

# The Independent State Legislature Theory, Federal Courts, and State Law

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*During the litigation surrounding the 2020 election, the independent state legislature theory (ISLT) emerged as a potentially crucial factor in the presidential election. The ISLT rests on the Electors and Elections Clauses of the Constitution, which assign decisions about federal elections to state legislatures. Proponents of the ISLT, including Supreme Court Justices, assert that state constitutions' substantive provisions cannot apply to state election laws governing federal elections; that state courts' statutory interpretations of such laws must be rigidly textualist and are reviewable, apparently de novo, by federal courts; and/or that delegations of decision-making authority to nonlegislative bodies may be limited, albeit in unspecified ways. The ISLT is at issue in current litigation involving congressional redistricting that the Supreme Court will hear during its October 2022 Term.*

*This Article charts the emergence of this unprecedented reading of the Electors and Elections Clauses and examines both its justifications and its practical implications. Its central claim is that the ISLT, particularly in its maximalist form, is an unprecedented, unconstitutional, and potentially chaos-inducing intrusion into state election law. Those promoting the ISLT skip the crucial step of statutory interpretation—asking what the state legislature actually did. As a result, the ISLT undermines its own claims to promote political accountability and predictability by failing to engage in the question of whether a legislature has in fact rejected the state constitution and other aspects of state law. The Article concludes with suggestions for the Supreme Court, Congress, state actors, and litigants to protect the continued independence of state election law.*

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## INTRODUCTION

In the run-up to the November 2020 election, the Pennsylvania Supreme Court unanimously agreed that voters who voted by mail, complying with all statutory requirements, faced a realistic danger that their mail-in ballots would not be received by election officials in time, given the particular circumstances of the election.<sup>1</sup> Those conditions included not only the COVID-19 pandemic but also the U.S. Postal Service’s announcement that it might be unable to timely deliver mail-in ballot applications and completed ballots. All seven justices also concluded that, as a result, the statutory schedule for application and return of mail-in ballots would disenfranchise voters and was inconsistent with the state constitution’s guarantee of free and fair elections, that judicial relief was therefore necessary, and that appropriate relief required modifying one of the statute’s deadlines for the 2020 general election only.<sup>2</sup> They disagreed, however, about which deadline should be modified. A four-justice majority

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<sup>1</sup> Pa. Democratic Party v. Boockvar (*Boockvar I*), 238 A.3d 345, 370–71 (Pa. 2020); *id.* at 392–93 (Donohue, J., concurring in part and dissenting in part); *id.* at 392 (Saylor, J., concurring in part and dissenting in part) (joining the relevant section of Justice Christine Donohue’s dissent). The majority also noted that the Election Code itself incorporated the “‘intent’ . . . to [ ] provid[e] ‘an equal opportunity for all eligible electors to participate in the election process.’” *Id.* at 370 (quoting *In re General Election-1985*, 531 A.2d 836, 839 (Pa. Cmwlth. Ct. 1987)).

<sup>2</sup> *Id.* at 370–72; *id.* at 392 (Saylor, J., concurring in part and dissenting in part); *id.* at 394–98 (Donohue, J., concurring in part and dissenting in part).

exercised the court's equitable powers and extended the deadline for receipt of absentee ballots.<sup>3</sup> The three dissenting justices would have instead moved the deadline to apply for a ballot, making it earlier, but would have similarly expanded the time period between the application deadline and the ballot-receipt deadline.<sup>4</sup>

The Republican Party and the 2020 Trump campaign (collectively, the GOP) asked the U.S. Supreme Court to stay that judgment, arguing that the Pennsylvania Supreme Court had imposed a "judicial rewrite" of Pennsylvania election law.<sup>5</sup> The Supreme Court denied the stay by a 4–4 vote and declined to expedite the petition for certiorari.<sup>6</sup> Justice Samuel Alito ordered Pennsylvania election officials to segregate the ballots that arrived after election day,<sup>7</sup> but ultimately, those ballots would not have made a difference in the results of either the presidential or the congressional elections in Pennsylvania, and the Supreme Court denied certiorari several months after the election.<sup>8</sup> In different opinions along the way, however, several Justices opined that the Pennsylvania high court appeared to have overstepped its authority under the Federal Constitution.<sup>9</sup>

Justice Alito, for example, proclaimed that

[t]he provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.<sup>10</sup>

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<sup>3</sup> *Boockvar I*, 238 A.3d at 371–72.

<sup>4</sup> *Id.* at 392 (Saylor, J., concurring in part and dissenting in part); *id.* at 394–98 (Donohue, J., concurring in part and dissenting in part).

<sup>5</sup> Emergency Appl. for Stay Pending Disposition of a Pet. for a Writ of Cert., Republican Party of Pa. v. Boockvar, No. 20A54, at \*23.

<sup>6</sup> See generally Republican Party of Pa. v. Boockvar, 141 S. Ct. 643 (2020) (denying a stay by a 4–4 vote, as Justice Amy Coney Barrett had not yet been confirmed); Scarnati v. Boockvar, 141 S. Ct. 644 (2020) (same); Republican Party of Pa. v. Boockvar (*Boockvar II*), 141 S. Ct. 1 (2020) (denying a motion to expedite review for the petition for certiorari).

<sup>7</sup> Order Requiring County Boards of Election to Segregate and Separately Count Ballots Received after Nov. 3, Republican Party of Pa. v. Boockvar, 208 L. Ed. 2d 293, No. 20A54 (Nov. 6, 2020) (ordering election officials to segregate late-arriving ballots and to count them separately).

<sup>8</sup> Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021) (denying certiorari).

<sup>9</sup> See, e.g., *Boockvar II*, 141 S. Ct. at 2 (Alito, J., statement respecting denial of certiorari); *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari).

<sup>10</sup> *Boockvar II*, 141 S. Ct. at 2 (Alito, J., statement).

Justice Clarence Thomas likewise argued that the Pennsylvania Supreme Court “violated the Constitution by overriding ‘the clearly expressed intent of the legislature.’”<sup>11</sup>

These arguments arise from two clauses in the Federal Constitution. In the Electors Clause, the Constitution provides that each state appoint presidential electors “in such Manner as the Legislature thereof may direct.”<sup>12</sup> Similarly, the Elections Clause authorizes state legislatures to determine “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” although Congress can enact federal regulations that override such state laws.<sup>13</sup> And these arguments are one form of what has become known as the independent state legislature theory (ISLT).<sup>14</sup>

The ISLT can take several forms. Some ISLT proponents assert that state legislatures have plenary and exclusive power, at least among state entities, to regulate federal elections. The Supreme Court rejected one version of this argument in 2015, when it upheld an Arizona constitutional provision, enacted by popular initiative, that created an independent redistricting commission.<sup>15</sup> But that case, *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*,<sup>16</sup> was decided by a 5–4 vote, with Justices Ruth Bader Ginsburg and Anthony

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<sup>11</sup> *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari) (quoting *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring)).

<sup>12</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>13</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>14</sup> This argument is also sometimes called the “independent state legislature doctrine.” See, e.g., Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 11 (2020) [hereinafter Morley, *ISLD and Elections*]. Because the argument has never been endorsed by the full Supreme Court—and in fact the Court has rejected some forms of it—this Article calls it the “independent state legislature theory.” As explained, there are a variety of different versions of the ISLT, and endorsing one does not necessarily imply acceptance of others. See Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 505 (2021) [hereinafter Morley, *ISLD*]; *The Independent State Legislature Theory and Its Potential to Disrupt Our Democracy: Hearing Before the Comm. on House Admin.*, 117th Cong. (2022) (statements of Carolyn Shapiro, Professor of Law, Chicago-Kent Coll. of L., and Richard Pildes, Professor of Law, N.Y.U. Sch. of L.). This Article focuses primarily on three major versions: the claim that state constitutions cannot constrain state legislatures when they regulate federal elections, the claim that the ISLT requires a particular textualist approach to statutory interpretation that can be implemented by federal courts, and the claim that the ISLT limits legislatures’ ability to delegate decisions to election officials or other executive officers.

<sup>15</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n (AIRC)*, 576 U.S. 787, 793 (2015). The logic of the ISLT could reach much further than gerrymandering, however. It would, for example, also nullify state constitutional provisions requiring presidential electors to be popularly elected. See, e.g., COLO. CONST. sched., § 20.

<sup>16</sup> 576 U.S. 787 (2015).

Kennedy, who have since been replaced by more conservative Justices, in the majority. Chief Justice John Roberts wrote the principal dissent, which argued that the provision violated the Federal Elections Clause because it was not enacted by the legislature and divested the legislature of the authority to draw congressional districts.<sup>17</sup>

Only four years later, however, the Court appeared to unanimously accept that some state constitutional provisions governing congressional redistricting, even when enacted by initiative, are valid. Even as the Court held in *Rucho v. Common Cause, Inc.*,<sup>18</sup> that federal courts cannot adjudicate claims of extreme partisan gerrymandering, the majority opinion, again written by Chief Justice Roberts, explained that state constitutions could themselves limit that practice.<sup>19</sup>

The breadth and durability of the Court's rejection of the ISLT are being tested during the current Supreme Court term.<sup>20</sup> In *Harper v. Hall*,<sup>21</sup> the North Carolina Supreme Court struck down that state's congressional redistricting as an unconstitutional partisan gerrymander under the state constitution.<sup>22</sup> (The map at issue drew ten Republican districts and four Democratic districts, even though North Carolina is about evenly split in terms of votes for Republicans and Democrats in general elections.<sup>23</sup>) But unlike the state constitutional provisions at issue in *AIRC* and cited in *Rucho*, the provisions at issue in *Moore v. Harper*<sup>24</sup>—the Supreme Court appeal of *Harper v. Hall*—do not speak directly to redistricting or gerrymandering. Instead, the North Carolina Supreme Court relied on broader guarantees in the state constitution, including “the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, and the principle of democratic and political equality that reflects the spirit[ ] and intent of our Declaration of Rights.”<sup>25</sup> The petitioners in *Moore* are thus asking the Supreme

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<sup>17</sup> *Id.* at 824.

<sup>18</sup> 139 S. Ct. 2484 (2019).

<sup>19</sup> *See id.* at 2507–08 (2019). *Rucho* was another 5–4 decision, but the dissenters also expressed support for such state constitutional limits on congressional districting. *Id.* at 2524 (Kagan, J., dissenting).

<sup>20</sup> *See Moore*, 142 S. Ct. at 2901.

<sup>21</sup> 380 S.E.2d 499 (N.C. 2022).

<sup>22</sup> *Id.* at 535–47.

<sup>23</sup> *See, e.g., id.* at 516–17.

<sup>24</sup> 142 S. Ct. 2901 (2022).

<sup>25</sup> *Id.* at 546.

Court either to overrule *AIRC* or to limit its holding to highly specific state constitutional guarantees, like the Arizona provision, that explicitly create redistricting commissions or prohibit gerrymandering.<sup>26</sup>

As this Article demonstrates, a version of the ISLT that precludes state constitutions from imposing limitations on the regulation of federal elections, whether through general or specific language, is highly questionable in theory, problematic in practice, and without historical basis. But during the 2020 election litigation, some Supreme Court Justices embraced even more sweeping versions of the ISLT. Some argued, for example, that the Clauses require the Supreme Court to undertake its own textualist interpretation of state election law, *de novo*, without deference to state courts' interpretations or interpretive methodology. Repeatedly, Justices Thomas, Alito, and Neil Gorsuch accused state courts (and in one case, a State Board of Elections) of "rewriting" the laws, without considering whether those state officials had accurately applied precedent and practice or had appropriately taken into account legislative intent and the broader statutory scheme. In other words, these Justices asserted that the Clauses require a particular type of textualism, regardless of preexisting state law about appropriate statutory construction methodology. And some Justices suggested that the Clauses might actually *prohibit* state legislatures from delegating discretionary authority to election administrators. This Article expressly takes on these maximalist versions of the ISLT.

In part, this Article builds on important and new historical research demonstrating the invalidity of the ISLT as a matter of originalism, Madisonian liquidation, and longstanding practice.<sup>27</sup> But it goes beyond those analyses in several important ways. First, this Article demonstrates the significant disruption to state law, election administration, and principles of federalism that the ISLT would cause. Most states have election laws that apply to

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<sup>26</sup> See generally *Petition for Certiorari, Moore*, 142 S. Ct. 2901, No. 21-1271 (2022) [hereinafter *Moore Petition*].

<sup>27</sup> See, e.g., Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. CT. REV. 1, 19–26 (2022); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 759–61 (2002) [hereinafter Smith, *History*]; Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y (forthcoming 2023); Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 1091 (2022); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022) [hereinafter Smith, *Revisiting History*]. For a discussion of Madisonian liquidation, see note 40 and accompanying text.

both state and federal elections without distinction, and the ISLT would cause particular chaos in those states. If, for example, a state court strikes down a state law governing elections as violating the state constitution, under the ISLT, although that holding would apply to state elections, the law would still remain operational for federal elections, requiring two sets of election rules and causing confusion (at best) for election administrators and voters alike. And the maximalist ISLT, which allows—and even requires—federal courts to review state court interpretations of election laws, could likewise lead to inconsistent federal and state interpretations of the same law. Moreover, the threat of such inconsistent interpretations might itself constrain state courts and distort state law.

Second, the Article establishes that the policy justifications offered by ISLT proponents—including claims of political accountability and predictability—are in fact undermined by the ISLT. Despite ISLT proponents' claim to respect and protect state legislative prerogatives, they in fact skip the most basic questions of statutory interpretation. That is, even assuming that some form of the ISLT is correct, ISLT proponents *assume* that legislatures chose not to incorporate state constitutional limitations, state law governing statutory interpretation, state court precedent, and other aspects of state law into statutes governing federal elections. But legislators—and their constituents—may well have understood the statute to operate like any other state law. By ignoring or rejecting those understandings, the ISLT in fact undermines both accountability and predictability.

Third, the ISLT, particularly the maximalist version, also threatens to disrupt longstanding precedents, practices, and structures of election administration in the states. Suppose a state supreme court strikes down a comprehensive election law as violating the state constitution, but there is no appeal to the U.S. Supreme Court. The ISLT might allow a federal candidate to claim, years later, that the law is still valid for federal elections. In other words, the ISLT could provide fertile ground for lawyerly creativity, a distinct lack of finality, and unending divisive litigation.

Fourth, the ISLT is itself a significant change in law that undermines predictability by disrupting longstanding norms and understandings. If fully embraced, it would shift significant power away from state courts and towards the U.S. Supreme Court. It would turn the review and interpretation of any state statute governing federal elections into a federal constitutional

case. The eagerness of some Justices to seize that power was evident during the 2020 election.<sup>28</sup> Yet state legislatures and state courts have long understood that election law is their province, not subject to second-guessing by federal courts.

And all of these problems are worsened when election cases arrive at the Supreme Court by emergency filings, as they often do. Over the past few years, the Supreme Court has become increasingly willing to issue highly consequential rulings in response to such filings, in what has become known as the shadow docket.<sup>29</sup> The Article thus considers the role that the Supreme Court's shadow docket has played and could play in the development and application of the ISLT. For example, the Justices who have already embraced the ISLT did so without the benefit of the significant historical research that they would have had time to consider under normal briefing and argument. When the Court decides *Moore*, we may learn whether they are willing to reevaluate their positions in light of that research, much of which has emerged in the last two years.

The rushed nature of the shadow docket can also preclude appropriate investigation into state law, which can be complex and nuanced. There is a significant risk of gamesmanship and incomplete presentation of the issues on the shadow docket, especially in election cases where time is short and the cases inevitably have a highly partisan valence. Wholesale rejection of state court decision-making under those circumstances, as some Justices have urged, may have serious unanticipated consequences, including for the Supreme Court's own legitimacy.

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Part I of this Article describes the historical development of interpretations of the Electors and Elections Clauses, including discussions of new research. It then details the emergence of the maximalist ISLT during both the 2000 and the 2020 presidential elections. Part II explains why, even on its own terms, the ISLT skips crucial statutory interpretation questions and how making

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<sup>28</sup> Cf. Mark A. Lemley, *The Imperial Supreme Court* (2022) (Stan. L. Sch. working paper) (manuscript available at <https://perma.cc/P7UU-GXR3>) (arguing that the Supreme Court is systematically removing power from other government institutions and amassing it itself).

<sup>29</sup> See, e.g., Melissa Quinn, *Supreme Court's Abortion Decision Shines Light on "Shadow Docket"*, CBS NEWS (Sept. 8, 2021), <https://perma.cc/8CRH-FEDC>; *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the Senate Committee on the Judiciary*, 117th Cong. (2021) (testimony of Stephen I. Vladeck, Professor of Law, Univ. of Tex. Sch. of L.), <https://perma.cc/9HCV-DNLV>.



such decisions on the shadow docket means that the Supreme Court is particularly likely to miss key nuances of state law. Part III explores the ways that, in operation, the ISLT can wreak havoc on state election law and improperly federalizes state election law. Part IV proposes a range of actions for state courts, state legislatures, litigants, and Congress to help maintain existing expectations and division of authority.

### I. THE HISTORY AND DEVELOPMENT OF THE ISLT

In the Electors Clause, the Constitution assigns to state legislatures the job of “direct[ing]” the “Manner” in which presidential electors are appointed.<sup>30</sup> Likewise, the Elections Clause authorizes the legislatures to determine “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” although Congress can enact federal regulations that override such state laws.<sup>31</sup> Proponents of the ISLT point to the word “Legislature” in each clause to argue that when state legislatures exercise their authority over federal elections, nothing that is required or prohibited by their state constitutions is relevant.<sup>32</sup> And some also suggest that protecting this extraordinary grant of authority to legislatures also requires federal court supervision of state court statutory interpretation and possibly of election officials’ exercise of statutorily provided discretion.<sup>33</sup>

But the language of the Clauses does not compel a reading that excludes any constraints imposed by state constitutions or that diminishes state courts and restricts discretion by administrators. To the contrary, legislatures are creatures of their own constitutions, and an at least equally natural reading is that the Clauses provide for legislatures to act as they ordinarily do when they regulate federal elections, meaning that legislatures have no special powers.<sup>34</sup>

And as this Part shows, recent endorsements of the ISLT by some Supreme Court Justices are particularly extreme and unprecedented. Part I.A reviews the history of the clauses and then

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<sup>30</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>31</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>32</sup> See, e.g., Michael W. McConnell, *Two-and-a-Half Cheers for Bush v Gore*, 68 U. CHI. L. REV. 657, 661 (2001).

<sup>33</sup> See *infra* Part I.B.

<sup>34</sup> Many have made this point. See, e.g., Amar & Amar, *supra* note 27, at 19 (arguing that the original “public meaning of state ‘legislature’ . . . was not just an entity created to represent the people; it was an entity *created and constrained by the state constitution*”) (emphasis in original); Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1057 (2021).

describes how state courts, federal courts, and Congress have historically interpreted them. Part I.B describes the emergence of the ISLT during the litigation surrounding the 2000 presidential election. Part I.C charts the ISLT's reemergence, in an unprecedented and extreme form, before and shortly after the 2020 election.

#### A. The Historical Record

The ISLT is inconsistent with the historical record. If that fact was not entirely clear in 2000 or in 2020, it is now. Especially since the 2020 election, numerous scholars have delved deeply into that history, and the evidence against the ISLT is overwhelming.<sup>35</sup> For example, Professor Hayward Smith, who wrote one of the first historical evaluations of the ISLT following the 2000 election,<sup>36</sup> has a new, even more detailed discussion of the history of the Elections and Electors Clauses, in which he concludes that the Framers did not grant any authority to state legislatures to act outside the scope of their state constitutional powers,<sup>37</sup> a conclusion echoed by others.<sup>38</sup> In a recent article, Mark Krass details the states' extensive practice of delegation at the Founding to argue that the Clauses cannot be understood to restrict such delegation, as some Justices have hinted.<sup>39</sup> And Michael Weingartner argues that any ambiguity within the clauses has long since been settled by what James Madison called "constitutional liquidation"—a longstanding and "regular course of practice."<sup>40</sup> That practice, Weingartner demonstrates, overwhelmingly establishes that, notwithstanding a few outlier

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<sup>35</sup> After the ISLT's emergence during the 2000 election, there was an initial flurry of scholarship. At the time, however, even some of those who supported the ISLT did not argue that it had a solid historical basis. *See generally, e.g.*, McConnell, *supra* note 32. Most of the scholarship that I rely on in this Section, however, is new since 2020.

<sup>36</sup> *See generally* Smith, *History*, *supra* note 27.

<sup>37</sup> *See generally* Smith, *Revisiting History*, *supra* note 27.

<sup>38</sup> *See, e.g.*, Amar & Amar, *supra* note 27 at 19–26; *see also* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1002–17 (2021) (presenting evidence that in enacting the Elections Clause, the Framers were extremely concerned about state legislatures abusing their power); Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1267 (describing Madison's fear that state legislatures would be particularly susceptible to capture by factions as a "serious reason[ ] to doubt that the Framers would have empowered the state legislatures vis-à-vis all other state offices").

<sup>39</sup> *See generally* Krass, *supra* note 27.

<sup>40</sup> Weingartner, *supra* note 27 at 3 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern et al. eds., 2009); *see also* William Baude, *Constitutional Liquidation*,

events, state constitutions can impose substantive limits on the legislatures' regulation of federal elections.<sup>41</sup>

On the other side, the primary academic proponent of the ISLT, Professor Michael Morley, argues in an article written before the 2020 election that the original public meaning of the Clauses allowed no such limitations on state legislatures and that the Constitution evidences "a consistent, pervasive, institutional choice" to give the responsibility to regulate federal elections to the political branches.<sup>42</sup> He admits, however, that there is no evidence that the Framers expressly considered the issue; that even at the Founding some such state constitutional limitations existed; and that, at least since the early twentieth century, a different understanding has held sway.<sup>43</sup> The extraordinarily widespread nature of that understanding is likewise established by Smith's and Weingartner's encyclopedic catalog of state constitutional provisions and amendments, as well as the long history of state supreme courts evaluating the constitutionality of various state election laws and practices pursuant to their own constitutions.<sup>44</sup>

These scholars, and others, have produced detailed and careful discussions of the historical record, and in this Article, I do not attempt to summarize them fully or to definitively resolve their disagreements. Instead, I identify here some important historical facts about which there appears to be little disagreement, while also highlighting a few points of contention. This background is essential for understanding the current state of the law and for evaluating the claims made by ISLT proponents, including several Supreme Court Justices.

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71 STAN. L. REV. 1, 4 (2019) (presenting a thorough analysis of liquidation and arguing that it "was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery").

<sup>41</sup> Weingartner, *supra* note 27, at 13–14 (relying on *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), to demonstrate the Court's use of a liquidation model).

<sup>42</sup> Morley, *ISLD and Elections*, *supra* note 14, at 34. Morley also argues that state legislatures' authority over "federal elections was understood to be co-extensive with Congress' power to do so[.]" *id.* at 35, and congressional power obviously was not limited by state constitutions. The ISLT, he argues, maintains "this symmetry." *Id.* at 36; *see also id.* at 38–39; McConnell, *supra* note 32, at 661 (noting that the Electors Clause means that "the manner of selecting electors will be chosen by the most democratic branch of the state government").

<sup>43</sup> Morley, *ISLD and Elections*, *supra* note 14, at 38–39 & n.168; *id.* at 9–10.

<sup>44</sup> Weingartner, *supra* note 27; Smith, *Revisiting History*, *supra* note 27, at 516–29. Smith's post-2020 article is in part a direct response to Morley and analyzes his historical arguments in depth.

First, there is no evidence that the Framers “expressly considered” the ISLT nor that they “addressed the potential significance of their use of the term ‘legislature,’”<sup>45</sup> and the drafting history of the Clauses does not directly address it.<sup>46</sup> There is, however, some historical context. The Articles of Confederation used language very similar to the Clauses, providing that delegates to that early Congress “be annually appointed in such manner as the legislature of each state shall direct.”<sup>47</sup> And “[m]ost of the state constitutions adopted between Independence and the adoption of the U.S. Constitution purported to regulate the selection of delegates to Congress.”<sup>48</sup> The Elections and Electors Clauses were drafted in that context.

Second, all agree that beginning in the early years after the Founding, some state constitutions included provisions that limited how state legislatures could regulate federal elections.<sup>49</sup> The constitutions of at least five states required *all* elections to be conducted by ballot, instead of voice vote, which “was one of the most important, and most contested, issues of election administration in the post-Founding era.”<sup>50</sup> Other early state constitutional provisions explicitly applied to federal elections. Only three years after the national Constitution was ratified, Delaware, for example, adopted a new constitution, which provided that congressional elections would occur in the same manner and in the same places as elections for the state legislature.<sup>51</sup> And in 1810, Maryland amended its 1776 constitution to provide that all free white men

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<sup>45</sup> Morley, *ISLD*, *supra* note 14, at 503.

<sup>46</sup> See McConnell, *supra* note 32, at 661 (noting that “[t]here is no relevant legislative history”).

<sup>47</sup> ARTICLES OF CONFEDERATION OF 1781, art. V.

<sup>48</sup> Smith, *Revisiting History*, *supra* note 27, at 479 & n.152; see also Amar & Amar, *supra* note 27, at 23 (discussing “state constitutions in the Confederation era [that] nonetheless directly and expressly regulated how state legislatures had to act in the appointment of Confederation Congressmen”).

<sup>49</sup> See, e.g., Weingartner, *supra* note 27, at 40; Morley, *ISLD and Elections*, *supra* note 14, at 38 n.168; Smith, *Revisiting History*, *supra* note 27, at 487–92; Amar & Amar, *supra* note 27, at 22–24.

<sup>50</sup> Weingartner, *supra* note 27, at 36.

<sup>51</sup> *Id.* at 36; Smith, *Revisiting History*, *supra* note 27, at 484–85.

could vote in all elections—expressly including federal elections<sup>52</sup>—and that voting in such elections would be “by ballot.”<sup>53</sup>

To be sure, as is often the case with history, there are arguable counterexamples. Morley, for example, points to the Massachusetts constitutional convention in 1820, where delegates considered a provision that would have required congressional representatives to be elected by district.<sup>54</sup> Justice Joseph Story, who was a delegate, argued against the provision on the ground that it would violate the Elections Clause, and the convention rejected the provision.<sup>55</sup> But this episode is ambiguous, as there were a number of reasons that convention delegates might have voted against the provision.<sup>56</sup> It is also an extreme outlier among all of the evidence from the Founding era and the early years of the republic.

Third, not only did state constitutions regulate federal elections beginning at the Founding, but they have consistently done so ever since,<sup>57</sup> and state courts have routinely adjudicated and enforced these provisions. Weingartner documents more than eighty such cases, extending from the nineteenth century until

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<sup>52</sup> See Smith, *History*, *supra* note 27, at 758 (citing MD. CONST. of 1776, art. XIV (1810)). This provision does not implicate the ISLT with respect to eligibility to vote for Members of the House of Representatives because Article I of the Federal Constitution separately regulates voter qualifications for such elections, providing that “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST., art I, § 2; see Morley, *ISLD and Elections*, *supra* note 14, at 38–39 & n.168 (making this point). The Maryland amendment does, however, provide evidence against the ISLT because it requires voting by ballot for all elections and because the Electors Clause in Article II does not regulate voter qualifications for presidential elections. See U.S. CONST., art II, § 1, cl. 2.

<sup>53</sup> MD. CONST. OF 1776, art. XIV (1810).

<sup>54</sup> Morley, *ISLD and Elections*, *supra* note 14, at 39–40 (citing JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 104 (Boston Daily Advertiser, Rev. ed. 1853) [hereinafter MASSACHUSETTS JOURNAL]).

<sup>55</sup> Morley, *ISLD and Elections*, *supra* note 14, at 40 (citing MASSACHUSETTS JOURNAL, *supra* note 54, at 109–10). Daniel Webster also argued that the provision should be rejected, but his comments were less explicit as to whether he thought that it would violate the Elections Clause or whether he merely thought that it was advisable for the state constitution to “have as little connection with the constitution of the United States as possible.” Morley, *ISLD and Elections*, *supra* note 14, at 40 & n.184 (quoting MASSACHUSETTS JOURNAL, *supra* note 54, at 112 (statement of Webster)).

<sup>56</sup> See, e.g., Smith, *Revisiting History*, *supra* note 27, at 512–16 (discussing the 1820 Massachusetts convention).

<sup>57</sup> See, e.g., Weingartner, *supra* note 27, at 37–40; Smith, *Revisiting History*, *supra* note 27, at 505–09, 525–28; Nathaniel Persily, Samuel Byker, Williams Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 708, 715–18 (2016) (documenting state constitutional provisions that were enacted by popular initiatives and that regulate federal elections).

today.<sup>58</sup> ISLT proponents point to a small handful of cases in which a state court permitted state legislative action related to federal elections despite an arguably contradictory state constitutional provision.<sup>59</sup> But as a group, those cases do not meaningfully support the ISLT. In some, the state high courts concluded that the relevant state constitutional provisions did not apply to federal elections—either without mentioning the ISLT at all<sup>60</sup> or discussing it in dicta.<sup>61</sup>

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<sup>58</sup> Weingartner, *supra* note 27, at 40–43. In a recent podcast, Professor Michael McConnell points out that until the 1960s, federal courts generally considered issues of election regulation to be nonjusticiable political questions, so the lack of federal court cases reviewing these questions should be seen as an absence of evidence, not evidence of absence. Michael McConnell, Rick Pildes & Jeffrey Rosen, *The Case for Reforming the Electoral Count Act – Part 2*, NAT'L CONST. CTR. (Aug. 4, 2022), <https://constitutioncenter.org/news-debate/podcasts/the-case-for-reforming-the-electoral-count-act-part-2.-count-act-part-2>.

<sup>59</sup> Scholars seem to have identified at most seven such cases, but some of those cases do not clearly address the ISLT. *See infra* notes 63–66 and accompanying text.

<sup>60</sup> In New Hampshire, for example, the state legislature asked the state supreme court for an advisory opinion as to the constitutionality of a law allowing Union soldiers to vote for federal offices where they were stationed. *Opinion of the Justices of the Supreme Judicial Court on the Constitutionality of the Soldiers' Voting Bill*, 45 N.H. 595, 595 (1864) [hereinafter *Opinion of the Justices*] (advisory opinion). The question arose because the New Hampshire constitution provided that individuals qualified to vote for state legislators do so in the places where they lived. *Id.* at 601–02. The New Hampshire Supreme Court concluded that this provision said nothing about whether the legislature could authorize out-of-state voting for federal offices. *Id.* at 602–05.

The court's analysis turned on whether this provision set forth the “qualifications” for voting, in which case the Federal Constitution would require it to apply to voting for congressional representatives, see U.S. CONST., art I, § 2, or whether it was a “time, place, manner” regulation, which the Elections Clause leaves to the state legislature in the absence of congressional action. The court concluded that the state constitution's location-of-voting requirement was a regulation, not a qualification, and so held that it did not apply to federal elections at all. *Opinion of the Justices*, 45 N.H. at 602–05. Likewise, because Article II also does not have any provisions related to place of voting for presidential electors, the state law was valid as to presidential electors. *Id.* at 600–01. See Smith, *Revisiting History*, *supra* note 25, at 519–21, for a detailed discussion of the case, including a rebuttal of Morley's claim that it is “one of the nineteenth century's clearest, most emphatic endorsements of the” ISLT, Morley, *ISLD and Elections*, *supra* note 14, at 42.

<sup>61</sup> *See* *State v. Williams*, 49 Miss. 640, 665–66 (1873) (construing a state constitutional requirement of biannual elections to apply to specific offices, thereby allowing the state legislature to set congressional elections in years opposite elections for state offices); *id.* at 681 (Simrall, J., concurring) (same); *id.* at 666 (comparing state legislative authority to congressional authority); *In re the Plurality Elections*, 15 R.I. 617, 619–20 (R.I. 1887) (advisory opinion) (construing the state constitution's majority-vote requirement to apply only to state offices, thereby allowing plurality votes to decide both federal and local elections and noting that if the requirement applied to congressional elections, it would be unconstitutional); *Opinion of the Judges of the Supreme Court on the Constitutionality of “An Act Providing for Soldiers Voting”*, 37 Vt. 665, 676 (1864) [hereinafter *Opinion of the Judges*] (advisory opinion) (holding that the Vermont constitution required in-person voting in state elections but “is entirely silent” as to federal elections); *id.* at 677 (describing the Federal Constitution as leaving regulation of federal elections to the legislature).

Moreover, in none of these cases was there any ambiguity about what the legislature was trying to do. In several early cases, for example, state legislatures sought advisory opinions from their state supreme courts about whether they had more or different authority with respect to federal, as opposed to state, elections.<sup>62</sup> In other cases, the challenged laws applied expressly to federal elections only.<sup>63</sup> In other words, these legislatures' decisions to treat federal elections differently from state elections were deliberate, public, and explicit. They thus provide no support for a maximalist ISLT that would, for example, allow federal courts to second-guess state courts' review or interpretations of statutes that govern federal and state elections without distinction. Nor were the arguments in those cases the product of post hoc litigation positioning or gamesmanship.<sup>64</sup>

Fourth, there is general agreement that when a state legislature regulates federal elections, it does so through its ordinary lawmaking processes and so is subject to its state constitution's procedural lawmaking requirements.<sup>65</sup> More specifically, during the first half of the twentieth century, the Supreme Court upheld the use of both the gubernatorial veto and a statewide referendum disapproving otherwise valid legislation with respect to congressional redistricting.<sup>66</sup> Likewise, in 2015, the Court upheld (albeit by a 5–4 vote) a state constitutional provision establishing an independent redistricting commission enacted by popular initiative because initiatives were a constitutionally permitted exercise of that state's legislative authority.<sup>67</sup> Congress too, acting as the judge of its own elections,<sup>68</sup> has “typically enforced state constitutions' procedural requirements concerning the legislative process” when judging the results of elections.<sup>69</sup> I am aware of no historical

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<sup>62</sup> See, e.g., *Plurality Elections*, 15 R.I. at 618; *Opinion of the Judges*, 37 Vt. at 666; *Opinion of the Justices*, 45 N.H. at 596.

<sup>63</sup> See *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936) (upholding state laws specific to choosing presidential electors); *Dummit v. O'Connell*, 181 S.W.2d 691, 694–96 (Ky. 1944) (upholding a statute allowing absent soldiers to vote in federal elections only); *Beeson v. March*, 34 N.W.2d 279, 285–87 (Neb. 1948) (upholding a state law specific to presidential electors).

<sup>64</sup> See *infra* Part III.C.

<sup>65</sup> See, e.g., Morley, *ISLD*, *supra* note 14, at 541–42.

<sup>66</sup> *Smiley v. Holm*, 285 U.S. 355, 399–400 (1932); *State of Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569–70 (1916).

<sup>67</sup> *AIRC*, 576 U.S. at 793.

<sup>68</sup> U.S. CONST., art. I, § 5 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”).

<sup>69</sup> Morley, *ISLD and Elections*, *supra* note 14, at 46.

or scholarly support for a version of the ISLT that bypasses state constitutional lawmaking procedures.<sup>70</sup>

Fifth, although some ISLT proponents suggest that there is a difference between procedural rules for lawmaking and substantive constitutional limitations, the Supreme Court has never held that when a state legislature regulates federal elections, it is free of such substantive constitutional constraints. Proponents of the ISLT often point to language in the 1892 case *McPherson v. Blacker*,<sup>71</sup> but in that case the Court considered only whether the Electors Clause itself imposed any restrictions on the legislature, which had determined that presidential electors be chosen by district instead of statewide.<sup>72</sup> In that context, the Court said that the language of the Electors Clause “convey[s] the broadest power of determination” and “leaves it to the legislature exclusively to define the method” for appointing presidential electors.<sup>73</sup> The Clause, the Court said, thus “operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power.”<sup>74</sup>

But despite this broad language, *McPherson* has no holding exempting the legislature from the constraints of the state constitution. To the contrary, in that opinion, the Court noted that Article II specifically directed “[e]ach state” to appoint electors,<sup>75</sup> and said that “[w]hat is forbidden or required to be done by a State is forbidden or required of the legislative power under the state constitutions as they exist[,]” and that “[t]he [state’s] legislative power is the supreme authority except as limited by the

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<sup>70</sup> Cf. Levitt, *supra* note 34, at 1067–68 (noting that even under Article II, under which the legislatures might be able to appoint presidential electors themselves, doing so would require the passage of a law); Morley, *ISLD*, *supra* note 14, at 546 (same). In this way, the Clauses are different from the federal constitutional provisions involving the appointment of senators and the ratification of constitutional amendments. See *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (holding that a state constitution cannot require a referendum to ratify a federal constitutional amendment); *id.* at 227–28 (explaining that the same is true for the selection of senators before the 17th Amendment); *id.* at 229 (distinguishing between those acts and regular legislation); *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (rejecting state constitutional challenges to ratification of the 19th Amendment where state constitutions prohibited such ratification).

<sup>71</sup> 146 U.S. 1 (1892).

<sup>72</sup> *Id.* For examples of reliance on *McPherson*, see Morley, *ISLD and Elections*, *supra* note 14, at 84, and *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from denial of certiorari).

<sup>73</sup> *McPherson*, 146 U.S. at 27.

<sup>74</sup> *Id.* at 25.

<sup>75</sup> *Id.* at 24.



constitution of the State.”<sup>76</sup> *McPherson*, at most, contains ambiguous or contradictory dicta about the scope of state legislative authority to regulate federal elections, and the more explicit language actually militates against the ISLT.<sup>77</sup>

Sixth, Congress has long assumed the legitimacy of state constitutional regulation of federal elections. As Weingartner points out, for example, when admitting (and readmitting) states, Congress has approved numerous state constitutions that regulate federal elections.<sup>78</sup> And when each house of Congress resolves election disputes as “the Judge of the Elections . . . of its own Members,”<sup>79</sup> they frequently rely on state constitutions and state court decisions.<sup>80</sup> In 1861, for example, despite arguments expressly invoking the ISLT, the House seated an Oregon candidate whose election was held on the date set by the Oregon constitution instead of the candidate elected on a different date chosen by the legislature.<sup>81</sup>

The primary counterexample on which ISLT proponents rely is a Civil War–era election contest from Michigan.<sup>82</sup> The case, known as *Baldwin v. Trowbridge*,<sup>83</sup> arose from a potential conflict between Michigan’s constitutional requirement of in-person voting and a statute allowing Union soldiers to vote absentee.<sup>84</sup> In one congressional race, those absentee votes were decisive.<sup>85</sup> The House Committee on Elections issued a majority report relying on the ISLT and arguing in favor of accepting the soldiers’ votes.<sup>86</sup> There was also a minority report opposing the ISLT.<sup>87</sup> Similar

<sup>76</sup> *Id.* at 25.

<sup>77</sup> Compare Amar & Amar, *supra* note 30, at 31 (explaining that *McPherson* does not conclude that state legislatures can be constrained by state constitutions in deciding how to appoint presidential electors), with Morley, *ISLD and Elections*, *supra* note 14, at 84 (arguing that *McPherson* means that state constitutions cannot constrain state legislatures at all with respect to appointing presidential electors). It is indisputable, however, that the only question the Court was deciding in *McPherson* was whether the Electors Clause of the federal Constitution limits the methods the legislature chooses.

<sup>78</sup> Weingartner, *supra* note 27, at 51–55 (noting different states’ regulations).

<sup>79</sup> U.S. CONST., art. I § 5.

<sup>80</sup> *E.g.*, Weingartner, *supra* note 27, at 56–62 (documenting numerous instances).

<sup>81</sup> *See, e.g.*, Smith, *Revisiting History*, *supra* note 27, at 509–11 (describing the dispute between candidates George Shiel and Andrew Thayer); Weingartner, *supra* note 27, at 59 (same).

<sup>82</sup> *See, e.g.*, Morley, *ISLD and Elections*, *supra* note 14, at 48–52.

<sup>83</sup> H.R. REP. NO. 39-13 (1866).

<sup>84</sup> *Id.* at 1–2.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 2 (describing the majority report as “argu[ing] that the state’s constitutional requirement could not constrain the legislature’s action in a federal election”).

<sup>87</sup> *Baldwin v. Trowbridge*, H.R. REP. NO. 39-14 (1866).

arguments were repeated on the House floor, and the House ultimately voted to seat Rowland Trowbridge, the candidate who won when the absentee ballots were counted.<sup>88</sup>

*Baldwin* is a fascinating episode, but it carries less weight than some argue. For one thing, like the 1820 Massachusetts constitutional convention story, it is an extreme outlier. Both before and after *Baldwin*, Congress relied on state constitutional provisions and state court decisions in deciding election contests. Moreover, even on its own terms, its lesson is ambiguous. As Smith documents, a number of Members who voted to seat Trowbridge nonetheless expressly rejected the ISLT, arguing instead that the absentee votes were valid because the statute permitting them did not in fact violate the Michigan Constitution.<sup>89</sup> All we can conclude from *Baldwin* is that in a highly charged partisan environment, some Members of Congress in 1861 argued in favor of the ISLT to seat a candidate of their own party and some did not.<sup>90</sup>

Seventh, there is general agreement that, under the Clauses, state legislatures are free to delegate substantial discretionary decision-making to executive branch and local election officials, and such statutes rarely distinguish between federal and state elections. As Krass has established, such delegation has been widespread and remarkably broad since the Founding, with election officials making decisions about where, when, and how voting would take place.<sup>91</sup> And although there is some academic debate about what the outer limits of permissible delegation might be,<sup>92</sup> the Supreme Court has never struck down a delegation under the Clauses. Indeed, because election administration is complicated and technical, it is hard to imagine how elections would function if the legislature itself had to make every single decision.<sup>93</sup>

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<sup>88</sup> *Baldwin*, H.R. REP. NO. 39-13 at 3.

<sup>89</sup> Smith, *Revisiting History*, *supra* note 27, at 523–24.

<sup>90</sup> In this way, *Baldwin* is good precedent for how the ISLT is manipulable. After decades of Congress assuming state constitutions validly regulated federal elections, some Members seized on the ISLT at a moment when it provided some partisan advantage.

<sup>91</sup> Krass, *supra* note 27, at 122–38.

<sup>92</sup> Morley, for example, argues for evaluating delegations in this context using the same standard as the federal nondelegation doctrine, which is extremely capacious. Morley, *ISLD*, *supra* note 14, at 554–55. He does not discuss, however, what should happen if the Supreme Court were to adopt a new, more restrictive version of the doctrine, which may well happen. See, e.g., Krass, *supra* note 27, at 104 n.12; see also Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. L. REV. 717, 736–39 (2016).

<sup>93</sup> See Krass, *supra* note 27, at 107 (noting that election officials “depend heavily on delegation to keep their agencies moving”).

Finally, there is absolutely no historical support for arguments that the Clauses give the federal courts the power to reject state court interpretations of state laws governing federal elections.<sup>94</sup> The Supreme Court has *never* relied on the Clauses to reject a state court's interpretation of state election law governing federal elections. In fact, before 2000, no Supreme Court Justice—or any other judge, so far as I can tell—ever suggested such a possibility. Likewise, there is no support for the suggestion, hinted at by Justice Gorsuch, that federal courts can second-guess election administrators' discretion about how to implement state law.<sup>95</sup> As already noted, recent historical research establishes that since the Founding, legislatures delegated significant discretion to local officials in running elections.<sup>96</sup> But as explained below, the claims that federal courts—or more significantly, the Supreme Court—can insist on their own interpretation of state statutory language and can use those interpretations to limit the discretion of election officials are emerging as important and potentially highly disruptive issues in the federal constitutional law of elections.

In sum, the pre-2000 history demonstrates that from the Founding, Congress, drafters of state constitutions, state legislatures, and state courts have all repeatedly either rejected the ISLT outright or proceeded on the understanding that it did not exist. The few arguable counterexamples are, in many instances, ambiguous as to the basis of the decisions reached. And there is no historical support at all for the maximalist ISLT that allows federal courts to second-guess state courts' statutory construction and election administrators' discretionary decisions.

## B. The Modern Emergence of the ISLT: The Election of 2000

The presidential election of 2000 is remembered for hanging chads, weeks of uncertainty, and the Supreme Court's decision in *Bush v. Gore*.<sup>97</sup> But it is also the modern source of the maximalist ISLT.

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<sup>94</sup> As Smith explains, the historical record does contain some examples of “state courts and Congress consider[ing whether to] declin[e] to observe state constitutional requirements.” Smith, *Revisiting History*, *supra* note 27, at 503. In contrast, in the version of the ISLT pressed today, “federal courts, in the name of protecting state ‘legislatures,’ are considering whether to assume the role of overseeing state court interpretations of state law.” *Id.*

<sup>95</sup> See *Moore v. Circosta*, 141 S. Ct. 46, 47–48 (2020) (*Moore II*) (Gorsuch, J., dissenting from denial of application for injunctive relief).

<sup>96</sup> See, e.g., Krass, *supra* note 27, at 122–38.

<sup>97</sup> 531 U.S. 98 (2000).

As is well known, the vote in Florida that year was extraordinarily close, and Florida's electoral votes would determine the overall winner of the presidential election. In the aftermath of the election, there were several parallel proceedings in the Florida courts and in the U.S. Supreme Court, culminating in *Bush v. Gore*. There, in a 5–4 opinion, the Court overruled the Florida Supreme Court, ended the recount in Florida, and effectively declared George W. Bush the winner of the election.<sup>98</sup>

The majority in *Bush v. Gore* relied on the Equal Protection Clause for its holding, but the ISLT also arose during the litigation over the election. In *Bush v. Palm Beach County Canvassing Board*,<sup>99</sup> the first case to come to the Supreme Court, the Court raised the possibility, though did not hold, that the ISLT might limit the application of the state constitution to state legislatures' choices related to presidential elections.<sup>100</sup> Later, in *Bush v. Gore* itself, Chief Justice William Rehnquist embraced the argument that there might be special approaches to statutory interpretation for laws governing federal elections.<sup>101</sup> But the Supreme Court issued no holding about the ISLT,<sup>102</sup> and even Chief Justice Rehnquist did not go as far as some current Justices were prepared to during the 2020 election litigation.<sup>103</sup>

1. *Bush v. Palm Beach County Canvassing Board*.

Shortly after election day, when Florida was still considered too close to call and Bush appeared narrowly ahead in the official count, then–Vice President and 2000 presidential candidate Al Gore requested a manual recount in four counties. Controversy and litigation ensued about whether the Secretary of State would be required to accept the results of those recounts if they were submitted after the initial statutory timeframe. Exercising its equitable authority and noting the Florida Constitution's express right to vote, the Florida Supreme Court set a new deadline and ordered the Secretary of State to accept recount results submitted by that date.<sup>104</sup>

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<sup>98</sup> *Id.* at 110–11.

<sup>99</sup> 531 U.S. 70 (2001) (per curiam).

<sup>100</sup> *Id.* at 473–74.

<sup>101</sup> *Gore*, 531 U.S. at 112–21 (Rehnquist, C.J., concurring).

<sup>102</sup> See generally *id.*

<sup>103</sup> See, e.g., *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari).

<sup>104</sup> *Palm Beach Cty. Canvassing Bd. v. Harris (Palm Beach I)*, 772 So. 2d 1220, 1240 (Fla. 2000) (per curiam).

Bush appealed to the U.S. Supreme Court, arguing, among other things, that the Florida Supreme Court had improperly intruded on the authority that the Electors Clause gives the legislature.<sup>105</sup> More specifically, he argued that, because “the Constitution ‘leaves it to the legislature *exclusively* to define the method of effecting the object’” of appointing electors” and because the Florida “legislature manifestly did *not* grant the authority to adjust deadlines for election returns to organs of the Florida judiciary[,] . . . [t]he Florida Supreme Court’s extensive and unauthorized revision of that scheme was unconstitutional.”<sup>106</sup>

But the Supreme Court did not decide whether the Florida Supreme Court had exceeded its authority. Nor did it decide whether a state court could, as the Florida Supreme Court arguably had, use the constitutional avoidance canon in construing a state election statute that governed federal elections. Instead, the Court explained that it was “unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under” the Electors Clause, and it “decline[d] at this time to review the federal questions asserted to be present.”<sup>107</sup> In other words, the Supreme Court engaged in its own form of constitutional avoidance by remanding the case to the Florida court to clarify the basis for its ruling.<sup>108</sup> The Supreme Court punted on the ISLT.

The Supreme Court also specifically instructed the state supreme court to take into account § 5 of the Electoral Count Act<sup>109</sup> (ECA) when it construed the state law.<sup>110</sup> The ECA provides that when a state has put in place procedures for resolving disputes over the outcome of a presidential election before election day, and where those procedures lead to resolution of any dispute at least six days before the electors vote, that resolution is “conclusive.”<sup>111</sup> That provision, sometimes called the “safe harbor” provision,<sup>112</sup> is a promise that Congress will defer to the state’s own resolution of election disputes so long as the state uses the procedures that were in place before the election. The U.S. Supreme Court instructed the Florida Supreme Court to consider whether the legislature wished to take advantage of the safe harbor, and

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<sup>105</sup> Petitioner’s Brief, *Bush*, 531 U.S. 70, at 43–48.

<sup>106</sup> *Id.* at 37 (emphasis in original) (quoting *McPherson*, 146 U.S. at 27).

<sup>107</sup> *Bush*, 531 U.S. at 78.

<sup>108</sup> *See id.*

<sup>109</sup> 3 U.S.C. §§ 5–7, 15–18 (1994).

<sup>110</sup> *Id.* at 77–78 (citing 3 U.S.C. § 5).

<sup>111</sup> 3 U.S.C. § 5.

<sup>112</sup> *Bush*, 531 U.S. at 77.

if so, whether that “legislative wish . . . would counsel against any construction of the Election Code that Congress might deem to be a change in the law.”<sup>113</sup>

On remand, the Florida Supreme Court analyzed the state election code, which had just been enacted in 1999 and for which there was therefore no well-developed precedent. The court did not reference the state constitution. It explained that its “polestar” in statutory interpretation was “legislative intent.”<sup>114</sup> Turning to the statutory text, it identified several ambiguities in the statutory scheme, which it resolved by reference to legislative intent and by relying on well-settled principles of statutory interpretation, such as “the specific statute controls the general statute.”<sup>115</sup> The court noted that the legislature had “chosen to have a single election code control all elections”<sup>116</sup> and that by doing so it had made “no provision for applying its rules one way for presidential elector elections and another way for all other elections.”<sup>117</sup>

The Florida Supreme Court also took into account the ECA. It reinstated its deadline for the county canvassing boards to submit the results of the manual recounts to the Department of State<sup>118</sup> but held that the statute gave the Department discretion to “ignore” the returns.<sup>119</sup> It rejected the idea that this discretion was unbridled, however, and said that in most elections it could “foresee no reason why the Department would refuse to accept amended returns if a county was proceeding in good faith with a

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<sup>113</sup> *Bush*, 531 U.S. at 78. Morley reads *Palm Beach County* as an affirmative “endorsement” of the maximalist ISLT. Morley, *ISLD and Elections*, *supra* note 14, at 81. Noting that the Court relied on some of the language from *McPherson*, he argues that the Court would have had no reason to remand with these instructions if the Justices were not in unanimous agreement that reliance on the state constitution was improper. *Id.* at 80–81; *see also* McConnell, *supra* note 32, at 659 (describing the case as “decid[ing] nothing of practical consequence” but “remind[ing] the Florida Supreme Court that its decisions were subject to review on federal grounds”); Morley, *ISLD*, *supra* note 14, at 517 (noting that “the primary reason for remand was to give the Florida Supreme Court the opportunity to clarify whether the state constitution was influencing its interpretation of the election code”). Morley’s reading is, in my view, a drastic overreach. Much more likely, the Court hoped to avoid deciding that question. And in fact, in *Bush v. Gore*, only three Justices embraced this version of the theory. *See* Amar & Amar, *supra* note 31, at 42 (noting that this version of the theory was accepted by three Justices and rejected by four). For a discussion of Justice David Souter’s dissent, *see* Part I.B.2.

<sup>114</sup> *Palm Beach Cty. Canvassing Bd. v. Harris (Palm Beach II)*, 772 So. 2d 1273, 1282 (Fla. 2000) (per curiam).

<sup>115</sup> *Id.* at 1287.

<sup>116</sup> *Id.* at 1291.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1289.

<sup>119</sup> *Palm Beach II*, 772 So. 2d at 1288–89.

manual recount.”<sup>120</sup> In the unique context of presidential elections, however, it held that the Department could exercise discretion to ignore those results if “it can clearly be determined that the late filing would prevent . . . the consideration of Florida’s vote in a presidential election.”<sup>121</sup> In other words, the Florida court read the statute to have a single meaning for both state and federal elections, but it acknowledged that the discretion the statute granted election officials might have a different scope for presidential elections in light of the ECA’s safe harbor provision.

While there may have been different ways to resolve the statutory ambiguities, nothing about the court’s approach to statutory interpretation was unprecedented or unusual. Indeed, the decision was 6–1, with the lone dissenter arguing solely that the court should hold off on ruling while the U.S. Supreme Court was considering *Bush v. Gore*,<sup>122</sup> in which it had already granted certiorari.<sup>123</sup>

## 2. *Bush v. Gore*.

*Bush v. Gore* grew out of a state court lawsuit filed by Al Gore, in which he relied on Florida law to contest the statewide election results. Although in that case, known as *Gore v. Harris*<sup>124</sup> in the state courts, the Florida Supreme Court did not grant all the relief that Gore sought, it did order a manual recount of those ballots for which the ballot-tallying machines had registered no vote for president.<sup>125</sup>

The Florida Supreme Court’s opinion in *Harris* was issued on December 8, 2000, four days after the U.S. Supreme Court remanded the *Palm Beach County* case. Unsurprisingly, therefore, the Florida Supreme Court began its analysis by pointing to both the Electors Clause and the Electoral Count Act, noted that the legislature had delegated the resolution of election contests to the courts, and explained why it concluded that the text of the statute required that the intent of each voter be discerned and counted if at all possible.<sup>126</sup> In other words, the Florida court expressly

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<sup>120</sup> *Id.* at 1289.

<sup>121</sup> *Id.* at 1291.

<sup>122</sup> *Id.* at 1292 (Wells, J., dissenting).

<sup>123</sup> See generally *Bush*, 531 U.S. 1046. Bush did not seek Supreme Court review of the Florida Supreme Court’s opinion in *Palm Beach II*.

<sup>124</sup> 772 So. 2d 1243 (Fla. 2000) (per curiam).

<sup>125</sup> *Id.* at 1247.

<sup>126</sup> *Id.* at 1248–49, 1254–55.

grounded its holding in its analysis of the statute as it governed a presidential election. It did not rely on the state constitution.

Ultimately, of course, the U.S. Supreme Court shut down the recount. Five Justices concluded that the lack of a statewide standard for identifying voter intent violated the Equal Protection Clause and that the recount had to stop.<sup>127</sup> But in a concurring opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, relied on the Electors Clause to revisit the Florida Supreme Court's statutory interpretation. Chief Justice Rehnquist argued—with no corroborating citations—that under Article II, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”<sup>128</sup> This claim was, quite literally, unprecedented. Chief Justice Rehnquist cited no authority for it, and none appears to have existed at the time.

The crux of the statutory issue that Chief Justice Rehnquist focused on was what authority the legislature had delegated to the Secretary of State and what it had delegated to the courts.<sup>129</sup> He disagreed with the Florida court's interpretation of the statute allowing it to order manual recounts and extend the deadlines the Secretary of State was enforcing. Chief Justice Rehnquist acknowledged that “[i]n any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives [here, the Secretary of State] as it chooses, . . . and this Court will have no cause to question the court's actions.”<sup>130</sup> But presidential elections are different, he said, and “[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.”<sup>131</sup>

Chief Justice Rehnquist did not discuss the Florida court's reliance on longstanding principles of Florida's law of statutory interpretation in its effort to make sense of a statute with provisions that were, if not absolutely contradictory, at least in tension with each other. Nor did he discuss the fact that the statute did

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<sup>127</sup> *Bush*, 531 U.S. at 104–11. Justices Stephen Breyer and Souter agreed that the recount as originally conducted violated the Equal Protection Clause, but they would have remanded for the Florida courts to “establish uniform standards for evaluating the several types of ballots that have prompted differing treatments.” *Id.* at 134–35 (Souter, J., dissenting).

<sup>128</sup> *Id.* at 113 (Rehnquist, C.J., concurring).

<sup>129</sup> *Id.* at 113–14.

<sup>130</sup> *Id.* at 114.

<sup>131</sup> *Id.* at 113.



not distinguish between state and federal elections. And he provided no clear standard of review, sometimes using deferential language but undertaking apparent de novo review of the state court's interpretation of the state law.

Moreover, despite Chief Justice Rehnquist's claim about the special significance of the statutory text, his argument was not purely textual. He pointed to the ECA's safe harbor provision providing that Congress would defer to preelection dispute procedures established by state law. He imputed a specific intent to the Florida legislature: a "desire to attain the 'safe harbor.'"<sup>132</sup> As a result, he concluded, if the Florida Supreme Court's preelection holding functioned to change the law from its preelection state—or even if "Congress might deem [it] to be" such a change<sup>133</sup>—that would infringe the federal constitutional power granted to the Florida legislature.<sup>134</sup> And he concluded that such (potential) disruption was precisely what had happened.<sup>135</sup>

The safe harbor provision informed his analysis in another way as well. One of the key statutory provisions in the Florida law gave courts overseeing election contests the "authority to provide relief that is 'appropriate under such circumstances.'"<sup>136</sup> And the Florida Supreme Court relied on these statutorily delegated "equitable powers" in ordering the manual recounts.<sup>137</sup> Chief Justice Rehnquist argued that these equitable powers were limited by an unstated legislative intent. Much as the Florida Supreme Court concluded that the scope of the Secretary's discretion to ignore late-arriving recounts might be different in presidential elections rather than in others, Chief Justice Rehnquist here explained: "Surely when the Florida Legislature empowered the courts of the State to grant 'appropriate' relief, it must have meant relief that would have become final by the cutoff date of" the ECA.<sup>138</sup> In other words, the scope of "appropriate relief" for

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<sup>132</sup> *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

<sup>133</sup> *Id.* at 113 (quoting *Palm Beach Cty.*, 531 U.S. at 78).

<sup>134</sup> *Id.* at 114.

<sup>135</sup> *Id.* at 120–21.

<sup>136</sup> *Id.* at 121 (quoting FLA. STAT. ANN. § 102.168(8) (Supp. 2001)).

<sup>137</sup> *Palm Beach Cty.*, 531 U.S. at 76 (quoting *Palm Beach I*, 772 So. 2d at 1240).

<sup>138</sup> *Bush*, 531 U.S. at 121 (Rehnquist, C.J., concurring). Ironically, the Florida Supreme Court agreed with this conclusion. The disagreement between that court and Chief Justice Rehnquist was based on a prediction about whether the recount it ordered could in fact be final by that deadline. And that uncertainty was created by the stay that the Supreme Court itself had issued. *See id.* at 135 (Souter, J., dissenting) (noting that "before this Court stayed the effort to [recount the ballots manually,] the courts of Florida were ready to do their best to get that job done").

presidential elections had to be informed by the operation of the ECA.

Only Justices Scalia and Thomas joined Chief Justice Rehnquist's opinion. Justices Kennedy and Sandra Day O'Connor, who were in the five-Justice majority, did not join or adopt his reasoning. All of the dissenters disagreed.<sup>139</sup> There was nothing close to a majority for the ISLT proposition that Chief Justice Rehnquist espoused.

### C. The 2020 Election

The 2020 presidential election was, we can only hope, unique in numerous ways. One way, of course, is that it took place in the midst of a global pandemic. In addition, as the election approached, the U.S. Postal Service appeared to be struggling with significant mail delays. As a result, state legislatures, executive officers, local election officials, and courts alike faced new and challenging questions about how to administer a free and fair election safely, while also complying with state and federal constitutional and statutory law.

Although the ISLT did not turn out to be decisive in any of the litigation surrounding the 2020 election, and although the

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<sup>139</sup> Justice John Paul Stevens, for example, dissenting and joined by Justices Ginsburg and Breyer, argued that “nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it.” 531 U.S. at 124 (Stevens, J., dissenting); *see also id.* at 130–33 (Souter, J., dissenting). Justice Stevens also took issue with Chief Justice Rehnquist's statutory interpretation, concluding that “the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes.” *Id.* at 124 (Stevens, J., dissenting). Justice Stevens rejected the notion that the Electors Clause “grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law.” *Id.* And finally, all four dissenters disagreed with Chief Justice Rehnquist's claim that the Florida court had essentially rewritten state law. *Id.* at 127–28; *id.* at 130–33 (Souter, J., dissenting).

Some proponents of the ISLT have suggested that Justice Souter “was somewhat more sympathetic to” it. *See, e.g.,* Morley, *ISLD and Elections*, *supra*, note 14, at 85. Indeed, Justice Souter did cite the Electors Clause and indicated that a constitutional issue might be presented if the Florida Supreme Court's reasoning “was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative Act in question.” *Id.* at 130–31 (Souter, J., dissenting). But he was quite explicit that disagreement about how to interpret a statute did not come close to meeting this standard of lawlessness, *id.* at 131–33, and he expressly reaffirmed the “customary respect for state interpretations of state law,” *id.* at 133. Nothing in Justice Souter's opinion provides support for Chief Justice Rehnquist's approach—evidenced by the fact that all of the other dissenters joined that portion of his opinion—much less for the even more extreme versions of the ISLT endorsed by some Justices during the 2020 election litigation.

Supreme Court issued no holdings regarding it, the ISLT nonetheless reemerged as salient and potentially potent in a variety of separate opinions. This subsection explores the ways the ISLT developed through that litigation, specifically focusing on cases that arose in Wisconsin, Pennsylvania, and North Carolina.

This Section first gives an overview of how different Supreme Court Justices offered maximalist visions of the ISLT that are more extreme and have much more disruptive implications even than Chief Justice Rehnquist's opinion in *Bush v. Gore*. Next, this Section describes the litigation from each state in some detail, highlighting the different versions of the ISLT that different Justices discussed. Finally, this Section describes the limited authority and justification that these Justices offered in their opinions.

### 1. Overview.

The versions of the ISLT that various Justices have described were even more extreme than Chief Justice Rehnquist's version in at least four important ways.

First, in Chief Justice Rehnquist's *Bush v. Gore* opinion, he identified a "legislative wish" to take advantage of the ECA's safe harbor,<sup>140</sup> and, as just discussed, part of his argument rested on an understanding of whether the relief ordered was "appropriate" within the meaning of the state law.<sup>141</sup> In other words, Chief Justice Rehnquist thought that for a presidential election, the scope of the court's discretionary equitable powers, expressly granted by the legislature, was implicitly limited by the ECA's time constraints. In 2020, the Justices who embraced the maximalist ISLT did not discuss whether the state legislatures might have any particular intent with respect to federal elections.

Second, at no time did Chief Justice Rehnquist so much as hint that there was a question of whether the state legislature's delegations to the executive and to the courts were improper. To the contrary, he acknowledged that "the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State and to state circuit courts."<sup>142</sup> Rather, the only issue with respect to those delegations was whether the Florida Supreme Court had properly construed them. In 2020,

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<sup>140</sup> *Bush*, 531 U.S. at 120–21 (Rehnquist, C.J., concurring) (quoting *Palm Beach Cty.*, 531 U.S. at 78).

<sup>141</sup> *Id.* at 121.

<sup>142</sup> *Id.* at 113–14 (citations omitted) (citing FLA. STAT. ANN. § 97.012(1) (2001)).

Justice Gorsuch twice—in litigation from Wisconsin and from North Carolina—hinted at limitations on such delegations.

Third, the controversy at issue in *Bush v. Gore* applied only to postelection counting of votes, and only for votes in the presidential election itself. As a result, there was no possibility that Chief Justice Rehnquist's Article II argument could lead to different rules for the operation of federal versus state elections that year. In contrast, all of the statutes at issue in 2020, and all of the legal disputes about them, applied to both state and federal elections without distinction, and the disputes arose before election day. None of the opinions discussing the ISLT acknowledged those facts or the disruption and confusion for election officials and voters alike that the ISLT might cause in that context.

Fourth, again because of the post-election posture of *Bush v. Gore* and the nature of the question before the courts, there were no meaningful reliance interests at stake, whether from voters, election officials, or candidates. There was no reason to think that any voters would have behaved differently if they knew how the votes would be counted after the fact.

None of this was true in the 2020 cases. No longer was there an effort to identify a reason why the legislature might have intended to limit its delegation to state courts, or for that matter, to other officials, with respect to federal elections. To the contrary, there were even hints that some delegations might themselves violate the ISLT. There was no meaningful discussion of what the state legislatures actually did or of what impact federal judicial rulings would have on election administration and on the significant reliance interests at stake. Instead, some of the Justices simply claimed that the Supreme Court could review, apparently *de novo*, any and all state court holdings with respect to federal elections for some kind of enhanced textualist statutory interpretation and for improper reliance on state constitutions.

All of the Justices who made these claims relied on Chief Justice Rehnquist's opinion, citing it as if it carried the weight of a holding, and some also cited the nonholding of *Palm Beach County*. Many of them cited the *McPherson* dicta favorable to their position. But they all failed to consider whether or why a state legislature that passed a single law governing elections would expect it to be reviewed and construed differently for state versus federal contests.

## 2. The cases.

a) *Wisconsin*. During the 2020 election, the first time that the Justices issued opinions discussing the ISLT was in litigation about absentee ballots in Wisconsin. Strictly speaking, the ISLT was not relevant to the issues presented, as the case arose in federal court and involved federal constitutional claims. Nonetheless, both Justice Gorsuch and Justice Brett Kavanaugh opined about it, hinting at an expansion of the theory.<sup>143</sup>

The case involved a district court injunction that extended the deadline for receipt of absentee ballots. Justice Gorsuch criticized the federal district court for “substitut[ing] its own election deadline for the State’s” due to the pandemic, even though the Wisconsin Elections Commission had made numerous efforts to make voting accessible, including sending absentee ballot applications to every voter over the summer.<sup>144</sup>

Although that initial point was unrelated to the ISLT, Justice Gorsuch then invoked the theory. Despite praising the Wisconsin Elections Commission’s actions in responding to the pandemic, Justice Gorsuch hinted at a potential delegation problem arising from his reading of the Elections Clause. “The 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.”<sup>145</sup> But even while hinting that the Commission may have exceeded its authority under the Federal Constitution, Justice Gorsuch did not acknowledge that the election at issue included state offices, to which even the most maximalist versions of the ISLT cannot apply. He likewise failed to acknowledge the chaos and confusion that might ensue were the ISLT to apply to such unified elections.

Justice Gorsuch also provided a political-accountability justification for the distinction between the legislatures and courts, though he did not expressly discuss other branches of state government—and this justification recurred in later opinions involving the 2020 election. “Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges

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<sup>143</sup> The Wisconsin case was pending in the Supreme Court at the same time as the Pennsylvania case. *Compare No. 20A66*, SUP. CT. OF THE U.S., available at <https://perma.cc/7YTG-UB6E> (Wisconsin), with *No. 20-542*, SUP. CT. OF THE U.S., available at <https://perma.cc/3EFD-LNYA> (Pennsylvania).

<sup>144</sup> *Democratic Nat’l Comm. v. Wis. State Legislature (DNC)*, 141 S. Ct. 28, 28–29 (2020) (Gorsuch, J., concurring in denial of vacatur of stay); see also *id.* at 29 (arguing that it was “indisputable that Wisconsin has made considerable efforts to accommodate early voting and respond to COVID”).

<sup>145</sup> *Id.* at 29 (emphasis added).

cannot,” he wrote.<sup>146</sup> “Legislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful.”<sup>147</sup>

Justice Gorsuch argued further that “Legislatures enjoy far greater resources for research and factfinding on questions of science and safety than” courts generally do.<sup>148</sup> And he noted that “[i]n reaching their decisions, legislators must compromise to achieve the broad social consensus necessary to enact new laws.”<sup>149</sup> Justice Gorsuch cited no authority to suggest that these reasons in fact motivated the Framers and no cases connecting these arguments to the ISLT.<sup>150</sup>

Justice Kavanaugh joined Justice Gorsuch’s concurrence, but he also wrote his own separate opinion, most of which focused on the relationship between the federal courts and state legislatures. He included a long footnote about the ISLT, however, quoting from and endorsing Chief Justice Rehnquist’s concurrence in *Bush v. Gore*.<sup>151</sup> He summed up his position: “[T]he text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.”<sup>152</sup>

In sum, what emerged from the Wisconsin litigation was not only a full-throated endorsement of Chief Justice Rehnquist’s claim that statutory interpretation itself can run afoul of the ISLT but also several new ideas. Justice Gorsuch in particular raised the possibility that some delegations to or exercises of discretion by elections administrators might also be unconstitutional and he articulated a new political accountability justification for the ISLT. And although Justice Kavanaugh noted that the ISLT

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *DNC*, 141 S. Ct. at 29.

<sup>150</sup> Justice Gorsuch was not the first to make some of these arguments. *See, e.g.*, Morley, *ISLD and Elections*, *supra* note 14, at 33 (arguing that “the Framers deliberately structured the Constitution to place ultimate responsibility for elections in the political branches of government”); *id.* at 34 (describing ISLD as “not an anomaly stemming from an ill-considered word in an isolated constitutional provision or two, but rather a component of a consistent, pervasive, institutional choice concerning the entities to be entrusted with ultimate authority over federal elections”); McConnell, *supra* note 32, at 661 (noting that Article II, § 1, clause 2 “puts the federal court in the awkward and unusual posture of having to determine for itself whether a state court’s ‘interpretation’ of state law is an authentic reading of the legislative will”).

<sup>151</sup> *DNC*, 141 S. Ct. at 34 n.1 (2020) (Kavanaugh, J., concurring in denial of vacatur of stay).

<sup>152</sup> *Id.*

would be relevant only to federal elections,<sup>153</sup> neither he nor Justice Gorsuch explored the implications of the ISLT when laws and regulations apply to both state and federal elections without distinction.

*b) North Carolina.* Unlike in Wisconsin, the litigation in North Carolina initially presented only state constitutional claims brought in state court, although—like in Wisconsin—the claims involved statutes that applied, without distinction, to federal and state elections. The state court litigation culminated in a settlement that was approved by a state trial court and that the state supreme court refused to disrupt. Nonetheless, legislators who were unhappy with the settlement invoked the ISLT in an attempt to persuade the federal courts—including the Supreme Court—to declare the settlement unconstitutional. The North Carolina litigation illustrates some of the complications that can arise if federal courts second-guess state court statutory construction and review not only of substantive election law but also of the assignment of authority to different state officials.

In June 2020, North Carolina Governor Roy Cooper signed the Bipartisan Elections Act,<sup>154</sup> which was intended, in part, to address the challenges of holding an election during the COVID-19 pandemic.<sup>155</sup> The legislation, for example, changed the witness requirement for an absentee ballot application from two witnesses to one.<sup>156</sup> It did not, however, change either the deadline for requesting an absentee ballot or the three-day-after-election-day deadline for receipt of completed ballots.<sup>157</sup>

On July 30, 2020, more than a month and a half after the Governor signed the revised election law, the U.S. Postal Service formally announced that it might be unable to timely deliver completed absentee ballots of voters who complied with all North Carolina requirements.<sup>158</sup> For this and other reasons, the North Carolina Alliance for Retired Americans, along with some individual plaintiffs, sued the Board of Elections in state court, alleging violations of the North Carolina constitution.

The plaintiffs sought a variety of types of relief, including an injunction extending the receipt deadline for absentee ballots.<sup>159</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> 2020 N.C. Sess. Laws § 2020-17.

<sup>155</sup> 2020 N.C. Sess. Laws § 2020-17.

<sup>156</sup> 2020 N.C. Sess. Laws § 2020-17.

<sup>157</sup> 2020 N.C. Sess. Laws § 2020-17.

<sup>158</sup> *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections (N.C. Alliance I)*, 2020 WL 10758664, \*1 (N.C. Super. Ct. 2020).

<sup>159</sup> Complaint, *N.C. Alliance I*, 2020 WL 10758664, at \*38–41.

They also asked for full elimination of the witness requirement for absentee voters in single-adult households, expansion of early voting opportunities, elimination of the existing signature-matching procedures, and elimination of the prohibition on assistance in applying for and returning absentee ballots.<sup>160</sup> After the lawsuit was filed, the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the State Senate intervened as of right,<sup>161</sup> as authorized by statute.<sup>162</sup>

In September 2020, the plaintiffs and the Board of Elections asked the state court to approve a consent order. One of the agreement's provisions required that absentee ballots postmarked by election day be accepted if they were received within nine days of the election, matching the received-by deadline for overseas and military voters.<sup>163</sup> The settlement also provided for drop boxes and for a "revised cure process" for absentee ballots.<sup>164</sup> As a condition of the settlement, the plaintiffs agreed to drop their remaining claims, which included claims for significant additional injunctive relief.<sup>165</sup>

The legislator-intervenors objected to the settlement and claimed that it could not be entered without their consent.<sup>166</sup> The state trial court disagreed and entered the settlement as a consent judgment.<sup>167</sup> The court noted that the plaintiffs had "agreed to forgo many of their demands,"<sup>168</sup> and it concluded both "that the plaintiffs are likely to succeed on the merits of their [state] constitutional claims" and that the settlement was "a compromise" and "not a product of collusion."<sup>169</sup> The trial court also held that entering the consent order was "in the public interest" because of the "strong public interest in having certainty in our elections

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<sup>160</sup> *Id.*

<sup>161</sup> *Wise v. Circosta*, 978 F.3d 93, 106 (4th Cir. 2020) (Wilkinson & Agee, J.J., dissenting).

<sup>162</sup> N.C. G.S. § 1-72.2(b) (establishing that the Speaker of the House and the President Pro Tempore of the Senate "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute" and can intervene as of right).

<sup>163</sup> *See N.C. Alliance I*, 2020 WL 10758664, at \*2.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Wise*, 978 F.3d at 106 (noting that the legislative intervenors "opposed entry of the decree"); *N.C. Alliance I*, 2020 WL 10758664, at \*4–5 (explaining that the legislative intervenors were not necessary parties and that their consent was not required for the entry of the consent decree).

<sup>167</sup> *N.C. Alliance I*, 2020 WL 10758664, at \*5.

<sup>168</sup> *Id.* at \*2.

<sup>169</sup> *Id.* at \*3.



procedures and rules” and that the order would “provide public confidence in the safety and security in this election.”<sup>170</sup>

The trial court also considered the authority of the Board of Elections to agree to the consent order and the authority of the legislator-intervenors to prevent its entry. North Carolina statutes gave the Board, “upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes.”<sup>171</sup> The trial court compared that authority to the statutory authority to intervene given to the legislators, concluded that the legislators were not “necessary parties,” and held that their consent was not necessary for the settlement.<sup>172</sup>

Finally, the trial court analyzed the Board’s substantive statutory authority to agree to the settlement’s modifications of election procedures. It cited the statutes that gave the Board discretion to “exercise emergency powers to conduct an election . . . where the normal schedule for the election is disrupted by a ‘natural disaster’” and concluded that the COVID-19 pandemic constituted such a disaster.<sup>173</sup> The court held that the settlement did not “enjoin any statutes” and “retain[ed] fidelity to the purpose behind these statutes.”<sup>174</sup>

The legislator-intervenors asked the state supreme court to stay the judgment pending appeal, but that court denied their petitions.<sup>175</sup> The U.S. Supreme Court also denied an application for a stay, although Justices Alito, Gorsuch, and Thomas indicated, without opinion, that they would have granted it as to the ballot receipt deadline.<sup>176</sup>

After the Board of Elections and the plaintiffs moved for entry of the consent judgment but before the trial court ruled, however, the same legislators who intervened in that case, along with a number of private plaintiffs, initiated a federal court action. Relying on both an ISLT argument and an equal protection claim,

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<sup>170</sup> *Id.*

<sup>171</sup> N.C. G.S. § 163-22.2 (2019). In 2021, the North Carolina legislature amended this provision to remove the settlement authority. *Id.* (amended 2021).

<sup>172</sup> *N.C. Alliance I*, 2020 WL 10758664, at \*4–5.

<sup>173</sup> *Id.* at \*4 (quoting N.C. G.S. § 163-27.1).

<sup>174</sup> *Id.* at \*2. The court described the purposes as counting all ballots marked in accordance with state law where later delivery was not the fault of the voter, ensuring a record of who returns absentee ballot so fraud investigations could be undertaken when necessary, and ensuring that absentee ballots are completed by the correct voters. *Id.*

<sup>175</sup> *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, 848 S.E.2d 496, 497 (N.C. 2020); *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, 848 S.E.2d 497, 498 (N.C. 2020).

<sup>176</sup> *Berger v. N.C. State Bd. of Elections*, 141 S. Ct. 658, 658 (2020).

they asked the federal district court to enjoin the Board of Elections from issuing the memoranda required by the settlement.<sup>177</sup> The federal district court declined to do so, as did the en banc Fourth Circuit (with three judges dissenting) and the Supreme Court.<sup>178</sup>

At the Supreme Court, Justice Gorsuch, joined by Justice Alito, dissented and wrote an opinion endorsing the maximalist ISLT. (Justice Thomas noted his dissent but did not write or join an opinion.) Justice Gorsuch accused the Board of Elections and the state court of “egregious” and collusive action, asserting that they had “worked together to override a carefully tailored legislative response to COVID.”<sup>179</sup> And he cited the intervention of the legislators as proof of this egregiousness, suggesting that they would not have intervened if the Board and the court had not overstepped.<sup>180</sup> He did not discuss the trial court’s explicit conclusion that the settlement was not the product of collusion.

Beyond questioning the state trial court and Board of Elections’ integrity and authority, Justice Gorsuch disagreed with the state court’s analysis of the statutory scheme and the authority that it gave the Board. He argued that the legislature had already concluded that the deadline change the Board agreed

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<sup>177</sup> See generally Complaint, *Wise v. N.C. Bd. of Elections*, No. 1:20-CV-00912, at 27–33 (M.D.N.C. 2020).

<sup>178</sup> *Moore v. Circosta*, 494 F. Supp. 3d 289, 331 (M.D.N.C. 2020) (*Moore I*); *Wise*, 978 F.3d at 102–03; *Moore II*, 141 S. Ct. 46, 46 (2020). The district court held that none of the plaintiffs had standing to challenge the Board of Elections’ actions, although it nonetheless analyzed the question and concluded that the Board had exceeded its statutory authority. *Moore I*, 494 F. Supp. 3d at 323–24 (standing analysis); *id.* at 325–31 (Board’s authority). The district court, however, rejected the plaintiffs’ argument that a delegation to the Board allowing it to act in contradiction to other, more specific statutes in an emergency would necessarily violate the Clauses, noting that it was appropriate for the legislature to delegate the ability to respond quickly in an emergency. *Id.* at 324–25. And although the district court found that some individual plaintiffs established a likelihood of success on equal protection claims unrelated to the ISLT, it did not issue an injunction because the court believed it to be too close to the election under *Purcell*, 549 U.S. 1 (2006). *Moore I*, 494 F. Supp. 3d at 315–22. The Fourth Circuit, in an en banc ruling with three dissenters, held that the legislators lacked standing for their ISLT claim and that, in any event, equitable relief was inappropriate so close to Election Day. See generally *Wise*, 978 F.3d 93.

<sup>179</sup> *Moore II*, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief). Justice Gorsuch said that their actions might be even worse than the Wisconsin federal court intervention, for which the Supreme Court had previously denied an application to vacate a stay issued by the Seventh Circuit. *Id.* (citing *DNC*, 141 S. Ct. at 28–30 (Gorsuch, J., concurring in denial of application to vacate stay)). He did not mention standing at all in his opinion. Justice Thomas also dissented, without explanation.

<sup>180</sup> *Id.* at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief).

to was “unnecessary”<sup>181</sup> when it declined to change it when making other changes to election law due to the pandemic, but he did not mention that those changes occurred before the U.S. Postal Service’s announcement. He also raised the issue of whether the legislature “could delegate its Elections Clause authority to” the Board, although he concluded that such delegation did not occur here.<sup>182</sup>

At no point did Justice Gorsuch mention the state trial court’s analysis of the statutory scheme giving the Board of Elections settlement authority. Although he argued that the statutory criteria for modifying election law—a “natural disaster” that “disrupted” “the normal schedule for the election”—were not met,<sup>183</sup> he did not acknowledge that the state trial court had considered that issue and concluded otherwise. Nor did he note that the state supreme court itself had declined to intervene. And he did not mention that the statutes at issue, and therefore the settlement, applied to both state and federal elections, and so did not consider the implications of his arguments for the state elections held simultaneously with the federal ones.

In other words, Justice Gorsuch construed the statutes *de novo*, announcing his view of what the phrases “natural disaster” and “normal schedule for the election is disrupted” mean,<sup>184</sup> without reference to other state statutes, to longstanding practice, or to the fact that the statute and settlement applied to both state and federal elections, much less to the holding of the state trial court, which he accused of colluding with the Board of Elections. On every point, however, there were significant counterarguments. As the Fourth Circuit pointed out, the Board of Elections regularly changes the deadline for receipt of absentee ballots in response to potential disruptions caused by hurricanes.<sup>185</sup> And while the COVID-19 pandemic may not have been a hurricane, there was ample support to consider it a natural disaster within the meaning of state law.<sup>186</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Moore II*, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief) (quoting *N.C.G.S.A.* § 163-27.1).

<sup>185</sup> *Wise*, 978 F.3d at 97 n.2.

<sup>186</sup> See *N.C.G.S.A.* § 166A-41 (implementing the Emergency Management Assistance Compact (EMAC), which authorizes participating states to assist each other in responding to “any emergency or disaster that is duly declared by the governor of the affected state or states, whether arising from *natural disaster*, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack” (emphasis added)); N.C. Exec. Order No. 130 (invoking EMAC as part of the

In his dissent, Justice Gorsuch again pointed to political accountability as a justification for the ISLT, and he also suggested that the state court's actions undermined the predictability that is particularly important for election law. He complained that the "constitutional overreach and . . . last-minute election-law-writing-by-lawsuit" exemplified in this case "do damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures."<sup>187</sup> But Justice Gorsuch did not consider whether the ISLT, in the form he appeared to embrace, was consistent with those values. To the contrary, he did not acknowledge that the Board of Elections decision to extend the deadline itself was a unanimous decision of a bipartisan board appointed by a popularly elected governor.<sup>188</sup> Nor did he consider whether the people of North Carolina would have expected their election statute to be construed by a Federal Supreme Court that insisted on reading it in a vacuum, devoid of any context and without regard to the views and actions of state election officials and judges. The "last-minute election-law-writing-by-lawsuit"<sup>189</sup> was his.

c) *Pennsylvania*. Pennsylvania revamped its election laws shortly before the pandemic. In October 2019, the legislature enacted a statute, known as Act 77, that "created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day."<sup>190</sup> As November 2020 approached, concerns emerged about how this new opportunity would be implemented in light of the pandemic and the

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state's response to COVID-19). It is true that the U.S. Postal Service problems were not themselves a natural disaster, but they were caused, at least in part, by the pressures of the pandemic.

<sup>187</sup> *Moore II*, 141 S. Ct. at 48.

<sup>188</sup> *Wise*, 978 F.3d at 97. See, e.g., Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1797 (2021) (discussing the 2020 litigation in North Carolina and arguing that "[i]t is hard to see how honoring the wishes of the two leaders of the unconstitutionally gerrymandered legislature [who filed suit in federal court] would have been a better approximation of the will of the people than adhering to the decision of the [bipartisan] officials appointed by the popularly elected governor").

<sup>189</sup> *Moore II*, 141 S. Ct. at 48.

<sup>190</sup> *Pa. Democratic Party v. Boockvar (Boockvar I)*, 238 A.3d 345, 352 (Pa. 2020) (citing 25 P.S. §§ 3150.11–3150.17).

problems with the post office.<sup>191</sup> Litigation ensued over how to construe and apply the statute, in particular provisions relating to expanded opportunities for absentee voting.<sup>192</sup>

As already explained, the Pennsylvania Supreme Court concluded that the state constitution required it to extend the deadline for receipt of absentee ballots. The Supreme Court, splitting 4–4 during the period between Justice Ginsburg’s death and Justice Amy Coney Barrett’s confirmation, denied a stay.<sup>193</sup> In a subsequent opinion, Justice Alito, joined by Justices Thomas and Gorsuch, accused the state court of significant overreach:

The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.<sup>194</sup>

In other words, Justice Alito accused the Pennsylvania Supreme Court of completely substituting its own policy judgment for the legislature’s under the guise of judicial review, although he did not note that the Pennsylvania Supreme Court had not interpreted the statute as the plaintiffs requested across the board.<sup>195</sup>

Once the election was over, the Supreme Court denied certiorari in the Pennsylvania case.<sup>196</sup> The same three Justices dissented from the decision. Justice Alito, joined by Justice Gorsuch, reiterated his complaint about the Pennsylvania Supreme Court usurping the role of the legislature. Noting what he called “the breadth” of the state court’s decision, Justice Alito described it as “claim[ing] that a state constitutional provision guaranteeing

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<sup>191</sup> See Jonathan Lai & Ellie Rushing, *USPS Says Pennsylvania Mail Ballots May Not Be Delivered on Time, and State Warns of ‘Overwhelming’ Risk to Voters*, PHILA. INQUIRER (Aug. 16, 2020), <https://perma.cc/8JQ2-QVE6>.

<sup>192</sup> See generally, e.g., *Boockvar I*, 238 A.3d 345; Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

<sup>193</sup> See *supra* note 6.

<sup>194</sup> *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (*Boockvar II*) (Alito, J., statement).

<sup>195</sup> The Pennsylvania Supreme Court rejected the plaintiffs’ requests to order county election boards to provide voters with notice and an opportunity to cure technical defects, like using the wrong ink color or failing to use both the required inner and outer envelopes, or to provide the inner envelopes themselves. *Boockvar I*, 238 A.3d at 374–80 (citing 25 P.S. §§ 3146.6(a), 3150.16(a)).

<sup>196</sup> *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021).

‘free and equal’ elections gives the Pennsylvania courts the authority to override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections.”<sup>197</sup> Again, Justice Alito did not discuss Pennsylvania precedent construing its “free and equal”<sup>198</sup> elections clause, did not consider the implications of the same statute applying to both state and federal elections, and did not consider whether the legislature had disavowed the state constitutional limitation, for federal elections only, when it passed Act 77.

Justice Thomas echoed Justice Alito’s argument about the Pennsylvania court, as well as, by implication, other bodies: “[B]oth before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules.”<sup>199</sup> He complained that the Pennsylvania Supreme Court was “[d]issatisfied” with the “unambiguous” election day deadline so decided “to rewrite the rules.”<sup>200</sup> He criticized the Pennsylvania court’s reliance on what he called a “vague clause” in the state constitution.<sup>201</sup> And he highlighted the problems caused by a lack of predictability and clear rules established ahead of time. “Unclear rules . . . sow confusion and ultimately dampen confidence in the integrity and fairness of elections,” he said, which is why the Supreme Court has “repeatedly . . . blocked rule changes made by courts close to an election.”<sup>202</sup> When it is unclear who has the authority to set the rules, “voters may not know which rules to follow” and “[e]ven worse . . . competing candidates might each declare victory under different sets of rules.”<sup>203</sup> But Justice Thomas did not consider whether the maximalist ISLT itself might lead to such problematic results.<sup>204</sup>

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<sup>197</sup> *Id.* at 739 (Alito, J., dissenting from denial of certiorari).

<sup>198</sup> *Id.* at 739.

<sup>199</sup> *Id.* at 732 (Thomas, J., dissenting from denial of certiorari).

<sup>200</sup> *Id.* at 732–33.

<sup>201</sup> *Degraffenreid*, 141 S. Ct. at 733.

<sup>202</sup> *Id.* at 734.

<sup>203</sup> *Id.* at 734.

<sup>204</sup> To be fair, Justice Thomas’s arguments about uncertainty addressed, in part, why he thought that the Court should have granted certiorari to clarify the relative authority of state legislatures. *Id.* at 735–37. But he relied on and promoted the maximalist ISLT—elimination of state courts’ authority over the construction and review of laws governing federal elections. *Id.* at 732–35. And like Justice Alito, Justice Thomas did not acknowledge the many ways in which the Pennsylvania Supreme Court had denied relief to the plaintiffs.

### 3. Limited support and extreme positions.

The Justices—Thomas, Alito, Gorsuch, and (to a lesser extent) Kavanaugh—who appeared to endorse the maximalist ISLT during 2020 relied on limited authority, expressed no hesitation about their positions, and failed to acknowledge any counterarguments or potential disruption were their views to become law. They did, of course, cite and quote the Elections and Electors Clauses’ assignment of authority and responsibility to states through their legislature.<sup>205</sup> Justice Thomas quoted dicta from *McPherson*, though he overstated its weight and did not acknowledge the case’s contradictory language.<sup>206</sup> Some of them cited *Palm Beach County* with no meaningful discussion of its precedential weight, or lack thereof.<sup>207</sup> None of them discussed any other historical evidence or acknowledged the longstanding practices described above, nor did they suggest that any additional information could affect their views.

And of course, the ISLT-endorsing Justices in these cases relied in part on Chief Justice Rehnquist’s concurrence in *Bush v. Gore*, even as they also went beyond it.<sup>208</sup> Unlike Chief Justice Rehnquist, they did not consider legislative intent, so they did not address whether the legislatures intended to allow for different interpretations of the same statute with respect to federal and state elections or for different conclusions about their constitutionality—or whether, in contrast, the legislatures incorporated by reference state constitutional law and statutory interpretation practices and precedents. Unlike Chief Justice Rehnquist, who accepted that the legislature could delegate authority, Justices in the 2020 litigation hinted at limitations on such delegation. And

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<sup>205</sup> *DNC*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay) (“Nothing in our founding document contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court’s decisions.”); *Moore II*, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief); *Boockvar II*, 141 S. Ct. 1, 1 (2020) (Alito, J., statement).

<sup>206</sup> *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari) (noting that the Federal “Constitution ‘operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power’ to regulate federal elections” (alteration in original) (quoting *McPherson*, 146 U.S. at 25)); see also *DNC*, 141 S. Ct. at 34 n.1 (Kavanaugh, J. concurring in denial of application to vacate stay) (citing *McPherson*, 146 U.S. at 25).

<sup>207</sup> *Degraffenreid*, 141 S. Ct. at 738–39 (Alito, J., dissenting from denial of certiorari); *DNC*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay); *Boockvar II*, 141 S. Ct. at 1 (Alito, J., statement).

<sup>208</sup> *DNC*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay); *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari).

these Justices engaged in apparent de novo textualist interpretation of state statutes, in some cases without even acknowledging that state courts had reached different conclusions about the meaning of the same laws. The following Part explores the far-reaching and disruptive implications of this approach in more detail.

## II. CONSTRUING ELECTION LAW

### A. Skipping Statutory Interpretation

In all of the 2020 cases, the ISLT-embracing Justices skipped the crucial question of statutory interpretation. They entirely failed to address what the state legislatures actually did when they passed election laws. Instead, they assumed that the legislatures eschewed state constitutional limitations, state law precedent, and longstanding state law methodology about statutory interpretation.

Even if the Elections and Electors Clauses give legislatures the power, under the Federal Constitution, to reject state constitutional limitations and other aspects of state law when regulating federal elections, that does not mean they have in fact done so.<sup>209</sup> To the contrary, if they have the power to reject those aspects of state law, they surely also have the power to incorporate them into the election law statutes they enact. The Justices' failure to consider that possibility is particularly remarkable given the political accountability justification for the ISLT. If, as Justice Gorsuch argued, "[l]egislators can be held accountable by the people for the rules they write or fail to write,"<sup>210</sup> then it is crucial that the people know what those rules actually are.<sup>211</sup>

But by failing to take the first statutory interpretation step, the Justices are endorsing an ISLT that *presumes* that state legislatures are imposing election laws on federal elections that would be unconstitutional under their state constitutions—and *that the legislatures are doing so absolutely silently*.

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<sup>209</sup> Cf. Amar & Amar, *supra* note 27, at 38 (arguing that state legislatures incorporate state constitutional law, especially when they mandate unified elections for state and federal offices).

<sup>210</sup> *DNC*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay).

<sup>211</sup> Cf. Levitt, *supra* note 34, at 1058 (describing the failure to ask this question as "the use of a decoding system different from the encoding engine the legislature used in the first place").



This problem is even more acute when it comes to laws that apply to federal and state elections without distinction. State legislatures unquestionably cannot reject state constitutional constraints with respect to the laws governing state elections. But the maximalist ISLT appears to presume that even where a law violates the state constitution and so must be struck down as to state elections, it must remain in effect for federal contests. In other words, when the same laws govern both federal and state elections, the ISLT presumes that the legislatures have—again silently—decided to allow for the possibility that different rules will govern the two types of elections. Likewise, the maximalist ISLT presumes that the legislatures passed statutes that they understood might be construed differently as to federal and state elections. These presumptions, implicit in the maximalist versions of the ISLT, will inevitably undermine political accountability and create confusion for election officials and voters.<sup>212</sup>

The historical record is devoid of support for such presumptions. I am not aware of a single example of a state or federal court interpreting or reviewing the same state law differently as to state versus federal elections. As already noted, in the tiny number of cases in which state supreme courts *have* allowed state legislatures to regulate federal elections differently from state elections under state constitutions, the laws in question applied expressly and exclusively to federal elections, not state elections.<sup>213</sup> As also discussed earlier, since the Founding, state constitutions have constrained legislative choices with respect to federal elections.<sup>214</sup> As recently as 2019, the Supreme Court itself acknowledged the validity of state constitutional restraints on congressional redistricting.<sup>215</sup> That state constitutions apply to *all*

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<sup>212</sup> There are other reasons to doubt the claim that the ISLT is justified by democratic accountability. See Seifter, *supra* note 188, at 1796 (arguing that, in 2020, the states in which the ISLT arose were states with highly gerrymandered countermajoritarian legislatures); *id.* at 1797 (discussing the 2020 litigation in North Carolina); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. (forthcoming) (manuscript at 20) (available at <https://perma.cc/YX2J-Q8PU>) (arguing that the self-interest and “biases that plague legislative processes are at least as strong, if not stronger, in the election context”); *id.* at 21 (noting scholarship establishing ways that legislators use election rules to entrench themselves in power). And the emergence of remarkably effective and durable partisan gerrymandering enabled by mapping software and extensive data about voters likewise weakens McConnell’s pro-ISLT argument that legislatures act under a veil of ignorance while courts often do not, at least in the context of redistricting. McConnell, *supra* note 32, at 662.

<sup>213</sup> See *supra* notes 54–59.

<sup>214</sup> See *supra* notes 43–49.

<sup>215</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019); *id.* at 252 (Kagan, J., dissenting); see also *AIRC*, 576 U.S. 787, 793 (2015).

state election law is, to put it mildly, a widespread baseline assumption.

The same is true of other issues related to state law, including the types of equitable powers that state courts have, the appropriate delegation of discretion and election law interpretation to both election officials and courts, and states' established doctrines of statutory interpretation.<sup>216</sup> Even if the state legislature *could* constitutionally reject all of that, the question remains whether it in fact did so. The ISLT, particularly in its most extreme forms, ignores that question entirely.

## B. Demanding Textualism

Much of the discussion of the ISLT focuses on whether state constitutions can constrain state legislatures' regulation of federal elections, but some of the issues in the 2020 election litigation turned on more ordinary questions of statutory interpretation. In the North Carolina case, for example, Justice Gorsuch reviewed statutory language authorizing the state Board of Elections to issue certain types of regulations and concluded that the Board had exceeded that authority.<sup>217</sup> And he did so even though the state trial court came to the opposite conclusion and the state supreme court declined to intervene. Justice Gorsuch, and other proponents of a maximalist ISLT, have thus "prescribed the unusual role for the Supreme Court of deciding whether a state court properly interpreted state law,"<sup>218</sup> and doing so apparently with *de novo* review.

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<sup>216</sup> Such questions have been front and center in *Moore*, 142 S. Ct. 2901, since the first Supreme Court filings in the case. Although *Moore* involves congressional redistricting, and so does not raise the problems present with statutes that apply to both federal and state elections, there are still questions of statutory interpretation. Not only are there questions about whether the legislature incorporated the state constitution by reference when enacting the maps, but as the respondents argued in their opposition to the application for a stay, state law expressly authorizes state courts to hear constitutional challenges to congressional districting. See, e.g., Harper Respondents' Response in Opposition to Emergency Application, *Moore*, No. 21A455, at \*2–6 (Mar. 2, 2022) (citing N.C. Gen. St. §§ 1-267.1(a), 1-81.1(a), and 120-2.4(a), (a1), (b), 120-2.3). Petitioners argue in response that the statutes in question are civil procedure statutes that do not affirmatively authorize state courts to hear state constitutional challenges to congressional districts but instead contemplate, in part, the procedures for federal constitutional challenges. Reply in Support of Emergency Application for Stay Pending Petition for Certiorari, *Moore v. Harper*, No. 21A455, at \*18–20 (Mar. 3, 2022). Normally, such questions of interpretation of state laws are definitively left up to state courts.

<sup>217</sup> *Moore II*, 141 S. Ct. 46, 47–48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief).

<sup>218</sup> Robert A. Schapiro, *Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie*, 34 LOY. U. CHI. L.J. 89, 93 (2002).

Chief Justice Rehnquist took a similar but more modest position, and in the 2020 election opinions, the ISLT Justices went further than he had in staking out the federal courts' role. Recall that Chief Justice Rehnquist, although claiming that the Electors Clause gave the "text of the election law itself . . . independent significance,"<sup>219</sup> imputed a specific intent to the legislature to take advantage of the ECA's safe harbor. The more recent statements of the Justices, however, suggest that at least some of them are claiming that the Clauses empower—indeed require—federal courts to engage in *de novo* textualist construction of state election law, without regard to legislative intent, as they complain about "nonlegislative officials . . . rewrit[ing]" statutes.<sup>220</sup>

But the choice between textualism and purposivism is a contested jurisprudential one.<sup>221</sup> Many states have law—sometimes embodied in statutes—*requiring* courts to engage in purposivist statutory construction in at least some circumstances.<sup>222</sup> The maximalist ISLT appears to reject this approach as a matter of federal constitutional law.

Justice Gorsuch's opinion in the North Carolina case provides one example of how the Court might entirely override a state court interpretation of the state's own statute while failing to engage with the state's own legal framework or the state court's analysis. But there are other potential examples. Take, for example, an issue in the Pennsylvania litigation that the parties did not bring to the Supreme Court, but that, under a maximalist ISLT, would be ripe for such an appeal. The 2019 statute, which applied without distinction to federal and state elections, provided that an absentee voter must either return a ballot by mail or "deliver it in person to [the] county board of election."<sup>223</sup> The plaintiffs sought a declaration that this provision allowed county boards to set up "as many secure and easily accessible locations

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<sup>219</sup> *Bush*, 531 U.S. at 113.

<sup>220</sup> *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732–33 (2021) (Thomas, J., dissenting from denial of certiorari).

<sup>221</sup> See Schapiro, *supra* note 218, at 108–09; Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 720–21 (2001); Amar & Amar, *supra* note 27, at 29 n.71, 44, 48–49. As Professors Leah Litman and Kate Shaw note, this rejection ignores the fact that textualists have long pointed to the lawmaking process laid out in the Federal Constitution as justification for their approach, but states are not bound by those provisions. Litman & Shaw, *supra* note 38, at 13–16. Moreover, textualism itself does not provide anything close to the predictability that its proponents claim. *Id.* at 12–13 (documenting examples of inconsistency); *id.* at 12 n.59 (listing scholarship documenting textualism's problems).

<sup>222</sup> See, e.g., 1 Pa.C.S. § 1921(a).

<sup>223</sup> 25 P.S. § 3150.16(a).

to deliver personally their mail-in ballots as each board deems appropriate.”<sup>224</sup> Other parties (and intervenors) argued that the language meant that the only place a voter could deliver a ballot was to a board’s official office.<sup>225</sup>

The Pennsylvania Supreme Court concluded first that the statutory language was ambiguous.<sup>226</sup> “Accordingly,” the court explained, “we turn to interpretive principles that govern ambiguous statutes generally and election matters specifically.”<sup>227</sup> The court pointed to the Pennsylvania Statutory Construction Act in which the legislature itself directed the courts that “[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.”<sup>228</sup> The Act also contains “a comprehensive list of specific factors” that the courts should turn to if the statutory text is unclear.<sup>229</sup> And the court expressly mentioned some of those factors, including “the occasion and necessity for, the mischief to be remedied by, and the object to be obtained by the statute.”<sup>230</sup>

The court also noted both “the longstanding and overriding policy in this Commonwealth to protect the elective franchise”<sup>231</sup> and its conclusion, dating back to at least 1965, that “the Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.”<sup>232</sup> Relying on those principles, the court held that the statute “should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including dropboxes.”<sup>233</sup> It explained: “This conclusion is largely the result of the clear legislative intent . . . to provide electors with options to vote outside of traditional polling places.”<sup>234</sup>

When the GOP petitioned for certiorari in this litigation, it did not challenge this holding. But as the maximalist ISLT has reemerged, it is not hard to imagine what such a challenge would look like. The plaintiffs would argue first that the statute was not

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<sup>224</sup> Pa. Democratic Party v. Boockvar (*Boockvar I*), 238 A.3d 345, 357 (Pa. 2020)

<sup>225</sup> *Id.* at 358–59.

<sup>226</sup> *Id.* at 360.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 355–56 (quoting 1 Pa.C.S. § 1921(a)).

<sup>229</sup> *Boockvar I*, 238 A.3d at 356.

<sup>230</sup> *Id.* at 361 (citing 1 Pa.C.S. § 1921(c)(1), (3), (4)).

<sup>231</sup> *Id.* at 360–61 (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)).

<sup>232</sup> *Id.* at 356 (citing *Perles v. Hoffman*, 213 A.2d 781, 784 (Pa. 1965)).

<sup>233</sup> *Id.* at 361.

<sup>234</sup> *Boockvar I*, 238 A.3d at 361. On this issue, the court split 5–2. *See id.* at 392 (Saylor, J., concurring and dissenting).

ambiguous.<sup>235</sup> And even in the case of ambiguity, the challenger could argue that the state court's purposivist approach to resolving the ambiguity and its reliance on legislative intent—despite the Pennsylvania statute that the legislature itself passed instructing courts to use that approach—were improper because under the maximalist ISLT, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”<sup>236</sup> And the challenge might suggest that state law precedent construing the Election Code is irrelevant for purposes of construing the statute's application to federal elections. Under the maximalist ISLT, then, federal courts would be encouraged (perhaps even required) to ignore states' statutory construction statutes, legal precedent, practices, and conventions, all of which legislatures, as well as courts, rely on, and which may render a purely textualist reading of a statute inappropriate even given unusual deference to the legislature.

Ignoring all of these sources of legal meaning could have astonishing and chaotic results. *Boockvar*<sup>237</sup> again provides an example. In the Supreme Court, the crux of the GOP's claims was that the Pennsylvania Supreme Court rewrote Act 77 by extending the received-by deadline. As part of that argument, the GOP pointed to the Act's nonseverability clause.<sup>238</sup> That clause identified a number of specific provisions as “nonseverable” and stated: “If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.”<sup>239</sup> Because the Pennsylvania court had concluded that the received-by deadline could not function constitutionally under the circumstances of the 2020 election, the GOP argued, it should have struck down the entire mail-in voting regime.<sup>240</sup>

A purely textualist reading of this provision might come to the same conclusion.<sup>241</sup> But a deeper knowledge of state law

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<sup>235</sup> Cf. *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519, 540–41 (Wis. 2022) (construing a comparable Wisconsin statute to unambiguously prohibit drop boxes). See *supra* note 221 for a discussion of textualism's lack of certainty.

<sup>236</sup> *Bush v. Gore*, 121 S. Ct. 525, 534 (Rehnquist, C.J., concurring).

<sup>237</sup> 141 S. Ct. 643 (*Boockvar II*) (2020).

<sup>238</sup> *Petition for Certiorari, Republican Party of Pa. v. Boockvar*, No. 20-542, at \*22.

<sup>239</sup> 2019 Pa. Laws 552, at § 11.

<sup>240</sup> *Petition for Certiorari, Republican Party of Pa. v. Boockvar*, No. 20-542, at \*6–7, \*22; see also *Amicus Curiae Brief of Honest Elections Project, Republican Party of Pa. v. Boockvar*, No. 20-542, at \*15.

<sup>241</sup> One cert-stage amicus brief, from the state of Missouri and nine other states, described the statutory provision as “an admirably clear severability clause that was enacted by the Pennsylvania legislature for the very purpose of *preventing* Pennsylvania courts

demonstrates that the story is not so simple. First, the Pennsylvania courts do not automatically apply nonseverability clauses as written. In fact, in 2006, the Pennsylvania Supreme Court refused to give force to a nonseverability clause with *identical language* to Act 77.<sup>242</sup> There, the court concluded that the clause exceeded the legislature's authority largely because of the "separation of powers concerns" that arise when the legislature attempts to influence the outcome of a judicial proceeding.<sup>243</sup> The court reasoned that where a nonseverability clause is designed to deter the judiciary from finding statutory provisions unconstitutional—that is, from doing its job—by making the consequences of doing so terrible, the clause should not necessarily be enforced.<sup>244</sup>

Thus, under precedent dating back more than a decade, the Pennsylvania legislature knew that Act 77's nonseverability clause would not automatically be enforced. Nor did the legislature claim to be invoking the ISLT to override the 2006 holding. To the contrary, because Act 77 applied equally to state and federal elections—elections that occur simultaneously—the strongest inference is that the legislature expected the statute, nonseverability clause and all, to apply and be interpreted identically to both.

Second, in the same litigation, the Pennsylvania Supreme Court appeared to distinguish its well-established equitable powers to make adjustments to election procedures in the face of a natural disaster<sup>245</sup>—which under Pennsylvania law included the pandemic—from a holding that the statute was unconstitutional as applied.<sup>246</sup> As a result, the court concluded that the nonseverability clause was not implicated at all.

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from making such post-hoc changes to Pennsylvania's mail-in voting system." Amicus Brief of Missouri et al., *Republican Party of Pa. v. Boockvar*, No. 20-542, at \*5 (emphasis in original). But that description of the statute begs the question of what the legislature actually meant and, more specifically, whether it in fact enacted the clause expecting that the courts would apply it without reference to existing contrary precedent.

<sup>242</sup> *Stilp v. Commonwealth*, 905 A.2d 918, 973 (Pa. 2006) (citing 2005 Pa. Laws 201, at § 6).

<sup>243</sup> *Id.* at 979–80.

<sup>244</sup> *Id.* In other words, the Missouri amicus brief described precisely the kind of legislative attempt to stop the judiciary from honestly and thoroughly assessing a law's constitutionality that the Pennsylvania Supreme Court had previously concluded violated the state's separation of powers principles. See *supra* note 241

<sup>245</sup> *Boockvar I*, 238 A.3d at 370 (citing *Friends of Devito v. Wolf*, 227 A.3d 872, 888 (Pa. 2020)).

<sup>246</sup> *Id.* at 366, 369–71; see also *id.* at 397 n.4 (Donohue, J., concurring and dissenting) (disagreeing with the particular remedy but concluding that "the election specific remedies

Third, at least three Pennsylvania Supreme Court justices believed that strict application of the nonseverability clause to strike down the entire law “would itself be unconstitutional [under the state constitution], as it would disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election.”<sup>247</sup>

And finally, application of the nonseverability clause would have had much further-reaching effects than the petition for certiorari acknowledged. In the Supreme Court, the petitioners described the election-day deadline as part of a bipartisan compromise that the clause was designed to preserve.<sup>248</sup> But the deal that was struck in the legislature had little to do with the receipt date. Instead, the legislation embodied a three-way agreement with an entirely different focus. It provided a funding mechanism for new voting machines that had a paper trail, which the Department of State had mandated; it provided for no-excuse mail-in voting, which was sought by Democrats; and it eliminated straight-ticket voting, which Republicans badly wanted.<sup>249</sup> So if the nonseverability clause were applied literally, *all* of those provisions would have been eliminated,<sup>250</sup> for federal elections only, less than seven weeks before the election.<sup>251</sup>

The chaos and confusion that would ensue under such circumstances make the argument that the nonseverability clause was designed to deter meaningful judicial review or equitable relief particularly strong, thus making the Pennsylvania court’s refusal to give effect to it entirely consistent with longstanding state law. And indeed, although the Pennsylvania justices did not agree on everything, they were unanimous on two important points: (1) the absentee ballot application and return deadlines could not

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at issue here” are not an “as-applied constitutional violation [ ] triggering the draconian consequence” of the nonseverability clause).

<sup>247</sup> *Id.* at 397 n.4 (Donohue, J., concurring and dissenting)

<sup>248</sup> Petition for Certiorari, Republican Party of Pa. v. Boockvar, No. 20-542, at \*6–7.

<sup>249</sup> See, e.g., Jonathan Lai, *Pa.’s Election System Is on the Verge of the Largest Changes in Decades — In Time for the 2020 Election*, PHILA. INQUIRER (Oct. 23, 2019), <https://perma.cc/5QRF-ZLJV>.

<sup>250</sup> The funding mechanism for new voting machines appears in a section of the statute not expressly listed as nonseverable. See 2019 Pa. Laws 552, at §§ 11.3.1, 11. But the second sentence of the nonseverability clause—the language at issue in 2006—ostensibly applied to the entire statute. *Id.* at § 11.

<sup>251</sup> Under some versions of the ISLT, having struck down the statute, the state court would be powerless to impose any other remedy as to federal elections. See, e.g., Derek Muller, *Rucho v. Common Cause and a Weak Version of the Claims in the North Carolina Partisan Gerrymandering Dispute*, ELECTION L. BLOG (Mar. 8, 2022), <https://perma.cc/SLQ5-QBTY>.

operate constitutionally under the circumstances, and (2) whatever remedy the court imposed (about which they did disagree), the nonseverability clause would not apply.

None of this is to say that the Pennsylvania Supreme Court's decision and reasoning were unassailable. Instead, the point is that the law of any particular state may be complicated and nuanced in ways that legislators and state courts are well aware of but that may not be apparent on the face of a statute. When U.S. Supreme Court Justices accuse state courts of rewriting election laws, then, relying on their own narrow textualist methodology, they have it exactly backwards. And both political accountability and predictability are undermined when federal judges ignore the likelihood that state legislators—and their constituents—understood election laws to incorporate established state law.<sup>252</sup>

This danger is exacerbated when the Supreme Court rules on the shadow docket and in the absence of full briefing. Indeed, it is exacerbated even when individual Justices issue separate opinions without full briefing, as they may stake out positions that they are later reluctant or embarrassed, consciously or not, to back off of. In the heat of election litigation, issues may go undeveloped. As described in the next Part, the Court runs the risk of irreparable damage to state law, and to itself, if it embraces the maximalist ISLT, especially under such circumstances.

### III. CONSEQUENCES

Not only have the proponents of the ISLT skipped the first, essential statutory interpretation question before proceeding to claim significant new federal judicial authority, but they also ignore numerous serious disruptions to state law and the predictable operation of elections that might ensue from unrestrained federal intrusion on state election law. This Part explores some of these consequences. Part III.A addresses practical consequences for election officials, candidates, and voters. Part III.B takes on the consequences for federalism of a maximalist ISLT, and Part III.C does the same for issues of democracy and institutional legitimacy.

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<sup>252</sup> Cf. Marisam, *supra* note 212, at 20 (noting that the ISLT has the ironic effect of “diminish[ing] the role of the more accountable state judges, while elevating the role of the less accountable federal judges”); *id.* at 22 (discussing the Pennsylvania case).



### A. Practical Disruptions

This Article has already noted many of the practical disruptions that might ensue from a maximalist ISLT, but this Section engages those questions in more depth. It focuses first on just how disruptive the ISLT would be when it inevitably leads to different rules for state elections as opposed to federal ones, turning then to the lack of finality and certainty the ISLT might bring, and, finally, addressing the disruption to election administration if delegations to nonlegislative officials are construed narrowly or even prohibited.

#### 1. Dual systems.

As discussed in the prior Part, when a state legislature enacts a law that applies to state and federal elections without distinction, federal courts should presume that the legislatures incorporated state constitutional law and state law precedent and conventions. The alternative is deeply problematic as a practical matter. Under the ISLT, if a state court finds some or all of a statute unconstitutional under the state constitution, the statute would still apply to federal elections. Likewise, a federal court might disagree with the state court's construction of a statute that applies to both state and federal elections, leading to two different sets of rules.

In some situations, these inconsistent holdings could be confusing and might disrupt voters' expectations, but they would not be impossible to administer. Election officials could segregate absentee ballots arriving after election day, for example, and could count votes on those ballots for state offices but not for federal ones. In fact, Pennsylvania was prepared to do just that in 2020.<sup>253</sup>

But other situations would be substantially more complicated. If, for example, a state court struck down voter identification requirements as violating the state constitution, election officials would be prohibited from enforcing them with respect to state elections. The ISLT would nonetheless require the state to keep the requirements in force for federal elections. That legal inconsistency would, at a minimum, require costly administrative

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<sup>253</sup> Pennsylvania Chief Deputy Attorney General J. Bart DeLone, *RE: Republican Party of Pa. v. Kathy Boockvar, Secretary of Pa., et al., COMMONWEALTH OF PA. OFF. OF ATT'Y GEN.*, <https://perma.cc/7F5Q-LHQF>.

duplication and create confusion for election officials and voters alike.<sup>254</sup>

The ISLT might also prevent state courts from appropriately managing election-related litigation or would place those courts in an impossible catch-22, even where the litigation does not expressly involve federal elections. For example, the ISLT could cause disruption in cases involving state constitutional challenges to state legislative redistricting, even though the ISLT does not apply directly in those contexts. The disruption would come at the remedy stage. Once a court concluded that state legislative maps were unconstitutional, new maps would need to be drawn. And because the creation of new maps takes time, the primary election for those state legislative offices might not be able to occur on the date originally set by statute—a statute that might well also provide that the primary be for all state and federal offices. In other words, the state court would have to consider whether to move the date of the primary or sever the state and federal elections.<sup>255</sup> And under the ISLT, both of those outcomes would be improper.

## 2. No finality.

The ISLT invites claims, even years after the fact, that a state court decision construing or striking down an election law violated the Elections and Electors Clauses, a possibility made all the more likely by the recent emergence of the ISLT as a viable legal argument.<sup>256</sup> To be concrete, consider recent litigation in New Hampshire.

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<sup>254</sup> Professor Justin Levitt provides an example. Tennessee had a statute imposing a five-minute voting limit, which a state court construed as hortatory, requiring election officials to count ballots even when voters took longer. *Stuart v. Anderson Cnty. Election Comm'n*, 300 S.W.3d 683, 688 (Tenn. Ct. App. 2009). Applying the text strictly to federal elections but not to state elections would be problematic at best. Levitt, *supra* note 34, at 1059.

<sup>255</sup> See Emergency Application, *Toth v. Chapman*, No. 21A457, at \*24–26 (2022) (arguing that Pennsylvania Supreme Court could not change the primary schedule due to the ISLT).

<sup>256</sup> See Krass, *supra* note 27, at 115–20 (discussing the changed landscape regarding Elections Clause challenges to state legislative delegations of election law and comparing *Baldwin v. Cortes*, 378 F. App'x 135, 138–39 (3d Cir. 2010) (rejecting a delegation challenge), with more recent cases).

In 2017, the New Hampshire legislature enacted a law, known as SB 3, that amended the state's voter registration process.<sup>257</sup> The new law applied to all elections and made no distinction between federal and state offices. The state Democratic Party and the League of Women Voters, along with six individual plaintiffs, sued, alleging that the new registration requirements were confusing and unduly onerous, particularly when combined with significantly increased civil and criminal penalties.<sup>258</sup> They brought only state law claims, alleging that SB 3 violated Part I, Article 11, of the state constitution, which states in relevant part: "All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election."<sup>259</sup>

The trial court denied the state's motion for summary judgment, which claimed that the plaintiffs could not show that SB 3 was facially unconstitutional.<sup>260</sup> More specifically, the trial court relied on New Hampshire Supreme Court precedent to hold that the plaintiffs did not have to show that the law "placed a substantial burden on the vast majority of voters."<sup>261</sup> Following the same precedent, the court "required the State to meet its burden under intermediate scrutiny to demonstrate that the law is substantially related to an important government objective."<sup>262</sup>

The case proceeded to trial, where, relying on "unrebutted expert testimony, supported by testimony from a multitude of witnesses and the State's own data," the trial court held that the state failed to meet that burden and that SB 3 therefore violated the New Hampshire constitution.<sup>263</sup> The trial court thus imposed a permanent injunction.<sup>264</sup> The state defendants did not seek a stay of the injunction, and neither the Republican Party nor any

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<sup>257</sup> See generally *N.H. Democratic Party v. Sec'y of State (N.H. Dem. Party)*, 262 A.3d 366 (N.H. 2021).

<sup>258</sup> *Id.* at 371.

<sup>259</sup> *Id.* at 374 (quoting N.H. CONST. pt. I, art. 11). The plaintiffs also alleged a violation of the state constitution's equal protection guarantees. *Id.* at 369. Although the trial court granted an injunction on both bases, the state supreme court did not reach the equal protection issue. *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* (noting the district court's reliance on *Guare v. State of New Hampshire*, 117 A.3d 731 (N.H. 2015)).

<sup>262</sup> *N.H. Dem. Party*, 262 A.3d at 373 (quotation marks omitted).

<sup>263</sup> *Id.* (quotation marks omitted).

<sup>264</sup> See generally *League of Women Voters of N.H. v. Gardner*, 2020 WL 4343486 (N.H. Super. Ct. 2020).

Republican candidate or campaign nor any state legislator attempted to intervene to do so. As a result, SB 3 was not in effect during the 2020 general election.

In July 2021, the New Hampshire Supreme Court affirmed.<sup>265</sup> It accepted the trial court's findings of fact and interpretations of the evidence, and it agreed that SB 3 unconstitutionally burdened the right to vote in New Hampshire.<sup>266</sup> Under New Hampshire law, because SB 3 was struck down, the preexisting law remains. No party filed for certiorari.

But the ISLT might disrupt this equilibrium. Of course, at some point, the New Hampshire legislature may enact a new version of SB 3 that attempts to resolve the constitutional defects the court identified or might try to amend the state's election laws in other ways. But in the absence of such legislative action, any candidate for federal office at any time in the future might be able to bring a federal lawsuit challenging the New Hampshire Supreme Court's decision as violating the ISLT and seeking an injunction to reinstate SB 3's requirements for federal elections—but only for federal elections.<sup>267</sup> The ISLT would hang, like the sword of Damocles, over settled state election law.<sup>268</sup>

The same problem with respect to state court decisions arises—and indeed is likely multiplied—with respect to actions taken by members of a state's executive branch or by other election officials. Campaign and party lawyers would go through administrative rules, guidance, adjudications, and other decisions by election officials with a fine-tooth comb, looking for any conceivable daylight between executive interpretations and applications and the kind of hypertextualist readings of state statutes that the ISLT maximalists promote. Challenges would be limited

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<sup>265</sup> *N.H. Democratic Party*, 262 A.3d at 366. In New Hampshire, most civil cases are tried in Superior Court, and appeals are taken directly from Superior Court to the Supreme Court. See, e.g., *Find a Court*, N.H. JUD. BRANCH (2022), <https://perma.cc/Q4GF-L7VN>.

<sup>266</sup> *N.H. Democratic Party*, 262 A.3d at 382.

<sup>267</sup> Some ISLT proponents suggest that highly specific constitutional provisions, such as those mandating nonpartisan redistricting commissions, might not violate the Clauses, but that vague or broad ones, like the free-elections provisions in many state constitutions, do. See, e.g., Muller, *supra* note 251. That version of the ISLT is sometimes described as narrow, but as the New Hampshire case demonstrates, its implications are extraordinarily broad. Those state constitutional provisions have long applied to a host of different types of election law, not just to redistricting.

<sup>268</sup> Levitt coined the phrase “zombie requirements” to refer to statutory provisions that were struck down by state courts but are revived for federal elections. Levitt, *supra* note 34, at 1058.

only by the creativity of armies of lawyers. The ISLT might be better named the Perpetual Election Litigation Machine.

### 3. Disrupting Delegation

Similar arguments apply to other important issues of state law, including, for example, state law delegation doctrines as applied to state election laws.<sup>269</sup> Under the maximalist ISLT, challenges to executive action as related to federal elections could render irrelevant any state law governing delegation of election law-related matters.<sup>270</sup>

Indeed, Justice Gorsuch hinted at an argument that the Electors and Elections Clauses might actually *restrict* legislatures' ability to delegate various aspects of election administration. He questioned whether "the North Carolina General Assembly could delegate its Elections Clause authority to other officials," although he ultimately concluded that no improper delegation had occurred.<sup>271</sup>

But delegation is ubiquitous and crucial in our election system. The ISLT, whether by subjecting discretionary decisions to de novo textualist review or by limiting the range of permissible discretion, could thus destabilize longstanding productive and professional election administration, including administrators' responses to unexpected and disruptive events.<sup>272</sup> In 2020, for example, several states' election officials mailed absentee ballot applications to every registered voter.<sup>273</sup> Some of these mailings

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<sup>269</sup> See, e.g., Krass, *supra* note 27.

<sup>270</sup> See, e.g., *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 150–54 (5th Cir. 2020) (Ho, J., concurring).

<sup>271</sup> *Moore II*, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); see also *DNC*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (noting that the Clauses provide that "state legislatures— . . . not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules"). The petitioners in *Moore v. Harper* echoed that claim, hinting that the legislature might not even have the power to authorize, or to delegate the power to, state courts to review the constitutionality of congressional maps. See Reply in Support of Emergency Application for Stay Pending Petition for Certiorari, *Moore*, No. 21A455, at \*18–19 (describing this issue as "a momentous constitutional question that this Court should avoid if possible").

<sup>272</sup> See Krass, *supra* note 27, at 107 (explaining that "elections officials depend heavily on delegation to keep their agencies moving"); *id.* at 107 n.21 (citing Daniel P. Tokaji, *The Future of Elections Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 130–31 (2009), for the proposition that discretion is "baked into current election administration systems").

<sup>273</sup> E.g., Todd Spangler, *Secretary of State: All Michigan Voters Will Get Absentee Ballot Applications at Home*, DET. FREE PRESS (May 19, 2020), <https://perma.cc/JLR9-UWPL>; David Eggert, *Michigan Mails Absentee Ballot Applications to All Voters*, A.P. (May 19, 2020), <https://perma.cc/7FZ3-3YPS>; *WEC Prepares for Fall Elections by Approving Block*

were not expressly authorized by state statutes. A maximalist ISLT might prohibit voters who used such applications from voting in federal elections, or it might prohibit the state from counting votes for federal offices from such voters, on the grounds that the legislature authorized some methods of encouraging voters to apply for absentee ballots, or making those applications available, but not others.

Election officials would likely find themselves defensively limiting their own discretionary decisions. Under a robust ISLT, a discretionary decision to, for example, set up drop boxes or send out absentee ballot applications would be likely to provoke costly and time-consuming litigation—and could result in confusion or worse if a federal court determined that the decision was improper under the ISLT. Faced with such possibilities, officials are likely to exercise their discretion very conservatively, affecting their administration of state elections as well as federal. Similarly, if a state court held, as the Pennsylvania court did, that drop boxes were permissible under the statute but a federal court disagreed, election officials would likely not use drop boxes at all, rather than try to explain to voters that they could use them but their votes for federal offices would not count.

## B. Consequences for Federalism

The maximalist ISLT could create significant practical problems for courts, election officials, and voters alike, as the last Section explains. But it also could undermine state courts and state law in more far-reaching ways. If, as Justices Gorsuch, Alito, and Thomas seem to suggest, the proper construction of state election law governing federal elections requires a different approach from the way that state courts ordinarily interpret state statutes, one implication of the ISLT is that federal courts might be *superior* to state courts at the task.<sup>274</sup> State courts' understanding of and immersion in their states' legal culture, precedent, and

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*Grants to Municipalities and Mailing to Voters - COVID-19*, WIS. ELECTIONS COMM'N (May 29, 2020), <https://perma.cc/FC5Y-R9JF>.

<sup>274</sup> Morley suggests (although does not clearly embrace) a version of this argument in the context of determining the scope of election officials' statutorily delegated authority. For one thing, he hints that elected judges may have an interest in the outcome or in pleasing election officials. Morley, *ISLD*, *supra* note 14, at 513. In addition, he argues that "A federal judge also may be further removed from the state's political scene and therefore better able to objectively adjudicate a case that is likely to have partisan consequences." *Id.* at 513.

constitutions would, if anything, detract from their ability to interpret these particular state laws in the peculiarly textualist manner the maximalist ISLT requires.<sup>275</sup>

For these reasons, a maximalist ISLT essentially federalizes the interpretation and application of state election law as it applies to federal elections.<sup>276</sup> The normal deference to state court interpretation and expertise is lacking and state courts' usual role as the authoritative interpreters of state law is irrelevant at best, obstructionist at worst.<sup>277</sup> Parties might, therefore, prefer to go directly to federal court to seek rulings about the meaning and application of these state laws. Or they could seek injunctions from federal courts to preclude state actors from applying state court rulings to federal elections.<sup>278</sup>

Such litigation could be significantly destabilizing to state law. For one thing, if a federal court interpreted a state election law before the state courts did so, that might create significant pressure on the state courts to accept that interpretation with respect to state elections because failure to do so could lead to a two-tier election system, which could be confusing to voters and difficult or even impossible to implement. For another, to the extent that the provision interpreted by the federal court relates to or interacts with other parts of the election code, it could affect state court interpretations of state statutes beyond the specific disputes in question.

Further, the ISLT is insulting to state courts and could well undermine public confidence in the state judiciary.<sup>279</sup> State courts might begin to alter their own approaches to statutory interpretation and judicial review with respect to election law if they fear federal court reversal or contradiction, both out of a desire to preserve their own legitimacy and in order to avoid the problems that

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<sup>275</sup> *E.g.*, Pildes, *supra* note 221, at 720–21; Schapiro, *supra* note 218, at 107–09; *cf.* Litman & Shaw, *supra* note 38, at 3 (describing the insistence on textualism as “an assertion of interpretive primacy on the part of federal courts”).

<sup>276</sup> *See, e.g.*, Morley, *ISLD*, *supra* note 14, at 526 & nn. 188–94 (discussing this concern and citing other scholars who have argued the point).

<sup>277</sup> *Cf.* Amar & Amar, *supra* note 27, at 18; Litman & Shaw, *supra* note 38, at 20.

<sup>278</sup> For one example of plaintiffs attempting to use federal courts to circumvent state court rulings in pending elections cases, see *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020).

<sup>279</sup> *See, e.g.*, Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 493, 529–30 (2001) (arguing that Chief Justice Rehnquist's concurrence “all but heaps scorn on state jurists” and “compromises state judicial authority”).

might arise from a dual system of elections.<sup>280</sup> The ISLT's contempt for state judges could in the end distort state law.

And most counterintuitively given the “independent state legislature” label, the ISLT, especially in its most maximalist forms, does not empower state legislatures. Maximalist forms of the ISLT might disregard legislative intent, undermine legislative decisions to have unified elections for federal and state offices, ignore preexisting precedent against which legislatures act, and prohibit delegation to professional election administrators. None of that empowers state legislatures. To the contrary, it empowers federal courts—especially the Supreme Court—which can second-guess everything states do that affects federal elections.

### C. Undermining Institutional and Democratic Legitimacy

A core insight about election law—and one that was much discussed after the 2000 election—is that it is crucial to know ahead of time, from behind the veil of ignorance, what the rules are and who the deciders are. That is even more true today with our intense partisanship.

But federal courts too can engage in “adventurous or unanticipated judicial changes in the law.”<sup>281</sup> The ISLT itself is just such a change. State and federal courts, state legislatures, Congress, and the people of various states in amending their own constitutions have presumed for most of this country's history that state constitutions—and thus state courts—control state law governing federal elections.<sup>282</sup> As recently as 2019, although the Supreme Court was sharply divided on the federal justiciability of partisan gerrymandering, all nine Justices agreed that state constitutions can prohibit it, including in congressional districting.<sup>283</sup>

Indeed, until 2020, the Supreme Court showed no interest in reviewing state court holdings applying such state constitutional limitations. In 2018, for example, the Pennsylvania Supreme Court struck down the state legislature's congressional redistricting map as violating the state constitution and imposed its own

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<sup>280</sup> As Litman and Shaw put it, the ISLT may “effectively require[] states to allocate decision-making authority within the state in a particular way, which flies in the face of the idea that states have considerable latitude in structuring their governmental system.” Litman & Shaw, *supra* note 38, at 20.

<sup>281</sup> Krent, *supra* note 279, at 529.

<sup>282</sup> See *supra* Part I.A.

<sup>283</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019); *id.* at 2524 (Kagan, J., dissenting).



map when the legislature failed to provide one.<sup>284</sup> When legislative leaders sought a stay and then petitioned for certiorari, expressly raising the ISLT,<sup>285</sup> the Supreme Court denied both without comment.<sup>286</sup>

The Supreme Court has instead insisted that federal courts defer to state courts in matters involving federal elections. In *Grove v. Emison*,<sup>287</sup> for example, both the state and federal courts were hearing challenges to Minnesota’s congressional maps.<sup>288</sup> Although the legislature passed new redistricting plans, they were vetoed by the governor; shortly thereafter, the federal district court enjoined the state court from imposing its own maps, including a congressional map.<sup>289</sup> The Supreme Court unanimously held that the federal court should have deferred to the state court process. More specifically, the Court emphasized that “reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*,”<sup>290</sup> and it expressly demanded deference to the state court in congressional redistricting.<sup>291</sup>

Under these circumstances, and along with the long history of state constitutional regulation of election law described in Part I, neither the Pennsylvania Supreme Court in 2020—nor any other state supreme court—was on notice that any of the U.S. Supreme Court Justices were about to embrace the ISLT. Nor, for that matter, were state legislators. The ISLT is itself a significant change in the rules<sup>292</sup>—and in part because of its novelty, it is a

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<sup>284</sup> See generally *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

<sup>285</sup> Petition for Certiorari, *Turzai v. Brandt*, No. 17-1700, at \*38–39; Emergency Application for Stay, *Turzai v. League of Women Voters of Pa.*, No. 17A909.

<sup>286</sup> *Turzai v. Brandt*, 139 S. Ct. 445, 445–46 (2018); *Turzai v. League of Women Voters of Pa.*, 138 S. Ct. 1323, 1323 (2018). Of course, certiorari denials are not precedential, and the Court has often warned against reading anything into them. See, e.g., *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (“For the well-settled view that denial of certiorari imparts no implication or inference concerning the Court’s view of the merits, see *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (Frankfurter, J.).”). But in the broader context of the Supreme Court’s treatment of federal judicial involvement in state election law, this denial is a telling piece of evidence.

<sup>287</sup> 507 U.S. 25 (2003).

<sup>288</sup> *Id.* at 27–28.

<sup>289</sup> *Id.* at 30–31.

<sup>290</sup> *Id.* at 34 (emphasis added) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

<sup>291</sup> *Id.* at 36–37.

<sup>292</sup> That the ISLT itself would upset longstanding expectations is a partial response to Morley’s claim that it is important for law governing federal elections to

be judged according to a uniform body of known federal constitutional standards, subject to ultimate review in the U.S. Supreme Court, rather than according to

change that, as already explained, functionally shifts power to the Supreme Court, not to state legislatures.

Moreover, the ISLT, especially as it interacts with other aspects of the Supreme Court's docket, invites litigation gamesmanship and could damage that Court's own legitimacy. Return to the 2020 litigation in Pennsylvania.<sup>293</sup> The GOP argued that the statute's nonseverability clause required striking down the entire mail-in ballot regime. But, as already explained, if applied literally, that clause would have required striking down most or all of the entire statute, including the elimination of straight-ticket voting. The GOP did not argue for that result, presumably because getting rid of straight-ticket voting was something that the party had sought for a long time. The defendants and the Democratic party did not make that argument because they opposed *any* application of the nonseverability clause. Particularly when a case arises with the time pressure and absence of briefing (including amicus briefing) that characterize the shadow docket, the Court may not have adequate information to assess the meaning of a particular statute and the parties may have incentives not to provide exhaustive information and background about the statutes at issue.

Parties may also be strategic in the specific issues they present to the Supreme Court in ways that push the Court into taking sides in hotly partisan matters without full information. In 2020, for example, Republican litigants repeatedly asked the Court to intervene when other courts had concluded that election-day deadlines for receipt of absentee ballots had to be extended. But they did not ask the Court to reverse numerous other state court holdings, even in the same cases.<sup>294</sup>

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potentially esoteric, idiosyncratic, or otherwise unpredictable state constitutional restrictions. It is far easier for the federal government—and other states—to accept legislatures' actions impacting the federal government at face value when they do not need to consider those acts' substantive validity under state constitutions.

Morley, *ISLD and Elections*, *supra* note 14, at 37. It is, quite simply, too late in the day for this justification to work. See *AIRC*, 576 U.S. at 804–09 (upholding a constitutional amendment creating a redistricting commission over an ISLT-type challenge); Persily et al., *supra* note 57, at 709–38 (documenting numerous state laws and constitutional provisions adopted by initiative that might be called into question by the ISLT). Morley himself tacitly acknowledges this problem by suggesting that if the Supreme Court adopts the version of the ISLT that precludes state constitutional constraints, then it could “make its ruling prospectively applicable only in the case before it and as to future state statutes.” Morley, *ISLD*, *supra* note 14, at 552.

<sup>293</sup> See *supra* notes 222–28.

<sup>294</sup> See, e.g., Emergency Application for Stay Pending Disposition of a Petition for a Writ of Certiorari, *Republican Party of Pennsylvania v. Boockvar*, No. 20A54, at \*31.

More recent litigation in Pennsylvania also illustrates the possibility for such gamesmanship. A state appeals court recently held that Act 77's expansion of mail-in voting to all voters violates the state constitution.<sup>295</sup> This holding was reversed by the Pennsylvania Supreme Court.<sup>296</sup> But suppose the state supreme court had agreed with the lower court. Under the ISLT, promoted by the GOP and opposed by the Democratic Party in 2020, that holding would not have applied to federal elections. But to make that argument, Republicans and Democrats in Pennsylvania would have had to switch sides from their positions as to the ISLT in 2020. So, either the ISLT will be only selectively enforced, or the parties will have to take deeply unprincipled positions.

#### IV. FENDING OFF THE ISLT

As described in Part I, there is powerful evidence against the argument that state legislatures are not bound by state constitutions when they regulate federal elections. But even if some version of that claim is ultimately endorsed by the Supreme Court, the rest of this Article demonstrates the illogic, danger, and disruption of the most aggressive forms of the ISLT. This Part discusses how to fend off some of those consequences. There are roles here for numerous players—state courts, state legislatures, elections administrators, Congress, litigants, and the Supreme Court itself—and some strategies could be embraced by several of them. This Part therefore describes the strategies in relatively broad strokes, as the details may vary by situation and by actor.

State courts and state legislatures alike should embrace the importance of political accountability and predictability in election law. Legislatures can include express statements in election-related laws indicating that they are incorporating the full body of state law into their election-related enactments. Even better, they can pass stand-alone laws declaring that all election laws incorporate all state law, and that unless otherwise expressly stated, federal and state election laws are reviewed and interpreted identically, with all state precedent applying equally to both. Congress too could establish that legislatures cannot dis-

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<sup>295</sup> *McLinko v. Dep't of State*, 270 A.3d 1243, 1273 (Pa. Commw. Ct. 2022).

<sup>296</sup> *McLinko v. Dep't of State*, 279 A.3d 539, 582 (Pa. 2022).

vow state law and state constitutional limitations when they regulate federal elections, or at least that they must expressly say so.<sup>297</sup>

State courts should expressly determine whether the state legislature intended not to incorporate state law when reviewing and construing laws governing federal elections.<sup>298</sup> Moreover, state courts should write defensively. That is, they should assume that their readers know nothing about their state's law, and they should explain how their analysis is grounded in longstanding state law precedent and norms. The Pennsylvania Supreme Court, for example, could have explained its nonseverability precedent in more detail, including noting that the clause at issue in 2020 was identical to the clause it refused to enforce in 2006 and that the legislature therefore knew that the clause might well be ineffective.

Claims about state constitutionality or the meaning of election laws should be decided by state courts in the first instance. There are numerous mechanisms—including exhaustion, waiver, abstention, and certification requirements—that either Congress or the federal courts could use to ensure that happens. Indeed, Congress has imposed such a requirement on habeas petitioners, who must exhaust their state remedies before filing for federal court review of their convictions.<sup>299</sup> Before seeking federal court review of state election law, litigants could be required to present their issues to the state courts, up to and including the state court of last resort. If there is no definitive state court ruling, the federal courts could be required to certify questions to state high courts. And especially where there are parallel proceedings, abstention doctrines, like *Pullman* abstention, could apply.<sup>300</sup>

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<sup>297</sup> Under the Elections Clause, Congress unquestionably has the authority to pass such a law with respect to congressional elections. Congress could also enact a law that “ratifies non-legislative state regulations of congressional elections.” See Nick Stephanopoulos (@ProfNickStephan), TWITTER (June 30, 2022), <https://perma.cc/9KLLK-69PE>. As for presidential elections, the Supreme Court has long held that Congress’s power to regulate presidential elections is comparable its power to regulate congressional elections. See, e.g., *Burroughs v. United States*, 290 U.S. 534, 544–48 (1934).

<sup>298</sup> Cf. Amar & Amar, *supra* note 27, at 29 (arguing that federal courts should defer to state court interpretations on this point).

<sup>299</sup> 28 U.S.C. § 2254(b).

<sup>300</sup> See, e.g., *Wise v. Circosta*, 978 F.3d 93, 101–02 (4th Cir. 2020) (abstaining under the *Pullman* doctrine); see also Morley, *ISLD*, *supra* note 14, at 514 (discussing *Pullman* abstention). Other preemption doctrines might also be relevant. See generally Wright and Miller, 17A FEDERAL PRACTICE AND PROCEDURE (3d ed., April 2022 Supp.) § 4241. The specific application of those doctrines is well beyond the scope of this Article.

Litigants should also have to make the same ISLT claims in state court that they later present to the Supreme Court and other federal courts. In other words, it should not be enough for litigants to ask state courts to construe or review statutes. Where the statutes apply to both federal and state elections, litigants should have to expressly ask state courts to evaluate whether the statutes might mean something different for federal, as opposed to state, elections and whether the legislature made clear an intention to abrogate ordinary state constitutional and other constraints, or such arguments are waived or forfeited.<sup>301</sup> And as already suggested, state courts should address the question, even if not expressly asked to.

Courts should impose strong norms of legislative acquiescence to address the threat of litigation disrupting settled expectations and settled law. If the legislature does not enact a new law after state court litigation, or after established administrative practice, federal courts should consider those interpretations of the law definitive as to both federal and state elections.<sup>302</sup> And Congress could legislate such a requirement.<sup>303</sup>

Nor should individual legislators be able to call such acquiescence into question, whether by litigation, public statements, or speeches on the floor of the legislature. Regardless of how one reads the scope of authority over federal elections that the Constitution grants to state legislatures, it is a grant of authority only to the legislature as a whole. Indeed, Supreme Court precedent establishes that it is a grant of authority to the legislature *as a lawmaking body*,<sup>304</sup> and additional precedent establishes that individual legislators have no standing to assert the interests of the full body.<sup>305</sup> That individual legislators might be unhappy with court decisions should be irrelevant to the status of the law.

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<sup>301</sup> Habeas law again provides an analogy. When habeas petitioners fail to raise their claims in state court first, those claims are generally considered to be procedurally defaulted. See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732 (2022).

<sup>302</sup> Cf. Michael L. Wells & Jeffrey M. Netter, *Article II and the Florida Election Case: A Public Choice Perspective*, 61 MD. L. REV. 711, 715 (2002) (pointing out that federal judicial involvement in “the business of state governments” is often unnecessary because “the main tool for seeing that courts do not exceed their authority is the power of the legislature to override nonconstitutional court rulings by enacting new legislation”); *id.* at 712 (arguing that Article II is “a guarantee that election rules are put in place *before* the election” (emphasis in original)); Pildes, *supra* note 221, at 695 (discussing Chief Justice Rehnquist’s claim in *Bush v. Gore* that the Florida Supreme Court had essentially created new state law after the votes had been cast in the 2000 election).

<sup>303</sup> See *supra* note 297.

<sup>304</sup> *Smiley v. Holm*, 285 U.S. 355, 365–66 (1932).

<sup>305</sup> *E.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019).

Put another way, while state law might give them standing to litigate, the fact that they decide to do so should have no bearing on an assessment of whether a state court's holding was correct.

Finally, even a maximalist ISLT does not require the Supreme Court to leap into action every time it disagrees with a state court. The Supreme Court itself has instructed the lower federal courts to be cautious about issuing election-related injunctions that change the status quo too close to an election.<sup>306</sup> Because elections are primarily governed by state law, the Supreme Court has repeatedly emphasized, federal court involvement at the last minute can be extraordinarily disruptive.

This principle is called the *Purcell* principle, after the 2006 case *Purcell v. Gonzalez*.<sup>307</sup> During and after the 2020 election, the Court has enforced it increasingly vigorously. In a February 2022, case, for example, the Court stayed a three-judge district court order that the state of Alabama redraw its congressional districts because it found that the original map violated the Voting Rights Act.<sup>308</sup> Justice Kavanaugh, joined by Justice Alito, argued in a concurrence that *Purcell* compelled the Court to grant the stay—even though the first primary elections were still months away.<sup>309</sup> As Justice Kavanaugh explained, “It is one thing for a State on its own to toy with its election laws close to a State’s elections. But it is quite another thing for a federal court to swoop in and redo a State’s election laws in the period close to an election.”<sup>310</sup>

But the scope of *Purcell* is deeply unclear, and the Justices invoking it do not appear to be applying it evenhandedly. In the North Carolina case about absentee ballot deadlines, for example, only six days before the election, Justice Gorsuch, joined by Justice Alito, was eager to swoop in when he disagreed with a state court’s interpretation of state election law.<sup>311</sup> In other words,

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<sup>306</sup> *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). See *Wise*, 978 F.3d at 99 (4th (explaining that the Supreme Court’s own actions during the 2020 election litigation clarified that *Purcell* deference extended to state court actions). But see *Moore II*, 141 S. Ct. 46, 46–48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief) (asserting, in response to an application for an emergency stay in the same case, that the Supreme Court should have intervened).

<sup>307</sup> 549 U.S. 1 (2006) (per curiam).

<sup>308</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022).

<sup>309</sup> *Id.* at 881. (Kavanaugh, J., concurring in grant of applications for stays); *id.* at 888–89 (Kagan, J., dissenting from grant of application for stays) (explaining why *Purcell* should not apply).

<sup>310</sup> *Id.* at 881 (Kavanaugh, J., concurring in grant of applications for stays). Justice Kavanaugh’s opinion was joined by Justice Alito.

<sup>311</sup> *Moore II*, 141 S. Ct. at 46–48 (Gorsuch, J., dissenting). Justice Thomas also would have granted the requested injunctive relief, although he neither joined Justice Gorsuch’s opinion nor wrote his own.

these Justices not only embraced a maximalist ISLT that would give the Court the unique authority to definitively construe state election law, but they were willing to do so under circumstances in which they themselves instructed all other federal courts to stay their hands.<sup>312</sup> And that approach, in turn, will invite unending last-minute challenges to state court holdings regarding all aspects of state election law.

The full Supreme Court, or Congress, should reject this double standard. A full discussion of *Purcell*—the inconsistent ways the Court has applied it during and since 2020 and the full range of possible congressional interventions—is beyond the scope of this Article.<sup>313</sup> But either actor could, for example, provide expressly that state court rulings, even if relatively close to an election, receive more deference from the Supreme Court than do federal court rulings.

Such a statute or doctrine would be consistent with Chief Justice Roberts’s concurring opinion in the 2020 Wisconsin case. The case involved a challenge to a federal district court injunction, which the Seventh Circuit stayed.<sup>314</sup> The Supreme Court refused to vacate the stay, and Chief Justice Roberts explained that the situation was very different from the Pennsylvania case, in which the Court allowed the state court ruling that modified election rules to stand.<sup>315</sup> “While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes[,]” he said.<sup>316</sup> “Different bodies of law and different precedents govern these two situations.”<sup>317</sup>

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There is, of course, a legitimate federal interest in orderly and lawful federal elections, and therefore there may be a federal judicial role in ensuring, for example, that state courts do not issue rulings that are so unpredictable or ungrounded that they “change the law,” especially after voters, candidates, parties, and

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<sup>312</sup> See generally Lemley, *supra* note 28.

<sup>313</sup> For more about the inconsistency with which the Supreme Court applies *Purcell*, see, for example, Carolyn Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court*, 83 OHIO ST. L.J. ONLINE 111, 118–21 (2022); STEPHEN I. VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 197–227* (2023).

<sup>314</sup> *DNC*, 141 S. Ct. 28.

<sup>315</sup> *Id.* at 28 (Roberts, C.J., concurring in denial of application to vacate stay).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

election administrators have relied on previous understandings.<sup>318</sup> But it is not so clear that these interests arise from the Electors and Elections Clauses' assignment of responsibilities to state legislatures rather than from the fact that the elections are *federal elections* and the federal government thus has an interest in preserving its own integrity.<sup>319</sup> So the issue confronting federal courts is not whether state courts encroached on the authority of state legislatures but rather whether state courts have undermined federal elections.

There may be other interests at stake as well. As Professor Richard Pildes has explained, late changes in election law might implicate reliance interests, in some contexts strongly enough to violate the Due Process Clause.<sup>320</sup> But these kinds of inquiries also require a much more deferential standard than the maximalist ISLT's de novo textualism and nihilistic approach to state constitutional law.<sup>321</sup>

#### CONCLUSION

In his concurring opinion in *Bush v. Gore*, Chief Justice Rehnquist claimed that the version of the ISLT he was promoting did "not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."<sup>322</sup> But the ISLT, especially the maximalist version, shows no such respect for state legislatures. It fails to engage in basic questions of statutory interpretation. Some Justices even appear to suggest

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<sup>318</sup> See, e.g., Krent, *supra* note 279, at 508–09 (explaining that it is crucial for rules to be in place before an election and if they change, "faith in the integrity of the election process itself may be compromised," and also explaining why the Constitution insisted that change come from the legislature); McConnell, *supra* note 32, at 662 (noting the importance of laws being created ahead of time under the "veil of ignorance"). Professors Michael Wells and Jeffrey Netter even suggested that Article II might apply differently depending on whether it is before or after an election. Wells & Netter, *supra* note 302, at 722.

<sup>319</sup> Cf. *Burroughs*, 290 U.S. at 544–48 (explaining that Congress must have the power to preserve the Republic).

<sup>320</sup> Pildes, *supra* note 221, at 704 (citing *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995)).

<sup>321</sup> See Amar & Amar, *supra* note 27, at 49 (suggesting that the proper questions are "[i]n the federal-election case at hand, was the state supreme court doing the kinds of things it has generally done in other cases (especially cases involving the same types of statutes and state constitutional provisions at issue) in years past?" and "[w]as the state court and/or the state constitution treating federal elections similarly to state elections?"); Litman & Shaw, *supra* note 38, at 32 (proposing the use of "the extremely rare, extremely limited, and extremely deferential review of state law questions that is reflected in the adequate and independent state ground doctrine").

<sup>322</sup> *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (emphasis in original).



that even where the legislature itself expects legislative intent to play a role in statutory construction, doing so would violate the Electors and Elections Clauses. Justice Gorsuch, joined by Justice Alito, has also hinted that state legislatures are limited in their ability to delegate election-related decision-making to courts and to election administrators.

Instead of demonstrating respect for state legislatures, the ISLT is a significant shift of authority in election law away from state legislatures and state courts in favor of the Supreme Court. And if the Court demonstrates a willingness to overrule state court actions, including at the last minute, it is inviting a deluge of emergency applications over even minor state court decisions, such as whether candidates have complied with ballot-access requirements or whether particular polling places can be kept open late due to problems earlier in the day. And state laws that govern both federal and state elections could be subject to different, even contradictory, interpretations and applications, with all the chaos that would bring.

Any reading of the Elections and Electors Clauses that deprives state courts and state constitutions of their ordinary authority over state law is questionable at best. But the maximalist version of the ISLT—the version that some Justices seemed to espouse in 2020—goes beyond any reasonable understanding of those Clauses. It must be rejected.