space

Eventually, the Court is going to have to choose between the very different approaches to reviewing state courts introduced in the Rehnquist and Souter opinions in *Bush v. Gore* or define a third way through this thicket. This choice will be defined at least in part by the Supreme Court's own conception of federalism and how it chooses to exercise its authority in shared constitutional space. As explained above,[390] the majority's heavy reliance on the reasoning and exceptional case law cited by Chief Justice Rehnquist may be a tell-tale sign of where it may be heading. This is not a court inclined to deference when dealing with other branches of government, state or federal.[391] The Court has already shrunk or supplanted state constitutional law in a number of different areas where previously state constitutional law had been allowed to thrive. Nowhere is that more evident than in the Supreme Court's religion cases.

Whereas in the past, state constitutional anti-aid and anti-Establishment Clause jurisprudence was allowed to play out in the "play in the joints" that was once found to exist in the constitutional space that existed between the federal free exercise and anti-establishment clauses of the First Amendment, the Roberts Court has increasingly tightened the gap and narrowed state constitutional decision-making in this area.[392] As the author of a number of the decisions in this area, Chief Justice Roberts often began with modest precedents and propositions, but over time the acorns grew into oaks that crowded out state constitutional decision-making.[393] Good examples are his free exercise of religion cases. His expansive interpretation of *Church of Lukumi Babalu Aye, Inc. v. Hialeah*[394] is illustrative. As explained by long-time Supreme Court commentator Linda Greenhouse in *Fulton v. City of Philadelphia*,[395] Chief Justice Roberts transformed an unusual precedent involving a city ordinance targeting animal sacrifice into a precedent for providing religious entities with a "most-favored nation" status.[396] Another example is

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390. *See supra* pp. 15–53.

391. *See, e.g.,* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97–110 (2022).

392. *See* Kafker, *supra* note 10, at 122–24.

393. We emphasize that the Chief Justice may be the key fifth vote to clarifying *Moore*. Three justices have already adopted the most vigorous interpretation of the ISLT. Justice Kavanaugh has also endorsed the Rehnquist approach. As the author of *Moore*, the Chief Justice may be expected to flesh out its meaning, that is, if he is in the majority.

394. 508 U.S. 520 (1993).

395. 141 S. Ct. 1868 (2021).

396. *See* Linda Greenhouse, *What the Supreme Court Did for Religion*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-religion.html; *Fulton*, 141 S. Ct. at 1877 (interpreting *Lukumi* to hold that a law "lacks general applicability if it prohibits religious conduct while permitting

Trinity Lutheran Church of Columbia, Inc. v. Comer,[397] a free exercise opinion involving the denial of state funding to pay for a church playground resurfacing project. In his opinion, Chief Justice Roberts stated the case involved only "express discrimination based on religious identity with respect to playground resurfacing" and did not address "religious uses of funding or other forms of discrimination."[398] Subsequent decisions quickly, however, involved protections for funding of religious activity.[399] The ever widening gyre of these free exercise of religion cases has substantially shrunk historic protections provided by anti-aid and anti-establishment provisions in state constitutions.[400]

Ultimately, this Court's overarching conception of federalism, and its respect for state as well as federal constitutional rights, will influence, if not determine, how it will clarify the standard of review it has introduced in *Moore*. If state courts may be found to have arrogated the function of the state legislature whenever the majority of the Supreme Court strongly disagrees with the way state courts interpret (1) state statutes that affect the times, places, and manner of elections, (2) the state constitution to provide greater protections of the right to vote than the state legislature, or (3) legislative delegations of the regulation of elections to other state or local officials, the Supreme Court is essentially substituting its judgment for the state supreme court's statutory and, constitutional review of elections. This, in our view, violates fundamental principles of federalism.

In contrast, as explained above, the standard set out in the Souter dissent in *Bush v. Gore* respects the ordinary principles and

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secular conduct that undermines the government's asserted interests in a similar way").

397. 582 U.S. 449 (2017).

398. *Id.* at 465–67 & n. 3.

399. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2255–57 (2020); Carson v. Makin, 142 S. Ct. 1987, 1997–98 (2022).

400. The Supreme Court has contracted state constitutional authority in other areas as well, including state police powers over health and guns, *see supra* text accompanying notes 174–75, and state property rights. *See* Kafker, *supra* note 10, at 120–21 (discussing how the court's expansive interpretation of property rights in Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) appears to have cut back on PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), which "has been considered among the most important state constitutional law decisions, as it eliminated the state action requirement in certain contexts"). At the same time, the Court has also championed federalism in other contexts. Writing for the court in *Jones v. Mississippi*, Justice Kavanaugh explained, "[O]ur holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. . . . All of these options, and others, remain available to the States." 141 S. Ct. 1307, 1323 (2021)

practices of federalism and the limited purpose of the Elections Clause.[401] It respects the right of state courts to interpret their own statutes and constitutions, so long as the particular prescription in the Elections Clause is not violated. Thus, it leaves to state courts, not the Supreme Court, the interpretation of state statutes and constitutions unless those interpretations are so untethered to those statutes and constitutions as to produce a new law, and thus, a "nonjudicial act."[402] It allows state court to fill in gaps and resolve uncertainties in state statutes affecting the times, places, and manner of elections. It also allows state courts to interpret state constitutions to provide greater rights to vote than the state legislature. It does not allow the Supreme Court to substitute its judgment when it disagrees with these interpretations, unless they are so "untethered" to and expansive of those statutes as to constitute the construction of new election laws, and thus a "usurpation" of the legislative function.[403] Significant and wide-ranging judicial rewriting of statues is required to meet this standard.

We recognize that the Supreme Court has explicitly declined to adopt either the Rehnquist concurrence or the Souter dissent in *Bush v. Gore* and may adopt another standard. Some of the current Supreme Court justices in their various concurrences and dissents during and after the 2020 election have introduced other possibilities. For example, Justice Thomas and Justice Alito have suggested that it is inappropriate to rely on vague or open-ended provisions in state constitutions.[404] This, we believe, is inconsistent with the essential holding in *Moore* which provides for state constitutional review of state legislation.[405] Constitutional law, both state and federal, is based on the interpretation on such capacious clauses. Supreme courts in this country are expected to provide a principled understanding of such clauses. Whether it is to lend meaning to fair or free elections, liberty, equality, or due process, that is what supreme courts do. If state supreme courts cannot interpret "vague" constitutional provisions, they cannot enforce state constitutions.[406]

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401. *See supra* notes 381–85.

402. Bush v. Gore, 531 U.S. 98, 131 (2000) (Souter, J., dissenting).

403. *Id.* at 129–33*; Id.* at 152 (Breyer, J., dissenting).

404. *See* Degraffenreid v. Pa. Democratic Party, 141 S. Ct. 732, 733 (Thomas, J., dissenting from denial of certiorari); *Boockvar III*, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite).

405. Moore v. Harper, 143 S. Ct. 2065, 2079–81 (2023).

406. *See* Litman & Shaw, *supra* note 9, at 1265 ("This particular iteration of the ISLT would place the federal courts in the absurd position of determining when particular state constitutional provisions are open and vague . . . . This inquiry could not be administered in a principled or coherent way, in part because it would require the Justices to assess each individual state constitutional provision—a matter they are concededly not experts in.").

The non-delegation doctrine for state elections suggested by Justice Gorsuch also has both legal and practical problems. Such "delegation is ubiquitous and crucial in our election system."[407] As explained above, the Elections Clause relied on the states to conduct federal elections as they had state elections, subject to congressional intervention.[408] There was no special respect for state legislatures or non-delegation requirements imposed. States are also not bound by federal separation of powers generally; rather, states are free to structure their relationships between the different branches of government, including administrative agencies and state and local officials, as they see fit. State governments' implementation and oversight of elections, as demonstrated in state constitutions, legislation, and regulations, reflects this legal authority as well as the practical realities of holding elections. As explained by one amicus in *Moore*:

> [H]undreds of administrative rules and regulations promulgated by chief election officials are necessary to provide the detailed guidance for local officials and poll workers to run elections. State legislatures have neither the expertise, nor the flexibility, nor the time to replace these detailed rules. Similarly, the emergency powers executed by governors or chief election officials are necessary to respond to unpredictable events, like hurricanes or power outages.[409]

The enormous problems caused by COVID-19 provide a recent example of such challenges.

D. Whether the Electors Clause Changes the Analysis

We briefly return to the Electors Clause, and the question whether a challenge based on the Electors Clause, as opposed to the Elections Clause, in any way changes the analysis of Supreme Court review over state courts discussed above. We conclude that it does not.

As a reminder: The Electors Clause provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors equal to the whole Number of Senators and Representatives to which the State may be entitled in the

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407. Shapiro, *supra* note 20, at 189.

408. *See supra* pp. 103–07.

409. Brief for the Brennan Center for Justice at NYU School of Law as Amicus Curiae Supporting Respondents at 26–27, Moore v. Harper, 143 S. Ct. 2065 (2023) (No. 21–1271); *see, e.g.*, 950 MASS. CODE REGS. ch. 46–60 (2023) (providing regulations for voting equipment, vote counting, voter registration, polling place accessibility, administrative complaints, loan applications for local governments to obtain voting machines, and more). Moreover, the Help America Vote Act required states to "establish and maintain State-based administrative complaint procedures" as a condition of receiving federal funds. 52 U.S.C. § 21112(a)(1).

Congress."[410] In *Chiafalo v. Washington*,[411] the so-called faithless electors case, the Supreme Court explained the convoluted history of this clause and its purpose. The Electors Clause plan "emerged from an eleventh-hour compromise," was quickly amended to account for the emerging party system, and "gives the States far-reaching authority over presidential electors," including allowing states to constrain electors' discretion, as all have done in one form or another since the first presidential elections—nowadays, via requiring electors to vote for the winner of state elections.[412]

As mentioned earlier, the Electors Clause, not the Elections Clause, was the focal point of *Bush v. Gore*, as the contested issues involved judicial review of state election statutes pursuant to the state legislative scheme for selection of presidential electors. *Moore v. Harper*, in contrast, involved an Elections Clause, not an Electors Clause, challenge, because it related to judicial review of state statutes defining congressional districts. Nonetheless, the Court in *Moore* turned to Chief Justice Rehnquist's analysis of the Electors Clause in *Bush v. Gore* for guidance, without suggesting in any way that a different analysis applied to the issue of state judicial review in an Elections Clause case.[413] In both cases the critical issue was the propriety of judicial review of state legislation. Indeed, in response to an argument that the Court had held that state legislatures had exclusive power over elections in *McPherson*,[414] an Electors Clause case, the Court stated: "Our decision in *McPherson* . . . had nothing to do with any conflict between provisions of the Michigan Constitution and action by the State's legislature—the issue we confront today."[415] In that case, the Michigan Supreme Court had upheld the validity of state legislation governing the appointment of electors based on the votes in congressional districts, rather than as a state as a whole, under the federal Constitution.[416]

In both *Moore* and *Bush v. Gore*, the heart of the disputes was the legality of the state statutes governing the electoral process and whether state judicial review of those statues was appropriate. The election statutes at issue were designed to protect the right to vote and the integrity of the election process, including the selection of the

410. U.S. CONST. art. II, § 1, cl. 2.

411. 140 S. Ct. 2316 (2020).

412. *Id.* at 2320–21, 2324. "After the popular vote was counted, States appointed the electors chosen by the party whose presidential nominee had won statewide, again expecting that they would vote for that candidate in the Electoral College," except Maine and Nebraska, which allocate some electors to the election winner in each congressional district. *Id.* at 2321, 2321 n.1.

413. Moore v. Harper, 143 S. Ct. 2065, 2089 (2023).

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

415. *Moore*, 143 S. Ct. at 2083–84.

416. *See McPherson*, 146 U.S. at 23.

winners, all according to the state and federal constitutions.[417] The appointment of Presidential electors is part and parcel of this overall process, as reflected in the statutes that have been passed by the different states assigning electors to the winners of elections. Again, this is carefully delineated in *Chiafalo*, which explained that each state assigns slates of electors picked by a political party to the winning candidate from that party.[418] The Court explained that some states have statutes that "prohibit so-called faithless voting," via requiring a pledge from electors or imposing a legal duty on them; "Either way, the statutes work to ensure that the electors vote for the candidates who got the most statewide votes in the presidential election."[419]

We recognize that there is some discussion in *Moore* of earlier Supreme Court cases suggesting that when a state legislature is exercising authority under the federal Constitution but *not* acting in a lawmaking capacity, it is not subject to state court review.[420] We need not, however, resolve whether these historic examples remain good law to conclude that judicial review and the standards set out in *Moore* for such review are applicable to Electors Clause challenges based on disputed election statutes and results. As the Court in *Moore* stated, "[F]ashioning regulations governing federal elections 'unquestionably calls for the exercise of lawmaking authority.'"[421] And as the Court recognized in *Chiafalo*, every state has provided for elections by statute in order to select presidential electors.[422] Who won the election and is thus entitled to the electors' votes is a matter

417. Chiafalo v. Washington, 140 S. Ct. 2316, 2321 (2020).

418. *Id.*

419. *Id.* at 2321–22; *see also id.* at 2332 (Thomas, J., concurring in the judgment) ("Some States expressly require electors to pledge to vote for a party nominee as a condition of appointment and then impose a penalty if electors violate that pledge," while others "impose a legal duty that has no connection to elector appointment.").

420. *See Moore*, 143 S. Ct. at 2085 ("Legislatures act as 'Consent[ing]' bodies when the Nation purchases land, Art. I, § 8, cl. 17; as 'Ratif[ying]' bodies when they agree to proposed Constitutional amendments, Art. V; and—prior to the passage of the Seventeenth Amendment—as 'electoral' bodies when they choose United States Senators" (quoting Smiley v. Holm, 285 U.S. 355, 365 (1932))); *see also id.* at 2084 ("[W]hen state legislatures ratify amendments to the Constitution, they carry out 'a federal function derived from the Federal Constitution,' which 'transcends any limitations sought to be imposed by the people of a State.'" (quoting Leser v. Garnett, 280 U.S. 130, 137 (1922))). However, "[b]y fulfilling their constitutional duty to craft the rules governing federal elections, state legislatures do not consent, ratify, or elect—they make laws," and are thus "subject to the ordinary constraints on lawmaking in the state constitution." *Id.*

421. *Id.* at 2085 (quoting Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808 n.17 (2015)).

422. *Chiafalo*, 140 S. Ct. at 2321.

of the application and review of state election statutes. Thus, we discern no reason to apply a different standard to state court review of an Electors Clause challenge when it arises out of an election dispute.[423][424]

CONCLUSION

Unfortunately, there is a dangerous lack of clarity in the holding of *Moore v. Harper*. By resurrecting *Bush v. Gore* and possibly the concurrence by Chief Justice Rehnquist in that case to fill this void, the Supreme Court has deeply unsettled state and federal constitutional review of election law.

None of this is necessary. The Elections Clause has a limited purpose. Instead of establishing a uniform national election standard, the Framers relied on the states to conduct national, along with state, elections, with the state legislatures prescribing the times, places, and manner of such elections in accordance with their state constitutions, as reviewed by their state courts, and subject to congressional oversight as well. The provision did not authorize the Supreme Court to substitute its judgment for state courts on the meaning of state election statutes or state constitutions whenever the

423. Congress has also added at least one other consideration here. In 2022, in response to the January 6, 2021 attack on the U.S. Capitol, Congress passed the Electoral Count Reform Act, 3 U.S.C. § 5 (2022), which clarifies the requirements for certifying slates of electors. *See* Miles Parks, *Congress Passes Election Reform Designed to Ward Off Another Jan. 6*, NPR (Dec. 23, 2022, 3:44 PM), https://www.npr.org/2022/12/22/1139951463/electoral-count-act-reform-passes. The law preserved the "safe harbor" provision which Chief Justice Rehnquist relied on in *Bush v. Gore* to support his conclusion that a recount would be inconsistent with the intent of the Florida Legislature: "Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, *under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day*." 3 U.S.C. § 5(a)(1) (emphasis added). A certificate issued pursuant to that provision "shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State." *Id.* § 5(c)(1)(A). In addition, the law created a special federal venue for certification challenges with a direct appeal to the Supreme Court. *Id.* § 5(d)(1). Thus, if a state legislature changed a slate of electors after election day, the slate could be challenged in either state court or federal court.

424. The Supreme Court's recent decision in *Trump v. Anderson*, No. 23-719, 2024 WL 899207 (U.S. Mar. 4, 2024) does not change our analysis. In that case, the Court concluded that states may not disqualify a candidate for federal office under Section 3 of the Fourteenth Amendment, the so-called Insurrection Clause. *Id.* at *3. The Court explained that state power over the "election and qualifications" of federal officers "must be specifically 'delegated to, rather than reserved by, the States.'" *Id.* (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 803–04 (1995)). The Court recognized that the Elections and Electors Clauses, and not the Insurrection Clause, contains such delegation to states. *Id.* at *4.

state courts filled in gaps in such election statutes, addressed unforeseen circumstance, declared parts of such statutes unconstitutional, or provided remedies necessary to correct state constitutional violations, including modifications of statutory requirements. Nor did it prevent state courts from providing greater protection of voting rights than that provided by state legislatures or the federal Constitution when such rights are provided by the state constitution. It also did not impose a particular interpretive methodology on state courts in interpreting their constitutions or the federal constitutional conception of separation of powers or federal notions of *stare decisis*. Rather, federal oversight of voting rights is, for the most part, provided by other provisions in the federal Constitution, such as the Equal Protection and Due Process Clauses and federal statutes expressly authorized by the Elections Clause itself.[425] That oversight is, however, less protective of the right to vote than that provided in the state courts.

In our view, the Elections Clause provides for a very limited form of additional federal oversight. It prevents state courts from acting like state legislatures, as the state legislatures are expressly responsible under the federal Constitution for prescribing the times, places, and manner of elections. Those state election laws are subject to state judicial review according to state constitutions, but state judges cannot simply substitute laws of their own devising for those drafted by state legislatures. When state courts so overreach, the Supreme Court must intervene, as state courts have exceeded their own powers in a way that cannot otherwise be timely reviewed or corrected. Justice Souter's dissent in *Bush v. Gore* encapsulates the overreach at issue.[426] State courts may not, by transcending the accepted bounds of statutory and state constitutional interpretation, create new election laws untethered to the legislative acts and state constitutions in question. Such fundamental rewriting of the election laws is forbidden by the Elections Clause.

Respect for the fundamental principles of state and federal constitutional law requires such a narrow reading of the prohibition imposed by the Elections Clause. In the Elections Clause in particular, and in federalism more generally, the different branches of state and federal government have their respective functions to perform, as directed by both state and federal constitutions. They must also respect and not perform the functions reserved for other state or federal institutions.

In *Moore*, the Supreme Court has brought the issue of judicial overreach to the fore in two respects. It has focused its attention on judicial overreaching by state courts. In so doing, the Supreme Court itself has raised the issue of its overreaching, as it appears to

425. *See, e.g.*, U.S. CONST. amend. XIV, § 2.

426. *See* Bush v. Gore, 531 U.S. 98, 129 (2000) (Souter, J. dissenting).

authorize its own intrusion on state courts' rights to interpret state laws and state constitutions. Both forms of judicial overreach ought to be rejected. The Elections Clause empowers the Supreme Court to prevent state courts from usurping the electoral lawmaking powers of state legislatures, but it does not empower the Supreme Court to take over state courts' rights to interpret their own state election laws and election provisions in their state constitutions. It is our view that Justice Souter's dissent identifies the not-so-subtle difference between the two, while Chief Justice Rehnquist's concurrence collapses it. The Souter opinion reflects the distinct and limited purpose of the Elections Clause and allows most existing state elections processes, including state judicial review, to proceed as they have in the past.[427] The Rehnquist opinion, on the other hand, at least as it was applied by the Chief Justice in *Bush v. Gore*,[428] invites the Supreme Court to substitute its judgment for state courts whenever it strongly disagrees with state court decisions interpreting state statutes or constitutions that in any way modify the times, places, and manner of federal elections as originally prescribed by the state legislature. Such overreaching by the Supreme Court itself has the potential to unleash the same type of chaotic reaction to the judiciary that followed *Bush v. Gore*. Unfortunately, that is what happens when ghosts are summoned from their graves.

427. Shapiro, *supra* note 20, at 192 ("State and federal courts, state legislatures, Congress, and the people of various states in amending their own constitutions have presumed for most of this country's history that state constitutions—and thus state courts—control state law governing federal elections.").

428. *Bush*, 531 U.S. at 111.