MOORE TO COME: THE IMPENDING INDEPENDENT STATE LEGISLATURE DEPARTURE STANDARD

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State constitutions have long served as a source of robust protection for the right to vote. However, the Supreme Court's recent decision in Moore v. Harper *may substantially disrupt state court application of such constitutional provisions to federal elections. While the Court declined to adopt the Independent State Legislature Theory ("ISLT") in its maximalist form, it did signal an intention to adopt a less stringent variant of the theory that could, in certain instances, constrain state courts. Part V of the Court's opinion announces that state courts may not "transgress the ordinary bounds of judicial review" when applying state constitutional provisions in the context of federal elections. Yet, the Court refrained from developing this vague principle into an intelligible legal standard. This Note posits a potential version of that test—the departure standard—and examines its likely impact on the right to vote under state law.*

This Note aims to ascertain how the impending ISLT standard will take shape beyond Moore *and evaluate its anticipated impact on relevant state court decision-making. While the precise application of a standard is far from certain, the Court's opinion and pre-opinion consideration of* Moore *provide meaningful insight into when a state court might conceivably run afoul of the Elections Clause. As this Note demonstrates, examining existing state court decisions through the prism of* Moore *helps to illustrate what may be potentially fatal deficiencies in analysis, outcome, or both in cases to come.*

Finally, this Note advances a series of projections regarding the likely path forward for voting rights-affirming state court constitutional decisions. It argues that application of the ISLT through the departure standard will result in the federal courts stymying the development of state constitutional election law that varies from federal constitutional orthodoxy. Federal courts would be likely to misapprehend the nature and frequency of intra-state disputes giving rise to an ISLT question. Moreover, state lawmaking and judicial review processes would likely be manipulated to evade ISLT under the departure standard. In sum, the Court's seemingly judicious disposition of Moore *has precipitated even more complex questions that it must answer in the near term in the midst of fraught, highly competitive, partisan federal elections.*

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INTRODUCTION

To the surprise of many informed, civically engaged citizens, the United States Constitution entails no express right to vote. Rather, the Constitution only dictates particular bases upon which, and conditions under which, citizens' votes may not be denied or abridged.[1] This observation,

1. U.S. CONST. amend. XV (prohibiting the United States and the states from denying or abridging a citizen's right to vote "on account of race, color, or previous

of course, suggests that some other source supplies our nation's deeply-engrained recognition of a right to participate in elections—state constitutions.[2] Every state's version includes, at least, a "right to vote" provision.[3] The United States employs a rather convoluted framework governing election regulation: the right to participate in an election for federal offices is shaped by a state's relevant constitutional protections; Congress has plenary power to regulate the times, places, and manner of federal elections; if Congress chooses not to exercise this power, the responsibility falls to the states (broadly speaking, as we will see).[4] Ordinarily, then, a citizen's right to participate in federal elections relies largely on the lawmaking process of the state in which he or she resides. This arrangement fosters a diverse fabric of approaches across the fifty states, which at times casts doubt on the assurance of a strong, uniform right to vote.

The Supreme Court's recent decision in *Moore v. Harper* has brought to the fore the operation of the state's role in this arrangement. For the first time, a case predicated on the so-called Independent State Legislature Theory ("ISLT") reached the Supreme Court.[5] Petitioners—

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condition of servitude."); *id.* amend. XIX (prohibiting the United States and the states from denying the right to vote to citizens of the United States on the basis of sex); *id.* amend. XXVI (prohibiting the United States and the states from denying or abridging the right to vote based on age, for citizens who are eighteen years of age or older). Further, the U.S. Constitution has been interpreted to regulate substantive infringements on the right to vote under the Equal Protection Clause, see, e.g., Burdick v. Takushi, 504 U.S. 428 (1992) (cementing a doctrinal framework to analyze the burden on the right to vote on a subset of citizens with a corresponding scrutiny analysis); Bush v. Gore, 531 U.S. 98 (2000) (holding Florida's recount process treated particular voters unequally in violation of the Constitution), and under the Due Process Clause, see e.g., Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) (*Roe I*) (finding changes to post-election practices implicated reliance interests and fundamental fairness the Clause protects). *See also* Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995) (*Roe III*); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 Fla. St. U. L. Rev. 691, 702–04 (2001) (discussing *Roe v. Alabama*).

2. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014).

3. *Id.* at 144–49.

4. U.S. Const. art. I, § 4 [the "Elections Clause"] (providing states the right to regulate federal elections where Congress does not); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions,* 55 Ga. L. Rev. 1, 16 (2020) (citing Smiley v. Holm, 285 U.S. 355, 366 (1932)) ("The U.S. Supreme Court has held that these provisions delegate sweepingly broad authority. The 'comprehensive words' of the Elections Clause, for example: 'embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'").

5. Moore v. Harper, 142 S. Ct. 2901 (2022).

proponents of the ISLT—sought to reorient the relationship between state legislatures and state courts in determining which entities possess determinative authority to finalize state election procedures.[6] In its simplest form, and to be addressed at length in what follows, the ISLT posits, *inter alia*, that the Elections Clause of the United States Constitution precludes or limits state courts from exercising judicial review of state legislative action on federal elections. Though the Court declined to adopt the maximalist version of the ISLT, it certainly did not reject the theory entirely.[7] Underlying developments in North Carolina, where the case arose, had led many outside experts to believe that the lawsuit had become moot.[8] Defying these expectations, the Court addressed the merits of the case.[9] The particular contours of the arguments presented in *Moore* limited the Court's consideration of the ISLT to its most fulsome, sweeping form. Thus, despite the Court's momentary halting of the advancement of the most expansive version of the ISLT, future litigants are assuredly guaranteed to propagate more limited versions of the ISLT in cases to come.[10] However, because the Court reviewed the

6. Petition for Writ of Certiorari at i, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271) (framing the question presented in the case as "[w]hether a State's judicial branch may nullify regulations governing [elections] . . . " enacted by the state legislature by striking down the regulations based on state constitutional provisions and "prescrib[ing] whatever rules it deems appropriate . . . " when it exercised judicial review).

7. Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News*, N.Y. Times (June 28, 2023), https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html [https://perma.cc/8TS6-UE2T].

8. On April 27, 2023, the Supreme Court of North Carolina issued a ruling vacating the court's prior decision that held the congressional map constituted impermissible partisan gerrymandering. *See* Harper v. Hall (*Harper II*), 384 N.C. 292 (N.C. Apr. 28, 2023) (vacating the previous holding while also noting that "*Harper I* is now overruled"). This occurred after the North Carolina Court granted a motion for reconsideration of the underlying ruling in the case. *See* Harper v. Hall (*Harper I*), 384 N.C. 1 (N.C. Feb. 3, 2023). As both the initial ruling striking the map and most recent decision to vacate that holding were decided on partisan lines, it is notable that in the 2022 Elections, the partisan composition of the state supreme court changed from a 4-3 Democratic majority to a 5-2 Republican majority. *See* Ellis Champion, *North Carolina Supreme Court Will Rehear Two Voting Rights Cases with New GOP Majority*, Democracy Docket (Feb. 3, 2023), https://www.democracydocket.com/news-alerts/north-carolina-supreme-court-will-rehear-two-voting-rights-cases-with-new-gop-majority/ [https://perma.cc/WWY5-7JXR]. As a result, commentators thought for some time prior to the *Moore* decision that the Supreme Court might have concluded the case was moot or would be dismissed as improvidently granted. *See* Derek Muller, *What Happens to Moore v. Harper After the latest North Carolina Supreme Court Decision in the Partisan Gerrymandering Case?*, Election L. Blog (Apr. 28, 2023, 10:04 AM), https://electionlawblog.org/?p=135865 [https://perma.cc/DV4S-WH2E].

9. *Moore*, 600 U.S. at 11.

10. *See* Rick Hasen, *Updated: In Ruling with Major Political Implications that Potentially Moots U.S. Supreme Court Decision in Moore v. Harper Independent State*

parties' briefs, conducted oral argument, and addressed a forthcoming standard in Part V of its opinion, we now possess fairly robust insight into this Court's assessment of a tempered ISLT. And though the complexity of this proposed doctrine could lead the Court in various directions, its path appears to have come into focus.

Moore's unique posture and narrow decision provide an interesting and rare opportunity for engaged onlookers who might predict, with a reasonable degree of certainty, how the Court is likely to decide future ISLT cases. Because *Moore*'s decision was limited to the maximalist version of the theory, its refined precise rule will not yet be in effect until a subsequent case arises advancing a more moderate version of the ISLT. This provides interested actors—state legislatures, state courts, the federal judiciary, candidates, campaigns, citizens, groups—a chance to assess the propriety of existing state supreme court constitutional provisions and decisions on the right to vote, as well as those to come. These actors may not only be able to assess the current lay-of-the-land in this realm, but also preemptively respond to the shifting nature of state court decision-making. Under any formulation, the ISLT will cause notable disruption to the ordinary state lawmaking process of regulating federal elections. The longer-than-expected runway the *Moore* decision supplies may enable interested actors to mitigate some of that disruption.

This Note assesses the anticipated impact of the ISLT legal standard. Part I will address the anticipated standard likely to develop beyond *Moore v. Harper*, as interpreted by the Court's opinion and pre-opinion consideration of the case. The Court's receptiveness, and to some degree reticence, to the notion of the ISLT at oral argument was apparent. And its discussion with the parties signaled the likely result. This Note attempts to articulate, with as much precision as possible, the standard the Court is likely to employ in cases involving an election regulation dispute between a state legislature and state court.

Part II, proceeding under the assumption that the standard signaled by the Court is adopted, will consider its application to a handful of monumental state court decisions interpreting state constitutions. Because the federal Constitution provides a floor for constitutionally-grounded voting rights, state jurisprudence often

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Legislature Case, North Carolina Supreme Court, on 5-2 Partisan Vote, Holds Partisan Gerrymandering Claims Cannot Be Brought Under State Constitution, ELECTION L. BLOG (Apr. 28, 2023, 10:09 AM), https://electionlawblog.org/?p=135855 [https://perma.cc/KB4F-YJXA] (discussing a pending Ohio case, *Huffman v. Neiman*, 143 S. Ct. 2687 (2023), raising similar ISLT issues on which the Court may grant review or that there are surely to be a number of state enactments and court decisions in the run-up to the 2024 elections that could prompt review).

affords greater protections.[11] As such, many state courts' constitutional approaches go beyond federal decisions in striking down legislatively enacted election regulations. This Note's goal will be to consider when and why such decisions may become infirm, or perhaps reaffirmed, by adoption of the ISLT. Though assessment of one state's law has no bearing on another state's law as a practical matter, as discussion of the ISLT will elucidate, this analysis considers how the Supreme Court would be expected to scrutinize state court decisions. While the relevant state provisions and interpretive processes will vary, presumably the federal court inquiry will be transferable.

Part III, applying the earlier assessment of the likely *Moore* standard to a representative sample of state court decisions, will attempt to synthesize the ISLT's anticipated effects on established state law. These insights will suggest the extent to which the Supreme Court's forthcoming jurisdiction will intermeddle in intra-state policymaking on congressional elections. This analysis identifies key principles applicable when a state legislatures' election administration-focused enactments, and resulting state court constitutional review, become the subject of litigation.

I.
Identifying the ISLT Standard

A. Defining the ISLT as Presented

As an initial starting point, it is necessary to engage in an abbreviated effort to define what the Independent State Legislature Theory is.[12] Its origin lies in the Elections Clause of the U.S. Constitution.[13] The Elections Clause allows "state legislatures" to enact regulations relating

11. *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law,* 90 U. Chi. L. Rev. 140–41 (2023) (detailing how state constitutions have proscribed election regulations in a way that the federal Constitution has not).

12. The ISLT and *Moore* have been the subject of many insightful works by renowned legal thinkers, who have considered the concept of the doctrine in far greater detail than is possible here. For more in-depth description of the theory, see *id.*; *The Independent State Legislature Theory and its Potential to Disrupt Democracy: Hearing Before the H. Comm. on Admin.*, 117th Cong. 1 (2022) (statement of Richard H. Pildes, Sudler Fam. Professor of Const. L., N.Y.U.); Morley, *supra* note 4, at 14; Akhil Amar & Vikram D. Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Nation and Related Rubbish*, 2021 Sup. Ct. Rev. 1 (2021); Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 Wis. L. Rev. 1235 (2022).

13. U.S. Const. art. I., § 4. This is not to be confused with the Electors Clause of Article II, which relates to Presidential elections and prompts similar issues. *See* Morley, *supra* note 4, at 32.

to the "Times, Places, or Manner" of congressional elections.[14] It likewise provides what has been determined to be plenary power to Congress to regulate Congressional elections across the many states.[15] But where Congress fails to do so, each state's regulations govern.[16]

The ISLT, at face value, reflects an extraordinarily literal textualist reading of the clause. It posits that because the Framers used the term "legislature," only the legislative body in the state—and not its state courts—have authority to determine election laws.[17] Thus, so the argument goes, the federal Constitution outright prohibits, or at least limits, state courts from invalidating an election regulation enacted by the state legislature. The legislature would therefore be "independent," insofar as its legislation goes unchecked by state judicial review, effectively exempting state election laws from the protections and limitations state constitutions would otherwise provide.

The Supreme Court considered the merits of the ISLT for the first time in the 2023 case *Moore v. Harper*.[18] The litigation originated as a challenge to North Carolina's congressional map for creating an undue partisan advantage for Republican candidates.[19] The plaintiffs pursued claims under the North Carolina Constitution because, in a case addressing North Carolina's congressional map only a few years earlier, the United States Supreme Court held that political gerrymandering claims are non-justiciable political questions for lack of judicially manageable standards, foreclosing a challenge in federal court.[20] In the instant case, the North Carolina Supreme Court ultimately invalidated the congressional map enacted by the North Carolina General Assembly.[21] That court concluded the map constituted an impermissible partisan gerrymander and thereby violated a combination of provisions found in

14. U.S. Const. art. I, § 4.
15. Morley, *supra* note 4, at 8.
16. *Id.*
17. Litman & Shaw, *supra* note 12, at 1236.
18. Moore v. Harper, 600 U.S. 1 (2023).
19. Harper v. Hall, 383 N.C. 89, 95 (N.C. 2022) (describing challengers' claim that the congressional district map enacted in November 2021 constituted impermissible partisan gerrymandering that violated a number of provisions of the state constitution.).
20. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019) (holding that claims alleging North Carolina congressional and General Assembly maps constitute non-justiciable political questions, unable to be remedied without judicially manageable standards under the U.S. Constitution). *Rucho* foreclosed to possibility for resolution of partisan gerrymandering in federal courts and prompted state constitutional litigation as a viable alternative, noting "nor does our conclusion condemn complaints about districting to echo into a void . . . provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.*
21. *Harper*, 383 N.C. at 124–25.

the state constitution, namely, the "free elections" clause.[22] The General Assembly appealed to the U.S. Supreme Court, not to directly question the substance of the state court's ruling (which would not yield jurisdiction in the Supreme Court) but to raise the ISLT as a separate structural question.[23]

Petitioners argued the text of the Elections Clause prohibits, or limits, the North Carolina Supreme Court from invalidating the congressional districting plan the North Carolina General Assembly enacted.[24] They contended the law passed by the state legislature is essentially absolute and not subject to judicial review under the state constitution.[25] While petitioners in this case only addressed the theory as it related to a redistricting plan, the wider ISLT dictates that the federal Constitution steps in to regulate state lawmaking on federal voting regulations to prohibit any legislatively enacted election regulation from invalidation by a state court.[26] This presents a rather extraordinary proposition—that in the context of setting voting rules, state legislatures are unbound by state constitutions, at least in some circumstances.

B. Deciphering the Outcome in Moore

The *Moore* opinion and oral argument before the Supreme Court enabled the justices to grapple with various configurations of the ISLT. This has elucidated key insights. First, the Court unambiguously declined to adopt the maximalist version of the ISLT. Second, the Court nonetheless failed to reject the ISLT entirely. Third, the Court therefore appears poised to adopt a less stringent form of the ISLT, enabling federal court review of state court decisions in limited circumstances under defined guidelines. This intermediate position avoids a bright-line, categorical approach and therefore portends greater uncertainty in the application of the legal standard.

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22. *Id.*

23. Petition for Writ of Certiorari, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271).

24. Brief for Petitioners at 44–50, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271).

25. *Id.* at 13–17. Petitioners attempted to distinguish their claims from relevant precedent in which the Court had held that the requirements of overcoming a governor's veto and delegating map-making to an independent redistricting committee do not impermissibly invade on the state legislature's role in the Elections Clause. Smiley v. Holm, 285 U.S. 355, 372–73 (1932); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015). The Court appeared quite skeptical of Petitioners' fashioned "substance-procedure distinction" as an attempt to distinguish Smiley and AIRC from judicial review. *Id.* Nevertheless, for this Note's purposes, the ISLT pertains exclusively to judicial review of state election legislation by state courts.

26. Brief for Petitioners, *supra* note 24, at 13; Shapiro, *supra* note 11, at 139.

1. Far from Outright Rejection of the ISLT

Justice Jackson hinted at rejecting the ISLT in its entirety in oral argument.[27] She indicated on multiple occasions that to even ascertain what the Elections Clause meant by "legislature," one must consult the state constitution.[28] Each state's constitution defines what legislative power is, who can wield it, and when it can be properly exercised.[29] Thus, state courts must *always* be permitted to serve as a check on legislation enacted by a state general assembly because that court defines what legislating entails.[30] In other words, in a given state, an election regulation that violates the state constitution may not even be "legislation."[31] Therefore, Justice Jackson initially signaled that federal courts may never use the Elections Clause as a basis to second guess the determination of a state court on a statute's constitutionality.[32] This rejects the premise of an ISLT entirely.

Notably, only Justice Jackson articulated such a view, and only did so in argument. The remainder of the Court endorsed a view that some circumstances enable federal courts to review state court decisions striking down legislation enacted by the state legislature.[33] The majority opinion—which Justice Jackson ultimately joined—plainly noted that "federal courts must not abandon their own duty to exercise judicial review [in these circumstances] . . ."[34] This recognizes that, after all, regulating federal elections is a function—even when undertaken by states—with deeply-rooted federal interests. As a result, it is not the case that federal courts may *never* review a state court decision under the Elections Clause to determine whether the state court properly invalidated the legislature's enactment. In fact, it may be its duty to intervene.

2. A Maximalist Version of the ISLT Rejected

Conversely, only two members of the Court signaled varying degrees of support for a maximalist view of the ISLT—Justices Thomas

27. Transcript of Oral Argument at 12–15, 22–23, 33–37, 162–64, Moore v. Harper, 600 U.S. 1 (2022) (No. 21-1271) [hereinafter *Moore transcript*].
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 34–35. It should be emphasized that this discussion concerns only federal court review under the Elections Clause to make clear that there are other federal constitutional provisions that enable the Court to review the constitutionality of state legislation—and that is not in dispute. Namely, this includes the Equal Protection Clause, Baker v. Carr, 369 U.S. 186 (1962), and Due Process Clause, *Roe I* and *II*.
33. *Moore* transcript, *supra* note 27, at 42, 93–100, 130, 140–44, 158, 184–85, 190.
34. Moore v. Harper, 600 U.S. 1, 29–30 (2023).

and Gorsuch.[35] Part II of their dissent confirmed this suspicion.[36] This approach reviews the text of the Elections Clause literally and requires that only the state legislature may regulate the time, place, or manner of federal elections. They would likely hold that a state court has no role in assessing the propriety of the regulation under the state constitution and may not exercise even ordinary judicial review to that end. This maximalist view dictates that the state legislature is truly independent and unchecked by state law while performing this constitutionally-prescribed federal function.[37] This is a categorical approach in that it provides no discretion to federal courts to determine whether a state court's review suffices—the state legislature simply prevails over the state court in every instance.[38]

Without sufficient support for a categorical approach, the Court has clearly articulated at least this: that federal courts reviewing state court decisions under the Elections Clause will have discretion over whether to affirm or reverse those courts' rulings.

3. Consensus: A Departure Standard[39]

It is at this stage where the ISLT becomes most complicated. As the doctrine was not outright rejected or adopted, various intermediate approaches may arise.[40] In this circumstance, an ISLT is adopted insofar as it enables the Supreme Court to invalidate state court decisions (which invalidated election regulations) only in particular instances. The details are dispositive. Under what guidelines can the Supreme Court act, and relatedly, in what circumstances are state court decisions suspect?

The majority in *Moore* unambiguously embarks down this path in Part V.A. of its opinion. Chief Justice Roberts first indicates that "state

35. *Moore* transcript, *supra* note 27, at 93–96, 143–44.

36. *See Moore*, 600 U.S. at 1, 17 (Thomas, J., dissenting).

37. Michael Weingartner & Carolyn Shapiro, *After the Oral Argument in* Moore v. Harper, 54 U. Tol. L. Rev. 387, 387, 389 (2023). Again, even under this view, state election legislation would still be subject to federal constitutional constraints under the Equal Protection Clause, Due Process Clause, First Amendment, etc.

38. *Id.*

39. As will become clear below, the Court does not use the term "depart" or "departure" in its opinion in *Moore*. However, this paper utilizes the term departure routinely throughout as it best reflects the "transgression" of which the majority speaks in its warning to state courts in "arrogat[ing] to themselves" the state legislature's power—that is, where the state court is departing too far from established state law and/or its role as a court performing judicial review. *See Moore*, 600 U.S. at 26–29. This Note reflects a suspicion that further consideration of subsequent ISLT cases will distill the Court's present admonition into a more refined standard that the concept of a departure best encapsulates.

40. Shapiro, *supra* note 11, at 157.

courts do not have free rein" in construing state constitutional provisions when determining the constitutionality of the state's regulation of federal elections.[41] Later, the majority unveils its opaque directive: "we hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[42] It concludes by restating this view that "state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4 . . . ."[43] Justice Kavanaugh, writing alone in concurrence, notes that "[to] revie[w] state court interpretations of state law 'we must necessarily examine the law of the State as it existed prior to the action of the [state] court.'"[44] There now exists a clear indication of *what* federal courts may do (invalidate transgressing state court decisions) but not *how* they will carry out that task—as "the Court offers no guidance, no standard at all, for lower courts to know when a state court has gone too far" and "offers no concrete understanding nor any example of what that means."[45] The Court has announced a general principle, but a true legal standard remains to be developed.

This Note posits that the *Moore* standard will incorporate two main considerations: (a) the sufficiency of the state court decision's analysis and (b) the nature of the state constitutional provision(s) at issue. Primarily, federal courts will assess whether and to what extent the state court decision departs from the state's legal practice and tradition—i.e., the anti-transgression principle. In conjunction with the first consideration, the federal court will have license to consider the generality or specificity of the state constitutional provision upon which the state court decision was predicated. Where a state constitutional provision is relatively vague or general, the state court's burden is higher to demonstrate the propriety of its decision as appropriately rooted in state law; where the provision is more specific, the federal court offers greater latitude to that court's decision.

These considerations were the subject of much discussion in the oral argument and captured the attention of a majority of the justices. The Court is likely to articulate and employ what is deemed here the departure standard. The justices and advocates appear to acknowledge

41. *Moore*, 600 U.S. at 26.
42. *Id.* at 29.
43. *Id.* at 30.
44. *Id.* at 39 (Kavanaugh, J., concurring) (citing Bush v. Gore, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring)).
45. *See* Pildes, *supra* note 7.

two differing conceptions of a departure that could warrant reversal of a state court decision overturning the state legislature. The first is whether the substance or outcome of the state court decision becomes unmoored, in some abstract way, from ordinary state practice. The second, articulated by former Solicitor General Donald Verrilli on behalf of the State Respondents in his colloquies with the justices, was more concrete and technical. He attempted to reframe the inquiry to focus on the modes and manner of the state court opinion, identifying whether the court's decision-making process ran afoul of ordinary state practice in tangible ways.[46]

This would mean the federal court's inquiry in reviewing a state court decision invalidating election regulation passed by the state legislature could reflect any of the multiple configurations of this standard's verbiage considered by the Court and Respondents, including:

Arguably Substance- or Outcome-driven

- Whether "state court decision is so lacking in any basis and has no fair or substantial support and can only be understood as an effort to frustrate federal rights."[47]
- "When the court is actually abdicating its judicial role and instead claiming raw policymaking power."[48]
- "Whether the state court exceeded 'the limits of reasonable' interpretation of state law."[49]
- "Whether the state court reached a 'truly aberrant' interpretation of state law."[50]

Arguably Process- or Analysis-driven

- "When is this not the court acting like a court when it has gone off the rails and it's just doing policy under the guise of statutory interpretation or constitutional interpretation."[51]
- "Whether the state decision is such a significant departure from the state's ordinary modes of constitutional interpretation that it lacks any fair and substantial basis in state law."[52]

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46. Verrilli's discussion with Justice Alito addressed the application of history and precedent in the North Carolina decision. *See Moore* transcript, *supra* note 27, at 145–52.

47. *Id.* at 185.

48. *Id.* at 186.

49. *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (relaying Justice Souter's discussion of a standard in *Bush v. Gore*).

50. *Id.* at 38–39 (Kavanaugh, J., concurring) (citing Brief for the United States as Amicus Curiae at 27).

51. *Moore* transcript, *supra* note 27, at 186–87.

52. *Id.* at 130, 140–41.

- "Does the state court decision impermissibly distort beyond any fair reading of the state law?"[53]
- "Has the judicial opinion in interpreting the law . . . gone so far afield that we can no longer fairly say as a matter of federal law that the legislature is the one who prescribed the time, place, and manner?"[54]

As is often true with attempts to draw distinctions of this fashion, some of these articulations may not fit neatly into one category or the other exclusively. Nevertheless, there appears to be some indication of a split on the Court about whether to scrutinize the state court's decision or opinion—with Justices Roberts, Alito, Kavanaugh, and Barrett more apt to evaluate the departure vis-à-vis the overall outcome while Justices Kagan, Sotomayor, and Jackson would evaluate the decision process. Even upon adopting a departure standard approach as indicated above, it remains to be seen where the bulk of the emphasis will be directed in subsequent cases.

Variations in the departure standard's language explored above are mostly semantic at this juncture; its core principles appear constant.[55] But its scope is surely debatable. It is possible that the Court, upon initially adopting this version of the ISLT, would mirror Respondents' suggestions that this standard should be "stratospheric,"[56] "sky high,"[57] a "high bar,"[58] "highly deferential,"[59] and/or at the "outer bounds."[60] Yet as Justice Kavanaugh noted in his concurrence in *Moore*, "deference is not abdication."[61] This signifies that the Court envisions the constraint on state courts as only applying in the most extreme scenarios, where they have brought about a result that clearly usurped a state legislature's policymaking role or strayed from ordinary judicial decision-making in the state. But what represents an extreme in this context is largely unclear,[62] especially given the persisting lack of clarity regarding

53. *Moore*, 600 U.S. at 28; *id.* at 38 (Kavanaugh, J., concurring); *Moore* transcript, *supra* note 27, at 130, 158, 190.

54. *Moore* transcript, *supra* note 27, at 143 (articulated by Justice Gorsuch).

55. *See Moore*, 600 U.S. at 39 n.1 (Kavanaugh, J., concurring) ("I doubt that there would be a material difference in application among the standards"; "I doubt that the precise formulation of the standard . . . would be the decisive factor in any such disagreement [over a case's outcome]").

56. *Moore* transcript, *supra* notes 27, at 103, 105, 123, 130, 191.

57. *Id.* at 86, 91, 105, 115, 123, 130, 143 (including references by Justices Kagan, Barrett, Gorsuch, and Thomas).

58. *Id.* at 185.

59. *Id.* at 131, 141, 167–68.

60. *Id.* at 170.

61. *Moore*, 600 U.S. at 39 (2023) (Kavanaugh, J., concurring).

62. Justice Kagan pointed out that saying a court engages in policymaking, rather than interpreting law, is unhelpful—as it is common refrain from judges who simply

whether federal courts should center their focus on the substance of the state court's decision or the reasoning underlying its opinion that remains unresolved.

Members of the majority likened this departure standard to Justice Rehnquist's concurrence in *Bush v. Gore*.[63] The rationale underlying that opinion and its application in *Moore* is that federal courts retain a federal interest at the outer bounds of state court action with respect to federal elections.[64] These elections are, after all, extraordinarily consequential with nationwide impact.[65] Cementing the federal courts as an extra layer of review of state court decision-making concerning federal elections would not be meant to relitigate or second-guess state court decisions for mere correctness, but to ensure (or preemptively incentivize) they undertake "ordinary judicial review."[66]

The next case that raises the ISLT issue is likely to garner a majority adopting a departure standard. This is likely to consist of, at least, Justices Roberts, Kavanaugh, Barrett, Kagan, Sotomayor, and perhaps Alito. Justice Jackson would likely join to stress that the departure standard be sufficiently deferential to state courts' interpretations of state legislative power and state law tradition.[67] Justice Alito may be more likely join if he believes the departure standard is sufficiently antagonistic to state courts instituting sizable limits on state legislatures.[68] Justices Thomas and Gorsuch appear poised to dissent to any configurations of the majority coalition so constituted. They will likely remain adherent to a formalistic definition of "legislature" and will prefer to hold that state courts may never review state legislative actions, as Justice

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would have decided the same case differently. With that verbiage carrying weight in the analysis, she expressed concerns that the departure standard would be too easily satisfied. *See Moore* transcript, *supra* note 27, at 158–59.

63. *Moore*, 600 U.S. at 28; *Moore* transcript, *supra* note 27, at 41. Note, however, that *Bush v. Gore* was decided in the context of the Equal Protection Clause of the Fourteenth Amendment that conveys a substantive legal principle, not under a structural provision like the Elections Clause of Article I or Electors Clause of Article II. 531 U.S. 98 (2000).

64. *Moore* transcript, *supra* note 27, at 168. The conceivable federal interest here is in ensuring that state legislatures, not state courts, are performing the legislative role of regulating elections, as the Elections Clause suggests. This is distinct from federal interests arising under Equal Protection or Due Process, as it polices the structure of intra-state regulation, not the substance of the enactments and/or process.

65. Just as *Bush v. Gore* was not merely a determination of which candidate won a handful of counties in Florida, it was deciding the nationwide outcome for the Presidency.

66. *Moore* transcript, *supra* note 27, at 81, 112, 122.

67. *See id.* at 13.

68. *See id.* at 40.

Thomas presents in his dissent in *Moore*.[69] Nevertheless, with some assurance that a majority of the Court prefers some variation of the departure standard as hypothesized here over categorical approaches or other intermediate discretionary approaches, we next turn to pragmatic considerations—the application of such a standard.

II.
Application of the Departure Standard to Existing State Court Decisions

The U.S. Constitution supplies only a floor for voting rights protections. Therefore, state constitutions may go above and beyond federal protections. This is a familiar structure across constitutional law in the United States broadly, but it is especially pronounced in the context of citizens' rights against restrictive election regulations. While the federal Constitution and statutes have been interpreted as failing to supply remedies for many arguably injurious voting regulations,[70] many challenges will naturally proceed under state constitutional provisions. Such challenges will produce a narrow slice of state court decisions that stand to be scrutinized under the ISLT departure standard. The relevant question is how rigorous such scrutiny will be.

This Note considers a sampling of monumental state supreme court decisions interpreting state constitutional "right to vote" provisions.[71] In the examples that follow, a state court utilized state constitutional provisions to strike down duly enacted regulations of the federal elections process by the state legislatures. This recognizes a key prerequisite for the ISLT to be implicated: the existence of an intra-state disagreement.[72] These decisions consider a number of issues under the broad umbrella of election regulation: partisan gerrymandering, voter identification laws, ballot receipt deadlines, voter roll purges, early/absentee voting, and third-party ballot collection. This list of affected areas is not exhaustive, as the ISLT departure standard could conceivably apply to

69. Moore v. Harper, 600 U.S. 1, 55–65 (2023) (Thomas, J., dissenting).

70. *See generally* Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Shelby County v. Holder, 570 U.S. 529, 557 (2013) (striking section 4 of the Voting Rights Act and preventing federal preclearance review of voting regulations under section 5 of the Act); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2345–46 (2021) (setting a more restrictive bar for vote denial or abridgement claims made pursuant to section 2 of the Voting Rights Act).

71. Douglas, *supra* note 2, at 101–04 (detailing each state's "right to vote" provision compared to more specific provisions).

72. Where the state court does not invalidate the legislature's statute, a *Moore*-variant ISLT problem does not arise because the state court's ruling reaffirms the legislature's will.

any state election regulation that governs the time, place, or manner of a federal election. However, review of the caselaw suggests that litigation on these topics is most likely to arise across many states and provide a basis for disjunction between state court decision-making and Supreme Court decision-making orthodoxy. Notably, this collection of state court decisions focuses primarily on "right to vote," "free elections," and/or "fair elections" provisions in state constitutions.[73] Many state constitutional provisions are often more detailed than the federal Constitution and reflect state-specific idiosyncrasies, which supply less replicable foundations for assessing the extensive impact the ISLT is likely to entail.[74]

In reviewing the cases explored in Part II, it may be helpful to preview one aspect of the analysis in Part III. Principally, this Note will argue that state constitutional decisions are likely to be better supported, when reviewed by federal courts, where the state decision closely follows analogous federal constitutional review. Thus, as Part III.A. will further expound, state court adherence to or mirroring of federal constitutional principles may be one nearly dispositive factor under my conception of a departure standard. While the significance of the space between federal and state methods of constitutional interpretation is unclear, flagging those differences in what follows may help to refine a key component of what might transgress the ordinary bounds of judicial review.

A. Partisan Gerrymandering – Ohio: Adams v. DeWine[75]

Partisan gerrymandering has been one of the most common election-related subjects state courts have addressed under state constitutional provisions.[76] The recent example of *Adams v. DeWine*, an Ohio case decided in 2022, provides an interesting contrast to the *Moore* litigation in North Carolina. After reapportionment pursuant to the 2020 Census, where Ohio lost one House seat, the Supreme Court of Ohio addressed the constitutionality of the proposed redistricting plan enacted by the Ohio General Assembly.[77] The Court ultimately determined the map violated a provision of the Ohio Constitution enacted by ballot

73. Douglas, *supra* note 2.
74. *Id.*
75. 195 N.E.3d 74 (Ohio 2022).
76. This has been especially true post-*Rucho*, but even in the decades prior, the Supreme Court had encouraged state courts to develop justiciable standards governing partisan gerrymandering. *See* Vieth v. Jubelirer, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986).
77. *Adams*, 195 N.E.3d at 79–81.

initiative in 2018.[78] To determine whether the decision would meet the requirements of the anticipated departure standard, we must look first to the nature of the constitutional provision and second to the state court's decision.

First, Ohio Const. Article XIX, Section 1 is an extremely detailed provision that expressly prevents partisan gerrymandering by the state legislature. Section 1(C)(3)(a) prohibits the General Assembly from passing by simple majority a congressional-district plan "that unduly favors or disfavors a political party or its incumbents."[79] Article XIX, Section 1 (C)(1)(b) prohibits the legislature from "unduly split[ing] governmental units."[80] Article XIX, Section 1 (C)(1)(c) dictates that the plan "attempt[s] to draw districts that are compact."[81] The Ohio court noted that this section articulates a standard that is grounded in a limited and precise rationale and is clear, manageable, and politically neutral.[82] This detailed and specific provision is very similar to a version in the New York Constitution that invalidated its 2022 congressional map.[83] And it stands in stark contrast to the text of the provisions relied upon by the North Carolina Supreme Court.[84]

Second, the Ohio Supreme Court's application of facts to the constitutional provisions was extremely thorough, and it worked to define the contours of the standard described in Article XIX, Section 1. The court invalidated the map relying on evidence of it as a statistical outlier (as a whole as a result of partisan favoritism not warranted by legitimate, neutral criteria) from all other conceivable congressional maps that could have been drawn.[85] This extreme partisan bias was determined not to be attributable to the state's political geography.[86] Further, the court seized on the map's packing and cracking effects, specifically in urban areas such as Cleveland, Cincinnati, and Columbus.[87] The map likewise failed to draw sufficiently compact districts in large part

78. *Id.* at 100.
79. *Id.* at 78 (citing Ohio Const. Article XIX, Sec. 1(C)(3)(a)).
80. *Id.*
81. *Id.*
82. *Id.* at 83–84 (citing Justice Kennedy's concurring opinion in Vieth v. Jubelirer, 541 U.S. 267 (2004)).
83. Jane C. Timm, *N.Y.'s Top Court Tosses Congressional Map over Democratic Gerrymandering*, NBC News (April 27, 2022, 2:50 PM), https://www.nbcnews.com/politics/new-york-top-court-tosses-congressisonal-map-democratic-gerrymandering-rcna26138 [https://perma.cc/TSU8-LZ47]; Harkenrider v. Hochul, 197 N.E.3d 437, 441 (interpreting N.Y. Const. art. III, §§ 4–5, a 2014 constitutional amendment to preclude gerrymandering).
84. N.C. Const. art. 1, § 10 (providing "All elections shall be free").
85. *Adams*, 195 N.E.3d at 87–91.
86. *Id.* at 85.
87. *Id.* at 88–91.

because it contorted district lines in and around high population areas with large concentrations of Democratic voters.[88] The court refined consideration of the notion of a partisan advantage in Section 1(C)(1)(a) by utilizing statistical measures such as efficiency gap, mean-median gap, declination, and partisan symmetry measures.[89]

The court also definitively rejected interpreting a test or standard in a manner that was not based in the language of the constitutional provision. In that sense, the court averted any policymaking beyond the scope of the text of Article XIX. The majority clearly rejected the legislature's argument for a competitiveness standard, noting ". . . 'competitiveness' is not a prescribed standard under Article XIX of the Ohio Constitution. That term does not appear within Article XIX, and rules of statutory construction forbid us from adding to the text of Article XIX."[90] The court further noted that "while supposed district competitiveness was offered here as a post-hoc rationalization for the mapped districts in the enacted plan, Article XIX itself does not require it and does not provide any calculable measure for it."[91]

Adams v. DeWine would almost certainly withstand departure standard review. The Ohio constitution's Article XIX provides identifiable, delineated standards for what constitutes impermissible partisan gerrymandering. As a result, the Ohio court could clearly tie its analysis to the constitutional text, and though text's specificity is not the entire inquiry, it guides the court's review. The decision remains cabined by the contours of the language of the provision itself, even though it employs various statistical measures to define the line of impermissibility for redistricting plans. Ultimately, the court performs the ordinary judicial role of defining what constitutes a partisan advantage that the constitution proscribes, without taking the preceding step of identifying that partisan advantage is itself violative of state law. Further, even under a more substantive conception of a departure, the court's decision does not give rise to an outcome that is entirely out of order with Ohio law. The state constitution expressly envisions circumstances where the state supreme court would invalidate a gerrymandered map. Thus, like the framework of the decision, the actual result of striking the congressional map is itself not unmoored from state practice. This clarifies a key insight—that the specificity of the constitutional provision will often, in practice, do a great deal of work to determining whether the state court performs the ordinary application of interpretation of state law.

88. *Id.* at 90.
89. *Id.* at 91–92.
90. *Id.* at 86.
91. *Id.*

Where constitutional text is clear, the state court is likely to prevail so long as it promotes the values enshrined in the text.

The Supreme Court reviewing the Ohio Supreme Court's decision may also consider the impetus for the recent enactment of Article XIX by the electorate. Presumably, the enactment was a recent indication by the citizens of Ohio to promote districting practices that are not driven by partisanship.[92] The recency of the provision likely supplies leeway to the state courts in refining the applicable standards. Thus, in this case—which was the court's first attempt at defining what constitutes partisan advantage, divisions of local subdivisions, and lack of compactness—it is difficult to say the court departed from past practice. It follows that the Supreme Court could apply a more deferential departure standard where the state court interprets a recent constitutional provision on an issue of first impression.

Last, it is worth noting that the Supreme Court of Ohio employed a remedial remedy in its decision, concluding: "We therefore declare the plan invalid and we order the General Assembly to pass a new congressional-district plan."[93] The court merely struck the map as it was drawn and redirected policymaking authority back to the state legislature, as the state constitution dictates.[94] The state court's willingness to defer to the legislative branch to adhere to the constitutional standard amounts to another factor demonstrating it was exercising its ordinary powers of judicial review rather than usurping legislative policymaking power.

B. Ballot Deadlines – Pennsylvania: Pennsylvania Democratic Party v. Boockvar[95]

In the lead-up to the 2020 Election, in light of logistical complications posed by the COVID-19 pandemic, many states expanded access to absentee or mail voting.[96] Simultaneously, concerns about the capacity

92. *Id.* at 77–78 (explaining that in 2018 Ohio voters overwhelmingly approved the constitutional provision upon which the decision was based, in light of its 2011 congressional map having been struck down by a panel of federal judges in the Southern District of Ohio, but being vacated, in effect, by the Supreme Court's *Rucho* decision).

93. *Id.* at 100.

94. *See* William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, The Atlantic (Oct. 11, 2022), https://theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/ [https://perma.cc/VD2B-DFNY] (arguing that the Supreme Court should adopt a "moderate" version of the ISLT simply requiring that if a state court strikes an act of the legislature, the legislature should have the ability to craft the remedy to the state constitutional violation rather than the state court).

95. 238 A.3d 345 (Pa. 2020).

96. *See* Wendy R. Weiser, Eliza Sweren-Becker & Dominique Erney, *Mail Voting: What Has Changed in 2020*, Brennan Ctr. for Just. (Sept. 17, 2020), https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020 [https://perma.cc/VU37-WMMG].

of the U.S. Postal Service to properly transport ballots in a timely fashion to comply with ballot receipt deadlines arose.[97] The Supreme Court itself addressed ballot deadlines in Wisconsin under federal law and kept the existing deadline intact.[98] In Pennsylvania, litigants pursued an alternative route, seeking extension of the ballot deadline under the state constitution.

Ultimately, the Pennsylvania Supreme Court did extend the ballot deadline beyond Election Day. The court interpreted the state constitution to effectively rewrite the relevant section of the state election law "requir[ing] mail-in and absentee ballots to be returned to Boards no later than 8:00 p.m." to achieve "a three-day extension."[99] The court recognized that state law was unambiguous as to the ballot deadline and that "there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots," as setting such a practice clearly falls within the authority assigned to the legislature under the Elections Clause and Pennsylvania Constitution.[100] Nevertheless, the court relied on the Free and Equal Elections Clause of the Pennsylvania Constitution "to craft meaningful remedies when required," so "Tuesday at 8:00 pm" became "Friday at 8:00 pm."[101]

Pennsylvania's Free and Equal Elections Clause simply provides that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[102] The court noted "in considering this issue, we reiterate that the Free and Equal Elections Clause of the Pennsylvania Constitution requires that 'all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in

97. *See* Dan Mangan, *Postal Service Data Shows Poor Mail-in Ballot Delivery Rate in Key Swing States, Judge Suggests Postmaster General DeJoy Might Have to Testify*, CNBC (Nov. 4, 2020, 11:31 AM), https://www.cnbc.com/2020/11/04/2020-presidential-election-postal-data-shows-ballot-delivery-rate.html [https://perma.cc/VVV4-YAF5].

98. Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28 (2020).

99. *Boockvar*, 238 A.3d at 362, 371.

100. *Id.* at 369.

101. Brief for Laws. Democracy Fund et al. as Amici Curiae in Support of Petitioners at 24, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271) (quoting *Boockvar*, 238 A.3d 345).

102. Pa. Const. art. I, § 5.

government.'"[103] The court expressly recognized that it possessed broad authority to alter elections regulations as necessary under the Clause.[104]

The court additionally pointed to its emergency powers. It cited 25 P.S. § 3046 for the proposition that state courts on the day of an election may decide "'matters pertaining to the election as may be necessary to carry out the intent' of the Election Code, which the Commonwealth Court properly deemed to include providing 'an equal opportunity for all eligible electors to participate in the election process.'"[105] The court analogized the COVID-19 pandemic to a 1985 flood to justify amendment of the ordinary election deadline.[106] Apart from that example, the court did not provide further justification for the court's ability to extend a ballot deadline under the Free and Equal Elections Clause.

Boockvar appears emblematic of a decision the Supreme Court would be likely to disturb if it applied this departure standard. Starting with the constitutional provision, the Free and Equal Elections Clause is extraordinarily general and does not supply readily apparent standards on its face. The text of this clause is unavailing as to setting or adjusting ballot deadlines. The court's opinion did attempt to justify why failing to extend the deadline (for ballots postmarked by Election Day) would result in the denial of a free election given the arbitrariness of the franchise turning on USPS delivery or ballot processing. Likewise, it explained how such voters would be treated unequally from those willing to vote in person. But it did not explain how simply delaying the deadline three days necessarily remedies any unfair treatment between in-person and mail voters, as some potential differential treatment is baked into the risk assessment each voter makes in choosing between methods of casting a ballot. The policy underlying these arguments was rejected in the Wisconsin case,[107] and from a textually literal perspective, the provision does not appear to supply a basis for such drastic court action overcoming the legislature's desired deadline—especially where the legislature did not amend the deadline in between the primary and general elections.

Additionally, the state court's decision to extend the ballot deadline could be perceived as an example of a substantive departure from

103. *Boockvar*, 238 A.3d at 369.

104. *Id.* at 371 (quoting League of Women Voters of Pa. v. Commonwealth, 178 A.3d 809, 822 (Pa. 2018)) ("We have previously recognized that, in enforcing the Free and Equal Elections Clause, this Court possesses broad authority to craft meaningful remedies when required.").

105. *Id.* at 370.

106. *Id.*

107. Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28 (2020) (surmising that it is the role of the legislature, not courts to set ballot deadlines).

state practice, which was a significant concern identified by some of the conservative justices on the Supreme Court in *Moore*. That the Pennsylvania Supreme Court unilaterally set a new deadline looks more like an outcome untethered to ordinary state practice because the court itself created policy. It did not give the state any opportunity to fashion a remedy by extending the ballot deadline to a date of its choosing.[108] This presents the sort of decision the Supreme Court would likely consider to exceed the bounds of ordinary judicial review, at least in part due to the practical outcome of the case.

In the absence of a more specific provision, the Pennsylvania Supreme Court must provide a more robust foundation for its decision to displace the legislature's statutory deadline in the provision's intent, history, and/or purpose. The court's opinion was largely devoid of discussion in its interpretation of the state constitutional provision in terms favored by the federal courts, i.e., original intent and meaning and early post-ratification application. Instead, the court principally focused on one potentially analogous situation to consider as precedent. However, an unforeseen flood occurring on Election Day is easily distinguishable from COVID-19, which had existed for months prior to the election, could be accounted for by voters, and around which election officials could plan. Nor does it appear that the 1985 delay was justified to any extent based on the Free and Equal Elections Clause.[109] Furthermore, it is entirely clear that the Pennsylvania legislature did not attempt to delay the deadline when confronted with the issues the pandemic precipitated.

Boockvar reflects the uphill climb state courts face when interpreting general and vague state constitutional provisions. It was not entirely illogical for the Pennsylvania Court to decide to extend the ballot to ensure a free and equal election, but neither was its decision to do so in this instance necessarily well-rooted in state law.[110] Nor does its disposition setting a new deadline comport with general state practice enabling the state legislature to make election policy judgments. Additionally, it is unclear whether the law was struck entirely because of the Free and Equal Elections Clause or because of some combination of that provision and the emergency powers statute. Where there is

108. *See* Baude & McConnell, *supra* note 94 (suggesting that if the Pennsylvania Supreme Court held the ballot deadline unconstitutional but deferred to the state legislature to resolve the issue, its action should not violate the Elections Clause).

109. *See* In re Gen. Election 1985, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987).

110. It is worth noting that the decision may have been largely unprecedented because Pennsylvania had never before conducted an election in the midst of unforeseen exigencies reaching the magnitude of COVID-19. This reflects an ever-present concern that disproportionate reliance on history and tradition may unduly confine the legality of state conduct.

uncertainty as to whether the state constitutional provision alone wields the authority to undo the legislature's regulation, the Supreme Court may further scrutinize the state court's decision.

In reality, it may well be the case that state courts can reinforce their decision-making by attempting to mirror federal court jurisprudence. The Pennsylvania court did not adhere to the framework often employed by the Supreme Court with its preeminent focus on history, tradition, and original meaning and intent. As a result, the federal courts may be more likely to find that the Pennsylvania court's decision was a departure from its state's law in every aspect but for present exigency.

C. Voter Identification Laws

Voter identification laws have likewise prompted litigation under state constitutional provisions. Federal courts have interpreted the federal Constitution as requiring a high bar to invalidate voter identification laws, essentially foreclosing challenges under the Equal Protection Clause.[111] Therefore, litigation over such laws has centered on state constitutional challenges. These cases in particular are likely to implicate protections under common state "right to vote" or "free," "fair," or "open" elections provisions because they directly implicate primary voting rights issues, i.e., access to the ballot box, rather than the secondary and more abstract right to a meaningful or undiluted vote once cast.

1. Missouri: Priorities USA v. State[112]

In *Priorities USA v. State*, decided in 2020, the high court in Missouri struck down a portion of its voter identification law. Generally speaking, the law required citizens to show valid photo identification, as defined in the statute; if they did not possess sufficient identification, the law also permitted voters to vote under a non-photo identification option by showing an alternative form of identification and executing an affidavit.[113] The affidavit required voters to affirm that they did not possess *any* form of identification approved for voting.[114] Yet a more accurate statement would have been that the voter did not possess acceptable identification under option one, but did under option two—a non-photo identification. The argument, therefore, was that the law was

111. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–03 (2008) (finding that Indiana's voter ID law did not violate the U.S. Constitution, as it supplied only a minor burden on voters' rights and promoted legitimate state interests operating as a neutral and nondiscriminatory law).

112. Priorities USA v. State, 591 S.W.3d 448 (Mo. 2020).

113. *Id.* at 451.

114. *Id.*

contradictory and misleading, requiring voters to either make a technically inaccurate statement under penalty of perjury or forgo participating in a given election.[115] This affidavit requirement was arguably the teeth of the law, as evidence in the case adduced that voters who might ordinarily be rendered unable to participate under option one (photo ID) would often possess sufficient identification under option two.[116]

The Missouri Supreme Court invalidated the affidavit requirement under two state constitutional provisions comprising its right to vote:

> "Two constitutional provisions establish 'with unmistakable clarity' that Missouri citizens have a fundamental right to vote. Article I, section 25 provides that 'all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.' Article VIII, section 2 establishes the qualifications necessary to vote in Missouri. Missouri courts have made clear that, pursuant to these provisions, the right to vote is fundamental."[117]

The court engaged in a rather cursory analysis of the state interests that purportedly justified the law's requirements, holding that it "need not evaluate the extent of the burden imposed by the affidavit requirement because the requirement does not satisfy even rational basis review."[118] It did acknowledge, as expected, that the state has a notable interest in combatting voter fraud.[119] However, it noted that "requiring individual voters . . . to sign a contradictory, misleading affidavit is not a reasonable means to accomplish that goal."[120]

The decision appears sufficiently rooted in state law to survive scrutiny if reviewed by the Supreme Court under the departure standard. That is due, in part, to the decision's limited holding, where the court struck only the affidavit requirement designed by the state legislature, not its entire statutory scheme. While the opinion presents a case decided under the patina of constitutional infirmity, that largely was the result of statutory imprecision as well as an administrative failure to formulate a proper affidavit. Nevertheless, the impact of the poorly crafted affidavit requirement was to make it functionally unlawful for a certain subset of Missouri citizens to cast a ballot.

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115. *Id.* at 454.
116. *Id.* at 454–55.
117. *Id.* at 452 (quoting Weinschenk v. State, 203 S.W.3d 201, 211, 211 n.15 (Mo. 2006)).
118. *Id.* at 453.
119. *Id.* at 455.
120. *Id.*

Because of this technical statutory imprecision, the decision was not deeply "constitutional." The court did not engage in detailed analysis of either the "right to vote" or "free and open" elections clauses' text, history, or precedent. Perhaps, though, this represents a case that would not readily lend itself to oversight by the federal court under the ISLT. The state court seemed to perform a uniquely state court function here—that is, smoothing over imperfections in the practical application of state law to carry out orderly administration of the law at the state and local level. Indeed, it utilized the state constitution to do so, but it failed to present the sort of substantive concern the federal court might be worried about in state courts overriding legislative action.

It is easy to envision that the departure standard would account for a state court resolving a functional peculiarity of its state statute, providing additional leeway to the state court to do so without intense scrutiny. This is true even under a substantive conception of a departure because the decision results in striking the law to harmonize the overall state scheme—a clearly ordinary judicial role. Conversely, if the departure standard is to operate as a strict requirement to ensure state constitutional provisions are not used to frustrate state legislative will without engaging in in-depth constitutional analysis of the sort in which it ordinarily decides state constitutional claims, the Missouri Court might have cause for concern. Certainly, it would not be normatively ideal for the propriety of the Missouri Supreme Court's decision to turn on whether it mechanically goes through the motions of detailed constitutional interpretation or provides adequate window dressing to that end.

Overall, it is difficult to imagine this case would reach the bar set by the departure standard to upset ordinary judicial review in the state. But how the Supreme Court would balance the interplay of state constitutional application and a lack of statutory clarity will be consequential. This is especially so where the state court engages in a perfunctory exercise using general and vague constitutional provisions to resolve the intra-state conflict.

2. *Arkansas:* Martin v. Kohls[121]

In *Martin v. Kohls*, decided in 2014, the Arkansas Supreme Court held that the state's proof-of-identity requirement itself violated the state constitution.[122] In 2013, the state legislature had enacted Act 595, a relatively straightforward but strict identification requirement.[123]

121. Martin v. Kohls, 444 S.W.3d 844 (Ark. 2014).
122. *Id.* at 852.
123. Act 595, as enacted, states that "any person desiring to vote in this state shall . . . [p]resent proof of identity to the election official when appearing to vote in person

Section 1 lists acceptable documentation, which includes a driver's license, photo-identification card, and a United States passport, that satisfy the proof-of-identity requirement.[124]

The Supreme Court of Arkansas pointed to section 1 of article 3 of the Arkansas Constitution as providing the sole qualifications to vote in the state.[125] At the time of the litigation, section 1 provided: "that any person may vote in an election who is (1) a U.S. citizen, (2) an Arkansas resident, (3) eighteen years of age, and (4) lawfully registered to vote in the election before voting in an Arkansas election."[126] The court adhered to a form of textual literalism in striking down the statute, holding that the list in section 1 of article 3 is the exclusive and exhaustive list of voter qualifications for citizens in the state. "Here, the Arkansas General Assembly's passage of Act 595 requires an Arkansas voter to provide a 'voter identification card,' . . . or '[a] document or identification card.' However, Act 595's added requirement of providing a proof of identity as a prerequisite to voting runs afoul of [the provision]."[127]

The Arkansas Court likewise cited precedent in striking down Act 595, drawing on a long history in the state of refusing to permit additional voting qualifications not enshrined in the state constitution.[128] It noted that "for approximately 150 years, this court has remained steadfast in its adherence to the strict interpretation of the requisite voter qualifications

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either early or at the polls on election day." ARK. CODE ANN. § 7–5–201(d)(1)(A) (Supp. 2013). Specifically, section 1 of Act 595 provides the definition of "proof of identity" as follows:

(i) A voter identification card under § 7–5–322; or

(ii) A document or identification card that:

(a) Shows the name of the person to whom the document was issued;

(b) Shows a photograph of the person to whom the document was issued;

(c) Is issued by the United States, the State of Arkansas, or an accredited postsecondary educational institution in the State of Arkansas; and

(d) If displaying an expiration date:

(1) Is not expired; or

(2) Expired no more than four (4) years before the date of the election in which the person seeks to vote.

124. *Martin*, 444 S.W.3d at 846.

125. In 2018, Arkansas amended article 3, section 1 of its constitution to include a voter identification requirement. Emily Walkenhorst, *Voter-ID Amendment Gains Arkansans' Approval*, THE ARKANSAS DEMOCRAT-GAZETTE (Nov. 7, 2018), https://www.arkansasonline.com/news/2018/nov/07/voter-id-amendment-gains-arkansans-appr/ [https://perma.cc/9ZQL-Q6KW]. At issue in *Martin* was, of course, a statutory enactment requiring voter identification. To be clear, the current status of Arkansas law would not affect this assessment of how an ISLT departure standard would apply to a decision like *Martin* if it had been raised in federal court.

126. ARK. CONST. art. 3, § 1.

127. *Martin*, 443 S.W.3d at 852.

128. *Id.* at 851–52.

articulated in the Arkansas Constitution,"[129] citing cases striking requirements including a poll tax and statutory oath.[130] The opinion also draws on the "framers' intent . . . to require the foregoing four qualifications of voters in an Arkansas election and nothing more."[131] Finally, the court rejected the proposition that the Act serves to verify voting qualifications rather than supply an additional requirement.[132]

Upon review under the departure standard, the Supreme Court would be unlikely to displace the ruling in *Martin*. First, the federal court might defer to the state court's determination of whether this is a voting requirement as opposed to "a procedural means of determining whether an Arkansas voter can lawfully register to vote in the election."[133] Here, the identification requirement is a prerequisite to voting and is thus an additional qualification. As to these voting qualifications, the text of the Arkansas constitution is clear and specifically enumerates the state's requirements. It would be difficult to envision the Court dictating that the qualifications are not exhaustive when the Arkansas Supreme Court has a developed tradition of finding that they are. The state court cited to and engaged in detailed discussions of prior cases where the court consistently rejected additional requirements as mere prerequisites to voting. And finally, the state court drew particular attention to its goal of interpreting its state constitutional provisions to effectuate the original intent of its framers. Though it provides a cursory account supporting its conclusion that Arkansas strictly adhered to the four enumerated voting requirements, its conclusion is bolstered by the aforementioned text and precedent, even without delving into historical materials, if any exist.

On the other hand, it is possible to envision the Court policing the distinction between voter qualifications and election process regulations more closely. The Arkansas court emphatically stated that the law constituted an additional qualification and that "[w]e do not interpret Act 595's proof-of-identity requirement as a procedural means of determining whether an Arkansas voter can 'lawfully register to vote in the election.'"[134] Where the Supreme Court finds a state court wrongfully interprets what is a qualification versus a mere process regulation, it may be more likely to assert itself to correct the perceived error of

129. *Id.* at 851.
130. *Id.* at 851–52 (citing Faubus v. Miles, 377 S.W.2d 601 (Ark. 1964); Rison v. Farr, 24 Ark. 161 (1865)).
131. *Id.* at 852.
132. *Id.* at 853.
133. *Id.*
134. *Id.*

state law. This is because the Court retains an interest in separating out what is a time, place, or manner regulation as a threshold question to its jurisdiction—a predicate to analyzing whether a departure occurs. Certainly, one could imagine the Court being wary of state courts classifying statutory obligations as qualifications, rather than regulations, to avert Supreme Court review under the Elections Clause. For that reason, the Court might weigh in to better define the contours of regulations that fall within its purview under a departure standard approach.

Nevertheless, the Arkansas court's opinion appears to reflect established state constitutional interpretation methods and largely mirrors current Supreme Court jurisprudence as to prevailing methods of constitutional interpretation—focusing on history and tradition rather than reading in unenumerated language. Perhaps the Court could require the state court to conduct a more detailed review of whether the state framers' intent bars legislative implementation of a method to verify the four enumerated qualifications. Of course, this would raise unforeseen logistical questions—might the federal court review relevant Arkansas historical sources itself or certify a question to the court? Most likely, the federal court would find that Arkansas properly engaged with original intent vis-à-vis the provision's text and related longstanding precedent in holding that the voter identification requirement—considered as an election manner regulation—violates the state constitution without the act of judicial review running afoul of the Elections Clause.

D. Removal from the Voter Rolls

State constitutional guarantees of the right to vote have also been implicated in cases where citizens had been properly registered to vote but whose status on the voter registration rolls was altered. Many states over the last few decades have revoked registration status for voters who failed to vote in recent elections and/or failed to provide continuing verification of their qualifications to vote when they failed to, or elected not to, participate in an election.[135] A federal statute, the National Voter Registration Act ("NVRA") of 1993, was enacted to standardize the state-by-state process of managing the voter rolls.[136] While the NVRA was presumed by many to supply remedies to the removal of

135. *See* Mac Brower, *In Seven States, Removing Voters from the Rolls Just Got Easier*, Democracy Docket (Sept. 8, 2022), https://www.democracydocket.com/analysis/in-seven-states-removing-voters-from-the-rolls-just-got-easier/ [https://perma.cc/J2JR-679K].

136. 52 U.S.C. § 205 (2023); About the National Voter Registration Act, Civil Rights Division, United States Dep't of Justice (Apr. 5, 2023), https://www.justice.gov/crt/about-national-voter-registration-act [https://perma.cc/QV8S-28F9].

voters' registration status for not participating, the Supreme Court has interpreted statutory protections quite narrowly.[137] Nor have the federal courts interpreted the Fourteenth Amendment, under the *Anderson-Burdick* framework,[138] to find that such removals violate voters' rights under the federal Constitution.[139] In this area of election regulation, it is again state constitutional provisions that state courts have found to guarantee these protections.

1. Michigan: Michigan State UAW Community Action Program Council (CAP) v. Austin[140]

This 1972 decision of the Michigan Supreme Court predates the enactment of NVRA by over two decades, and yet provides more robust protections to voters' registration status in the state than under federal law. The state legislature had enacted Michigan Compiled Laws section 168.509, which required municipal clerks to assess the voter registration records in its jurisdiction yearly and suspend the registration of certain voters that had not performed a qualifying action within the last two years.[141] After the expiration of a thirty-day period subsequent to providing mailed notice of potential cancellation to voters, clerks were permitted to "cancel the registrations of all electors thus notified who ha[d] not applied for continuations."[142]

The Michigan Court decided the case solely under one provision of the Michigan Constitution, article 2, section 1. "In view of our

137. *See* Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (holding 5-4 that the NVRA did not bar Ohio from continuing its policy of purging voters who failed to vote for a certain number of years, despite the state's relatively weak justifications for the purges); Paul M. Smith, *"Use It or Lose It": The Problem of Purges from the Registration Rolls of Voters Who Don't Vote Regularly*, AM. BAR ASS'N (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/-use-it-or-lose-it---the-problem-of-purges-from-the-registration0/ [https://perma.cc/LH7G-9NUQ].

138. *See* Burdick v. Takushi, 504 U.S. 428 (1992) (establishing the ordinary standard for ballot access equal protection claims under the federal Constitution, where the court must first determine the extent of the burden caused by the challenged provision, and second, apply a corresponding level of scrutiny—either rational basis review or strict scrutiny).

139. *See* Smith, *supra* note 137 (referencing Fair Fight Action v. Raffensperger, No. 1:18-CV-5391-SCJ, 2019 U.S. Dist. LEXIS 245904 (N.D. Ga. Dec. 27, 2019)).

140. Michigan State UAW Cmty. Action Program Council v. Sec'y of State, 198 N.W.2d 385, 386 (Mich. 1972).

141. *Id.* at 386 (citing the relevant provision, "During the month of December in each year, the clerk shall examine the registration records and shall suspend the registration for all electors who have not voted, continued their registration, reinstated their registration, or recorded a change of address on their registration within a period of 2 years. Each such elector shall be sent a notice . . . .").

142. *Id.* at 386–87.

disposition of the case, we will deal with only one issue: Whether [the Act], violates Const.1963, art. 2, § 1, by imposing a further qualification for voting in addition to those qualifications exclusively provided therein?"[143] Thus, the court declined to reach issues under the state variants of due process or equal protection. The court's decision-making process under this provision largely mirrored an *Anderson-Burdick*-like assessment of the burden followed by a scrutiny analysis considering the state interests and means employed.

The majority noted that *any* burden must satisfy a compelling government interest.[144] However, it also suggested that the application of strict scrutiny is prompted as a result of the Act's burden on the right to vote both qualitatively—recognizing the significance of losing voter registration status outright—and quantitatively—pointing to evidence that nearly 600,000 citizens from Detroit alone were purged from the rolls between 1960 and 1970.[145] Next, the majority recognized the compelling interest of voter fraud prevention, as raised by the state.[146] And it noted that the Act accomplished that purpose to some extent. However, the statute failed strict scrutiny under a least restrictive means analysis, commonplace in federal court scrutiny analysis, noting that other methods could have been utilized to verify voter residences.[147]

This decision appears likely to withstand Supreme Court scrutiny under the departure standard. The Michigan Supreme Court engaged in straightforward analysis that mirrors federal court decision-making through application of an *Anderson-Burdick*-like framework and ordinary strict scrutiny application.[148] Any concerns regarding the vagueness or generality of the "right to vote" provision are less weighty here, given the nature of voting roll purges' direct implication on the ability to vote. In other words, the text is availing of a standard in this context, because registration status is the mechanism by which one is able to exercise the franchise. Perhaps one weakness in the court's decision to strike the legislature's statute is the absence of a discussion on the application of Michigan's right to vote provision over time. The court mostly

143. *Michigan State UAW Cmty. Action Program Council*, 198 N.W.2d at 387. MICH. CONST. art. 2, § 1 ("Every citizen of the United States who has attained the age of 21 years, who had resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes.").

144. *Michigan State UAW Cmty. Action Program Council*, 198 N.W.2d at 388.

145. *Id.*

146. *Id.*

147. *Id.*

148. Notably, the court does not cite to federal caselaw for employing that approach as this case predates those federal decisions. *Id.*

laid out conclusory statements about the meaningfulness of the right to vote in the state without citing to historical record or precedent.[149] At the same time, lofty language about the importance of voting is, as a general proposition, uncontroverted and uncontroversial. Surely, the decision would not deviate from state law or ordinary judicial review by prefacing its analysis with broadly accepted truisms. It is probably sufficient for state courts to generally hold that the right to vote is paramount without extensive assessment of state practice.

Whether the Supreme Court would overturn a similarly constructed decision under the Elections Clause would be a close call. An area for concern here would be if the Supreme Court probes the state court's classification of the Act's operation as an additional qualification rather than a regulation verifying qualifications. Even if deemed a regulation of the elections process, the state court nonetheless grounded its reasoning in burden and scrutiny analysis and engaged in procedurally routine judicial review. However, the substantive result of the decision to read hundreds of thousands of voters back on the active rolls could be sufficiently sizable that it prompts concerns about whether there is a substantive departure from state practice, and whether such a major policy question ought to be left to the state legislature. A case like this, if reviewed today, would likely expose consequential fault lines on the Supreme Court regarding whether the departure standard has decision- or outcome-focused contours.

2. *Maryland:* Maryland Green Party v. Maryland Board of Elections[150]

The Supreme Court of Maryland similarly struck down the state's statutory scheme permitting inactive voter registration status in 2003.[151] "[T]he Maryland Election Code provides for a separate inactive voter registration list and sanctions removal from that registry for voters whose names have remained on the inactive voter registration list for a specified period of time."[152] And "Title 1 of the Election Code, in § 1–101(gg), excludes an individual whose name appears on the inactive voter registry from the definition of 'registered voter.'"[153]

The state court struck the provision on the grounds that the Maryland Constitution supplied exhaustive voter qualifications,

149. *Id.* at 387–88 ("[T]he right to vote is a right at the heart of our system of government . . . ."; "[T]he right to vote receive[s] a referred place in our constitutional system . . . .").
150. 832 A.2d 214 (Md. 2003).
151. *Id.* at 229.
152. *Id.* at 225.
153. *Id.*

preventing local subdivisions from maintaining dual registration lists classifying voters with different statuses. The majority stated:

> The Maryland Constitution prescribes the exclusive and uniform qualifications for being on the list of registered voters and being entitled to vote under. The right to vote is conferred upon any United States citizen, age eighteen or older, who is a Maryland resident, and who is not disqualified by a criminal conviction or mental disability. Article 7 of the Declaration of Rights emphasizes that "every citizen having the qualifications prescribed by the Constitution" has "the right of suffrage." Article I, § 1, mandates that, once entitled to vote in the election district of his or her residence, a qualified voter remains entitled to vote in that district until he or she "shall have acquired a residence in another election district."[154]

Furthermore, article I, sections 2 and 4 bolster section 1's mandate by requiring uniform registration of all registered voters "possessing the qualifications set forth in § 1 and not disqualified under § 4."[155] The court then proceeded to strike down the state legislature's imposition of the additional qualification of casting a vote frequently and the enablement of local election boards to maintain inactive voter lists.[156]

Like the North Carolina Supreme Court in *Moore*, the Maryland Court relied on a similar mélange of constitutional provisions for its decision. From its opinion, one can glean that each individual clause of Article I would not operate to invalidate the purging statute and process, but only when read together. This is because the challenged action in the case denied "inactive" voters the ability to sign petitions for a Green Party candidate to appear on the ballot. Whether voters' registration was deactivated entirely was not raised. The circumstances set forth in section 3-502 of the Election Code were constitutionally valid bases for removal, complying with Article I, section 4, but the law's provision of an inactive list without affirmative proof of relocation to a different district ran afoul of Article I, section 2. Thus, it was the statutorily-enabled process of maintaining dual registration schemes that violated section 2, thereby undermining the broader principle reflected in section 1. The court also fleetingly noted that the practice "seems flatly inconsistent with the equal protection component of Article 24 of the Declaration of Rights."[157]

Here, each provision plainly relates to voter eligibility. The provisions are not open-ended guarantees that require the state court to

154. *Id.* at 222. The court also relied on Article I, section 2 of the Maryland Constitution requiring a system of uniform registration.
155. *Id.*
156. *Id.* at 229.
157. *Id.* at 227.

demonstrate a strong foundation in state law for standards that it applies. Instead, the Court may simply identify the state constitutional guarantee of the right of suffrage comprised of particular qualifications that are addressed. As in *Martin v. Kohls* (Arkansas), the Maryland Court is likely to have the benefit of latitude in defining whether constitutional voter qualifications are exclusive and exhaustive. Even with the proviso that that the Supreme Court may second-guess whether the scheme actually reflects a qualification rather than regulation, the state court's decision is likely sound. The Maryland court's holding is perhaps bolstered further considering that whether voters have participated in recent elections serves a less useful role (if any role) in confirming the constitution's voter qualification than does voter identification. It applied the multi-faceted constitutional patchwork of sections 1, 2, and 4, and the Declaration of Rights routinely. The result of ordering voter participation in a ballot signatures process appears well within the bounds of ordinary adjudication.

Overall, the lack of ambiguity resulting from the clear text of article I, section 1's general principle and sections 2 and 4's specific application, buttressed by Article 7 of the Declaration of Rights, makes the Maryland decision difficult for the federal courts to disturb. The state certainly did not go so far afield of the judicial role when it methodically applied the plain text of its constitution. Under the deferential departure standard, it would be difficult to surmise that this ruling frustrates federal rights.

E. Voter Registration Process – New Hampshire: New Hampshire Democratic Party v. Secretary of State[158]

Enacted in 2017, SB 3 amended New Hampshire's voter registration law to impose new requirements to prove an individual's domicile, which varied depending on whether the voter was registering more than 30 days prior to the election or within 30 days or on election day.[159] Further, the Act created new categories of conduct constituting wrongful voting subject to statutory penalties.[160] The court struck the law under part I, Article 11 of the New Hampshire Constitution, providing: "elections are to be free, and every inhabitant . . . shall have an equal right to vote . . . ."[161]

The court then embarked on defining the legal standard that applies to challenges under Article 11. It first engaged in a discussion of

158. 262 A.3d 366 (N.H. 2021).
159. *Id.* at 369–70.
160. *Id.* at 370.
161. *Id.* at 374.

precedent, especially *Guare v. State of New Hampshire*,[162] to reaffirm its utilization of an intermediate scrutiny standard when a voting restriction is somewhere between severe and reasonable.[163] Further, the decision cited federal caselaw reaffirming the strength of a generalized "right to vote,"[164] its "no set of circumstances" test that applies when challengers mount a facial challenge to a statute,[165] and the application of a burden and corresponding level of scrutiny analysis.[166]

The court concluded that SB 3 was unconstitutional because the State "failed to demonstrate that [the Act] is substantially related to the precise governmental interests it set forth as justifications necessitating the burdens the law imposes on the right to vote."[167] The majority acknowledged that the state interests proffered—safeguarding voter confidence, protecting public confidence in the integrity of the elections system, and protecting against voter fraud—were "important, if not vital."[168] However, it relied on the findings of the trial court that while SB 3 does not actually operate to impede fraudulent voters, it would nevertheless burden a class of good-faith voters. Thus, the court concluded that its "perceived need protecting the elections process was 'illusory.'"[169]

Considering the case in light of Supreme Court review under the ISLT, the opinion suggests that the state court operated in the legislative realm. The New Hampshire Supreme Court did not address the burden on voters in depth. It neither opined on statistical measures as to the scope of SB 3's burden on the universe of voters, nor provided a compelling explanation on when or why the extent of the burden on the individual voter is sufficiently problematic. If there was concern that the law affected voters registering more closely to the election, the court likely could have discussed that burden in light of the entire voting scheme.[170] Further, the court engaged in a cost-benefit analysis

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162. 117 A.3d 731 (N.H. 2015).

163. *New Hampshire Democratic Party*, 262 A.3d at 376–78 (citing *Guare v. State*, 117 A.3d 731; Akins v. Sec'y of State, 904 A.2d 702 (2006)).

164. Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

165. *New Hampshire Democratic Party*, 262 A.3d at 374–77.

166. *Id.* at 378 (citing Crawford v. Marion County Elections Bd., 553 U.S. 181 (2008), as a recent articulation and exploration of the *Anderson-Burdick* framework by the Supreme Court).

167. *Id.* at 380.

168. *Id.*

169. *Id.*

170. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2344 (2021) (assessing the burden in light of all possible ways of voting in Arizona). Just because one method of voting was arguably frustrated or impeded did not mean a given voter was inhibited overall. Here, following that logic, same-day registrants may not have been

of the new law, which might ordinarily be thought of as a legislative role. Under a substantive conception of a departure, focusing on the ultimate outcome in the case rather than the decision-making process, these holes in the state court's reasoning could be consequential—making the court's decision appear outcome-driven. This suggests possibly meaningful interplay between substantive and procedural views of a departure, where if an opinion is seemingly not sufficiently thorough or well-reasoned, the outcome may likewise appear an impermissible departure.

The general and vague right to vote provision at issue may present further problems for the court's analysis. The stakes of SB 3's mandate could be framed as an impediment in the process of registering to vote with specified opportunities to reach compliance, though not an outright denial of participation. Of course, this could be mitigated by the state court's finding that the forms designated to cure any defects were misleading and/or confusing,[171] as citizens would run the risk of their disenfranchisement being the product of an arbitrary state practice rather than their own mistakes. However, the court did not hold that the form defects make the statute unlawful under the state constitution, but rather that the entire scheme was overly burdensome to permit.[172] Thus, the court subjected its decision to scrutiny on whether it properly applies its right to vote provision in this context.

Finally, the precedent cited by the state court is far from longstanding. Although the court largely followed a similar process to the federal courts' scrutiny inquiry, it did so with an intermediate variant unique to New Hampshire law, expanding on *Anderson-Burdick*'s bifurcated approach to burden. It is also worth noting that while application of a burden/scrutiny analysis might operate to avoid Election Clause scrutiny to the extent it mirrors federal court jurisprudence, it might prompt Supreme Court review on other grounds.[173] The practice of applying intermediate scrutiny dates to 2015, when *Guare* was decided. The majority reexamined *Guare*'s holding and reasoning in detail and found it continues to be persuasive, rejecting the State's urging that it be overruled. And *Guare* itself changed course from a previously

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burdened when they could have simply registered sooner and had additional time to cure any defects under SB 3's requirements.

171. New Hampshire Dem. Party v. Sec'y of State, 262 A.3d 366, 382 (N.H. 2021) (finding that Form B and the VAD were integral to the overall structure of the law, that those components could not be severed, and the entire law must be struck).

172. *Id.*

173. For example, under the Adequate and Independent State Grounds Doctrine, if the state court's standard rests on a federal ground by use of a particular rule or doctrine. *See, e.g.*, Republican Nat'l Committee v. Burton, 455 U.S. 1301 (1982).

employed balancing test from *Akins*.[174] While likely alone not dispositive of the case's propriety under the Elections Clause, that the decision here points to recent precedent is unlikely to be highly persuasive in showing that it has not departed from state law. Overall, considering the decision's possible infirmities as to the burden, costs and effectiveness, and recently devised intermediate scrutiny standard, the Supreme Court sitting in review may be likely to find the state court abdicated its judicial role and claimed raw policymaking power over the state legislature.

F. Third-Party Ballot Collection – Montana: Driscoll v. Stapleton[175]

While the Supreme Court declined to invalidate Arizona's limitations on third-party ballot collection under Section 2 of the Voting Rights Act,[176] the state courts in Montana concurrently weighed in on the issue under the state constitution. In *Driscoll v. Stapleton*, the Montana Supreme Court enjoined the application of the Ballot Interference Prevention Act ("BIPA") through the 2020 Election.[177]

Under BIPA, absentee ballots could only be collected by certain persons, essentially only precluding ballot collection organizations from receiving or transporting ballots.[178] BIPA was both enacted by the state legislature in 2017 and passed by ballot initiative in 2018.[179] The Montana District Court issued a preliminary injunction, which the Montana Supreme Court affirmed less than two months prior to the general election.[180] This raises a unique question under the ISLT: whether the Supreme Court would entertain issuing a stay of a state court's grant of a preliminary injunction under the departure standard.

The Montana Supreme Court explicitly applied the *Anderson-Burdick* analysis.[181] While the trial court applied strict scrutiny, the highest court declined to decide the applicable level of scrutiny, noting "it [was] not dispositive to the issues on appeal."[182] Even without identifying the precise scrutiny standard, the court evaluated the trial court's findings on disproportionate effects of the Act on Native American voters.[183] Principally, it relied on evidence of increased turnout of this class

174. *New Hampshire Dem. Party*, 262 A.3d at 378.
175. 473 P.3d 386 (Mont. 2020).
176. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2348 (2021).
177. *Driscoll*, 473 P.3d at 395.
178. *Id.* at 389.
179. *Id.* at 388–89.
180. *Id.* at 390, 395.
181. *Id.* at 393–94.
182. *Id.* at 393 (explaining that the case was not yet being decided fully on the merits and thus there had not been a full evidentiary record developed).
183. *Id.* at 393–94.

of voters in recent elections due to the proliferation of collection organizations.[184] On the other hand, the court disregarded the interests proffered by the Secretary because the government did not provide evidence of voter fraud or ballot coercion in Montana.[185] Nor did it find that the Secretary sufficiently refuted the specter of disproportionate impact on Native Americans.[186]

The challenge resulted in the court enjoining the Act statewide, and not only in a way that was targeted at preserving ballot collection for Native American voters. It is reasonable to surmise that the Supreme Court would be concerned with a remedy striking a law in its entirety when it imposes a disproportionate burden on one group in limited geographical areas. Especially where the Court is concerned with a substantive departure, a statewide injunction lends itself to appearing as policymaking that usurps the legislature's power. If the Montana court had limited the scope of the injunction to correspond to its finding on the statute's particularized and limited burden, the outcome would have looked more convincingly like an exercise of ordinary judicial review and discretion.

Given the case's procedural posture, it seems the Supreme Court would be likely to scrutinize and ultimately overturn the decision under the departure standard. The state court's burden and scrutiny analyses were abbreviated because it was reviewing the preliminary injunction dispute in the run-up to an approaching election. While the federal court review almost assuredly would not center on the state's application of its preliminary injunction standard, functionally the abbreviated analysis that accompanies that sort of preliminary determination may fail to sufficiently justify the state court's ordered outcome under departure standard scrutiny. The court did not examine the burden statistically as to affected Native American voters. Nor did the court identify a level of scrutiny or articulate a precise standard for the governmental interests or means. Perhaps the federal court would afford more leeway to the state court where a full factual record was not available, but on the other hand, federal courts may be hesitant to invalidate a state statute without thorough fact-finding. And not only was BIPA an enactment of the state legislature, but it was also adopted by the voters. Where both the legislature and citizens' policymaking preference will have been frustrated, without full exploration of a legal standard on the merits, the Elections Clause may well be interpreted to dictate a preference for the will of

184. *Id.*
185. *Id.* at 393.
186. *Id.*

the public and its representatives even under an ordinarily deferential departure standard.

G. Other Categories of Cases

The state court decisions described above only scratch the surface of the entire universe of cases the ISLT could implicate, even in the narrow context of judicial review of statutes. Beyond more general "right to vote" or "free elections" cases, various state constitutions guarantee voting rights through more detailed, technical, and limited-scope provisions.[187] And many state court decisions have interpreted those provisions to invalidate state legislatures' enactments. These cases run the gamut of legislation under the umbrella of election time, place, or manner regulations, including: early voting,[188] voting by mail,[189] and candidate ballot access.[190] While it is beyond the scope of this Note to address many of the decisions confined to state-specific provisions unique to the constitutional framework of a given jurisdiction, they too are presumably subject to similar review under the departure standard. As an initial prediction, we might surmise that, as a category, cases implicating explicit provisions are less likely to reflect a sufficient departure from state law under federal court scrutiny. This again reiterates the point that while the ISLT standard is unlikely to turn solely on the specificity or generality of a provision's text, that consideration remains a notable factor.

III.
Practical Effects of the Departure Standard

Having attempted to forecast the technical application of the departure standard to existing decisions ripe for review, this Note now considers the effect of the impending standard at a higher level of abstraction. As a preliminary point, the difficulty of predicting the determinative features of the analysis under the standard is likely an indictment on the standard's utility itself. It remains to be seen whether the Supreme Court possesses the competence to divine a baseline understanding of

187. *See generally* Douglas, *supra* note 2.

188. Lamone v. Capozzi, 912 A.2d 674, 697 (Md. 2006) (holding that statute providing for early voting violates state constitutional provision setting election day).

189. Albence v. Higgin, 295 A.3d 1065, 1097 (Del. 2022) (holding that vote-by-mail and same-day registration statutes violate absentee voting-specific state constitutional provision).

190. Patterson v. Padilla, 451 P.3d 1171, 1191 (Cal. 2019) (striking down requirement on candidates to file income tax returns in order to appear on the ballot where a state constitutional provision set the exclusive qualifications for office).

state law practice from which to judge the present opinion or what typifies ordinary judicial review from legislating. And much of its determination must be made at the cert stage or on the shadow docket, where the Court will be pressed for time (especially with elections approaching) in assessing whether a state court decision meets the threshold for departure standard review without full briefing.[191]

The Court attempted to find a middle-ground, neither adopting the ISLT in full nor rejecting it outright. However, that attempt at moderation simply delayed tougher questions for another day. The departure standard may be capable of resolving some of the questions left open by *Moore*, but surely will not provide useful guidance in the others like some of the close calls described above. Meanwhile, no substantive guiding principle orients the Court's review under the Elections Clause—rather, its evaluation is limited to whether the state legislature has been sufficiently displaced in carrying out a federally-delegated role.[192] Though the Court's eschewal of a categorical approach to the ISLT may facially appear to be a compelling exercise of judicial prudence, it will compromise ease of judicial administration, competent and principled federal review, and predictability in outcomes.

While it is true that state law (i.e., statutes or other state practices) is often reviewed for its adherence with federal law, this area of litigation presents a distinct issue. That is, it is the very sufficiency of the state court decision and/or opinion that is itself being evaluated by the Supreme Court. And what would determine the sufficiency of such a decision is its adherence to the ordinary application of state law.[193] This arrangement will likely create at least three issues affecting the propriety of state lawmaking. First, application of state constitutional law likely will conform to prevailing federal constitutional modes of interpretation. Second, cases fostered through the state courts presenting ISLT issues will not be a representative sample of the landscape of state election law. Third, state court decision-making in light of federal review will create troublesome incentives for state legislatures and courts in setting policy for upcoming elections.

191. *See* Shapiro, *supra* note 11, at 184.

192. Ordinarily, when the Supreme Court reviews structural questions, it does so within the ambit of the organizational framework of the federal government. State governments can be and often are arranged in distinct ways, allocating the powers of each branch differently than the federal government does. *See* Litman & Shaw, *supra* note 12, at 1261–68.

193. It remains questionable to assert federal courts possess superior competence to make such a determination over the state court itself.

A. Aligning the Substance of State Constitutional Law on Federal Elections with Federal Decision-Making

A departure standard would evaluate, to some extent, a departure from the "ordinary modes of constitutional interpretation" or a "fair reading of state law."[194] This prompts the question: what comprises state law that the federal court would evaluate? As the cases in Part II illustrated, it will likely incorporate an ill-defined notion of a case result's departure from the substance of state law. But the inquiry will likewise often center on the process of the state court applying state law in its decision through text, structure, history, and precedent of the state constitution.

The text of the state constitutional provision could be functionally determinative.[195] If the provision supplies an applicable principle or standard on its face, the state's adherence to it is justified. The Ohio case, *Adams v. DeWine*, illustrates this point well when compared to *Moore*. There, the state court's invalidation of the congressional map was directly contemplated by the constitutional provision.[196] In contrast, North Carolina's free elections, due process, and equal protection clauses did not facially suggest their application to claims of partisan gerrymandering.[197] The other category of cases described also reflect more deferential application of the departure standard for clear, standard-explicative state constitutional provisions.

In "right to vote" and "free/fair elections" cases, the inquiry is more nuanced. As exploration of established caselaw demonstrated, state courts have incorporated structure, history, and precedent to varying extents. *Maryland Green Party v. Maryland Board of Elections* relied on structure, considering the application of three provisions of the Maryland Constitution and Declaration of Rights, which taken together, define the contours of the right to vote and system of voter registration in the state.[198] And that quadruple-helix of constitutional provisions explicitly dictated voter qualifications (and the manner of

194. *Moore* transcript, *supra* note 27, at 47–48, 51–52, 54.

195. For a more holistic discussion on the ISLT's tendency to promote and require adherence to textualism as defined by federal courts, see Shapiro, *supra* note 11, at 178–84 (arguing, *inter alia*, that many states' legal tradition requires adherence to other theories of interpretation other than textualism and/or other extraneous factors); Litman & Shaw, *supra* note 12, at 1247, 1252–53 (arguing how textualism in the federal courts, predicated on the structure of the federal government, may be inapplicable to state courts depending on their role in their respective state system).

196. *See supra* notes 75–94 and accompanying text.

197. *Moore*, *supra* note 19.

198. *See supra* notes 150–57 and accompanying text.

state administration maintaining proof thereof), in the court's view.[199] *Martin v. Kohls* best explored the history of voter qualifications clauses of the Arkansas Constitution but still largely relied on a state tradition of interpreting requirements exclusively, pointing to longstanding precedent.[200] The other cases were largely devoid of addressing the original meaning and intent, at the time of enactment, of relevant provisions. Of course, this could be for good reason—whether it be rejecting the interpretive premise of originalism or a dearth of historical evidence.[201] But a federal court accustomed to decision-making under the federal Constitution stressing adherence to pre-enactment history could find its absence in these decisions cause for concern.[202] Every state court decision in Part II relied on precedent to some extent—though some longstanding and some recent (e.g., *New Hampshire Democratic Party* citing *Guare*).[203]

Further, many of the decisions already incorporated federal doctrinal concepts in their opinions. Many courts employed the *Anderson-Burdick* framework—or a variant thereof—as developed under the Equal Protection Clause.[204] And many carried out a routine federal scrutiny analysis, assessing government interests and the fit of the means employed by the state law. We might expect state courts moving forward to continue to adopt these tests in their state constitutional jurisprudence and clearly cite to them as the basis for their rulings. But if they do so, the Supreme Court may have a hook to address the invocation of federal constitutional doctrine on other grounds.[205]

Importantly, some state court decisions may venture to consider other bases for striking state legislative election regulations. A state court could conceivably consider public opinion, the urgency of resolving the issue, or the case's procedural posture. The Montana case, *Driscoll v. Stapleton*, stayed the ballot collection prohibition on

199. *Id.*

200. *See supra* notes 121–34 and accompanying text.

201. *See, e.g.,* Dan Friedman, *Does Article 17 of the Maryland Declaration of Rights Prevent the Maryland General Assembly from Enacting Retroactive Civil Laws?*, 82 Md. L. Rev. 55, 59 (2022) (exploring the constitutional structure in Maryland to reject the notion that a constitutional interpreter can or should pick a single theory and adhere to it in every case; surmising that state courts could disregard textualism and originalism in interpreting their respective states' constitutions as those interpretive methods may be inconclusive or unpersuasive).

202. *See* Litman & Shaw, *supra* note 12, at 1258–61 (describing a doctrinal framework in other contexts that affords a state interpretive autonomy as to its state law, and noting the ISLT calls into question this point).

203. New Hampshire Dem. Party v. Sec'y of State, 262 A.3d 366, 376–78 (N.H. 2021).

204. *See* Burdick v. Takushi, 504 U.S. 428 (1992).

205. *See supra* note 173.

a lowered standard applying to a preliminary injunction.[206] *Michigan UAW CAP v. Austin* stressed the importance of invalidating the statute because of its tendency to deregister broad swaths of the electorate.[207] These considerations could be understood as unconventional rationales to determine the meaning of the state constitution—but it is not clear, and is perhaps problematic, that a state should be hindered in taking the information into account if it so chooses.[208] After all, the very nature of the decisions concern popular participation in elections that constitute who comprises the government. This prompts heightened concerns of voter exclusion or dilution—which may authorize state courts to decide cases in less conventional ways to avoid entrenchment by the political branches.[209]

We are likely to see state courts continue to lean into federal modes and methods of interpretation in anticipation of the departure standard. While it may not be explicitly necessary for state law to mirror federal practice, doing so is presumably less likely to signal a possible departure to the Supreme Court under the ISLT. At the very least, it lowers the odds of state supreme court reversal. State courts will be faced with strategic choices—principally, whether voting rights decisions should be draped in the window dressing of federal law. Where a case walks like a federal constitutional decision and talks like a federal constitutional decision, it may be likely to be accepted as one. But this could be profoundly troubling. Not only would there be parallelization of state and federal constitutional law as applicable to election disputes, but the departure standard could infringe on the ability of states to facilitate a laboratory of democracy. Some states may decide constitutional cases differently than the Supreme Court would—not just in outcome but in method—and that novelty in constitutional interpretation is justified.[210] Moving forward, we are unlikely to see evolving trends in constitutional interpretation that might be normatively appealing and reinforce public legitimacy of the court's role in elections. Further, to the extent the Court harps on the overall outcome's deviation from state law or

206. *See supra* notes 175–86 and accompanying text.

207. *See supra* notes 140–49 and accompanying text.

208. *See* Litman & Shaw, *supra* note 12, at 1257–69 (generally supporting that state courts are to have latitude in establishing interpretative methods that decide state law).

209. *See generally* Daryl J. Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 406 (2015).

210. *See* Litman & Shaw, *supra* note 12, at 1250–51 ("States deviate in countless other ways from the federal system when it comes to the allocation of power and authority . . . . States also deviate from the federal system in ways more directly relevant to questions about methods of interpretation . . . . [T]here is likewise no basis for the assumption that the rules, principles, and doctrines developed with specific reference to features of the federal system apply to the states.").

practice, we may see state courts self-circumscribe the reach of their decisions to appear within the generally accepted range of court action. In either sense, the departure standard stands ready to thwart progress.

B. An Unrepresentative Sample of Disputes

The ISLT as a whole, including its application through the departure standard, risks one-sided application—striking down voter-friendly aims. An ISLT dispute arises, in this iteration, only where the state legislature and state court disagree. A statute enacted by the legislature is likely to violate the "right to vote" where it denies, burdens, devalues, or constricts votes. State constitutions less readily apply to voter-friendly or expansive action. Indeed, each of the cases explored in Part II presented this sort of conflict.[211]

What if the North Carolina General Assembly had drawn a congressional map fairly reflecting the partisan balance of voters in the state? It is difficult to envision a constitutional provision of which that would run afoul. What if Missouri had not passed a voter ID law? Permitting citizens to vote with registration verified only by voter rolls is unlikely to prompt a constitutional question. What if Pennsylvania or New Hampshire had provided even more expansive routes for mail-in voting or same-day registration? Those decisions to supply expanded methods for registering and voting would not ordinarily prompt constitutional claims under a right to vote provision. Overall, these alternative scenarios demonstrate what the ISLT cannot capture. The departure standard may therefore be used to scrutinize decisions that thwart restrictive voting enactments under expansive principles. Practically, it will be the rare and elusive case where a federal court asserts itself to revert to a state legislature's voter-friendly course of action or inaction.

If these case filtration concerns come to fruition, the Supreme Court will not have an accurate and holistic representation of election law disputes in a given state. The Court will only address disputes between legislatures and courts; it will be less likely to encounter state supreme court invalidation of policies promoting less burdensome democratic participation. Thus, the Court's ability to assess ordinary state lawmaking in this domain—quite possibly the thrust of the departure standard—will be inordinately narrow. Further, the Court's perception of the frequency of state courts nullifying legislative action may be

211. And the vast majority of cases showed a similar tilt, where the state legislature's action restricted voting access or the value of a vote and the state court decision expanded the same. Supreme Court review would then enable the reimposition of more restrictive measures.

exaggerated, leading to a heightened sense of urgency for the federal courts to act.

C. State Lawmaking and Court Decision-Making Incentives

Apart from bringing about a confluence of state and federal court constitutional interpretation, the Supreme Court's adoption of the departure standard will create negative incentives for state court decision-making in other ways.[212] The net result of impending federal court review stands to create further uncertainty in elections by precluding finality at the state level.[213] In an era of political polarization and distrust in the elections process, the departure standard would contribute to erosion of confidence in our democratic system.[214]

First, the departure standard incentivizes state legislatures to enact legislation closer to the election.[215] This will delay the possibility for state court review—as well as corresponding federal court review—prior to the election. Changes in rules pending enactment and review will confuse voters and invariably cause some disruption to participation.

Second, the standard incentivizes state courts to write longer opinions, mirror federal orthodoxy, delay publishing opinions until closer to elections, and limit the scope of their judgment and possible remedies. A state supreme court seeking to prevent the Supreme Court from thwarting its determination on state law will simply attempt to make it impracticable for the Court to review in a timely fashion.[216] Further, a cascading effect of multiple states' courts issuing consequential elections rulings late in election cycles detracts from the ability of the Court to hear every case fully and decide them prudently.

Meanwhile, the federal courts have largely adhered to the *Purcell* principle—dictating that courts should prudentially abstain from ruling on cases as an election draws near.[217] This approach centers on creating predictability and maintaining voters' expectations in the critical juncture of a race.[218] This rationale applies to state court actions as well,

212. *See* Shapiro, *supra* note 11, at 186–89.
213. *Id.*
214. *Id.* at 192–95; *see also* Brief of Benjamin L. Ginsberg as Amicus Curiae in Support of Respondents at 23–24, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271); Brief of Richard L. Hasen as Amicus Curiae Supporting Respondents at 19–26, *Moore*, 600 U.S. 1 (No. 21-1271).
215. Brief of the Brennan Center for Justice as Amicus Curiae in Support of Respondents at 26–30, *Moore*, 600 U.S. 1 (No. 21-1271).
216. *Id.*
217. *See* Shapiro, *supra* note 11, at 170–72, 198 (citing Purcell v. Gonzalez, 549 U.S. 1 (2006)).
218. *Id.*

though its scope is unclear.[219] Where state legislatures and state courts delay on issuing regulations or decisions striking them, the Court's impetus for addressing Elections Clause issues cuts against the policy underlying *Purcell*. Perhaps the Court, given the opportunity, will err on the side of state legislatures in moments of exigency as a matter of form.

All of this is to say, the deferential nature of the departure standard will be functionally critical to its operation. The Supreme Court will not be able to embroil itself in every intra-state election controversy between legislatures and courts. But where it should draw the line on designating cases worthy of granting certiorari for federal review is less clear under the departure standard than any alternative version of the ISLT. Because of this, state courts are likely to make their decisions appear federally acceptable, both in form and substance. Surely the structure of state lawmaking and judicial review will not rest on such empty formalities, but indications suggest that shallow inquiry might carry the day.

Conclusion

The right to vote—secured in no small part by state constitutions—is the bedrock of democracy. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[220] Inevitable refinement of the ISLT in *Moore*'s progeny will reshape the parameters of state courts protecting and securing the right to vote by redefining permissible judicial review they are tasked with undertaking. State court constitutional decision-making as to elections will shift profoundly in light of the ISLT, both in the interim and after its further adoption. In order to ensure that voters are entitled to meaningful voting protections under state constitutional schemes, proponents of state law voting protections must begin to prepare today for this seismic doctrinal shift. If they do not, not only will the power of state courts erode, but so too may guarantees to voters long thought unassailable.

219. *Id.* at 198 (citing Wise v. Circosta, 978 F.3d 93, 99 (4th Cir. 2020) (explaining that the Supreme Court's own actions during the 2020 election litigation clarified that Purcell deference extended to state court actions)).

220. Wesberry v. Sanders, 736 U.S. 1, 17 (1964).