

STATE EXECUTIVE BRANCHES UNDER *MOORE V. HARPER*

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The independent state legislature theory (ISLT), if embraced by the U.S. Supreme Court, could have radically altered the relationship between the federal and state governments. Under the most radical version of ISLT, the reference in the Elections Clause of the U.S. Constitution to “Legislatures” gives state legislatures near-exclusive authority to regulate federal elections. The Court largely—but not totally—rejected ISLT in *Moore v. Harper*, but it also embraced the idea that state judiciaries could not “arrogate to themselves the power vested in state legislatures to regulate federal elections.”

How *Moore* will be applied to state judicial decisions that interpret state constitutions to require different electoral processes, or to guarantee to voters different rights and protections, is unclear—and will likely be fleshed out in the next decade. Yet an unanswered question from *Moore* is whether, and how, its decision applies to state *executive* branches, too. There may be good reason to think that it does. If the Court is concerned with intrusions into state legislative power, it’s possible that executives might be able to do that just as easily as judiciaries could.

However, in this Essay, I argue that the simplistic framework laid out in *Moore* is unhelpful in identifying how such disputes would be resolved, and that any alleged conflicts between state executive action and the U.S. Constitution’s delegation to state legislatures are wrought with difficulty. State executive branches radically differ from the executive branch established by the Constitution, and if the Court were to import federal assumptions about separated powers into the Elections Clause context, it would override nearly two hundred and fifty years of independent state constitutional development. Accordingly, to the extent that *Moore* applies in these contexts at all, I argue that the Court ought to exercise significant deference to state-specific practices, customs, and constitutional histories.

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INTRODUCTION

Much is left unspoken, undecided, and unclear in the U.S. Supreme Court’s decision in *Moore v. Harper*.¹ The dispute in *Moore* revolved around a narrow question—the authority of the North Carolina Supreme Court to strike down congressional districts on state constitutional grounds and to adopt a new set of districts in their place²—with significant implications for federal-state relations. In appealing the court’s decision, North Carolina Republicans raised an argument couched in the so-called independent state legislature theory (ISLT), arguing that the state supreme court’s ruling ran afoul of the Elections Clause of the U.S. Constitution.³

The Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”⁴ In the view of ISLT advocates, this delegation to state legislatures is near-exclusive, and state supreme courts cannot infringe on that authority.⁵ Some ISLT advocates argued for an even more extreme version of the theory, arguing that the Elections Clause turbocharged state legislatures to unilaterally set rules for federal elections without *any* role for other state actors.

Yet *Moore* did not produce such a rule. The 6–2 majority rejected most aspects of ISLT but pocketed a few crumbs for possible use in the future. Though many celebrated the apparent rejection of ISLT in its worst excesses,⁶ this relief was tempered somewhat by the Court’s

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

2. See *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *vacated*, 886 S.E.2d 393 (2023).

3. Petition for Writ of Certiorari at 26–31, *Moore*, 143 S. Ct. 2065 (No. 21-1271) [hereinafter *Moore v. Harper* Petition for Writ of Certiorari].

4. U.S. CONST. art. I, § 4, cl. 1.

5. *Moore v. Harper* Petition for Writ of Certiorari, *supra* note 3, at 29 (“The Constitution thus grants the state ‘Legislature’ primacy in setting the rules for federal elections, subject to check only by Congress.”); see, e.g., Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 557–58 (2021).

6. Vikram David Amar, *The Moore the Merrier: How Moore v. Harper’s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2022–2023 CATO SUP. CT. REV. 275, 276–77 (“[A]lthough the 6–2 *Moore* Court forcefully repudiated the crux of [ISLT] once and for all, not everyone seems to fully and deeply understand the ruling. . . . [S]ome in the

apparent willingness to review state court decisions that displace state legislatures' powers to regulate federal elections and "transgress the ordinary bounds of judicial review."⁷

What this means is unclear—and the Court acknowledged as much when it declined to adopt a specific test for "measur[ing] state court interpretations of state law in cases implicating the Elections Clause."⁸ Since the decision was handed down, constitutional and election law scholars expressed a variety of views about the decision's reach and possible impact prior to the 2024 presidential election.⁹ Litigants seeking to appeal state supreme court decisions have already invoked *Moore* in a variety of contexts in seeking U.S. Supreme Court review.¹⁰

On the other hand, perhaps *Moore* could be business as usual. The Court's review of state court decisions in the federal election context may just be another "area[] where the exercise of federal authority or the vindication of federal rights implicates questions of state law."¹¹ After all, while the Court has made clear that it will decline to exercise jurisdiction over state court decisions resting on "adequate and independent state grounds,"¹² this isn't (always) the end of the matter. Where a state court's interpretation of its own constitution or statutes

academy and elsewhere mistakenly suggest that [ISLT] notions might continue to make significant mischief.").

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

8. *Id.*

9. Carolyn Shapiro, *State Law and Federal Elections After Moore v. Harper*, 99 N.Y.U. L. REV. 2049, 2065–66 (2024) [hereinafter Shapiro, *State Law and Federal Elections*]; Leah M. Litman & Katherine Shaw, *The "Bounds" of Moore: Pluralism and State Judicial Review*, 133 YALE L.J.F. 881, 888–95 (2024); Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts of Bush v. Gore: How Moore v. Harper Haunts State and Federal Constitutional Interpretation of Election Laws*, 59 WAKE FOREST L. REV. 61, 108–20 (2024); Manoj Mate, *New Hurdles to Redistricting Reform: State Evasion, Moore, and Partisan Gerrymandering*, 56 CONN. L. REV. 839, 893–910 (2024); Michael Weingartner, *Textualism and Anti-Noveltty Under Moore v. Harper*, FORDHAM L. VOTING RTS. & DEMOCRACY PROJECT (Aug. 9, 2023, 10:30 AM), <https://fordhamdemocracyproject.com/2023/08/09/textualism-and-anti-novelty-under-moore-v-harper-2/> [https://perma.cc/KBE2-FRYK]; Michael Weingartner, *Second-Guessing State Courts in Election Cases: Arrogation and Evasion Under Moore v. Harper*, 56 ARIZ. ST. L.J. 1971, 2027–40 (2025); David H. Gans, Brianne J. Gorod & Anna K. Jessurun, *Moore v. Harper, Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. REV. (forthcoming 2025) (manuscript at 35–50), <https://ssrn.com/abstract=4947688>; Cory Conley & Tonja Jacobi, *Derailing Democracy, Shirking Responsibility: The New Election Law Landscape*, 76 FLA. L. REV. 1885, 1920–27 (2024).

10. *E.g.*, Petition for Writ of Certiorari at 19, *Jacobsen v. Mont. Democratic Party*, cert. denied, No. 24-220, 2025 WL 247449 (U.S. Jan. 21, 2025) (arguing that a Montana Supreme Court decision striking down voter-registration deadline statute and ban on paid absentee ballot collection was "outside the ordinary bounds of judicial review").

11. *Moore*, 143 S. Ct. at 2088; see also Amar, *supra* note 6, at 290–92.

12. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

runs afoul of the U.S. Constitution—or affects other rights guaranteed by the Constitution¹³—the Court has an “obligation” to step in.¹⁴ The Court drew an analogy in *Moore* to the property context, where state court decisions that limit or displace property rights can, in some contexts, implicate federal constitutional questions and trigger Supreme Court jurisdiction.¹⁵

Ultimately, the legal reality remains unclear. In the aftermath of *Moore*, a deluge of scholarly commentary has responded to the muddiness by parsing through the opinion, exploring possible implications, and arguing for an appropriate application of the principle in future cases. But most of this laudable work has focused on the implications for state *judiciaries*, not state executive branches. This focus is certainly understandable. *Moore* concerned the actions of the North Carolina Supreme Court, not those of the Governor, the State Board of Elections, or a county board of elections. And the discussion in *Moore* was framed almost entirely about the actions of the state judiciary, not any other actor.

At the same time, though, the basic principle of *Moore*—that state legislatures are delegated specific powers by the U.S. Constitution and that for the state judiciary to intrude too far on this power would violate the Elections Clause—could apply to executive branch officials, too.¹⁶ Indeed, in both the 2020 and 2024 presidential elections, ISLT-inspired claims challenging the actions of state administrative agencies have been raised. But answering these questions under the *Moore* framework seems nearly impossible, as revealed by the overly simplistic depiction of state systems of separated powers laid out in the majority opinion.¹⁷

13. For example, in *Robins v. PruneYard Shopping Center*, the California Supreme Court held that the California Constitution “protect[ed] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.” 592 P.2d 341, 347 (Cal. 1979). On appeal, the U.S. Supreme Court upheld the court’s decision, concluding that while “there has literally been a ‘taking’ of th[e] right” to exclude others, the taking “clearly does not amount to an unconstitutional infringement of appellants’ property rights under the Taking Clause.” *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–86 (1980). Justices Powell and White in concurrence agreed that the decision at issue did not affect a taking but suggested that other state constitutional decisions that “transform privately owned commercial property into public forums” might. *Id.* at 101 (Powell, J., concurring).

14. *Moore*, 143 S. Ct. at 2088.

15. *Id.*; see also *PruneYard*, 447 U.S. at 92 (Marshall, J., concurring) (suggesting similarly).

16. See Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 188–90 (2022) [hereinafter Shapiro, ISLT]; see also Rick Hasen, *Expect Many More Lawsuits in Federal Court Against the Actions of State and Local Election Officials After Moore v. Harper*, ELECTION L. BLOG (June 28, 2023, 5:51 PM), <https://electionlawblog.org/?p=137176> [https://perma.cc/K6LE-LQ3J].

17. See *infra* Part I.B.

This Essay argues that *Moore* could be invoked in cases involving the actions of state executive branch officials for the exact same reasons that state judicial decisions could be—insofar as both could involve actions taken pursuant to constitutional or statutory authorization that arguably trample on state legislative power. But any challenge to an executive actor’s conduct must be adjudicated first by a state court so that the permissibility of the action under state law can be conclusively determined.

However, while the Court’s framework provides little formal guidance on how to answer these questions, *Moore*’s underlying approval of delegations of state legislative power should be understood to foreclose most of these cases. Part I begins by briefly summarizing the decision in *Moore* and exploring several of the avenues in which litigation against state executive branch officials might invoke ISLT-adjacent claims. Part II identifies several specific contexts that might trigger these claims, including a governor’s use of the line-item veto and the exercise of quasi-legislative power by state administrative entities. Part III argues that the overwhelming majority of these claims should be resolved by affirming that state constitutions can distribute legislative power to other entities in state government and by grounding any analysis in state-specific constitutional history.

I. THE COURT’S DECISION IN *MOORE V. HARPER*

A. *The Scope of the Elections Clause*

The Court’s decision in *Moore v. Harper* rejected ISLT—mostly, anyway—and articulated a functionalist-sounding view of state legislative power and the status of state legislatures in the federal system. The majority opinion repeatedly emphasized its deference to state constitutions’ creation of different systems of separated powers. Within the context of the Elections Clause, the Court recognized that states have the flexibility “to establish their own governmental processes” and that state legislatures are limited by their own constitutions.¹⁸

State systems of government occupy comparatively little space in the U.S. Constitution, so the reference to state legislatures in the Elections Clause is somewhat unique. That said, there are some references throughout the Constitution to the “Executive” or “Executive

18. *Moore*, 143 S. Ct. at 2083 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 816 (2015)).

Authority”¹⁹ and “Legislature”²⁰ of each state. The dispute in *Moore* concerned state legislatures’ authority under the Elections Clause, which grants to state legislatures the power to “prescribe[]” the “Times, Places and Manner of holding Elections for Senators and Representatives.”²¹

The Court concluded that state legislatures’ powers under the Elections Clause materially differ from other powers in the U.S. Constitution and contrasted it with three other contexts. For example, when the federal government wishes to purchase land within states, state

19. U.S. CONST. art. I, § 2, cl. 4 (“When vacancies happen in the Representation [in the U.S. House] from any State, the Executive Authority thereof shall issue Writ of Election to fill such Vacancies.”); *id.* art. I, § 3, cl. 2 (“[I]f Vacancies [in the U.S. Senate] happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.”); *id.* art. IV, § 2, cl. 2 (“A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.”); *id.* art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”); *id.* amend. XVII (“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”).

20. *Id.* art. I, § 2, cl. 1 (“[T]he Electors in each State [for U.S. House Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); *id.* art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”); *id.* art. I, § 4, cl. 2 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”); *id.* art. I, § 8, cl. 17 (“[The Congress shall have Power] . . . to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings.”); *id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”); *id.* art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”); *id.* art. IV, § 4 (Guarantee Clause); *id.* art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.”); *id.* amend. XVII (“The electors in each State [for U.S. Senate] shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”).

21. *Id.* art. I, § 4, cl. 1.

legislatures are required to provide their “Consent” to the purchase.²² After Congress approves a potential constitutional amendment and sends it to the states, a requisite number of state legislatures must “Ratify” it.²³ And, prior to the passage of the Seventeenth Amendment, state legislatures selected members of the U.S. Senate.²⁴

These contexts, the Court noted, are different than state legislatures’ powers under the Elections and Electors Clauses. Consenting to the acquisition of land, ratifying a constitutional amendment, and electing Senators involve “straightforward exercises of authority” and can neither be delegated elsewhere nor be subject to the constraints of state constitutions.²⁵ On the other hand, “fashioning regulations governing federal elections ‘unquestionably calls for the exercise of lawmaking

22. *Moore*, 143 S. Ct. at 2085 (citing U.S. CONST. art. I, § 8, cl. 17).

23. *Id.* (citing U.S. CONST. art. V).

24. *Id.* (citing U.S. CONST. art. I, § 3, cl. 1).

25. While this observation is beyond the scope of this Essay, I will note that the U.S. Constitution’s delegations to state legislatures have not been policed consistently throughout American history. From 1791 to 1836, Vermont had a unicameral legislature—the House of Representatives—and an elected Supreme Executive Council that consisted of the Governor, Lieutenant Governor, and twelve other members, all of whom were elected statewide. By all measures, the Council was an executive entity, but despite this, in every U.S. Senate election that took place from 1791 to 1836, the Supreme Executive Council met with the House to elect members of the U.S. Senate. A law passed by the Vermont House of Representatives in 1791, and approved by the Executive Council, provided a multi-step process for U.S. Senate elections. First, the House and Council would, “in their respective houses,” vote for the candidates. They would then meet in “grand committee” and the candidates that each had nominated would be put to a joint vote, with the majority-vote winner being elected. Act of Jan. 19, 1791, Jan. Adj. Sess., 1791 Vt. Acts & Laws 4, 4–5. Judging from the records of the Council compiled by the Vermont Secretary of State in 1873, this basic process was apparently followed for the first forty-five years of Vermont’s statehood, and I am unaware of any contest filed against any U.S. Senator elected this way. 3 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 223–24 (E. P. Walton ed., Montpelier, Steam Press of J. & J. M. Poland 1875) (January 1791 election); 4 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 4–5 (E. P. Walton ed., Montpelier, Steam Press of J. & J. M. Poland 1876) (October 1791 election); *id.* at 65–66 (October 1794 election); *id.* at 110 (October 1796 election); *id.* at 142 (October 1797 election); *id.* at 260–65 (October 1800 election); *id.* at 296–98 (October 1801 election); *id.* at 331, 335–36 (October 1802 election); 5 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 118–20 (E. P. Walton ed., Montpelier, Steam Press of J. & J. M. Poland 1877) (October 1806 election); *id.* at 152–53 (October 1807 election); *id.* at 197–200, 204–205 (October 1808 election); *id.* at 351, 362, 367 (October 1812 election); 6 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 79–81 (E. P. Walton ed., Montpelier, Steam Press of J. & J. M. Poland 1878) (October 1814 election); *id.* at 204–05 (November 1817 election); *id.* at 228 (October 1818 election); *id.* at 297–99, 303–04 (October 1820 election); 7 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 123–24 (E. P. Walton ed., Montpelier, Steam Press of J. & J. M. Poland 1879) (October 1824 election); *id.* at 211–12 (October 1826 election); *id.* at 398–401 (October 1830 election); 8 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 78, 84–85 (E. P. Walton ed., Montpelier, Steam Press of J. & J. M. Poland 1880) (October 1832 election).

authority.’” As such, “the exercise of such authority . . . is subject to the ordinary constraints on lawmaking in the state constitution,” and states have the power to establish both substantive and procedural limitations on this legislative power.²⁶

A trio of cases, stretching from the early twentieth century to the present, established how state legislative authority under the Elections Clause can be checked by, or delegated to, other entities. In *Smiley v. Holm*,²⁷ the Court concluded that, when a state constitution grants the governor the power to veto proposed congressional districts, the exercise of that power does not violate the Elections Clause.²⁸ Sixteen years earlier, in *Ohio ex rel. Davis v. Hildebrandt*,²⁹ the Court held that, where the electorate has reserved a power in the state constitution to reject laws passed by the legislature, the application of that power to an act creating congressional districts did not run afoul of the Elections Clause, either.³⁰

This legislative power can also be distributed or delegated to other entities. In *Hildebrandt*, the Court wrote that “the referendum was treated as part of the legislative power” by the Ohio Constitution.³¹ While the state’s “legislative power” was “vested in a General Assembly consisting of a Senate and House of Representatives,” part of the power was “reserve[d]” to the people to propose laws and constitutional amendments of their own creation and to reject laws “passed by the General Assembly.”³² Likewise, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,³³ the Court concluded that states could “vest[] congressional redistricting authority in a body other than the elected group of people who ordinarily exercise legislative power.”³⁴

All of that said, there are situations in which these dynamics might go too far. State supreme courts are usually the final tribunals for the interpretation of state law, but when those interpretations result in violations of federal law, they exceed their authority. Likewise, the Court reasons, because “the Elections Clause expressly vests power to carry out its provisions in ‘the Legislature’ of each state,” when state courts

26. *Moore*, 143 S. Ct. at 2085 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808 n.17 (2015)).

27. 285 U.S. 355 (1932).

28. *Id.* at 372–73.

29. 241 U.S. 565 (1916).

30. *Id.* at 567–69.

31. *Id.* at 568.

32. OHIO CONST. art. II, § 1. For a discussion as to whether we should conceive this as a “right” or a “power” of the electorate, compare Jessica Bulman-Pozen & Miriam Seifter, *The Right To Amend State Constitutions*, 133 YALE L.J.F. 191, 201–03 (2023), with Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 NEB. L. REV. 125, 139–49 (2022).

33. 576 U.S. 787 (2015).

34. *Moore v. Harper*, 143 S. Ct. 2065, 2083 (2023) (citing *Ariz. State Legislature*, 576 U.S. at 792–93).

“transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections,” they violate the Elections Clause.³⁵ In short, while the Elections Clause allows states the flexibility “to establish their own governmental processes,” there are some outer bounds to how far this flexibility can go.

B. Applying the Court’s Holding to Executive Branch Officials

Moore’s framework is difficult to apply to real-world disputes. Setting aside the obvious—that the holding did not lay down a rule so much as it did several paragraphs of abstract considerations, and that the Court did not even determine whether the North Carolina Supreme Court’s actions violated the Elections Clause—there are plenty of outstanding questions. Many of these questions revolve around the permissibility of state judiciaries’ actions in interpreting their own constitutions, which remedies they can order, and in what obligations they might now have to ground their rulings to avoid a colorable Elections Clause violation.

Unexplored in *Moore*, however, is whether its holding might apply to executive branch officials. Though I am cautious in reaching this conclusion, it arguably does. The corollary of holding that state judiciaries can violate the Elections Clause by infringing on state legislative power is that other branches can, too—including executive branch officials. To paraphrase the Court’s language in *Moore*, perhaps a *governor* could “transgress the ordinary bounds [of executive power] such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.”³⁶

In the contexts in which executive power might be challenged, this paraphrased rule could make some sense. If, for example, an executive branch actor interprets a statute beyond what the state legislature intended, or claimed a particularly significant delegation of authority, that would seemingly implicate the same concerns under the Elections Clause that judicial action would—even if they were acting within their state constitutional power.³⁷ Challenges raising these kinds of arguments have been few and far between, but it is not difficult to imagine more being raised in the future.

First, the most obvious analog of the actual dispute in *Moore* might occur when a state or local election official interprets and applies state

35. *Id.* at 2089.

36. *Id.*

37. In other words, state constitutional authorization may not serve as a shield against an ISLT claim. See Shapiro, *State Law and Federal Elections*, *supra* note 9, at 2065.

law relating to election administration. If a state court could plausibly run afoul of the Elections Clause by stretching the interpretation of a state statute too far, surely an election administrator could as well. *Moore* applies most cleanly in such cases, though there are not very many examples of cases invoking ISLT in such disputes.³⁸

Several cases during the 2020 presidential election involved, at least in part, challenges to how election officials interpreted state statutes. These cases, decided prior to *Moore*, saw conservative jurists embrace arguments that the officials had incorrectly interpreted statutes.³⁹ A more recent case, filed in the lead-up to the 2024 election, challenged the legality of Pennsylvania Governor Josh Shapiro’s executive order implementing automatic voter registration on similar grounds, but the case was dismissed for lack of standing.⁴⁰

Second, an executive actor could lawfully take an action pursuant to a delegation of authority by their state legislature that is argued to violate the Elections Clause. During the 2020 election, the need to alter the normal operation of elections spurred many governors and election administrators to adopt different voting processes, commonly relying on

38. Beyond the cases cited below, the Republican National Committee and Republican Party of Wisconsin also raised an ISLT challenge in 2024 as amici in *Priorities USA v. Wisconsin Election Commission*, which concerned the legality of absentee ballot drop boxes. Non-Party Brief of the Republican National Committee, the Republican Party of Wisconsin & RITE PAC in Support of Defendant-Respondents at 9–11, *Priorities USA v. Wisconsin Elections Comm’n*, 2024 WI 32, 8 N.W.3d 429 (No. 2024AP164) [hereinafter *Priorities USA v. WEC RNC Brief*]. Previously, in 2022, the Wisconsin Supreme Court held that the state elections commission did not have the authority to authorize drop boxes. *Teigen v. Wis. Elections Comm’n*, 2022 WI 64, ¶ 87, 976 N.W.2d 519, 547. In 2024, the question was brought to the court once again. The RNC’s amicus brief effectively argued that the Commission’s 2020 administrative guidance violated *Moore v. Harper*, noting that “[t]he Legislature has long required absentee voters to mail their ballots or deliver them in person,” and arguing that “after more than a century of settled practice, WEC tried to skirt that rule, concocting a novel absentee-voting procedure that was ‘found nowhere in the statutes,’ ‘history,’ ‘or evidence.’” It then argued that, if the court overruled *Teigen*, doing so would “‘transgress the ordinary bounds of judicial review’ and usurp ‘the power vested in state legislatures to regulate federal elections.’” *Priorities USA v. WEC RNC Brief*, *supra*, at 10.

39. *Moore v. Circosta*, 141 S. Ct. 46, 47–48 (2020) (Gorsuch, J., dissenting) (arguing that “even assuming the North Carolina General Assembly could delegate its Election Clause Authority to other officials,” the state board of elections’ decision relied on a misinterpretation of state law); *Hotze v. Hudspeth*, 16 F.4th 1121, 1128–30 (5th Cir. 2021) (Oldham, J., dissenting) (arguing that the Harris County, Texas, Election Department’s interpretation of a state statute to allow drive-through voting violated the Elections Clause); see also Complaint for Emergency Injunctive Relief at 9–11, *Hotze v. Hollins*, No. 20-cv-03709 (S.D. Tex. Nov. 2, 2020), 2020 WL 6373661 (“Here, the Texas Legislature has created a detailed statutory scheme related to curb-side voting to govern the conduct of federal elections. Defendant Hollins has significantly departed from the legislative scheme [This] scheme violates [the Elections Clause].”).

40. Complaint at 24, *Keefer v. Biden*, 725 F. Supp. 3d 491 (M.D. Pa. 2024) (No. 24-cv-00147), 2024 WL 287039; *Keefer*, 725 F. Supp. 3d at 505.

delegations of authority to do so.⁴¹ That year, for example, in *Moore v. Circosta*,⁴² Justice Neil Gorsuch tacitly questioned whether the North Carolina General Assembly “could delegate its Elections Clause authority to other officials.”⁴³ However, these challenges have not been frequent.

* * *

Regardless of the specific challenge to reach the Court, however, its decision in *Moore* provides only very thin guidance on how such a challenge would be adjudicated. Much of this difficulty originates from the fact that the Court did not have to deal with a meaningful divergence from the separation of powers scheme established by the U.S. Constitution. The North Carolina Supreme Court’s decision involved a state-specific interpretation of a right in the state constitution, not the operation of a state check or balance that was radically different from an analog in the federal system.

But if the Court were to confront a challenge to an *executive* branch action, the dissimilarity between the federal and state systems would—or should—be much more obvious. The next Part lays out how some of those differences might play out.

II. STATE EXECUTIVE BRANCHES AND REDISTRIBUTED LEGISLATIVE POWER

At the time of the Founding, state systems of separated powers were in their infancy. Though some state constitutions expressly required that executive, judicial, and legislative powers be kept separate, these requirements existed more on paper than in reality. Though stronger lines of demarcation between the different branches of government emerged, especially in the nineteenth century, contemporary state constitutions still establish branches of government that are more blended in the powers they exercise than the U.S. Supreme Court has permitted federally.

This is especially true with respect to state executive branches. Across the country, governors and other executives are granted powers by their state constitutions that scramble the assumptions about separated powers at the federal level. For example, most governors are granted an

41. See Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 WASH. & LEE L. REV. 359, 380–85 (2023).

42. 141 S. Ct. 46 (2020).

43. *Id.* at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief). *But see* Shapiro, *State Law and Federal Elections*, *supra* note 9, at 2071 n.121 (“No delegation restrictions exist in the Elections and Electors Clauses.”); Kafker & Jacobs, *supra* note 9, at 124.

item veto power—which is prohibited under the U.S. Constitution. A significant number of state supreme courts have interpreted this power as allowing governors to functionally rewrite parts of state legislation, which can be understood as an exercise of at least quasi-legislative power.

There are also some circumstances in which governors or other executive branch officials might exercise legislative power much more literally. In many states, members of the state legislature are placed in the gubernatorial or lieutenant-gubernatorial lines of succession, which can allow an official to simultaneously exercise executive and legislative power.⁴⁴

And finally, most state constitutions establish executive branch officials other than the governor, creating a plural executive structure. Some state constitutions merely establish an office, like secretary of state or a state board of elections, and delegate to the office some generic authority to oversee elections. Other state constitutions establish a broader administrative structure without specifying any particular agency, but empower any statutorily created agency to promulgate rules and regulations. In the context of administering federal elections, any of these setups could plausibly trigger a challenge under the Elections Clause.

In this Part, this Essay surveys these two dynamics of state systems. Section A discusses the item veto and suggest several situations in which its exercise might trigger an Elections Clause challenge. Then, Section B discusses state administrative structures and the power of state election administrators under state constitutions.

44. See, e.g., Quinn Yeargain, *Democratizing Gubernatorial Succession*, 73 RUTGERS U. L. REV. 1145, 1155–61 (2021) (describing the operation of state senate presidents as acting governors). For example, in 2023, the Governor and Lieutenant Governor of Oklahoma were out of the state, leaving State Senate President Greg Treat as acting Governor. Dale Denwalt, *Should the Governor Keep Power When Traveling out of the State? The Constitution Says No*, OKLAHOMAN (June 22, 2023, 6:03 AM), <https://www.oklahoman.com/story/news/politics/state/2023/06/22/oklahoma-power-outages-governor-kevin-stitt-emergency-declaration-constitution/70342965007/> [https://perma.cc/3T92-MN4G]. In New Jersey, when State Senate President Nick Scutari served as Acting Governor, he signed several pieces of legislation. Zach Blackburn, *Acting Governor Scutari Acts as Governor, Signs Handful of Bills*, N.J. GLOBE (Aug. 22, 2024, 4:42 PM), <https://newjerseyglobe.com/section-2/acting-governor-scutari-acts-as-governor-signs-handful-of-bills/> [https://perma.cc/Z38H-Y8TV].

A. The Item Veto

In forty-four states, the governor may exercise a partial veto over acts of the state legislature.⁴⁵ While the operation of the line-item veto varies by state, it is most commonly limited to individual items in appropriations bills.⁴⁶ Interpretative difficulties abound here—most prominently, how an “item” is defined,⁴⁷ but also what constitutes an “appropriations bill”⁴⁸—and lack obvious answers.

The exercise of a partial veto is a curious power that fits poorly in a conception of separated powers rooted in the U.S. Constitution. (After all, the Supreme Court struck down an attempted effort to grant the President a line-item veto.⁴⁹) Some state supreme courts have characterized the line-item veto as a limited exercise of legislative power by the governor, given that the governor can effectively amend a piece of legislation, checked only by the power of the legislature to override the veto. In Washington, where the Legislature can only override the veto with a two-thirds vote, the state supreme court has characterized the governor as “hold[ing] one-third of the votes” when exercising the line-item veto.⁵⁰

In some states, it seems to be the case that the governor is practically, if not formally, exercising legislative power. Though courts are largely unanimous in concluding that governors can use their line-item veto powers to eliminate or reduce specific appropriations, they have differed in determining whether the power extends to removing conditions, provisos, or riders accompanying the appropriations.⁵¹ But in states where the governor’s power extends that far, they effectively have the power to rewrite acts of the legislature.

Consider, for example, a situation in which the legislature appropriates funds to the secretary of state’s office to establish an online voter registration system, but includes an apparent restriction on how the funds could be used:

One million dollars is appropriated from the general fund to the office of the secretary of state for expenditure in fiscal year

45. JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* 60 (2018).

46. Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1175–77 (1993).

47. *Id.* at 1182.

48. *Id.* at 1175 n.14 (“Several state courts have emphasized that the governor can wield the item veto only on bills containing more than one item of appropriation.”).

49. *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

50. *Wash. Fed’n of State Emps. v. State*, 682 P.2d 869, 874 (Wash. 1984).

51. Briffault, *supra* note 46, at 1185–94.

2026 for the purpose of implementing an online voter registration system.

As a condition, limitation, and qualification, the secretary of state shall not use the appropriation from this section to automatically register any person to vote.

Upon receiving the bill, the governor partially signs it into law, but vetoes the underlined text, exercising her power under the state constitution to “approve appropriations bills in whole or in part” and to “disapprove any item of an appropriation bill.”⁵² An effort to override the veto fails. When several state legislators challenge the governor’s exercise of her veto power, the state supreme court rules in the governor’s favor, concluding that the vetoed language is a “separate and unrelated piece of legislation” affecting the administration of a voter registration system, essentially, operating as an “unrelated rider” rather than a condition on use of the funds.⁵³ Such an outcome is certainly not implausible—the text of the proposed statute, the constitutional provision regarding the item veto, and the hypothetical rationale of the court are all based on *Welsh v. Branstad*,⁵⁴ a decision by the Iowa Supreme Court that upheld a gubernatorial veto in an analogous situation.⁵⁵

A more dramatic, and less representative, example could come from Wisconsin, where the Wisconsin Supreme Court has read the Governor’s power to “approve[] in whole or in part” any “appropriation bill[]”⁵⁶ to include the power to “veto individual words, letters and digits, and also [to] reduce appropriations by striking digits, as long as what remains is a complete, entire, and workable law.”⁵⁷ Moreover, because the Legislature is allowed to “inclu[de] . . . substantive legislation in appropriations bills” and there is no “‘one-bill-one-subject’ limitation on bills other than the private and local limitation,” if substantive legislation is included in an appropriations bill, the Governor could effectively rewrite it.⁵⁸

52. See IOWA CONST. art. III, pt. 2, § 16.

53. See *Welsh v. Branstad*, 470 N.W.2d 644, 649–50 (Iowa 1991).

54. 470 N.W.2d 644 (Iowa 1991).

55. See *id.* (upholding Governor’s line-item veto of “unrelated rider” that purported to condition the use of a state appropriation for trade missions).

56. WIS. CONST. art. V, § 10.

57. *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 388 (Wis. 1988).

58. *Id.* at 391. Several prominent exercises of the item veto power prompted constitutional amendments ratified in 1990 and 2008 that prohibited the Governor from “creat[ing] a new word by rejecting individual letters” or “a new sentence by combining parts of 2 or more sentences.” WIS. CONST. art. V, § 10(1)(c). The Wisconsin Supreme Court recently held that the restrictions adopted by these amendments “relates exclusively to the deletion of letters to create new words, not the deletion of digits to create new numbers,” such that “the plain language of the constitutional text permits striking

Suppose that the Wisconsin Legislature decided—foolishly⁵⁹—to establish the state’s congressional districts through an appropriations bill. And suppose this bill included, in relevant part, the following text:

Section 3.11: First congressional district. All of the following territory constitutes the first congressional district:

(1) WHOLE COUNTIES. Alpha.

(2) GAMMA COUNTY. That part of Gamma County consisting of the cities of Aphrodite and Apollo.

(3) DELTA COUNTY. That part of Delta County consisting of the cities of Ares and Artemis.

Section 3.12: Second congressional district. All of the following territory constitutes the second congressional district:

(1) WHOLE COUNTIES. Beta.

(2) GAMMA COUNTY. That part of Gamma County consisting of the city of Athena.

(3) DELTA COUNTY. That part of Delta County consisting of the city of Demeter.⁶⁰

Exercising the item veto, the Governor then vetoed the underlined items, effectively creating a new first congressional district that consisted of all of Alpha and Gamma Counties, and a new second district that consisted of all of Beta and Delta Counties.⁶¹ If the Governor’s actions were to be challenged as exceeding her authority under the Wisconsin Constitution, it seems entirely likely that the Wisconsin Supreme Court would, relying on its well-established precedent, uphold the actions as permissible.

numbers written out with digits.” *LeMieux v. Evers*, 2025 WI 12, ¶ 25, 2025 WL 1142217, at *5, (Apr. 18, 2025).

59. *Thompson*, 424 N.W.2d at 395 (“[I]f the legislature wants to insulate its initiatives from the governor’s partial veto, it should make sure that it submits its policy legislation as individual, general bills, and not include such enactments in the budget bill.”).

60. I used fictional counties and cities to more cleanly illustrate the concept but based the text of the fictional section on the 2011 act creating Wisconsin’s congressional districts after the 2010 Census. 2011 Wis. Act 44, § 3.

61. Rewritten, section 3.11 would read: “First congressional district. All of the following territory constitutes the first congressional district: **WHOLE COUNTIES. Alpha. GAMMA.**” And section 3.12 would read: “Second congressional district: All of the following territory constitutes the second congressional district: **WHOLE COUNTIES. Beta. DELTA.**” That the text is slightly awkward—in that there are randomly capitalized counties and a period separating the counties—is of no moment. “[T]he test applied to determine the validity of the governor’s partial vetoes is not one of grammar.” *Thompson*, 424 N.W.2d at 398.

B. Executive Branch Agencies in State Constitutions

Unlike at the federal level, where the U.S. Constitution establishes no executive branch departments or agencies, every state in the country has constitutionally established entities beyond the governor. This includes other statewide elected officials, like an attorney general, auditor or comptroller, secretary of state, or treasurer, among other positions. For purposes of election administration, in most states, this includes an elected secretary of state.⁶² The duties of secretaries of state vary but commonly include supervision of ballot measures and candidate filing, administering the state campaign finance system, participating in the redistricting process, and receiving, canvassing, or certifying election results.⁶³ Moreover, most secretaries of state are responsible for the day-to-day operation of statewide election administration, which is usually established as a statutory duty. Outside of the secretary of state, several other states have a constitutionally established statewide election

62. ALA. CONST. art. V, §§ 112, 114; ARIZ. CONST. art. V, § 1; ARK. CONST. art. VI, §§ 1, 3; CAL. CONST. art. V, § 11; COLO. CONST. art. IV, § 1(1); CONN. CONST. art. IV, § 1; GA. CONST. art. V, § 3, ¶ 1; IDAHO CONST. art. IV, §§ 1–2; IND. CONST. art. VI, § 1; IOWA CONST. art. IV, § 22; KAN. CONST. art. I, § 1; KY. CONST. § 91; LA. CONST. art. IV, §§ 1(A), 3(A); MASS. CONST. amend. art. LXXXII; MICH. CONST. art. V, § 21; MINN. CONST. art. V, § 1; MISS. CONST. art. V, § 133; MO. CONST. art. IV, § 12; MONT. CONST. art. VI, §§ 1(1), 2(1); NEB. CONST. art. IV, § 1; NEV. CONST. art. V, § 19(1); N.M. CONST. art. V, § 1; N.D. CONST. art. V, § 2; OHIO CONST. art. III, § 1; OR. CONST. art. VI, § 1; R.I. CONST. art. IV, § 1; S.C. CONST. art. VI, § 7; S.D. CONST. art. IV, § 7; VT. CONST. ch. 2, §§ 43, 48; WASH. CONST. art. III, § 1; W. VA. CONST. art. VII, § 1; WYO. CONST. art. IV, § 11. In two states, the (elected) lieutenant governor fulfills this duty instead. ALASKA CONST. art. III, § 7 (office renamed in 1970); UTAH CONST. art. VII, § 1(1). Several states have a secretary of state with election responsibilities that is chosen through another method. ME. CONST. art. V, pt. 2, § 1 (chosen by Legislature); N.H. CONST. pt. 2, art. 67 (same); N.J. CONST. art. V, § 4, ¶ 3 (appointed by Governor and confirmed by Senate); OKLA. CONST. art. VI, § 1(B) (same); TEX. CONST. art. IV, §§ 1–2, 21 (same). *See also Election Administration at State and Local Levels*, NCSL, <https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels> (Jan. 29, 2025) (listing chief election officers and statutory citations by state).

63. *See, e.g.*, ARIZ. CONST. art. VI, § 38 (receiving candidate filings for judges seeking retention); ARK. CONST. art. VIII, § 1 (creating board of apportionment with secretary of state as a member); COLO. CONST. art. XXVIII, §§ 8–9 (supervising campaign finance requirements); KAN. CONST. art. XIV, § 1 (publishing constitutional amendments); LA. CONST. art. IV, § 7 (“He shall prepare and certify the ballots for all elections, promulgate all election returns, and administer the election laws, except those relating to voter registration and custody of voting machines.”); MICH. CONST. art. IV, § 6 (administering selection process for independent redistricting commission); MINN. CONST. art. VIII, § 6 (receiving recall petitions); MISS. CONST. art. IV, § 114 (receiving election results); MO. CONST. art. III, §§ 50, 52(a), 53 (receiving initiative and referendum petitions); OHIO CONST. art. XVI, § 1 (creating ballot board, with secretary of state as a member, with responsibility for determining ballot language); OR. CONST. art. IV, § 6 (possessing backup authority to draw state legislative districts in the event of failure of legislature to do so).

administrator.⁶⁴ A handful of states have no election administrator created in their constitutions and have instead created those offices by statute,⁶⁵ but even here, the state constitutions grant legislatures the power to regulate the conduct of elections,⁶⁶ which guarantees some legislative power to delegate authority to an election administrator.

At the same time, many states have also constitutionalized other aspects of their administrative structures. These systems vary but generally include limits on the number of principal departments and a concordant requirement that agencies be organized into those departments,⁶⁷ established processes for the appointment and removal of department heads,⁶⁸ and in some states, a gubernatorial power to reorganize the structure of departments.⁶⁹

64. HAW. CONST. art. IV, § 3 (creating the Chief Election Officer); ILL. CONST. art. III, § 5 (creating the State Board of Elections); OKLA. CONST. art. III, § 2 (creating the State Election Board); VA. CONST. art. V, § 2 (creating the State Board of Elections); *see also* N.Y. CONST. art. II, § 8 (requiring bipartisan registration and election boards at state and local levels); PA. CONST. art. VII, § 11 (creating district election boards); VA. CONST. art. II, § 8 (creating county and city election boards).

65. DEL. CODE ANN. tit. 15, § 201 (2024) (creating the State Department of Elections); § 301 (creating the State Election Commissioner); FLA. STAT. §§ 15.01, 97.012 (2024) (creating the Secretary of State and designating Secretary of State as “chief election officer of the state”); MD. CODE ANN., ELEC. LAW § 2-102 (LexisNexis 2024); N.Y. ELEC. LAW § 3-100 (Consol. 2024) (creating the State Board of Elections); N.C. GEN. STAT. § 163-19 (2024) (creating the State Board of Elections); 71 PA. STAT. AND CONS. STAT. § 61 (West 2025) (creating the Secretary of the Commonwealth); 25 PA. STAT. AND CONS. STAT. § 2621 (West 2025) (granting the Secretary of the Commonwealth election administration duties); TENN. CODE ANN. § 2-11-101 (2024) (creating State Election Commission); § 2-11-201 (creating Coordinator of Elections); WIS. STAT. § 5.05 (2023–24) (creating the Elections Commission).

66. DEL. CONST. art. V, §§ 1, 4; FLA. CONST. art. VI, §§ 1, 7; MD. CONST. art. III, § 49; N.Y. CONST. art. II, §§ 5–8; N.C. CONST. art. VI, § 3(1); PA. CONST. art. VII, §§ 1, 6, 14; TENN. CONST. art. IV, § 1; WIS. CONST. art. III, § 2.

67. *E.g.*, ALASKA CONST. art. III, § 22; COLO. CONST. art. IV, § 22; FLA. CONST. art. IV, § 6; HAW. CONST. art. V, § 6; IDAHO CONST. art. IV, § 20; LA. CONST. art. IV, § 1(B); MICH. CONST. art. V, § 2; MO. CONST. art. IV, § 12; MONT. CONST. art. VI, § 7; N.J. CONST. art. V, § IV, para. 1; N.Y. CONST. art. V, §§ 2–3.

68. *E.g.*, ALASKA CONST. art. III, § 25; COLO. CONST. art. IV, § 6; FLA. CONST. art. IV, § 6(a); HAW. CONST. art. V, § 6; IDAHO CONST. art. IV, § 6; MICH. CONST. art. V, § 3; MO. CONST. art. IV, § 12; MONT. CONST. art. VI, § 8; N.J. CONST. art. V, § IV, para. 2; N.Y. CONST. art. V, § 4.

69. *E.g.*, ALASKA CONST. art. III, § 23; MICH. CONST. art. V, § 2. In several other states, which have constitutionally capped the number of departments and authorized the legislature to organize existing executive branch entities into a set number of departments, the legislature has delegated to the governor sprawling authority to reorganize the executive branch themselves. *See, e.g., In re Plan for the Abolition of the Council on Affordable Hous.*, 70 A.3d 559, 568 (N.J. 2013) (“The Constitution requires the Legislature to allocate all executive and administrative offices within no more than twenty principal departments of State government. As part of the Reorganization Act, the Legislature gave certain powers to the Governor to reorganize executive agencies.”); *see*

State election administrators are delegated rulemaking authority by statute,⁷⁰ if not by the constitution itself,⁷¹ and routinely exercise this power in the course of their duties.⁷² As a result, the administration of state elections—federal and state elections alike—reflects a regime propped up by state constitutional provisions, election codes adopted by statute, and administrative regulations promulgated by state election officials. For example, minimum requirements for voter registration in Colorado are set by the state constitution,⁷³ the process is set out in an intricate set of statutes,⁷⁴ and the operations are further clarified by rules adopted by the Secretary of State.⁷⁵

The result is that questions involving the authority of state election administrators might play out differently in the states than analogous questions at the federal level. The permissibility of legislative delegations to state agencies⁷⁶ and the deference owed by courts to statutory interpretation by administrative agencies⁷⁷ do not involve the same separation of powers concerns that exist under the U.S. Constitution.⁷⁸ Moreover, while the constitutional status of departments and agencies does not necessarily grant them any inherent authority, their constitutional status may insulate them from some challenges. A requirement that the “number of departments within the executive branch” be limited to a specific number does not, by itself, “grant

also Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 505–07 (2017) [hereinafter Seifter, *Gubernatorial Administration*].

70. See, e.g., NEV. REV. STAT. § 293.124 (2023–24) (designating the Secretary of State as the “Chief Officer of Elections” and granting the Secretary the power to “adopt such regulations as are necessary to carry out the provisions of this section”).

71. See *Kozel v. State Bd. of Elections*, 533 N.E.2d 796, 801 (Ill. 1988) (“As an administrative agency established by statute, an electoral board [the State Board of Elections] may exercise only the powers conferred upon it by the legislature.”).

72. See, e.g., ALA. ADMIN. CODE r. 820-2-1-.01 to -2-12-.06 (2024); CAL. CODE REGS. tit. 2, §§ 19001–20719 (2022).

73. COLO. CONST. art. VII, § 1 (“Only a citizen of the United States who has attained the age of eighteen years, has resided in the state for such time as may be prescribed by law, and has been duly registered as a voter if required by law shall be qualified to vote at all elections.”).

74. COLO. REV. STAT. §§ 1-2-101 to -2-229 (2023) (“Qualifications of Electors” and “Registration of Electors”).

75. COLO. CODE REGS. § 1505-1, R. 2 (“Voter Registration”) (2024).

76. Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 287–90 (2022); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191–93 (1999).

77. Christopher J. Walker & Neena Menon, *Chevron’s 51 Imperfect Solutions*, 2024 WIS. L. REV. 1585, 1590–96; Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 563–68 (2014) (discussing relationship between accountability and democratic election).

78. Jonathan L. Marshfield, *America’s Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 566–69 (2023).

rulemaking authority,” as the Idaho Supreme Court recently held,⁷⁹ but constitutional entities that are named and granted some modicum of power might be protected from being totally stripped of their authority.⁸⁰

These unique arrangements could complicate an analysis under the Elections Clause. A state election official to whom the state legislature has delegated rulemaking authority in the context of federal election administration has effectively been granted a small amount of legislative power. Regardless of how such a delegation might play out in federal court—now, or in a future case where the major questions doctrine is deployed more regularly or the nondelegation doctrine itself is revived—most states use a “weak” version of the nondelegation doctrine and uphold most defensible delegations.⁸¹

A recent example from the 2024 election illustrates how this could play out. Maine uses ranked choice voting (RCV) for most (though not all⁸²) primary and general elections, including elections to the U.S. House of Representatives.⁸³ While the mechanics of RCV systems vary somewhat, Maine’s system operates fairly typically. For general elections, the party nominees and independent candidates appear listed on the ballot, along with a space for voters to write in another candidate.⁸⁴ Voters then rank the candidates in order of preference. If a candidate receives a majority of the vote, then no additional calculation is necessary. But if no candidate receives a majority, then the last-place candidate is eliminated, and their votes are redistributed to the remaining candidates. This process is repeated over a series of rounds until one candidate has received a majority of the vote.⁸⁵ Maine law does include

79. *Idaho State Athletic Comm’n v. Off. of the Admin. Rules Coordinator*, 542 P.3d 718, 734 (Idaho 2024).

80. Quinn Yeargain, *The Constitutionality of Stripping Elected Officials of Their Power*, ST. CT. REP. (Sept. 21, 2023) [hereinafter Yeargain, *Elected Officials*] <https://statecourtreport.org/our-work/analysis-opinion/constitutionality-stripping-elected-officials-their-power> [<https://perma.cc/DBF4-9T6E>].

81. Postell & May, *supra* note 76, at 287.

82. See Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1173, 1809–18 (2021) (describing the litigation over Maine’s use of ranked-choice voting).

83. The full history of how Maine came to use ranked-choice voting spans several years and includes several statewide votes, litigation before the Maine Supreme Judicial Court, and repeated disagreements between the Governor and Legislature. See *Ranked Choice Voting in Maine*, ME. ST. LEG., LAW & LEGIS. REF. LIBRARY, <https://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509> [<https://perma.cc/2455-RJ7M>]; ERICA FRAZIER, FAIRVOTE, THE HISTORY OF RANKED CHOICE VOTING IN MAINE 3–7 (2019), <https://fairvote.app.box.com/s/iop8ke1gd0jii2hr1155cjlhy8fl11lh> [<https://perma.cc/AEX3-N94J>].

84. ME. STAT. tit. 21-A, § 692(1)–(2) (2024). However, the write-in space can be eliminated by the Secretary of State “[i]f there is no declared write-in candidate who has qualified in accordance with” state law. 29-250-535 ME. CODE R. § 3(2).

85. ME. STAT. tit. 21-A, § 723-A(2) (2024).

one important variation on normal RCV practice: If a ballot has no first-choice preference but *does* include a second-choice preference, it is considered to have a “skipped ranking”⁸⁶—and “the subsequent ranking is counted.”⁸⁷

Two separate elections—first in 2018, then in 2024—for Maine’s Second Congressional District have failed to produce a majority-vote winner in the first round, triggering the ranked-choice voting procedure. Both times, the use of RCV has been controversial. In 2018, Republican Congressman Bruce Poliquin, who was defeated by Democratic challenger Jared Golden, filed suit against the constitutionality of using RCV, but his challenge was rejected, and he eventually conceded to Golden.⁸⁸ In 2024, Golden was ultimately re-elected to his fourth term, but it was unclear whether RCV even needed to be used at all.

The final vote totals showed that Golden received 196,189 votes, Republican Austin Theriault received 194,030 votes, and write-in candidate Diana Merenda received 420 votes, with 12,635 blank ballots.⁸⁹ Nevertheless, Secretary of State Shenna Bellows ordered that an RCV tabulation take place. Bellows concluded that the ranked-choice requirement was a default procedure, and that an RCV tabulation will always take place except “in situations in which it is mathematically impossible for the leading candidate . . . to lose if the race were to proceed to a ranked-choice tabulation.”⁹⁰ She explained that because the approximately twelve thousand “blank” ballots might include a second-choice preference and could be lawfully counted as “skipped ranking” ballots, “it is mathematically possible that the second choice of those voters could change the outcome.”⁹¹

However, this conclusion depends on how the statute, as well as the rule promulgated by Secretary of State applying the statute, is

86. 29-250-535 ME. CODE R. § 2(8).

87. § 4(2)(B)(2).

88. *Baber v. Dunlap*, 376 F. Supp. 3d 125, 128–29, 145–46 (D. Me. 2018) (rejecting constitutional claims against Maine’s RCV statute); Steve Mistler, *Bruce Poliquin Concedes 2nd District Race to Jared Golden*, ME. PUB. RADIO (Dec. 26, 2018, 1:03 PM), <https://www.mainepublic.org/politics/2018-12-26/bruce-poliquin-concedes-2nd-district-race-to-jared-golden> [<https://perma.cc/N67H-KFAS>].

89. Press Release, Me. Sec’y of State, Ranked-Choice Voting Tabulation Announced for Maine Congressional District 2 (Nov. 7, 2024), <https://www.maine.gov/sos/news/2024/RCVTabulationAnnouncedMaineCD2for2024.html> [<https://perma.cc/2PRM-KKG2>] (results available under “Update Nov. 7, 2024, 10:45 PM” at the hyperlink with the text “our spreadsheet of the CD2 results”).

90. Press Release, Me. Sec’y of State, Bellows Statement Regarding Necessity of RCV Tabulation in CD2 Race (Nov. 8, 2024), <https://www.maine.gov/sos/news/2024/BellowsStatementRegardingNecessityRCVTabulation.html> [<https://perma.cc/W867-AL6M>] [hereinafter Bellows Statement].

91. *Id.*

interpreted. The Secretary of State is expressly delegated rulemaking authority by the RCV statute.⁹² The enabling statute provides an *extremely* broad grant of authority and does not specify what triggers an RCV calculation or the precise details of how it is conducted.⁹³ (Nor does it necessarily embrace Bellows’s view that an RCV calculation is the default.) In lieu of statutory specificity, the Secretary has adopted a comprehensive rule that governs when and how RCV calculations take place.⁹⁴ This rule specifies that, where “no candidate receives more than 50% of the first choice votes,” an RCV count must take place.⁹⁵ Though the Secretary clearly interpreted her office’s own rule as establishing that “skipped ranking” ballots must be counted to determine *whether* an RCV count must take place,⁹⁶ there are other ways of reading the statute. For example, Congressman Golden’s attorney argued in a letter to the Secretary that, based on how the rule lays out the process, although “skipped ranking” ballots would be counted *in* an RCV round, they could not be used to determining *whether* an RCV calculation takes place.⁹⁷

In the end, the count commenced, was administered as Bellows laid out, and Golden won re-election.⁹⁸ Accordingly, Golden would have won either way, under both his theory of how to read the statute and the rule and the Secretary’s. Had that not been the case, it is not implausible that Golden may have raised an ISLT-flavored claim—however meritless—in court. He plausibly might have challenged the Legislature’s delegation of authority to the Secretary of State, the specific regulation promulgated pursuant to that delegation, or the application of that regulation to the instant-runoff voting context. Yet the legal context in Maine suggests that such a challenge should be rejected. The Maine Constitution establishes the Secretary as a constitutional office with significant powers to

92. ME. STAT. tit. 21-A, § 723-A(5-A) (2024).

93. See § 723-A.

94. See 29-250-535 ME. CODE R. § 4.

95. § 4(2)(A).

96. See Bellows Statement, *supra* note 90.

97. Letter from Peter J. Brann, Partner, Brann & Isaacson, to Jonathan R. Bolton, Assistant Att’y Gen., Office of the Me. Att’y Gen., at 2 (Nov. 7, 2024) (on file with author).

98. Kevin Miller, *Golden Wins Ranked-Choice Runoff in Maine’s 2nd Congressional District*, ME. PUB. RADIO (Nov. 15, 2024, 7:19 PM), <https://www.mainepublic.org/politics/2024-11-15/golden-wins-ranked-choice-runoff-in-maines-2nd-congressional-district> [https://perma.cc/6Y8A-2H2V]. After the RCV calculation, Theriault requested a recount, which Golden also won. Lauren McCauley, *Theriault Ends Recount, Confirming Golden’s Win in Maine’s 2nd Congressional District*, ME. MORNING STAR (Dec. 4, 2024, 2:52 PM), <https://mainemorningstar.com/2024/12/04/theriault-ends-recount-confirming-goldens-win-in-maines-2nd-congressional-district/>.

administer elections.⁹⁹ Moreover, Maine courts employ a high level of deference to administrative agencies,¹⁰⁰ and its Supreme Judicial Court has interpreted its constitution as having a weak nondelegation doctrine.¹⁰¹ Accordingly, it would be unsurprising, and entirely in keeping with its precedent, for the Maine Supreme Judicial Court to soundly reject any such challenge.

III. ANSWERING EXECUTIVE BRANCH QUESTIONS UNDER *MOORE V. HARPER*

To say that *Moore v. Harper* might plausibly apply to state executive branches is not an endorsement that it should. Instead, almost *any* federal judicial intervention into state executive actions in the Elections Clause context would be entirely indefensible. Consider what any attempted intervention would involve. The Court would be hearing an appeal directly from a state supreme court decision,¹⁰² and would, in effect, override the decision of a state supreme court on a matter of state constitutional law. Doing so would in turn require either superimposing federal assumptions of separated powers onto state systems or assuming a paramount authority to definitively answer questions of state law. Moreover, unlike the traditional ISLT situation, a decision to override a state executive decision practically overrides the decisions of at least two separate branches of government—not just the executive branch, but also the state judiciary, in affirming the legality of the conduct under state law, and possibly the state legislature as well, if the executive actor were acting under legislative delegation.¹⁰³ Few cases would be exceptional enough to justify federal judicial intervention at such a level.

99. See ME. CONST. art. V, pt. 2, § 1 (establishing Office of Secretary of State); *id.* art. IV, pt. 3, §§ 17–18 (delegating Secretary of State power to administer initiative and referendum elections); *id.* art. IV, pt. 1, § 5 (receiving and canvassing election results for the State House); *id.* art. IV, pt. 2, § 3 (same for State Senate); *id.* art. V, pt. 1, § 3 (same for Governor).

100. Walker & Menon, *supra* note 77, at 1602 tbl.1, 1605 tbl.2.

101. Postell & May, *supra* note 76, at 304 tbl.2 (characterizing Maine as having a “Weak Nondelegation” doctrine); Rossi, *supra* note 76, at 1201 tbl.1 (characterizing Maine as having a “Moderate” nondelegation doctrine); Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 588–92, 592 n.111 (1994) (characterizing Maine as having a “loose” nondelegation standard).

102. It is certainly possible that a challenger might raise an ISLT-flavored challenge for the first time in a federal lawsuit challenging the practice. However, I agree with Carolyn Shapiro that “those challenging state court decisions as ‘beyond the ordinary bounds of judicial review’ should have to make a version of that argument in state court first.” Shapiro, *State Law and Federal Elections*, *supra* note 9, at 2053.

103. See Shapiro, *ISLT*, *supra* note 16, at 189–90.

Moore provides some reassurance that these kinds of interventions are unlikely to be common. Echoing throughout the opinion is a professed commitment to the flexibility of states in setting up their own systems of government. But it is unclear how much the Court has contemplated what that means—or how committed it actually is to that idea.¹⁰⁴ The understanding on the part of the federal courts of state systems of separated powers is quite poor in practice,¹⁰⁵ which does not inspire confidence in their ability to responsibly handle this kind of review.

Accordingly, if a state executive branch decision is challenged as running afoul of the Elections Clause, the onus may be on the state officials to justify and explain their actions to a federal court that is unfamiliar with the specific contours of that state’s system of separated powers. State courts, in adjudicating these disputes and upholding the challenged actions in the first instance, will also face pressure to explain why they are doing so.

Carolyn Shapiro has outlined several suggestions for how courts and litigants might undertake this task. She has argued that that “federal litigation must take account of the fact that state constitutions generally protect democracy and voting rights more explicitly and more expansively than does the federal Constitution.”¹⁰⁶ Where state courts rely on these protections to strike down legislative acts, “they—and the litigants defending their rulings—can provide some protection” by “assum[ing] that their readers know nothing about their state’s law” and educating the Court about “how their analysis is grounded in longstanding state law precedent and norms,” “their state’s unique history,” and “principles related to delegation to administrative and executive agencies in their states.”¹⁰⁷

The need for such explanations is especially true for state executive branches, which are composed, selected, checked, and balanced differently from the federal executive. These differences are not accidents of history but instead reflect state-specific, and frequently idiosyncratic, responses to distinct historical moments—as well as

104. Z. Payvand Ahdout & Bridget Fahey, *Layered Constitutionalism*, 124 COLUM. L. REV. 1295, 1329 (2024) (arguing that the Court “employs the language of deference, but . . . simultaneously suggests that there are federal constitutional principles with which state structures must be ‘in full harmony’”).

105. Brief of Constitutional Law Scholars Quinn Yeagain and Anthony Michael Kreis as *Amici Curiae* in Support of Petitioners at 3–4, *Rose v. Raffensperger*, 144 S. Ct. 2686 (2024) (No. 23-1060), 2024 WL 1913465 (arguing that the Eleventh Circuit’s decision in *Rose v. Raffensperger* “reflects a misunderstanding of the Georgia Constitution and the Supreme Court of Georgia’s line of caselaw”); Ahdout & Fahey, *supra* note 104, at 1330 (arguing that some “state choices will be discordant with federal structural trends and so, perhaps too, with the ‘republican’ blueprints that federal judges conjure out of their generalized knowledge”).

106. Shapiro, *State Law and Federal Elections*, *supra* note 9, at 2066.

107. *Id.* at 2073.

deliberately framed constitutional text. The structures established by state constitutions differ so significantly from ostensibly analogous federal systems that relying on analogies to the federal system would be fatally flawed.

For example, the plural executive is omnipresent in the states, though the specifics differ depending on the state.¹⁰⁸ These features were not common among state constitutions in place at the Founding, instead emerging during the Jacksonian era as an exercise in populism.¹⁰⁹ Then, beginning in the Progressive era, reformers sought to consolidate executive power in governors. They frequently moved to convert elected, largely ministerial positions into appointed offices under the governor's purview.¹¹⁰ As I have previously documented, voters themselves played a significant role in shaping administrative capacity in the states, frequently approving or disapproving proposed modifications, as well as proposing structures of their own creation.¹¹¹

The nature of executive power differs, too. Most governors have line-item vetoes, though, as noted earlier, the scope of this power varies.¹¹² As state administrative capacities have grown over time, legislatures (and voters) have added new checks and balances on agency action, including greater gubernatorial review of proposed regulations and legislative vetoes.¹¹³

The explanations for these differences vary, but many of them arose from a deep skepticism of state legislatures.¹¹⁴ At the time of the Founding, state legislatures dominated state governments. Most

108. As New York's highest court recently noted, "New York does not have a unitary Executive"—and, as such, federal caselaw ignores this structural difference between the state and federal constitutions. *See Cuomo v. N.Y. State Comm'n on Ethics & Lobbying in Gov't*, __ N.E.3d __, 2025 WL 515384, at *6 (Feb. 18, 2025). To that end, all state constitutions establish executive branch officials other than the governor and lieutenant governor. In virtually all states, at least some of these officials are elected. In the few that don't do this—Alaska, Maine, and Tennessee—the state constitutions establish appointed officers or set the contours for how the executive branch is organized. *See* sources cited *supra* note 62.

109. Seifter, *Gubernatorial Administration*, *supra* note 69, at 495–96; Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 884–87 (2021); Quinn Yeargain, *Administrative Capacity in Direct Democracy*, 57 UC DAVIS L. REV. 1347, 1355–58 (2023) [hereinafter Yeargain, *Administrative Capacity*].

110. Seifter, *Gubernatorial Administration*, *supra* note 69, at 496–98; Yeargain, *Administrative Capacity*, *supra* note 109, at 1377–80.

111. Yeargain, *Administrative Capacity*, *supra* note 109, at 1381–83.

112. Briffault, *supra* note 46, at 1185–94; Seifter, *Gubernatorial Administration*, *supra* note 69, at 507–10.

113. Seifter, *Gubernatorial Administration*, *supra* note 69, at 503–07.

114. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1768–77 (2021) [hereinafter Seifter, *Countermajoritarian Legislatures*]; Marshfield, *supra* note 78, at 561–65.

governors were indirectly elected, and legislatures played a significant role in staffing other members of the executive and judicial branches.¹¹⁵ The delegation of power to “legislatures” in the Elections Clause, therefore, may make sense historically¹¹⁶—but it has made less sense over time, as the systems of powers in state governments have shifted.

If *Moore*’s text is taken seriously, it is friendly to these realities. It contemplates, even if superficially, that states may develop their own distinct systems of separated powers. It notes that states can “establish their own governmental processes” independent of what exists at the federal level, and has seemingly approved of at least some limited delegations of legislative power, *e.g.*, to the electorate vis-à-vis direct democracy and to an independent redistricting commission.¹¹⁷ As Payvand Ahdout and Bridget Fahey recently noted, these modifications do not excessively deviate from a “federally approved form of republican government.”¹¹⁸

The difficulty of the past decisions involving ISLT, however, is that they have involved relatively straightforward alterations to how legislative power is separated. Upholding the Governor of Minnesota’s veto of a bill establishing congressional districts in *Smiley v. Holm*,¹¹⁹ for example, was easy enough.¹²⁰ There is an obvious, near-identical parallel to the presidential veto in the U.S. Constitution,¹²¹ which made the gubernatorial veto an understandable check on the state legislature’s power. Such ordinary vetoes can hardly ever be challenged under state constitutions. And there needn’t be any deeper analysis of whether any particular veto excessively infringes on state legislative power.¹²²

115. Seifter, *Countermajoritarian Legislatures*, *supra* note 114, at 1768–74; Quinn Yeagain, *Democratizing Gubernatorial Selection*, 14 NE. U. L. REV. 1, 9–14 (2022).

116. Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 25 (2022) (“The Framers knew that each of the thirteen then-existing states had an ordinary standing legislature, and Article II created a simple, inexpensive, and self-executing default that, *unless a future state constitution specified otherwise by creating a special ad hoc legislative body or process*, the state’s ordinary pre-existing state legislature would be the body to adopt federal election regulations.”).

117. *Moore v. Harper*, 143 S. Ct. 2065, 2083 (2023) (quoting *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 816 (2015)).

118. Ahdout & Fahey, *supra* note 104, at 1327. *But see* Mate, *supra* note 9, at 909–10 (“*Moore v. Harper* could allow federal courts to limit or rein in state courts’ ability to recognize norms against partisan gerrymandering through state constitutional interpretation, undermining judicial federalism.”).

119. 285 U.S. 355 (1932).

120. *Id.* at 374–75.

121. U.S. CONST. art. I, § 7, cl. 2.

122. A governor’s use of the veto involves some limited exercise of legislative power. Thomas Cooley noted that “in the approval of laws, the governor is a component

But the same is not true for a line-item veto, even one far short of the extreme example suggested earlier. There is no analogous line-item veto under the U.S. Constitution,¹²³ and different questions come up in this context than for an ordinary veto. As a result, there is a rich body of caselaw surrounding line-item vetoes.¹²⁴ Courts have had to answer questions like: Did the legislation the governor attempted to partially veto actually fall within the scope of the line-item veto power?¹²⁵ Was the vetoed provision a permissible “item” to veto?¹²⁶ These questions are not totally answerable by the text of veto provisions themselves.¹²⁷ Accordingly, answering these questions requires a deeper analysis of the purpose of the provision and its effect on the balance of power between the executive and the legislative.¹²⁸ Such analysis requires a deep understanding of the specific state constitutional history and culture.

The delegation of legislative power to the electorate (in *Hildebrandt*) or to an independent redistricting commission (in *Arizona*)¹²⁹ was similarly understandable in federal parlance, even if it was less analogous to any permissible delegation in the federal constitutional context. Again, as with the ordinary veto in *Smiley*, there is no interpretative question under the state constitution to answer. Both the initiative power in *Hildebrandt* and the creation of the independent redistricting commission

part of the legislature.” THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 153 (Boston, Little, Brown & Co. 1868). John Adams viewed the gubernatorial veto as part of a tricameral legislature—though he went further by advocating to have the governor as a formal part of the legislature. RICHARD ALAN RYERSON, JOHN ADAMS’S REPUBLIC 220–22 (2016); Richard Samuelson, *John Adams and the Republic of Laws*, in HISTORY OF AMERICAN POLITICAL THOUGHT 114, 126–27 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 1st ed. 2003).

123. *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

124. Briffault, *supra* note 46, at 1172 (“[T]he item veto has been a fertile source of state constitutional litigation.”).

125. *Id.* at 1198–1203.

126. *Id.* at 1181–84.

127. *See id.* at 1198 & n.110 (noting that “item” and “appropriations bill” are “term[s] in need of definition, yet most state constitutions do not provide one”); Non-Party Brief of *Amicus Curiae* Professor Richard Briffault at 8, *LeMieux v. Evers*, No. 2024AP000729 (Wis. Sept. 17, 2024), 2024 WL 4328812 [hereinafter *LeMieux* Briffault Brief] (“Line-drawing in partial veto cases is inherently difficult; no state court has avoided close judgment calls.”).

128. Briffault, *supra* note 46, at 1173–74 (“The item veto alters the balance of constitutional authority between a governor and a legislature, yet many state courts either fail to recognize this or are unable to articulate a vision of executive-legislative relations that adequately incorporates the changes affected by the item veto.”); *LeMieux* Briffault Brief, *supra* note 127, at 8–9 (arguing that the item veto ought to be interpreted based on the state “Constitution’s text, history, and structure and its core democratic commitments”).

129. *See supra* Section I.A.

in *Arizona* were explicit delegations of power under their respective state constitutions.¹³⁰

But whether the statutory delegation of power to a state election board is permissible under the state constitution is harder to answer. If the state constitution includes a general grant of power—say, for example, that the board has whatever power is delegated to it by the legislature¹³¹—that does not necessarily speak to the specific powers that the board has, nor how its actions fit into a state framework of separated powers.¹³² Does the state board, by the mere fact of its creation as a constitutional office, have any inherent powers?¹³³ When promulgating a rule based on a statute, what level of deference does a court owe the board?¹³⁴ Are there *any* limits on how much authority the legislature could delegate?¹³⁵

Accordingly, the context in which the Supreme Court might review the decision of a state supreme court in one of these cases—*e.g.*, an ISLT-flavored challenge to a governor’s line-item veto or a state board of elections’ action in some respect—is materially different than those in *Smiley*, *Hildebrandt*, or *Arizona*. Each of those cases merely concerned whether the challenged actions were permissible under the Elections Clause. They had nothing to do with whether the actions were *also* lawful under the state constitutions. Yet *this* is the context in which an ISLT-flavored challenge would arise. In that respect, these challenges might play out very similarly to a challenge to a state court decision. The Court, as it explained in *Moore*, would consider whether the state court’s decision was within the “bounds of ordinary judicial review,” though it did not specify what this meant.¹³⁶ There is good reason to suspect that the Court could very well rely on its favored interpretative methodologies, like textualism or originalism, while also considering the

130. See *supra* notes 32–34 and accompanying text.

131. *E.g.*, HAW. CONST. art. IV, § 3 (“The legislature shall provide for a chief election officer of the State, whose responsibilities shall be as provided by law and shall include the supervision of state elections, the maximization of registration of eligible voters throughout the State and the maintenance of data concerning registered voters, elections, apportionment and districting.”); ILL. CONST. art. III, § 5 (“A State Board of Elections shall have general supervision over the administration of the registration and election laws throughout the State.”); OKLA. CONST. art. III, § 2 (“The Legislature shall create a State Election Board to be charged with the supervision of such elections as the Legislature shall direct.”).

132. Marshfield, *supra* note 78, at 566–69.

133. See Yeargain, *Elected Officials*, *supra* note 80.

134. See Walker & Menon, *supra* note 77, at 1590–96; Saiger, *supra* note 77, at 563–68.

135. See Postell & May, *supra* note 76, at 287–302; Rossi, *supra* note 76, at 1191–1201; see also Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U. L. REV. 359, 380–81 (2023).

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

role of history, the consistency of a state court's interpretation, and state-specific realities.¹³⁷ With respect to reviewing an executive branch decision—which would have already been approved by a state judiciary and could well have been authorized by a state legislature—it might employ a similar analysis.

It is incumbent upon a state court upholding a challenged executive action, or litigants defending one in court, to situate the case in the state's specific constitutional context. They must emphasize the structural differences between the federal and state systems, educate the Court about the reasons for these differences, and articulate a cogent explanation as to a state-specific theory of separated powers.¹³⁸

And, in turn, the Supreme Court owes an obligation to respect that state constitutions establish different systems of government than does the U.S. Constitution. The setups may look similar—they are obviously closer to the federal government's presidential system than, say, Canada's parliamentary system—but assuming that the superficial similarity means that federal assumptions work in state systems is flawed.¹³⁹ Accordingly, the Supreme Court should defer to a state court's determination as to the legality of a state executive's action in the absence of an extraordinary reason not to.

CONCLUSION

By its own text, the Supreme Court's decision in *Moore v. Harper* only applies to the actions of state judiciaries. Courts are prohibited from “transgress[ing] the ordinary bounds of judicial review” and “arrogat[ing] to themselves the power vested in state legislatures to regulate federal elections”—and executive branch officials are not mentioned at all. Yet the core concern about state judicial action intruding on the power of state legislatures under the U.S. Constitution could surely extend to executive branch intrusions as well.

But if *Moore*'s decision is a specter looming over state constitutional adjudication in state courts, I argue in this Essay that it is even more problematic when applied to executive actions. The distinct separated-powers scheme established by the U.S. Constitution is not mirrored in

137. See Litman & Shaw, *supra* note 9, at 893–95; Shapiro, *State Law and Federal Elections*, *supra* note 9, at 2054–58; Kafker & Jacobs, *supra* note 9, at 116–20.

138. Shapiro, *State Law and Federal Elections*, *supra* note 9, at 2064–65.

139. Marshfield, *supra* note 78, at 560–61 (arguing that “surface-level similarities” between federal and state governments “misrepresent state government and state constitutional design,” which “suggest[s] that Madisonian separation-of-power models are unlikely to work well or fully account for state constitutional design”); Gans, Gorod & Jessurun, *supra* note 9, at 45 (“State government structures differ from the federal government in several other respects, and these differences underscore why federal conceptions of separations of powers are inapplicable to the states.”).

any state constitution. State governors do not exist as unitary executives, agencies and other executive officers are named as constitutional entities, and governors frequently exercise powers that are denied to the President. As such, the idea that federal courts should play a role in policing violations of the Electors and Elections Clauses by executive officials is a concerning prospect that could inappropriately import federal conceptions of power into entirely different state systems.

Accordingly, I contend that, to the extent that *Moore*'s limitations apply to executive branches, the Supreme Court ought to tread carefully—and defer to state-specific conceptions of executive power. Though federal courts have a flawed track record of understanding how state systems balance power differently than the Federal Constitution, federalism demands that the Court respect state-specific differences. States have adopted systems that deviate from federal practice both to reflect their own unique idiosyncrasies and also to improve on the federal system. Disregarding those deliberate choices is, at its core, an affront to federalism.

* * *