Moore v. Harper (2023)

Chief Justice Roberts delivered the opinion of the Court.

Several groups of plaintiffs challenged North Carolina's congressional districting map as an impermissible partisan gerrymander. The plaintiffs brought claims under North Carolina's Constitution, which provides that "[a]ll elections shall be free." Art. I, §10. Relying on that provision, as well as the State Constitution's equal protection, free speech, and free assembly clauses, the North Carolina Supreme Court found in favor of the plaintiffs and struck down the legislature's map. The Court concluded that North Carolina's Legislature deliberately drew the State's congressional map to favor Republican candidates.

In drawing the State's congressional map, North Carolina's Legislature exercised authority under the Elections Clause of the Federal Constitution, which expressly requires "the Legislature" of each State to prescribe "[t]he Times, Places and Manner of " federal elections. Art. I, §4, cl. 1. We decide today whether that Clause vests state legislatures with authority to set rules governing federal elections free from restrictions imposed under state law.

I

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. *Arizona* v. *Inter Tribal Council of Ariz., Inc.* (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules.

A

The 2020 decennial census showed that North Carolina's population had increased by nearly one million people, entitling the State to an additional seat in its federal congressional delegation. Following those results, North Carolina's General Assembly set out to redraw the State's congressional districts. The General Assembly also drafted new maps for the State's legislative districts, including the State House and the State Senate. In November 2021, the Assembly enacted three new maps, each passed along party lines.

Shortly after the new maps became law, several groups of plaintiffs—including the North Carolina League of Conservation Voters, Common Cause, and individual voters—sued in state court. The plaintiffs asserted that each map constituted an impermissible partisan gerrymander in violation of the North Carolina Constitution. . . . The trial court [found] that the General Assembly's 2021 congressional districting map was "a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Con- gressional delegation." But the court denied relief, reasoning that the partisan gerrymandering claims "amounted to political questions that are nonjusticiable under the North Carolina Constitution."

The North Carolina Supreme Court reversed, holding that the legislative defendants violated state law "beyond a reasonable doubt" by enacting maps that constituted partisan gerrymanders. It also rejected the trial court's conclusion that partisan gerrymandering claims present a nonjusticiable political question. . . . The State Supreme Court also rejected the argument that the Elections Clause in the Federal Constitution vests exclusive and independent authority in state legislatures to draw congressional maps. . . .

After holding that the 2021 districting maps "substantially infringe upon plaintiffs' fundamental right to equal voting power," the Court struck down the maps and remanded the case to the trial "court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." The Court entered judgment on February 15, 2022. *Harper* v. *Hall* [This first case was known as *Harper I*]. Two days later, the General Assembly adopted a remedial congressional redistricting plan. But the trial court rejected that plan and adopted in its place interim maps developed by several Special Masters for use in the 2022 North Carolina congressional elections.

On February 25, 2022, the legislative defendants filed an emergency application in this Court, citing the Elections Clause and requesting a stay of the North Carolina Supreme Court's decision. We declined to issue emergency relief but later granted certiorari.

B

Following our grant of certiorari, the North Carolina Supreme Court heard an appeal concerning the trial court's remedial order. In December 2022, the Court issued a decision affirming in part, reversing in part, and remanding the case. As relevant, it agreed with the trial court's determination that the General Assembly's remedial congressional plan "fell short" of the requirements set forth in *Harper I*. [This second case was known as *Harper II*.]

The legislative defendants sought rehearing, requesting that the North Carolina Supreme Court "withdraw" its remedial opinion in *Harper II*. They also asked the Court to "overrule" its decision in *Harper I*, although they conceded that doing so would not "negate the force of its order striking down the 2021 plans." The North Carolina Supreme Court granted rehearing in *Harper II*, and we ordered the parties to submit supplemental briefing concerning our jurisdiction over this case in light of that decision.

Following the parties' submission of supplemental briefs in this Court, the North Carolina Supreme Court issued a decision granting the requests made by the legislative defendants. The Court withdrew its opinion in *Harper II*, concerning the remedial maps, and "overruled" its decision in *Harper I*. Relying on our decision in *Rucho* and on a renewed look at the constitutional provisions at issue, the Court repudiated *Harper I* 's conclusion that partisan gerrymandering claims are justiciable under the North Carolina Constitution.

The North Carolina Supreme Court dismissed the plaintiffs' claims with prejudice. But it did not reinstate the 2021 congressional plans that *Harper I* had struck down under the North Carolina Constitution. Instead, the Court provided the General Assembly with the "opportunity to enact a new set of legislative and congressional redistricting plans, guided by federal law, the objective constraints in Article II, Sections 3 and 5 [of the North Carolina Constitution], and this opinion." The Court did not revisit *Harper*

I 's conclusion that the Federal Elections Clause does not shield state legislatures from review by state courts for compliance with state constitutional provisions. We invited the parties to submit additional supplemental briefs addressing the effect of the Court's decision on our jurisdiction.

II

Before turning to the merits, we must "determine as a threshold matter that we have jurisdiction." *Goodyear Atomic Corp.* v. *Miller* (1988). The Constitution provides for our jurisdiction over "Cases" and "Controversies." Art. III, §2. That constitutional requirement ensures that the parties before us retain a "personal stake" in the litigation. *Baker* v. *Carr* (1962). As "[a] corollary to this case-or-controversy requirement," there must exist a dispute "at all stages of review, not merely at the time the complaint is filed." *Genesis HealthCare Corp.* v. *Symczyk* (2013). Mootness doctrine "addresses whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit." *West Virginia* v. *EPA* (2022).

The North Carolina Supreme Court's decision to withdraw *Harper II* and overrule *Harper I* does not moot this case. The plaintiffs here sought to enjoin the use of the 2021 plans enacted by the legislative defendants. *Harper I* granted that relief, and in doing so rejected the Elections Clause defense at issue before us. Prior to both the appeal and rehearing proceedings in *Harper II*, the North Carolina Supreme Court had already entered the judgment and issued the mandate in *Harper I*. And the time during which the defendants could seek rehearing as to that judgment had long since passed. Recognizing this reality, the legislative defendants did not ask the North Carolina Supreme Court to disturb the judgment in *Harper I* as part of the rehearing proceedings. They instead acknowledged that they would remain bound by *Harper I* 's decision enjoining the use of the 2021 plans.

The North Carolina Supreme Court "overruled" *Harper I*, thereby granting the specific relief requested by the legislative defendants. As a result, partisan gerrymandering claims are no longer justiciable under the State's Constitution. But although the defendants may now draw new congressional maps, they agree that the North Carolina Supreme Court overruled only the "*reasoning* of *Harper I* " and did not "disturb . . . its judgment nor . . . alter the presently operative statutes of North Carolina." In other words, although partisan gerrymandering claims are no longer viable under the North Carolina Constitution, the North Carolina Supreme Court has done nothing to alter the effect of the judgment in *Harper I* enjoining the use of the 2021 maps. As a result, the legislative defendants' path to complete relief runs through this Court. Were we to reverse the judgment in *Harper I*—a step not taken by the North Carolina Supreme Court—the 2021 plans enacted by the legislative defendants would again take effect. The parties accordingly continue to have a "personal stake in the ultimate disposition of the lawsuit." *Chafin* v. *Chafin* (2013).

A North Carolina statute with specific application to this proceeding confirms that the controversy before us remains live. Under state law, if "the United States Supreme Court . . . reverses" the decision in *Harper I*, the 2021 maps will again become "effective." We have previously found such trigger provisions—in North Carolina, no less—sufficient to avoid mootness under Article III. See *Hunt* v. *Cromartie* (1999).

We also have jurisdiction to review the judgment in *Harper I* under 28 U. S. C. §1257(a). That statute provides for this Court's exercise of jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." . . .

Justice Thomas sees it differently. He correctly observes that the North Carolina Supreme Court has now dismissed the plaintiffs' claims with prejudice. He posits, therefore, that the legislative defendants "are not injured by the judgment of *Harper I*." But the record before us belies that notion. *Harper I* enjoined the use of the 2021 maps in subsequent elections in North Carolina. Well after the time for seeking rehearing as to that judgment passed, the legislative defendants instead sought rehearing with respect to *Harper II*, a distinct decision concerning remedies. The defendants steadfastly maintained in rehearing proceedings before the North Carolina Supreme Court that "overruling *Harper I* [would] not negate the force of its order striking down the 2021 plans." With those concessions on the record, the North Carolina Supreme Court issued its decision "overruling" *Harper I*, and—by contrast—"withdraw[ing]" its decision in *Harper II*. And mirroring their representations before the North Carolina Supreme Court, the legislative defendants now maintain in this Court that they continue to remain bound by the judgment in *Harper I*.

In an effort to cast doubt on these consistent representations by the injured party before us, Justice Thomas contends that the legislative defendants have already received complete relief because nothing now prevents the implementation of the 2021 maps. For the reasons stated above, that would come as a surprise to both the legislative defendants and the North Carolina Supreme Court. The dissent also emphasizes that several of the plaintiffs contest our jurisdiction. But that has been their position from the very beginning, and it did not prevent our granting certiorari. The concessions offered by the legislative defendants as part of the rehearing proceedings, the recent opinion issued by the North Carolina Supreme Court, and the legislative defendants' briefing in this Court all tell the same story: *Harper I* continues to enjoin the use of the 2021 maps. Following the dissent's logic and dismissing this case as moot would foreclose the one path to full relief available to the legislative defendants: A decision by this Court reversing the judgment in *Harper I*.

This Court has before it a judgment issued by a State's highest court that adjudicates a federal constitutional issue. The defendants did not ask the North Carolina Supreme Court to vacate that judgment, that court did not purport to do so, and the defendants now concede that they remain bound by it. *Cox Broadcasting* considered our exercise of jurisdiction where the "federal issue . . . will survive and require decision regardless of the outcome of future state-court proceedings." Unlike cases in which we must anticipate what the future might hold, we now know the resolution of the anticipated state court proceedings. The record shows that *Harper I* finally decided the Elections Clause question, the judgment in that case continues to bind the parties before us, and the 2021 congressional maps would again take effect in North Carolina were we to reverse. Accordingly, we have jurisdiction under both Article III and §1257(a).

III

The question on the merits is whether the Elections Clause insulates state legislatures from review by state courts for compliance with state law.

Since early in our Nation's history, courts have recognized their duty to evaluate the constitutionality of legislative acts. We announced our responsibility to review laws that are alleged to violate the Federal Constitution in *Marbury* v. *Madison*, proclaiming that "[i]t is emphatically the province and duty of the judicial department to say what the law is." (1803). *Marbury* confronted and rejected the argument that Congress may exceed constitutional limits on the exercise of its authority. "Certainly all those who have framed written constitutions," we reasoned, "contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."

Marbury proclaimed our authority to invalidate laws that violate the Federal Constitution, but it did not fashion this concept out of whole cloth. Before the Constitutional Convention convened in the summer of 1787, a number of state courts had already moved "in isolated but important cases to impose restraints on what the legislatures were enacting as law." G. Wood, The Creation of the American Republic 1776–1787 (1969). Although judicial review emerged cautiously, it matured throughout the founding era. These state court decisions provided a model for James Madison, Alexander Hamilton, and others who would later defend the principle of judicial review. . . .

North Carolina and Rhode Island did not stand alone. . . . All told, "[s]tate courts in at least seven states invalidated state or local laws under their State constitutions before 1787," which "laid the foundation for judicial review." J. Sutton, 51 Imperfect Solutions (2018).

The Framers recognized state decisions exercising judicial review at the Constitutional Convention of 1787. On July 17, James Madison spoke in favor of a federal council of revision that could negate laws passed by the States. He lauded the Rhode Island judges "who refused to execute an unconstitutional law," lamenting that the State's legislature then "displaced" them to substitute others "who would be willing instruments of the wicked & arbitrary plans of their masters." A week later, Madison extolled as one of the key virtues of a constitutional system that "[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void." Elbridge Gerry, a delegate from Massachusetts, also spoke in favor of judicial review. (Known for drawing a contorted legislative district that looked like a salamander, Gerry later became the namesake for the "gerrymander.") At the Convention, he noted that "[i]n some States the Judges had [actually] set aside laws as being agst. the Constitution." Such judicial review, he noted, was met "with general approbation."

Writings in defense of the proposed Constitution echoed these comments. In the Federalist Papers, Alexander Hamilton maintained that "courts of justice" have the "duty . . . to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78,. "[T]his doctrine" of judicial review, he also wrote, was "equally applicable to most if not all the State governments." The Federalist No. 81.

State cases, debates at the Convention, and writings defending the Constitution all advanced the concept of judicial review. And in the years immediately following ratification, courts grew assured of their power to void laws incompatible with constitutional provisions. W. Treanor, Judicial Review Before *Marbury*, 58 Stan. L. Rev. 455 (2005). The idea that courts may review legislative action was so "long and well established" by the time we decided *Marbury* in 1803 that Chief Justice Marshall referred to judicial review as "one of the fundamental principles of our society."

IV

We are asked to decide whether the Elections Clause carves out an exception to this basic principle. We hold that it does not. The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.

A

We first considered the interplay between state constitutional provisions and a state legislature's exercise of authority under the Elections Clause in *Ohio ex rel. Davis* v. *Hildebrant* (1916). There, we examined the application to the Elections Clause of a provision of the Ohio Constitution permitting the State's voters "to approve or disapprove by popular vote any law enacted by the General Assembly." In 1915, the Ohio General Assembly drew new congressional districts, which the State's voters then rejected through such a popular referendum. Asked to disregard the referendum, the Ohio Supreme Court refused, explaining that the Elections Clause—while "conferring the power therein defined upon the various state legislatures"—did not preclude subjecting legislative Acts under the Clause to "a popular vote."

We unanimously affirmed, rejecting as "plainly without substance" the contention that "to include the referendum within state legislative power for the purpose of apportionment is repugnant to §4 of Article I [the Elections Clause]."

Smiley v. *Holm*, decided 16 years after *Hildebrant*, considered the effect of a Governor's veto of a state redistricting plan. Following the 15th decennial census in 1930, Minnesota lost one seat in its federal congressional delegation. The State's legislature divided Minnesota's then nine congressional districts in 1931 and sent its Act to the Governor for his approval. The Governor vetoed the plan pursuant to his authority under the State's Constitution. But the Minnesota Secretary of State nevertheless began to implement the legislature's map for upcoming elections. A citizen sued, contending that the legislature's map "was a nullity in that, after the Governor's veto, it was not repassed by the legislature as required by law.". The Minnesota Supreme Court disagreed. In its view, "the authority so given by" the Elections Clause "is unrestricted, unlimited, and absolute." *State ex rel. Smiley* v. *Holm* (1931). The Elections Clause, it held, conferred upon the legislature "the exclusive right to redistrict" such that its actions were "beyond the reach of the judiciary."

We unanimously reversed. A state legislature's "exercise of . . . authority" under the Elections Clause, we held, "must be in accordance with the method which the State has prescribed for legislative enactments." *Smiley*. Nowhere in the Federal Constitution could we find "provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted."

Smiley relied on founding-era provisions, constitutional structure, and historical practice, each of which we found persuasive. Two States at the time of the founding provided a veto power, restrictions that were "well known." . . . And "long and continuous interpretation" as evidenced by "the established practice in the states" provided further support. *Smiley*. . . .

This Court recently reinforced the teachings of *Hildebrant* and *Smiley* in a case considering the constitutionality of an Arizona ballot initiative. Voters "amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n* (2015). The Arizona Legislature challenged a congressional map adopted by the commission, arguing that the Elections "Clause precludes resort to an independent commission . . . to accomplish redistricting." A divided Court rejected that argument. The majority reasoned that dictionaries of "the founding era . . . capaciously define[d] the word 'legislature,'" and concluded that the people of Arizona retained the authority to create "an alternative legislative process" by vesting the lawmaking power of redistricting in an independent commission. The Court ruled, in short, that although the Elections Clause expressly refers to the "Legislature," it does not preclude a State from vesting congressional redistricting authority in a body other than the elected group of officials who ordinarily exercise lawmaking power. States, the Court explained, "retain autonomy to establish their own governmental processes."

The significant point for present purposes is that the Court in *Arizona State Legislature* recognized that whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. The Court embraced the core principle espoused in *Hildebrant* and *Smiley* "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." see also (Roberts, C. J., dissenting) (recognizing that *Hildebrant* and *Smiley* support the imposition of "some constraints on the legislature"). . . .

The reasoning we unanimously embraced in *Smiley* commands our continued respect: A state legislature may not "create congressional districts independently of" requirements imposed "by the state constitution with respect to the enactment of laws."

B

The legislative defendants and the dissent both contend that, because the Federal Constitution gives state legislatures the power to regulate congressional elections, only *that* Constitution can restrain the exercise of that power. The legislative defendants cite for support Federalist No. 78, which explains that the wielding of legislative power is constrained by "the tenor of the commission under which it is exercised."

This argument simply ignores the precedent just described. *Hildebrant*, *Smiley*, and *Arizona State Legislature* each rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections.

The argument advanced by the defendants and the dissent also does not account for the Framers' understanding that when legislatures make laws, they are bound by the provisions of the very documents that give them life. Legislatures, the Framers recognized, "are the mere creatures of the State Constitutions, and cannot be greater than their creators." "What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void."

Vanhorne's Lessee v. *Dorrance* (Pa. 1795). *Marbury* confirmed this understanding, and nothing in the text of the Elections Clause undermines it. When a state legislature carries out its constitutional power to prescribe rules regulating federal elections, the "commission under which" it exercises authority is two-fold. The Federalist No. 78, at 467. The legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the legislature's exercise of power.

Turning to our precedents, the defendants quote from our analysis of the Electors Clause in *McPherson* v. *Blacker* (1892). That Clause—similar to the Elections Clause—provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a [specified] Number of Electors." Art. II, §1, cl. 2. *McPherson* considered a challenge to the Michigan Legislature's decision to allocate the State's electoral votes among the individual congressional districts, rather than to the State as a whole. We upheld that decision, explaining that in choosing Presidential electors, the Clause "leaves it to the legislature exclusively to define the method of effecting the object."

Our decision in *McPherson*, however, had nothing to do with any conflict between provisions of the Michigan Constitution and action by the State's legislature—the issue we confront today. *McPherson* instead considered whether Michigan's Legislature itself directly violated the Electors Clause (by taking from the "State" the power to appoint and vesting that power in separate districts), the Fourteenth Amendment (by allowing voters to vote for only one Elector rather than "Electors"), and a particular federal statute. Nor does the quote highlighted by petitioners tell the whole story. Chief Justice Fuller's opinion for the Court explained that "[t]he legislative power is the supreme authority *except as limited by the constitution of the State*."

The legislative defendants and Justice Thomas rely as well on our decision in *Leser* v. *Garnett* (1922), but it too offers little support. *Leser* addressed an argument that the Nineteenth Amendment—providing women the right to vote—was invalid because state constitutional provisions "render[ed] inoperative the alleged ratifications by their legislatures." We rejected that position, holding that when state legislatures ratify amendments to the Constitution, they carry out "a federal function derived from the Federal Constitution," which "transcends any limitations sought to be imposed by the people of a State."

But the legislature in *Leser* performed a ratifying function rather than engaging in traditional lawmaking. The provisions at issue in today's case—like the provisions examined in *Hildebrant* and *Smiley*—concern a state legislature's exercise of lawmaking power. . . .

Hawke and *Smiley* delineated the various roles that the Constitution assigns to state legislatures. Legislatures act as "Consent[ing]" bodies when the Nation purchases land, Art. I, §8, cl. 17; as "Ratif[ying]" bodies when they agree to proposed Constitutional amendments, Art. V; and—prior to the passage of the Seventeenth Amendment—as "electoral" bodies when they choose United States Senators. Art. I, §3, cl. 1; Amdt. 17 (providing for the direct election of Senators).

By fulfilling their constitutional duty to craft the rules governing federal elections, state legislatures do not consent, ratify, or elect—they make laws. Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual

ballots. Legislatures must "provide a complete code for congressional elections," including regulations "relati[ng] 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." *Smiley*. In contrast, a simple up-or-down vote suffices to ratify an amendment to the Constitution. Providing consent to the purchase of land or electing Senators involves similarly straightforward exercises of authority. But fashioning regulations governing federal elections "unquestionably calls for the exercise of lawmaking authority." *Arizona State Legislature*. And the exercise of such authority in the context of the Elections Clause is subject to the ordinary constraints on lawmaking in the state constitution.

In sum, our precedents have long rejected the view that legislative action under the Elections Clause is purely federal in character, governed only by restraints found in the Federal Constitution.

C

Addressing our decisions in *Smiley* and *Hildebrant*, both the legislative defendants and Justice Thomas concede that at least some state constitutional provisions can restrain a state legislature's exercise of authority under the Elections Clause. But they read those cases to differentiate between procedural and substantive constraints. *Smiley*, in their view, stands for the proposition that state constitutions may impose only procedural hoops through which legislatures must jump in crafting rules governing federal elections. This concededly "formalistic" approach views the Governor's veto at issue in *Smiley* as one such procedural restraint. But when it comes to substantive provisions, their argument goes, our precedents have nothing to say.

This argument adopts too cramped a view of our decision in *Smiley*. Chief Justice Hughes's opinion for the Court drew no distinction between "procedural" and "substantive" restraints on lawmaking. It turned on the view that state constitutional provisions apply to a legislature's exercise of lawmaking authority under the Elections Clause, with no concern about how those provisions might be categorized.

The same goes for the Court's decision in *Arizona State Legislature*. The defendants attempt to cabin that case by arguing that the Court did not address substantive limits on the regulation of federal elections. But as in *Smiley*, the Court's decision in *Arizona State Legislature* discussed no difference between procedure and substance.

The defendants and Justice Thomas do not in any event offer a defensible line between procedure and substance in this context. "The line between procedural and substantive law is hazy." *Erie R. Co.* v. *Tompkins* (1938) (Reed, J., concurring in part). Many rules "are rationally capable of classification as either." *Hanna* v. *Plumer* (1965). Procedure, after all, is often used as a vehicle to achieve substantive ends. When a governor vetoes a bill because of a disagreement with its policy consequences, has the governor exercised a procedural or substantive restraint on lawmaking? *Smiley* did not endorse such murky inquiries into the nature of constitutional restraints, and we see no neat distinction today.

D

Were there any doubt, historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause. We have long looked to "settled and established practice" to interpret the Constitution. *The Pocket Veto Case* (1929). And we have found historical practice particularly pertinent when it comes to the Elections and Electors Clauses.

Two state constitutional provisions adopted shortly after the founding offer the strongest evidence. Delaware's 1792 Constitution provided that the State's congressional representatives "shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner." Even though the Elections Clause stated that the "Places" and "Manner" of federal elections shall be "prescribed" by the state legislatures, the Delaware Constitution expressly enacted rules governing the "places" and "manner" of holding elections for federal office. An 1810 amendment to the Maryland Constitution likewise embodied regulations falling within the scope of the Elections and Electors Clauses. Article XIV provided that every qualified citizen "shall vote, by ballot, . . . for electors of the President and Vice-President of the United States, [and] for Representatives of this State in the Congress of the United States." If the Elections Clause had vested exclusive authority in state legislatures, unchecked by state courts enforcing provisions of state constitutions, these clauses would have been unenforceable from the start.

Besides the two specific provisions in Maryland and Delaware, multiple state constitutions at the time of the founding regulated federal elections by requiring that "[a]ll elections shall be by ballot." These provisions directed the "manner" of federal elections within the meaning of the Elections Clause, as Madison himself explained at the Constitutional Convention.

The legislative defendants discount this evidence. They argue that those "by ballot" provisions spoke only "to the offices that were created by" state constitutions, and not to the federal offices to which the Elections Clause applies. We find no textual hook for that strained reading. "All" meant then what it means now.

In addition, the Framers did not write the Elections Clause on a blank slate—they instead borrowed from the Articles of Confederation, which provided that "delegates shall be annually appointed in such manner as the legislature of each state shall direct." Art. V. The two provisions closely parallel. And around the time the Articles were adopted by the Second Continental Congress, multiple States regulated the "manner" of "appoint[ing] delegates," suggesting that the Framers did not understand that language to insulate state legislative action from state constitutional provisions.

The defendants stress an 1820 convention held in Massachusetts to amend the Commonwealth's Constitution. After a Boston delegate proposed a provision regulating the manner of federal elections, Joseph Story—then a Justice of this Court—nixed the effort. In Story's view, such a provision would run afoul of the Elections Clause by "assum[ing] a control over the Legislature, which the constitution of the United States does not justify." But Story's comment elicited little discussion, and reflects the views of a jurist who, although "a brilliant and accomplished man, . . . was not a member of the Founding generation." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 856 (1995) (Thomas, J., dissenting).

V

A

Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein. "State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock* v. *Memphis* (1875). At the same time, the Elections Clause expressly vests power to carry out its provisions in "the Legislature" of each State, a deliberate choice that this Court must respect. As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law.

State law, for example, "is one important source" for defining property rights. *Tyler* v. *Hennepin County* (2023); see also *Board of Regents of State Colleges* v. *Roth*, (1972). At the same time, the Federal Constitution provides that "private property" shall not "be taken for public use, without just compensation." Amdt. 5. As a result, States "may not sidestep the Takings Clause by disavowing traditional property interests." *Phillips* v. *Washington Legal Foundation* (1998).

A similar principle applies with respect to the Contracts Clause, which provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." Art. I, §10, cl. 1. In that context "we accord respectful consideration and great weight to the views of the State's highest court." *Indiana ex rel. Anderson* v. *Brand* (1938). Still, "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made."

Cases raising the question whether adequate and independent grounds exist to support a state court judgment involve a similar inquiry. We have in those cases considered whether a state court opinion below adopted novel reasoning to stifle the "vindication in state courts of . . . federal constitutional rights." *NAACP* v. *Alabama ex rel. Patterson* (1958).

Running through each of these examples is the concern that state courts might read state law in such a manner as to circumvent federal constitutional provisions. Therefore, although mindful of the general rule of accepting state court interpretations of state law, we have tempered such deference when required by our duty to safeguard limits imposed by the Federal Constitution.

Members of this Court last discussed the outer bounds of state court review in the present context in *Bush* v. *Gore* (2000). Our decision in that case turned on an application of the Equal Protection Clause of the Fourteenth Amendment. In separate writings, several Justices addressed whether Florida's Supreme Court, in construing provisions of Florida statutory law, exceeded the bounds of ordinary judicial review to an extent that its interpretation violated the Electors Clause.

Chief Justice Rehnquist, joined in a concurring opinion by Justice Thomas and Justice Scalia, acknowledged the usual deference we afford state court interpretations of state law, but noted "areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." He declined to give effect to interpretations of Florida election laws by the Florida Supreme Court that "impermissibly distorted them beyond what a fair reading required." Justice Souter, for his part,

considered whether a state court interpretation "transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the 'legislature' within the meaning of Article II."

We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific. 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.

B

We decline to address whether the North Carolina Supreme Court strayed beyond the limits derived from the Elections Clause. The legislative defendants did not meaningfully present the issue in their petition for certiorari or in their briefing, nor did they press the matter at oral argument. Counsel for the defendants expressly disclaimed the argument that this Court should reassess the North Carolina Supreme Court's reading of state law. When pressed whether North Carolina's Supreme Court did not fairly interpret its State Constitution, counsel reiterated that such an argument was "not our position in this Court." Although counsel attempted to expand the scope of the argument in rebuttal, such belated efforts do not overcome prior failures to preserve the issue for review.

* * *

State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause. But federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, 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, of the Federal Constitution. Because we need not decide whether that occurred in today's case, the judgment of the North Carolina Supreme Court is affirmed.

Justice Kavanaugh, concurring.
I join the Court's opinion in full. The Court today correctly concludes that state laws governing federal elections are subject to ordinary state court review, including for compliance with the relevant state constitution. But because the Elections Clause assigns authority respecting federal elections to state legislatures, the Court also correctly concludes that "state courts do not have free rein" in conducting that review. Therefore, a state court's interpretation of state law in a case implicating the Elections Clause is subject to federal court review. see also *Bush* v. *Palm Beach County Canvassing Bd.* (2000) (unanimously concluding that a state court's interpretation of state law in a federal election case presents a federal issue); cf. *Democratic National Committee* v. *Wisconsin State Legislature*, 592 U. S. ___, n. 1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).[1] Federal court review of a state court's

[1] * Note [We have included Footnote 1 of Justice Kavanaugh's concurrence in *Wisconsin State Legislature*—Eds.]
A *federal court's* alteration of state election laws such as Wisconsin's differs in some respects from a *state court's* (or state agency's) alteration of state election laws. That said, under the U. S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections. Article II expressly provides that the rules for Presidential elections are established by the States "in such Manner as the *Legislature* thereof may direct." §1, cl. 2. The text of Article II means that :the clearly expressed intent of the legislature must prevail" and that a state court may not depart from the state election code enacted by the legislature. *Bush* v. *Gore* (2000) (Rehnquist, C. J., concurring); see *Bush* v. *Palm Beach County Canvassing*

interpretation of state law in a federal election case "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Bush* v. *Gore* (2000) (Rehnquist, C. J., concurring).

The question, then, is what standard a federal court should employ to review a state court's interpretation of state law in a case implicating the Elections Clause—whether Chief Justice Rehnquist's standard from *Bush* v. *Gore*; Justice Souter's standard from *Bush* v. *Gore*; the Solicitor General's proposal in this case; or some other standard.

Chief Justice Rehnquist's standard is straightforward: whether the state court "impermissibly distorted" state law "beyond what a fair reading required." As I understand it, Justice Souter's standard, at least the critical language, is similar: whether the state court exceeded "the limits of reasonable" interpretation of state law. *Id.*, at 133 (dissenting opinion). And the Solicitor General here has proposed another similar approach: whether the state court reached a "truly aberrant" interpretation of state law.

As I see it, all three standards convey essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication.[2] I would adopt Chief Justice Rehnquist's straightforward standard. As able counsel for North Carolina stated at oral argument, the Rehnquist standard "best sums it up." Chief Justice Rehnquist's standard should apply not only to state court interpretations of state statutes, but also to state court interpretations of state constitutions. And in reviewing state court interpretations of state law, "we necessarily must examine the law of the State as it existed prior to the action of the [state] court." *Bush* (Rehnquist, C. J., concurring).

Petitioners here, however, have disclaimed any argument that the North Carolina Supreme Court misinterpreted the North Carolina Constitution or other state law.[3] For now, therefore, this Court need not, and ultimately does not, adopt any specific standard for our review of a state court's interpretation of

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Bd, (2000) (*per curiam*); *McPherson* v. *Blacker* (1892). In a Presidential election, in other words, a state court's "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush* v. *Gore* (Rehnquist, C. J., concurring). As Chief Justice Rehnquist explained in *Bush* v. *Gore,* the important federal judicial role in reviewing state-court decisions about state law in a federal Presidential election "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures.* To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." The dissent here questions why the federal courts would have a role in that kind of case. *Post* (opinion of KAGAN, J.). The answer to that question, as the unanimous Court stated in *Bush* v. *Palm Beach County Canvassing Bd.,* and as Chief Justice Rehnquist persuasively explained in *Bush* v. *Gore,* is that the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.

[2] FN1: I doubt that there would be a material difference in application among the standards formulated by Chief Justice Rehnquist, Justice Souter, and the Solicitor General, given the similarities in the three standards, at least as described above. To be sure, different judges may reach different conclusions in an individual case about whether a particular state court interpretation is impermissible under the chosen standard. But I doubt that the precise formulation of the standard—assuming it is Chief Justice Rehnquist's, Justice Souter's, or the Solicitor General's—would be the decisive factor in any such disagreement.

[3] FN2: Instead, petitioners make the broader argument, which the Court today properly rejects, that the Elections Clause bars state courts from reviewing state laws for compliance with the relevant state constitution.

state law in a case implicating the Elections Clause. Instead, the Court today says simply that "state courts do not have free rein" and "hold[s] only that state courts may not transgress the ordinary bounds of judicial review." In other words, the Court has recognized and articulated a general principle for federal court review of state court decisions in federal election cases. In the future, the Court should and presumably will distill that general principle into a more specific standard such as the one advanced by Chief Justice Rehnquist.

With those additional comments, I agree with the Court's conclusions that (i) state laws governing federal elections are subject to ordinary state court review, and (ii) a state court's interpretation of state law in a case implicating the Elections Clause is in turn subject to federal court review.

Justice Thomas, with whom Justice Gorsuch joins, and with whom Justice Alito joins as to Part I, dissenting.

This Court sits "to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian School Tuition Organization* v. *Winn* (2011); see U. S. Const., Art. III, §1. As a corollary of that basic constitutional principle, the Court "is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre* v. *United States* (1943). To do so would be to violate "the oldest and most consistent thread in the federal law of justiciability." *Flast* v. *Cohen* (1968).

The opinion that the Court releases today breaks that thread. It "affirms" an interlocutory state-court judgment that has since been overruled and supplanted by a final judgment resolving all claims in petitioners' favor. The issue on which it opines—a federal defense to claims already dismissed on other grounds—can no longer affect the judgment in this litigation in any way. As such, the question is indisputably moot, and today's majority opinion is plainly advisory. Because the writ of certiorari should be dismissed, I respectfully dissent.

I

Here is the case before us in a nutshell: A group of plaintiffs sued various state officials under state law. The defendants raised both state-law and federal-law defenses. In the interlocutory judgment below, the State Supreme Court rejected both defenses and remanded for further proceedings. We granted review to consider the defendants' federal defense. But then, in subsequent proceedings, the state court revisited defendants' alternative state-law defense and held that it was meritorious. As a result, the court finally adjudicated the whole case in the defendants' favor, dismissing the plaintiffs' claims with prejudice.

This is a straightforward case of mootness. The federal defense no longer makes any difference to this case—whether we agree with the defense, disagree with it, or say nothing at all, the final judgment in this litigation will be exactly the same. The majority does not seriously contest that fact. Even so, it asserts jurisdiction to decide this free-floating defense that affects no live claim for relief, reasoning that a justiciable case or controversy exists as long as its opinion can in any way "alter the presently operative statutes of " a State. By its own lights, the majority "is acting not as an Article III court," *Uzuegbunam* v.

Preczewski (2021) (Roberts, C. J., dissenting), but as an ad hoc branch of a state legislature. That is emphatically not our job.

A

To review the history of this case is to demonstrate that the question presented is moot. In 2021, the North Carolina General Assembly passed an Act to redistrict the State for elections to the U. S. House of Representatives. . . . In *Harper I*, the court held that the 2021 Act violated the State Constitution, enjoined its implementation, and remanded the case to the trial court for remedial proceedings. In doing so, *Harper I* rejected both petitioners' state-law justiciability defense and their federal Elections Clause defense.

Petitioners then sought this Court's review of *Harper I* insofar as it rejected their federal defense. . . . From the start, they faced a significant jurisdictional question. . . . In granting certiorari, we relied on one of those doctrinal exceptions, premised on the assumption that "the federal issue" in this case would "survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp.* v. *Cohn* (1975).

As it turned out, that assumption was wrong. After *Harper I*, on remand, the trial court adopted a remedial districting plan for the 2022 elections. Petitioners then appealed that order, taking the case to the North Carolina Supreme Court for a second time. Initially, the North Carolina Supreme Court released an opinion applying *Harper I* and affirming the trial court's decree. But then, after granting petitioners' request for rehearing, the court "revisit[ed] the crucial issue in this case: whether claims of partisan gerrymandering are justiciable under the state constitution." After reexamining "the fundamental premises underlying the decisions in both *Harper II* and *Harper I*," the court "h[e]ld that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution." It concluded:

> "This Court's opinion in *Harper I* is overruled. We affirm the three-judge panel's [original] 11 January 2022 Judgment concluding, *inter alia*, that claims of partisan gerrymandering present nonjusticiable, political questions and dismissing all of plaintiffs' claims with prejudice. This Court's opinion in *Harper II* is withdrawn and superseded by this opinion. The three-judge panel's 23 February 2022 order addressing the Remedial Plans is vacated. Plaintiffs' claims are dismissed with prejudice."

In short, this case is over, and petitioners won. The trial court's original final judgment in favor of petitioners, affirmed by the State Supreme Court in *Harper III*, represents "the final determination of the rights of the parties" in this case. *Harper I* has been overruled, and plaintiffs-respondents' claims for relief have been dismissed on adequate and independent state-law grounds. As a result, petitioners' alternative Elections Clause defense to those claims no longer requires decision; the merits of that defense simply have no bearing on the judgment between the parties in this action. That is the definition of mootness for an issue.

It follows that no live controversy remains before this Court. . . [P]etitioners are not injured by the judgment of *Harper I* at all, nor could we redress any injury to petitioners by doing anything to it. Whether we accept or reject petitioners' Elections Clause defense, plaintiffs-respondents' claims remain dismissed. As far as this case is concerned, there simply is nothing this Court could decide that could make any difference to who wins or what happens next in any lower court. That is the definition of mootness for an appellate proceeding.

The United States understands this. So do the elections officials whose conduct *Harper I* once enjoined. So, too, do the plaintiffs-respondents who started this case in the first place. As one group of plaintiffs-respondents put it, "there is no non-frivolous basis for jurisdiction here."

B

The majority does not contest that the Elections Clause issue in this case was only a defense to plaintiffs-respondents' claims for relief. Nor does it deny that *Harper III* overruled *Harper I* and affirmed the very same trial-court judgment that *Harper I* had reversed. . . .

Nonetheless, the majority finds that the judgment below still presents a live Article III case or controversy; it then further concludes that the question presented has survived and requires decision under *Cox Broadcasting*. In doing so, it relies extensively on petitioners' "representations" that they "remain bound by the judgment in *Harper I*." But, of course, parties' mere representations that they are injured never carry their "burden of *demonstrating* that they have standing" in this Court. *TransUnion LLC* v. *Ramirez* (2021) (emphasis added). Nor can such representations affect our "independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.* (2008).

To ensure that it has jurisdiction here, the majority must explain how petitioners' federal defense could still affect "the rights of [the] litigants in th[is] case." *Rice*. It fails to do so. Instead, it mostly points to irrelevant facts about the procedural history of this case and misapplies civil-procedure rules as if *Harper I* and *Harper III* did not involve the same case. But the error that actually drives the majority's conclusion is much deeper. The majority evidently thinks that when *Harper I* held the 2021 Act unconstitutional, it entered a "judgment" affecting the 2021 Act *as a statute*, independent of its application to the legal rights of the litigants in this case. And the majority thinks that to reverse *Harper I* 's "judgment" would "negate the force of its order striking down" the Act, thus "alter[ing] the presently operative statutes of North Carolina." But, of course, the judicial power does not "operate on legal rules in the abstract"; it operates on the rights and liabilities of contending parties with adverse legal interests. *California* v. *Texas* (2021). The majority's reasoning cannot be squared with the judicial power vested by the Constitution, the case-or-controversy requirement, or the nature of judicial review.

I start by clearing away some of the brush. True, *Harper III* did not expressly "revisit" the Elections Clause issue; true as well, petitioners did not obtain rehearing of *Harper I*. But none of that matters because *Harper III* 's final judgment mooted the Elections Clause issue in this case by dismissing plaintiffs-

respondents' claims on alternative state-law grounds.[4] Likewise, the idea that *Harper III* did not "alter or amend in any way the judgment in *Harper I*," is both irrelevant and incorrect. It is irrelevant because our jurisdiction requires a *case*, and this *case* is over no matter what becomes of the empty husk of *Harper I*'s interlocutory judgment. It is incorrect because *Harper I*'s judgment—reversing the trial court's original judgment and remanding the case—was completely negated by *Harper III* 's affirmance of the same trial-court judgment. . . .

How could petitioners still be injured, and what more could this Court possibly do for them? The majority suggests that the interlocutory injunction issued in *Harper I* still harms petitioners, but that idea is untenable. To start, the majority overlooks that the injunction only ran against the conduct of defendants-respondents—the state officials who actually implement election laws—not petitioners as legislators. Next, the majority fails to consider what it would mean if the injunction is still binding: that defendants-respondents are liable to "be held in contempt and put in jail" if they ever implement the 2021 Act, even though *Harper III* dismissed this suit's challenge to the Act as "beyond the reach of [North Carolina's] courts," That idea defies both common sense and civil procedure. A court simply does not go on enforcing an interlocutory injunction—and imposing contempt sanctions for disobedience—after reaching a final judgment dismissing every relevant claim for relief. Rather, the interlocutory injunction (like all interlocutory orders) merges into the final judgment fully "adjudicating all the claims and the rights *and liabilities* of all the parties" to the case.

In any event, the majority's analysis plainly does not turn on the belief that any defendant remains liable to potential contempt sanctions and jail time. Instead, its animating idea (uncritically borrowed from petitioners) is that *Harper I* 's "judgment" operated against the 2021 Act *as a statute*. The majority describes *Harper I* 's "judgment" interchangeably as "enjoining the use of the 2021 ma[p]" and "striking down the 2021 pla[n]." It then reasons that reversing that "judgment" would "negate the force of its order striking down the 2021 pla[n]," thus "alter[ing] the presently operative statutes of North Carolina" such that the 2021 Act would "again take effect." The majority regards this aspect of *Harper I* 's "judgment" as entirely independent of *Harper III* 's final resolution of the claims in this case. . . . In short, the "case or controversy" that the majority thinks is still before us has nothing to do with the parties' rights and liabilities on the claims asserted in this action; rather, it is simply whether a particular legislative Act, which *Harper I* supposedly made inoperative, will again be "operative" or "effective" as a state statute.

This reasoning bears no connection to the judicial power of this Court or the court below. Judicial power is the power to adjudicate "definite and concrete" disputes "touching the legal relations of parties having adverse legal interests," *Rice* , by "determin[ing] the respective rights and liabilities or duties" of the parties before a court in a particular case, *Nicholson* v. *State Ed. Assistance Auth.* (1969). Thus, a judgment binds the rights of the parties in that case, see *Taylor*, 553 U. S., at 892–893, and it awards remedies that "operate with respect to [those] specific parties," *California*. In deciding any case, the court must "ascertai[n] and declar[e] the law applicable to the controversy"; this duty, in turn, implies "the negative power to disregard an unconstitutional enactment" in deciding the case. *Massachusetts* v. *Mellon* (1923); accord, *Nicholson*; *Marbury* v. *Madison* (1803). But this negative power of judicial review is not a "power

[4] FN3: Incidentally, the majority seriously errs when it says that *Harper III* "reaffirmed" *Harper I* 's Elections Clause holding . . . But, of course, *Harper III* had no need to decide that question, because its state-law justiciability holding fully determined the judgment in this action, thus mooting petitioners' alternative Elections Clause defense.

per se to review and annul acts of [legislation] on the ground that they are unconstitutional," *Mellon*; "to change or to repeal statutes," or to issue orders that "operate on legal rules in the abstract," *California*. Courts of law simply do not render "judgments" that toggle statutes from "operative" to "inoperative" and back again, as if judicial review were some sort of *in rem* jurisdiction over legislative Acts.

Indeed, such a conception would contradict the most basic premise of judicial review itself. "[A]n unconstitutional provision is *never* really part of the body of governing law," for "the Constitution automatically displaces [it] from the moment of [its] enactment." *Collins* v. *Yellen*, (2021). Thus, when a court holds a statute unconstitutional, it is emphatically not depriving it of any legal force that it previously possessed as an Act. The court is only deciding "a particular case" "conformably to the constitution, disregarding" a statute that cannot "govern the case" because it is already "void." *Marbury*. "That is the classic explanation for the basis of judicial review" set forth in *Marbury* . . . and it remains "from that day to this the sole continuing rationale for the exercise of this judicial power." *Mackey* v. *United States* (1971) (Harlan, J., concurring in judgment in part and dissenting in part).

The majority's theory thus fails twice over, both as a description of *Harper I* 's "judgment" and as an explanation of how any justiciable controversy could exist in this Court. . . . The judicial power operates upon parties and cases, not statutes, and *Harper I* was no exception.

Even if it were, we would still have no case or controversy in front of us. A freestanding "judgment" of statutory invalidation—neutralizing the 2021 Act in some manner transcending the final determination of the parties' respective rights in this case—would not be a judicial action within the meaning of Article III, and it could not be reviewed in this Court. . . .

In sum, there is no issue before this Court that can affect the judgment in this action. As such, the question presented is moot, and the writ of certiorari should be dismissed.

II

I would gladly stop there. The majority's views on the merits of petitioners' moot Elections Clause defense are of far less consequence than its mistaken belief that Article III authorizes any merits conclusion in this case, and I do not wish to belabor a question that we have no jurisdiction to decide. Nonetheless, I do not find the majority's merits reasoning persuasive.

The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, §4, cl. 1. The question presented was whether the people of a State can place state-constitutional limits on the times, places, and manners of holding congressional elections that "the Legislature" of the State has the power to prescribe. Petitioners said no. Their position rests on three premises, from which the conclusion follows.

The first premise is that "the people of a single State" lack any ability to limit powers "given by the people of the United States" as a whole. *McCulloch* v. *Maryland* (1819). This idea should be uncontroversial, as

it is "the unavoidable consequence of th[e] supremacy" of the Federal Constitution and laws. As the Court once put it (in a case about the Article V ratifying power of state legislatures), "a federal function derived from the Federal Constitution . . . transcends any limitations sought to be imposed by the people of a State." *Leser* v. *Garnett* (1922).

The second premise is that regulating the times, places, and manner of congressional elections "'is no original prerogative of state power,' " so that "such power 'had to be delegated to, rather than reserved by, the States.'" *Cook* v. *Gralike* (2001) (first quoting 1 J. Story, Commentaries on the Constitution of the United States (Story); then quoting *U. S. Term Limits, Inc.* v. *Thornton* (1995)). This premise is firmly supported by this Court's precedents, which have also held that the Elections Clause is "the exclusive delegation of " such power, as "[n]o other constitutional provision gives the States authority over congressional elections." *Cook*; see also *United States* v. *Classic* (1941).

The third premise is that "the Legislature thereof " does not mean the people of the State or the State as an undifferentiated body politic, but, rather, the lawmaking power as it exists under the State Constitution. This premise comports with the usual constitutional meanings of the words "State" and "Legislature," as well as this Court's precedents. "A state, and the legislature of a state, are quite different political beings." "A state, in the ordinary sense of the Constitution, is a political community of free citizens . . . organized under a government sanctioned and limited by a written constitution." *Texas* v. *White* (1869). " 'Legislature,' " on the other hand, generally means " 'the representative body which ma[kes] the laws of the people.' " *Smiley* v. *Holm* (1932) (quoting *Hawke* v. *Smith* (1920)).

To be sure, the precise constitutional significance of the word "Legislature" depends on "the function to be performed" under the provision in question. *Smiley*. Because "the function contemplated by" the Elections Clause "is that of making laws," this Court's Elections Clause cases have consistently looked to a State's written constitution to determine the constitutional actors in whom lawmaking power is vested. . . .

If these premises hold, then petitioners' conclusion follows: In prescribing the times, places, and manner of congressional elections, "the lawmaking body or power of the state, as established by the state Constitution," performs "a federal function derived from the Federal Constitution," which thus "transcends any limitations sought to be imposed by the people of a State," *Leser*. As shown, each premise is easily supported and consistent with this Court's precedents. Petitioners' conclusion also mirrors the Court's interpretation of parallel language in the Electors Clause[5] in *McPherson* v. *Blacker*: "[T]he words, 'in such manner as the legislature thereof may direct,' " "operat[e] as a limitation upon the State in respect of any attempt to circumscribe the legislative power."

The majority rejects petitioners' conclusion, but seemingly without rejecting any of the premises from which that conclusion follows. Its apparent rationale—that *Hildebrant*, *Smiley*, and *Arizona State Legislature* have already foreclosed petitioners' argument—is untenable, as it requires disregarding a principled distinction between the issues in those cases and the question presented here. In those cases, the relevant state-constitutional provisions addressed the allocation of lawmaking power within each

[5] FN9: The Electors Clause provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for the election of the President and Vice President. Art. II, §1, cl. 2.

State; they defined what acts, performed by which constitutional actors, constituted an "exercise of the lawmaking power." In other words, those cases addressed how to identify "the Legislature" of each State. But, nothing in their holdings speaks at all to whether the people of a State can impose substantive limits on the times, places, and manners that a procedurally complete exercise of the lawmaking power may validly prescribe. These are simply different questions: "There is a difference between *how* and *what*."

This is not an arbitrary distinction, but one rooted in the logic of petitioners' argument. . . . [I]f the power in question is not original to the people of each State and is conferred upon the constituted legislature of the State, then it follows that the people of the State may not dictate what laws can be enacted under that power—precisely as they may not dictate what constitutional amendments their legislatures can ratify under Article V. [6] Accordingly, if petitioners' premises hold, then state constitutions may specify *who* constitute "the Legislature" and prescribe *how* legislative power is exercised, but they cannot control *what* substantive laws can be made for federal elections.

The majority indicates that it does not perceive this distinction between "substantive" and "procedural" rules, illustrating its doubts with a rhetorical question: "When a governor vetoes a bill because of a disagreement with its policy consequences, has the governor exercised a procedural or substantive restraint on lawmaking?" The answer is straightforward: The power of approving or vetoing bills is "a part of the legislative process" because it is "a part in the making of state laws." A Governor's *motives* for vetoing a certain bill are irrelevant to the effect of the veto as part of the legislative process, just as the motives that may lead one house of the legislature to reject a bill passed by the other house are irrelevant to the effect of its doing so. . . .

But *substantive* constraints on what the lawmaking power can do (gubernatorial approval included) demand an entirely different justification—one that the majority never provides. . . .

Instead, the majority focuses on the power of state courts to exercise "judicial review" of Elections Clause legislation. But that power sheds no light on the question presented. In every case properly before it, any court—state or federal—must ascertain and apply the substantive law that properly governs that case. Thus, the court naturally must apply the Federal Constitution rather than any statute in conflict with it. The court must also apply the state constitution over any conflicting statute enacted under a power limited by that constitution. Petitioners' argument, however, is that legislation about the times, places, and manner of congressional elections is *not* limited by state constitutions—because the power to regulate those subjects comes from the Federal Constitution, not the people of the State. Right or wrong, this question has nothing to do with whether state courts have the power to conduct judicial review in the first place. To say that "state judicial review" authorizes applying state constitutions over conflicting Elections Clause legislation, is simply to assume away petitioners' argument.

III

The majority opinion ends with some general advice to state and lower federal courts on how to exercise "judicial review" "in cases implicating the Elections Clause." As the majority offers no clear rationale for

[6] FN11: . . . Nothing in *Smiley* even hints that a federally delegated power fails to "transcen[d] limitations sought to be imposed by the people of a State" simply because it is a lawmaking function.

its interpretation of the Clause, it is impossible to be sure what the consequences of that interpretation will be. However, judging from the majority's brief sketch of the regime it envisions, I worry that today's opinion portends serious troubles ahead for the Judiciary.

The majority uses the separate writings in *Bush* v. *Gore* (2000) as a loose touchstone for the kind of judicial review that it apparently expects federal courts to conduct in future cases like this one. On its face, this is an awkward analogy, for there is a significant difference between *Bush* and *Harper I*. In *Bush*, the state court's judgment was based on an interpretation of state statutory law, enacted by the state legislature. Thus, the relevant Electors Clause question was whether, in doing so, the state court had departed from "the clearly expressed intent of the legislature," (Rehnquist, C. J., concurring), "impermissibly distort[ing]" the legislature's enactments "beyond what a fair reading required." In *Harper I*, by contrast, there was no doubt that the state court departed from the clearly expressed intent of the legislature; it rejected the legislature's enactment as unconstitutional.

By doing so, today's majority concludes, *Harper I* did not commit *per se* error, as the Elections Clause permits state courts to apply substantive state-constitutional provisions to the times, places, and manner of federal elections. At the same time, state courts are warned that they operate under federal-court supervision, lest they "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." Thus, under the majority's framework, it seems clear that the statutory-interpretation review forecast in *Bush* (or some version of it) is to be extended to state *constitutional* law.

In this way, the majority opens a new field for *Bush*-style controversies over state election law—and a far more uncertain one. Though some state constitutions are more "proli[x]" than the Federal Constitution, it is still a general feature of constitutional text that "only its great outlines should be marked." *McCulloch*. When "it is a *constitution* [courts] are expounding," not a detailed statutory scheme, the standards to judge the fairness of a given interpretation are typically fewer and less definite.

Nonetheless, the majority's framework appears to demand that federal courts develop some generalized concept of "the bounds of ordinary judicial review"; apply it to the task of constitutional interpretation within each State; and make that concept their rule of decision in some of the most politically acrimonious and fast-moving cases that come before them. In many cases, it is difficult to imagine what this inquiry could mean in theory, let alone practice. . . .

Even in cases that do not involve a justiciability mismatch, the majority's advice invites questions of the most far-reaching scope. What *are* "the bounds of ordinary judicial review"? What methods of constitutional interpretation do they allow? Do those methods vary from State to State? And what about *stare decisis*—are federal courts to review state courts' treatment of their own precedents for some sort of abuse of discretion? The majority's framework would seem to require answers to all of these questions and more.

In the end, I fear that this framework will have the effect of investing potentially large swaths of state constitutional law with the character of a federal question not amenable to meaningful or principled adjudication by federal courts. In most cases, it seems likely that the "the bounds of ordinary judicial

review" will be a forgiving standard in practice, and this federalization of state constitutions will serve mainly to swell federal-court dockets with state-constitutional questions to be quickly resolved with generic statements of deference to the state courts. On the other hand, there are bound to be exceptions. They will arise haphazardly, in the midst of quickly evolving, politically charged controversies, and the winners of federal elections may be decided by a federal court's expedited judgment that a state court exceeded "the bounds of ordinary judicial review" in construing the state constitution.

I would hesitate long before committing the Federal Judiciary to this uncertain path. And I certainly would not do so in an advisory opinion, in a moot case, where "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle* (1869).

I respectfully dissent.