STATE LAW AND FEDERAL ELECTIONS AFTER *MOORE V. HARPER*

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In Moore v. Harper*, the Supreme Court rejected the extreme proposition that state legislatures operate free from state constitutional constraints and judicial review when they regulate federal elections. The Court, however, left open the possibility that a state court might run afoul of the federal Constitution if, in striking down or construing state election law, it exceeds "the ordinary bounds of judicial review." This Article explores the potential scope of that exception, and it proposes arguments and strategies to guard against undue and disruptive federal court intrusion on state election law. In particular, the Article relies on longstanding principles of federalism to develop substantive and procedural arguments that insist on federal court deference to state courts' interpretation and application of their own law.*

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Introduction

In June 2023, to the great relief of observers across the political spectrum, the Supreme Court rejected the extreme independent state legislature theory (ISLT) when it decided *Moore v. Harper*.[1] ISLT proponents had argued that because the Constitution's Electors Clause provides that each State's "legislature" determine how to appoint presidential electors,[2] and because the Elections Clause allows each legislature to regulate the "Time, Place, and Manner" of congressional elections,[3] when State legislatures take such actions they are free from state constitutional constraints and state judicial review. The ISLT would have upended well over a century of precedent and practice. It would have flown in the face of the widespread understanding at and since the Founding about the role of state constitutions and state courts in controlling state legislative authority to regulate federal elections. And it would have sowed chaos in election administration by, for example, forcing the creation of dual election systems—one for state and local elections and one for federal elections—and possibly by calling into question state legislative determinations to delegate election-related decisions to the executive branch, administrators, and even courts.[4]

The ISLT issue was presented in *Moore* in its starkest form.[5] The North Carolina legislature enacted an extreme partisan gerrymander

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1 600 U.S. 1 (2023).

2 U.S. Const. art. II, § 1, cl. 2.

3 U.S. Const. art. I, § 4.

4 For discussions of history, precedent, and consequences, see Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. Ct. Rev. 1, 19–26 (2022); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. U. L. Rev. 731, 759–61 (2002); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y 135 (2023); Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. 1091 (2022); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445 (2022); Michael Weingartner & Carolyn Shapiro, *After the Oral Argument in* Moore v. Harper, 54 U. Tol. L. Rev. 387 (2023) [hereinafter *After Oral Argument*]; Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. Chi. L. Rev. 137 (2023) [hereinafter Shapiro, *ISLT*].

5 In addition to the straightforward merits issue, there was also the complicated jurisdictional question of whether the case had become moot because the North Carolina Supreme Court had overruled the particular decision that was at issue in *Moore*. 600 U.S. at 13–14. In *Harper v. Hall*, 868 S.E.2d 499, 528 (N.C. 2022) (*Harper I*), the North Carolina Supreme Court held for the first time that extreme partisan gerrymandering was a justiciable question and concluded that the recently enacted congressional and legislative maps were unconstitutional under the state constitution. The court remanded the case to the trial court "to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." *Id.* at 510. Ultimately, the trial court instituted its own remedial maps, which the state supreme court upheld. *Harper v. Hall*, 881 S.E.2d 156 (N.C. 2022) (*Harper II*). After *Harper II* was decided, however, the make-up of the North Carolina Supreme Court shifted from a

of its congressional districts, which the North Carolina Supreme Court held violated the state constitution.[6] Republican legislative leaders appealed to the U.S. Supreme Court, relying on the ISLT. They argued that the Elections Clause means that when the state legislature drew congressional districts, it could not be constrained by the North Carolina constitution or the state courts' interpretation and application of it.[7]

In an opinion by Chief Justice Roberts, the Supreme Court rejected this argument, 6–2, with Justices Thomas and Gorsuch in dissent.[8] There is much to praise about this outcome. Independent redistricting commissions can continue to operate in states where they have been established;[9] state courts can continue to enforce the democratic guarantees of their own constitutions, which are generally more explicit and robust than the Federal Constitution;[10] and the danger that the ISLT might lead to dual systems of election regulation, where laws might be struck down as to state elections but remain in effect for federal elections, is significantly reduced.[11]

Despite rejecting the extreme versions of the ISLT, however, the Supreme Court did not entirely eliminate a role for itself, and possibly other federal courts, to review the work of state courts when they interpret and apply state constitutions and statutes in the context of federal elections. While declining to articulate a particular standard, the Court explained that "state courts may not transgress the ordinary

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Democratic majority to a Republican majority. *Harper v. Hall*, 886 S.E.2d 393, 451–52 (N.C. 2023) (*Harper III*) (Earls, J., dissenting). North Carolina elects its supreme court justices in statewide elections. N.C. Const., art. IV, § 16. The newly constituted court granted rehearing, withdrew *Harper II* and overruled *Harper III*. The *Moore* majority concluded that the case was not moot. 600 U.S. at 14–19. Justice Thomas, joined by Justices Alito and Gorsuch dissented on this basis. *Id.* at 40–55 (Thomas, J., dissenting).

6 *Harper I*, 868 S.E.2d at 528.

7 *Moore*, 600 U.S. at 9–10.

8 *Id.* at 40, 55–65 (Thomas, J., dissenting). Justice Alito joined only the portion of that opinion that dissented on jurisdictional grounds. *Id.* at 40.

9 *See id.* at 25–26 (majority opinion) (citing with approval and relying on Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787 (2015), which upheld such a commission against an ISLT-like challenge). That *Moore* relied on *Arizona State Legislature* was particularly notable because Chief Justice Roberts, who wrote the majority opinion in *Moore*, dissented in the Arizona case. *See Arizona State Legislature*, 576 U.S. at 824 (Roberts, C.J., dissenting).

10 Mike Parsons, Moore v. Harper *and the 'Anti-Arrogation Principle'*, Election L. Blog (June 30, 2023), https://electionlawblog.org/?p=137207 [https://perma.cc/Q9GD-KSLU]. For a discussion of the extent to which state constitutions are more protective of democracy than is the Federal Constitution, see, for example, Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

11 *See* Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News*, N.Y. Times (June 28, 2023), https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html [https://perma.cc/KD6V-E8CU] [hereinafter Pildes, *Not All Good News*].

bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[12]

Unsurprisingly, commentators have different views about what "the ordinary bounds of judicial review" means in this context. Some commentators worry that it creates a loophole wide enough for the Supreme Court to intervene whenever five Justices do not like a state court ruling that affects federal elections.[13] Others point to the majority opinion's analogies to the Takings and the Contracts Clauses, where federal courts tend to be fairly deferential to state court interpretations of state law, to argue that the Court has left the door open only the narrowest of cracks.[14]

Part I of this Essay explores this aspect of *Moore v. Harper* and its implications in more depth. It focuses first on the opinions themselves and then analyzes the debate over how much of a role for federal courts *Moore* allows. In my view, the latter group of commentators has the better reading of the actual opinion: Federal courts can override a state court ruling on state law only where the state court is acting lawlessly. But that better reading of the opinion will not necessarily constrain the Court in the future. When highly contentious litigation arises in the heat of an election, as it did during the 2020 election, the risk of disruptive, antidemocratic, and potentially outcome-determinative federal court intrusion into state law remains.[15]

Part II of this Essay therefore proposes ways to temper this risk and to guard against the *Moore* exception swallowing the rule. More specifically, I provide suggestions for litigants, advocates, and state court judges, although they may also apply to election administrators and other officials who interpret and apply state election law. For example, to reduce the chances of an ISLT-like reversal by the Supreme Court, state courts should explain in detail how any election-related ruling fits within preexisting precedent and practice, acting on the assumption that some of their most critical readers will know nothing about state law and legal culture. State bar associations might be prepared to file

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12 *Moore*, 600 U.S. at 36.

13 *See, e.g.*, Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, Slate (June 27, 2023, 12:44 PM), https://slate.com/news-and-politics/2023/06/supreme-court-voting-moore-v-harper-time-bomb.html [https://perma.cc/6DQQ-SHDJ] [hereinafter Hasen, *Time Bomb*]; Pildes, *Not All Good News*, *supra* note 11.

14 *See, e.g.*, 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*, 2023 Cato Sup. Ct. Rev. 275, 277.

15 *Cf.* Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 Yale L.J.F. 881, 888–90 (2024) [hereinafter *Bounds*] (suggesting that there may be at least four Justices willing to embrace a relatively broad version of the ISLT even after *Moore*).

amicus briefs in the Supreme Court explaining aspects of state law or practice. And litigants defending state court rulings should focus not only on the specific challenged holdings, but also on the evolution of the law and litigation at issue.

In addition, all relevant actors should be prepared to explain how a state's constitutional structure and judicial practice differ from the federal level. For example, purposivist statutory interpretation with explicit reliance on legislative history may be uncontroversial—and might even be mandated by the legislature itself. State judicial elections may present clear choices to the people about judicial philosophy that appropriately lead to changes in a state high court's approach or precedent more rapidly and dramatically than we might see in federal court. Pro-democracy advocates and state courts alike should not assume that federal courts will grasp the implications of these state-level features without explanation.

Finally, I explore arguments that litigants defending state court judgments should make in federal court, including in the Supreme Court. In particular, I argue 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. Presenting such arguments to a state court would encourage it to explain fully how its holding and analysis is well within the legal tradition of its state—and thus well within the bounds of ordinary judicial review. And a requirement that those arguments be made in state court first is appropriately respectful of federalism.

None of these suggestions eliminate the risk of the Supreme Court (or other federal courts) rejecting a state court's application and interpretation of state law in a particular case. Together, however, they can at least clarify the stakes, both for federalism and for democracy.

I
The Door Left Open

A. What the Justices Said in Moore

The petitioners in *Moore* were Republican state legislators from North Carolina. They argued that when the North Carolina Supreme Court struck down the extreme partisan gerrymander of congressional districts, the court improperly impinged on the legislature's authority under the Elections Clause.They did not argue that the North Carolina Supreme Court was wrong in its interpretation of the North Carolina Constitution, but rather, they claimed, the North Carolina Constitution simply did not apply to the legislature's congressional remap because

the Elections Clause rendered the state constitution irrelevant.[16] This extreme position is what the Supreme Court rejected in *Moore*. Nonetheless, the Court left open the possibility that it, or other federal courts, might step in if the state courts went beyond "the ordinary bounds of judicial review."[17] Although the Court did not provide guidance on what those bounds would look like, we can begin to map the possibilities by putting together the majority opinion, Justice Kavanaugh's concurrence, and Justice Thomas's dissent.

1. The Majority Opinion

In *Moore*, the Supreme Court soundly rejected the most extreme versions of the ISLT, in a majority opinion written by Chief Justice Roberts and joined by Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson.[18] The Court began by tracing the deep roots of judicial review dating back to state constitutions that existed before the ratification of the Constitution.[19] "The idea that courts may review legislative action was so 'long and well established' by the time we decided *Marbury* in 1803," Roberts wrote, "that Chief Justice Marshall referred to judicial review as 'one of the fundamental principles of our society.'"[20] And, the Court held, nothing in the Elections Clause carves out a special exception to this principle.[21] In other words, "historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause," and when state courts engage in judicial review of laws governing federal elections, they apply the same state constitutional provisions as when reviewing all other laws.[22]

Nonetheless, the Court explained that although "the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein" when they apply and interpret that law.[23] "As in other areas where the exercise of federal authority or vindication of federal rights implicates questions of state law," Chief Justice Roberts's opinion explained, "we have an obligation to ensure that state court interpretations of that law do not evade federal law."[24]

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16 Brief for Petitioners at 22–24, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271).
17 *Moore*, 600 U.S. at 36.
18 *Id.* at 1.
19 *Id.* at 20–22.
20 *Id.* at 22 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803)).
21 *Id.* at 22–34.
22 *Id.* at 32.
23 *Id*. at 34.
24 *Id*.

There are, of course, a variety of ways federal law might be implicated when a state court rules in an election case. Most obviously, individual rights, such as First and Fourteenth Amendment rights, might be at issue. Federal statutes, such as the Voting Rights Act,[25] the Help America Vote Act,[26] and the National Voter Registration Act[27] might be relevant. But *Moore* left the door open for some kind of federal court review of state courts' own review or interpretation of *state* law in the context of federal elections. Specifically, *Moore* explained: "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 reserved to state legislatures by" the Elections Clause.[28]

Although the Court provided virtually no guidance about what "the bounds of ordinary judicial review" might mean or how courts should determine when they have been exceeded "such that [state courts] arrogate to themselves the power vested in state legislatures to regulate federal elections,"[29] it analogized the inquiry to three other circumstances in which federal courts "have an obligation to ensure that state court interpretations of [state] law do not evade federal law."[30]

First, the Court discussed Takings, where "States 'may not sidestep the Takings Clause by disavowing traditional property interests.'"[31] Second, it pointed to the Contracts Clause, where federal courts "'are bound to decide for ourselves whether a contract was made.'"[32] And third, it cited cases in which it assessed "whether adequate and independent grounds exist to support a state court judgment" or "whether a state court opinion below adopted novel reasoning to stifle the 'vindication in state courts of . . . federal constitutional rights.'"[33] But the Court did not explain these analogies further.

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25 52 U.S.C. §§ 10301–14, 10501–08, 10701–02.

26 52 U.S.C. §§ 20901–21145.

27 52 U.S.C. §§ 20501–11.

28 *Moore*, 600 U.S. at 37. The Court did not primarily focus on the Electors Clause, which provides that each state appoints presidential electors "in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1, cl. 2. But it relied heavily on *Bush v. Gore*, see *Moore*, 600 U.S. at 36, which involved only the Electors Clause, and it referred to the regulation of federal elections generally. *See id.* It is hard to see why the Electors Clause would be subject to a different analysis from the Elections Clause of Article I, and in this Essay, I presume that they would be treated identically by the Supreme Court.

29 *Moore*, 600 U.S. at 36.

30 *Id.* at 34.

31 *Id.* at 35 (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998)).

32 *Id.* (quoting Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938)).

33 *Id.* (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457–58 (1958) (omission in original)). In her dissent in *Bush v. Gore*, Justice Ginsburg explained that these cases "arose in contexts of extreme resistance to federal power . . . [such as] 'Southern resistance to the civil rights movements'" that were quite distinct from the statutory interpretation controversy at issue in 2000. Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts*

Finally, the *Moore* majority also invoked two of the separate opinions in *Bush v. Gore*: Chief Justice Rehnquist's concurrence, joined by Justices Scalia and Thomas, and Justice Souter's dissent, joined by Justices Stevens, Ginsburg, and Breyer.[34] *Bush v. Gore* was an appeal from the Florida Supreme Court's interpretation of Florida election law, and both Rehnquist and Souter acknowledged that it was possible for a state court to exceed its authority under the Electors Clause, although they articulated different tests and reached different conclusions about whether the Florida Supreme Court had in fact done so. But in *Moore*, the Court expressly declined to "adopt these or any other test by which we can measure state court interpretations of state law in cases" involving federal elections.[35] The majority thus created an exception to its general holding, suggested that the exception is narrow, but did not meaningfully define its scope.

2. *Justice Kavanaugh's Concurrence*

Justice Kavanaugh wrote a brief concurrence that can be read to open the door a little wider to federal court review than the majority opinion.[36] Justice Kavanaugh began by laying out three different formulations for the standard federal courts could impose when considering state court decisions about state law in the context of federal elections. First, he cited Chief Justice Rehnquist's *Bush v. Gore* standard: "whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required.'"[37] Second, he cited "the critical language" of Justice Souter's standard from *Bush v. Gore*—"whether the state court exceeded 'the limits of reasonable' interpretation of state law"—which he described as "similar" to Rehnquist's.[38] Finally, he referred to the Solicitor General's "similar approach in *Moore* itself: whether the state court reached a 'truly aberrant' interpretation of state law."[39]

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of Bush v. Gore*: How* Moore v. Harper *Haunts State and Federal Constitutional Interpretation of Election Laws*, 59 Wake Forest L. Rev. 61, 62–63 (2024) (quoting Bush v. Gore, 531 U.S. 98, 140 (Ginsburg, J., dissenting)).

34 *Moore*, 600 U.S. at 36 (citing *Bush v. Gore*, 531 U.S. 98 (per curiam)). The per curiam opinion in *Bush v. Gore*, on the other hand, relied solely on the Equal Protection Clause of the Fourteenth Amendment. *Bush v. Gore*, 531 U.S. at 106–09.

35 *Moore*, 600 U.S. at 36.

36 *Id.* at 38–40 (Kavanaugh, J., concurring); *cf.* Litman & Shaw, *Bounds*, *supra* note 15, at 885–86 (discussing the Kavanaugh concurrence).

37 *Moore*, 600 U.S. at 38 (quoting *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring)).

38 *Id.* (quoting *Bush v. Gore*, 531 U.S. at 133 (Souter, J., concurring)).

39 *Id.* at 39 (quoting Brief for United States as Amicus Curiae Supporting Respondents at 27, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271)).

Ultimately, Justice Kavanaugh argued that "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." Yet despite considering the standards largely the same, Kavanaugh endorsed Rehnquist's "straightforward standard."[40] And, he continued, this "standard should apply not only to state court interpretations of state statutes," which was the context of the *Bush v. Gore* discussions, but also to state court interpretations and applications of state constitutions.[41]

Several things are notable about Justice Kavanaugh's opinion. First, he argued that "the precise formulation of the standard" is unlikely to "be decisive . . . in any such disagreement."[42] This language can be read as a candid acknowledgment that Justices may engage in motivated reasoning when confronted with high-stakes litigation in this area.[43] That acknowledgment is all the more reason for advocates and state courts to anticipate how such reasoning might develop and to guard against it as early as possible in the litigation.[44]

Second, Justice Kavanaugh took a crucial part of Chief Justice Rehnquist's *Bush v. Gore* reasoning out of context. "[I]n reviewing state court interpretations of state law," Kavanaugh said, quoting Rehnquist, "'we necessarily examine the law of the State as it existed *prior to* the action of the [state] court.'"[45] But Kavanaugh failed to acknowledge or discuss *why* Rehnquist was particularly focused on whether the state court changed the law.

Rehnquist's focus arose from the federal law that, at the time, governed Congress's counting of electoral votes for President. That

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[40] *Id.*

[41] *Id.*

[42] *Id.* at 39 n.1.

[43] *See* Litman & Shaw, *Bounds*, *supra* note 15, at 894 (suggesting that *Moore* might be "a stalking horse for the Justices' preferred method of statutory interpretation and even their preferred *results* in statutory cases").

[44] *See infra* Part II. In addition, Justice Kavanaugh argued, wrongly, that the Supreme Court "unanimously conclud[ed] that a state court's interpretation of state law in a federal election case presents a federal issue" in *Bush v. Palm Beach Cnty. Canvassing Bd.*, the precursor to *Bush v. Gore*. *Moore*, 600 U.S. at 38 (citing Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76–78 (2000)). To the contrary, in *Palm Beach County*, "the Court explained that it was 'unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under' the Electors Clause, and it 'decline[d] at this time to review the federal questions asserted to be present.'" Shapiro, *ISLT*, *supra* note 4, at 157 (quoting *Palm Beach Cnty.*, 531 U.S. at 78) (alteration in original). Rather than conclude that there were federal constitutional questions at issue, "the Supreme Court engaged in its own form of constitutional avoidance by remanding the case to the Florida court to clarify the basis for its ruling." *Id.*

[45] *Moore*, 600 U.S. at 39 (quoting Bush v. Gore, 531 U.S. 98, 114 (Rehnquist, C.J., concurring) (alteration in original, emphasis added)).

law, the Electoral Count Act (ECA), "provide[d] that when a state has put in place procedures for resolving disputes over the outcome of a presidential election before election day, and where those procedures lead to resolution of any dispute at least six days before the electors vote, that resolution [was] 'conclusive'" when Congress counts the electoral votes.[46] Rehnquist thought that the Florida legislature must have had a specific legislative intent to take advantage of this "'safe harbor'" created by the ECA by enacting dispute resolution mechanisms prior to the election.[47] And he thought that in *Bush v. Gore*, there was a risk that the Florida court's interpretation or application of its own statutes or constitution, or an exercise of its statutorily-granted equitable powers, would be considered a change in law, thus undermining the legislature's intent.[48]

Kavanaugh's discussion wrenches Rehnquist's reasoning out of context and thus suggests a general anti-novelty principle that is much broader than Rehnquist's argument. Put another way, Rehnquist's argument did not preclude the possibility that a state court might, for example, appropriately overrule or extend precedent in the context of federal elections in general. Rather, his *Bush v. Gore* opinion expressly spoke to inferring state legislative intent in the unique circumstance where the state court acts *after* a presidential election in a way that might implicate congressional acceptance of the state's electoral votes. Justice Kavanaugh did not acknowledge these limitations, but during election litigation that may raise ISLT issues, advocates should insist on them.

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[46] 3 U.S.C. § 5 (1994), *amended by* 3 U.S.C. § 5(a)–(d) (2022). The Electoral Count Act, as originally enacted in 1887, included a number of loopholes and ambiguities that Donald Trump and his allies sought to exploit in their efforts to overturn the 2020 election. The statute provided, for example, that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." 3 U.S.C. § 2 (1994). One of the Trump team's arguments was that such a failure had occurred in some states, like Georgia, and so the legislature should choose the electors. *See* Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors to Vote for Trump? Not Likely*, N.Y. Times (Jan. 5, 2021), https://www.nytimes.com/article/electors-vote.html [https://perma.cc/VR4W-2DNR]. Following the events of January 6, 2021, Congress passed the Electoral Count Reform Act which amended the ECA in a number of important ways, including eliminating the "failed to make a choice" provision. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. P, tit. I, 136 Stat. 4459, 5233–41 (2022).

[47] *Bush v. Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring) ("If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5.").

[48] *See id.* at 120–21 ("The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the 'legislative wish' to take advantage of the safe harbor provided by 3 U.S.C. § 5.").

3. The Dissent

Justice Thomas, joined by Justice Gorsuch, dissented from *Moore*'s ISLT holding.[49] State legislatures are performing federal functions when they regulate federal elections, the dissent argued.[50] As a result, they cannot be subject to any substantive limits of state constitutions, although state constitutions can dictate the procedures by which laws are made.[51] Thomas thus embraced a substantive/procedural distinction that the majority expressly rejected,[52] as well as a dramatic expansion of the Supreme Court's ability to oversee state court rulings that implicate federal elections.

Justice Thomas also argued that federal court review of state court interpretation and application of state constitutions is meaningfully different from the issue in *Bush v. Gore*.[53] Thomas described the issue in *Bush v. Gore* as "whether . . . the state court had departed from 'the clearly expressed intent of the legislature'" while construing a statute.[54] In the context of constitutional judicial review, however, "the standards to judge the fairness of a given interpretation are typically fewer and less definite."[55] Ultimately, he warned, *Moore*'s holding may lead to "winners of federal elections [being] . . . decided by a federal court's expedited judgment that a state court exceeded 'the bounds of ordinary judicial review' in construing the state constitution" in cases arising "in the midst of quickly evolving, politically charged controversies."[56] Much like Justice Kavanaugh's claim that the specific language of the governing standard may not matter, Justice Thomas's description of the Court's potential role in an election is unfortunately realistic.[57]

B. How Wide Open Is the Door?

Election law experts and Supreme Court observers overwhelmingly—and correctly—celebrated *Moore v. Harper*.[58]

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[49] *Moore*, 600 U.S. at 55–65 (Thomas, J., dissenting).

[50] *Id.* at 58–60.

[51] *Id.*

[52] *See id.* at 31–32 (majority opinion).

[53] *Id.* at 63–65 (Thomas, J., dissenting).

[54] *Id.* at 63 (quoting Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring)).

[55] *Id.* at 64.

[56] *Id.* at 65.

[57] *See* Litman & Shaw, *Bounds*, *supra* note 15, at 888–90 (discussing the likelihood that a majority of the Court would adopt a broad reading of its authority to review state court rulings in this context).

[58] *See, e.g.*, Amar, *supra* note 14; Michael C. Dorf, *Trump is the Biggest Loser in* Moore v. Harper, Dorf on L. (June 27, 2023); Parsons, *supra* note 10; Rick Hasen, *Breaking: Supreme Court Decides* Moore v. Harper, *Rejecting Maximalist Version of Independent State Legislature Theory But Giving Federal Courts a Chance to Second Guess Some State Rulings*

The potential for massive disruption of decades, even centuries, of practice and precedent had the case come out the other way cannot be overstated.[59] And many commentators, both before and after the decision, agreed that the Supreme Court would, and should, leave some room for federal court oversight if a state court did something "truly wacky"[60] (although as I and others have argued, the appropriate source of that authority is the Fourteenth Amendment, not the Elections or Electors Clauses[61]). But no one—probably including the Court itself—knows precisely how much room *Moore* allows. In other words, no one knows how wide open the door is.

Commentators have offered a range of possible interpretations of and predictions about *Moore*. Professor Vikram Amar argues that the open door "should not lead to significant problematic intermeddling" by federal courts.[62] To the contrary, he argues that the logic of the opinion means that the door is open only wide enough for the type of review that "would exist whether or not the misbegotten sense of notions that together form ISL had ever occurred to or been advocated by anyone."[63] Amar emphatically explains: "[T]he only 'federal right' embodied directly in the Elections Clause is the right to have state courts comply with state law."[64] As a result, "Elections Clause challenges are limited to claims that state courts are misapplying or misunderstanding state law."[65]

Amar also distinguishes the Takings Clause and Contracts Clause cases, explaining that less deference to state courts is appropriate in those contexts than in election law because they "concern[] a dependent downstream federal right that exists against the state itself . . .[,] protect[ing] federal interests . . . beyond what a state chooses

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as "Transgressing the Ordinary Bounds of Judicial Review," ELECTION L. BLOG (June 27, 2023, 7:18 AM), https://electionlawblog.org/?p=137093 [https://perma.cc/F9WE-ADSR]; Pildes, *Not All Good News*, *supra* note 11.

59 *See generally* Shapiro, *ISLT*, *supra* note 4, at 137.

60 *See* Rick Hasen, *Breaking: Supreme Court Decides* Moore v. Harper*, Rejecting Maximalist Version of Independent State Legislature Theory But Giving Federal Courts a Chance to Second Guess Some State Rulings as "Transgressing the Ordinary Bounds of Judicial Review*," ELECTION L. BLOG (June 27, 2023, 7:18 AM), https://electionlawblog.org/?p=137093 [https://perma.cc/F9WE-ADSR].

61 *See, e.g.*, Shapiro, *ISLT*, *supra* note 4, at 199–200; *After Oral Argument*, *supra* note 4, at 398–405; Brief for Akhil Reed Amar, Vikram Amar & Steven Gow Calabresi as Amici Curiae Supporting Respondents, Moore v. Harper, 600 U.S. 1, 25–26 (2023) (No. 21-1271); *The Independent State Legislature Theory and Its Potential to Disrupt Our Democracy: Hearing Before the Comm. on House Admin.*, 117th Cong. 10–11 (2022) [hereinafter Pildes, *Testimony*] (testimony of Richard H. Pildes).

62 Amar, *supra* note 14, at 277.

63 *Id.* at 285.

64 *Id.* (emphasis omitted).

65 *Id.* at 287.

to protect."[66] On the other hand, "the Elections Clause protects only those interests that a state has itself chosen to protect."[67] In the end, Amar concludes, federal courts have the same oversight over state courts' supervision of federal elections as they have over state courts' supervision of state elections.[68]

Other commentators are less sanguine. Some lament the Court's failure to provide any "concrete guidance on where the boundaries are on state court decision-making."[69] In a recent law review article, Massachusetts Supreme Judicial Court Associate Justice Scott Kafker (along with co-author Simon Jacobs) describes *Moore*'s standard of review as "disturbingly unclear."[70] Highlighting the lack of guidance in the Court's decision, several commentators note that it is unclear whether the underlying dispute in *Moore*—the North Carolina Supreme Court's determination that the state constitution precludes extreme partisan gerrymandering and that the particular maps at issue violated those principles—would pass muster.[71] And some note that to the extent Justice Kavanaugh's opinion provides some guidance, its "anti-novelty" principle could also call into question that same court's reversal of that precedent after an election leading to a change in court personnel.[72] The lack of clarity may lead federal courts to impose their own views of constitutional stare decisis or separation of powers on state courts, potentially undermining basic features of state constitutional design, such as elected judges.[73]

And commentators warn that the Court has, again, preserved (or taken) for itself remarkable power. Professor Richard Hasen describes

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66 *Id.* at 290.

67 *Id.*; *see also* Dorf, *supra* note 58 (noting that Contracts and Takings Clause cases "are the sort of thing where federal courts rarely, if ever, intervene").

68 Amar, *supra* note 14, at 295–96; *cf.* Weingartner and Shapiro, *After Oral Argument*, *supra* note 4, at 398–405 (arguing that the due process clause is the proper frame for evaluating state court rulings in both federal and state elections).

69 Richard Pildes, *The Court's Mixed Message on the Independent State Legislature Theory*, Election L. Blog (June 27, 2023, 7:40 AM), https://electionlawblog.org/?p=137096 [https://perma.cc/9LFT-6L25].

70 Kafker & Jacobs, *supra* note 33, at 63 (observing that "the Supreme Court has fundamentally shrunk and supplanted historic state constitutional authority in a similar fashion in other contexts, and even done so by first relying on and then widely expanding seemingly modest decisions.").

71 *See, e.g.*, Pildes, *Not All Good News*, *supra* note 11; Kafker & Jacobs, *supra* note 33, at 69; *see also* Moore v. Harper, 600 U.S. 1, 64 (2023) (Thomas, J., dissenting) (discussing the open questions about the constitutionality of the North Carolina Supreme Court's ruling in *Harper I*).

72 Kafker & Jacobs, *supra* note 33, at 69–70; Leah Litman, *Anti-Novelty, the Independent State Legislature Theory in* Moore v. Harper*, and Protecting State Voting Rights*, Election L. Blog (July 2, 2023), https://electionlawblog.org/?p=137239 [https://perma.cc/48FYBXSM].

73 *See* Litman, *supra* note 72; *see also* Kafker & Jacobs, *supra* note 33, at 67–68, 68 n.336.

the open door as a "time bomb" that "give[s] great power to federal courts, especially to the U.S. Supreme Court, to second-guess state court rulings in the most sensitive of cases."[74] Both Hasen and Professor Richard Pildes anticipate more litigation, possibly even creating the circumstances for the Supreme Court to determine the result of a presidential election.[75] Justice Kafker and his co-author note dryly that the Supreme Court is "not . . . inclined to deference when dealing with other branches of government, state or federal."[76] They warn that:

> [W]henever the majority of the Supreme Court strongly disagrees with the way state courts interpret (1) state statutes that affect the time, place, and manner of elections, (2) the state constitution to provide greater protections of the right to vote than the state legislature, or (3) legislative delegations of the regulation of elections to other state or local officials, the Supreme Court is essentially substituting its judgment for the state supreme court's statutory and, constitutional review of elections. This, in our view, violates fundamental principles of federalism.[77]

I share these concerns. This Supreme Court is not shy about claiming and exercising remarkable power over all other government institutions.[78] In no small part, this imperiousness seems to be motivated by a belief that other government actors often cannot be trusted, whether due to a lack of competence or more nefarious reasons. This view was evident during the 2020 election when several cases came to the Supreme Court with ISLT claims. Although the Court as a whole did not accept those arguments, some Justices did. And one of the most notable features of the ISLT separate opinions in 2020 was the confidence with which Supreme Court Justices declared that state court judges had gotten their own law egregiously wrong and had engaged

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74 Hasen, *Time Bomb*, *supra* note 13.

75 *Id.*; Pildes, *Not All Good News*, *supra* note 11.

76 Kafker & Jacobs, *supra* note 33, at 121 (citing Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97, 97–110 (2022)).

77 *Id.* at 122.

78 *See* Lemley, *supra* note 76, at 97 (arguing, in 2022, that "[t]he common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court"); Rebecca L. Brown & Lee Epstein, *Is the US Supreme Court a Reliable Backstop for an Overreaching US President? Maybe, but is an Overreaching (Partisan) Court Worse?*, 53 PRESIDENTIAL STUD. Q. 234, 235 (2023) (finding that the Roberts Court "consistently . . . injects itself more directly in matters of policy across the spectrum of legal issues than prior courts"); Kate Shaw, *The Imperial Supreme Court*, N.Y. TIMES (June 29, 2024), https://www.nytimes.com/2024/06/29/opinion/supreme-court-chevron-loper.html [https://perma.cc/N8CB-RRYY] (describing "a key project of this Supreme Court" as "the expansion of the power of the court and its corollary, the disempowerment of other entities").

in improper nonjudicial lawmaking. In one case from North Carolina, for example, Justice Gorsuch, joined by Justice Alito, rejected the state court's construction of state law and accused a state trial court of collusion with the plaintiffs and the Board of Elections "to override a carefully tailored legislative response to COVID."[79] In another case, Justice Alito accused the Pennsylvania Supreme Court of having "overrid[den] the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."[80]

Such allegations are not unique to election cases; indeed, on the current Supreme Court, Justices level similar accusations at each other with some frequency.[81] And if the nine current Justices are willing to make such charges about their immediate colleagues, it seems unlikely they would feel constrained when it comes to state court judges applying bodies of law unfamiliar to the Supreme Court in the throes of a hotly contested election. In other words, regardless of one's view of the best reading of *Moore* itself, the threat of ISLT claims arising during, and potentially deciding, a future election are real. As the next Part explains, however, the risks presented by *Moore*'s exception can be tempered, even if they cannot be eliminated.

II
Mitigating the Risk

Commentators have taken three main approaches to the problem of potentially dramatic and inappropriate Supreme Court "intermeddling" in state court review and construction of state election law. As already noted, some argue that *Moore* itself forecloses such overreach.[82] Others argue for ways that the Court should clarify that the *Moore* standard is narrow.[83] And some say that state courts themselves have a role to

[79] Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting from denial of injunctive relief).

[80] Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (Alito, J.) (statement respecting denial of motion to expedite peitition for certiorari); *see also* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732–33 (2021) (Thomas, J., dissenting from denial of certiorari) (complaining that during the 2020 election, "nonlegislative officials in various States took it upon themselves to set the rules").

[81] *See* Kafker & Jacobs, *supra* note 33, at 85–88 (citing Biden v. Nebraska, 143 S. Ct. 2355 (2023); South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Students for Fair Admissions v. President and Fellows of Harvard Coll., 143 S. Ct. 2141 (2023); New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022)); *see also* Parsons, *supra* note 10.

[82] *See* Dorf, *supra* note 58. *See generally* Amar, *supra* note 14.

[83] *See, e.g.*, Kafker & Jacobs, *supra* note 33, at 63; Parsons, *supra* note 10; Michael Weingartner, *Second-Guessing State Courts in Election Cases: Arrogation and Evasion Under*

play in avoiding an ISLT-like reversal by federal courts by hewing very closely to whatever text the legislature has enacted.[84] All of these arguments make important points, but in this Part, I will come at the ISLT risk from a slightly different perspective, trying to leverage the depth of state courts' expertise about their own law alongside some basic understandings about federalism. After all, state constitutional law and structure are highly variable, as are doctrines and methods of statutory interpretation in different states. This variation has long been celebrated, and there is widespread agreement that development and application of state constitutional law should be encouraged.[85] But that variation could be undermined by an overbroad application of the *Moore* exception.

In Section II.A, I discuss the types of election law questions state courts address, exploring in more detail the types of issues that might present the "time bomb" described in Part I and why an overbearing Supreme Court might ignore or undermine state law. Section II.A concludes with some recommendations for how state courts talk about their own law in controversial elections cases—and for how litigants might do so as well.

Second, in Section II.B, I argue that the best way to protect against the Supreme Court swooping in whenever five Justices disagree with something a state court has done in an elections case is not by articulating a standard, which, as Justice Kavanaugh admitted, a motivated majority is likely to be able to claim has been met. Litigants defending state court rulings should of course urge the federal courts to defer to state courts' interpretations of state law, but they should also focus on two other points. First, they should highlight the problem of dual election systems and make arguments about what the state legislature actually did, particularly where it passed laws that apply to both state and federal elections without distinction. And second, litigants should push the argument that, to the extent that challengers wish to claim in federal court that the state courts have transgressed the ordinary bounds of judicial review, as required by the *Moore* exception, they should be

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Moore v. Harper, 56 Ariz. St. L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4947094 [https://perma.cc/D298-KUNC].

84 *See, e.g.*, Derek Muller, Moore v. Harper *Vindicates Rehnquist's Opinion in* Bush v. Gore, Election L. Blog (June 27, 2023, 8:46 AM), https://electionlawblog.org/?p=137104 [https://perma.cc/4N2H-QKTZ]; Ned Foley, Moore v. Harper *& the Need for Clarity*, Election L. Blog (June 28, 2023, 4:19 AM), https://electionlawblog.org/?p=137143 [https://perma.cc/5XP3-7Y6D]; Kafker & Jacobs, *supra* note 33, at 111.

85 *See generally* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2019); Carolyn Shapiro, Moore v. Harper *and State Courts*, Election L. Blog (June 29, 2023, 2:30 PM), https://electionlawblog.org/?p=137192 [https://perma.cc/4S2X-U47E] [hereinafter Shapiro, *State Courts*].

required to make those arguments to the state courts first. Section II.B will describe these arguments in more detail, as well as making some suggestions about when and how to make them.

A. In the States

There are a variety of ways that disputed questions of state election law might arise. Plaintiffs might challenge particular laws, regulations, or practices as unconstitutional under the state constitution, and they might seek to have an entire law, or particular provisions, struck down.[86] There may well be questions of statutory interpretation that arise both in conjunction with and separate from constitutional questions.[87] Challenges may also arise to particular decisions by executive branch officials and elections administrators, questioning whether those decisions are consistent with the relevant statutes and regulations,[88] or whether the state constitution permits a state legislature to delegate them.[89]

State courts' approaches to resolving these questions will likewise vary. Some courts may invoke constitutional avoidance when they interpret statutes;[90] some may invoke their state's constitutional and historical commitments to robust democracy when construing statutes;[91] and courts will undoubtedly adhere to other principles of statutory and constitutional interpretation embedded in state law. Courts in different states might reach different conclusions about the meaning of similar or identical provisions.[92]

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[86] *See, e.g.*, N.H. Democratic Party v. Sec'y of State, 262 A.3d 366 (N.H. 2021) (striking down restrictive voter registration law under state constitution).

[87] For example, litigation in many states has addressed whether state statutes allow ballot drop boxes. *See, e.g.*, Pa. Democratic Party v. Boockvar, 238 A.3d 345, 361 (Pa. 2020) (interpreting Pennsylvania law to allow drop boxes); Teigen v. Wis. Elections Comm'n, 976 N.W.2d 519, 540–41 (Wis. 2022) (interpreting Wisconsin law not to allow drop boxes); Ariz. Free Enter. Club v. Fontes, No. S1300CV202300872 (Ariz. Super. Ct. Apr. 25, 2024) (interpreting Arizona law to allow drop boxes).

[88] The drop-box litigation, for example, involves such issues. *See supra* note 87.

[89] *See, e.g.*, Unite N.M. v. Oliver, 438 P.3d 343, 346 (N.M. 2019) (holding that New Mexico nondelegation doctrine does not permit the legislature to allow the Secretary of State to decide whether to have straight-ticket voting).

[90] *See, e.g.*, *In re* Green Party of Tex., 630 S.W.3d 36, 40 (Tex. 2020) (relying on constitutional avoidance canon when construing state election code to provide candidates an opportunity to cure their failure to pay the required filing fee for ballot access).

[91] *See, e.g.*, *Boockvar*, 238 A.3d at 361 (expressly relying on principle that "election laws . . . ordinarily will be construed liberally in favor of the right to vote" to uphold use of ballot drop boxes) (internal quotation marks and citations omitted); *cf.* Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69 (2009).

[92] *See, e.g.*, *supra* note 87, and *supra* notes 90–91 and accompanying text.

State courts will also have to order appropriate relief if they conclude that certain statutes, regulations, or decisions are unconstitutional or otherwise unauthorized,[93] and they (or other state actors) may need to issue orders in response to unanticipated events, like natural disasters, or operational problems, like inadequate numbers of ballots or late-opening polling places.[94] Under *Moore*'s undeveloped exception, any and all of these situations may wind up in federal court.

Such 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.[95] For example, some states have constitutional provisions explicitly restricting extreme partisan gerrymandering in congressional elections,[96] the enforcement of which, after *Moore*, appear safe from challenges that they violate the Elections or Electors Clauses.[97] But state constitutions also contain many open-ended provisions that have different contexts and histories, and that can be interpreted and applied in different ways, using different interpretive methodologies by different state judiciaries.[98] Indeed, this diversity is understood to be one of federalism's greatest strengths.[99]

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[93] *See, e.g.*, *Boockvar*, 238 A.3d at 370–72 (finding that under unique circumstances of 2020 election, the statutory deadlines for application and return of mail-in ballots could not operate constitutionally and using equitable power to extend the return deadline).

[94] *See, e.g.*, *In re* Gen. Election—1985, 531 A.2d 836 (Pa. Commw. Ct. 1987) (holding that court could suspend voting until a flood emergency had been resolved); *see also* Wise v. Circosta, 978 F.3d 93, 97 n.2 (4th Cir. 2020) (en banc) (noting that the North Carolina Board of Elections "regularly extends its absentee ballot receipt deadlines in response to the hurricanes that befall us in the autumn").

[95] *See generally* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

[96] *See, e.g.*, Fla. Const. art. III, § 20 ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . ."); N.Y. Const. art. III, § 4 ("Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.").

[97] *See* Kafker & Jacobs, *supra* note 33, at 70–71 n.46. Even under these explicit provisions, however, challengers might allege that they have been misapplied or misinterpreted so severely as to be "beyond the bounds of ordinary judicial review."

[98] Amar, *supra* note 14, at 289 n.51 ("Given the range of substantive and methodological diversity that characterizes state constitutions and their proper interpretation, we should remember that what might seem at first blush to the Supreme Court to be state-court overreaching might actually be proper under that state's legal and interpretive traditions."). Even Justice Thomas acknowledged this reality. *See* Kafker & Jacobs, *supra* note 33, at 62 (quoting Moore v. Harper, 600 U.S. 1, 65 (2023) (Thomas, J., dissenting)).

[99] *See* Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation 123–26 (2022); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750 (2010).

Redistricting litigation in state courts demonstrates this reality. State supreme courts construing open-ended constitutional provisions such as equal protection clauses or "free and equal" or "free and open" elections guarantees have used different approaches and come to different conclusions about whether extreme partisan gerrymandering claims are justiciable. Compare, for example, recent decisions involving similar constitutional provisions in New Hampshire and New Mexico.[100] The courts in these cases construed such open-ended constitutional language in light of their specific state historical contexts, precedents, and interpretive methodologies, and they came to opposite conclusions about the justiciability of partisan gerrymandering claims under their respective state constitutions.

In the New Hampshire case, *Brown v. Secretary of State*, the plaintiffs challenged the 2020 redistricting as a partisan gerrymander, invoking the state's Free and Equal Elections Clause,[101] which provides: "All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election."[102] The plaintiffs also pointed to the state constitution's equal protection guarantees and to its constitutional rights to free speech and association.[103]

The New Hampshire Supreme Court rejected the claims, concluding that they presented a nonjusticiable political question. The court concluded that there were no judicially manageable standards by which the invoked constitutional provisions, separately or together, could support a justiciable partisan gerrymandering claim.[104] In addressing the Free and Equal Elections Clause in particular, the court expressly engaged in an originalist analysis, explaining that "our framework requires that we assess not only 'the natural significance of the words used by the framers,' but also the historical context in which the language was used in light of the circumstances surrounding its formulation in New Hampshire."[105] In 1784, when the first version of that Clause was adopted, voting was not only restricted to men twenty-one and older, but the state also imposed a poll tax.[106] As a result, the court majority

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100 *See* Brown v. Sec'y of State, 313 A.3d 760 (N.H. 2023); Grisham v. Van Soelen, 539 P.3d 272 (N.M. 2023). State constitutional challenges to extreme partisan gerrymandering became particularly important after the Supreme Court concluded that such claims are nonjusticiable under the federal Constitution. *See* Rucho v. Common Cause, Inc., 588 U.S. 684 (2019).

101 *Brown*, 313 A.3d at 764.

102 N.H. Const. pt. 1, art. 11.

103 *Brown*, 313 A.3d at 764.

104 *Id.* at 776–77.

105 *Id.* at 777 (quoting State v. Mack, 249 A.3d 423, 431 (N.H. 2020)).

106 *Id.*

rejected the dissent's argument that the Clause provided a judicially enforceable mandate that "all aspects of the electoral process . . . be . . . conducted in a manner which guarantees, to the greatest degree possible, a [qualified] voter's right to equal participation in the electoral process for the selection of his or her representatives in government."[107] The state's unique history, dating back to the Founding era, was central to this conclusion.

The New Mexico Supreme Court, in contrast, held in *Grisham v. Van Soelen* that extreme partisan gerrymandering claims are justiciable under the New Mexico constitution, and it articulated a standard for evaluating them. In finding the claims justiciable, the court relied on its own precedent requiring it to "decide the merits" of allegations "that the government has unconstitutionally interfered with a right protected by the [New Mexico] Bill of Rights, or has unconstitutionally discriminated against them. . . ."[108] And in construing the scope of the state's equal protection guarantee, which was the primary basis of the plaintiffs' claims, the court read that clause "*in par[i] materia* or through the 'prism' of . . . other" constitutional guarantees, including the Free and Open Elections Clause, the Popular Sovereignty Clause, and the Right of Self-Government Clause.[109] "[W]e fail to see how all political power would be 'vested in and derived from the people' and how 'all government of right [would] originate[] with the people' and be 'founded upon their will,' as required by the Popular Sovereignty Clause," the court explained, "if the will of an entrenched political party were to supersede the will of New Mexicans. . . . In such a scenario . . . the fundamental right to vote in a free and open election as required by . . . the New Mexico Constitution would be transformed into a meaningless exercise."[110]

The New Mexico court also expressly rejected the argument that it should proceed in lockstep with the United States Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment. As the court explained, it had already "interpreted [its own equal protection clause] as providing broader protection than the Fourteenth Amendment in other contexts."[111] The New Mexico Equal

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107 *Id.*; *see id.* at 788 (Hicks and Bassett, JJ., dissenting) (alteration in original) (internal quotations omitted) (quoting League of Women Voters of Pa. v. Pennsylvania, 178 A.3d 737, 804 (Pa. 2018)). Both the majority and the dissent in *Brown* made numerous other arguments.

108 Grisham v. Van Soelen, 539 P.3d 272, 284 (N.M. 2023) (alteration added) (quoting Griego v. Oliver, 316 P.3d 865, 870 (N.M. 2013)).

109 *Id.* at 282 (alteration in original).

110 *Id.* (second and third alterations in original) (quoting N.M. CONST. art. II, § 2) (citing N.M. CONST. art. II, § 8).

111 *Id.* at 286 (alteration added).

Protection Clause "affords rights and protections independent of the United States Constitution" and its protections reach "different groups and rights than the federal" clause.[112] Similarly, the *Grisham* court held that its state "constitutional responsibility to vindicate the individual right" at issue outweighed any prudential arguments in favor of following the United States Supreme Court's conclusion that extreme partisan gerrymandering is a nonjusticiable political question under the federal Constitution, noting that the New Mexico constitution does not incorporate the limitations of Article III of the federal Constitution.[113] It remanded the case for the trial court to develop the record and apply intermediate scrutiny if warranted under the standards it articulated.[114]

Under our federalist system, the New Hampshire and New Mexico courts are entirely free to interpret their similar constitutional provisions differently from each other and differently from the Supreme Court's interpretation of the federal Constitution, and to use different methodologies to do so. But the door left open in *Moore* allows the losing parties in the two cases very different options. The New Mexico defendants could have claimed that the New Mexico Supreme Court exceeded the ordinary bounds of judicial review and asked the Supreme Court to review the decision. And although those defendants did not in fact do so, they will have another opportunity if the New Mexico courts ultimately strike down the new congressional districting map under the standards the *Grisham* court articulated.[115]

On the other hand, the losing plaintiffs in a case challenging congressional districts, or other aspects of state law governing federal elections, have no such recourse. That is true even if the state court declares the issue nonjusticiable and even though, as the *Brown* dissenters argued, that court had "never before declined to decide a constitutional question on th[e] ground" that there were no judicially

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112 *Id.* at 287 (quoting Breen v. Carlsbad Mun. Schools, 120 P.3d 413, 418–19 (N.M. 2005) (internal quotation marks and citations omitted)).

113 *Id.* at 288–89 (citing Rucho v. Common Cause, Inc., 588 U.S. 684 (2019)).

114 *Id.* at 289–93.

115 As Justice Thomas pointed out, in such an appeal, there may be two distinct arguments for the Court to consider. First, the Court may have to decide whether "reading justiciable prohibitions against partisan gerrymandering into the [state] Constitution exceeded the bounds of ordinary judicial review in" that state. Moore v. Harper, 600 U.S. 1, 64 (2023) (Thomas, J., dissenting). But even if the Court concludes that the decision on that legal issue falls within those bounds, the Court might "need[] to ask next whether it exceeded the bounds of ordinary judicial review in [that state] to find that the specific congressional map *here* violated those prohibitions." *Id.*

manageable standards.[116] In other words, when a state court rejects a challenge to congressional districting (or other regulation of federal elections), however far-fetched or novel its reasoning, there can be no claim that arrogated the legislature's power to itself and thus no basis for federal court review under the *Moore* exception. Yet—again—the opposite is true if the state court accepts such a challenge to state regulation of federal elections.

This asymmetry means that the Supreme Court is much more likely to see cases in which state supreme courts strike down election-related laws as violating state constitutional provisions than cases where they uphold statutes. To the extent that some Justices are suspicious of state courts in this context—and as I've suggested, at least during the 2020 election, some Justices certainly seemed to be—seeing this skewed sample may only reinforce those suspicions.

Similar problems may arise in non-constitutional contexts. A nontextualist reading of a statute is probably more likely to lead to an appeal to the Supreme Court claiming that the state court has exceeded "the bounds of ordinary judicial review" than is a textualist reading, even if that textualist reading undermines the clear purpose of the statute and even if the state has express legislative direction to take statutory purpose into account.[117] States do not have to adopt textualism as their approach to statutory interpretation. "A given state legislature, the[] people who elect that state legislature, and the spirit of that state's overarching state constitution might well prefer a state-law jurisprudence that is more purposive, or structural and holistic, or precedent-based, or representation-reinforcing, or democracy-promoting, or canon-driven, than relentlessly textual."[118] Moreover, in the particular context of election law, some state courts have long relied on the democracy guarantees in their state constitutions to construe "ambiguous state election statutes in ways that allow more votes to be counted."[119] Richard Hasen has documented the history of what he calls the Democracy Canon—the principle that election laws should be liberally construed to protect the right to vote—dating back to the

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116 Brown v. Sec'y of State, 313 A.3d 760, 782 (N.H. 2023) (Hicks and Bassett, JJ., dissenting). *Brown* itself involved only state legislative redistricting.

117 *See, e.g.*, 1 Pa. Cons. Stat. § 1921 (1972); *Moore*, 600 U.S. at 36.

118 Amar, *supra* note 14, at 289 n.51; *see also* Parsons, *supra* note 10 ("Are the 'ordinary bounds' of judicial review defined by what's *supposedly outrageous under a particular judicial method* (such as textualism) or are they defined by what's *atypical or unexpected*?"); Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 Wis. L. Rev. 1235 [hereinafter *Textualism*]; Shapiro, *ISLT*, *supra* note 4, at 179 n.221.

119 Kafker & Jacobs, *supra* note 33, at 92.

mid-nineteenth century.[120] Unduly aggressive use of the *Moore* exception risks undermining these important state-specific approaches.[121]

The *Moore* exception could also lead to significant disruption in how states run their own elections. Redistricting is unique among election law disputes in that federal court intervention under *Moore*'s anti-arrogation theory would be relatively manageable as a practical matter. If the Supreme Court were to decide that the New Mexico court exceeded the bounds of ordinary judicial review, for example, that conclusion would invalidate that decision only as to congressional maps. An Elections Clause reversal by definition applies only to congressional elections. The state court's anti-gerrymandering holding would stand as to state legislative maps. In virtually all other areas of election law, on the other hand, the *Moore* exception threatens the same kind of disruption as the original ISLT. Because most state election laws, other than redistricting, apply to federal and state elections without distinction, an Elections/Electors Clause reversal of a state court's constitutional ruling or interpretation of a statute would lead to one set of laws being in effect for state elections and another for federal elections.[122]

A recent decision in Montana illustrates this problem. In *Montana Democratic Party v. Jacobsen*, the Montana Supreme Court struck down four new laws as unconstitutional under the Montana constitution.[123] The laws all would have had the effect of making it more difficult for some people to vote. One of the new statutes would have eliminated same-day voter registration;[124] another revised the state's photo identification requirements so those using a Montana student ID

120 Hasen, *supra* note 91, at 75–80.

121 Nor are state courts the only entities that engage in statutory interpretation. Executive branch officials and elections officials, whether acting on the basis of express delegations or filling in gaps left by the legislature, routinely interpret and apply statutes. No delegation restrictions exist in the Elections and Electors Clauses. *See* Kafker & Jacobs, *supra* note 33, at 124 ("States are also not bound by federal separation of powers generally; rather, states are free to structure their relationships between the different branches of government, . . . as they see fit. State governments' implementation and oversight of elections, . . . reflects this legal authority . . . ."). Yet during the 2020 election litigation, Justice Gorsuch suggested in two different cases that the Elections and Electors Clauses might actually *limit* legislatures' choices about how much to delegate. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay); Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting from denial of injunctive relief). *See also* Shapiro, *ISLT*, *supra* note 4, at 189 & n.271 (discussing Gorsuch's separate opinions).

122 *See* Shapiro, *ISLT*, *supra* note 4, at 177, 185–86. Likewise, as with the original maximalist ISLT, such challenges could emerge at any time, eliminating finality in election law. *Id.* at 186–89.

123 545 P.3d 1074 (Mont. 2024).

124 2021 Mont. Laws ch. 244, § 13-2-304, *invalidated by* Mont. Democratic Party v. Jacobsen, 545 P.3d 1074 (Mont. 2024).

would have to provide additional documentation;[125] another outlawed paid absentee ballot collection;[126] and the fourth precluded people who would be eighteen years old by Election Day from receiving an absentee ballot before their eighteenth birthday.[127] The Court held that all of these provisions violated the "clear and unequivocal fundamental right" to vote under the Montana Constitution.[128]

As with most election laws, the challenged provisions did not distinguish between federal and state elections. But if the Supreme Court were to conclude that the Montana Supreme Court exceeded the "bounds of ordinary judicial review" in its holding, the provisions would be revived, but for federal elections only.[129] The resulting dual system would be, at best, extremely unwieldy and confusing. Students voting with only their student IDs and Election Day voter registrants would have to be given ballots for state and local elections only, as would those who seek an absentee ballot before their eighteenth birthday. And it would require an entirely new monitoring structure for absentee ballot collection, under which some ballots could not have their votes for federal offices counted. To describe these consequences is to demonstrate their unworkability.[130]

Perhaps the most fraught areas for the *Moore* exception are remedial—situations in which a court concludes that the constitution or principles of equity require some modification of the statutory scheme.[131] This circumstance led to the most controversial case during 2020. The Pennsylvania Supreme Court unanimously concluded that, due to the combination of COVID and the Postal Service's admission

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125 2021 Mont. Laws ch. 254, § 13-13-114, *invalidated by* Mont. Democratic Party v. Jacobsen, 545 P.3d 1074 (Mont. 2024).

126 2021 Mont. Laws ch. 534, § 2, *invalidated by* Mont. Democratic Party v. Jacobsen, 545 P.3d 1074 (Mont. 2024).

127 2021 Mont. Laws ch. 531, § 13-2-205(2), *invalidated by* Mont. Democratic Party v. Jacobsen, 545 P.3d 1074 (Mont. 2024).

128 *Jacobsen*, 545 P.3d at 1084.

129 *Cf.* Shapiro, *ISLT*, *supra* note 4, at 185–86.

130 The dual system problem is not the only potential bad consequence if the Supreme Court interprets and applies the *Moore* anti-arrogation principle too broadly. Candidates, campaigns, and political parties may attempt to challenge longstanding state court precedent insofar as it applies to federal elections. *See id.* at 186–89 (arguing that the ISLT would encourage challenges to longstanding judicial precedents). The ISLT could also stymie the development if state court judges become wary of being second-guessed by federal courts, particularly in high-profile and potentially disruptive election law cases. *See id.* at 191–92 (discussing these possibilities). And for the Supreme Court to declare a state court decision "beyond the ordinary bounds of judicial review" could undermine state court legitimacy. *See id*.

131 Kafker and Jacobs point to remedial "relief that allows deviation from statutory requirements" as the circumstance that "presents the most difficulty in distinguishing judicial interpretation from judicial usurpation." Kafker & Jacobs, *supra* note 33, at 101.

that it could not guarantee timely delivery of ballot applications and ballots, the election-day deadline for receipt of ballots could not operate consistent with the Pennsylvania Constitution.[132] To reiterate: Although the justices disagreed on remedy, with the dissenters arguing for moving the statutory deadline to request ballot applications instead of the ballot-receipt deadline, all seven of them agreed that the statutory scheme had to be altered.[133] There was no way for the Pennsylvania Supreme Court to address the problem before it without altering the statutory scheme.

Certainly, in this context, state courts must be careful—as they should be even in the absence of the *Moore* exception. As Justice Kafker and his co-author argue, courts should "hew as closely as possible to the existing statutory scheme, requiring only changes compelled by the constitution."[134] Other commentators urge state courts to give the legislature the first opportunity to solve the constitutional problem.[135] But inevitably situations will arise in which time does not permit referral to the legislature.

The reality is that state courts cannot fully insulate themselves from the Supreme Court deciding that *Moore*'s anti-arrogation principle has been breached. But they—and the litigants defending their rulings—can provide some protection. As I have argued before, "state courts should write defensively. That is, they should assume that their readers know nothing about their state's law, and they should explain how their analysis is grounded in longstanding state law precedent and norms,"[136] as well as their state's unique history when relevant. They can explain principles related to delegation to administrative and executive agencies in their states, which may be particularly important when discretionary decisions of election administrators are challenged.

State courts can and should exhaustively detail the legislature's own instructions about statutory interpretation, including but not limited to directions to consider legislative intent. Such an explanation

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132 Pa. Democratic Party v. Boockvar, 238 A.3d 345, 370–71 (Pa. 2020); *id.* at 392–93 (Donohue, J., concurring in part and dissenting in part); *id.* at 392 (Saylor, J., concurring in part and dissenting in part). For further discussion of *Boockvar*, see Shapiro, *ISLT*, *supra* note 4, at 138–39, 172–73, 179–84; Shapiro, *State Courts*, *supra* note 85.

133 *See* sources cited *supra* note 132.

134 Kafker & Jacobs, *supra* note 33, at 101.

135 *See, e.g.*, Ned Foley, *A Brief Follow-up on* Moore v. Harper, Election L. Blog (June 29, 2023, 4:19 PM), https://electionlawblog.org/?p=137198 [https://perma.cc/6K2B-7TJJ]; Parsons, *supra* note 10; Pildes, Testimony, *supra* note 61, at 10–11; William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, Atlantic (Oct. 11, 2022), https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695 [https://perma.cc/P9C7-557B].

136 Shapiro, *ISLT*, *supra* note 4, at 196.

could have been important in the 2020 litigation in Pennsylvania. There, Republicans argued that extending the ballot-receipt deadline, even for only the 2020 election, should trigger the underlying statute's nonseverability clause, leading to a relatively new election reform statute being struck down.[137] Even the justices who dissented as to the remedy rejected this argument,[138] with one justice pointing out that the court had, ten years earlier, refused to enforce a nonseverability clause with identical language.[139]

Even beyond that point, however, there was more that could have been said. The legislature itself had provided instructions about the significance of such precedent in its general instructions about statutory interpretation. Specifically, the legislature instructed the courts that "when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language."[140] But no Pennsylvania justice discussed that instruction. Fuller discussions of such state law would be helpful in preventing or resolving unwarranted appeals to the federal courts under the *Moore* exception.

State courts (and litigants defending their rulings) should also place their decisions in a broader legal and historical context. The Montana Supreme Court did this well in its recent decision when it concluded that the Montana Constitution provides greater protection for the right to vote than under current United States Supreme Court precedent.[141] It expressly asserted its right to interpret Montana constitutional language that is "nearly identical" to federal provisions differently from the United States Supreme Court and, importantly, identified other cases in which it had done so.[142] Such arguments might help stave off a *Moore* challenge.

To the extent that what a particular state court does is consistent with what a number of other state courts have done, whether in terms of jurisprudential methodology or result, that fact may mitigate Supreme Court disfavor about a particular outcome. At the same time, however, state courts and their defenders should insist on the benefit of variation among states. Similarly, state courts should insist on their right to depart from the dominant approach of the U.S. Supreme Court. Professors

137 *See Pa. Democratic Party*, 238 A.3d at 367.

138 *See id.* at 397 n.4 (Donohue, J., dissenting).

139 *Id.* (citing Stilp v. Commonwealth, 905 A.2d 918, 978 (Pa. 2006)); *see also* Shapiro, *ISLT*, *supra* note 4, at 181–84 (discussing the nonseverability clause issue).

140 1 Pa. Cons. Stat. § 1922(4) (1972).

141 Mont. Democratic Party v. Jacobsen, 545 P.3d 1074, 1085–87 (Mont. 2024).

142 *Id.* at 1086.

Leah Litman and Katherine Shaw point out, for example, that one common defense of textualism at the federal level focuses on the federal Constitution's separation of powers and lawmaking process.[143] But states may have different arrangements.

State courts can invoke popular constitutionalism to justify changes in law that might follow judicial elections. The North Carolina Supreme Court's holding in *Harper I* finding extreme partisan gerrymandering justiciable marked a new development in the law of that state, but one that followed a statewide judicial election during which partisan gerrymandering was front and center.[144] And after a subsequent election, the same court overruled that new precedent.[145] Similarly, extreme partisan gerrymandering was a central issue in Wisconsin's recent supreme court election.[146] In these states, the judiciary operates somewhat differently from the federal system. These courts are accountable to the people, who can weigh in, through judicial elections, on how they believe their state constitutions should be interpreted.[147] State courts should not be afraid to explain how their constitutional roles may come with their own political legitimacy and accountability, and how that might affect the way they do their work.

Finally, when relevant, state courts should expressly address the dual system problem. They should consider whether the legislature intended the possibility that there would be two sets of election regulations. If not, the legislation should be understood to incorporate all of state law, eliminating the possibility of an Elections/Electors Clause challenge.[148] And of course, pro-democracy advocates should make all of these arguments to state courts.

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143 *Textualism*, *supra* note 118, at 1247–50; *see also* Shapiro, *ISLT*, *supra* note 4, at 179 n.221.

144 *See, e.g.*, Anne Blythe, *She's Fought Gerrymandering and Voter ID. Now She Wants a NC Supreme Court Seat.*, News & Observer: Under the Dome (Nov. 16, 2017), https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article184720433.html [https://perma.cc/JM76-RK63]; Matthew Chapman, *North Carolina Republicans Heading for Disaster in Supreme Court Election*, Salon (Oct. 10, 2018), https://www.salon.com/2018/10/10/north-carolina-republicans-heading-for-disaster-in-supreme-court-election_partner [https://perma.cc/ET96-SMK5].

145 Harper v. Hall, 886 S.E.2d 393 (N.C. 2023); *see also* Moore v. Harper, 600 U.S. 1, 12–14 (2023).

146 *See, e.g.*, Reid J. Epstein, *2023's Biggest, Most Unusual Race Centers on Abortion and Democracy*, N.Y. Times (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/us/politics/wisconsin-supreme-court-election.html [https://perma.cc/2YAX-LCCU].

147 Amar, *supra* note 14, at 288; *see also* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum. L. Rev. 2047, 2068–74 (2010).

148 *See* Shapiro, *ISLT*, *supra* note 4, at 176–78, 196–97.

B. Binding the Court

1. The Problem and the Opportunity

The current Supreme Court is not inclined to restrict its own power.[149] The Justices, however, appear very sensitive about criticisms that they are in any way politically motivated.[150] Moreover, all nine Justices would almost certainly agree that, as a general matter, different states can interpret similar or identical constitutional provisions and statutory language differently,[151] that state courts have the final say on the meaning of state law,[152] and that the allocation of power within any state is generally not a federal concern.[153] It is at least plausible, therefore, that *before* a heated election dispute similar to *Bush v. Gore* or some of the 2020 cases, some of the Justices might be willing to pre-commit to those basic and uncontroversial principles in the election law context and—more significantly—the procedural limitations they imply.

How to make that kind of pre-commitment actually happen, in a context where the Court is likely to simply deny many petitions for certiorari or applications for emergency relief, is a harder question. But this circumstance might be one where the shadow docket can do meaningful work. The shadow docket generally refers to decisions that the Supreme Court makes, often with no explanation or written opinion, in cases that have not been fully briefed and argued.[154] As Professor Stephen Vladeck has explained, the Court has always issued

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149 *See generally* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

150 *See, e.g.*, Adam Liptak, *Justice Breyer on Retirement and the Role of Politics at the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html [https://perma.cc/WR45-JU7Y]; Jessica Gresko, *Supreme Court Justices Spar over Court Legitimacy Comments*, A.P. NEWS (Oct. 26, 2022), https://apnews.com/article/abortion-us-supreme-court-elena-kagan-samuel-alito-government-and-politics-10bf92ae6830573054da5f756a029d1c [https://perma.cc/SAU3-2BL9].

151 *See* SUTTON, *supra* note 85, at 17 (explaining that "[s]tate constitutional law respects and honors" the "differences between and among the States by allowing interpretations of the fifty state constitutions to account for . . . differences in culture, geography, and history").

152 Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.'") (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940)).

153 *See* SUTTON, *supra* note 99, at 7–8 (noting that states can have "diverse ways to structure a government"); Litman & Shaw, *Bounds*, *supra* note 15, at 900–04 (describing ways state governments differ from the federal system and from each other).

154 *See* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 12–13 (2023) (explaining what the shadow docket is); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015); *see also* Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 288–90 (2006) (discussing the value of the Supreme Court explaining why it is denying certiorari in some cases).

such orders, generally uncontroversially and largely in an effort "to manage their workload."[155] More recently, however, the Court has used the shadow docket "to change the law both on the ground and in the books" and "has, with increasing frequency, intervened preemptively, if not prematurely" in many high profile and hotly contested matters.[156]

Critics of the Court's aggressive use of the shadow docket point to its lack of transparency, the Court's inconsistent application of the criteria for emergency relief, and the fact that by deciding important issues of law on undeveloped records and without full briefing, the Court may not fully appreciate the nuances, complications, and implications of what they are deciding.[157] But for purposes of narrowing the gap left by *Moore*, the shadow docket provides an opportunity. Even when the full Court does not issue an opinion in a shadow docket case, individual Justices can express their views, and that can, in some circumstances, create a mini-doctrine.

Justice Kavanaugh has done exactly this with respect to what is known as the *Purcell* principle in election law. The *Purcell* principle arises from the case of *Purcell v. Gonzalez*, in which the Supreme Court vacated a Ninth Circuit injunction of Arizona's new voter ID requirements.[158] The Court objected both to the Ninth Circuit's failure to explain its reasoning and to the timing of the injunction—so close to an election that it could easily lead to administrative challenges and voter confusion.[159] Starting in 2020, however, the Court, almost entirely without explanation, "extended *Purcell*'s reach dramatically to undermine voting rights plaintiffs' ability to obtain relief—or, put another way, to require elections to be conducted in the face of illegal or unconstitutional practices."[160]

In one such case in 2022, without a majority opinion, the Court stayed the preliminary injunction issued by a district court to remedy Alabama's likely violation of the Voting Rights Act in its congressional redistricting.[161] Justice Kavanaugh, joined by Justice Alito, wrote

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155 Vladeck, *supra* note 154, at 12.

156 *Id.* at 12–13.

157 *See* Harry Isaiah Black & Alicia Bannon, *The Supreme Court 'Shadow Docket'*, Brennan Ctr. for Just. (July 19, 2022), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket [https://perma.cc/4MVP-8Q5Q].

158 549 U.S. 1, 4–6 (2006) (per curiam).

159 *Id.*

160 Carolyn Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court* [hereinafter *Limits*], 83 Ohio St. L.J. Online 111, 118–19 (2022).

161 *See* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022). The district court had ordered the state to draw a second majority minority district following the 2020 census. Caster v. Merrill, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *1–2 (N.D. Ala. Jan. 24, 2022), *cert. granted before judgment sub nom.* Merrill v. Milligan, 142 S. Ct. 879 (2022).

a concurrence explaining that *Purcell* precluded the district court from requiring remedial maps. And he insisted that "the *Purcell* principle"—that federal courts should not order changes to voting and election laws too close to an election—"reflects a 'bedrock tenet of election law.'"[162] His evidence for this claim was a seven-case-long string citation of shadow docket cases from 2020.[163]

Justice Kavanaugh's non-majority shadow docket opinion in this Alabama case is deeply problematic for a number of reasons, as is the highly manipulable *Purcell* principle itself.[164] But Justice Kavanaugh's inclination to explain himself might offer an opportunity. As emergency applications in elections cases find their way to the Supreme Court, as they inevitably will, litigators should argue for several limitations on *Moore*'s open door. And they should encourage the Court to take the opportunity to endorse some of those limitations. (They can and should also make these arguments to lower federal courts when the circumstances warrant.) Even if the full Court does not announce that it has accepted them, Justice Kavanaugh and other members of the conservative majority might, and those positions might be helpful in later litigation.[165]

2. The Arguments

There are at least three possible types of arguments that pro-democracy litigators should consider pushing in the Supreme Court whenever the posture of an election case allows it. First, litigants should amplify the types of arguments about state law described in Section II.A.

Second, advocates should revive some of the pre-*Moore* anti-ISLT arguments. In particular, advocates should explore the implications for both statutory interpretation and election administration were

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162 *Limits*, *supra* note 160, at 119 (quoting *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of application for stays)).

163 *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of application for stays) (citing Merrill v. People First of Ala., 141 S. Ct. 25 (2020); Andino v. Middleton, 141 S. Ct. 9 (2020); Merrill v. People First of Ala., 141 S. Ct. 190 (2020); Clarno v. People Not Politicians, 141 S. Ct. 206 (2020); Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020)).

164 *See Limits*, *supra* note 160, at 119–21; VLADECK, *supra* note 154, at 204–16.

165 This suggestion may be criticized as naïve or pollyannish. It is certainly no magic bullet to protect against the Supreme Court effectively deciding an election if the right circumstances present themselves. But I do not believe that any such magic bullet exists. *Cf.* Carolyn Shapiro, *Democratic Federalism and the Supreme Court: Keynote Address at the 2023 Ira C. Rothgerber Jr. Conference*, 95 U. COLO. L. REV. 359, 373 (2024) (arguing that "[e]very pressure point must be pursued" to prevent or ameliorate democratic decline).

the Supreme Court to decide that a state court has gone beyond the bounds of ordinary judicial review or statutory interpretation with respect to any statute that applies equally to federal and state elections. Advocates should insist on the logically prior statutory interpretation question: Does the statutory scheme incorporate, or did the legislature intend, the possibility of a dual elections system, with one set of laws for federal elections and another for state elections and the election administration nightmare that would ensue?[166] Where the legislature has enacted only one set of laws that apply to both types of elections, advocates should argue for a presumption that the legislature expected that those laws would operate and be interpreted in the same way for both state and federal elections, effectively precluding the *Moore* exception from applying.[167]

Third, advocates should argue that unless a particular claim was actually made to a state court, it has been forfeited and cannot be made for the first time in federal court.[168] For example, if a litigant argues in the Supreme Court that a particular statutory interpretation is outside the bounds of ordinary judicial review, that litigant should have previously made a comparable claim to the state court.[169] In other words, the litigant should not just have claimed that their interpretation was the right one, but rather that the interpretation pressed by their opposition was so egregiously wrong that accepting it would transgress the bounds of ordinary judicial review and violate the anti-arrogation principle. Doing so would encourage the state courts to explain how their rulings fit into their own state law and legal culture, as described above. This approach is appropriately respectful of state courts and their expertise.

Current litigation pending in Arizona provides an example of how these procedural requirements might operate in practice. The Arizona Secretary of State recently adopted a new Election Procedures Manual (EPM). The Republican party is suing the state, alleging that the EPM was improperly adopted because the Secretary of State did not comply with the Arizona Administrative Procedure Act (APA).[170] That claim is one of statutory interpretation. Specifically, is the Secretary of State an

166 *See* Shapiro, *ISLT*, *supra* note 4, at 176–78.

167 *Id.*

168 *Id.* at 197; *cf.* Shinn v. Ramirez, 596 U.S. 366, 375–76 (2022) (explaining similar requirement for habeas petitioners challenging state convictions). A version of this argument can also apply to lawsuits seeking lower federal court injunctions of state court actions.

169 Obviously, sometimes a state court might adopt an interpretation that was not presented by any of the parties. In those circumstances, the presumption would likely not apply.

170 *See* Complaint at ¶¶ 4–5, Republican Nat'l Comm. v. Fontes, No. CV2024-050553 (Ariz. Super. Ct. Maricopa Cnty. Feb. 8, 2024), https://www.democracydocket.com/wp-content/uploads/2024/02/1-2024-02-09-Complaint.pdf [https://perma.cc/9DFF-E47R].

"agency" within the meaning of the state APA, and, if so, does the fact that the statute requiring the EPM lays out procedural requirements that are different from the APA mean that the EPM is exempt from the APA? If the Arizona courts hold that the Secretary is not an agency and/or that the EPM-specific procedures indicate that the APA does not apply, the plaintiffs may well then complain to the Supreme Court that the state courts have exceeded the bounds of ordinary judicial review. But if that is a foreseeable part of their litigation strategy, they should be required to argue to the state court not just that they are right in their interpretation, but that the alternative interpretation is lawless—beyond the bounds of ordinary judicial review. Presenting that argument to the state court expressly invites it to explain in more detail why whatever decision it makes is well within the bounds of that state's law and legal tradition, which in turn may make it less likely that the U.S. Supreme Court will swoop in where it should not.

Similarly, in any case involving statutes that apply to both state and federal elections, those invoking the *Moore* exception should ask the state courts to consider whether the statures contemplate a dual system. In the Montana litigation, for example, the state defendants of course defended the statutes against the state constitutional challenges, but they also argued to the Montana Supreme Court that "reflexively applying strict scrutiny [under the state constitution] to every law the [sic] touches the electoral process" would run afoul of the Elections Clause.[171] After losing in the Montana Supreme Court, those defendants have filed a petition for certiorari, relying on the *Moore* exception.[172] But in state court, they did not address the question of whether it is plausible to interpret the statutes to apply to federal elections if they are struck down as to state elections. That failure alone should preclude their Elections Clause argument.

Such requirements might also reduce the dangers of litigation gamesmanship that are invited by the *Moore* exception. A lawsuit filed by Stephen Miller's litigation group, America First, for example, alleges a series of illegal election practices in several counties in Arizona.[173] Similar lawsuits may be filed in battleground states around the country.

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171 Appellant's Opening Brief at 87, Mont. Democratic Party v. Jacobsen, 545 P.3d 1074 (Mont. 2024) (No. DA 22-0667).

172 Petition for a Writ of Certiorari to the Montana Supreme Court, Jacobsen v. Mont. Democratic Party, No. 24-220 (Aug. 26, 2024), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-220.html [https://perma.cc/EA3U-C7ES].

173 *See* Complaint at ¶¶ 10–12, Strong Communities Found. of Arizona Inc. v. Yavapai Cnty., No. CV2024-00175 (Ariz. Super. Ct. Maricopa Cnty. Feb. 3, 2024), https://media.aflegal.org/wp-content/uploads/2024/03/02003522/Strong-Communities-v.-Yavapai-Maricopa-and-Coconino-Counties-Complaint.pdf [https://perma.cc/L8PB-K2QQ].

Most of them are likely to fade away, but as the particular political and legal challenges of the 2024 election crystallize, some may emerge—like the Pennsylvania absentee ballot case of 2020—as potentially decisive. The more that litigants in such cases are required to make their ISLT arguments to state courts first, the less likely *Moore* is to bring us another *Bush v. Gore*.

Conclusion

Moore v. Harper definitively rejected the argument that state constitutions cannot constrain state legislative decisions in their regulation of federal elections. This holding is extremely important, and it preserves important state constitutional provisions like the creation of independent redistricting bodies and numerous pro-democracy state court rulings based on more open-ended constitutional language. But *Moore* left open the possibility of federal court review of state judicial decisions related to federal elections, even if those decisions are based solely on state law. And especially because election litigation is often both rushed and politically charged, that exception could, in practice, swallow much of the *Moore* rule. The strategies proposed in this Article for state courts and pro-democracy litigants can help mitigate that possible outcome.