# The *Moore* the Merrier: How *Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators

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*Moore v Harper*[1] was remarkably easy and uneasy at once. The case was extraordinarily easy because the core question presented, the validity of the so-called "Independent State Legislature" theory (ISL),[2] could reasonably admit of only one answer; the claim at the heart of ISL—that the word "legislature" in Article I's Elections Clause[3] (and presumably in Article II's Electors Clause[4] as well) refers to a "particular" entity within each state (an entity I shall call here the "ordinary elected legislature"), such that each state's ordinary elected

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[1] 143 S. Ct. 2065, 2081 (2023).

[2] For background on ISL, *see generally* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037 (2000) (demonstrating how ISL makes no constitutional sense, in an essay that appears to be the first law review article or judicial opinion to use the phrase "independent legislature" or "independent state legislature," and that was published before even the Bush-versus-Gore election); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1 (2022) (thoroughly debunking ISL in both Articles II and I) (hereinafter *Eradicating*); Brief of *Amici Curiae* Professors Akhil Reed Amar, Vikram David Amar and Steven Gow Calabresi in Moore v. Harper, 143 S. Ct. 2065 (2023) (No. 21-1271) (same) (hereinafter *Amici Brief*).

[3] The Clause provides in relevant part that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . ." U.S. Const. art. I, § 4, cl. 1.

[4] U.S. Const. art. II, § 1, cl. 2.

legislature is entitled by the federal Constitution to regulate federal elections all by itself—is thoroughly foreclosed by federal constitutional text and founding ideology,[5] the overwhelming weight of public-meaning originalist evidence,[6] and clear unbroken U.S. Supreme Court precedent spanning over a century.[7] The notion that each state's ordinary elected legislature is free from (or "independent" of) interference by any *other* institution, organ, or actor within state government, including the state constitution that created that ordinary elected legislature, the Governor, a state court enforcing state constitutional limitations, or the state's electorate itself, is as constitutionally wrong as wrong can be. Yet *Moore* was disturbingly uneasy because of the stakes involved,[8] because at least five members of the current Court had seemed to embrace (albeit sometimes provisionally) untenable ISL notions over the past decade,[9] and because,

[5] *See Moore*, 143 S. Ct. at 2083 (noting that the Court had already observed that founding-era dictionaries define "legislature" capaciously); *id*. at 2082 (pointing out that in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court had read "Congress" in the Elections Clause to include the President); Vikram David Amar, *(Yet) Another Reason ISL Theory is Wrong About the Meaning of the Term State "Legislature": The Constitution's References to the Federal Counterpart—"Congress"*, Justia.com (June 30, 2022), https://bit.ly/3s2iymR (pointing out that in several places where the Constitution empowers "Congress"—even without the "by law" modifier—"Congress" does not refer specifically to a particular institution, i.e., the House combined with the Senate, but instead means the entire federal lawmaking system, which includes the President); *Amici Brief*, *supra* note 2, at 17–18 (same); *Moore*, 143 S. Ct. at 2084 (pointing out that in *McPherson v. Blacker*, 146 U.S. 1 (1892), the Court equated a state's "legislative power" with the "State" itself).

[6] *See Moore*, 143 S. Ct. at 2079–81, 2086–88; *Eradicating*, *supra* note 2, at 19–30; *Amici Brief*, *supra* note 2, at 7–22.

[7] *See Moore*, 143 S. Ct. at 2081–86; *Eradicating*, *supra* note 2, at 30–36; *Amici Brief*, *supra* note 2, at 28–29.

[8] If embraced, ISL would permit ordinary elected legislatures (provided they comply with federal statutory timelines) to displace state voters or state courts in the selection of presidential electors under Article II, notwithstanding state constitutional requirements regarding the roles of voters and state courts. *See Eradicating*, *supra* note 2, at n.117 & accompanying text.

[9] *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting, joined by Thomas & Alito, JJ.—as well as Scalia, J.); Democratic Nat'l Comm. v. Wisc. State Legis., 141 S. Ct. 28, 34 n.1 (2020) (mem.) (Kavanaugh, J., concurring in denial of application to vacate stay); Republican Party v. Degraffenried, 141 S. Ct. 732, 732–33 (2021) (mem.) (Thomas, J., dissenting from the denial of certiorari); *id*. at 738 (Alito, J., joined by Gorsuch, J., dissenting from the denial of certiorari); *Moore*, 143 S. Ct. at 2100 (Thomas, J., joined by Gorsuch, J., dissenting).

although the 6–2[10] *Moore* Court forcefully repudiated the crux of ISL once and for all, not everyone seems to fully and deeply understand the ruling. Seemingly based on a failure to fully appreciate how the various parts of the Court's opinion *necessarily* fit together (against the background of judicial federalism first principles), some in the academy[11] and elsewhere mistakenly suggest that ISL notions might continue to make significant mischief.

More specifically, the pessimists point to the fact that even as the *Moore* majority gave the lie to ISL—and made clear the Court has no tolerance for the ISLers' claim that the "Elections Clause insulates state legislatures from review by state courts for compliance with state law"[12]—the Court in the last part of its opinion observed that state-court rulings relating to federal elections, even state-court rulings rendered under *state* constitutions, technically raise federal questions that are subject to federal-court review to ensure compliance with federal constitutional provisions. Accordingly, the Court said, state courts "do not have free rein" in this realm and could be subject to federal judicial oversight if they exceed "ordinary judicial review."[13] While the Court's (to my mind banal) mention of reserved federal judicial power may cause some lawsuits to be filed, this last part of the *Moore* opinion must be understood in conjunction with *Moore*'s earlier and thorough rejection of ISL's premise that the federal Constitution protects ordinary elected legislature entities in particular. Properly understood, this last part of the *Moore* opinion and the federal judicial review it necessarily contemplates should not lead to significant problematic intermeddling going forward. Indeed, one goal of this article is to set the worriers straight and ease their minds.

[10] Justice Samuel Alito didn't register a view on the merits, although he joined the part of the dissent arguing that the case was moot. I do not address the mootness question in this short article, except to say I believe (and argued) that the Court had power to reach the merits. *See* Vikram David Amar & Jason Mazzone, *The Court Should Maintain Optionality in Resolving the So-Called "Independent State Legislature" (ISL) Theory by Granting Cert. in* Huffman v. Neiman *Right Away as the Justices Chew on Whether* Moore v. Harper *is Moot*, Justia.com (May 1, 2023), https://bit.ly/3OWbTXj.

[11] *See, e.g.*, Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News.*, N.Y. Times (June 28, 2023), https://bit.ly/3OzS9Yq; Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, Slate.com (June 27, 2023), https://bit.ly/45amDHx.

[12] *Moore*, 143 S. Ct. at 2078.

[13] *Id*. at 2088–89.

But another goal is to celebrate a ruling that favored principle over politics at a time when many people accuse the Justices of being political hacks and many commentators predicted the conservative wing of the Court would go along with Republican-backed ISL notions. As discussed below, this case has many winners, including a large number of academics who rose to the occasion when ISL made a (re)appearance in 2020, and who should now feel at least somewhat better about the Court and the country. So before we look down the road to where the Justices will go after *Moore*, let us first dwell on how much *Moore* itself reflects important (and for many cynical critics unexpected) movement by many key members of the Court.

### *Moore* on the Merits

Perhaps no member of the Court personifies the evolving and now perfectly clear high-Court rejection of ISL more than Chief Justice John Roberts. After all, he wrote the lead dissent in *Arizona Legislature v. Arizona Independent Redistricting Commission* (*AIRC*),[14] a 2015 case in which an ISL claim was unsuccessfully brought to challenge an Arizona direct-democracy initiative that relocated districting power from the ordinary elected legislature to a newly created independent districting commission. In *AIRC*, Roberts suggested (without meaningful analysis) that there was a difference between a state's (permissible) decision to *supplement* the work of the ordinary elected legislature in federal-election regulation and the state's (impermissible) decision to *supplant* the work of the ordinary elected legislature altogether via the creation of an alternative regulatory body.[15] By the time of *Rucho v. Common Cause*,[16] four years later, Roberts appeared to have quietly abandoned this untenable distinction.[17] In *Rucho* he wrote an opinion for the Court that effectively blessed voter-created independent districting commissions, but he pointedly declined to cite or rely on *AIRC* as support. In *Moore*, by contrast, Roberts's opinion for the Court affirmatively and fully embraced *AIRC*'s result and

[14] 576 U.S. 787 (2015).

[15] *See id*. at 841 (Roberts, C.J., dissenting).

[16] 139 S. Ct. 2484 (2019).

[17] *See* Vikram David Amar, *Response to Baude/McConnell on ISL*, Justia.com (Oct. 17, 2022), https://bit.ly/3Yy5iFZ (demonstrating the distinction makes no sense in this context—in part because the Elections Clause uses the word "prescribe"—and is unworkable in any event).

reasoning. He acknowledged that, as a logical matter, *AIRC* followed from ("reinforced")[18] the reasoning in *Smiley v. Holm*[19] nearly a century earlier, a case which upheld against ISL challenge the use of a Governor's veto in congressional districting legislation. Crucially, Roberts made clear that the reasoning (underlying both *Smiley* and *AIRC*) "commands our continued respect."[20]

En route to his (and the Court's) full embrace of *AIRC*,[21] Roberts necessarily rejected not only the untenable supplement/supplant distinction that he had cryptically invoked in his *AIRC* dissent, but also the nebulous "procedure/substance" distinction that ISLers have been pressing. According to this inscrutable notion, while procedures that ordinary elected legislatures use in regulating federal elections can be dictated by the state, the substantive policy decisions such elected legislatures make cannot. As Roberts wrote in *Moore* refuting this distinction, "the [petitioners and the dissent fail to] . . . offer a defensible line between procedure and substance in this context."[22]

In light of Roberts's repudiation of these two attempts to define and protect any particular state lawmaking entity in this realm, it is no surprise that his recapitulation of the basic principle embodied in *AIRC* was clear and broad: "[A]lthough the Elections Clause expressly refers to the state 'Legislature,' it does not preclude a State from vesting congressional redistricting authority in a body other than the elected group of officials who ordinarily exercise lawmaking power."[23] In other words—and this is the nub of the matter—"Legislature" in this context means not a specific entity (the ordinary elected legislature) but whatever lawmaking system a state has selected to make rules for

[18] *Moore*, 143 S. Ct. at 2082.

[19] 285 U.S. 355 (1932).

[20] *Moore*, 143 S. Ct. at 2083.

[21] The majority opinion did not hedge on *AIRC* in any way, nor did it remotely intimate that *Moore*'s result would have been the same even if *AIRC* had come out the other way or were overruled. Instead, the *Moore* majority described *AIRC* as having "reinforced [but not extended or extrapolated] the teachings" of *Hildebrant* (a predecessor case) and *Smiley*, and having "embraced the core principle espoused in *Hildebrant* and *Smiley*" that redistricting must be done in accordance with each state's "prescriptions" for lawmaking. *Id*. And near the end of its analysis, *Moore* featured *AIRC* as one of the cases that had "rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections" and that the dissent simply could not account for. *Id*. at 2082–83.

[22] *Id*. at 2086.

[23] *Id*. at 2083.

federal elections. Under *AIRC*, he observed, states "'retain autonomy to establish their own governmental processes.'"[24]

Chief Justice Roberts has thus fully come around on *AIRC* and its embrace of the idea that "legislature" means "lawmaking system" rather than "particular entity." This conversion meant that he also necessarily, if gently, had to move away from what his predecessor, Chief Justice William Rehnquist (for whom Roberts himself clerked), had written in a concurring opinion in *Bush v. Gore*[25] in 2000. Rehnquist had asserted that the Elections Clause is one of "a few exceptional cases in which the Constitution imposes a duty or confers a power on a *particular*" entity within a state's government, insulating that entity from judicial review under the state constitution.[26] In other words, Rehnquist had read "legislature" to mean a particular entity, not a lawmaking system, something that *Smiley*, *AIRC*, and now John Roberts and the Court have emphatically rejected. Unsurprisingly, Roberts consciously declined to adopt the standard for federal-court review of state courts in this realm that Rehnquist had offered, a choice by Roberts that makes sense given his refutation of the premise on which Rehnquist's ISL-based standard of review rested. The current Chief Justice deserves kudos for *Moore*'s outcome, and for *Moore*'s thorough explanation of why the ISL dog, as one might say in North Carolina (where *Moore* arose), simply won't hunt.

Justice Brett Kavanaugh joined *Moore*'s majority opinion in full, and thus he too walked away from some pro-ISL things he had written in the runup to the 2020 election.[27] In a 2020 opinion, Kavanaugh seemed, albeit provisionally, to read "legislature" (at least in Article II) in the same way that Chief Justice Rehnquist had read it two decades earlier, to mean a particular entity (the ordinary elected legislature) whose "clearly expressed intent . . . must prevail," such that "a state

[24] *Id*. In this vein, his description of what the Court ruled in *AIRC* included the following sweeping quote: "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place and manner of holding federal elections in defiance of provisions of the State's constitution." *Id*. (quoting *AIRC*, 576 U.S. at 817–18) (brackets in original). Thus, under *AIRC* and *Moore*, it is the state constitution, and not the will of the ordinary elected legislature, that matters.

[25] 531 U.S. 98, 111 (2000) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring).

[26] *Id*. at 112 (emphasis added).

[27] Indeed, Kavanaugh's writing in 2020 (which he did not follow through on in *Moore*) was the first post-2000 writing by a Justice that invoked *Bush v. Gore* to embrace ISL. *See Eradicating*, *supra* note 2, at 37.

court may not depart from the state election code," notwithstanding what the state's constitution may provide.[28] But *Moore* makes clear that the ordinary legislature's intent, no matter how forcefully expressed, cannot override the state constitution. Kavanaugh's joining of the majority opinion in *Moore* thus necessarily signals a reversal of course on his embrace of Rehnquist's belief that the word "legislature" in this setting denotes and protects a particular entity. Although Kavanaugh also wrote a concurrence in *Moore* (discussed in more detail below), his embrace of Roberts's opinion is a cause for celebration (even as his vote was not necessary to reach five).

Justice Amy Coney Barrett joined the majority opinion in full as well, even though she (like Roberts and Kavanaugh) had played a litigation role in *Bush v. Gore* on the Republican Party side. This serves as a good reminder that one's views as a jurist can be quite distinct from the positions one took as an advocate.

Justices Ketanji Brown Jackson, Sonia Sotomayor, and Elena Kagan were all excellent at oral argument in the case (especially Justice Jackson) and joined the majority opinion in full (and may have done even more behind the scenes). Three cheers for them!

Justice Samuel Alito viewed the case to be moot and registered no views on the merits, declining to double down on troubling pro-ISL things he had previously written. As for the latter, good for him.[29]

Justices Clarence Thomas and Neil Gorsuch did not embrace the majority's views.[30] Both Justices Thomas and Gorsuch had written strongly pro-ISL opinions long before the flood of recent scholarship and amicus briefs. Candidly, if one begins by seeing the duck, it is often hard to see the rabbit. But even these two Justices were forced to address (and ultimately chose to embrace) *Smiley*, its predecessor *Ohio ex. rel. Davis v. Hildebrant*,[31] and *AIRC*. Given that Justice Thomas dissented in *AIRC* and now seems to appreciate (or at least accept) it, this seems to be genuine progress.

[28] Democratic Nat'l Comm. v. Wisc. State Legis., 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (quoting *Bush v. Gore*, 531 U.S. at 120 (Rehnquist, J., concurring)).

[29] *Cf.* Ritter v. Migliori, 142 S. Ct. 1824 (2022) (mem.) (Alito, J., dissenting from the denial of an application for a stay) (explicitly acknowledging, in an election dispute, that further briefing could change his views from what they were in the context of a request for emergency relief).

[30] *See Moore*, 143 S. Ct. at 2100 (Thomas, J., joined by Gorsuch, J., dissenting).

[31] 241 U.S. 565 (1916).

The Thomas-Gorsuch dissent is also careful in its tone and its bottom line. For example, the dissent nowhere clearly states that these two Justices, had they found the case still live, would have reversed the North Carolina Supreme Court's exercise of judicial review under the state constitution on the merits. Moreover, while these two Justices wrote they did not think the majority's "merits reasoning [was] persuasive,"[32] they found the majority's views on the merits to be of "far less consequence" than the majority's rejection of mootness.[33] And, importantly, the dissent seemed to concede that an ordinary elected legislature *can be* divested of federal-election regulation power so long as the state's constitution vests lawmaking power in another body as well. This position, which is consistent with these two Justices' embrace (or at least acceptance) of *AIRC*, essentially repudiates ISL's core claim that "legislature" means ordinary elected legislature and can mean nothing else.[34]

[32] *Moore*, 143 S. Ct. at 2100 (Thomas, J., joined by Gorsuch, J., dissenting).

[33] *Id. But see Degraffenried*, 141 S. Ct. at 737 (mem.) (Thomas, J., dissenting from the denial of certiorari) (arguing that the ISL question falls within the "capable of repetition yet evading review" exception to mootness).

[34] Justice Thomas seemed to suggest that for a state to take advantage of the flexibility it enjoys in this realm, the state constitutional text must itself vest "legislative" power in bodies other than the ordinary elected legislature. *Moore*, 143 S. Ct. at 2101 n.8. It is on this basis that he distinguished the Arizona situation in *AIRC* (where the Arizona constitution textually conferred legislative power in the people via the initiative process) from the North Carolina situation (where Thomas apparently believed that the state constitution did not reserve all sovereign power to the people, even though it actually did). This proffered distinction is specious insofar as it wasn't the *people* in Arizona who were themselves promulgating federal election rules in 2015, but the Independent Commission doing so (*see, e.g.*, *Moore*, 143 S. Ct. at 2083, stating that *AIRC* held that the "redistricting [itself] is a legislative function"), and there is nothing in the Arizona Constitution conferring "legislative" power on the Commission. Moreover, in *Smiley*, the "legislative" power in Minnesota's constitution was textually vested in Minnesota's House and Senate and not the Governor, and yet Justice Thomas seemed to accept the legitimacy of the gubernatorial involvement at issue there. To the extent Thomas might counter by observing that the Governor is included in the lawmaking process elsewhere in the Minnesota constitution so too are the courts in every state; everyone agrees that, as a general matter, state courts in each state are given the power of judicial review by the state constitution to determine which statutory enactments are consistent with the state constitution and thus valid "laws." On top of all this, where does Justice Thomas's apparent insistence on clear state constitutional text come from? The question of who has been given legislative authority under a state constitution is itself a state-law question, one as to which Justice Thomas is no expert. None of his reasoning here hangs together, and Justice Thomas's failure to engage any of the direct originalist material relied on by the majority (and provided by the briefs) is more than a bit disappointing.

**Is There Any *Moore* of ISL Still to Be Dealt With?**

So much for how we got here. Where do things go from here? As noted earlier, the *Moore* Court said that while "ordinary" judicial review by state courts poses no federal constitutional problems, state courts do not enjoy "free rein" insofar as federal courts "have an obligation to ensure that state court interpretations of [state] law do not evade federal law" or "stifle the 'vindication . . . [of] federal . . . rights'" or "circumvent federal constitutional provisions" or "intrude upon the role specifically reserved to state legislatures."[35] What are we to make of the reservation of federal judicial power to oversee state courts in this realm?

First, rejection of state-court "free rein" in such a context is nothing new. Everyone already appreciated that state-court rulings applicable to federal elections can technically raise federal questions because of the federal-election context involved.[36] And state courts never enjoy "free rein" to interpret state law in ways that run afoul of a federal right someone claims to enjoy.[37]

Second, the federal judicial oversight of state courts that *Moore* adverts to is limited to instances in which the state courts are exercising "judicial review" under their state constitutions. As noted earlier—and this is a significant point—the majority opinion expressly recognizes that a state can vest federal-election regulatory power in entities other than the ordinary elected legislature. (Once more, "legislature" here means "state lawmaking system"; it does not refer to any particular organ of state government.) If a state were to confer *lawmaking* (rather than judicial) power on its courts in this area, nothing in *Moore* would prevent such a delegation. *Moore*'s admonition that state-court judicial review must be "ordinary" is limited to instances in which the state court has been given power to enforce the limits in the state constitution, but has not been given any lawmaking power in the federal-election realm. (And whether

[35] *Moore*, 143. S. Ct. at 2088–90.

[36] For example, there was unanimity among the Justices in the Bush-versus-Gore election episode that the Florida court rulings affecting the presidential election technically implicated federal questions under Article II that were within the subject-matter jurisdiction of the federal courts.

[37] After conducting several Westlaw searches, I could find not a single case in which the Court had ever used the term "free rein" in the context of latitude enjoyed by state courts, much less in any case technically presenting a federal question.

there has been such a delegation would itself be a question under state law.)

Third, and of critical importance, any constraints on state-court interpretation of state law in this realm are themselves limited to the objective of enforcing *federal* "rights," "law," and "constitutional provisions." These are the terms the Court uses, seemingly interchangeably. Preventing such federal rights and provisions from being flouted is the *only basis* for federal-court review that the *Moore* Court suggests. That is, state-court interpretations of state law pose no substantial questions appropriate for federal courts to review except to the extent that such interpretations run afoul of identifiable values reflected in federal constitutional or statutory provisions.[38] Thus, after *Moore*, the question is whether there are identifiable federal values housed uniquely in the Elections Clause that a state-court interpretation of state law might violate. The answer, given the repudiation of ISL in the bulk of *Moore*, turns out to be a rather clear: "no."[39]

The answer is "no" because there is only one federal "right" that ISLers (or others) have argued federal courts must protect to vindicate the distinctive federal interests embodied in the Elections Clause, namely, the "right" of the ordinary elected legislature to have its statutorily expressed will implemented, free from interference or oversight by other state actors. But that is precisely the "right" that was rejected, on the merits, in *Moore*. Going forward, all federal judges must heed *Moore*'s holding that the "federal rights" to be enforced under the Elections Clause have nothing to do with Article I, section 4's use of the word "legislature." *Moore* fundamentally rejects the notion that "Legislature" in Article I refers to any entity in particular. That is why those commentators who have characterized the latter part of *Moore* (reserving federal judicial oversight) as embracing a mild version of ISL are simply wrong. The residual federal-court review of state courts in this realm has nothing to do with respecting the work-product of ordinary state legislatures *per se*, much less ordinary state legislatures that are in any way "independent" from or protected vis-à-vis their state constitutions, which

[38] This is unlike the situation in which a state court asserts "adequate and independent state-law grounds" to block the raising of an unrelated federal right. In the Elections Clause context, the state-court decision would itself have to violate Article I.

[39] Other provisions, of course, might provide norms for federal courts to enforce. *See Eradicating*, *supra* note 2, at 43–50.

is the sum and substance of the ISL theory. The post-*Moore* review by federal courts, whatever it properly should be, would exist whether or not the misbegotten set of notions that together form ISL had ever occurred to or been advocated by anyone.

To wit, *Moore* makes three foundational principles clear: (1) state Governors can continue to exercise veto power (for any reason they like) in the congressional-election-regulation setting; (2) independent, unelected redistricting commissions can be created and can draw congressional district lines based on commissioners' views of the best election-regulation policies; and (3) the people of each state can enact explicit language into their constitutions (which state courts can then enforce), reflecting detailed and comprehensive policy judgments about the substance and procedure of congressional-election regulation. From these principles it follows ineluctably that the ordinary elected set of legislators—the body that ISL says is specially empowered and insulated to prescribe federal-election regulations—doesn't have a federally protected prerogative to "prescribe" anything at all.

Thus, after *Moore*, there is no Article I (or Article II) federal right or federal policy that confers special powers or protections upon ordinary elected state legislatures vis-à-vis other institutions of state government. Relatedly, there is no substantive federal value, in either Article I or Article II, demanding emphatically literal (or narrow) adherence to the text of state enactments. *There simply is no general federal interest in implementing any particular intra-state separation-of-powers regime or any specific textual methodology for construing state laws in this domain.*[40]

So the only "federal right" embodied directly in the Elections Clause is the right to have state courts *comply with state law*. Put differently, the "role specifically reserved to [ordinary elected] state legislatures" in Article I (to use the words from the end of *Moore*'s opinion that may have caused some people to think there is anything

[40] Of course, other provisions of the Constitution, unlike Articles I and II, use specific language that reflects specific and documented historical concerns with some state governmental institutions vis-à-vis others. For example, section 2 of the Seventeenth Amendment, in a single sentence, pointedly differentiates between the legislatures and executive authorities of states, and it confers appointment powers only on the latter. See Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional under the Seventeenth Amendment*?, 35 Hastings Const. L. Q. 727 (2008).

left of ISL) is precisely—no more than and no less than—whatever role state law has decided to confer. As Justice Potter Stewart put the point in an analogous context in *Oregon v. Mitchell*, "[t]he Constitution thus adopts as the federal standard the standard which each State has chosen."[41] Post-*Moore*, there is no separate federal interest in protecting the work-product of ordinary elected legislatures or anybody or anything else; the power of ordinary elected legislatures is protected under the Elections Clause only *because and to the extent that* state law chooses to protect it. And it is emphatically the province of the state courts to decide what the scope of state-law protections of the ordinary elected legislature is.

It's one thing to review state courts when a federal provision (constitutional or statutory) tells states they must regulate the filling of congressional vacancies in particular ways (i.e., the Fifteenth Amendment's command against discrimination on the basis of race) or through the use of particular actors (i.e., the Seventeenth Amendment's admonition that Governors rather than potentially gerrymandered legislative bodies appoint temporary Senators).[42] In these situations, a federal court can compare the state court's actions against the specifics of the federal substantive or procedural commands. But the matter is entirely different when there is no particular federal command other than the command that a state undertake regulation in whatever ways and through whichever actors the *state* in fact has chosen. That is the situation in the aftermath of *Moore*. Once again, recall the words of the *Moore* majority recapitulating and affirming *AIRC*: a state may "vest[] congressional redistricting authority in a body other than the elected group of officials who ordinarily exercise lawmaking power" because "[s]tates . . . . 'retain autonomy to establish their own governmental processes.'"[43] Accordingly, the Elections Clause is understood (properly, today) as if the word "state," instead of "legislature," had been used.[44]

[41] 400 U.S. 112, 288 (1970) (Stewart, J., joined by Burger, CJ., & Blackmun, J., concurring in part and dissenting in part).

[42] *See supra* note 40.

[43] *Moore*, 143 S. Ct. at 2083.

[44] To say that "legislature" and "state" in the Elections Clause are modernly interchangeable is not to say that the use of "legislature" at the founding didn't have certain clarifying advantages. *See Eradicating*, *supra* note 2, at 25–26; *Amici Brief*, *supra* note 2, at 19–20.

From now on, Election Clause challenges can't involve claims that state courts are ignoring a particular federally selected norm or directive (ISLers lost on the assertion of such a norm exalting the work of ordinary elected legislatures, a norm state courts necessarily and permissibly override when engaging in judicial review). Instead, Elections Clause challenges are limited to claims that state courts are misapplying or misunderstanding state law. And state law, of course, is the bailiwick of state, not federal, judges. That is Federal Courts 101. Given that: (1) there is no federal value to be enforced beyond the idea that each state should follow whatever state law the state has chosen to adopt; and (2) the bedrock starting point is that state courts are authoritative interpreters of state law, then there is very, very little left for federal courts to do. Regardless of whether the *Moore* majority fully appreciated (or preferred to downplay[45]) how much its repudiation of ISL's core minimizes the resulting role for federal courts, the ballgame was essentially over once the Court rejected the essence of ISL on the merits.

Indeed, if the U.S. Supreme Court were to assume a large role in making sure state courts rightly interpret state constitutions (pause for a minute to consider how weird that concept sounds from a federalism standpoint), such an outcome would flout more than a century of clear teachings by the Court. In *Green v. Lessee of Neal*,[46] the Court emphatically held that state courts are the master interpreters of state law. A century later, the Court in *Erie R.R. v. Tompkins*[47] reaffirmed this principle in observing that whether state law comes from statutes or judicial rulings is no concern of the federal government. And even more broadly still, in a seminal ruling from the founding era, *Calder v. Bull*,[48] the Court made clear its understanding that states have broad power under the Tenth Amendment (subject, of

[45] It is possible (perhaps even likely) that the Court in the last part of its opinion chose some language (e.g., that state courts cannot "arrogate" power that does not belong to them) in the hope of dissuading state courts from being too adventurous in this realm. Indeed, such language probably explains why some academics understandably have expressed concern about the future. But even if the Court would *prefer* state courts to be strait-laced in this realm, the rejection of the "independence" of ordinary elected legislatures, combined with background federalism principles, prevents the federal judiciary from meddling significantly even when state courts innovate.

[46] 31 U.S. (6 Pet.) 293, 297 (1832).

[47] 304 U.S. 64, 78 (1938).

[48] 3 U.S. (3 Dall.) 386, 387–88 (1798).

course, to republican government principles) to blend legislative and judicial roles.

Conferral of a large role on federal courts in this arena would also ignore the structural ways in which state supreme court judges (who are often elected by statewide, ungerrymandered electorates and thus accountable to them) are very different from appointed and life-tenured federal judges, who are rightly much more confined in their lawmaking powers.

To be sure, state courts can get state law wrong, but we normally think they are empowered to decide what state law is. And constitutionally speaking, there is no distinctive basis for distrust in this realm. Remember, ISL purports to be based on the "deliberate" use of the word "legislature" in Article I, section 4. But nowhere does Article I, section 4 mention state courts or state judges, much less single out these actors (any more than Governors or independent commissions or the state electorates) for any special (negative) treatment.[49] If state courts are to be distrusted here, the distrust would apply even if Article I, section 4 had directly used the word "state" rather than "legislature." Similarly, if state courts were to warrant distrust in this realm, then they would have to be distrusted as to state-law interpretations anytime anyone alleged a federal violation more generally. After all, interpretation of state law by state courts could conceivably implicate alleged federal rights in virtually any domain—tort law, family law, criminal law, etc.—and yet in all those settings federal courts rightly take a hands-off approach, absent a particular reason to think state courts are being manipulative.

All of this explains why the writers of all the opinions in *Moore* effectively recognize (albeit using different language to convey the point) that instances in which state courts exercise judicial review in a way that is not "ordinary" will necessarily be quite rare. Justice Thomas's dissent, in particular, points out that federal-court review will have to be "forgiving" now that state courts need not defer to the wishes of the ordinary legislature (insofar as all judicial review involves at least the potential override of those wishes). This is

[49] Indeed, as the briefing and majority opinion in *Moore* make clear, state-court judicial review to enforce provisions of state constitutions was well known and well accepted even before the creation of the U.S. Constitution. There is no meaningful suggestion in the historical record that either Article I or Article II represented an exception to this background state-court power.

especially true given that all constitutions (federal and state) mark, as a textual matter "only . . . [the] great outlines" of that which is allowed and prohibited.[50] For this reason, an argument that many ISLers have often made—that state courts cannot invoke "vague" state constitutional provisions in the federal-election regulation arena—will (rightly) go nowhere. (Imagine if the U.S. Supreme Court could not undertake "ordinary" judicial review simply because the constitutional provision in question were worded in grand or vague terms.)

Justice Thomas also (rightly) intimates that methods of appropriate constitutional interpretation (including the weight given to *stare decisis*) permissibly vary by state, making federal-court review necessarily more deferential.[51] Justice Kavanaugh's concurring opinion highlighted deference as well, and it provisionally embraced Chief Justice Rehnquist's suggestion that a state court would have to "impermissibly distort[]"[52] state law before a federal court could intervene. The "impermissibly distort" standard connotes a requirement of intentional deception about the meaning of state law rather than a mere good-faith (if heated) disagreement over inevitably controversial and indeterminate state-law questions. Chief Justice Roberts, for his part, invoked similar verbs—"evade," "circumvent," and "sidestep"[53]—that suggest a requirement of intentional and conscious manipulation by state courts before a substantial federal question would be presented.

A day after *Moore* issued and in a different majority opinion (*Biden v. Nebraska*), Roberts again drove home the key point that judicial interpretations (directly applying or informed by constitutional values)

[50] *Moore*, 143 S. Ct. at 2015–06 (Thomas, J., joined by Gorsuch J., dissenting).

[51] *See id*. at 2105. Given the range of substantive and methodological diversity that characterizes state constitutions and their proper interpretation, we should remember that what might seem at first blush to the Supreme Court to be state-court overreaching might actually be proper under that state's legal and interpretive traditions. There is no general federal common law of state constitutional interpretation (or state statutory interpretation or state common-law interpretation). A proper test here cannot be whether a state supreme court is suitably "textualist," as some members of the U.S. Supreme Court might seek to define textualism. A given state legislature, the state people who elect that state legislature, and the spirit of that state's overarching state constitution might well prefer a state-law jurisprudence that is more purposive, or structural and holistic, or precedent-based, or representation-reinforcing, or democracy-promoting, or canon-driven, than relentlessly textual.

[52] *Id*. at 2090 (Kavanaugh, J., concurring).

[53] *Id*. at 2088.

can be contentious and controversial without coming close to exceeding the judicial function. In words that seem tailor-made to guide the post-*Moore* "ordinary judicial review" inquiry, he wrote:

> It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. . . . We have employed the traditional tools of judicial decisionmaking . . . [in reaching the decision we reach today, and while] [r]easonable minds may disagree with our analysis—in fact, at least three do—[w]e do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country."[54]

The same observations about damage to institutions and the country apply, perhaps even more forcefully, with respect to federal judicial intervention in state-court interpretation of state law. For these reasons, a federal court will have to tread very carefully before overturning a state-court ruling interpreting state law on the ground that the state court exceeded its judicial role within the meaning of state law.

These points also help show why the examples of federal judicial oversight *Moore* mentions—examples which are sensible on their own terms—in reality demonstrate that second-guessing under the Elections Clause would be exceptional and problematic. *Moore* invokes three cases in two constitutional settings in which the Supreme Court declined to reflexively accept state courts' interpretations of state law. Crucially, in both of those settings—involving the Takings Clause and Contracts Clause, respectively—state law interpretation is logically antecedent to the protection of a separate federal right. Indeed, each setting concerns a dependent downstream federal right that exists against the state itself. The Takings Clause and the Contracts Clause both protect federal interests (in property and contract rights, respectively) beyond what a state chooses to protect. By contrast, post-*Moore*, the Elections Clause protects only those interests that a state has itself chosen to protect.

When there exists a separate federal right (albeit a right dependent on state-law definitions), state courts obviously cannot be fully trusted to apply state law consistent with the vindication of such a

[54] Biden v. Nebraska, 143 S. Ct. 2355, 2375–76 (2023).

federal entitlement. This is especially so where the federal right in question runs against the state itself such that all state entities—including state courts—might be tempted to warp state law to protect the state fisc.[55] It is thus not remotely surprising that in the two cases *Moore* cites in the takings context, *Phillips v. Washington Legal Foundation*[56] and *Webb's Fabulous Pharmacies Inc. v. Beckwith*,[57] the Supreme Court was wary of accepting at face value state-court definitions of property that might defeat the claims asserted by the federal claimants. What is perhaps most noteworthy in these two cases is that the Court explicitly confined its willingness to (somewhat independently) examine the contours of state law to circumstances where the right in question was against the state and involved the state fisc such that all state institutions, including state courts, had an incentive to distort state law. For example, the Court's observation in *Phillips* that "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law" was overtly limited to "confiscatory regulations (as opposed to those regulating the use of property)."[58]

Similar features explain the case the *Moore* Court cited in the Contracts Clause setting, *Indiana ex. rel. Anderson v. Brand*.[59] In that dispute, public school teachers claimed that the state had reneged on a long-term contract that they had with the state itself. It was in that context that the Court observed:

> The Supreme Court [of Indiana] has decided, however, that it is the state's policy not to bind school corporations by contract for more than one year. On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the state's highest court, but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired *its* [*own*] *obligation*.[60]

[55] For more on this point, *see Eradicating*, *supra* note 2, at n.111 & accompanying text.

[56] 524 U.S. 156 (1998).

[57] 449 U.S. 155 (1980).

[58] *Phillips*, 524 U.S. at 167 (parenthetical in original).

[59] 303 U.S. 95 (1938).

[60] *Id.* at 100 (emphasis added). In the final case cited by *Moore*, General Motors v. Romein, 503 U.S. 181, 186 (1992), the Court fully followed the state-law interpretation of the state courts.

Unlike the Takings and Contracts Clause cases cited by Chief Justice Roberts, the Elections Clause—post-*Moore*—does not involve any federal right that is separate from state-law entitlements and that state courts might have an incentive to evade, circumvent, or sidestep. Simply put, the Elections Clause does not embody any federal decision to protect any particular entity or particular substantive interest within state decisionmaking. Once again, the authority of an ordinary elected state legislature (or any other organ of state government) is protected by the Elections Clause only to the extent that state law has chosen to protect it: "The Constitution thus adopts as the federal standard the standard which each State has chosen."[61] If federal courts were to be skeptical of state-court determinations of state law in the Elections Clause arena, there would be literally no reason for federal courts not to be skeptical of all state-court interpretations of state law. And if that happened all of federalism would become a dead letter.

Of course, state (and federal) court judges might have political biases. But potential judicial bias is present and relevant in any setting—think of environmental or employment regulation or tax policy (areas where partisan disagreements are pronounced). Yet we don't, as a general matter, say that the possibility of bias forecloses courts from performing their general dispute-resolution and norm-declaration roles throughout our legal system. We expect that state judges in congressional-election or presidential-election disputes can reasonably engage in the same kinds of judicial processes and consider the same kinds of interpretive factors that have historically guided them to resolve election contests and other important state statutory and constitutional questions. As long as state courts can reasonably be said to be doing so, federal courts will necessarily defer to state-court understandings of state statutory and constitutional law meanings.

With these principles clearly in mind, one can see that the better constitutional analogy to post-*Moore* federal-court review under the Elections Clause is not review under the Takings Clause or the Contracts Clause, but instead review under a clause much closer to (the Election Clause's) home—Article I, section 2. This provision, which governs *who* is eligible to vote in federal elections as distinguished from the Election Clause's treatment of *how* federal elections shall

[61] *Mitchell*, 400 U.S. at 288 (Stewart, J., concurring in part and dissenting in part).

be run, provides in relevant part: "the [voters] in each State [for the House of Representatives] shall have the Qualifications requisite for [voters] of the most numerous [legislative branch in state elections]."[62] Pursuant to this provision, voter eligibility for congressional elections incorporates whatever voter-eligibility standards exist in state law for state elections. The Constitution does not mandate any particular set of qualifications, but instead delegates decisions over eligibility to the state governments themselves. In the same way, the Elections Clause (as understood in *Moore*) does not mandate within each state who shall regulate federal elections or what those regulations must look like, but instead directs states themselves to make such decisions.[63] In the setting of Article I, section 2, it would quite unusual indeed for the Supreme Court to second-guess a state high court's interpretation of state-election eligibility laws, even though the (resulting) question of federal voting eligibility would, technically, raise a federal question susceptible of review in federal courts.

Another good analogy is the creation of federal crimes in federal enclaves located within state boundaries. The so-called Assimilated Crimes Act (ACA)[64] provides that federal criminal law incorporates the state criminal law of the state surrounding the federal enclave.[65]

Under the ACA, the federal system (albeit this time Congress rather than the Constitution itself) has similarly chosen to delegate federal regulation to the states. When applying this statute, federal courts recognize that although the question whether a crime has been committed under the ACA is appropriate for the federal courts to resolve, federal judges should (tightly) follow the state-law interpretations of state courts. As the Fourth Circuit explained in one case, for example:

> The Assimilative Crimes Act [ACA] by its own terms incorporates into federal law only the criminal law of the jurisdiction within which the federal enclave exists.

[62] U.S. Const. art I, § 2, cl. 1. The same essential language is also used for Senate elections in the Seventeenth Amendment.

[63] Cf. *Moore*, 143 S. Ct. at 2084 (quoting *McPherson*, 146 U.S. at 25, for the notion that "State" and "legislative power" are essentially interchangeable in the federal election context).

[64] 18 U.S.C. § 13.

[65] *See*, *e.g.*, United States v. Eure, 952 F.2d 397 (4th Cir. 1991) (per curiam).

> The Supreme Court of Virginia has held [state law to mean X]. *We, of course, must accept this authoritative interpretation of Virginia law.*[66]

To be sure, both Article I, section 2 and the ACA do not merely confer federal-election-regulation powers and duties upon the states, but also require that the states themselves utilize the same regulations that will apply federally. And there is safety in generality.[67] The Elections Clause, by contrast, does not require that a state regulate federal and state elections identically.[68] As I have written before,[69] where a state chooses to regulate federal elections differently than state elections (either in the lawmaking system used for federal-election regulation or in the regulations themselves), a federal court might be justified in ensuring that the state has a valid, non-invidious reason for such differentiation. But in the overwhelming majority of real-world situations, state-court rulings in the election-law realm apply to both state and federal elections, and in all such cases it makes no sense for federal courts to apply rigorous review of state-court decisions.

In discussing federal judicial oversight, the instinct to try to formulate clear standards of deference is understandable (and many of the Justices in *Moore* seemed interested in doing that.) But specifying a standard of review in abstract terms may be less helpful to understanding the actual oversight federal courts are expected to perform in the real world than is specifying the consequences that would inevitably ensue in a given case if the applicable level of deference were overcome to justify federal-court intervention. This brings us to a very useful point that builds on the preceding discussion. Just as "safety in generality" calls for a very high level of deference, if that deference is overcome by evidence of state

[66] United States v. Rowe, 599 F.2d 1319, 1320 (4th Cir. 1979) (per curiam) (emphasis added). Even those circuits that say state cases are not binding appear to use "binding" only "in the traditional sense of a higher court's caselaw controlling decisions of a lower court. *See* United States v. Smith, 965 F. Supp. 756, 761 (E.D. Va. 1997). "Obviously, because state courts do not review federal-court decisions, state substantive criminal caselaw is not binding in this traditional sense." *Id.* Moreover, even circuits that purport not to be bound by state-court rulings virtually always end up applying and following the relevant state-court decisions.

[67] *Cf.* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (explaining that broader application of a law is a safeguard against unreasonable or unfair legislation).

[68] *See AIRC*, 576 U.S. at 819 n.25.

[69] *See Eradicating*, *supra* note 2, at 46.

judicial wrongdoing and infidelity to state law sufficient to violate the Elections Clause, then such evidence would for similar reasons also always (I can't think of a plausible real-world hypothetical in which it wouldn't) call for preventing state courts from applying their misbegotten interpretation to *state elections* too. (For example, if a federal court were to reject state-court determinations of voter eligibility in the context of Article I, section 2 in a federal election, that rejection would inevitably have to apply to state-election voter eligibility as well.)

In other words, if the Supreme Court believes that state courts have misbehaved by flouting state law in violation of the Elections Clause, then the federal court would have to be prepared to ensure that state elections are free from the same egregious state-court action. Lawlessness so severe as to violate the Elections Clause would also seem inevitably to run afoul of many federal constitutional provisions when applied to state elections. A state-court ruling sufficiently corrupt, aberrant or irrational to warrant federal-court oversight under the Elections Clause would also fail, for use in state elections, to survive even rational basis review under the Equal Protection Clause (which requires a rational fit to a *permissible* government purpose), much less the heightened scrutiny that is implicated on account of the fundamental "right to vote" in any election, state or federal.[70] And state-court rulings concerning state separation-of-powers or state-law individual rights that are so far-fetched and unforeseeable as to not count as good-faith interpretations of state law would also violate the due process, fair notice, and rule-of-law concerns embodied in the Fourteenth Amendment (and, I would argue, also in the Guarantee Clause and elsewhere in the Constitution).[71] Put conversely, if a state

[70] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

[71] *See, e.g.*, Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995) (affirming finding of a likely due process violation when state-court ruling that ignored clearly stated absentee-ballot-signature requirements seemingly came from nowhere, disregarded past practice, and upset settled expectations of voters, would-be voters, and political campaigns). Thus, while a state-court ruling that so mangles state law as to be truly unfaithful to it certainly can implicate a federal interest, such an interest, though perhaps implicit in the Elections Clause, would not be uniquely grounded in Article I. If a federal court is inclined to find that a state court genuinely disregarded, rather than interpreted, state law with regard to the lawmaking system the state has chosen for federal-election regulation or with regard to the federal-election regulations themselves, then the high bar that would have been met would be akin to the one applied in due process settings, and such a conclusion by a federal court would doom application of the state-court ruling in state elections as well as federal contests, provided that the state was regulating state and federal elections in the same ways, thus illustrating that the constitutional flaw is not distinctively limited to Article I.

judicial interpretation is rational enough to pass federal constitutional review for purposes of state elections, it would be hard if not impossible to conceive of a basis for saying the state courts misinterpreted state law for purposes of the Elections Clause.[72]

At the end of the day, the "federal law," "federal constitutional rights," and "federal constitutional provisions" whose enforcement requires (according to *Moore*) federal-court review in this arena will have to involve one or both of two kinds of federal law. First are particular federal statutes and federal constitutional provisions relating to elections (such as the Voting Rights Act and the Fifteenth, Nineteenth, and Twenty-Sixth Amendments) that reflect particular concerns (often relating to equality). And second are more generally applicable due process/rule-of-law/republican-government "states must not flout state law on which voters rely in election settings" principles (that are not specific to, but that can be said to be implicated by, the Elections Clause) that prevent state courts, acting as courts, from truly making things up out of nowhere in ways that upset the settled expectations of voters. But, and here's the key point, all of these federal provisions and values operate to constrain state courts when those courts issue rulings affecting *state*, and not just *federal*, elections. So a federal court should (whenever states are treating federal and state elections similarly) not be prepared to characterize a state court's invocation of judicial review in a federal election setting as other than "ordinary" unless the federal court is prepared to do so for purposes of state elections as well. And that sets a high bar indeed.[73]

[72] To be sure, Article I, section 4 governs *federal* elections, such that the federal system has a stake in the game. But remember that Article I's drafters and ratifiers explicitly, consciously and publicly chose to confer power on state governments to administer congressional elections (opting for a presumptively decentralized, rather than an inherently federalized, election system), and specifically identified Congress (along with the President)—*not the Supreme Court*—as the federal entity empowered to regulate congressional elections, or refuse to seat ostensibly elected members of Congress, when states are doing bad things. As far as I can tell there is no originalist evidence to suggest federal courts play a key role here. And the same goes for Article II and presidential elections, even more so given the lack of explicit congressional power to regulate selection of presidential electors.

[73] "Ordinary judicial review," it should also be noted, is not limited to state-court rulings that invalidate statutory enactments in the name of the state constitution. Ordinary judicial review in state court also includes interpretations of state statutes, via avoidance techniques and the like, in the light of, or against the backdrop of, the state constitution. Federal courts do likewise all the time.

*Moore Winners*

The winners in *Moore* include, but are not limited to, the respondents. Perhaps the biggest winner is American democracy itself. Within the realm of congressional elections alone, an opposite result in *Moore* would have, as a necessary logical matter, called *AIRC* into doubt and made solving the partisan gerrymandering problem much harder. An opposite result in *Moore* would have had even more dangerous implications for presidential elections. To be sure, I have previously explained why ISL is much less plausible for Article II than for Article I in any event, and indeed why ISL's embrace in Article I would actually have made its embrace in Article II by fair-minded jurists even *less* defensible.[74] But the reality is that had *Moore* come out the other way, many folks would have argued that ordinary elected legislatures enjoy unfettered power over presidential elections, even to the point of having the authority (provided it were exercised in a manner consistent with federal statutory timelines) to oust the state peoples and the state courts from their traditional roles (roles often embodied in state constitutions) in selecting presidential electors. In the context of the 2024 presidential election and the modern partisan makeup of elected state legislatures,[75] that would have been catastrophic.

A win for petitioners would also have been devastating for the Court (and for its leader, John Roberts). ISL was and is an embarrassingly weak theory, especially judged by the originalist yardstick to which the Court has recently committed itself. Had the Court embraced ISL after what the Justices said in *Dobbs* and *Bruen* about the importance of history and original understandings, very, very few honest analysts would have been able to take the Court seriously. And the drive on Capitol Hill to impose radical reforms on the Court would have (rightly) picked up a great deal of steam, notwithstanding any efforts Chief Justice Roberts might make to forestall intrusion by Congress and the president.

[74] *See Eradicating*, *supra* note 2, at n.90 & accompanying text; *Amici Brief, supra* note 2, at 30–31.

[75] *See* Vikram David Amar, *Musings on Last Week's New York High Court Ruling Invalidating Partisan Gerrymandering, With Special Attention to the So-Called Independent-State-Legislature Theory*, Justia.com (May 6, 2022), https://bit.ly/445eym0.

That points up another winner—originalism. If one asks how Chief Justice Robert's (6–2 merits) opinion in *Moore* differs from Justice Ruth Bader Ginsburg's narrow 5–4 majority opinion in *AIRC*—which also rejected ISL—the most significant answer is that *Moore* contains a whole section on originalism, on the history right before and right after the Constitution's adoption concerning the alleged "independence" of ordinary elected legislatures. That, more than anything else, might explain the apparent change of heart by so many Justices. Notably, not a *single* brief by the parties or the amici in the *AIRC* litigation mentioned (much less analyzed) *any* of the originalist evidence featured in *Moore*. For those Supreme Court advocates who don't yet understand, *Moore* is another signal that where originalist evidence is relevant, litigants who disregard it or (like the petitioners in *Moore*) fail to plausibly account for it, do so at their peril.

That brings me to the final winner—legal and history[76] scholars. Whether or not their briefs and articles were cited in the Justices' opinions, scholars who participated as amici and who published essays in the years leading up to *Moore* were clearly influential in resolving this case. The respondents' briefs made effective use of scholarship, and examination of the structure and content of the majority opinion suggests that the ideas and evidence scholars contributed had significant impact. Indeed, scholars provided something none of the parties actually did—a full-throated explanation of how ludicrous ISL is, and how one can't embrace ISL and at the same time accept *Smiley* and *AIRC*.

The respondents were understandably reluctant to insult many of the Justices who had worked on *Bush v. Gore* and who had expressed at least provisional support for ISL. The respondents thus tried to offer the Court an approach that would have recognized constitutionally mandated "primacy"[77] with respect to the actions of the ordinary elected legislature (and that would have essentially allowed the Court to undo *AIRC*, since, as the petitioners forcefully ob-

[76] Some of the best and perhaps most influential amicus briefs relating to founding history came from law professors as well as professional historians. This is particularly heartening given the questions that have been raised about how a Court lacking in professional history training can properly do originalism. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022).

[77] *See* Non-State Respondent's Brief at 24, Moore v. Harper, 143 S. Ct. 2065 (2023) No. 21-1271).

served, fully displacing an elected legislature is hardly consistent with respecting its "primacy"). This approach was certainly much less dangerous than an even more robust ISL, but it was not fully coherent either. "Legislature" refers either to a "particular" entity (as ISL says) or to a "lawmaking system chosen by the state," as history, theory, and analogy to the meaning of "Congress" in the Constitution[78] all establish.[79] If the former holds, *AIRC* (and *Smiley* too) cannot survive. If the latter holds, then there is nothing to the idea of a federally mandated "primacy" of ordinary elected legislatures or any other organ of state government.

Happily, the Court opted for the latter, rejecting facile distinctions such as process/substance and supplement/supplant. The Court's straightforward repudiation of ISL is reflected in *Moore*'s restatement of the heart of *AIRC*: The "Elections Clause['s] express[] . . . refer[ence] to the 'Legislature,' . . . does not preclude a State from vesting congressional redistricting authority in a body other than the elected group of officials who ordinarily exercise lawmaking power," because "[s]tates . . . 'retain autonomy to establish their own governmental processes.'"[80] This position was urged by members of the scholarly community[81] much more forcefully than the parties, and it was the position that prevailed. Crucially, the Court's embrace of this position on the merits is, as explained above, what makes further mischief by federal courts very unlikely. This should undoubtedly provide a shot in the arm for conscientious scholars who are needed now more than ever to help the skilled Supreme Court bar and the Justices themselves.

[78] *See* Amar, *supra* note 5.

[79] As Yogi Berra reportedly said: "When you come to a fork in the road, take it." Although ridiculed, the adage does rightly suggest that, at least sometimes, you simply have to make a choice.

[80] *Moore*, 143 S. Ct. at 2083 (quoting *AIRC*, 576 U.S. at 816).

[81] *See, e.g.*, *Amici Brief*, *supra* note 2. The Court's opinion aligned with most of the basic points we urged in our brief. It bears noting, in this regard, that dozens of well-known and highly regarded academics wrote, submitted, or joined amicus briefs critiquing ISL, while only one person who is famous (if not always for good reasons) and who has been recently associated with an academic institution weighed in to support the petitioners: John Eastman.