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History and Consequences: Setting the Record Straight on the Elections Clause and *Moore v. Harper*

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KEY TAKEAWAYS

In *Moore v. Harper*, the issue is whether state courts can override state legislatures' election regulations and congressional maps that comport with federal law.

The Framers did not look to state courts or constitutions as proper bodies to regulate federal elections; instead, they looked to state legislatures and Congress.

The respondents in *Moore* have not identified any core voting right guarantee that will fall away if the Supreme Court rejects their constitutional arguments.

In *Moore v. Harper*,[1] the Supreme Court of the United States will consider "[w]hether a State's judicial branch may nullify the regulations" the state's legislature enacts to govern federal elections "and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions."[2] The answer will turn on the meaning of the Constitution's Elections Clause, which, along with its counterpart Electors Clause, directs "the Legislature" of each state to prescribe the "Manner" of federal elections in that state.[3] The *Moore* petitioners argue that because these clauses delegate federal lawmaking power directly to state legislatures—not states generally—state courts may not apply state constitutions to override and replace them.

Criticism of this theory has tracked an unfortunate trend of hyperbole employed in recent discussion of election regulation, which is liberally offered but

rarely finds support in facts, experience, or common sense. For example, after the Georgia legislature reformed the state's election code to, *inter alia*, apply voter-identification requirements to absentee voting, regulate the use of ballot drop boxes, and prohibit conduct the state regards as improper influence on voters, widespread comparisons to "Jim Crow" followed.[4] Similar laws in other states received the appellation "Jim Crow 2.0."[5] In fact, recent evidence suggests that voter turnout has not suffered and likely has improved under such regimes.[6]

That was no surprise. The same rhetoric had already been tried and found wanting earlier in the past decade with Virginia's voter identification requirement, which was compared to "discriminatory voting laws that existed in the lingering Jim Crow era of 1913."[7] But "[r]esearchers found that notifications about voter ID requirements did not negatively impact voter turnout, and may have actually increased turnout,"[8] and when the Virginia legislature repealed the requirement, almost all voters continued to present photo identification at the polls.[9]

Voting outcomes, however, have generally not deterred some activists from going nuclear in their talking points.[10] One major publication, in the putative spirit of fair-mindedness, went to voters directly to ask them "[w]hy are Americans okay with voter suppression?"[11] That is the election-law equivalent of "when did you stop beating your wife?"

Of course, informed citizens should be attentive to the impact of voting laws and election-law doctrines and criticize those that do more harm than good. But if Aesop's fables taught us anything,[12] it should be that not *every* election law reform or theory can be alleged to spell the end of democracy or racial equality. Indiscriminate comparisons of today's election regimes to Jim Crow dilute criticisms that might be grounded in fact and do more to trivialize the grievous moral and legal wrongs of voter suppression that millions of Americans suffered than to persuade the general public of the evil supposedly lurking in seemingly commonsensical voting rules. Declarations of the end of democracy when the end of democracy is not actually nigh are likewise self-defeating, especially when they come in endless streams that do not in fact precede the end of democracy.

Yet critics of the theory proposed in *Moore* generally seem incapable of overcoming the temptation to mark this case, too, as the worst election-related event in history if it goes the petitioners' way. Some have called it "the most important case for American democracy in the almost two and a half centuries since America's founding."[13] They insist that for the Supreme Court to adopt the petitioners' theory, sometimes called the "independent state legislature doctrine," would "upend the very foundation of our democracy: free and fair elections."[14] It would be, in a word, "damaging."[15]

On the merits, these apocalyptic claims are no more compelling than all the others proven false by experience. This *Legal Memorandum* is principally concerned not with the legal arguments for and against the *Moore* petitioners' position but with the assertion that their proposed holding would be dangerous to democracy. Central to that claim is the assertion that the Supreme Court would be rejecting "over two hundred years of historical practice" in the state courts,[16] which are presumed to have established and preserved the right to vote as we currently understand it. The *Moore* respondents have been supported by many *amici*, and many scholars have written on this subject, but despite their considerable efforts, they have failed to show that a ruling for the *Moore* petitioners would pose any threat to democracy or voting rights.

Their historical analysis is equally wanting. No one has identified any state court decision invalidating a law enacted under the Elections Clause or Electors Clause for at least 70 years after the constitutional Framing. The first time courts took this step was during the Civil War, and they did so to *deny* active servicemembers defending the Union the right to vote. Other courts, adopting the *Moore* petitioners' theory, affirmed legislative efforts to extend them the right to vote. In short, the only time until recently that this question had any national import, the theory today called "dangerous" achieved the only policy outcome anyone genuinely concerned with voting rights would desire.

From the end of the Civil War until the 21st century, what little evidence there is cuts both ways and, by consequence, against any claim of a "national consensus."[17] Some state court decisions adhered to the *Moore* petitioners' theory, including at least one World War II–era decision that again ratified legislation permitting active servicemembers to vote by mail. A handful of state court decisions applied state constitutions against laws governing federal elections, generally without discussing the federal Constitution, but those decisions established no voting-rights precedent of any import. Virtually all gains in voting rights achieved in the 20th century were achieved by acts of Congress, decisions of the federal courts applying federal law, and acts of the very state legislatures we are supposed to believe cannot be trusted to legislate. The *Moore amici* and academics supporting their position have identified no legal doctrine essential to "democracy" that would fall away with a ruling for the *Moore* petitioners.

Instead, the Cassandra's warnings[18] about *Moore* concern highly controversial, progressive "reforms" that activists desire but cannot convince their fellow citizens to support or the Supreme Court to deem compelled by federal law. Activists have targeted laws regulating third-party ballot collection, photo identification laws, commonly used voting machines, poll hours, basic ballot-casting requirements, ballot-access laws, and laws establishing

congressional district boundaries. When lawsuits seeking to rewrite state election codes failed in federal court, the question became whether state courts would ratify those rejected theories. The answer to that question has less to do with the actual content of state constitutions than it has with the identities of state judges, as some of the less scrupulous advocates of this strategy have not been shy about admitting.

Other than for those who view the election world from that hardened ideological vantage point, it is difficult to see the harm of carrying forward this nation's tradition of trusting election-law legislation to state legislatures. Most voters believe reasonable regulation of elections is appropriate, which is why most legislatures enact reasonable election laws. When they do not, federal law is more than equal to the task of intervening. Democracy has fared perfectly well since 1789 without rule by judges, and preventing that transition of power now would preserve it.

Background

The Elections Clause as Interpreted by the Supreme Court. The Elections Clause provides 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."[19] It is one of several constitutional provisions that assign a task to a particular component of state governments rather than to the states *simpliciter*.[20]

- The Electors Clause of Article II, Section 1 directs each state to appoint presidential electors "in such Manner as the Legislature thereof may direct."[21]

- Article V dictates that proposed constitutional amendments be "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof."[22]

- Article IV, Section 3 predicates establishing new states "within the Jurisdiction of any other State" on, *inter alia*, "the Consent of the Legislatures of the States concerned."[23]

- Article IV, Section 4 requires the United States to protect each state "against domestic Violence" "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)."[24]

- Article I, Section 3 originally directed "the Legislature" of each state to choose its Senators before the Seventeenth Amendment transferred that authority to the states' electorates.[25]

- The Constitution similarly vests specific responsibilities with "the Executive Authority" of each state.[26]

Provisions like these breathe federal constitutional significance into a limited class of state separation-of-powers disputes that would otherwise be resolved by state courts applying state law.[27] Because of the Constitution's precision in delegating[28] power to specific state actors, other state actors or expressions of state authority may contravene the U.S. Constitution if they purport to act "as a limitation on that power."[29] For example, in *Hawke v. Smith*,[30] the Supreme Court held that the Ohio legislature's ratification of the Eighteenth Amendment could not, consistent with Article V, be subject to review under the state constitution's popular referendum procedure.[31] In *Leser v. Garnett*,[32] the Court held that "the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state."[33] And state legislatures' power to appoint Senators before the Seventeenth Amendment was approved is generally regarded as a power beyond the constraint of state laws or authorities.[34]

The Supreme Court has similarly read the reference to "the Legislature" in the Elections Clause as not delegating federal power to the states generally. In two early 20th century decisions, the Court read the Elections Clause to refer not narrowly to each state's legislative body standing alone, but to "the method which the state has prescribed for legislative enactments."[35]

In the first, *Smiley v. Holm*, the Court held that a congressional redistricting plan that passed both chambers of the Minnesota legislature but was not signed by the governor did not take legal effect.[36] It rejected the argument that passage by the legislature was sufficient under the Elections Clause, reasoning that the state constitution gave the governor a part in the making of state laws through "the veto power."[37] By commanding state legislatures to "prescribe[]," the Elections Clause established an "authority" that "is conferred for the purpose of making laws," and the Court found "no suggestion…of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted."[38] The Court cited its 1916 holding in *Ohio ex rel. Davis v. Hildebrant*[39] that a popular referendum was

effective to override a legislatively adopted redistricting plan because, "by the state Constitution and laws, the referendum was treated as part of the legislative power."[40]

Nearly a century later, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, a divided Court extended these holdings to approve an Arizona ballot initiative amending the constitution to establish a redistricting commission and empowering it to establish congressional districts.[41] The Court's precedent, said the majority, "teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."[42] It "acknowledge[d]" that the "exercise of the initiative... was not at issue in our prior decisions" but saw "no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking."[43] The dissenting opinion agreed that a legislature promulgating election rules under the Elections Clause is "required to do so within the ordinary lawmaking process" but objected that it cannot be "excluded" from that process.[44]

Notwithstanding this disagreement over the Election Clause's application in *Arizona State Legislature*, it remains common ground among the Court's precedents that the Elections Clause will be satisfied if congressional-election rules are set through "the State's lawmaking processes."[45] The Court, however, has never approved the states' imposition of such rules outside their own lawmaking processes absent an independently sufficient federal law basis, and the Court's care in basing its rulings on "a State's lawmaking apparatus" seems to reject that possibility.[46]

To be sure, the Supreme Court has endorsed the imposition of congressional redistricting plans by state and federal courts many times, but these holdings were founded on independent federal grounds. Specifically:

- The Court has held that legislation enacted under a state legislature's Elections Clause authority is not immune from federal constitutional challenge[47] even though older precedents suggested that the Elections Clause "conferred upon Congress exclusive authority to" override federal election laws passed by state legislatures.[48] The now-controlling precedents reason that any exercise of power under the Constitution, including that of Congress,[49] can and must yield if it "offend[s] some other constitutional restriction."[50]

- Once a court has identified a violation of federal law, its "powers of... equity" are "adequate" to impose a remedy,[51] which in the context of redistricting includes fashioning remedial plans,[52] if the legislature does not act first to remedy the federal law violation.[53]

- The Supreme Court has preferred state court remedies to federal court remedies as a matter of comity and has commanded federal courts to defer to state court proceedings that may produce an effective federal law remedy.[54]

- State legislatures' Election Clause legislation is also subject to review for compliance with federal legislation enacted pursuant to Congress's power under the Elections Clause to "make or alter" laws governing congressional elections. Because the Elections Clause affords Congress authority to "make or alter" state election laws,[55] a conflict between congressional federal election laws and those enacted by state legislatures will be resolved in favor of the former.[56]

This network of federal law doctrines does not read the term "Legislature" out of the Elections Clause or construe it to mean "State" or "Court." Instead, it implements the primacy of federal constitutional guarantees over state statutes as recognized in the Elections Clause itself.[57] This doctrine provides no foundation for state courts to apply state constitutional provisions to reject and replace state laws governing federal elections.[58] Approving that would require the Court to extend existing precedent beyond its logical underpinnings.

The Current Dispute. *Moore v. Harper* came to the U.S. Supreme Court from the North Carolina state court system. "The legislative power" of North Carolina is "vested in the General Assembly,"[59] and the state constitution deprives the governor of veto power in connection with redistricting legislation.[60] North Carolina courts lack any legislative power and play no role in the state's lawmaking process.[61]

In 2021, in response to the 2020 census results, the General Assembly enacted new congressional and state legislative district maps to satisfy the U.S. Constitution's one-person, one-vote requirement.[62] Three groups of plaintiffs, comprising voters and advocacy groups, filed suit in North Carolina Superior Court alleging that the new plans were partisan gerrymanders and that partisan gerrymandering violates the North Carolina Constitution's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses.[63] In 2015, the North Carolina Supreme Court had rejected a similar claim, finding that it "is not based upon a justiciable standard."[64]

A three-judge panel convened under North Carolina law to adjudicate the 2021 cases.[65] The plaintiffs moved for a preliminary injunction, and the Superior Court denied that motion, finding no factor of the preliminary-injunction test to favor the plaintiffs.[66] Among other things, the court ruled that the Elections Clause deprived it of authority to adjudicate the challenge to the congressional plan.[67] The plaintiffs appealed.

In North Carolina, judges and justices run for office as members of political parties. The three-judge panel included two Republicans and one Democrat. The North Carolina Supreme Court was composed of four Democrats and three Republicans. Without explanation, that court granted a preliminary injunction and remanded the case, directing the Superior Court to bring the case to a final judgment in one month.[68] The Superior Court complied.[69] The Superior Court held the claims non-justiciable and entered judgment in favor of the General Assembly's officers, who represent its interests in state court.[70]

On Appeal, the North Carolina Supreme Court again expedited proceedings and, by a strict party-line vote, issued the seemingly predetermined judgment that all three plans—state House and Senate and congressional—violated the state constitution.[71] In a subsequently issued opinion, the court recognized that the state constitution does not specifically address gerrymandering, as some state constitutions do, but found this omission irrelevant. It reasoned that "it is no answer to say that responsibility for addressing partisan gerrymandering is in the hands of the people" because North Carolina is "a state without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments."[72] In its view, "the only way that partisan gerrymandering can be addressed is through the courts."[73]

The court remanded the case for remedial proceedings. The General Assembly enacted new House, Senate, and congressional plans, but the Superior Court rejected the congressional plan as falling short of the standard it perceived the North Carolina Supreme Court to have set and fashioned its own plan.[74] The General Assembly's officers applied to the North Carolina Supreme Court for a stay, which was denied, and then requested the same from the U.S. Supreme Court. By a 6–3 vote, the Supreme Court denied a stay application.[75] Justice Samuel Alito, joined by Justices Clarence Thomas and Neil Gorsuch, dissented from that ruling, proposing that, "if the language of the Elections Clause is taken seriously, there must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections."[76] Justice Brett Kavanaugh concurred in the stay denial on the view that "it is too late for the federal courts to order that the district lines be changed for the 2022 primary and general elections."[77]

The Court subsequently granted certiorari,[78] and the case will be argued on December 7, 2022.[79] The question the court has agreed to answer is "[w]hether a State's judicial branch may nullify the regulations" enacted under the Elections Clause "and replace them with regulations of the state

courts' own devising, based on vague state constitutional provisions" that do not expressly reference gerrymandering.[80]

History and Significance of State Court Review of Laws Governing Federal Elections

The question presented in *Moore v. Harper* arises only now because the phenomenon of state courts improvising federal election regulation is a new one. Whatever else may be said of the competing positions in this case, there is little basis for contending that the state courts adhered to a "[l]ong settled and established practice"[81] of invalidating and replacing a congressional plan based on freewheeling theories of "free" and "equal" elections.

We have reviewed the parties' briefs in *Moore*, the *amicus* briefs, and academic papers cited in support of the respondents' position and have conducted independent research in order to identify past state court decisions that, like the North Carolina decision in *Moore*, rejected acts of state legislatures under the Elections Clause under conditions materially akin to those in *Moore*. There turns out to be very little of that precedent to find, at least between 1789 and the early 21st century. Although *amici* supporting the *Moore* respondents[82] and some academic papers[83] have buried the Supreme Court in citations to state court decisions, a careful review reveals nearly all to be irrelevant. Many applied federal law; many did not involve federal elections; many involved elector qualifications (which are not governed by the Elections Clause); many addressed procedures like veto and referendum authority; and many construed state law rather than subjecting it to judicial review. Moreover, much of the authority is quite recent, which only underscores that rejection and replacement of federal elections laws by state courts is a recent phenomenon.

Perhaps most important, our research indicates that state court decisions do not form the basis of what most would consider the meaningful election-law progressions of the 20th century. The few state court decisions most helpful to the *Moore* respondents' legal theory denied Civil War servicemembers the right to vote in federal elections, despite state legislatures' best efforts to enable them to vote absentee. There is no colorable argument that overruling those decisions would harm democracy. The handful of 20th century decisions cited by the *Moore* respondents' supporting *amici* and academics who support their theory established no doctrine of any practical import. There is no basis for the assertion that overruling these decisions would in any way harm the right to vote.

History of State Court Decisions Invalidating Elections Clause Legislation Under State Constitutions. No analogy to the North Carolina Supreme Court's decision can be identified until recently, and there is no basis for the contention that "over two hundred years of historical practice," properly understood, supported its approach.[84]

The First 70 Years. To begin at the beginning, no one disputes that no state court review of legislation enacted pursuant to the Elections Clause occurred for the first 70 years of United States history. The *Moore* respondents, their *amici*, and academics who support their theory generally begin their historical analysis of state judicial decisions with the "Civil War era."[85] Our own research uncovered nothing they missed. None of the many authorities we have seen supposedly representing an established historical practice of state court review predates that era. That omission is significant. The most probative historical-practice evidence is what occurred in the wake of the Constitution's ratification; later evidence "do[es] not provide as much insight into its original meaning."[86]

Here the conceded 70 years of state court silence says much.[87] The *Moore* respondents strive to establish that:

1. "The Framers celebrated state-court judicial review,"[88]

2. State constitutional provisions existed to provide the basis of that review,[89]

3. State court judicial review of state laws occurred around the time of and even before the Framing,[90] and

4. "[I]mportant" issues concerning elections were then "actively contested."[91]

Thus, in their telling, the heat, fuel, and spark were all there at the Founding—but no fire broke out for 70 years. That is evidence that neither state judges nor potential litigants viewed state courts as authorized to intervene in the field of federal elections.

Only the United States Solicitor General, an *amicus* supporting the respondents, offers an alternative explanation for this "dog that did not bark,"[92] proposing that it "simply suggests that legislatures complied with state constitutional constraints" during that era.[93] But the basic problem in *Moore* is that legislatures cannot "simply" "compl[y]" with "state constitutional constraints" by force of will under the respondents' theory of judicial

primacy. The North Carolina General Assembly in 2021 also believed that it complied with state constitutional constraints, as does more or less every legislature.

As in baseball, where the question is not whether a pitch is *actually* a strike but whether the umpire *calls* it a strike, the question in *Moore* is whether state courts may announce violations of state law as *they* construe it to override Elections Clause legislation. Because the underlying matter disputed in *Moore*—gerrymandering—is "not new to the American scene"[94]—"[n]or is frustration with it"[95]—the Solicitor General's theory that early election legislation complied with state constitutional constraints would suggest that current election legislation equally complies with state constitutional constraints.[96] What changed are the judges and perhaps the legal culture, not the law itself.

The Civil War Era. There is also general agreement among scholars and the litigants in *Moore* that "the earliest conflicts between state constitutions and election laws passed by state legislatures arose during the Civil War, when several states enacted soldier absentee voting laws in violation of state constitutional provisions requiring ballots be cast in person."[97] State court decisions concerning this conflict went both ways. A few state courts forbade soldiers' votes from counting, even in federal elections, because of specific state constitutional provisions mandating in-person voting.[98] Those holdings, even if taken as authoritative, fall short of the North Carolina Supreme Court's claim to freewheeling power to declare rules that are "free"[99] and "equal."[100]

However, those decisions were not authoritative, even at the time. Other states' courts embraced the contrary view, holding that "[t]he authority of the State legislature to prescribe the time, place and manner of holding elections for representatives in Congress, is derived from...the Constitution of the United States"; that "[t]heir action on the subject is not an exercise of their general legislative authority under the Constitution of the State, but of an authority delegated by the Constitution of the United States"; and that "[t]he constitution and laws of this State are entirely foreign to the question...."[101]

Prior to *Bush v. Gore*,[102] this was the only clash in American history between state courts and a constitutional delegation of power to state legislatures of any practical national significance, and it illustrates the folly of shrill assertions that applying the Elections Clause would be "so potentially damaging for American democracy."[103] Obviously, permitting active servicemembers fighting to preserve the Union to vote by mail was not damaging for American democracy. A leading academic opponent of the theory acknowledges that the

"doctrine reached its high-water mark during the Civil War" precisely because "it provided a way to evade state constitutional limitations on solder-voting in federal elections"[104]—i.e., to *extend* voting rights.

Dismissing this history, some of the *Moore* respondents[105] and academics have pointed out that "several states amended their constitutions" during the Civil War to permit absentee servicemember voting, which they assert "would have been unnecessary if the prevailing view in these states had been that state constitutions could not regulate federal elections."[106] This assumes, however, that state constitutional amendments are intended principally to express abstract theories rather than to achieve desired outcomes when experience says that the reverse is true. Claiming that these amendments reflected agreement with decisions holding that state constitutions can constrain state legislatures is like claiming that those who propose to repeal state abortion bans must agree with the Supreme Court that those bans are enforceable because the federal Constitution "does not prohibit the citizens of each State from regulating or prohibiting abortion."[107]

The bottom line is that from the Founding through the Civil War, there was no evident consensus view, expressed in state court practice, that state courts are empowered to reject legislation enacted pursuant to the Elections Clause. There also is certainly no precedent for the North Carolina Supreme Court's decision in *Moore*. There is, then, neither foundation in state court practice that can "liquidate & settle the meaning of" the clause[108] nor any basis for the consequentialist assertion that *Moore* may mark a dramatic and damaging departure from that practice.

Reconstruction Through 2000. For the subsequent 140 years, no consensus view in favor of state court supremacy would emerge: In fact, the weight of authority cut the other way. For example:

- Several state courts held that because "[t]he office of representative in congress is created by and depends solely on the constitution of the United States," contrary state constitutional provisions are "of no effect."[109]

- The Rhode Island Supreme Court held that a constitutional majority-vote rule could not be applied to federal elections.[110]

- The Kansas Supreme Court held, with respect to presidential-elector candidates, that a legislatively enacted compulsory-primary law could not be made "subject to constitutional restrictions which prevent the Legislature from limiting the right of candidates to have their names on the general ballot."[111]

- The Nebraska Supreme Court found it "unnecessary...to consider whether or not there is a conflict" between the legislature's method of appointing presidential electors and a constitutional provision requiring that "[a]ll elections shall be free" because that provision "may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States."[112]

- In 1944, the Kentucky Supreme Court, in a rerun of the Civil War disputes, privileged "the Act of 1944 Kentucky Legislature" permitting "'absentee voting' by constitutionally qualified citizens of the State absent from their voting precincts, during a state of war" over a constitutional provision requiring that ballots be "marked by each voter...at the polls."[113]

Nevertheless, it has been asserted that these cases represent "only a handful" of state courts that "embraced ISL theory," ultimately overwhelmed by "[t]he clearest evidence" of contrary authority.[114] This is incorrect. This assertion is founded on the erroneous belief that practically any state court election-related lawsuit contradicts the *Moore* petitioners' view of legislative power. In fact, one group of *amici* presented an appendix of miscellaneous state court decisions that (in their description) "exercised judicial review over a wide variety of federal election disputes" involving everything from federal filing deadlines, to ballot-access disputes, to voting equipment.[115]

But state court rulings "over" "election disputes" do not speak to the question in *Moore*, which calls on the Supreme Court to decide whether, in those disputes, state courts must privilege state statutes over conflicting substantive constitutional provisions. When the amalgamation of more-or-less random state court decisions is boiled down to cases involving *that* question, there turns out to be, at best, a handful of decisions in support of the *Moore* respondents' view.

Irrelevant State Court Rulings from This Era. Several categories of state court decisions do not bear on the question in *Moore* and lack probative value.

The first comprises state court decisions applying federal law. As explained, any exercise of lawmaking authority under the U.S. Constitution is subject to judicial review for compliance with other provisions of *that* Constitution. It is equally well-settled that claims under federal law may be properly brought in state court.[116] It should therefore come as no surprise that disputes raising issues of federal law have been adjudicated in state courts, sometimes resulting in the invalidation of state election statutes.

Despite the obvious irrelevance of such actions to the issue in *Moore*, the *Moore* respondents and their supporting *amici* and academics cite these authorities liberally.[117] In particular, they have cited the frequent occurrence of a redistricting impasse where the state legislature fails to redistrict after the decennial census; a court must remedy the one-person, one-vote violation (under the U.S. Constitution's Equal Protection Clause) with a court-fashioned plan; and the Supreme Court has established a preference that state courts rather than federal courts do that work.[118] None of this implicates the issue raised in *Moore* because under any view of the Elections Clause, state election laws would continue to be reviewed for compliance with federal law.[119] Accordingly, this line of authority is not historical evidence that runs contrary to the theory proposed in *Moore*.

Next are state court rulings identifying whether an election law was properly promulgated by the state's lawmaking apparatus. The *Moore* respondents and their supporting *amici* and academics have cited state court decisions tracking the *Smiley* holding that "the Legislature" refers broadly to a state's prescriptions for lawmaking.[120] Because the Elections and Electors Clauses refer to a state's own definition of this process, *Smiley* and *Arizona State Legislature* implicitly endorse state court adjudication of whether that process was properly followed—for example, whether legislation was properly presented to the governor for approval or veto. There are many decisions of this genre,[121] but they do not bear on the question of whether a state court may override a law enacted in conformity with a state's lawmaking procedures and so are incapable of establishing a settled practice on that issue.[122]

Another line of cases cited in briefing and academic papers involves disputes over non-federal elections. Such cases are easy to come by, and the *Moore* respondents' supporting *amici* and academics have cited them liberally.[123] They are also plainly irrelevant to the question at hand: The Elections and Electors Clauses apply only to the regulation of federal elections, not state and local elections.

Another irrelevant body of law involves adjudication of voter qualifications. State courts have sometimes been called on to decide whether someone "had the qualifications of a voter" and have sometimes found the answer in the state's constitution.[124] But these cases do not shed light on the Elections Clause because different federal constitutional provisions govern elector qualifications. Article I, Section 2, Clause 1 provides that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,"[125] and the Seventeenth Amendment adopted materially identical language.[126] These provisions

require that "all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives."[127] Because state constitutions may establish qualifications to vote in state legislative races, application of such provisions by state courts does not establish a practice pertinent to the Elections or Electors Clauses.

Next, some of the *Moore* respondents' supporting *amici* have identified cases applying state constitutions in the context of primary elections to federal office.[128] These cases were decided in the early 20th century,[129] three decades before the Supreme Court held that primary elections to federal office are embraced within the Elections and Electors Clauses.[130] Before *United States v. Classic*, four justices had suggested that "the term 'elections' in § 4 of Article I did not embrace a primary election since that procedure was unknown to the framers," but that position had not achieved a majority.[131] State court decisions concerning primaries did not discuss the federal Constitution, and that omission reflects only the prevailing view that it did not apply to primary elections—or at most an unawareness of the issue.

Finally, many *amici* supporting the *Moore* respondents appear to believe that *any* state court election-law case supports the respondents' position under the Elections Clause. There are innumerable state court decisions applying election statutes in various disputes arising from federal elections, and the *amici* briefs are loaded with examples.[132] This reliance is misguided. The Elections Clause requires that "the Legislature" select the "manner" of congressional elections in the state, and applying the legislative choices in that regard upholds the Elections Clause. That is as it should be—to decline to apply state statutes would violate the Elections Clause.[133] It is therefore peculiar that some *amici* believe the Supreme Court in *Moore* might bar "judicial review of elections"[134] and bury the Court with state court election disputes, the vast majority of which apply state statutes in *conformity* with the Elections Clause rather than reject those statutes in defiance of the Clause.[135]

Remaining Decisions. Once the proverbial chaff is discarded, what is left of the supposed unbreaking line of state court decisions privileging state constitutions over Elections Clause legislation? Very little. Recall that even academics supportive of the *Moore* respondents agree that "a handful" of decisions from this era embraced the *Moore* petitioners' theory.[136] Any theory of a contrary consensus would require more than a handful of contrary cases.

Only a handful of decisions, at best, go the other way—with no discussion of the Elections Clause.

- One 1932 Illinois decision invalidated a congressional redistricting plan under the state's constitution, but it cited independent federal grounds to reach the same result, so the Elections Clause (had it been considered) would not have changed the outcome.[137]

- The same can be said of two Virginia cases that likewise invalidated congressional redistricting plans on independently sufficient state and federal grounds.[138]

- An additional Illinois case struck down candidate qualification fees under the state's free and equal elections clause,[139] but the decision has not withstood the test of time: "fees remain a staple throughout the United States."[140]

- The California Supreme Court in 1902 held that a congressional candidate nominated by both the Democratic and Union Parties had a state constitutional right to have his name printed twice on the ballot (once for each party), despite a contrary state law.[141] The case did not address the Elections Clause, and the theory has not gained acceptance: The Michigan Supreme Court, for example, called it "absurd."[142]

- The New York Court of Appeals in 1911 struck down a ballot law permitting a straight-ticket vote for some candidates but required individual marks for others."[143] The import of this odd-year ruling on federal elections was not outlined, and the theory also did not gain traction. The Montana Supreme Court, for example, was "content... with saying that such an argument––if it can be called an argument––does not appeal to us."[144]

Beyond those decisions, the *Moore* respondents' supporting *amici* identify a smattering of cases *upholding* state statutes against state constitutional challenges.[145] The import of these decisions as to federal elections is generally unclear; they do not address the federal Constitution, and the probative worth of decisions finding no liability is considerably diminished as compared to those finding liability. Certainly, these cases do not implicate the question posed by *Moore*: Liability was typically denied because state courts revered "the exclusive province of the legislature to enact laws providing for the registration of voters, and the time, place, and manner of conducting elections."[146]

Similarly, state constitutional decisions often tracked federal standards. A good example is *Erfer v. Commonwealth*,[147] in which the Pennsylvania

Supreme Court adjudicated a gerrymandering claim against Pennsylvania's congressional districts under the state constitution. But it applied the standard the U.S. Supreme Court had recently adopted in *Davis v. Bandemer*,[148] rejected the claim as failing that standard, and recognized that it found the claim justiciable only because this Court found such claims to be justiciable in *Bandemer*.[149] Both the rules of decision and the result tracked federal law. Unsurprisingly, when the Pennsylvania Supreme Court invalidated a congressional plan in 2018, it had little choice but to "expressly disavow" *Erfer*.[150]

The 21st Century. The 21st century has marked a significant turn in this avenue of constitutional history, and this fact again is widely acknowledged.[151] But whereas the *Moore* respondents' supporting *amici* and academics frame this as carrying forward an established tradition, the more accurate description is "rupture." As shown, state court decisions striking down laws governing federal elections were few, far between, and intermixed with an equal number of contrary cases. Only now do such decisions abound with regularity.[152]

Advocates for this trend acknowledge that the theories they espouse are rarely to be found in state constitutions, nor are they readily discernible through ordinary interpretive methods. A leading article advocating state court election challenges is most notable for what it omits: any suggestion that state constitutions be examined in text, context, and history to assess whether the supposed rights asserted actually exist.[153] Instead, the article devotes 15 pages to "Judicial Ideology, Selection, and the Right to Vote."[154] It declares that "[l]iberal judges tend to view individual rights broadly," "that we should select judges who espouse this value," and therefore that these outcome-oriented goals should "inform the debate over how we select our judiciary."[155]

The point, stated differently, is that activists should put likeminded individuals on state courts and expect their goals to be achieved irrespective of what state constitutions provide to override what state legislation clearly provides. Of course, if these goals were popular, this would be unnecessary.

This approach has produced incessant litigation, generally organized and funded by national interests and conducted by forum shopping in jurisdictions with benches stocked with perceived political, even partisan allies. Lawsuits have targeted photo identification laws,[156] the use of commonly used voting machines,[157] poll hours,[158] basic ballot-casting requirements,[159] ballot-access laws,[160] and laws establishing congressional district boundaries.[161] The 2020 federal elections saw a staggering number of lawsuits, making it already by September 2020 likely "the most litigated election

ever."[162] "There were over 400 cases in forty-four states about the 2020 election during the COVID-19 pandemic."[163] Law firms reaped incredible profits.[164] Under this approach, a voting procedure can be derided, and the legal theory will follow in due course, more or less.

The 2020 elections demonstrated that courts have become aggressive in seizing on open-ended provisions of state constitutions as the bases for what in truth are policy disagreements with state legislatures. Lower federal courts issued multiple rewrites of state election codes, but the Supreme Court and the courts of appeals repeatedly stayed those decisions.[165] Hence the flow of suits to selectively chosen state courts, which activists view as an end-run around Supreme Court review.

Pennsylvania provides a prominent example. The General Assembly procured a bipartisan compromise in 2019 to allow "all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day."[166] The General Assembly then liberalized that system further in response to the 2020 COVID-19 pandemic.[167] But this did not satisfy the Pennsylvania Democratic Party (whose legislative members had supported the compromise), which brought suit. Nor did it satisfy the Pennsylvania Supreme Court, which rewrote the section "require[ing] mail-in and absentee ballots to be returned to Boards no later than 8:00 p.m. on Election Day" to achieve "a three-day extension."[168] The court recognized that state law was clear and that "there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots."[169] Nevertheless, the court relied on the state's free and equal elections clause to wield a legislative pen "to craft meaningful remedies when required,"[170] so "Tuesday at 8:00pm" became "Friday at 8:00pm."

Similar extensions were obtained in North Carolina, Michigan, and Minnesota.[171] The Michigan order was reversed on appeal in state court,[172] and the Minnesota order was enjoined by the Eighth Circuit under the Constitution's Electors Clause.[173] The North Carolina and Pennsylvania orders, however, remained in effect after split decisions from the Supreme Court denied stay applications.[174]

These decisions illustrate why the question presented in *Moore* has arisen in the Supreme Court only now, more than 230 years after the Founding. No one then imagined that state courts would claim such sweeping power to rewrite election laws. No foundation in "a regular course of practice" suggests otherwise.[175] Contemporary cases are unlike the contested Civil War–era absentee cases enforcing discrete constitutional dictates. The courts of Pennsylvania, North Carolina, and Minnesota ignored the "presumption…that…the legislature is more directly amenable to the people,"[176]

and there is nothing about the phrase "[e]lections shall be free and equal"[177] that favors a November 6 deadline over a November 3 deadline. But given the finality that state courts claim over state law, they may, under this theory, deem themselves entitled to read specific date requirements into state constitutions and apply them to offices that govern the nation.

Comparative Significance of State Court Decisions in Guaranteeing the Right to Vote. Even acknowledging that occasional state court rulings, which fall well short of a consensus, have applied state constitutions to laws governing federal elections does not require acknowledging that these rulings carry any practical significance. Most critics of a plain-text reading of the Elections Clause do not object only in theory; they insist that the reading is "dangerous" and "anti-democratic"[178] because "[s]tate constitutional guarantees could disappear."[179]

But what guarantees are even in play? As shown, the rulings supposedly presenting a consensus from the Framing until the 21st century established in a few states, if anything, that soldiers risking their lives to defend the nation may not vote by mail, that candidates nominated by more than one political party have a right to have their names listed twice, and (in Illinois) that candidate fees may not be permitted.[180] If the legacy of these rulings represents the stakes of a decision for the *Moore* petitioners, who cares?[181]

The *Moore* respondents and their supporting *amici* and academics have not identified any core voting right guarantee that they believe will fall away if the Supreme Court rejects their constitutional arguments. Nor is any apparent, because federal law has done nearly all the work in this arena. And that was by design.

The Constitution's Framers did not look to state courts or constitutions as proper bodies to regulate federal elections but instead assigned the primary grant of power to state legislatures, "checked and balanced" with a secondary grant of power to "the Federal Congress."[182] The framers of the Reconstruction Amendments likewise did not rest their hopes for racial equality in voting (or otherwise) with state courts or state constitutions. They instead worked to amend the federal charter to guarantee these things directly, as enforceable in federal litigation, and to make Congress "chiefly responsible for implementing the rights created" in the Fourteenth and Fifteenth Amendments.[183] Applying these Amendments, the Supreme Court invalidated numerous impositions on voting rights, including in state constitutions.[184] And pursuant to its authority, Congress enacted numerous election laws, most notably the Voting Rights Act of 1965, which "employed extraordinary measures to address an extraordinary problem."[185] The voting-rights regime Congress fashioned views state courts with no less suspicion than it views other organs of state government.[186]

Meanwhile, it was Congress that stepped in to guarantee servicemember voting through the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),[187] and Congress has repeatedly intervened in federal elections through such legislation as the Help America Vote Act of 2002, which mandated "nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote";[188] the Materiality Provision of the Civil Rights Act of 1964, which prohibits states from "deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election;[189] and the National Voter Registration Act, which requires states to facilitate voter registration as part of the driver's license application process.[190] The Supreme Court, in turn, has backstopped this federal law system of voting protections through the so-called *Anderson–Burdick* framework, which condemns "excessively burdensome requirements" in *any* election as unconstitutional.[191] None of this is at risk in *Moore*.

In fact, the disaster scenario that some advocates have warned against—that reversal in *Moore* might empower state legislatures to overturn the results of a presidential election[192]—is facially nonsensical precisely because both federal law and the U.S. Constitution clearly prohibit that outcome. The Electors Clause, like the Elections Clause, empowers state legislatures with "plenary" "power to select the manner for appointing electors,[193] but under both the Electors and Elections Clauses, Congress has power to establish the "time" of the election, and it has done so, identifying the first Tuesday after the first Monday in November as the day.[194] Thus, if a state legislature is to exercise its prerogative to "take back the power to appoint electors,"[195] it must do so in time to select the slate as of the congressionally defined election day; to change course *after* the votes have been cast would plainly violate federal law and intrude on congressional powers in violation of the Electors and Elections Clauses.

That safeguard—and the additional force that the Equal Protection Clause would bring to bear[196]—is far simpler and preferable to relying on the idiosyncrasies of 50 unique state constitutions, as interpreted by 50 separate state court systems, to ensure orderly transitions of power at the federal level. There is no plausible claim that a decision for the *Moore* petitioners would facilitate an election steal—and leading academics on the other side of the general issue concede as much.[197]

That is not to say, however, that the stakes here are small or that there is not a risk to democracy. While a decision for the *Moore* petitioners

would not lead to any dire outcome—it would instead continue the norm of following election legislation that has largely prevailed from the very beginning—such a decision would cut off what has quickly become the preferred venue for parties seeking to upend and override federal election regulations for partisan ends.

Conclusion

Advocates lament that the *Moore* theory "would mean that the partisan gerrymandering of congressional districts by state legislatures would not be reviewable by the state courts,"[198] that "voter ID laws" may be permissible in federal elections,[199] and that racial discrimination in voting may somehow become possible (despite the Fourteenth and Fifteenth Amendments and the Voting Rights Act).[200] These are simply variations on their criticisms of recent U.S. Supreme Court decisions[201] and typically reflect controversial positions they have not been able to achieve through democratic means.[202]

The point of the Electors Clause is to identify who decides these questions and to subject them to the democratic process. It is not anti-democratic to insist that those who desire election law reforms persuade rather than litigate. That would be the only practical outcome of a ruling for the *Moore* petitioners, and it seems to us as beneficial from a policy standpoint as it is sound as a matter of constitutional law.

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Endnotes

1. No. 21-1271 (U.S. argument scheduled for December 7, 2022).
2. Brief for Petitioners at i, *Moore*, No. 21-1271 (U.S. filed Aug. 29, 2022), 2022 WL 4084287.
3. U.S. Const. art. I, § 4, cl. 1; *see also id*. art. II, § 1, cl. 2 (Electors Clause).
4. *See*, *e.g.*, Maegan Vazquez and Kate Sullivan, *Biden Calls Georgia Law "Jim Crow in the 21st Century" and Says Justice Department Is "Taking a Look,"* CNN (March 26, 2021), https://www.cnn.com/2021/03/26/politics/joe-biden-georgia-voting-rights-bill/index.html.
5. *"Election Integrity Act" Is Jim Crow 2.0 Voter Suppression*, Democracy North Carolina, https://democracync.org/research/election-integrity-act-is-jim-crow-era-voter-suppression/ (last visited Nov. 18, 2022).
6. *See Georgia Voters Continue Record Early Voting Turnout; Surpasses Presidential Election Levels*, Georgia Sec'y of State (Oct. 19, 2022), https://sos.ga.gov/news/georgia-voters-continue-record-early-voting-turnout-surpasses-presidential-election-levels; Isabella Murray, *Early Vote Count Surpasses Ordinary Midterm Turnout*, ABC News (Oct. 30, 2022), https://abcnews.go.com/Politics/national-early-vote-counts-hit-million-surpassing-ordinary/story?id=91620263.
7. Qasim Rashid, *Virginia's Racist Voter ID Law Is a Chilling Step Towards Jim Crow America*, MIC (Nov. 5, 2013), https://www.mic.com/articles/71947/virginia-s-racist-voter-id-law-is-a-chilling-step-towards-jim-crow-america.
8. Donald Green et al., *The Effects of Voter ID Notification on Voter Turnout in the United States*, J-PAL (2014), https://www.povertyactionlab.org/evaluation/effects-voter-id-notification-voter-turnout-united-states.
9. Graham Moomaw, *Virginians Don't Have to Show ID to Vote Anymore. Data Shows Almost Everyone Still Does*, Va. Mercury (Aug. 23, 2021), https://www.virginiamercury.com/2021/08/23/virginians-dont-have-to-show-id-to-vote-anymore-data-shows-almost-everyone-still-does/.
10. Tim Darnell, *Georgia's Voting Laws Remain Jim Crow 2.0 Despite Record Black Turnout, Organization Says*, Atlanta News First (Oct. 21, 2022), https://www.atlantanewsfirst.com/2022/10/21/georgias-voting-laws-remain-jim-crow-20-despite-record-black-turnout-organization-says/.
11. Geoff Tomaino et al., *Why Are Americans Okay with Voter Suppression? We Asked More than 1,200 Voters—and They Failed to Appreciate the Impact of Restrictions on Their Own Turnout*, Fortune (Nov. 8, 2022), https://fortune.com/2022/11/08/americans-midterms-suppression-turnout-voters-impact-restrictions-turnout-politics-behavior-tomaino-carmon-mazar-wood/.
12. *See The Boy Who Cried Wolf*, Fables of Aesop (Nov. 23, 2013), https://fablesofaesop.com/the-boy-who-cried-wolf.html (collecting various versions).
13. J. Michael Luttig, *There Is Absolutely Nothing to Support the "Independent State Legislature" Theory*, Atl. (Oct. 3, 2002), https://www.theatlantic.com/ideas/archive/2022/10/moore-v-harper-independent-legislature-theory-supreme-court/671625/.
14. Kendall Ciesemier, *This Supreme Court Case Could Upend Democracy*, ACLU, https://www.aclu.org/podcast/this-supreme-court-case-could-upend-democracy (last visited Nov. 18, 2022).
15. Brief for Non-State Respondents at 4, Moore v. Harper, No. 21-1271 (U.S. filed Oct. 19, 2022), 2022 WL 14052280.
16. Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (forthcoming 2023) (manuscript at 3), *available at* https://ssrn.com/abstract=4044138 (last revised Apr. 18, 2022).
17. *Id.* at 34.
18. In Greek mythology, Cassandra was a Trojan princess with the gift of prophecy, but because of a curse by Apollo, her prophecies were never believed. *See* The Editors of Encyclopedia Britannica, *Cassandra*, *in* Encyc. Britannica (Feb. 14, 2019), https://www.britannica.com/topic/Cassandra-Greek-mythology (last visited Nov. 18, 2022).
19. U.S. Const. art. I, § 4.
20. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 832–33 (2015) (Roberts, C.J., dissenting) (identifying provisions).
21. U.S. Const. art. II, § 1.
22. U.S. Const. art. V.
23. U.S. Const. art. IV, § 3.
24. U.S. Const. art. IV, § 4.
25. U.S. Const. art. I, § 3.
26. U.S. Const. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *see also id*. art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").
27. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000) ("As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.").

28. The Supreme Court has twice ruled that "[b]ecause any state authority to regulate election to those [federal] offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.'" Cook v. Gralike, 531 U.S. 510, 522 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995)). "By process of elimination, the States may regulate the incidents of such elections…only within the exclusive delegation of power under the Elections Clause." *Id.* at 523. Justice Thomas, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, disagreed, positing that authority over congressional elections is a reserved power (as recognized in the Tenth Amendment) and that the Elections Clause "simply imposes a duty upon" the states through their respective legislatures. *U.S. Term Limits*, 514 U.S. at 863 (Thomas, J., dissenting).
29. McPherson v. Blacker, 146 U.S. 1, 25 (1892).
30. 253 U.S. 221 (1920).
31. *Id.* at 229–30.
32. 258 U.S. 130 (1922).
33. *Id.*at 137.
34. *See Hawke*, 253 U.S. at 228 ("It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment."); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 807 (2015) (conceding this point); *id.* at 831–32 (Roberts, C.J., dissenting) (emphasizing this point). The *Moore* respondents have doubted this proposition, suggesting that some early state constitutions restricted state legislatures' authority in electing Senators. Brief for Non-State Respondents, *supra* note 15, at 39–41; *see also* Brief for the United States as Amicus Curiae Supporting Respondents at 23 n.7, Moore v. Harper, No. 21-1271 (U.S. filed Oct. 22, 2022), 2022 WL 16556220. But state court litigation challenging legislatures' selection of Senators was not remotely plausible and appears never to have been countenanced.
35. Smiley v. Holm, 285 U.S. 355, 367 (1932).
36. *Id.* at 361, 368, 372–73.
37. *Id.* at 373; *see also id*. at 368. The Court was equally clear that the Elections Clause "neither requires nor excludes such participation" by the governor; the question "is a matter of state polity." *Id.* at 368.
38. *Id.* at 367–68.
39. 241 U.S. 565 (1916).
40. *Smiley*, 285 U.S. at 371 (quoting *Hildebrandt*, 241 U.S. at 568). *Hildebrant* is less robust in reasoning than *Smiley*, and the decision arguably held only that an act of Congress authorized the referendum and that the referendum did not violate the Guarantee Clause. *See Hildebrandt*, 241 U.S. at 568–69; Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 840 (2015) (Roberts, C.J., dissenting) (finding only these two propositions apparent in *Hildebrant*). *But see id.* at 804 (majority opinion of Ginsburg, J.) (finding in *Hildebrant* a broader holding that the Elections Clause "encompass[es] a veto power lodged in the people").
41. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).
42. *Id.* at 808.
43. *Id.* at 808–09.
44. *Id.* at 841–42 (Roberts, C.J., dissenting).
45. *Id.* at 824 (majority opinion).
46. *Id.* at 795 n.3. By contrast, the Colorado Supreme Court interpreted *Smiley* and *Hildebrant* to hold that "the word 'legislature' in Article I…broadly encompass[es] any means permitted by state law," including "court orders." People *ex rel*. Salazar v. Davidson, 79 P.3d 1221, 1232 (Colo. 2003). If that were true, most of the analysis in *Smiley* and *Arizona State Legislature* would have been unnecessary.
47. Wesberry v. Sanders, 376 U.S. 1, 6–7 (1964).
48. Colegrove v. Green, 328 U.S. 549, 554 (1946); *see also id.* at 553 ("Of course no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid."). This theme was echoed in dissents in the 1960s reapportionment decisions. *See Wesberry*, 376 U.S. at 42 (Harlan, J., dissenting) ("The constitutional scheme vests in the States plenary power to regulate the conduct of elections for Representatives, and, in order to protect the Federal Government, provides for congressional supervision of the States' exercise of their power.").
49. Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986); Burdick v. Takushi, 504 U.S. 428, 433–34 (1992); *see also* Rucho v. Common Cause, 139 S. Ct. 2484, 2495–96 (2019) ("Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree." (internal citation omitted)).
50. Buckley v. Valeo, 424 U.S. 1, 132 (1976) (plurality opinion) (recognizing as valid a separation-of-powers challenge to Congress's Elections Clause legislation).
51. Whitcomb v. Chavis, 403 U.S. 124, 161 (1971).

52. *Id.* at 162 ("When the legislature ignored the court's findings and suggestion, it was not improper for the court to order statewide redistricting, as district courts have done from the time Reynolds v. Sims, 377 U.S. 533 (1964), and its companion cases were decided."); *id*. at 162 n.42 (discussing the District Court's redistricting of the state).
53. *See*, *e.g.*, Upham v. Seamon, 456 U.S. 37, 40 (1982); *see also Whitcomb*, 403 U.S. at 162 ("Even with this convincing showing of malapportionment, the court refrained from action in order to allow the Indiana Legislature to call a special session for the purpose of redistricting.").
54. Growe v. Emison, 507 U.S. 25, 35–37 (1993); Perry v. Perez, 565 U.S. 388, 392 (2012). State courts are not only permitted but required to entertain suits found on federal law. *See* Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990); United States v. Bank of N.Y., 296 U.S. 463, 479 (1936) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them.").
55. U.S. Const. art. I, § 4, cl. 1.
56. Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 9, 13–15 (2013). As a result, remedial doctrine in Voting Rights Act litigation follows the doctrine in constitutional litigation. McGhee v. Granville Cnty., N.C., 860 F.2d 110, 115 (4th Cir. 1988); Large v. Fremont Cnty., Wyo., 670 F.3d 1133, 1138 (10th Cir. 2012); United States v. Brown, 561 F.3d 420, 435 (5th Cir. 2009); Bone Shirt v. Hazeltine, 461 F.3d 1011, 1022 (8th Cir. 2006).
57. Notably, the provision of Article II concerning presidential elections does not empower Congress to make or alter state legislative choices regarding the manner of elections. U.S. Const. art. II, § I, cl. 2.
58. The respondents in *Moore v. Harper* argue that the Elections Clause treats Congress and state legislatures in parallel: Just as Congress must comply with the federal Constitution in enacting election laws, so must the state legislatures comply with their state constitutions. Brief by State Respondents at 32–45, Moore v. Harper, No. 21-1271 (U.S. filed Oct. 19, 2022), 2022 WL 2022 WL 14052447. But that proves a *non-sequitur* under the principle that Congress and the state legislatures are equally acting under the same federal constitutional provision: Just as Congress is not constrained by state constitutions in exercising that power, state legislatures are likewise unconstrained, except insofar as their constitutions create and define the prescriptions for lawmaking referenced in the Elections Clause. On this point, it is significant that the Supremacy Clause defines "the Laws of the United States" broadly as those "made in Pursuance" of "[t]his Constitution" rather than narrowly as those enacted by Congress. U.S. Const. art. VI, § 2.
59. N.C. Const. art. II, § 1.
60. *Id*. art. II, § 22.
61. *See*, *e.g.*, Cooper v. Berger, 809 S.E.2d 98, 107 (N.C. 2018).
62. *See*, *e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003) (discussing analysis "comports with the one-person, one-vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny"); Evenwel v. Abbott, 578 U.S. 54, 59–60 (2016) (explaining genesis of "one-person, one-vote principle").
63. The North Carolina Superior Court consolidated the cases of the plaintiffs "North Carolina League of Conservation Voters" and the "Harper Plaintiffs." Harper v. Hall, No. 21-cvs-500085, 2021 WL 6883732, at *1 (N.C. Super. Ct. Dec. 3, 2021). Subsequent to consolidation, the court permitted Common Cause to intervene as another plaintiff. Harper v. Hall, 868 S.E.2d 499, 514 (N.C. 2022), *cert. granted sub nom*. Moore v. Harper, 142 S. Ct. 2901 (2022).
64. Dickson v. Rucho, 781 S.E.2d 404, 440 (N.C. 2015), *vacated on other grounds*, 137 S. Ct. 2186 (2017).
65. *Harper*, 868 S.E.2d at 514 (describing that plaintiffs "were assigned to [a] three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1.").
66. *Id.*; *Harper*, 2021 WL 6883732, at *4–5.
67. *Harper*, 2021 WL 6883732, at *4; *see also* Petition for Writ of Certiorari App. at 266a, Moore v. Harper, No. 21-1271 (U.S. filed Mar. 17, 2022).
68. *Harper*, 868 S.E.2d at 514.
69. *Id*. at 527.
70. *Id*. at 526 ("[T]he trial court concluded that plaintiffs' partisan gerrymandering claims are nonjusticiable."); *id*. at 353 (describing trial court's order in favor of Legislative Defendants); N.C. Gen. Stat. § 1-72.2(a) (providing that in any North Carolina state court action challenging the validity or constitutionality of an act of the North Carolina General Assembly, "when the State of North Carolina is named as a defendant in such cases, both the General Assembly [jointly through the House of Representative Speaker and the Senate President Pro Tempore] and the Governor constitute the State of North Carolina"); *id*. § 120-32.6(b) (providing that the General Assembly holds "final decision-making authority with respect to the defense of the challenged act of the General Assembly or provision of the North Carolina Constitution" in state or federal court litigation).
71. Harper v. Hall, 867 S.E.2d 554, 556 (N.C. 2022).
72. Harper v. Hall, 868 S.E.2d 499, 509 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022).
73. *Id.*
74. Order at 11, 22–23, N.C. League of Conservation Voters, Inc. v. Hall, No. 15426 (N.C. Super. Ct. Feb. 23, 2022).
75. Moore v. Harper, 142 S. Ct. 1089 (2022).
76. *Id.* at 1091 (Alito, J., dissenting).
77. *Id.* at 1089 (Kavanaugh, J., concurring).

78. Moore v. Harper, 142 S. Ct. 2901 (2022).
79. Minute Entry, Moore v. Harper, No. 21-1271 (U.S. Oct. 18, 2022), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1271.html.
80. Petition for Writ of Certiorari at i, *Moore*, No. 21-1271 (filed Mar. 17, 2022), 2022 WL 846144.
81. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020) (citation omitted).
82. *See*, *e.g.*, Brief of Amici Curiae Colo. Sec'y of State et al. in Support of Respondents at 5–15 & App. A, *Moore*, No. 21-1271 (filed Oct. 26, 2022), 2022 WL 16637848; Brief of Benjamin Ginsburg as Amicus Curiae in Support of Respondents at 19–22 & n.24, *Moore*, No. 21-1271 (filed Oct. 26, 2022), 2022 WL 16555981; Brief of the District of Columbia et al. as Amicus Curiae in Support of Respondents at 15–18, *Moore*, No. 21-1271 (filed Oct. 26, 2022), 2022 WL 16552940.
83. Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 529–32 (2022); Weingartner, *supra* note 16, at 40–43.
84. Weingartner, *supra* note 16, at 3.
85. Brief of the District of Columbia et al., *supra* note 82, at 8; Brief for Non-State Respondents, *supra* note 15, at 45; Weingartner, *supra* note 16, at 40.
86. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)). The leading group of respondents agree. Brief for Non-State Respondents, *supra* note 15, at 28 (explaining that "Founding-era state practice and the debates at the Constitutional Convention" are "evidence that merits great weight when assessing the Constitution's meaning") (citing, *inter alia*, *Heller*, 554 U.S. at 605)); *see also* Brief by State Respondents, *supra* note 58, at 45.
87. *New York State Rifle & Pistol Assn.,* 142 S. Ct. at 2131 ("[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.").
88. Brief for Non-State Respondents, *supra* note 15, at 23.
89. *Id.* at. 31. The parties disagree on the extent to which state constitutional provisions had legal application to federal elections. *See* Brief for Petitioners, *supra* note 2, at 3, 12, 25–39. That question is beyond the scope of this *Legal Memorandum*; we focus here on actual state court practice.
90. Brief by State Respondents, *supra* note 58, at 3–4 ("Both before and after ratification of the Constitution, nearly every State regulated federal elections through its constitution.").
91. Brief for Non-State Respondents, *supra* note 15, at 36.
92. Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991).
93. Brief for the United States, *supra* note 34, at 22.
94. Vieth v. Jubelirer, 541 U.S. 267, 274 (2004) (plurality opinion).
95. *Rucho*, 139 S. Ct. at 2494.
96. Importantly, the Solicitor General concedes that the Elections Clause places outer bounds on state courts' authority and proposes they may be transgressed where a state court "adopt[s] an interpretation of state constitutional provisions that had no 'fair or substantial support' in state law." Brief for the United States, *supra* note 34, at 27 (citation omitted). That gerrymandering was recognized as within "state constitutional constraints" as of the Founding, *id.* at 22, but not by the North Carolina Supreme Court more than 230 years later would seem to mean that the ruling fails the Solicitor General's standard.
97. Weingartner, *supra* note 16, at 40 (citation omitted).
98. *See In re* Opinion of Justices, 30 Conn. 591, 591–94 (1862); Chase v. Miller, 41 Pa. 403, 427–29 (1862); People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127, 142–43, 149–51, 153–55 (1865); *In re* Opinion of Justices, 44 N.H. 633, 636 (1863); *see also* John C. Fortier and Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 UNIV. MICH. J.L. REFORM 483, 493–99 (2003).
99. Harper v. Hall, 868 S.E.2d 499, 540–41 (N.C. 2022), *cert. granted sub nom*. Moore v. Harper, 142 S. Ct. 2901 (2022).
100. *Id.* at 542.
101. *In re* Opinions of Justices, 45 N.H. 595, 601 (1864); *see also* Opinion of the Judges, 37 Vt. 665 (1864); State v. Williams, 49 Miss. 640 (1873) (state legislatures may schedule congressional elections notwithstanding contrary state constitutional provisions); *see also* Weingartner, *supra* note 16, at 41 & n.327 (acknowledging that these and other decisions "embraced the ISL theory").
102. 531 U.S. 98 (2000) (per curiam).
103. Brief for Non-State Respondents, *supra* note 15, at 4.
104. Smith, *supra* note 83, at 516.

105. Brief by State Respondents, *supra* note 58, at 45–46 (discussing "three States amended their constitutions to allow Union soldiers to vote absentee in federal elections" when the "Civil War threatened to disenfranchise Union soldiers").

106. Smith, *supra* note 83, at 517.

107. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

108. *Chiafalo*, 140 S. Ct. at 2326 (quoting Letter to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)).

109. *In re* Plurality Elections, 8 A. 881, 881–82 (R.I. 1887). Some have argued that this decision and others turned on state-law grounds, given the decisions' additional observation that generic references to elections in state constitutions may not reach federal elections. *See* Smith, *supra* note 83, at 529–30. But that theory would lend significant support to the *Moore* petitioners, who argue that state constitutional references to elections without specific reference to federal elections were widely regarded as reaching only state elections. Brief for Petitioners, *supra* note 2, at 38–39. The *Moore* respondents have derided that view. Brief for Non-State Respondents, *supra* note 15, at 33; Brief by State Respondents, *supra* note 58, at 41–42. If state courts were, as some suggest, avoiding conflict together in this way, that would significantly strengthen the petitioners' hand.

110. *In re Plurality Elections*, 8 A. at 882. The court also doubted whether the generic reference to "all elections" was "intended to extend to elections of representatives to congress." *Id*.

111. Parsons v. Ryan, 60 P.2d 910, 912 (Kan. 1936).

112. State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286–87 (Neb. 1948) (quoting Neb. Const. art. I, § 22 and McPherson v. Blacker, 146 U.S. 1, 7 (1892)).

113. Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 692 (Ky. 1944).

114. Weingartner, *supra* note 16, at 40–41.

115. Brief of Amici Curiae Colo. Sec'y of State et al., *supra* note 82, at 8; Brief of Amici Curiae Colo. Sec'y of State et al. in Support of Respondents App. at 1a–19a, Moore v. Harper, No. 21-1271 (U.S. filed Oct. 26, 2022).

116. *See supra* "The Elections Clause as Interpreted by the Supreme Court.". Of course, defendants in cases raising federal questions have a right of removal to federal court. *See* 28 U.S.C. § 1447.

117. *See*, *e.g.*, Brief for Non-State Respondents, *supra* note 15, at 52, 62–63; Brief by State Respondents, *supra* note 58, at 24; Brief of Amici Curiae Colo. Sec'y of State et al., *supra* note 82, at 5.

118. *See*, *e.g.*, Growe v. Emison, 507 U.S. 25, 30 (1993); *see also*, *e.g.*, Mellow v. Mitchell, 607 A.2d 204, 205 (Pa. 1992); Alexander v. Taylor, 51 P.3d 1204, 1206, *as corrected* (Okla. June 27, 2002); Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 478 (Wis. 2021); *cf.* State *ex rel.* Sundfor v. Thorson, 6 N.W.2d 89, 90 (N.D. 1942) (federal qualifications case).

119. Brief for Petitioners, *supra* note 2, at 23 ("[W]here a state legislature's election regulations violate some other provision of the Constitution, such as the Equal Protection Clause, the Constitution itself authorizes the federal or state courts to intervene to secure enumerated constitutional rights.").

120. *See supra* "The Elections Clause as Interpreted by the Supreme Court."

121. *See*, *e.g.*, LeRoux v. Sec'y of State, 640 N.W.2d 849, 859–60 (Mich. 2002) (presentment to the governor); Spier v. Baker, 52 P. 659, 661 (Cal. 1898) (single-topic limit); State v. Polley, 127 N.W. 848, 850–51 (S.D. 1910) (referendum); State *ex rel.* Carroll v. Becker, 45 S.W.2d 533, 533–34 (Mo. 1932), *aff'd sub nom.* Carroll v. Becker, 285 U.S. 380 (1932) (gubernatorial veto); Assembly of State of Cal. v. Deukmejian, 639 P.2d 939, 948 (Cal. 1982) (referendum); *In re* Opinion of the Justices, 107 A. 705, 707 (Me. 1919) (referendum); *see also* Brady v. N.J. Redistricting Comm'n, 622 A.2d 843, 848–49 (N.J. 1992) (venue provision for judicial review).

122. The respondents have argued that there is "no textual basis" of the Elections Clause for the distinction between substantive and procedural rulings. Brief for Non-State Respondents, *supra* note 15, at 51. But of course, there is: the explicit text, "the Legislature," which references the states' lawmaking process, not their judicial processes or substantive constitutional provisions.

123. The following is a sample of such cases we have found littered in briefs and papers. *See* Bourland v. Hildreth, 26 Cal. 161, 162 (1864) (county election); City of Owensboro v. Hickman, 14 S.W. 688, 688 (Ky. 1890) (municipal elections); Jones v. Smith, 264 S.W. 950, 950 (Ark. 1924) (county circuit clerk election); Straughan v. Meyers, 187 S.W. 1159, 1165 (Mo. 1916) (county judicial election); Nichols v. Minton, 82 N.E. 50, 50 (Mass. 1907) (city commissioner election); State v. Anderson, 76 N.W. 482 (Wis. 1898) (city attorney election); State v. Drexel, 105 N.W. 174, 175 (Neb. 1905) (election to "county offices"); State v. Phelps, 128 N.W. 1041, 1043 (Wis. 1910) (county offices); City of Owensboro v. Hickman, 14 S.W. 688, 688 (Ky. 1890) (city offices); Wallbrecht v. Ingram, 175 S.W. 1022, 1023 (Ky. 1915) (alcohol prohibition), *dismissed for lack of jurisdiction*, 239 U.S. 625 (1915); *see also* Meredith v. Lebanon Cnty., 1 Pa. D. 220, 220 (Pa. Com. Pl. 1892), *aff'd sub nom.* De Walt v. Bartley, 24 A. 185 (Pa. 1892) (no mention of federal offices); *McCall v. Automatic Voting Mach. Corp.*, 180 So. 695, 696 (Ala. 1938) (same).

124. Kinneen v. Wells, 11 N.E. 916, 917 (Mass. 1887); *see also* Dells v. Kennedy, 6 N.W. 246, 246 (Wis. 1880); Monroe v. Collins, 17 Ohio St. 665, 685 (1867); Howell v. McAuliffe, 788 S.E.2d 706, 710 (Va. 2016); State v. Jefferson Cnty. Comm'rs, 17 Fla. 707, 720 (1880); Morris v. Powell, 25 N.E. 221, 225 (Ind. 1890); Perkins v. Lucas, 246 S.W. 150, 155 (Ky. 1922); State v. Findley, 19 P. 241, 241 (Nev. 1888); State v. Conner, 34 N.W. 499, 501 (Neb. 1887); White v. Cnty. Comm'rs of Multnomah Cnty., 10 P. 484, 489 (Or. 1886); Page v. Allen, 58 Pa. 338, 347 (1868).

125. U.S. Const. art. I, § 2, cl. 1.

126. U.S. Const. amend. XVII ("The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

127. Tashjian v. Republican Party of Conn., 479 U.S. 208, 229 (1986). For a discussion of the framing of these provisions, see *id.* at 231–34 (Stevens, J., dissenting); Oregon v. Mitchell, 400 U.S. 112, 289–90 (1970) (Stewart, J., concurring in part and dissenting in part).
128. *See*, *e.g.*, Kelso v. Cook, 110 N.E. 987, 996 (Ind. 1916); Ledgerwood v. Pitts, 125 S.W. 1036, 1036–37 (Tenn. 1910); State *ex rel.* Thompson v. Scott, 108 N.W. 828, 829–30 (Minn. 1906); State *ex rel*. Zent v. Nichols, 97 P. 728, 730–31 (Wash. 1908); Socialist Party v. Uhl, 155 Cal. 776, 790 (1909).
129. See *supra* note 128.
130. United States v. Classic, 313 U.S. 299, 317 (1941).
131. *Id.* (discussing *Newberry v. United States*, 256 U.S. 232 (1921)). The "white-primary cases," of course, did not inform the issue because they were decided under the Fourteenth and Fifteenth Amendments. *See* Oregon v. Mitchell, 400 U.S. 112, 203 n.84 (1970) (Harlan, J., concurring in part and dissenting in part).
132. Just some of them are listed here: *See* State *ex rel.* Karlinger v. Bd. of Deputy State Supervisors of Elections, 89 N.E. 33 (Ohio 1909), *overruled by* State *ex rel.* Automatic Registering Mach. Co. v. Green, 168 N.E. 131 (Ohio 1929) (challenge to voting machines under state law); Catlett v. Beeson, 401 S.W.2d 202, 203 (Ark. 1966) (applying state statutes and summarily rejecting a federal constitutional challenge); Terry v. Harris, 64 S.W.2d 80, 82 (Ark. 1933) (applying state statutes); Wexler v. Lepore, 878 So. 2d 1276, 1281 (Fla. Dist. Ct. App. 2004) (same); Blackburn v. Hall, 154 S.E.2d 392, 400 (Ga. 1967) (same); Tataii v. Yoshina, No. 25599, 2003 WL 21267262, at *3 (Haw. May 22, 2003) (same); Hansen v. Jones, 695 P.2d 1237, 1237 (Idaho 1984) (same); Cobb v. State Canvassing Bd., 140 P.3d 498, 507 (N.M. 2006) ("Both Petitioners and the State Canvassing Board agree that this is a case of statutory interpretation."); Britt v. Bd. of Canvassers of Buncombe Cnty., 90 S.E. 1005, 1009 (N.C. 1916) (applying state statutes); Reichert v. Byrne, 210 N.W. 640, 643 (N.D. 1926) ("[N]o question is presented as to the constitutionality of chapter 136, Laws of 1925"); Masters v. Sec'y of State, 744 P.2d 1309, 1311 (Or. Ct. App. 1987) (determining whether executive complied with state statute); *In re* Cong. Election, 9 A. 224, 225 (R.I. 1887); State *ex rel.* Cravotta v. Hechler, 421 S.E.2d 698, 702 (W. Va. 1992) (similar).
133. As noted above, the U.S. Solicitor General agrees that an implausible reading of state law would also violate the Clause. See *supra* note 96.
134. Brief of Amici Curiae Colo. Sec'y of State et al., *supra* note 82, at 3.
135. *Id.* App. A.
136. *See supra* note 114 and accompanying text.
137. Moran v. Bowley, 179 N.E. 526, 531 (Ill. 1932).
138. Brown v. Saunders, 166 S.E. 105, 106 (Va. 1932); Wilkins v. Davis, 139 S.E.2d 849, 854 (Va. 1965).
139. People *ex rel.* Breckton v. Bd. of Election Comm'rs of Chi., 77 N.E. 321, 324–25 (Ill. 1906), *overruled by* People *ex rel.* Lindstrand v. Emmerson, 165 N.E. 217 (Ill. 1929).
140. Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 Am. U.L. Rev. 1283, 1301–02 (2005). The more relevant question concerning such fees is whether they constitute impermissible qualifications for office, *see id.* at 1326–52, which may not be added beyond those in the Constitution by any means, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 817–19 (1995).
141. Murphy v. Curry, 70 P. 461, 461–62, 464 (Cal. 1902).
142. Todd v. Bd. of Election Comm'rs, 64 N.W. 496, 498 (Mich. 1895).The Wisconsin Supreme Court also rejected it. State v. Anderson, 76 N.W. 482, 486–87 (Wis. 1898).
143. Hopper v. Britt, 96 N.E. 371, 371–72, 375 (N.Y. 1911).
144. State v. Wileman, 143 P. 565, 566 (Mont. 1914).
145. *See*, *e.g.*, Todd v. Bd. of Election Comm'rs, 64 N.W. 496, 498 (Mich. 1895); State *ex rel*. Bateman v. Bode, 45 N.E. 195, 197 (Ohio 1896); Jansen v. State *ex rel*. Downing, 137 So. 2d 47, 48–49 (Ala. 1962).
146. *Todd*, 64 N.W. at 496.
147. 794 A.2d 325 (Pa. 2002).
148. 478 U.S. 109 (1986).
149. Erfer v. Commonwealth, 794 A.2d 325, 334 (Pa. 2002).
150. League of Women Voters v. Commonwealth, 178 A.3d 737, 813 (Pa. 2018).
151. *See* Weingartner, *supra* note 16, 41–42 ("In recent years…the number of election law cases has more than doubled"); Richard L. Hasen, *The Supreme Court's Shrinking Election Docket 2001–2010: A Legacy of Bush v. Gore or Fear of the Roberts Court?*, 10 Election L.J. 325, 327 (2011) ("The period after *Bush v. Gore* witnessed an explosion in the quantity of lower court election law litigation."); Joshua A. Douglas, *State Judges and the Right to Vote*, 77 Ohio St. L.J. 1, 13 (2016) (describing state court election litigation "since 2000" as "a burgeoning field").
152. *See* Douglas, *supra* note 151, at 13–32.
153. *Id.* at 1–47.
154. *Id.* at 32–47.

155. *Id.* at 33, 46, 47.
156. *See* Weinschenk v. State, 203 S.W.3d 201, 221–22 (Mo. 2006); Martin v. Kohls, 444 S.W.3d 844, 852 (Ark. 2014).
157. Chavez v. Brewer, 214 P.3d 397, 407 (Ariz. Ct. App. 2009).
158. Republican Party of Ark. v. Kilgore, 98 S.W.3d 798, 801 (Ark. 2002).
159. Stuart v. Anderson Cnty. Election Comm'n, 300 S.W.3d 683, 685–87 (Tenn. Ct. App. 2009).
160. Nader for President 2004 v. Md. State Bd. of Elections, 926 A.2d 199, 214–15 (Md. 2007).
161. *In re* 2012 Legislative Districting, 80 A.3d 1073, 1094 (Md. 2013).
162. Sam Gringlas, Audi Cornish & Courtney Doring, *Step Aside Election 2000: This Year's Election May Be The Most Litigated Yet*, NPR (Sept. 22, 2020), *available at* https://www.npr.org/2020/09/22/914431067/step-aside-election-2000-this-years-election-may-be-the-most-litigated-yet.
163. Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59, 88 (2021).
164. Dylan Jackson & Dan Roe, *Big Firms Bring in Millions as Hundreds of Election Lawsuits Rage Across the Country*, The American Lawyer (October 15, 2020) (reporting that "Jones Day has billed the Republican Party $12.1 million since 2019, while Perkins Coie has received roughly $41 million from various Democratic organizations"), https://www.law.com/americanlawyer/2020/10/15/big-firms-bring-in-millions-as-hundreds-of-election-lawsuits-rage-across-the-country/?slreturn=20221022062720.
165. *See*, *e.g.*, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206 (2020); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020); Merrill v. People First of Ala., 141 S. Ct. 25 (2020); Andino v. Middleton, 141 S. Ct. 9 (2020); Merrill v. People First of Ala., 141 S. Ct. 190 (2020); Clarno v. People Not Politicians Ore., 141 S. Ct. 206 (2020); Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020); New Georgia Project v. Raffensperger, 976 F.3d 1278, 1284 (11th Cir. 2020).
166. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 352 (Pa. 2020) (citing 25 P.S. §§ 3150.11–3150.17).
167. 2020 Pa. Legis. Serv. Act 2020-12 (approved Mar. 27, 2020), https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2020&sessInd=0&act=12.
168. *Pa. Democratic Party*, 238 A.3d at 362, 371.
169. *Id.* at 369.
170. *Id.* at 371 (citation omitted).
171. *See* Wise v. Circosta, 978 F.3d 93, 97 (4th Cir. 2020) (nine-day ballot-receipt extension); Mich. All. for Retired Americans v. Sec'y of State, 964 N.W.2d 816, 821 (Mich. Ct. App. 2020) (14-day ballot-receipt extension); Carson v. Simon, 978 F.3d 1051, 1056 (8th Cir. 2020) (seven-day extension).
172. *Mich. All. for Retired Americans*, 964 N.W.2d at 830–31.
173. *Carson*, 978 F.3d at 1062–63. Messrs. Rivkin, Grossman, and Raile were counsel to the plaintiffs in *Carson*.
174. *See* Moore v. Circosta, 141 S. Ct. 46 (2020); Republican Party of Pa. v. Boockvar, 141 S. Ct. 643 (2020).
175. *Chiafalo*, 140 S. Ct. at 2326 (citation omitted).
176. Morrison v, Lamarre, 65 A.2d 217, 222–23 (R.I. 1949) (citation omitted).
177. Pa. Const. art. I, § 5.
178. Michael Sozan, *Supreme Court May Adopt Extreme MAGA Election Theory That Threatens Democracy*, Am. Progress (Sept. 26, 2022), https://www.americanprogress.org/article/supreme-court-may-adopt-extreme-maga-election-theory-that-threatens-democracy/.
179. Eliza Sweren-Becker, *How the "Independent State Legislature Theory" Might Change Our Elections*, Brennan Center for Just. (Nov. 2, 2022) (boldface omitted), https://www.brennancenter.org/our-work/analysis-opinion/how-independent-state-legislature-theory-might-change-our-elections.
180. *See supra* "Reconstruction Through 2000."
181. Some attempts to explain the policy implications as disastrous are almost comical. *See* Sozan, *supra* note 178 ("For example, the ISL theory could prevent a governor from vetoing an anti-voter bill."). *But see supra* "The Elections Clause as Interpreted by the Supreme Court (recognizing that veto power is permitted under the Elections Clause).
182. *Rucho*, 139 S. Ct. at 2496.
183. South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966); U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2.
184. *See*, *e.g.*, Guinn v. United States, 238 U.S. 347, 360–65 (1915) (grandfather clause in Oklahoma constitution); Myers v. Anderson, 238 U.S. 368, 378–79 (1915) (similar clause in Maryland constitution); *see also* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2330–31 (2021) (collecting cases).
185. Shelby Cnty. v. Holder, 570 U.S. 529, 534 (2013).
186. *See*, *e.g.*, Branch v. Smith, 538 U.S. 254, 264–65 (2003) (affirming federal court injunction against state court–implemented redistricting plan under Section 5 of the Voting Rights Act).
187. Pub. L. 99–410, 100 Stat. 924; 52 U.S.C. § 20301 *et seq.*

188. 52 U.S.C. § 21081(a)(6).
189. 52 U.S.C. § 10101(a)(2)(B).
190. 52 U.S.C. § 20504; *see* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 5 (2013).
191. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008) (plurality opinion) (citation omitted); *Burdick*, 504 U.S. at 433.
192. Ethan Herenstein & Thomas Wolf, *The "Independent State Legislature Theory," Explained*, Brennan Center for Just. (June 30, 2022), https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained ("[A]fter the 2020 election, President Trump and his allies used the independent state legislature theory as part of their effort to overturn the results.").
193. Bush v. Gore, 531 U.S. 98, 105 (2000).
194. *See* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1; Foster v. Love, 522 U.S. 67, 69 (1997).
195. *Bush*, 531 U.S. at 104.
196. *See id.* at 104 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment" deny that right).
197. Leah Litman, Kate Shaw & Carolyn Shapiro, *A New Supreme Court Case Threatens Another Body Blow to Our Democracy*, Wash. Post (July 2, 2022), https://www.washingtonpost.com/opinions/2022/07/02/moore-harper-gerrymandering-supreme-court-state-voting-rights/ ("Fortunately, even if the court embraces the revanchist [independent state legislature theory], that would not permit state legislatures to throw out votes already cast to appoint presidential electors of their choosing.").
198. Luttig, *supra* note 13.
199. Hansi Lo Wang, *How the Supreme Court Could Radically Reshape Elections for President and Congress*, NPR (June 30, 2022), https://www.npr.org/2022/06/30/1107648753/supreme-court-north-carolina-redistricting-independent-state-legislature-theory.
200. Brief of Amici Curiae Boston University Center for Antiracist Research and Professor Atiba R. Ellis in Support of Respondents at 14, Moore v. Harper, No. 12-1271 (U.S. filed Oct. 26, 2022), 2022 WL 16630890.
201. Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).
202. Another odd assertion is that the *Moore* petitioners' theory "would also empower heavily gerrymandered legislatures to make the rules regarding federal elections." Litman et al., *supra* note 197. Legislative redistricting plans are not at issue in *Moore*, which concerns only federal elections. Indeed, the North Carolina General Assembly that enacted the plan at issue in *Moore* was elected from a redistricting plan approved by a court at the end of partisan-gerrymandering litigation at the end of the prior decade.