
The “Bounds” of *Moore*: Pluralism and State Judicial Review

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ABSTRACT. In *Moore v. Harper*, the Supreme Court rejected a maximalist version of the “independent state legislature theory” (ISLT), invoking state judicial practices both before and after the Constitution was ratified. This piece uses *Moore*’s method to examine another variation on the ISLT, one pushed most recently by Justice Brett Kavanaugh and before him by Chief Justice William Rehnquist. The Rehnquist-Kavanaugh version of the ISLT would empower federal courts to review state officers’ interpretation of state laws regarding federal elections. But the logic of *Moore* is fatal to that potential version of the ISLT. The Rehnquist-Kavanaugh version of the ISLT contemplates a kind of federal-court review of state officers’ interpretation of state election laws that is not rooted in history or tradition, given the pluralist interpretive traditions that existed in the states both before and after the drafting and ratification of the original Constitution. It is also fatally inconsistent with basic principles of both federalism and democracy.

INTRODUCTION

In 1977, Justice William J. Brennan, Jr. famously argued that state constitutions, no less than the Federal Constitution, are “a font of individual liberties,” with protections “often extending beyond those required by the Supreme Court’s interpretation of federal law.”¹ Without recognizing “the independent protective force of state law,” Brennan cautioned, “the full realization of our liberties cannot be guaranteed.”²

Justice Brennan wrote these words at a pivotal moment in U.S. Supreme Court history. In the years immediately preceding his famous piece, the Court’s

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2. *Id.*

majority, according to Brennan, had retreated from meaningful enforcement of the constitutional guarantees of equality and liberty, as well as various provisions of the Bill of Rights.³ As evidence of that retreat, Brennan pointed to cases allowing discrimination against pregnant workers;⁴ permitting the indigent to be denied access to judicial fora;⁵ and limiting the force of the Constitution’s warrant requirement, prohibition on compelled self-incrimination, and right to counsel.⁶ Many of the cases “limit[ing] the protective role of the federal judiciary”⁷ did so on the premise that state courts “c[ould] be trusted to safeguard individual rights.”⁸ To Brennan, this premise constituted – and he amplified – “a clear call to state courts to step into the breach.”⁹

Justice Brennan’s call came to be known as the “new judicial federalism,”¹⁰ and it ushered in an era of serious attention to state constitutions as sources of rights, separate and independent from the Federal Constitution.¹¹ In more recent years, attention has increasingly turned to the structural choices made by state electorates and in state constitutions, in addition to the rights guaranteed by state constitutions.¹²

But a theory considered by the U.S. Supreme Court last Term – the so-called “independent state legislature theory” (ISLT) – could call into question the power of state courts and state constitutions to protect rights above and beyond the rights secured by federal law. It could throw into doubt states’ power to structure their affairs in ways that diverge from the federal system. And it could

3. *Id.* at 495-98 & nn.37-60 and accompanying text.

4. *Id.* at 495 n.37 (citing *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)).

5. *Id.* at 495-96 & nn.39-40 and accompanying text.

6. *Id.* at 496-98 & nn.47-57 and accompanying text.

7. *Id.* at 503.

8. *Id.* at 502-03.

9. *Id.* at 503; see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548-52 (1986) (advocating for state-court leadership in protecting individual rights).

10. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097 (1997).

11. See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (arguing that American constitutional law is richest and most protective of individual rights when state supreme courts reject lockstepping and assert independence in interpreting their constitutions).

12. See generally JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF DEMOCRATIC EXPERIMENTATION (2022) (detailing how American federalism allows the states to serve as laboratories of structural innovation).

do all of that in an arena that involves the most important state choices regarding both rights and structure – voting and democracy.

The ISLT, in brief, maintains that the Federal Constitution gives to state legislatures, and withholds from other entities, the power to regulate Federal elections.¹³ Proponents of the theory suggest that it follows from two provisions of the Federal Constitution: Article I’s Elections Clause, which provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,”¹⁴ and Article II’s Presidential Electors Clause, which provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”¹⁵

In seeking to assign state legislatures unique powers flowing from the Federal Constitution, the ISLT threatens to constrain state judicial decision-making in ways that would make state courts, state constitutions, and state law both less rights-protective and less democratic. Under the guise of the ISLT, the Court could effectively require state courts to use the U.S. Supreme Court’s preferred method of interpreting legal texts, or at least the method of interpretation the Court says that it prefers – textualism. Self-proclaimed textualist Justices could insist that only textualist readings of state law and perhaps only their preferred textualist interpretations of state law constitute “fair readings” of state law for purposes of the Elections and Electors Clauses. They could use that notion to invalidate state rulings that expand voting rights. This variation on the ISLT could empower federal courts to prevent state courts from recognizing new voting-rights protections in state constitutions, from giving effect to existing democracy-promoting mechanisms in state constitutions, and from responding to democratic processes.

Last Term, the Supreme Court declined to embrace a maximalist version of the ISLT in the much-anticipated case *Moore v. Harper*.¹⁶ But the Court’s failure to clearly and decisively repudiate the ISLT in *Moore* means that the ISLT may continue to pose a threat to meaningful rights protection by state courts, and more broadly to state-level democracy.

In this Essay, we identify the gaps left open in the Court’s opinion in *Moore*. In Part I, we suggest that language in both the majority opinion and Justice Kavanaugh’s concurrence may leave open the possibility that the Court could still

13. Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1236.

14. U.S. CONST. art. I, § 4, cl. 1.

15. U.S. CONST. art. II § 1, cl. 2.

16. 600 U.S. 1 (2023).

deploy the ISLT to invalidate democracy-enhancing decisions by state courts or other state actors. In Part II, we show that such use of the ISLT would be impossible to reconcile with the *Moore* majority's history-and-tradition approach to evaluating proposed constitutional doctrine, particularly the *Moore* majority's focus on state interpretive practices close in time to ratification, which were decidedly nontextualist in method. Finally, in Parts III and IV, we show that this twist on the ISLT would be fundamentally incompatible with core precepts of federalism, which grants states considerable leeway in both structuring their institutions and adopting different modes of interpretation, and with sensible accounts of democracy.

I. *MOORE V. HARPER*

Moore involved an audacious request by a group of North Carolina legislators: that the U.S. Supreme Court throw out a decision of the North Carolina Supreme Court that had invalidated the state's legislative maps under the North Carolina Constitution.¹⁷ On the state lawmakers' account, the state high court lacked the authority to sit in judgment on the state's congressional map, because under the Federal Constitution, only state *legislatures* may regulate federal elections.¹⁸

The Supreme Court's opinion in *Moore* rejected the legislators' request, disavowing a strong form of the ISLT and holding that "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review."¹⁹ In other words, the Court explained, state courts, no less than federal courts, possess the power of judicial review, which includes the ability to review state laws governing federal elections to determine whether those laws are consistent with a state's constitution.

But *Moore* conspicuously declined to address when and under what circumstances federal courts *could* review how state interpreters, including state courts, interpreted state constitutional and statutory law governing federal elections. That was no small omission. Indeed, it had been a key part of the debate in *Bush*

17. *Harper v. Hall*, 868 S.E.2d 499, 553, 555-56, 559 (N.C. 2022). In the state high court, the legislators had not only defended their map against a partisan gerrymandering claim, but also challenged the state courts' ability to review the map under the "independent state legislature theory" ISLT; the state high court rejected the ISLT argument as "repugnant to the sovereignty of states . . . and the independence of state courts." *Id.* at 551.

18. Brief for Petitioners at 17-18, *Moore*, 600 U.S. 1 (No. 21-1271) ("The plain import of the Elections Clause's allocation of election-regulating authority to each State's legislature is that the legislature's possession of this authority is exclusive That specification necessarily entails that no *other* state organ is authorized to exercise that power.").

19. *Moore*, 600 U.S. at 22.

v. Gore,²⁰ as well as its predecessor *Bush v. Palm Beach County Canvassing Board*.²¹ In *Bush v. Gore*, the U.S. Supreme Court reversed a Florida Supreme Court decision that concluded that a manual recount was required by Florida state law. Although the basis for the Supreme Court’s reversal was the Federal Constitution’s Equal Protection Clause, Chief Justice Rehnquist wrote separately to assert that the Florida Supreme Court had so badly warped the meaning of state law that the state court had violated the Federal Constitution’s Electors Clause. According to Rehnquist, the Electors Clause required the state legislature, rather than state courts, to determine the rules according to which presidential electors are awarded.²² That theory provoked several dissents, with Justices Souter, Stevens, Ginsburg, and Breyer rejecting the Rehnquist view that the Florida Supreme Court had so badly erred in its interpretation of state law that the Supreme Court could set that interpretation aside under the Electors Clause.²³

The *Moore* Court alluded to these debates but declined to take any position on them, explaining that “[w]e do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause.”²⁴ Instead, the Court said only that when reviewing state laws governing federal elections, “state courts may not transgress the ordinary bounds of judicial review.”²⁵

Justice Kavanaugh issued a separate concurrence in which he explicitly adopted Chief Justice Rehnquist’s standard from *Bush v. Gore*.²⁶ This position, which we term the “Rehnquist-Kavanaugh position,” does concede that state courts, like federal courts, possess the power of judicial review. But Kavanaugh’s concurrence cautioned that “state courts do not have free rein’ in conducting that review,”²⁷ and further explained that in cases involving federal elections, “a state court’s interpretation of state law . . . is subject to federal court review.”²⁸ It is true that federal courts have long asserted a power to conduct due-process

20. 531 U.S. 98 (2000).

21. 531 U.S. 70 (2000) (per curiam); see generally Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 155-62 (2022) (discussing litigation surrounding the 2000 presidential election).

22. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

23. *Id.* at 133 (Souter, J., dissenting) (“Whatever people of good will and good sense may argue about the merits of the Florida court’s reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the ‘legislature’ . . .”).

24. *Moore v. Harper*, 600 U.S. 1, 36 (2023).

25. *Id.*

26. *Id.* at 38-40 (Kavanaugh, J., concurring).

27. *Id.* (Kavanaugh, J., concurring) (quoting *id.* at 34).

28. *Id.* (Kavanaugh, J., concurring).

review of truly outlier state-court decisions.²⁹ But the Kavanaugh concurrence, like Rehnquist's before it, seemed to assert a broader federal judicial power in the context of the Elections and Electors Clauses. As for what principle should govern this special federal-court review of state-court interpretations of state constitutions and state statutes, Kavanaugh echoed Rehnquist's *Bush v. Gore* concurrence: "whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required.'"³⁰

There is substantial reason to think that Justice Kavanaugh's decision to write separately in *Moore* to embrace Chief Justice Rehnquist's version of the ISLT was tactical. During his time on the Court, Kavanaugh, the Court's frequent median justice, has used concurring opinions to try to shape the future direction of the Court's jurisprudence. Consider his surprise concurrence in the Voting Rights Act (VRA) case *Allen v. Milligan*, which kept Section 2 of the VRA alive despite widespread predictions of its imminent demise.³¹ In that case, Kavanaugh supplied the critical fifth vote to strike down Alabama's racially discriminatory legislative map. He joined nearly all of the Chief Justice's opinion for the Court, including the portion of the opinion in which the Chief Justice concluded, based mostly on the Court's own VRA precedents, that Section 2 was squarely constitutional as applied to redistricting.³² While he joined the Chief Justice's opinion, Kavanaugh also penned a separate concurrence, which contained an ominous passage signaling some agreement with a point made in Justice Thomas's dissent—that "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future."³³ But, Kavanaugh added, "Alabama did not raise that temporal argument in this Court, and I therefore would not consider it at this time."³⁴ It seems clear that this Kavanaugh concurrence was responsible for emboldening Alabama's immediate return to the Court where Alabama sought permission to use a set of maps that were similar in relevant respects to the maps the Court had just invalidated.³⁵

29. *E.g.*, *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

30. *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)).

31. *Allen v. Milligan*, 599 U.S. 1 (2023).

32. *Id.* at 41-42.

33. *Id.* at 45 (Kavanaugh, J., concurring).

34. *Id.*

35. After the Supreme Court's decision in *Allen*, Alabama produced a new map that, once again, contained only one majority-Black district. See Kate Shaw, *How the Supreme Court Should Respond to Alabama's Defiance*, N.Y. TIMES (Sept. 12, 2023), <https://www.nytimes.com/2023/09/12/opinion/supreme-court-alabama-voting.html> [https://perma.cc/NW6L-A9PU].

While Alabama’s effort was ultimately unsuccessful, Kavanaugh’s signaling has ensured that other states and litigants continue to mount additional constitutional challenges to Section 2.³⁶

Or consider Justice Kavanaugh’s separate concurrences in *Dobbs v. Jackson Women’s Health Organization* and *New York State Rifle & Pistol Ass’n v. Bruen*.³⁷ Each concurrence explicitly looked ahead to follow-on cases, and each sought to preemptively shape the Court’s approaches to such cases. Kavanaugh joined in full Justice Alito’s majority opinion in *Dobbs*, supplying the decisive fifth vote to overrule *Roe v. Wade* and eliminate the federal constitutional right to abortion. But his separate concurrence appeared designed to temper fears about the breadth of the majority opinion; although the question was not presented, he opined that a state could not “bar a resident of that State from traveling to another State to obtain an abortion,” based on the “constitutional right to interstate travel.”³⁸ This could well be important and useful language in future challenges to state efforts to limit interstate travel; our point is merely that Kavanaugh’s use

Plaintiffs challenged the plan again in federal court in Alabama. The State’s briefings to the district court argued that adding another majority-Black district would require unconstitutional race-conscious districting, citing both Justice Kavanaugh’s concurrence in *Allen* and his concurrence in the Harvard affirmative action case. See Defendants’ Joint Proposed Findings of Facts and Conclusions of Law at 95, *Milligan v. Allen*, No. 21-cv-1530 (N.D. Ala. Aug. 19, 2023) (noting that “racial classifications, even when otherwise permissible, must be a temporary matter, and must be limited in time”) (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 313 (2023) (Kavanaugh, J., concurring)). The district court again blocked the State from holding any elections under the new plan. *Milligan v. Allen*, No. 21-cv-1530 at 6 (N.D. Ala. Sept. 5, 2023). Alabama immediately appealed the decision and filed an emergency application for a stay with the Supreme Court, arguing that the district court had misapplied *Allen* in a way that “every opinion in *Allen* cautioned against,” citing, of course, Justice Kavanaugh’s *Allen* concurrence. Emergency Application for Stay Pending Appeal to Supreme Court of the United States at 21, 600 U.S. 1 (2023) (No. 23A231). But it is not just Alabama that has been emboldened by Justice Kavanaugh’s concurrences. The State of Louisiana sought relief from the Supreme Court after the district court invalidated its congressional map, which, like Alabama’s plan, contained only one majority-Black district. Emergency Application for Admin. Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment, *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022) (No. 21A814). Louisiana relied heavily on Justice Kavanaugh’s *Allen* concurrence, arguing the congressional map should not be enjoined so close to an election. Emergency Application for Admin. Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment, *supra*, at 3-5, 16, 25, 27-30, 36-37.

36. *E.g.*, Notice of Constitutional Question, *Nairne v. Ardoin*, No. 22-cv-00178 (M.D. La. Nov. 9, 2023) (notifying the court that the State of Louisiana would challenge the constitutionality of Section 2 of the Voting Rights Act).
37. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *id.* at 336 (Kavanaugh, J., concurring); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022); *id.* at 79 (Kavanaugh, J., concurring).
38. *Dobbs*, 597 U.S. at 346 (Kavanaugh, J., concurring).

of concurrences to shape the future trajectory of the law is now a familiar move. The same is true of his concurring opinion in the Second Amendment case *Bruen*. As in *Dobbs*, he joined the majority opinion in full, and as in *Dobbs*, he concurred separately to offer his gloss on the opinion; he explained that in his view, the majority opinion allowed states to retain licensing requirements for carrying concealed weapons, so long as they were “objective licensing requirements like those used by the 43 shall-issue States.”³⁹ As in *Dobbs*, Kavanaugh staked out a position that seemed designed to appear more moderate than the one reflected in the majority opinion. Once again, Kavanaugh’s use of the concurrence to attempt to shape the next case was clearly strategic.

On the ISLT specifically, there are reasons to think that Justice Kavanaugh’s vision could appeal to a majority of the Court at some point in the future. Two members of the Supreme Court have already embraced it: in addition to Kavanaugh, Justice Thomas joined Chief Justice Rehnquist’s concurrence in *Bush v. Gore*.⁴⁰

Other members of the Court have endorsed even broader versions of the ISLT, which could lead them to vote with Justice Kavanaugh for the same bottom-line result in future cases. If they did so, Kavanaugh’s narrower opinion could be deemed controlling precedent going forward.⁴¹ In *Moore*, for example, Justice Gorsuch joined Justice Thomas’s dissent, which expressed the view that state courts could not enforce broad, substantive guarantees in state constitutions against state laws regulating federal elections.⁴² Before *Moore*, during the 2020 election cycle, four members of the current Court—Justices Thomas, Alito, Gorsuch, and Kavanaugh—seemed to signal their approval of some version of the ISLT that would allow federal courts to second-guess states’ interpretation of state laws.⁴³ In one important case involving Wisconsin’s April 2020 presidential primary, the U.S. Supreme Court stayed a district-court order that had extended the absentee-ballot-return deadline to account for COVID-19.⁴⁴ Later, in the lead-up to the general election, a district court once again ordered the state to

39. *Bruen*, 597 U.S. at 80 (Kavanaugh, J., concurring).

40. *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

41. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))); Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 798 (2017).

42. *Moore v. Harper*, 600 U.S. 1, 56 (2023) (Thomas, J., dissenting).

43. Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 289 & n.128 (2022).

44. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020).

extend the absentee-ballot-receipt deadline.⁴⁵ Once again this decision did not survive appellate review, with the U.S. Court of Appeals for the Seventh Circuit staying the district court injunction,⁴⁶ and the U.S. Supreme Court denying the request to vacate the Court of Appeals’s stay.⁴⁷ Gorsuch’s concurrence invoked the ISLT to argue that in addition to the problems with federal courts’ extension of absentee-ballot deadlines, there was a constitutional problem with the Wisconsin Elections Commission’s decision to accommodate voters in light of the pandemic. Gorsuch wrote that “[t]he Constitution provides that *state legislatures*—not federal judges, not state judges, not state governors, *not other state officials*—bear primary responsibility for setting election rules.”⁴⁸ Kavanaugh’s concurrence in the case explicitly invoked the ISLT and Chief Justice Rehnquist’s *Bush v. Gore* concurrence in particular. He emphasized federal courts’ power to review state courts’ interpretations of state election law, writing that “the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.”⁴⁹

Other Justices invoked the ISLT in 2020 election cases out of North Carolina and Pennsylvania. In the lead-up to the 2020 election, the North Carolina Board of Elections agreed to a settlement that required extending the receipt deadline for absentee ballots.⁵⁰ A group of state legislators intervened, arguing that state-court approval of the settlement would displace the state legislature’s authority to set rules regarding federal elections.⁵¹ When the state court rejected their argument,⁵² the intervenors sought emergency relief in the Supreme Court. The Court denied that request, although Justices Alito, Gorsuch, and Thomas would have stayed the state court’s decision.⁵³ Later, after the legislators challenged the state-court judgment in federal court, Justices Gorsuch and Alito invoked the ISLT as a reason to stay the state-court decision extending the absentee-ballot-receipt deadline.⁵⁴ The full U.S. Supreme Court once again declined to do so,

45. Democratic Nat’l Comm. v. Bostelmann, 466 F. Supp. 3d 957, 970 (W.D. Wis. 2020).

46. Democratic Nat’l Comm. v. Bostelmann, 976 F.3d 764, 768 (7th Cir. 2020).

47. Democratic Nat’l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020).

48. *Id.* at 29 (Gorsuch, J., concurring in denial of application to vacate stay) (emphasis added).

49. *Id.* at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay).

50. N.C. All. for Retired Ams. v. N.C. State Bd. of Elections, No. 20 CVS 8881, 2020 WL 10758664, at *1-3 (N.C. Super. Ct. Oct. 5, 2020); Wise v. Circosta, 978 F.3d 93, 97 (4th Cir. 2020).

51. Emergency Application for Stay Pending Appeal at 1, Berger v. N.C. State Bd. of Elections, 141 S. Ct. 658 (2020) (No. 20A74).

52. N.C. All., 2020 WL 10758664, at *5.

53. Berger, 141 S. Ct. at 658 (mem.).

54. Moore v. Circosta, 494 F. Supp. 3d 289, 331 (M.D.N.C. 2020), *injunction pending appeal denied sub nom.* Wise v. Circosta, 978 F.3d 93 (4th Cir. 2020), *stay denied sub nom.* Moore v. Circosta,

with Gorsuch and Alito dissenting from that decision.⁵⁵ And in the lead-up to the 2020 election in Pennsylvania, the Pennsylvania Supreme Court held that the state constitution required the secretary of state to extend the deadline for receipt of absentee ballots.⁵⁶ A request to stay that decision reached the U.S. Supreme Court after Justice Ginsburg died, but before Justice Barrett was confirmed to replace her. The Court divided four to four over whether to stay the decision, with Justices Thomas, Alito, Gorsuch, and Kavanaugh all voting to stay the decision. With only four votes, however, the stay did not issue.⁵⁷

So, in the run-up to *Moore*, four members of the current Court seem to have embraced a version of the ISLT that, although underdeveloped, certainly appears as broad as the Rehnquist-Kavanaugh position. While it is unclear if there is a fifth vote for such an approach, there are reasons to think Justice Barrett might provide it. Barrett, like Justice Kavanaugh and Chief Justice Roberts, was on the Bush campaign legal team that first pioneered the Rehnquist-Kavanaugh version of the ISLT.⁵⁸ That is by no means definitive evidence that she would embrace the theory: While Kavanaugh has explicitly adopted the Bush campaign's version of the ISLT, the Chief Justice has not. But there are passages at the end of the opinion in *Moore* that are susceptible to an interpretation that leaves open the door to the Rehnquist-Kavanaugh version of the ISLT. In particular, at the very end of the opinion in *Moore*, the Court wrote:

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

Chief Justice Rehnquist, joined in a concurring opinion by Justice Thomas and Justice Scalia, acknowledged the usual deference we afford state court interpretations of state law, but noted "areas in which the

141 S. Ct. 46 (2020); *Moore*, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief).

55. *Moore*, 141 S. Ct. at 46 (Gorsuch, J., dissenting from denial of application for injunctive relief).

56. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 371-72 (Pa. 2020).

57. *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.).

58. Joan Biskupic, *Supreme Court Is About to Have 3 Bush v. Gore Alumni Sitting on the Bench*, CNN (Oct. 17, 2020, 8:07 AM EDT), <https://www.cnn.com/2020/10/17/politics/bush-v-gore-barrett-kavanaugh-roberts-supreme-court/index.html> [<https://perma.cc/9E7S-M658>].

Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.” He declined to give effect to interpretations of Florida election laws by the Florida Supreme Court that “impermissibly distorted them beyond what a fair reading required.” Justice Souter, for his part, considered whether a state court interpretation “transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the ‘legislature’ within the meaning of Article II.”

We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific. We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.⁵⁹

At least based on the oral argument in *Moore*, it is unlikely that the Democratic appointees wanted to leave the door open to the Rehnquist-Kavanaugh version of the ISLT. And in light of his prior votes in the 2020 election cases, the Chief Justice also seems unlikely to have insisted on that language.⁶⁰ While Justice Kavanaugh obviously wanted to preserve the Court’s ability to explicitly

59. *Moore v. Harper*, 600 U.S. 1, 35-36 (2023) (internal citations omitted) (first quoting *Bush v. Gore*, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring); then quoting *id.* at 115; and then quoting *id.* at 133 (Souter, J., dissenting)).

60. See Transcript of Oral Argument at 49, *Moore*, 600 U.S. 1 (No. 21-1271) (Kagan, J.) (“If I could, Mr. Thompson, I’d like to step back a bit and just, you know, think about consequences, because this is a theory with big consequences. It—it would say that if a legislature engages in the most extreme forms of gerrymandering, there is no state constitutional remedy for that, even if the courts think that that’s a violation of the constitution. It would say that legislatures could enact all manner of restrictions on voting, get rid of all kinds of voter protections that the state constitution, in fact, prohibits. It might allow the legislatures to insert themselves, to give themselves a role, in the certification of elections and—and—and—and—and the way election results are calculated. So—and, in all these ways, I think what might strike a person is that this is a proposal that gets rid of the normal checks and balances on the way big governmental decisions are made in this country. And—and you might think that it gets rid of all those checks and balances at exactly the time when they are needed most, because legislators, we all know, have their own self-interests. They want to get re-elected. And so there are countless times when they have incentives to suppress votes, to dilute votes, to negate votes, to prevent voters from having true access and true opportunity to engage the political process. And so I just thought, I—I mean, I would give you a chance to respond to that because it seems very much out of keeping with the way our governmental system works and is meant to work. And I think, if I could just connect it up to the last question that I asked, it’s why in all these recent cases we have statements that say, of course, when the legislature act—acts, it’s subject to the normal constraints, I mean, in this area of all areas I guess I would add.”); *id.* at 15-16 (Sotomayor, J.) (“But let me go back to what I don’t fundamentally understand about

adopt the Rehnquist version of the ISLT, there were six Justices in the *Moore* majority, so his preference on that point may not have been sufficient, on its own, to get the ambiguity into the opinion in *Moore*. But if Justice Barrett was also hesitant to foreclose the Court from adopting Rehnquist's version of the ISLT, Barrett and Kavanaugh together could have insisted that the *Moore* majority remain somewhat vague in that respect. That seems plausible if only because Barrett has not usually been inclined to break with her more conservative colleagues to form a narrow 5-4 majority with the Democratic appointees and the Chief Justice — at least in ideologically salient, high-profile cases.⁶¹

While we can only speculate about the provenance of this language, it is clear that *Moore* contains both gaps and ambiguities. The widely divergent reactions that attended release of the Court's decision in *Moore* also suggest that its meaning is very much subject to debate — heightening the risks that the Kavanaugh concurrence could shape *Moore*'s emergent meaning. Within twenty-four hours of the decision in *Moore*, essays in the *New York Times*,⁶² *Slate*,⁶³ and the *New*

this case. The text of the Constitution of the Elections Clause says the legislature in each state shall prescribe 'the time, place, and manner' of elections. We know that before the founding, at the founding of the Constitution, decades after, and even to today that state constitutions have regulated time, place, and manner. We have the voice votes. We have one constitution that set elections at the courthouse and not in the county where the legislature wanted it. We have laws about voice votes as opposed to ballot votes. It seems to me that if I'm a textualist and I read that the legislature in each state shall prescribe 'the time, place, and manner' of elections that your argument would have to be that you can't regulate — the state constitution can't regulate that. But there is no substantive limitation in the Constitution. And the Tenth Amendment says the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. And if there's no substantive limitation in the Elections Clause, I don't know how we could read one in."); *id.* at 13 (Jackson, J.) ("But—but—well, I don't understand how that's a different thing. In other words, if the state constitution tells us what the state legislature is and what it can do and who gets on it and what the scope of legislative authority is, then, when the state supreme court is reviewing the actions of an entity that calls itself the legislature, why isn't it just looking to the state constitution and doing exactly the kind of thing you say when you — when you admitted that this is really about what authority the legislature has? In other words, the authority comes from the state constitution, doesn't it?").

61. *But see* Dep't of Homeland Sec. v. Texas (U.S. No. 23A607 Jan. 22, 2024), https://www.supremecourt.gov/orders/courtorders/o12224zr_fd9g.pdf [<https://perma.cc/629P-P3LM>].

62. David French, *The Supreme Court Just Helped Save American Democracy from Trumpism*, N.Y. TIMES (June 27, 2023), <https://www.nytimes.com/2023/06/27/opinion/scotus-saved-democracy.html> [<https://perma.cc/45AT-BYME>].

63. Dahlia Lithwick, *The Supreme Court's Latest Decision Is a Big Fat Rebuke to Donald Trump's Jan. 6 Claims*, SLATE (June 27, 2023, 6:05 PM), <https://slate.com/news-and-politics/2023/06/state-legislature-theory-donald-trump-rejected.html> [<https://perma.cc/4HG3-E7F2>].

*Yorker*⁶⁴ suggested that the Court in *Moore* had decisively repudiated the ISLT. Some academic commentators echoed this reading.⁶⁵ At the same time, a number of pieces warned that the Court’s opinion in *Moore* had *not* foreclosed the possibility that future federal courts might second-guess state courts in the context of federal elections.⁶⁶

Adopting the Rehnquist-Kavanaugh variant of the ISLT could lead the Court to impose an interpretive straitjacket on the states, essentially requiring the states to adopt the Court’s preferred interpretive method, textualism, or even preferred applications of that method (i.e., the Justices’ preferred results) in particular cases. According to Chief Justice Rehnquist and Justice Kavanaugh, the ISLT authorizes federal courts to determine whether state courts (and likely other state actors, such as state executives) have adopted “a fair reading” of state law regarding federal elections.⁶⁷ This opens the possibility that federal courts could impose their own conception of what constitutes a “fair reading” of legal texts onto state law. The Republican appointees on the Court pledge their fealty to textualism, an interpretive method whose “key claim . . . is that judges interpreting statutes should limit themselves to the ‘plain meaning’ of the words of the statute in question.”⁶⁸ So, as we have explained in previous work, the textualist

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64. Andrew Marantz, *The Supreme Court Declines to Dismantle Democracy*, NEW YORKER (June 27, 2023), <https://www.newyorker.com/news/daily-comment/the-supreme-court-declines-to-dismantle-democracy> [<https://perma.cc/82FK-YY3L>].
65. 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, 287 (arguing that there is no need to worry about mischief from federal courts because, after *Moore*, “Elections Clause challenges are limited to claims that state courts are misapplying or misunderstanding state law. And state law, of course, is the bailiwick of state, not federal, judges.”).
66. 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/77KF-GTTL>] (suggesting that the Court in *Moore* actually did endorse a “weaker version” of the ISLT, a version that will “loom over – and potentially affect – the 2024 elections”); 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/D237-QKD4>].
67. *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring); *Moore v. Harper*, 600 U.S. 1, 38 (2023) (Kavanaugh, J., concurring) (quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring)).
68. Litman & Shaw, *supra* note 13, at 1245; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (“The new textualism posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant.”).

Justices could insist that only textualist approaches to state law constitute “fair readings” of state law.⁶⁹

Despite being unified in their professed commitment to textualism, the Justices’ methods of statutory interpretation are in fact both variable and malleable,⁷⁰ as well as itinerant.⁷¹ But these observations only underscore that the Justices would have considerable discretion in deciding which versions of textualism and applications of textualism would be acceptable. That is, the Justices could declare that only particular results in certain cases are consistent with the Justices’ vision of textualism.⁷² But as Justice Kagan pointed out during the oral argument in *Moore*, even “very good judges on very good courts can find it incredibly easy to disagree with each other,” and every judge writes “opinions” “saying that other judges” “have engaged in policymaking rather than in law.”⁷³ That’s “just sort of one of the things that judges say when they really disagree.”⁷⁴ As such, the ISLT could provide an avenue for Justices to characterize readings of state law with which they disagree as not “fair readings” for purposes of the ISLT, and accordingly unconstitutional under the Elections or Electors Clause.

This summary of the ISLT as a stalking horse for the Justices’ preferred method of statutory interpretation, and even their preferred *results* in statutory cases, captures how Chief Justice Rehnquist applied his version of the ISLT in *Bush v. Gore*. Rehnquist faulted the Florida Supreme Court for concluding that canvassing board decisions about recounts were subject to de novo review when, in his view, the Florida statutory scheme “clearly vests discretion whether to recount in the boards.”⁷⁵ He also maintained that the Florida Supreme Court had misconstrued several specific terms or phrases in the Florida statutory scheme, including “an error in the vote tabulation” and “rejection of . . . legal votes.”⁷⁶ He said the Court could sit in judgment of the state court’s interpretation of state law because the ISLT required that “the clearly expressed intent of the [state] legislature must prevail” and there was “no basis for reading the Florida statutes”

69. See Litman & Shaw, *supra* note 13, at 1245.

70. Compare *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020) (majority opinion) (isolating the word “sex” to argue that sexual-orientation discrimination necessarily constitutes discrimination on the basis of sex), with *id.* at 1828 (Kavanaugh, J., dissenting) (lambasting Justice Gorsuch’s majority opinion as “literalist” and arguing that the “ordinary meaning” of “sex” counsels in favor of distinguishing between “sex discrimination and sexual orientation discrimination”).

71. See *infra* Section III.B (discussing substantive canons like the major questions doctrine).

72. Litman & Shaw, *supra* note 13, at 1243-49.

73. Transcript of Oral Argument at 158-59, *Moore v. Harper*, 600 U.S. 1 (2023) (No. 21-1271).

74. *Id.* at 159.

75. *Bush v. Gore*, 531 U.S. 98, 118 (2000) (Rehnquist, C.J., concurring).

76. *Id.* at 117-19.

the way the Florida Supreme Court had.⁷⁷ He even specifically faulted the Florida Supreme Court’s “textual analysis.”⁷⁸ Conveniently, the interpretation of state law that Rehnquist insisted was required by the Federal Constitution meant that the recount ordered by the Florida Supreme Court could not proceed, a result that ended the postelection proceedings and handed the presidency to George W. Bush. But as the next three Parts explain, the ostensible legal basis for Rehnquist’s concurrence – his particular twist on the ISLT – has no support in history or principles of federalism and democracy.

II. HISTORY

In the abstract, the Rehnquist-Kavanaugh standard – “whether the state court ‘impermissibly distorted’ state law ‘beyond what a fair reading required’”⁷⁹ – might appear reasonable. But a close examination of the Rehnquist-Kavanaugh position reveals that it is in fact quite radical.

This Part shows that the Rehnquist-Kavanaugh version of the ISLT is at odds with the *Moore* majority’s history-and-tradition approach to evaluating the ISLT. In determining whether state courts had the power of judicial review under substantive provisions in state constitutions, *Moore* focused on state interpretive practices around the time the Federal Constitution was ratified, as well as practices leading up to and postdating ratification.⁸⁰ Judged by these metrics of history and tradition, any federal-court effort to limit state courts to especially “textualist” methods of interpretation of state law fails. State courts and other state interpreters have long practiced varied methods of interpretation when interpreting both state statutes and state constitutions, and some of those methods do not remotely resemble the kind of textualism that the Rehnquist-Kavanaugh version of the ISLT could impose on the states. If anything, there is a robust history and tradition of *nontextualism* when it comes to how state courts interpret state statutes and state constitutions.

The period surrounding and following the Constitution’s ratification featured a variety of structural and interpretive approaches. Start with the materials

77. *Id.* at 120.

78. *Id.*

79. *Moore v. Harper*, 600 U.S. 1, 38 (2023) (Kavanaugh, J., concurring) (quoting *Bush*, 531 U.S. at 115).

80. See *Moore*, 600 U.S. at 19 (“Since early in our Nation’s history, courts have recognized their duty to evaluate the constitutionality of legislative acts.”); *id.* at 20 (“*Marbury* proclaimed our authority to invalidate laws that violate the Federal Constitution, but it did not fashion this concept out of whole cloth.”).

cited in *Moore* itself—materials the Court has already identified as salient to evaluating the ISLT.⁸¹ The Court cited William Michael Treanor’s article, *Judicial Review Before Marbury*, to describe the particulars of the case *Trevett v. Weeden*, an early Rhode Island Supreme Court decision, as well as the evolution of judicial review in the states more generally.⁸² The *Moore* Court also cited “the 1786 case *Trevett v. Weeden*” as one of the “state court decisions” that “provided a model for James Madison, Alexander Hamilton, and others who would later defend the principle of judicial review.”⁸³ Treanor described the argument that prevailed in *Trevett* as “striking for its nontextualism.”⁸⁴ The decision included “appeals to natural law” and, more generally, a lack of grounding in a written constitution.⁸⁵

Something similar could be said about the three other cases *Moore* relied on to establish the bounds of the ISLT—*State v. Parkhurst*, *Bayard v. Singleton*, and *Vanhome’s Lessee v. Dorrance*.⁸⁶ *State v. Parkhurst* interpreted the New Jersey Constitution by relying on previous state-court decisions, treatises (specifically what was “said by Lord Coke”), and “ancient grants and local customs and usages” that might shed light on a “general principle.”⁸⁷ The focus of the opinion, in other words, was not on the text of the state constitution as such. The state court’s reasoning emphatically drew upon structural principles that the court inferred from the nature of the state’s constitutional system. The state court rejected certain evidence from history on the ground that a certain “practice” was “too corrupt to give precedent to a free and virtuous republic,” invoking a value-laden inference from structure.⁸⁸ The state court also pointed to “the nature of the thing itself,” meaning the nature of the offices the court’s ruling touched on.⁸⁹ This is not what one would call an especially textualist or even originalist decision.

81. In *Moore*, the Court relied on these materials to reject as insufficiently grounded in history any version of the theory that would prohibit state courts from enforcing state substantive constitutional guarantees in cases regarding federal elections. *Id.* at 20–22.

82. *Moore*, 600 U.S. at 20; *id.* at 22.

83. *Id.* at 20.

84. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 477 (2005).

85. *Id.*

86. *Moore*, 600 U.S. at 20.

87. 9 N.J.L. 427, 446 (N.J. 1802).

88. *Id.* at 446. As Gillian Metzger has persuasively shown, the federal courts, including the U.S. Supreme Court, engaged in this kind of reasoning early on as well. See generally Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98 (2009) (citing foundational U.S. cases that reasoned from general principles not clearly tethered to specific text).

89. *Parkhurst*, 9 N.J.L. at 446.

Nor is *Bayard v. Singleton*.⁹⁰ The reporter’s notes to *Bayard* indicate the decision relied on “the policy of all Nations and States” and “general maxim[s]” to interpret the North Carolina constitution.⁹¹ That is not a concerted focus on the text of the state’s constitution. The same is true for *Vanhorne’s Lessee v. Dorrance*. There, the court inferred a general principle from several provisions in the constitution, writing that “[f]rom these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.”⁹² The court’s decision also emphasized “the social compact” and “principles of reason, justice, and moral rectitude.” It evaluated legal arguments based on “the comfort, peace, and happiness of mankind,” “social alliance in every free government,” and “the letter *and spirit* of the [state] Constitution.”⁹³ This kind of reasoning, too, is not exactly a hallmark of textualism.

Those are just the cases cited in *Moore* itself, but many other state court opinions display similarly pluralist modes of reasoning. In *In re Opinions of Justices*, the New Hampshire Supreme Court assessed the constitutionality of a state law by examining what was “inherent in the nature of the right to vote,” “the nature of popular elections,” “the history of popular elections in this State,” and “practice under the Constitution,”⁹⁴ in addition to the common, ordinary meaning of words.⁹⁵ In *Patterson v. Barlow*, the Pennsylvania Supreme Court asked about the *purpose* of state law – what “was evidently intended” by various provisions in the state constitution and the state’s declaration of rights.⁹⁶ The court also focused on the effects of different legal interpretations – and whether “it would be in vain for the Constitution to declare that all persons who have complied with certain prerequisites shall enjoy the right of electors, if the legislature can by law exclude them practically from such compliance.”⁹⁷ In analyzing the state constitutional claims, the court took particular care to analyze the practical burdens that a law would impose on different voters, with attention to the reality of Pennsylvanians’ lives:

The class upon whom this invidious burden is laid is large and respectable, comprehending journeymen mechanics, clerks in banks, insurance

90. 1 N.C. 5 (1787).

91. *Id.* at 9.

92. 2 U.S. (2 Dall.) 304, 310 (1795).

93. *Id.* (emphasis added).

94. 45 N.H. 595, 597-98, 600 (N.H. 1864).

95. *Id.* at 602.

96. 60 Pa. 54, 62, 63 (Pa. 1869).

97. *Id.* at 67.

offices, and other corporations, as well as in stores and manufactories, and unmarried workmen in all kinds of employment, who are usually boarders in some shape or other. Practically, numbers will find it very difficult, if not impossible, to fulfill these conditions.⁹⁸

This reasoning was not an aberration. In *Jeffries v. Ankeny*, the Ohio Supreme Court rejected a claim that persons of Native American descent could not be “free white citizens” under state law.⁹⁹ The court reasoned “that no other rule could be adopted, so intelligible and so practicable as this; and that further refinements would lead to inconvenience.”¹⁰⁰ The dissent pointedly chastised the majority for being insufficiently textualist: “The words of the statute, in my opinion excludes Indians and part Indians.”¹⁰¹

In other cases as well, state courts rejected arguments grounded in the ordinary or plain meaning of words in state law if the courts determined that ordinary meaning conflicted with a sensible understanding of the structure and design of state law. In *Warren v. City of Charlestown*, the Supreme Judicial Court of Massachusetts acknowledged that the statute’s “terms ‘take effect,’ if they stood alone, would seem to imply that it shall have no effect, that it shall not go into operation, until accepted.”¹⁰² Then the court explained: “But if that were the meaning, no meeting could be held under it, or by force of it. And from its connection, we are satisfied that this was not the intention of the legislature.”¹⁰³ The Supreme Court of New York reasoned similarly in *Barker v. People*.¹⁰⁴ There, the court rejected a constitutional challenge to a state law barring duelers from holding office.¹⁰⁵ The challengers pointed to a state constitutional provision that “no other oath, declaration, or test” besides the oath of office “shall be required as a qualification for any office or public trust.”¹⁰⁶ “[I]t is contended,” the court explained, “that the word test has a most extensive meaning, and prohibits the establishing any other rule by which the capacity of a person to hold an office shall be determined, than that defined, the oath of the person appointed or elected.”¹⁰⁷ But, the court wrote, “I cannot accede to this.” The constitutional provision

98. *Id.* at 69.

99. 11 Ohio 372, 374 (Ohio 1842).

100. *Id.* at 375.

101. *Id.* (Read, J., dissenting).

102. 68 Mass. (2 Gray) 84, 96 (Mass. 1854).

103. *Id.*

104. 20 Johns. 457 (N.Y. Sup. Ct. 1823).

105. *Id.*

106. *Id.* at 460.

107. *Id.* at 461.

“means only, that no other oath of office shall be required. It was intended to abolish the oath of allegiance and abjuration, or any political or religious test, as a qualification.”¹⁰⁸

In other cases, state courts explicitly rejected textualism as such. In the *Prohibitory Amendment Cases*, the Kansas Supreme Court wrote: “It is an old and familiar doctrine that that which is within the spirit of the statute, though not within the letter, is a part of it; as well as that which is not within the spirit, but within the letter, is not a part of it.”¹⁰⁹ Another maxim the court recognized was that “Words and phrases, by usage and acquiescence, oftentimes acquire a meaning beyond their natural import.”¹¹⁰ The Missouri Supreme Court reasoned similarly in *Blair v. Ridgely*. There, the court wrote, “Ordinarily, it may be true, that when we speak of the people, the entire body of the inhabitants of the State is comprehended. But this cannot be so in a political sense. It can only mean that portion of the inhabitants who are entrusted with political power.”¹¹¹ The New York Superior Court offered a formulation that is perhaps among the most pointed antitextualist approaches to statutory interpretation: “A thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers.”¹¹²

In still other cases, the courts used substantive canons of construction — i.e., particular canons that suggest courts should place a thumb on the scale to favor certain substantive values. Courts invoked canons that urged courts to interpret laws with an eye to enhancing democracy. In *State ex rel. Quinn v. Lattimore*, the North Carolina Supreme Court reasoned that because “this is a government of the people, in which the will of the people, — the majority, — legally expressed, must govern,” “all acts providing for elections, should be liberally construed, that tend to promote a fair election or expression of this popular will.”¹¹³ That decision was not an aberration — there are other early precursors to substantive canons that call to mind something like a democracy canon that states might apply to the interpretation of state laws. In *Mayor of New York v. Lord*, the Supreme Court of Judicature of New York interpreted a state law by acknowledging that the purpose of the statute was “remedial” and therefore the provisions “must be

108. *Id.*

109. *Prohibitory Amendment Cases*, 24 Kan. 700, 716 (Kan. 1881).

110. *Id.* at 719.

111. *Blair v. Ridgely*, 41 Mo. 63, 71 (Mo. 1867).

112. *Jackson v. Collins*, 3 Cow. 89, 96 (N.Y. Sup. Ct. 1824).

113. 26 S.E. 638, 638 (N.C. 1897).

liberally expounded.”¹¹⁴ And the court adopted the “more reasonable and just construction.”¹¹⁵

These cases and others suggest that imposing “textualist” principles of interpretation on the state courts would conflict with *Moore’s* understanding that the constitutional system incorporates state approaches to judicial review and legal interpretation that existed at the Founding. Of course, there are more textualist opinions in addition to the nontextualist ones we have cited;¹¹⁶ our argument is not that nontextualism predominated at any particular point in time.

Our argument is more modest: the states’ longstanding interpretive methods are far more pluralist than the Rehnquist-Kavanaugh version of the ISLT seems to contemplate and far too pluralist to justify the federal courts imposing particular methods of interpretation (such as textualism) on the states under the guise of the ISLT. Any version of the ISLT that would impose textualism writ large on state courts or particular textualist applications on state courts has no grounding in history.

III. FEDERALISM

Imposing textualism on the states under the guise of the ISLT would also be inconsistent with federalism. Just as Justice Brennan identified state constitutions as sources of different and more expansive rights than the federal system, so too are states sites of considerable structural and interpretive variation.¹¹⁷ The Rehnquist-Kavanaugh version of the ISLT could impose on the states a set of interpretive rules that are derived from structural principles unique to the federal system and could even impose federal structural arrangements on the states, depriving states of the ability to structure and run their court systems and other governmental institutions as their citizens see fit. It could also deny state courts the ability to devise methods of constitutional and statutory interpretation that align with or grow out of the state’s structural choices and that diverge from the choices made in the federal system.

114. 17 Wend. 285, 292 (N.Y. Sup. Ct. 1837).

115. *Id.*; see *Stone v. Mayor of New York*, 25 Wend. 157, 180 (N.Y. 1840).

116. *E.g.*, *Bourland v. Hildreth*, 26 Cal. 161 (1864); *Blanchard v. Stearns*, 46 Mass. 298 (Mass. 1842).

117. See JEFFREY SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 7-8 (2021) (“Fifty-one approaches offer diverse ways to structure a government, permit variation when variation is due, generate a healthy competition for the best models, allow other sovereigns to import winning approaches when they suit their circumstances, and ultimately permit national solutions to nationwide problems.”).

A. State Structural Variation

The Rehnquist-Kavanaugh vision could limit state courts’ interpretive latitude by seeking to impose on those courts – under the guise of merely mandating a “fair reading”¹¹⁸ of state law – a narrow textualist mode of interpretation. But whatever its merits in the federal system, that narrow version of textualism is not required based on the structural features of state systems. There are important distinctions between state and federal courts. In light of these differences, imposing on state courts a federally derived vision of the proper judicial role would be inconsistent with the parts of *Moore*’s reasoning that recognized that state institutions, including state courts, state constitutions, and state legislatures, derive their authority from the people. *Moore* rejected the maximalist version of the ISLT because it did “not account for the Framers’ understanding that when legislatures make laws, they are bound by the provisions of the very documents that give them life,” that is, state constitutions that are adopted by the people.¹¹⁹ Those very state constitutions choose to arrange and empower state institutions in a wide variety of ways – ways that frequently differ in important respects from the federal system.

1. State Courts

In many states, the people have chosen to give their state courts powers that the federal courts do not have. Some state courts have the power to issue advisory opinions and to fashion more permissive rules of standing than exist under the Supreme Court’s interpretation of Article III.¹²⁰ Some state courts also perform administrative and even quasi-legislative functions that would be unthinkable in the federal system.¹²¹ All of these are perfectly permissible choices for state voters and state constitutions to make; but all of them could be challenged as representing departures from the “ordinary” (viz, federal) judicial role, and therefore perhaps the ordinary bounds of judicial review. And these additional powers make clear that a foundational precept of textualism – that courts must hew

118. *Moore v. Harper*, 600 U.S. 1, 38 (2023) (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)).

119. *Id.* at 26; see *id.* at 26-27 (“Legislatures, the Framers recognized, ‘are the mere creatures of the State Constitutions, and cannot be greater than their creators.’”).

120. Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836 (2001).

121. Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719, 719 (2021) (“Across all fifty states, a woefully understudied institution of government is responsible for a broad range of administrative, legislative, law enforcement, and judicial functions. That important institution is the state courts.”).

closely to the words of statutes, because of the particular and limited role federal courts play within the federal system – simply does not apply to the states.¹²²

In addition, in the vast majority of the states, judges of the highest court stand for election – some partisan, some nonpartisan, and some retention.¹²³ The high courts in the vast majority of states also have limited terms, with some imposing term limits and others mandatory retirement ages.¹²⁴ Only in Rhode Island do state judges, like those in the federal system, retain their positions during “good behavior.”¹²⁵ These state-level decisions about judicial selection and tenure clearly do not reflect the same choices and values as the decision to insulate federal judges from popular selection and direct political accountability. These structural choices have implications for interpretation and interpretive methodology. Textualism assigns responsibilities between the federal courts, the federal executive, and the federal legislature in part based on assessments about which branches are relatively more accountable than others;¹²⁶ these assessments are simply inapplicable in the states, given the structure and operation of state courts.

2. State Lawmaking

States and state lawmaking processes also deviate from the federal lawmaking process in ways that may bear directly on questions of interpretive methodology. The specific attributes of the federal lawmaking process are central to justifications for textualism as a mode of interpretation in the federal system.¹²⁷ But lawmaking processes look fundamentally different from the federal model in many states. First, state legislative processes are distinct from the Federal Constitution’s “bicameralism and presentment”¹²⁸ process of lawmaking. Nebraska,

122. See, e.g., Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 909 (2016) (“The [Federal] Constitution itself reflects this choice in its very design . . .”).

123. 52 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 193 (2020 ed.).

124. *Id.*; Zachary D. Clopton & Katherine Shaw, *Public Law Litigation and Electoral Time*, 2023 WIS. L. REV. 1513, 1520-21 (“The high courts of forty-six states have fixed terms, and some also impose term limits or mandatory retirement ages.”); see generally JAMES L. GIBSON, ELECTING JUDGES (2012) (focusing on the Kentucky Supreme Court).

125. R.I. CONST. art. X, § 5 (“Justices of the supreme court shall hold office during good behavior.”).

126. Gorsuch, *supra* note 122, at 909-10 (emphasizing “the will of the people acting through their representatives” as distinct from federal courts).

127. See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68-69 (1994) (stating that “[t]he Constitution limits what counts as ‘law[.]’” to text enacted “by two Houses of Congress and one President”) (emphasis omitted).

128. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

for example, notably has a unicameral legislature.¹²⁹ Unlike the federal system, many state legislators are subject to term limits.¹³⁰ In contrast to the president, most governors can use the “item veto” to disapprove portions of appropriations bills and sometimes other kinds of bills.¹³¹ In many states, governors may use executive orders to achieve ends that would require legislation in the federal system, like reorganizing the executive branch.¹³² So when it comes to lawmaking by legislatures, states often do not possess the core feature of the federal system—bicameralism and presentment—which, according to some, require the federal courts to use textualism.

In addition to these differences, about half of the states allow for some form of direct democracy—devices, like referenda or ballot initiatives, that allow voters to bypass representatives and enact laws or constitutional amendments directly.¹³³ Many state constitutional provisions governing such procedures expressly indicate that they operate to “withhold power from state legislatures and retain it for the people.”¹³⁴ These provisions are a key illustration, as Jessica Bulman-Pozen and Miriam Seifter have shown, of state constitutions’ commitment to the values of “political equality, popular sovereignty, and majority rule.”¹³⁵ And because these mechanisms are available for constitutional as well as statutory change, they reflect yet another critical and enduring difference between states and the federal system: while the Article V process makes the Federal Constitution virtually unamendable today,¹³⁶ state constitutions, by contrast, are fundamentally dynamic documents, subject to frequent formal change at the hands of the people. Surely it is appropriate for state courts to take seriously the

129. See Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 251-52 (2014) (discussing Nebraska).

130. See *The Term-Limited States*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 3, 2023), <https://www.ncsl.org/about-state-legislatures/the-term-limited-states> [<https://perma.cc/ZTS5-R5CE>]; cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that states cannot impose qualifications for U.S. representatives or senators in addition to those in the U.S. Constitution).

131. Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1175-76 (1993); cf. *Clinton v. New York*, 524 U.S. 417 (1998) (striking down a presidential line-item veto).

132. Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 499 (2017).

133. See *Direct Democracy in the States: A 50-State Survey of the Journey to the Ballot*, STATE DEMOCRACY RSCH. INITIATIVE (Nov. 6, 2023), <https://statedemocracy.law.wisc.edu/direct-democracy> [<https://perma.cc/8UGS-6TKA>]; Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 774 (2024).

134. Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1342.

135. *Id.* at 1339.

136. See Richard Albert, *The World’s Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005 (2022).

provenance of laws and constitutional provisions that emerge from the people directly—and therefore to interpret state law in ways that deviate from federal courts interpreting federal statutes and the Federal Constitution, which contain no such mechanisms for direct democracy.¹³⁷

3. *State Executives*

State executives, too, stand in stark contrast to the federal executive. While in the federal executive branch, only the president and vice president are elected, all state executives are plural to some degree: in most states, voters cast ballots for multiple statewide executive-branch officials.¹³⁸ The Supreme Court has even acknowledged this in the context of litigation, crediting state choices to divide litigation responsibility among different executive-branch officials.¹³⁹

This could implicate assumptions both about what modes of interpretation are legitimate and about which institutional actors are legitimate interpreters. Independently elected state officials like secretaries of state, or locally elected or appointed election administrators, could interpret state election laws in ways that expand rather than constrict access to the ballot. In doing so, they could rely on modes of interpretation that, as discussed above, focus on purpose, rely on prodemocracy principles, or otherwise deviate from precepts of textualism.¹⁴⁰ A Court that insists upon a federally forged notion of a “fair reading” of a statute’s meaning might be unable or unwilling to appreciate that institutional context.

137. Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 48 (“To the extent that textualism is justified by the federal constitutional structure and its requirements of bicameralism and presentment, there would be no reason to extend its application to a law-making process where those structural safeguards are carefully omitted.”).

138. William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006) (“The states . . . employ a divided executive that apportions executive power among different executive officers not subject to gubernatorial control.”).

139. See *Cameron v. EMW Women’s Surgical Ctr.*, P.S.C., 595 U.S. 267, 277 (2022) (“Respect for state sovereignty must also take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court.”).

140. Cf. Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 360 (2012) (defending purposivism in the interpretation of regulations, because “[r]egulations are creatures of administrative law, and distinctive features of that legal context suggest a purposive rather than a textualist approach to interpretation.”).

B. State Interpretive Variation

The Rehnquist-Kavanaugh vision could also constrain state courts’ interpretive latitude and the variation among state courts’ interpretive practices.

This could mean limiting state courts’ (and state legislatures’ and state constitutions’) ability to reject textualism and plain meaning as the lodestars of statutory interpretation.¹⁴¹ It could also mean limiting state courts’ ability to consider context, purpose, and practical consequences in their interpretations of statutes and state constitutions, or limiting state courts’ ability to engage in forms of dynamic or living constitutionalism when interpreting state constitutions.

It could also include prohibiting state courts from invoking certain canons, or from placing more importance on those canons than the literal meaning of a statute. One potentially excluded canon of construction is the one that Jessica Bulman-Pozen and Miriam Seifter have derived from the “democracy principle” embodied in state constitutions. This principle, which we elaborate more on below, places a thumb on the interpretive scale to favor democracy-enhancing interpretations of state law.¹⁴² Constraining or even disallowing state courts from advertent to this principle would be a particularly egregious move in that it would disallow state courts from making moves that the Supreme Court has been willing to make in the Court’s recent embrace of other substantive canons or clear statement rules. A prime set of examples is the Court’s recent “major questions doctrine” cases, which use a “super-strong clear statement rule” to deny agencies the power to issue regulations that the Court deems to have “economic and political significance,” even where statutes appear to delegate to agencies the asserted authority.¹⁴³

The Rehnquist-Kavanaugh vision could also constrain state courts’ ability to break with the federal courts in their approaches to *stare decisis*, including by using stronger or weaker forms of the doctrine, or identifying special rules or considerations for overruling prior cases.

In short, as this list demonstrates, the facially reasonable “fair reading” requirement could yolk state courts to federal courts in their interpretive approaches, forcing state court “lockstepping” of the sort Justice Brennan warned

141. See *supra* text accompanying notes 67-78; Litman & Shaw, *supra* note 13, at 1249-54. For examples of states diverging in statutory interpretation, see generally Abbe R. Gluck, *States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

142. Bulman-Pozen & Seifter, *supra* note 10, at 861-62.

143. See Daniel Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1025, 1038 (2023).

against. Empowering federal courts to superintend state courts' interpretation of state law in this way would be fundamentally incompatible with federalism.

* * *

These are just some of the issues that *Moore* left for another day, all but guaranteeing that enterprising litigants will seek to advance arguments that state-court decisions do not survive whatever scrutiny they claim *Moore* prescribes.¹⁴⁴ But in light of the state-level realities discussed above, federal courts should not evaluate state decisions according to a set of interpretive rules that grow out of the federal experience. Doing so would be incompatible with general principles of federalism that limit the extent to which federal actors may impose either particular structural arrangements or interpretive philosophies on the states.¹⁴⁵ Attempting to constrain state courts in their interpretation of legal texts would also be inconsistent with the notion, reflected throughout *Moore*, that federalism requires granting state courts at least the same powers their federal counterparts enjoy. *Moore* understood that one important such power is the power of judicial review. When and if the Court considers adopting the Rehnquist-Kavanaugh version of the ISLT, it must reckon with what both history and core principles of federalism make clear – that the relevant power encompasses pluralist methods of interpretation.

IV. DEMOCRACY

The Rehnquist-Kavanaugh variant of the ISLT may also be at odds with democracy as envisioned in state constitutions or elsewhere – focused on prioritizing majority will and ensuring that everyone's votes and voices matter equally.¹⁴⁶ These conceptions of democracy, grounded in majority will and access to meaningful participation, may occasionally be in tension with one another, such as where a political majority attempts to suppress a minority's political power. But

144. See *Elections Clause – Independent State Legislature Theory* – *Moore v. Harper*, 137 HARV. L. REV. 290, 297 (2023) (“Because the [*Moore*] Court chose not to define its ‘transgressing’ standard, state court litigants have an incentive to add Elections Clause claims atop state law challenges, in case a new theory sticks.”).

145. See Litman & Shaw, *supra* note 13, at 1258–68 (citing abstention doctrines and doctrines regarding Supreme Court review of state-court decisions).

146. In previous work, we have highlighted another way in which the ISLT is undemocratic – forcing states to engage in a method of interpretation that disguises the choices that state interpreters make. This is undemocratic because it conceals state officers' decision points from voters who evaluate the state officers. See Litman & Shaw, *supra* note 13, at 1258.

laws that suppress a minority group’s political power are themselves undemocratic insofar as they restrict the franchise, or make some people’s votes count more than others. So, we focus on a version of democracy that prioritizes allowing people to vote and assigning equal weight to everyone’s votes.

The Rehnquist-Kavanaugh version of the ISLT could limit state courts’ ability to rely on democracy-reinforcing canons or principles generally inferred from state constitutions that prioritize interpretations that favor democracy; it could also limit the extent to which elections are responsive to democratic preferences. In any case in which it is used, the Rehnquist-Kavanaugh ISLT version would add a comparatively less democratic layer of federal-court review on top of a comparatively more democratic one in the states. Underscoring its antidemocratic nature is the fact that, in its appearances to date, the ISLT has served as a mechanism for barring state institutions from remedying antidemocratic practices like partisan gerrymandering.

A. *Democracy Canons & Constraints*

The Rehnquist-Kavanaugh account of the ISLT could undermine democracy to the extent it limits state courts (or other state offices) from relying on pro-democracy interpretive principles, meaning principles that reinforce measures that allow people to vote and ensure that votes will be counted, which generally facilitate majority will. Prodemocracy interpretive principles might include a “democracy canon,” by which we mean a substantive canon of interpretation that directs interpreters to construe state statutes, regulations, or constitutions in ways that preserve or promote democracy rather than obstruct it. Such a canon might present as a clear statement rule that requires legislators to be especially explicit when laws restrict democracy; a court might decline to read a statute to restrict democracy absent the clearest indication from the text.¹⁴⁷

As a substantive canon, the “democracy canon” could be at odds with the wooden formulation of textualism that this Supreme Court sometimes adheres to.¹⁴⁸ Under that version of textualism, courts are not supposed to consult background principles or substantive-value-laden principles, but instead are to focus only on the semantic meaning of the words enacted in a legal text.¹⁴⁹ If the Rehnquist-Kavanaugh account of the ISLT allows federal courts to police state

147. Bulman-Pozen & Seifter, *supra* note 134, at 1362 (arguing that “the democracy principle has a role to play as a canon of construction”).

148. Deacon & Litman, *supra* note 143, at 1040-41; see generally Benjamin Eidelson & Matthew Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515 (2023) (arguing that substantive canons of interpretation are generally incompatible with modern textualism).

149. Eidelson & Stephenson, *supra* note 148, at 517-21.

courts' or state executives' departures from the brand of textualism that does not permit interpreters to consult substantive canons, then it would conflict with states' reliance on the democracy canon or something like it.

The Rehnquist-Kavanaugh account of the ISLT could also undermine democracy by precluding state interpreters from relying on other democratic interpretive principles. For example, there is the widespread practice of courts inferring a commitment to democracy from various provisions in state constitutions that ensure democracy.¹⁵⁰ The state constitution might not, in so many terms, contain a provision that specifically says “this state is democratic,” or “this state values democracy.” But interpreters might nonetheless infer a general commitment to democracy from specific provisions in the state constitution pertaining to democracy, such as provisions allowing citizens to engage in direct democracy by amending the state constitution through ballot initiatives.¹⁵¹ The Pennsylvania Supreme Court, for example, concluded that partisan gerrymandering violated the state constitution in part by adopting a “broad and robust” reading of the free and equal elections clause in the state constitution and reasoning that the unequal voting power enabled by partisan gerrymandering is “the antithesis of a healthy representative democracy.”¹⁵² The court also emphasized that “for our form of government to operate *as intended*, each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives.”¹⁵³ Similarly, when the North Carolina Supreme Court limited the gerrymandered legislature’s ability to initiate amendments to the state constitution, the court emphasized that “popular sovereignty and democratic self-rule” were “the beating heart of North Carolina’s system of government.”¹⁵⁴

Because this method of interpretation infers general principles from more specific provisions, it too is potentially at odds with certain variants and iterations of textualism.¹⁵⁵ And the Rehnquist-Kavanaugh account of the ISLT, by allowing federal courts to police how state courts practice textualism (or state courts’ interpretations more generally), opens up the possibility of a federal

150. As Part III explained, this practice seems well-grounded in history.

151. Bulman-Pozen & Seifter, *supra* note 10, at 861 (“In text, history, and structure alike, they privilege ‘rule by the people,’ and especially rule by popular majorities.”); *id.* at 870-79 (listing specific provisions reflecting this general commitment).

152. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 814 (Pa. 2018).

153. *Id.* (emphasis added and omitted).

154. N.C. State Conf. of the NAACP v. Moore, 876 S.E.2d 513, 527 (N.C. 2022).

155. See generally John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009) (critiquing this method of interpretation as inconsistent with textualism when practiced at the federal level); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014) (same); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (same).

court limiting the extent to which state courts may infer general democracy-reaffirming commitments from more specific provisions in state constitutions.

B. Elections & Democracy

The Rehnquist-Kavanaugh version of the ISLT could also make states less democratic by severing the link between democracy and the substantive outcomes that result from democratic elections, i.e., the extent to which elections can implement the will of the voters. The Rehnquist-Kavanaugh version could limit the extent to which state interpreters may change their interpretive practices after voters in the state elect new justices to the state supreme court or new statewide officials like secretaries of state – if the U.S. Supreme Court Justices view the interpretive practices as novel, or as generating less than “fair readings” of state law.

Statewide elections are mechanisms for democracy in that they allow voters to select their preferred officeholders; when those officeholders are judges, judicial elections may be mechanisms of popular constitutionalism, making constitutional interpretation more democratic by taking into account the people’s views of the constitution.¹⁵⁶

Statewide elections allow voters to select one officeholder over another based (at least in part) on what the officeholder may do while in office. For example, in the 2023 Wisconsin state supreme court election, the two candidates differed starkly with respect to their positions on gerrymandering and abortion. The progressive candidate, now-Justice Janet Protasiewicz, referred to gerrymandered maps as rigged, and spoke of the value in reproductive freedom and reproductive justice. The conservative candidate, former Justice Dan Kelly, had defended the state legislature’s gerrymandered maps, and was endorsed by the state’s three

156. See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2117–18 (2010) (exploring the connections between judicial elections and popular constitutionalism); cf. Cristina Rodriguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 7 (2021) (discussing the relationship between democratic evolution and “regime change,” defined as “the replacement within the executive branch of one set of constitutional, interpretive, philosophical, and policy commitments with another”).

largest antiabortion groups.¹⁵⁷ The voters preferred Justice Protasiewicz by a large margin.¹⁵⁸

The Rehnquist-Kavanaugh version of the ISLT could prevent a statewide judicial election from delivering on its democratic promise and responding to the preferences of voters. Justice Kavanaugh's *Moore* concurrence seemed to suggest that under his version of the ISLT, *changes* in state interpretations might be especially suspect. He wrote that he would rely on Chief Justice Rehnquist's guidance from *Bush v. Gore* that federal courts "necessarily must examine the laws of the State as it existed prior to the action of the [state] court."¹⁵⁹ As one of us has written, "[t]his formulation" of the ISLT "has echoes of the anti-novelty principle that the Supreme Court has applied in constitutional law cases about the scope of Congress's powers, and in administrative law cases about the scope of agencies' authority under federal law. In those cases, the Court treats novelty as a mark against the lawfulness of a federal law or federal regulation."¹⁶⁰ In *Moore*, Kavanaugh seemed to suggest that novelty in state officers' interpretation of state laws should be counted as a mark against the federal constitutionality (under the ISLT) of the state officers' interpretation.

But there may be changes in how state officers interpret state law because of an election, whether that is for statewide judicial office or other statewide office.¹⁶¹ By allowing the federal courts to decide which changes in state interpretations are permissible, Justice Kavanaugh's take on the ISLT is at odds with one way that state elections are supposed to be democratic—by generating officeholders who will respond to the preferences and views of the majority of voters who selected them. His version of the ISLT therefore potentially undermines one

157. Zac Schultz, *Janet Protasiewicz, Daniel Kelly on Wisconsin Redistricting*, PBS Wis. (Mar. 9, 2023), <https://pbswisconsin.org/news-item/janet-protasiewicz-daniel-kelly-on-wisconsin-redistricting> [<https://perma.cc/ED3U-A2QT>]; Associated Press, *Wisconsin Supreme Court Candidates Clash over Abortion, Maps in Only 2023 Debate*, PBS Wis. (Mar. 21, 2023), <https://pbswisconsin.org/news-item/wisconsin-supreme-court-candidates-clash-over-abortion-maps-in-only-2023-debate> [<https://perma.cc/KB6M-7MHQ>].

158. Reid J. Epstein, *Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers*, N.Y. TIMES (Apr. 4, 2023), <https://www.nytimes.com/2023/04/04/us/politics/wisconsin-supreme-court-protasiewicz.html> [<https://perma.cc/XH4R-TGTE>].

159. *Moore v. Harper*, 600 U.S. 1, 31 (2023) (quoting *Bush v. Goore*, 531 U.S. 98, 114 (Rehnquist, C.J., concurring) (alteration in original)).

160. See Rick Hasen, *Litman: "Anti-Novelty, the Independent State Legislature Theory in Moore v. Harper, and Protecting State Voting Rights,"* ELECTION L. BLOG (July 3, 2023, 7:42 AM), <https://electionlawblog.org/?p=137239> [<https://perma.cc/U8LC-LTEP>]. For work debunking the antinovelty principle, see Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

161. See Zachary D. Clopton & Katherine Shaw, *Public Law Litigation and Electoral Time*, 2023 WISC. L. REV. 1513, 1514-15.

of the constitutional system’s mechanisms for democracy through which voters are able to translate their preferences into results through the officeholders they select.

C. *Less Democratic Interpretive Review*

Another antidemocratic aspect of the Rehnquist-Kavanaugh take on the ISLT is baked into the structure of the ISLT. The ISLT superimposes a comparatively less democratic layer of review (review in the federal courts) onto a comparatively more democratic layer of review (review in the states). Whether the relevant interpreter is a state court or state executive, the states’ interpretation of state law is probably more democratic than the federal courts’ interpretation of state law insofar as the state interpreters are elected, as many state courts or statewide officers are.¹⁶² The states’ interpretation could also be more democratic than the federal courts insofar as the state interpreters are subject to oversight by an elected statewide officer, as other state officers are.¹⁶³

D. *Insulating Antidemocratic Practices*

Still another way that the Rehnquist-Kavanaugh ISLT account is undemocratic has been borne out by how the ISLT has been used. The ISLT is often invoked to insulate undemocratic practices from meaningful scrutiny. In *Moore v. Harper*, the ISLT was the basis for challenging state judicial review of partisan gerrymandering, an undemocratic practice whereby legislators draw districts in ways that lock in their power at the expense of voters and democracy. Partisan gerrymandering can result in legislators remaining in power even when a majority of voters would prefer another set of legislators.¹⁶⁴ The ISLT (or something like it) was also the basis for challenging another mechanism to combat partisan gerrymandering, independent redistricting commissions.¹⁶⁵ And of course in

162. 52 COUNCIL OF STATE GOV’TS, BOOK OF THE STATES 206 tbl.5.7 (2020 ed.); JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 1-4 (2012).

163. See *supra* text accompanying notes 142-142.

164. See Ian Millhiser, *America’s Worst Gerrymander May Soon Finally Die*, VOX (Aug. 3, 2023, 4:40 PM), <https://www.vox.com/voting-rights/2023/8/3/23818858/wisconsin-gerrymander-clarke-wisconsin-election-commission-supreme-court-janet-protasiewicz> [<https://perma.cc/Z3W8-WJV5>].

165. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 813-15 (2015). Chief Justice Roberts, writing for four dissenters, interpreted the Elections Clause to require the state legislature, rather than an independent redistricting commission, to draw districts. *Id.* at 825 (Roberts, C.J., dissenting).

Bush v. Gore, Chief Justice Rehnquist’s original version of the ISLT supplied a way for the federal courts to order the state to stop manually counting presidential votes – even though such counting was necessary to ensure that all of the votes were counted accurately. Elsewhere, the ISLT supplied a way to challenge expansions of democracy. In the 2020 election cases, the ISLT provided the arguments for challenging mechanisms for extending absentee voting in the midst of a pandemic¹⁶⁶ – arguments that, if accepted, might have ensured that some votes did not count at all.

Part of what makes this pattern striking is that judicial interpretations that restrict democracy are not always especially textualist. Yet ISLT proponents do not seem especially interested in challenging atextual and nontextualist interpretations of state law that restrict voting. Take *Teigen v. Wisconsin Election Commission*, where the Wisconsin Supreme Court invalidated Wisconsin executive officers’ decisions to authorize municipal clerks and local election officials to create ballot drop boxes and allow family members or others to return a voter’s absentee ballot.¹⁶⁷ In ruling against these pro-democracy practices, the Wisconsin Court rejected the election officials’ “hyper-literal interpretation of” the statute’s “prepositional phrase”¹⁶⁸ – and yet no ISLT challenge to that interpretation materialized.

Nor are ISLT proponents particularly interested in challenging judicial about-faces when those about-faces restrict voting. For example, immediately after the North Carolina Supreme Court switched from a majority of Democratic Justices to a majority of Republican Justices, the Court promptly reversed two previous North Carolina Supreme Court decisions, one that had held partisan gerrymanders unconstitutional, and the other invalidating the state’s voter identification requirement.¹⁶⁹ Yet proponents of the ISLT were conspicuously silent on the court’s conduct in both cases.

In short, the social and legal practice of the ISLT has been antidemocratic. Indeed, in some ways antidemocracy is at the core of the ISLT. The Federal Constitution provides myriad ways to challenge state policies or practices that restrict voting. Constitutional provisions prohibit states from discriminating against certain voters, i.e., making it harder for those voters to vote or limiting the power

166. See *supra* text accompanying notes 44–57.

167. 976 N.W.2d 519, 547 (Wis. 2022).

168. *Id.* at 540.

169. *Harper v. Hall*, 886 S.E.2d 393, 448–49 (N.C. 2023) (overruling the 2022 *Harper v. Hall* case and finding partisan gerrymandering presents a nonjusticiable political question); *Holmes v. Moore*, 886 S.E.2d 120, 144 (N.C. 2023) (“Plaintiffs here have failed to prove beyond a reasonable doubt that S.B. 824 was enacted with discriminatory intent or that the law actually produces a meaningful disparate impact along racial lines.”).

of those votes. These provisions include the Fifteenth Amendment, which prohibits vote denials on the basis of race; the Nineteenth Amendment, which prohibits vote denials on the basis of sex; and the Twenty-Sixth Amendment, which prohibits vote denials on the basis of age. There are also provisions that implicitly guarantee a right to vote, like the Fourteenth Amendment.

If these provisions are ways of safeguarding democracy and voting, what is the ISLT for? Put differently, what does the ISLT add to these federal voting protections? The ISLT offers an argument in the other direction—a way to challenge state practices that expand the franchise or attempt to make state institutions more democratic. At the core of the ISLT is a kind of antidemocracy that has been borne out in how the theory has been used in practice.¹⁷⁰

CONCLUSION

The ISLT’s species of antidemocratic textualism has recently reared its head in other democratic efforts. Those include the efforts to hold people accountable for the events of January 6, when a mob stormed the U.S. Capitol, resulting in several deaths and delays in certifying the vote for President Joe Biden.¹⁷¹ In addition to the civil and criminal actions seeking to hold former President Trump accountable for his role in January 6, some litigation argued that former President Trump is disqualified under the Fourteenth Amendment from running for or again holding the office of President because of his role in January 6.¹⁷² The relevant provision of the Federal Constitution, Section 3 of the Fourteenth Amendment, says that “No person shall . . . hold any office” if they “have engaged in insurrection or rebellion against” the United States.¹⁷³ In December of 2023, the Colorado Supreme Court held that this provision of the Fourteenth Amendment disqualified Donald Trump from running for office.¹⁷⁴ In that same month, the Maine Secretary of State reached the same conclusion.¹⁷⁵

170. For elaboration, see generally LEAH M. LITMAN, *LAWLESS* (forthcoming 2025) (connecting the ISLT to a broader tradition in U.S. history of limiting the political power of racial minorities).

171. Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> [<https://perma.cc/EL27-ZJFB>].

172. See, e.g., *Trump v. Anderson*, No. 23-719, slip op. (U.S. Mar. 4, 2024).

173. U.S. CONST. amend. XIV, § 3.

174. *Anderson v. Griswold*, 2023 WL 8770111, at *51 (Colo. Dec. 19, 2023), cert. granted sub nom. *Trump v. Anderson*, No. 23-719, 2024 WL 61814 (U.S. Jan. 5, 2024).

175. Ruling of the Secretary of State, *In re Challenges of Rosen to Primary Nomination Petition of Donald J. Trump*, Republican Candidate for President of the United States (Dec. 28, 2023), <https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf> [<https://perma.cc/SKM5-GZXZ>].

Those decisions were challenged, and the Colorado case quickly made its way to the U.S. Supreme Court. There, the lawyers representing Donald Trump argued, among other things, that the Colorado Supreme Court decision contravened the independent state legislature theory. In the state-court opinion holding that Trump was disqualified under the Fourteenth Amendment, the Colorado Supreme Court had noted that under Colorado law, only “a qualified candidate” is entitled to participate in the presidential primary.¹⁷⁶ Illustrating the antidemocratic textualism of the ISLT in action, Trump’s opening Supreme Court brief insisted that the Colorado court’s reading “is not even remotely what the [Colorado] statute says.”¹⁷⁷ The brief argued that “[w]hen state courts interpret an election statute according to what they would like it to say rather than what it actually says,” the courts violate the ISLT.¹⁷⁸

This theory did not get much air time during the argument in the case. But neither did the Court’s ultimate decision enter the ISLT once and for all. Rather, in one of many conclusory sentences in the opinion, the Court declared, after acknowledging the Elections and Electors clauses, that “there is little reason to think that these Clauses implicitly authorize the States to enforce Section 3 against federal officeholders and candidates.”¹⁷⁹

So the ISLT continues to lie in wait for other antidemocratic uses, including possibly nullifying important changes in the composition of state courts that arose through democratic elections. As previously noted, in April 2023, Wisconsin voters elected to the Wisconsin Supreme Court a justice who changed the ideological makeup of the court. Almost immediately, the state’s heavily gerrymandered legislature began suggesting it might attempt to impeach the new justice, Janet Protasiewicz. The legislature sought to frame their effort as growing out of a concern for judicial ethics: the ostensible predicate for the threatened impeachment was Justice Protasiewicz’s campaign rhetoric regarding the state’s gerrymandered legislative maps, together with her failure to recuse from a challenge to those maps. But the effort was clearly driven by a fear that a newly constituted Wisconsin Supreme Court might invalidate the antidemocratic gerrymander that had locked in Republican control of the state legislature for years. Facing outcry, backlash, and pushback, including from former conservative justices of the Wisconsin Supreme Court, the state legislature balked.¹⁸⁰ Perhaps

176. *Id.* at 8.

177. Brief for Petitioner at 47, *Trump v. Anderson*, No. 23-719, 2024 WL 305382 (U.S. Jan. 5, 2024).

178. *Id.*

179. *Trump v. Anderson*, 144 S. Ct. 662, 668 (2024).

180. Reid Epstein, *Wisconsin Republicans Retreat from Threats to Impeach Liberal Justice*, N.Y. TIMES (Oct. 12, 2023), <https://www.nytimes.com/2023/10/12/us/politics/wisconsin-republicans-impeach-janet-protasiewicz.html> [<https://perma.cc/NK3Q-DYZE>].

they realized that the people of Wisconsin would not stand for their representatives doing something as antidemocratic as impeaching a justice for winning an election. Whether the theory may yet be invoked in litigation challenging the state’s partisan gerrymander remains an open question.

But the federal courts do not have to worry about electoral or political pushback in the same way that state legislatures do (even very gerrymandered ones). And the Rehnquist-Kavanaugh version of the ISLT, were it to become the law, could do a great deal of antidemocratic damage, accomplishing via litigation at least some of what an antidemocratic impeachment effort would have done — jettisoning democratic inputs to state offices, and undermining the democratic and federalist premises of our constitutional system.

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