Moore v. Harper, Evasion, and the Ordinary Bounds of Judicial Review

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In Moore v. Harper*, the Supreme Court confronted head on for the first time the so-called independent state legislature theory (ISLT), which posits that state legislatures have exclusive authority to enact laws and regulations governing federal elections and that those laws are not subject to state court judicial review pursuant to state constitutions. While the Supreme Court resoundingly rejected the most robust version of ISLT in* Moore*, commentators have argued that language in that opinion opened a dangerous door to federal supervision of state election law. This Article argues that those claims are wrong. Under* Moore*, federal court review is only appropriate to prevent state courts from evading federal interests, and as* Moore *itself made clear, the federally-protected interest under the Elections Clause is the prohibition of state courts "transgress[ing] the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." Looking to the Court's reasoning in* Moore*, as well as constitutional history and fundamental principles of state sovereignty, this Article argues that the ordinary bounds of judicial review are exceptionally broad, and there will virtually never be a case in which a state court transgresses those bounds in a way that amounts to an arrogation of power. The upshot, then, is that* Moore *did more than reject the essential premises of ISLT; it also made it extremely unlikely that any future ISLT claims will succeed.*

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INTRODUCTION

In 2023, the Supreme Court decided *Moore v. Harper*,[1] a case hailed as "the most important case for American democracy in the almost two and a half centuries since America's founding."[2] At the heart of *Moore* was the so-called independent state legislature theory (ISLT), a theory that its defenders say derives from the Elections and Electors Clauses in the U.S. Constitution. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[3] Similarly, the Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[4] According to ISLT proponents, because the Clauses expressly empower state "Legislature[s]" to regulate federal elections, they are the only state actors that can do so, and they cannot be checked by other branches of state government, including state courts, even if they act in derogation of state constitutional law.[5]

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[1] 600 U.S. 1 (2023).

[2] J. Michael Luttig, *There Is Absolutely Nothing to Support the 'Independent State Legislature' Theory*, THE ATLANTIC (Oct. 3, 2022), https://www.theatlantic.com/ideas/archive/2022/10/moore-v-harper-independent-legislature-theory-supreme-court/671625/; *see also* Ian Millhiser, *A New Supreme Court Case Is The Biggest Threat To US Democracy Since January 6*, VOX (June 30, 2022 10:47 A.M.), https://www.vox.com/23161254/supreme-court-threat-democracy-january-6; Richard L. Hasen, *It's Hard to Overstate the Danger of the Voting Case the Supreme Court Just Agreed to Hear*, SLATE (June 30, 2022 12:57 P.M.), https://slate.com/news-and-politics/2022/06/supreme-court-dangerous-independent-state-legislature-theory.html; Leah Litman, Kate Shaw, & Carolyn Shapiro, Opinion, *A New Supreme Court Case Threatens Another Body Blow To Our Democracy*, WASH. POST (July 2, 2022 7:00 A.M.), https://www.washingtonpost.com/opinions/2022/07/02/moore-harper-gerrymandering-supreme-court-state-voting-rights/; Vikram D. Amar, *The Legal Trick That Could Undermine The 2024 Election—If The Supreme Court Doesn't Shut It Down*, TIME (June 30, 2022 3:43 P.M.), https://time.com/6192872/supreme-court-independent-state-legislature/.

[3] U.S. CONST. art. I, § 4, cl. 1.

[4] *Id.* art. II, § 1, cl. 2.

[5] Prior to the Court's decision in *Moore v. Harper*, several scholars had written about ISLT and its myriad consequences for democracy. *See generally, 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 SUP. CT. REV. 1; Carolyn Shapiro, *The Independent State*

The petitioners in *Moore* urged the Court to hold that, under the Elections Clause of the Constitution, the North Carolina Supreme Court had no authority to strike down a congressional redistricting map passed by the North Carolina General Assembly on the ground that it violated the state constitution.[6] The Court rejected this maximalist view of ISLT.[7] Drawing upon the Court's precedent, as well as the long history of state court judicial review and state constitutional provisions governing elections, the Court held that state legislatures' actions relating to federal elections are not exempt from state court judicial review. But the Court did not stop there: in the final section of the opinion, the Court cautioned that "state courts do not have free rein" when it comes to state laws governing federal elections. As the Court explained, the Court retains authority to "to ensure that state court interpretations of that law do not evade federal law,"[8] and that state courts do not "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[9]

While some extolled *Moore* as a decisive rejection of ISLT,[10] others were far more skeptical. Professor Richard Hasen discussed the problematic prospect of federal judicial review of state court decisions on state election law and warned that federal courts can

Legislature Theory, Federal Courts, and State Law, 90 U. CHI. L. REV. 137 (2022); Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235; Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 135 (2023). This Article builds upon this scholarship by situating the legal and historical critiques of ISLT in the post-*Moore v. Harper* landscape.

[6] *See* Brief for Petitioners at 1, *Moore*, 600 U.S. 1 (No. 21-1271).

[7] *Moore*, 600 U.S. at 37.

[8] *Id.* at 34–35.

[9] *Id.* at 36.

[10] *See, e.g.*, *U.S. Supreme Court Rejects Dangerous Attempt to Destroy Democracy*, COMMON CAUSE (June 27, 2023), https://www.commoncause.org/press-release/u-s-supreme-court-rejects-dangerous-attempt-to-destroydemocracy/ ("The ruling in *Moore v. Harper* is a major victory for voters, given the potential the case had to shatter the checks and balances that serve as underpinnings of American democracy."); Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2023 CATO SUP. CT. REV. 275, 277 (arguing that the "*Moore* Court forcefully repudiated the crux of ISL[T] once and for all").

now "second-guess" any of those state court rulings.[11] Professors Leah Litman and Kate Shaw wrote that the Court's refusal to explain the bounds of its power to review state court judgments is "no small omission."[12] In their view, the Court's suggestion that it holds the ultimate authority to decide whether state courts transgress the Elections Clause opened a dangerous door to federal supervision and disruption of state election law.[13]

This Article argues that these concerns, while understandable, are overstated. After *Moore*, the scope of federal judicial review of state court adjudication in the elections context is exceedingly narrow—indeed, it is no broader than it was prior to the decision in *Moore*. *Moore*—and the doctrinal areas it cited to support federal court review of state court elections decisions—make that clear.

When describing the circumstances in which federal judicial intervention is permissible under the Elections Clause, the Court cited cases in which federal court review was deemed appropriate to prevent state courts from evading federal interests, including cases under the Takings Clause, Contracts Clause, and cases raising jurisdictional questions under the adequate and independent state ground doctrine. By situating the Court's scope of review under the Elections Clause within that evasion jurisprudence, the Court made clear that the circumstances in which it will be appropriate for federal courts to review state court decisions under that Clause will be exceptionally rare.

Evasion cases all follow a similar rubric. First, the Court identifies a federal interest at stake in the case. The federal interests at stake in evasion cases vary. In some instances, a federal constitutional provision constrains state conduct, and state courts may attempt to circumvent that constraint by using state law to avoid federal constitutional strictures. The federal interest in those cases, then, is the enforcement of the federal Constitution. Federal

[11] Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, SLATE (June 27, 2023 12:44 P.M.), https://slate.com/news-and-politics/2023/06/supreme-court-voting-moore-v-harper-time-bomb.html; *see also* Leah Litman, *Anti-Novelty, the Independent State Legislature Theory in* Moore v. Harper*, and Protecting State Voting Rights*, ELECTION LAW BLOG (July 3, 2023 7:42 A.M.), https://electionlawblog.org/?p=137239.

[12] Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 YALE L.J.F. 881, 884 (2024).

[13] *See id.* at 883–84.

interests can also simply be the application of federal statutory laws against resistant state actors. Another federal interest at risk of evasion is the Supreme Court's power to enforce federal law by adjudicating disputes arising out of that law. This Article uses the term "federal interest" to encompass a variety of federal constitutional and statutory values that can be frustrated by state law.

Second, the Court reviews the state court action to assess whether that action bears indicia that the state court is attempting to evade the federal interest. In other words, the Court cannot review state court determinations of state law unless it is doing so to vindicate clearly articulated federal interests, including constitutional limits on state action, federal statutes, or the Court's own power to hear disputes arising under federal law.

By invoking these evasion cases, the Court in *Moore* was simply making clear that, notwithstanding its rejection of ISLT, the Court could still review state court decisions on state law in the narrow circumstance where doing so was necessary to prevent the evasion of federal law. It was not, as skeptics have feared, giving itself plenary authority to review state court decisions implicating federal elections.

Examining the approach the Court has taken in other evasion cases confirms that Supreme Court review in this context should be quite limited. Critically, to start, there must be a federal interest that could be evaded by state action. Here, as the majority in *Moore* explained, there is a federal interest in ensuring that "state courts [do] not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[14] But there is no federal interest beyond that, and certainly no federal interest in freeing state legislatures from the checks of other state actors. In other words, so long as state court decisions do not exceed the ordinary bounds of judicial review, there is no basis for federal court intervention.

And as *Moore*'s own reasoning underscores, the ordinary bounds of judicial review are quite broad, giving state courts sweeping authority to construe their state charters.[15] *Moore*'s holding rejecting ISLT rested on three fundamental principles: (1) state legislatures are creatures of their own state constitutions and

[14] *Moore*, 600 U.S. at 36.
[15] *See infra* section III.A.

must therefore abide by constitutional limits on their powers; (2) state constitutions may include—and have historically included—restraints on state legislatures' power to enact election laws; and (3) state courts can enforce those restraints via judicial review without running afoul of the Elections Clause. Together, those principles make clear that the Elections Clause does not endow state legislatures with immunity from state constitutional provisions that govern elections, and routine checks from state courts fall squarely within the ordinary bounds of judicial review.

Moore's holding and reasoning are consistent with the text and history of the Elections and Electors Clauses.[16] In adopting the Clauses, the Framers were not seeking to insulate state legislatures from any checks on their power. Far from it: the Elections Clause empowers states *and* Congress to regulate laws governing federal elections precisely because the Framers distrusted state legislatures and feared that, if left unchecked, they would abuse their authority and weaken the federal government using election laws. The history of the Electors Clause is similar. While the Framers debated who should appoint electors to the Electoral College, there is no indication that, by choosing state legislatures to direct the manner of appointing electors, the Framers meant to empower state legislatures to choose how to appoint electors free from any state constitutional constraints on their authority.

Moore is also congruent with the Court's longstanding respect for federalism and state sovereignty.[17] The Court has repeatedly refused to insert itself in state separation of powers disputes and emphasized that the federal constitutional separation of powers principles that bind Congress, the Executive Branch, and the Court do not apply to the states. Even more, the Court has taken care not to encroach on state law by ensuring that federal courts do not displace state law with general federal common law. Any conception of the ordinary bounds of judicial review in state courts must be compatible with federalism principles that the Court has long recognized, and nothing in *Moore* should be read to contradict these basic tenets.

In sum, *Moore* held that state legislatures, consistent with state constitutions, are subject to checks from other state actors. So when the *Moore* majority noted that state courts do not have free

[16] *See infra* section III.B.
[17] *See infra* sections III.C–D.

rein to displace state election law, the Court merely preserved grounds of review that already existed and clarified that nothing in its decision exempted the Elections and Electors Clause cases from the existing, narrow exception to the general rule that state courts are the final authority on state law. But given how broad the ordinary bounds of judicial review are, it will rarely be the case that litigants will be able to show that a state court has exceeded those bounds and arrogated power to itself, thereby triggering application of the evasion doctrine.

This Article proceeds in three Parts. In Part I, the Article details the *Moore* decision and shows that *Moore*'s thorough rejection of ISLT leaves very little for ISLT proponents to latch onto. Part II then dives into the evasion cases the *Moore* Court cited and demonstrates how evasion review, consistent with the historical role of federal courts, is a narrow exception to the Court's general rule that it does not review state court decisions on state law. The *Moore* Court emphasized that its decision did not wholly exempt state courts from evasion review under the Elections Clause, but that is because, as an examination of the evasion cases makes clear, state court judgments of state law can always be reviewed *if* there is the prospect of evasion of a federal interest.

Part III applies that evasion jurisprudence to ISLT, identifying the federal interest at stake and explaining that because ordinary judicial review gives state courts immense leeway in how they conduct judicial review, it will almost never be appropriate to employ evasion to displace state court decisions on state election law. Part III analyzes *Moore*'s reasoning, the history of the Clauses, and the Court's longstanding respect for state separation of powers and sovereignty to illustrate just how illusory any claim of evasion under the Clauses would be. Indeed, because any interest under the Elections and Electors Clauses would need to be consistent with *Moore*, constitutional history, and federalism principles, there is practically no circumstance in which state courts could ever exceed the ordinary bounds of judicial review, and thus no grounds for displacing state law. A brief Conclusion follows.

I. ISLT AND *MOORE V. HARPER*

As *Moore v. Harper* headed to the Supreme Court, ISLT proponents were hopeful that it would prove to be the vehicle for

success that they had not previously found.[18] Those ISLT proponents would be severely disappointed. *Moore*'s rejection of the strong ISLT theory makes clear that state legislatures are subject to state constitutional limits on their power and, in so ruling, rejected several premises that are essential to ISLT proponents' arguments.

In early 2021, North Carolina, like every other state, began the process of decennial redistricting.[19] The North Carolina General Assembly, tasked with redistricting under the state's constitution,[20] passed congressional and state legislative maps "along strict party-line votes" in November 2021.[21] Several plaintiffs challenged the maps in state court as unconstitutional partisan gerrymanders under the North Carolina Constitution.[22] In February 2022, the North Carolina Supreme Court held in *Harper v. Hall*[23] that the claims were justiciable,[24] that partisan gerrymandering violated the state constitution,[25] and that the maps at issue were partisan gerrymanders and thus unconstitutional.[26] Legislative defendants had argued that the Elections Clause prevents the court from striking down a legislatively enacted congressional map on state constitutional grounds, but the court soundly rejected that argument, calling it "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences."[27]

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[18] Cases arising out of the 2020 election brought some ISLT-related questions before the Court, but none of those cases resulted in a majority of the Justices ruling in favor of ISLT proponents. For a description of these cases, see Shapiro, *supra* note 5, at 162–76.

[19] Harper v. Hall (*Harper I*), 868 S.E.2d 499, 511 (N.C. 2022).

[20] *Id.*

[21] *Id.* at 513.

[22] *Id.* Partisan gerrymandering claims are nonjusticiable under the U.S. Constitution. *See* Rucho v. Common Cause, 588 U.S. 684, 718 (2019).

[23] 868 S.E.2d 499 (N.C. 2022).

[24] *Id.* at 559.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 551. On April 28, 2023, the North Carolina Supreme Court overruled *Harper I* and held that partisan gerrymandering claims are nonjusticiable under the state's constitution. Harper v. Hall (*Harper III*), 886 S.E.2d 393, 401 (N.C. 2023). This reversal—which occurred after the Supreme Court had granted certiorari and heard oral argument in *Moore v. Harper*—raised mootness questions. *See* Richard L. Hasen, *Unfortunately, the Biggest Election Case of the Supreme Court Term Could Be Moot*, SLATE (Feb. 6, 2023 5:50 A.M.), https://slate.com/news-and-politics/2023/02/moore-v-harper-supreme-court-election-case-moot.html.

The legislative defendants successfully petitioned for certiorari to the U.S. Supreme Court, arguing that the Elections Clause rendered the North Carolina Supreme Court's ruling an unconstitutional usurpation of the state legislature's role in congressional redistricting.[28] The petitioners urged a sweeping version of ISLT, arguing that any judicial review by a state court under state constitutional law of state election law about congressional elections was impermissible under the federal Constitution.[29]

The Supreme Court, in a 6-3 decision, rejected the petitioners' plea for state legislative supremacy.[30] Chief Justice Roberts, writing for the majority, framed the question before the Court as "whether the Elections Clause insulates state legislatures from review by state courts for compliance with state law."[31] The Court's answer was unequivocal: no. At every step of its analysis, the Court decimated the pillars of ISLT proponents' understanding of the Elections Clause.

The Court began by surveying the history of judicial review, emphasizing that the principle that state courts exercised review of state statutes was well-established *even before* the Supreme Court decided *Marbury v. Madison*.[32] The Court next inquired whether the Elections Clause "carves out an exception to this basic principle" and decided that "it does not."[33] In explaining this result, the Court described prior instances in which it had reviewed the scope of state legislatures' authority under the Elections Clause. In each case, the Court had rejected the proposition that the Elections Clause nullified state law checks on state legislative power, including popular referenda,[34] gubernatorial vetoes,[35] and independent redistricting commissions.[36] The majority underscored those cases' teachings: "A state legislature may not 'create congressional districts independently of' requirements imposed 'by the state constitution

[28] *See generally* Petition for Writ of Certiorari, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271).
[29] *See* Brief for Petitioners at 1, *Moore*, 600 U.S. 1 (No. 21-1271).
[30] *Moore*, 600 U.S. at 37. The Court also held that *Harper III* did not moot the case, and thus the Court had jurisdiction. *See id.* at 15–16.
[31] *Id.* at 19.
[32] *Id.* at 19–22.
[33] *Id.* at 22.
[34] *Id.* at 23 (discussing Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916)).
[35] *Id.* at 23–24 (reviewing Smiley v. Holm, 285 U.S. 355 (1932)).
[36] *Id.* at 25 (describing Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015)).

with respect to the enactment of laws.'"[37] In particular, the Court emphasized that state legislatures were "created and bound by" state constitutions,[38] and that nothing in the Elections Clause disrupted the "ordinary constraints on lawmaking in" state constitutions.[39]

Next, the majority addressed an argument put forward by the legislative defendants and embraced by the dissent that would draw a distinction between "procedural and substantive constraints" on state legislatures: while the former—including gubernatorial vetoes and ballot initiatives—are permissible under the Elections Clause, the latter are not.[40] The Court rejected this position as "too cramped,"[41] and it noted that the line between procedure and substance was too hazy to do any meaningful work in this context.[42]

Finally, the Court turned to historical practice to "confirm[] that state legislatures remain bound by state constitution restraints even when exercising authority under the Elections Clause."[43] The Court pointed to provisions of Delaware's 1792 Constitution and an 1810 amendment to the Maryland Constitution that explicitly regulated congressional elections.[44] These provisions would have had no meaning, the majority reasoned, "[i]f the Elections Clause had vested exclusive authority in the state legislatures."[45] The Court also explained that the Elections Clause was based on a parallel provision in the Articles of Confederation about the appointment of delegates, and that even at the time of the Articles, state constitutions regulated such appointments.[46] This historical background bolstered the majority's conclusion that the Elections Clause does not insulate state legislatures from any and all checks on their power imposed by state constitutions.

In a final section of the opinion unnecessary to its holding, the Court addressed how it would approach the question of review of state court decisions under the Elections Clause. Although this issue had not been briefed by the parties, the majority offered some

[37] *Id.* at 26 (quoting *Smiley*, 285 U.S. at 373).
[38] *Id.* at 27.
[39] *Id.* at 29.
[40] *Id.* at 30.
[41] *Id.*
[42] *Id.* at 31.
[43] *Id.* at 32.
[44] *See id.* at 32.
[45] *Id.*; *see also id.* at 33 (describing other state constitutions in the Founding era that regulated the "manner" of federal elections).
[46] *Id.*

guideposts for future cases. Cautioning that "state courts do not have free rein" when it comes to state regulations of federal elections,[47] the majority wrote that the reference to the state legislature in the Elections Clause is "a deliberate choice that this Court must respect."[48] The Court continued: "As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law."[49]

As examples of this authority to prevent evasion, the majority cited cases evaluating state property rights in the Takings Clause context;[50] cases addressing state contract law in the Contracts Clause context;[51] and the Court's power to assess whether a ground for a state law decision is adequate for the purposes of determining whether the Supreme Court has jurisdiction to review a state court judgment.[52] According to the majority, these examples demonstrated that the Court's usual practice of deferring to "state court interpretations of state law" is "tempered" by the Court's "duty to safeguard limits imposed by the Federal Constitution."[53] The Court pointed to the Justices' separate writings in *Bush v. Gore*[54] for potential standards that could be used to determine whether a state court "exceeded the bounds of ordinary judicial review."[55]

This invocation of *Bush v. Gore* was unsurprising. As many scholars have noted, the ISLT arguments that came before the Court in *Moore* made their first appearance in *Bush v. Gore* in 2000.[56] In that infamous case, the Court was asked to decide the constitutionality of the Florida Supreme Court's decision to order a manual recount of paper ballots in certain counties.[57] While the *per curiam* majority ruled that the recount violated the Equal Protection Clause,[58] Chief Justice Rehnquist and Justice Ginsburg grappled

[47] *Id.* at 34.
[48] *Id.*
[49] *Id.*
[50] *See id.* at 34–35.
[51] *See id.* at 35.
[52] *See id.*
[53] *Id.*
[54] 531 U.S. 98 (2000) (per curiam).
[55] *Moore*, 600 U.S. at 36.
[56] *See, e.g.*, Amar & Amar, *supra* note 5, at 1–2; Litman & Shaw, *supra* note 5, at 1239; Shapiro, *supra* note 5, at 155; Weingartner, *supra* note 5, at 148–49.
[57] *See Bush*, 531 U.S. at 103.
[58] *Id.*

with the Article II question—that is, whether the Florida Supreme Court's ruling had violated the Electors Clause.

Chief Justice Rehnquist took the position that the Florida Supreme Court had violated the Electors Clause and wrote that the Clause makes the "distribution of powers among the branches of a State's government" a federal constitutional matter that federal courts must enforce.[59] While the Chief Justice acknowledged that the Supreme Court usually "deferr[ed] to the decisions of state courts on issues of state law,"[60] he concluded that the Electors Clause's specific empowerment of state legislatures meant that "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[61] Thus, in the Chief Justice's view, the Electors Clause embodied a federal constitutional interest in heightened deference to state legislatures when election laws implicating federal elections are at issue. He wrote that the Florida Supreme Court would violate Article II if its "interpretation of Florida election laws impermissibly distorted them beyond what a fair reading required."[62] Justice Souter, writing in dissent and disagreeing with Chief Justice Rehnquist's conclusion on the merits, phrased the standard differently: whether the state court's ruling 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."[63]

Justice Ginsburg's *Bush v. Gore* dissent offered a competing view. She forcefully refuted Chief Justice Rehnquist's view that federal courts had a role to play in reviewing state court decisions implicating federal elections. She rejected the idea that the Electors Clause endows state legislatures with a special status which requires deference to state legislative schemes at the expense of state courts. The Chief Justice's framework, she wrote, would "disrupt a State's republican regime"[64] and violate the "basic principle that a State may organize itself as it sees fit."[65] Justice Ginsburg further emphasized that even in cases in which federal constitutional review

[59] *Id.* at 111 (Rehnquist, C.J., concurring). Chief Justice Rehnquist was joined by Justices Scalia and Thomas.
[60] *Id.* at 112.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 131 (Souter, J., dissenting).
[64] *Id.* at 115 (Ginsburg, J., dissenting).
[65] *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

requires an analysis of state law, the Court has always been "mindful of the full measure of respect we owe to interpretation of a state law by a State's highest court."[66]

Ultimately, while the *Moore* majority did not embrace Justice Ginsburg's full-throated rejection of any ISLT-based federal court review of state law, it declined to adopt a precise test for determining whether state courts had "transgress[ed] the ordinary bounds of judicial review such that they arrogate[d] to themselves the power vested in state legislatures to regulate federal elections."[67] Indeed, the Court did not decide whether the North Carolina Supreme Court overstepped its role in this case, noting that the petitioners "expressly disclaimed" that argument.[68]

Justice Thomas, joined by Justice Gorsuch and by Justice Alito only as to the jurisdictional issue, dissented.[69] Justice Thomas believed that the state court had violated the Elections Clause. In his view, the Elections Clause limits the substantive restraints that state constitutions can impose on state laws implicating federal elections.[70] According to the dissent, the majority's focus on the "power of state courts to exercise 'judicial review'" missed the point.[71] Instead, the question was whether state legislation on congressional elections is limited by the state constitution at all when "the power to regulate those subjects comes from the Federal Constitution, not the people of the State."[72]

Justice Thomas also criticized the majority's conclusions about federal judicial review of state court decisions in Elections Clause cases. He wrote that "the majority offers no clear rationale for its interpretation of the Clause" and cautioned that the majority's

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[66] *Id.* at 137.
[67] *Moore*, 600 U.S. at 36.
[68] *Id.* at 36–37. Justice Kavanaugh concurred. *See id.* at 37 (Kavanaugh, J., concurring). He endorsed the majority's conclusion that "a state court's interpretation of state law in a case implicating the Elections Clause is subject to federal court review," *id.* at 38, and explained that such "review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication," *id.* at 38–39.
[69] *See id.* at 40 (Thomas, J., dissenting). Before turning to the merits, Justice Thomas disagreed with the majority's justiciability holding and wrote that he would have held that the case was moot. *Id.* at 40–41.
[70] *Id.* at 59
[71] *Id.* at 62.
[72] *Id.*

view "portends serious troubles ahead for the Judiciary."[73] In the dissent's view, by expanding "*Bush*-style controversies over state election law," the majority "invites questions of the most far-reaching scope."[74] Among them, Justice Thomas explained, was "What *are* the ordinary bounds of judicial review?"[75] Justice Thomas "fear[ed] that this framework will have the effect of investing potentially large swaths of state constitutional law with the character of a federal question not amenable to meaningful or principled adjudication by federal courts."[76]

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Moore rejected the most aggressive version of ISLT and affirmed state courts' power of judicial review over state legislatures under the Elections Clause. Notwithstanding *Moore*, however, ISLT claims and arguments persist. Some litigants have continued to bring ISLT claims against state constitutional provisions, state regulations, and even federal executive actions, though those cases have been dismissed on standing grounds.[77] Moreover, in the months since the decision, state supreme courts have cited *Moore* for the proposition that state courts' authority to interpret state law related to federal elections is limited by the federal Constitution.[78] And as of this writing, one state has indicated that it intends to seek certiorari in a case in which a state supreme court had struck down a state election law on state constitutional grounds, arguing that the

[73] *Id.* at 63.
[74] *Id.* at 65.
[75] *Id.* (emphasis in original).
[76] *Id.*
[77] *See, e.g.*, Keefer v. Biden, No. 24-cv-147, 2024 WL 1285538, at *1 (M.D. Pa. Mar. 26, 2024), *appeal docketed*, No. 24-1716 (3d Cir.); Lindsey v. Whitmer, No. 23-cv-1025, 2024 WL 1711052, at *1 (W.D. Mich. Apr. 10, 2024), *appeal docketed*, No. 24-1413 (6th Cir.).
[78] *See e.g.*, Graham v. Adams, 684 S.W.3d 663, 675–76 (Ky. 2023) (citing *Moore* for "recent guidance on the proper role of state judiciaries in considering compliance of Congressional district reapportionment plans with state constitutional law," including *Moore*'s admonition that state courts may not transgress the bounds of judicial review); Brown v. Sec'y of State, 313 A.3d 760, 779 n.3 (N.H. 2023) (citing *Moore* as support for the proposition that other state supreme court decisions striking down congressional maps on partisan gerrymandering grounds under state constitutions have less "precedential value").

state court's ruling exceeded the ordinary bounds of judicial review.[79]

The question remains, then, how widely the Court left the door open to future ISLT claims under the Elections Clause. And because the Court has interpreted the Elections Clause and Electors Clause as similar provisions when it comes to deciphering the significance of the word "Legislature,"[80] *Moore* will certainly have ramifications for future disputes under the Electors Clause as well. While the *Moore* Court reserved for itself the power to review state court decisions implicating the Elections Clause, the majority expressly grounded that review in the Court's longstanding but narrow exception to review state court decisions on state law when states evade federal interests. The following Parts dive into that jurisprudence and its application to the Election and Electors Clauses.

II. EVASION CASES: AN OVERVIEW

It is a fundamental principle of our system of government that "the final authority on state law" is the highest state court, not a federal court.[81] Thus, as a general rule, the U.S. Supreme Court will not, and indeed cannot, review state court decisions on state law. But for every rule there is an exception, and the exception to this rule is when state law operates to insulate states from their obligations under federal law.[82] In other words, the U.S. Supreme Court will review state court decisions only to ensure that state law is not being used to "evade consideration of a federal issue,"[83] which can range from constitutional rights to federal statutes to the Court's

[79] *See* Application For An Extension Of Time To File A Petition For A Writ Of Certiorari To The Montana Supreme Court at 2, Christi Jacobsen v. Montana Democratic Party, No. 23A1136 (U.S. June 13, 2024), https://www.supremecourt.gov/DocketPDF/23/23A1136/314850/20240612145022621_Jacobsen%20v%20MDP%20Application%20for%20extension.pdf.

[80] *See, e.g.*, *Moore*, 600 U.S. at 27 (calling the Electors Clause "similar to the Elections Clause"); *id.* at 32 ("[W]e have found historical practice particularly pertinent when it comes to the Elections and Electors Clauses."); *id.* at 36 (discussing *Bush v. Gore*'s analysis of the Electors Clause to analyze the scope of the Elections Clause).

[81] Fidelity Union Tr. Co. v. Field, 311 U.S. 169, 177 (1940) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

[82] *See* Amar, *supra* note 10, at 290–91 ("Where 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 federal entitlement.").

[83] Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1954).

own power to hear disputes in which a party seeks to vindicate a federal right. This Article will refer to these cases as evasion cases. After first grounding the Court's evasion jurisprudence in the history of Article III and the Supreme Court's jurisdiction to review state judgments, this Part will describe the cases in which the Court has applied this exception to vindicate a clearly established federal interest.

A. Evasion's Historical Roots

At the core of the evasion cases is the idea that federal courts will sometimes need to enforce federal interests against states that attempt to avoid their obligations under federal law. The *Moore* Court did not invent this concept. Instead, this relationship between federal courts vis-à-vis state courts dates back to the Founding. In fact, the concern for state courts ignoring federal law was one of the main reasons why the Framers created a federal judiciary, composed of a Supreme Court that could review state court decisions that implicated federal law and "such inferior Courts as the Congress may from time to time ordain and establish."[84]

The relationship between state and federal courts was the subject of much discussion in the founding debates surrounding Article III and the establishment of the federal judiciary. While there was general agreement about the need for a national judiciary, the scope of its jurisdiction was hotly contested.[85] Antifederalists were concerned that the creation of lower federal courts—that is, federal courts inferior to the U.S. Supreme Court—would displace state courts. Supreme Court review of state judgments, they argued, would be enough to vindicate federal law. As one opponent of inferior federal courts put it, "the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of [judgments]."[86] Proponents of inferior courts, such as Madison, responded that inferior courts were necessary to prevent "excessive opportunity for state inference with federal supremacy."[87] The dispute over inferior courts lead to the

[84] U.S. CONST. art. III.
[85] Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 762 (1984).
[86] *Id.* at 763 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1966) [hereinafter FARRAND'S RECORDS]).
[87] *Id.* at 767.

Madisonian compromise: a version of Article III that authorized, but did not require, Congress to establish inferior courts.[88]

Notwithstanding that compromise, antifederalist concerns about an expansive federal judiciary were prevalent in the ratification debates. Some antifederalists feared that a national judiciary would "swallow up the state jurisdictions"[89] and "utterly annihilate . . . state courts."[90] Others believed that inferior federal courts were unnecessary because state courts also had the power to hear disputes brought in federal court, and the addition of lower federal courts would result in conflicts between state and national courts.[91]

Federalists responded by emphasizing that a national judiciary was necessary to provide for "a neutral forum and neutral laws," as well as "to guarantee . . . supremacy of federal law."[92] As one proponent of federal courts explained, "the Constitution might be violated with impunity, if there were no power in the general government to correct and counteract such laws. This great object can only be safely and completely obtained by the instrumentality of the federal judiciary."[93]

Federalists also distrusted state judges, loyal to state governments for their appointments and salaries. They were skeptical that they would faithfully implement federal law and adjudicate cases without bias for their home state.[94] Hamilton, defending the federal judiciary, wrote that the need for federal courts "in cases in which the State tribunals cannot be supposed to be impartial speaks for itself."[95] He worried that state judges would favor litigants from their own states and, due to their bias, "[tie] the courts down to decisions in favor of the grants of the States to which they belonged."[96]

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[88] *Id.* at 763, 768.
[89] *Id.* at 802 (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551 (Johnathan Elliot ed., 1901) [hereinafter ELLIOT'S DEBATES]).
[90] *Id.* (quoting 2 ELLIOT'S DEBATES, *supra* note 89, at 524).
[91] *Id.*
[92] *Id.* at 811.
[93] *Id.* at 812 (quoting 4 ELLIOT'S DEBATES, *supra* note 89, at 156).
[94] *Id.* at 814.
[95] THE FEDERALIST NO. 80, at 478 (Hamilton) (Clinton Rossiter ed., 1961).
[96] *Id.* at 479.

Some federalists, however, were sympathetic to the antifederalist concern about expensive and inconvenient federal litigation. They proposed that Congress could mitigate this concern by "limit[ing] appeals in insignificant cases by its power of making exceptions and regulations for the jurisdiction of the Supreme Court."[97]

Ultimately, the Madisonian compromise prevailed. Shortly after the ratification of the Constitution, Congress passed the Judiciary Act of 1789.[98] Perhaps due to antifederalist concerns about excessive appeals to the Supreme Court, Section 25 of the Act limited Supreme Court jurisdiction over state court judgments to cases in which state courts ruled against a federal challenger.[99] In other words, only if a state court upheld a state law against a federal challenge could that judgment be appealed to the Supreme Court. Section 25 was uncontroversial among members of Congress at the time it was passed.[100] Even antifederalists agreed that the Supreme Court should have the final say in these cases.[101]

States, however, deeply opposed Supreme Court review of state court decisions. Some state courts refused to allow writs of error to the Supreme Court, while in other states, legislatures passed resolutions against the Court's appellate jurisdiction over state judgments.[102] In the wake of this opposition, Congressmen from these states also proposed bills to repeal Section 25 at least ten times.[103] Notwithstanding these attacks, the Court repeatedly defended its constitutional power to hear these appeals, and Congress repeatedly rejected efforts to limit the Court's appellate jurisdiction.[104]

One of the primary debates about Section 25 was whether it gave the Court the authority to review questions of state law when

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[97] Clinton, *supra* note 85, at 827.
[98] Judiciary Act of 1789, ch. 20, 1 Stat. 73.
[99] *See id.* § 25, 1 Stat. at 85; *see also* Laura Fitzgerald, *Suspecting the States*, 101 MICH. L. REV. 80, 101 n.84 (2002).
[100] *See* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1557 (1990).
[101] *Id.*
[102] *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 4 (1913).
[103] *Id.*
[104] *See, e.g.*, *id.* at 16–19 (describing the reaction to the Court's decision in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)).

those questions were incidental to the federal law question decided by the state court. In *Martin v. Hunter's Lessee*,[105] the Court said yes, proclaiming that it had the power to review a state court's decision on state law as a necessary component of the Court's duty to enforce federal law.[106] But the Court's view of that power ultimately changed in *Murdock v. City of Memphis*.[107] After extolling the virtues of state courts deciding questions of state law,[108] the Court concluded that its jurisdiction over federal issues was limited to those issues that were controlling over the judgment.[109] If another ground of decision (namely, a state law issue) would result in the same judgment no matter how the federal issue was decided, the Court "would not be justified in reversing the judgment of the State court."[110] *Murdock* provides an early example of the Court balancing the need for federal courts to vindicate federal law with the importance of state courts having the final say on state law.

Section 25's rule for Supreme Court review of state court judgments governed for over a century. But in 1914, there was a change. The tides had shifted, and state courts were more likely to declare state laws unconstitutional, while the Supreme Court was more likely to uphold state laws as constitutional.[111] In one notable example, in 1911, the New York Court of Appeals held that a worker's compensation law violated the Fourteenth Amendment.[112] This case motivated Congress to amend the Supreme Court's appellate jurisdiction over state court judgments because under the governing statute, the Supreme Court had no power to reverse the New York court.[113] The 1914 Judiciary Act amended the existing judicial code to permit certiorari from state court judgments rendered by a state's highest court in which state courts ruled in

[105] 14 U.S. (1 Wheat.) 304 (1816).
[106] *Id.* at 358.
[107] 87 U.S. (20 Wall) 590 (1874).
[108] *Id.* at 626 ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise.").
[109] *See id.* at 635.
[110] *Id.*
[111] Warren, *supra* note 102, at 2.
[112] *See* Ives v. S. Buffalo Ry. Co., 94 N.E. 431, 441 (N.Y. 1911).
[113] Warren, *supra* note 102, at 2; Stephen Vladeck, *73. The Supreme Court and State Courts*, ONE FIRST (March 25, 2024), https://www.stevevladeck.com/p/73-the-supreme-court-and-state-courts.

favor of federal law.[114] The Court's jurisdiction to review state court judgments remains the same today.[115]

Two basic principles flow from this history of the federal judiciary and the Court's review of state court judgments. First, when drafting and ratifying Article III, the Framers were highly cognizant of the role of state courts. Indeed, the antifederalist concern about state court obsolescence led to the compromise of allowing, but not mandating, the creation of lower federal courts. At the same time, the federalists succeeded in establishing a national judiciary empowered to hear cases arising under the Constitution, federal law, and treaties by arguing that the federal government needed courts that were free from state bias and able to vindicate federal law. Thus, the history of Article III illustrates the balancing between state and federal interests that was integral to the creation of our national judiciary. And importantly, federal courts were tasked with hearing cases of a distinctly federal character or those in which the risks of state bias were the most attenuated; these courts were not envisioned as displacing state courts' authority to decide questions of state law. Thus, the narrow exception for review of state court decisions on state law in cases in which such decisions evade state's federal obligations fits squarely into this foundational role of federal courts.

Second, for most of the Court's history, it only had the power to reverse state court judgments that violated federal rights. This demonstrates that Congress's primary motivation for permitting Supreme Court review of state court judgments was the vindication of federal rights—not other issues relevant to the national judiciary, such as the uniformity of federal law.[116] It was only when Congress felt that state courts were over-protecting federal constitutional rights that they amended the governing judiciary act to allow for Supreme Court review of these cases.

Put differently, this history shows that the evasion review contemplated by *Moore* is not an aggrandizement of federal court authority. Instead, it sits comfortably within the federal judiciary's longstanding role in vindicating federal interests when states refused to do so themselves. By invoking evasion review, *Moore* was

[114] *See* An Act To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, Pub. L. No. 224, 38 Stat. 790, 790 (1914).
[115] *See* 28 U.S.C. § 1257.
[116] *See* Vladeck, *supra* note 113.

merely confirming that the longstanding, narrow exception that allows the Court to review and displace state court decisions on state law applies under the Elections Clause just as it applies under other constitutional provisions.

As review of those evasion cases makes clear, federal court review of state court judgments can be necessary to ensure that state courts do not use state law to avoid their obligations under federal law. For example, as *Moore* itself recognized, antecedent state law questions often arise in cases under the Takings Clause and Contracts Clause when state court rulings on property or contract law questions, respectively, may render those constitutional limits on states inapplicable. Because of these state law questions' interrelation with federal law, however, the Court does not merely accept state court conclusions at face value. Instead, it evaluates whether state courts are using state law to evade federal interests. The next two Sections discuss these cases in detail.

B. Takings Clause

The Constitution's Takings Clause prohibits states from taking a person's "private property . . . for public use, without just compensation."[117] But as the Supreme Court recently explained, "[t]he Takings Clause does not itself define property."[118] Thus, in determining whether an interest is property protected under the Takings Clause, the Court historically has consulted state law as "one important source" of "'existing rules or understandings' about property rights."[119]

The Court, though, has long recognized that "state law cannot be the only source" for determining whether an interest is protected by the Takings Clause.[120] If it were, "a State could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate."[121] Thus, the Court also "look[s] to 'traditional property law principles,' plus historical

[117] U.S. CONST. amend. V.
[118] Tyler v. Hennepin County, 598 U.S. 631, 638 (2023) (citing Phillips v. Wash. Legal Fdn., 524 U.S. 156, 164 (1998)).
[119] *Id.* (quoting *Phillips*, 524 U.S. at 164); *see also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution, [but rather] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").
[120] *Id.*
[121] *Id.* (quoting *Phillips*, 524 U.S. at 167).

practice and this Court's precedents" to determine what interests are property interests protected by the Takings Clause.[122] In other words, to ensure that state actors are not using state property law to undermine the federal interest in proper enforcement of the Takings Clause, the Court reviews state court decisions against the backdrop of constitutionally-grounded property law values.[123]

Two cases involving individuals' property rights to interest accrued on their money illustrate how states could classify property as public, not private, property to evade their obligations under the Takings Clause. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[124] the Florida Supreme Court considered whether the Takings Clause applied to interest accrued on a private litigant's bank account that was held by a local court. The state court concluded that because the account was held by the court, the interest was public money, and thus the Takings Clause did not apply.[125] Similarly, *Phillips v. Washington Legal Foundation*[126] involved a challenge to Texas's Interest on Lawyers Trust Account (IOLTA) program.[127] Under IOLTA, "certain client funds held by an attorney in connection with his practice of law are deposited in bank accounts, [and t]he interest income generated by the funds is paid to foundations that finance legal services for low-income individuals."[128] The challengers sued in federal court and argued that the taking of the interest was unconstitutional.[129] In response, the state defendants argued that, under Texas law, an attorney's clients do not have a property right to that interest.[130]

In both cases, the U.S. Supreme Court held that the Takings Clause applied and that it would not sanction states' efforts to get around the Clause by claiming state law exceptions to general

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[122] *Id.* (quoting *Phillips*, 524 U.S. at 165–68).
[123] For more on this topic, see generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).
[124] 449 U.S. 155 (1980).
[125] *Id.* at 158–59.
[126] 524 U.S. 156 (1998).
[127] *Id.* at 159.
[128] *Id.* at 160.
[129] *Id.* Unlike *Beckwith*, *Phillips* did not involve the Supreme Court reviewing a state court's ruling on state property law. Nevertheless, *Phillips*, cited by the Court in *Moore*, stands for the principle that the Court will not allow states to use state law to get around their Takings Clause obligations and instead will apply traditional principles of property law to delineate the scope of the Takings Clause's protections.
[130] *Id.* at 167.

property rules.[131] In *Beckwith*, the Court expressly rejected the Florida Supreme Court's conclusion that the interest was public money. The Court explained that the general rule governing property rights to accrued interest is that those who have a property interest in the principal also have a property interest in the interest accrued on that principal.[132] The Florida Supreme Court's decision, however, was "contrary to this long established general rule" and reasoned that the statute allowing the clerk to put the money in an interest-bearing account turned that interest into public money.[133] The Court rejected this conclusion and emphasized that while some government action depriving owners of the use or value of their property can be "justified as promoting the general welfare," the state did not cite any police power to justify this deprivation.[134] And because the government offered no rationale for the taking of this interest, the retention of the interest constituted a "forced contribution to general government revenues," which is exactly what the Takings Clause prohibits.[135] "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree," the Court wrote, "may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court."[136]

Phillips heavily relied on *Beckwith*'s reasoning and underscored that "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."[137] The Court again emphasized the longstanding rule that property rights to accrued interest follow the principal and rejected Texas's efforts to claim that state law created an exception to that rule.[138] In both *Beckwith* and *Phillips*, the Court emphasized its duty to enforce federal constitutional property protections in the face of state attempts to classify private property as public money.

These cases exemplify the Court's approach to constitutional property issues that are enmeshed with state law. Whether on direct review of a state court's determination of state property interests or pursuant to its independent review of such property interests, the

[131] *Beckwith*, 499 U.S. at 164; *Phillips*, 524 U.S. at 167.
[132] *Beckwith*, 499 U.S. at 162–63.
[133] *Id*. at 163.
[134] *Id.*
[135] *Id.*
[136] *Id.* at 164.
[137] *Phillips*, 524 U.S. at 167.
[138] *See id.* at 165–67.

Court understands the Takings Clause to create a federal interest in property rights that must be protected against possible evasion by state actors using state law. To provide that protection, the Court uses history and background principles of property law to ensure that state changes to the status quo do not constitute violations of an individual's rights to property under the federal Constitution. In other words, the Court will not allow states to define away property interests when it suits them. This interest in enforcing the Takings Clause leads the Court to evaluate for itself whether property rights are at risk to ensure that states are not evading the Takings Clause.

C. Contracts Clause

The Contracts Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[139] Ultimately, while questions related to contracts are questions of state law, the Court has held that the question of whether a statute has created contractual obligations that are protected by the Contracts Clause is a question of federal law. Like the Takings Clause cases, the Contracts Clause cases illustrate that the Court will review state court judgments regarding state law when necessary to prevent evasion of the federal interest in enforcing the Contracts Clause.

An early case makes the point. In *Piqua Branch v. Knoop*,[140] the Court had to determine whether a statute governing how the Bank of Ohio was taxed constituted a contract, and if so, whether a subsequently-enacted statute increasing the Bank's tax rate violated the Contracts Clause.[141] The Supreme Court of Ohio had held that the first statute did not create a contract, but the U.S. Supreme Court disagreed. Urged to adopt the Ohio court's contract ruling on the state statute, the Court explained that it was not "administer[ing] the laws of a State"—in which case it would not be appropriate for it to disturb the state court judgment—but was instead "test[ing] the validity of such a law by the Constitution."[142] The Court continued: "if [the Ohio Supreme Court's] construction of the contract in

[139] U.S. CONST. art. I, § 10, cl. 1.
[140] 57 U.S. (16 How.) 369 (1854).
[141] *Id.* at 378.
[142] *Id.* at 391.

question impairs its obligation, we are required to reverse their judgment."[143]

Early twentieth-century cases took the same approach. In *Indiana ex rel. Anderson v. Brand*,[144] public school teachers in Indiana who had served for more than five years had tenure protections under a 1927 statute.[145] When a later statute repealed the application of the 1927 law to township schools, a township schoolteacher challenged the law in state court under the Contracts Clause.[146] The Indiana Supreme Court held that the 1927 statute did not create a contract with the schoolteacher,[147] but the Supreme Court reversed.[148] On the state law contract question, the Court said that it "accord[ed] respectful consideration and great weight to the views of the state's highest court," but nevertheless determined that it was "bound to decide for ourselves whether a contract was made" in order to vindicate the federal interest in enforcement of the Contracts Clause.[149] The Court then reviewed the 1927 statute and previous Indiana court decisions and ultimately concluded that the statute created a contract, and the contract was impaired by the statute's partial repeal.[150]

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[143] *Id.* at 391–92; *see also* Appleby v. City of New York, 271 U.S. 364, 380 (1926) ("[The contract question] is a state question, and we must determine it from the law of the state as it was when the deeds were executed to be derived from statutes then in force and from the decisions of the state court then and since made; but we must give our own judgment derived from such sources, and not accept the present conclusion of the state court without inquiry.").

[144] 303 U.S. 95 (1938).

[145] *Id.* at 97.

[146] *Id.* at 97.

[147] *Id.* at 100.

[148] *Id.* at 104.

[149] *Id.*

[150] *Id.* Other Contracts Clause cases around this time also involved statutory changes to public employees' terms of employment and taxation regimes. The cases all started from the same premise: a federal interest in enforcing the Contracts Clause permitted the Court's inquiry into the state court decisions on state law. *See* Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937); Higginbotham v. City of Baton Rouge, 306 U.S. 535, 538–39 (1939) ("While this Court in applying the contract clause of the Constitution must reach an independent judgment as to the existence and nature of the alleged contract, we attach great weight to the views of the highest court of the State." (citation omitted)); Phelps v. Bd. of Educ., 300 U.S. 319, 323 (1937); Hale v. State Bd. of Assessment & Rev., 302 U.S. 95, 101 (1937) ("The power is ours, when the impairment of an obligation is urged against a law, to determine for ourselves the effect and meaning of the contract as well as its existence. Even so, we lean toward agreement with the courts of the

Notably, evasion review does not invariably lead to displacement of state court judgments. In *General Motors Corp. v. Romein*,[151] a case cited by the *Moore* Court as an example of evasion review, the Court applied its evasion analysis to Contracts Clause questions but refused to overturn the state court's ruling. There, the Court had to decide whether a Michigan statute requiring two companies to pay retroactive workers' compensation benefits to its employees violated the Contracts Clause.[152] The Michigan Supreme Court had held that a previous workers compensation law (which did not require retroactive payments) was not an implied term of the employment contracts governing these workers.[153] The Supreme Court agreed, finding no reason to second-guess the state court's considered view.[154] While it concluded that the question whether a contract existed was a federal one and thus reached its own "independent judgment" that no contractual obligation existed under Michigan law and its own precedents,[155] it also acknowledged, quoting *Brand*, the importance of "accord[ing] respectful consideration and great weight to the views of the State's highest court."[156]

The Court's Contracts Clause cases thus echo its Takings Clause cases. While contracts are generally issues of state law, the Supreme Court has an obligation to ascertain whether a contract exists to protect the federal interest in enforcement of the Contracts Clause against evasion by state actors.

D. Adequate and Independent State Grounds

Evasion review is not limited to express constitutional constraints on states. The Court has also undertaken evasion review to protect its own jurisdiction to review state court decisions implicating federal law. Originating with *Murdock*,[157] the adequate and independent state grounds doctrine is a jurisdictional rule governing Supreme Court review of state judgments that provides that the Supreme Court "will not take up a question of federal law

state, and accept their judgment as to such matters unless manifestly wrong." (citation omitted)).

[151] 503 U.S. 181 (1992).

[152] *Id.* at 183.

[153] *Id.* at 187.

[154] *Id.*

[155] *Id.* (quoting Appleby v. City of New York, 271 U.S. 364, 380 (1926)).

[156] *Id.*

[157] *See supra* section II.A, [TAN 107–110].

in a case 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'"[158] This issue often arises when a state court declines to rule on a federal constitutional challenge because the court holds that a state procedural rule forecloses review on the merits. In these cases, the Supreme Court must determine whether the state procedural ground is adequate because an inadequate state law ground cannot trump the federal interest in the Court hearing federal disputes and vindicating federal rights.

"The question whether a state procedural ruling is adequate is itself a question of federal law."[159] When determining adequacy, the Court pays close attention to whether a state procedural rule is "firmly established."[160] Notably, a state ground can be "firmly established and regularly followed" even if the state procedural rule allows for state courts to exercise discretion in applying the rule.[161] When evaluating whether a state ground is adequate, the Supreme Court seeks to balance its respect for state judiciaries' prerogative to design their judicial systems as they see fit with the Court's own responsibility to ensure that individuals can vindicate their rights under the federal constitution.[162] The Court resolves this tension by resting its adequacy inquiry on litigants' rights to fair notice of how state procedural rules will be applied to them.[163]

Though the adequate and independent state ground doctrine was applied steadily in the years after *Murdock*,[164] state court resistance to the civil rights movement provided archetypical examples of states seeking to manipulate procedural rules to bar

[158] Cruz v. Arizona, 598 U.S. 17, 25 (2023) (alteration in original) (quoting Lee v. Kemna, 534 U.S. 362, 375 (2002)).
[159] *Id.* at 25 (internal quotation marks omitted) (quoting Beard v. Kindler, 558 U.S. 52, 60 (2009)).
[160] *See, e.g.*, James v. Kentucky, 466 U.S. 341, 348–49 (1984) (holding that a Kentucky rule was not a "firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights").
[161] *See Beard*, 558 U.S. at 60–61; *see also* Walker v. Martin, 562 U.S. 307, 317 (2011).
[162] *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1134–35 (1986).
[163] *Cruz*, 598 U.S. at 26; *see also* Meltzer, *supra* note 162, at 1138–39.
[164] *See, e.g.*, Johnson v. Risk, 137 U.S. 300, 308 (1890); Rogers v. Alabama, 192 U.S. 226, 230 (1904) ("It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."); Enter. Irr. Dist. v. Farmers' Mut. Canal Co., 243 U.S. 157, 164 (1917).

judicial review of federal constitutional rights.[165] One well-known case reached the Court twice due to the Alabama courts' hostility to the NAACP. First, in *NAACP v. Alabama ex rel. Patterson*,[166] Alabama sued the NAACP in state court to prevent the organization from operating in the state.[167] When the state court granted Alabama's request for the NAACP's membership records, the NAACP refused to comply on First and Fourteenth Amendment grounds and was held in contempt of court.[168] On appeal, the Alabama Supreme Court held that the NAACP used the wrong appellate remedy to review the contempt judgment and therefore refused to hear the constitutional challenge.[169] The U.S. Supreme Court reversed. As to its own jurisdiction to review the state judgment, the Court held that the Alabama Supreme Court's procedural holding was irreconcilable with "its past unambiguous holdings as [to] the scope of review" in such cases.[170] The Court emphasized that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."[171] Ultimately, the Court held that Alabama's actions violated the NAACP members' Fourteenth Amendment rights and reversed and remanded the case.[172]

On remand, the Alabama trial court held a hearing and then concluded that the NAACP was unlawfully conducting business in the state and enjoined the organization from operating in Alabama.[173] On appeal to the Alabama Supreme Court, the court once again refused to consider the NAACP's constitutional arguments, holding instead that the court did not have to review the NAACP's arguments because its brief did not conform to the court's rules.[174]

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[165] *See* E. Brantley Webb, Note, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1214 (2011).
[166] 357 U.S. 449 (1958).
[167] *Id.* at 452.
[168] *Id.* at 454–55.
[169] *Id.* at 455.
[170] *Id.* at 456.
[171] *Id.* at 457–58.
[172] *Id.* at 466–67.
[173] NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 292 (1964).
[174] *Id.* at 295–96.

The U.S. Supreme Court described the state court's decision as "wholly unacceptable" and held that the state ground was inadequate.[175] The Court disagreed with the Alabama court's conclusion that the brief violated the relevant rule and explained that "[t]he consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form."[176] The Court also observed that the Alabama courts had not previously applied this rule "with the pointless severity shown here,"[177] and it repeated its previous admonition that novel procedural rules cannot be used to prevent consideration of parties' arguments about their constitutional rights.[178]

Other cases during this period are testament to the Court's unwillingness to accept novelly- or inconsistently-applied state court procedural rules to frustrate federal court review. In *Staub v. City of Baxley*,[179] for example, the Court held that a Georgia requirement that litigants challenge specific sections of a city ordinance (as opposed to the ordinance as a whole) had no "fair or substantial support" in Georgia case law and therefore was inadequate, emphasizing that the rule was arbitrarily applied.[180] In *Wright v. Georgia*,[181] the Court refused to allow a purported brief-formatting rule to preclude its review of a constitutional challenge to the conviction of six Black boys for breach of the peace for merely being in a public park.[182] The Court underscored that "no prior Georgia case" had ever applied the rule as it was then being applied.[183] Finally, in *Sullivan v. Little Huntington Park, Inc.*,[184] a civil rights case about a Black family's access to community facilities, the Court held that because a procedural rule, although not novel, was inconsistently applied, it could not be relied upon to preclude the Court's review.[185]

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[175] *Id.* at 296.
[176] *Id.* at 297 (citing Davis v. Wechsler, 263 U.S. 22, 24 (1923)).
[177] *Id.*
[178] *Id.* at 301 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457 (1958)).
[179] 355 U.S. 313 (1958).
[180] *Id.* at 320.
[181] 373 U.S. 284 (1963).
[182] *See id.* at 291.
[183] *Id.*
[184] 396 U.S. 229 (1969).
[185] *Id.* at 403.

When conducting adequacy review, the Court understands states' interests in enforcing their own procedural rules and will give them effect if the Court concludes that they are being fairly applied. This is especially so in the Court's federal habeas jurisprudence.[186] Pointing to concerns about "comity and federalism,"[187] the Court has repeatedly concluded that federal habeas petitioners defaulted on their federal constitutional claims because they did not comply with state procedural rules.[188] However, if a state ground is "so novel and unfounded that it does not constitute an adequate state procedural ground,"[189] the Court will not hesitate to set it aside.

In sum, the Court uses the adequate and independent state grounds doctrine to review state court rulings on state law and ensure that litigants are not precluded from vindicating their constitutional rights at the Supreme Court because of state grounds that are "unforeseeable and unsupported."[190] By analyzing the adequacy of state grounds, then, the Court is protecting the federal interest in reviewing questions of federal law and enforcing the supremacy of federal law. If states could use arbitrary enforcement of procedural rules to prevent the Court from hearing federal constitutional challenges, then states—and particularly state courts—could flout their obligations to enforce federal law. *Moore* cited this line of cases as an example of when the strong federal interest in the supremacy of the federal Constitution requires an exception to the Court's general rule that it will not review state court decisions on state law.

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[186] As the Court has explained, "[t]he basis for application of the independent and adequate state ground doctrine in federal habeas is somewhat different than on direct review." Coleman v. Thompson, 501 U.S. 722, 730 (1991). Federal habeas law requires habeas petitioners to exhaust state remedies before coming to federal court, *see id.* at 731, so if a petitioner fails to comply with state procedure and, as a result, defaults on a federal constitutional claim in state court, a federal court will not hear that claim if it constitutes an adequate and independent ground except in limited circumstances, *see id.* at 750.

[187] *Id.* at 730.

[188] *See, e.g.*, *id.* at 757; Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977) ("We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that respondents' confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here."); Walker v. Martin, 562 U.S. 307, 321 (2011).

[189] Cruz v. Arizona, 598 U.S. 17, 29 (2023).

[190] *Id.* at 26.

E. Other Evasion Cases

As the foregoing discussion makes clear, the evasion framework discussed in *Moore* is neither novel nor exceptional. Indeed, the Takings Clause, Contracts Clause, and adequacy doctrine cases cited in *Moore* are just a few examples of the Court using this evasion framework to enforce federal interests in the face of state recalcitrance. And all of these cases have one element in common: they all feature a clearly articulated federal interest—including both constitutional and federal statutory obligations on states—that is jeopardized by the application of state law.

Take Congress's authority to regulate interstate commerce for example. The early twentieth century saw a "sharp rise in the reach of the federal commerce power,"[191] and state courts were unduly protective of state interests in the face of growing federal powers, using state law to avoid enforcing federal law against state actors. As these cases reached the Supreme Court, the Court had to decide whether these state law rulings were being used impermissibly to "avoid[] the jurisdiction of [the] Court."[192]

For example, in *Union Pacific Railroad v. Public Service Commission*,[193] a Utah railroad company challenged in state court the imposition of a fee by the state of Missouri as an unconstitutional burden on interstate commerce.[194] The Missouri Supreme Court, however, ruled that the company had paid the fee voluntarily and therefore, under state law, the company was estopped from challenging the payment. The court did not reach the constitutional question.[195] When the case reached the U.S. Supreme Court, Missouri argued that the state law ruling precluded the Supreme Court's jurisdiction.[196] The Supreme Court disagreed, emphasizing that "it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been

[191] Webb, *supra* note 165, at 1210.
[192] Terre Haute & Indianapolis R.R. v. Indiana *ex rel.* Ketcham, 194 U.S. 579, 589 (1904); *see also* Fitzgerald, *supra* note 99, at 122.
[193] 248 U.S. 67 (1918).
[194] *Id.* at 67.
[195] *Id.* at 69.
[196] *Id.*

waived."[197] The Court then reversed the state court's ruling on voluntary payment and held that the fee was "unlawful interference with commerce amongst the states."[198]

Two major cases from this period exemplified the Court's approach to reviewing state law questions that impeded the application of federal law. First, in *Ward v. Board of County Commissioners of Love County*,[199] the Court addressed local taxation of Indian land in Oklahoma. A few years earlier, the Court had held that the allotments of land at issue were exempt from local taxes and that state courts "had erred in refusing to enjoin [counties] from taxing the lands."[200] Love County nevertheless taxed the allotments, and the Choctaw paid the taxes while objecting that the taxation was invalid.[201] Despite the U.S. Supreme Court ruling expressly exempting the allotments from local taxation, the Oklahoma Supreme Court concluded that the taxes were paid voluntarily and therefore could not be recovered under state law.[202]

The Supreme Court reversed. Explaining its authority to review the state law issue, the Court wrote:

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[197] *Id.* at 69–70; *see also* Fitzgerald, *supra* note 99, at 135 ("[A]lthough the Court did not say so, it may have believed the Missouri court to be part of a larger multi-state resistance to federal wartime control of railroads—and to the ways in which federal control changed how state law could be enforced against those railroads under the 1918 Federal Control Act.").

[198] *Id.* at 69–70. Notably, however, this review did not always result in reversal of state courts. Sometimes the Court upheld state court rulings on voluntary payment of local taxes in interstate commerce challenges. *See, e.g.*, Gaar, Scott & Co v. Shannon, 223 U.S. 468, 473 (1912) (holding that because a Texas taxation statute did not require the plaintiff—an Indiana corporation—to pay taxes, the state court was correct when it held that the plaintiff paid the taxes voluntarily). In other cases, the Court held that state courts' application of local procedural rules were fair and did not impermissibly block federal interests. *See, e.g.*, Cen. Union Telephone Co. v. City of Edwardsville, 269 U.S. 190, 195 (1925) ("It seems to us that the practice under the statute of Illinois above quoted is entirely fair. . . . When so declared by the state court, it should bind us, unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it. This is no such case."); Vandalia R.R. v. Indiana *ex rel*. City of South Bend, 207 U.S. 359, 367 (1907) ("A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings, but that is not this case.").

[199] 253 U.S. 17 (1920).

[200] *Id.* at 20.

[201] *Id.* at 21.

[202] *Id.*

> [It is] within our province to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.[203]

The Court, echoing *Murdock*, acknowledged that "a judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it," was unreviewable by the Court.[204] But the *Ward* Court emphasized that this "qualification is a material one," and the state court ruling on duress was "without any fair or substantial support."[205] In *Ward*, then, the Court vindicated the principle of federal supremacy, ensuring that the state could not use state law to flout the states' obligation to obey the Court's rulings.

Next, in *Davis v. Wechsler*,[206] a plaintiff brought a personal injury lawsuit against a federal railroad official, and a federal statute specified the county or district in which such lawsuits had to be filed.[207] The defendant was substituted twice by his successors, and the state court ruled that those substitutions resulted in a waiver of the original defendant's challenge to venue pursuant to state procedural rules.[208] The Supreme Court swiftly rejected this effort to avoid the clear commands of a federal statute: "[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."[209]

Together, *Union Pacific Railroad*, *Ward*, and *Davis* stand for the principle that the Supreme Court's duty to enforce federal law and protect federal interests "cannot be evaded by the forms of local practice."[210] In each case, the Court used the evasion framework to prevent states from evading clearly identified federal interests.

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[203] *Id.* at 22.
[204] *Id.* at 22–23.
[205] *Id.* at 23.
[206] 263 U.S. 22 (1923).
[207] *Id.* at 23.
[208] *Id.* at 24.
[209] *Id.*; *see also* Fitzgerald, *supra* note 99, at 122 (describing these cases as "a hardening of the Court's suspicion against state courts, and a shortening of the Court's patience with claims that state grounds were 'adequate' to preclude Supreme Court review").
[210] Am. Ry. Express Co. v. Levee, 263 U.S. 19, 21 (1923).

As this Part has detailed, when reviewing state court judgments, the Court's presumption is that the Court does not have the power to review state court decisions on state law and, accordingly, must give such decisions full effect. The Court will only diverge from this default principle in "extreme cases" when state law results in the evasion of a federal right or interest.[211] If there is evasion, the Court will, if necessary, set aside state law to vindicate its duty to enforce federal law. Thus, when *Moore* cited these cases, it merely affirmed a narrow, preexisting ground for Supreme Court review of state judgments.

III. APPLYING EVASION ANALYSIS TO THE ELECTIONS AND ELECTORS CLAUSES

In *Moore*, the Court confirmed that "state courts are the appropriate tribunals" for deciding questions of state election law, but nevertheless affirmed its "obligation to ensure that state court interpretations of that law do not evade federal law."[212] By situating the Court's review of state courts under the Elections Clause within its evasion jurisprudence, the Court made clear that nothing in *Moore* exempted Elections Clause disputes from this existing, narrow exception to the general rule that state courts are the final arbiters of state law. Put differently, the Court in *Moore* did not aggrandize its power to review state court decisions under the Elections Clause; it merely restated its long-standing yet limited power to review state court decisions on state law when those decisions implicate federal interests. Thus, any analysis about the scope of review under the Clauses must follow the framework laid out in the evasion cases.

To apply the evasion analysis, courts must first determine what federal interest the Clauses are protecting. For example, in the Takings Clause and Contracts Clause cases, the Court is protecting the federal interest in proper enforcement of those Clauses against state actions. In the adequacy line of cases, the Court is protecting its own interest in enforcing federal constitutional protections. Any evasion by state courts in the ISLT context, therefore, requires a clearly articulated federal interest that can be thwarted by state court action.

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[211] Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975).

[212] Moore v. Harper, 600 U.S. 1, 34 (2023) (quoting Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 626 (1875)).

In *Moore*, the Court established a federal interest in state courts not exceeding the "ordinary bounds of judicial review" in a way that amounts to an "arrogat[ion]" of power from the state legislature to state courts.[213] In other words, two factors must be present before federal court intervention is appropriate: the state court must transgress the ordinary bounds of judicial review, *and* it must do so in a way that arrogates power from the state legislature to the state court.

As *Moore* makes clear, and the history of the Clauses and principles of state sovereignty both confirm, the scope of the ordinary bounds of judicial review is expansive, especially when one takes into account that in a federalist system there are many different modalities of judging that states courts can choose to employ. Thus, only in the rarest of circumstances will state courts exceed those bounds, making it permissible for federal courts to second-guess a state court's interpretation of its own laws.

A. Moore

Three fundamental principles were integral to the Court's holding in *Moore*. Taken together, these principles make clear that state courts conducting judicial review over state statutes pursuant to state constitutions is nothing out of the ordinary.

First, *Moore* confirmed that, when it comes to legislation regarding federal elections, state legislatures are not free from state constitutional constraints simply because they are empowered to act by the Elections Clause. To the contrary, those legislatures may not, the Court explained, act "independently of requirements imposed by the state constitution with respect to the enactment of laws."[214] The Court emphasized that state legislatures "are the mere creatures of the State Constitutions,"[215] "bound by the provisions of the very documents that give them life,"[216] and are subject to state constitutional constraints.[217] Because of this, constitutional provisions for gubernatorial vetoes, popular referenda, and ballot initiatives do not run afoul of the Elections Clause.[218] Such

[213] *Id.* at 36.
[214] *Id.* at 26 (internal quotation marks omitted).
[215] *Id.* at 27.
[216] *Id.*
[217] *See id.* at 29–30.
[218] *See id.* at 23–26.

mechanisms are part and parcel of the state lawmaking power as defined and limited by the state constitution.

Second, *Moore* confirmed that state constitutions may regulate state election laws governing the time, place, and manner of federal elections without conflicting with the Elections Clause. The Court cited several state constitutional provisions from the Founding Era and noted that such provisions would have been rendered inapplicable upon the ratification of the federal Constitution if ISLT advocates were right.[219] *Moore* explained that such constraints do not violate the Elections Clause.

Third, *Moore* also reaffirmed that nothing in the Elections Clause removes state laws regulating federal elections from state courts' power of judicial review. The majority, drawing upon Founding Era history, explained that state court judicial review predated the federal Constitution, and as such, it would be nonsensical to conclude that the Framers meant to exempt state legislatures from this check on their power.[220] The Court embraced the bedrock principle of constitutionalism that a state statute that conflicts with the state constitution is null and void.

At bottom, *Moore* held that checks and balances on state legislatures continue to apply, notwithstanding the grant of power to state legislatures to regulate the time, place, and manner of election laws governing federal elections.[221] This ruling makes clear that state courts are acting within the ordinary bounds of judicial review when they review state laws to ensure they comply with state constitutional constraints.[222] Put differently, *Moore* confirmed that, under the Elections Clause, state legislatures can be checked by state constitutions (as enforced by state courts), governors, and voters—which is no different from any other context in which state legislatures use their lawmaking power.[223] Even more, by refuting the petitioners' and Justice Thomas's procedure/substance distinction, the *Moore* majority underscored that, under the Constitution, there is no material distinction between different kinds of checks on state legislatures. As long as other state actors are

[219] *Id.* at 32–33.
[220] *Id.* at 21–22.
[221] *See* Amar, *supra* note 10, at 285.
[222] *Id.*
[223] *Moore* distinguished between state legislature's ordinary lawmaking power and their ratification power under Article V of the Constitution. *See* 600 U.S. at 29–30.

employing means mandated or authorized by state constitutions to limit legislatures' authority to enact election laws, there is no Elections Clause problem.

In sum, *Moore* firmly rejected the notion that there is a federal interest in exempting state legislatures from the normal checks and balances of "ordinary judicial review." Given that, in the mine run of cases, there will be no basis for the Court to second-guess state court determinations of state law.

B. History and Practice

Moore also teaches that history provides helpful guidance for interpreting the Clauses, and history is at odds with any argument seeking to limit state courts' authority to conduct judicial review. After all, state practices since the Founding demonstrate pervasive state constitutional regulation of federal elections. This 200-plus years of state practice refute the notion that state legislatures are immune from state constitutional checks and judicial review and confirm that state court review of state election laws under state constitutions has long been accepted as a key part of American constitutionalism.

As the Court noted in *Arizona State Legislature*, when drafting the Elections Clause, the Framers were deeply skeptical of states, worrying that they would play political games and refuse to hold elections unless checked by Congress. Accordingly, "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation."[224] The Framers were also concerned that state legislators would manipulate election law to their own benefit at the expense of the public.[225] Madison feared that, "without the Elections Clause, '[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.'"[226] In fact, foreshadowing today's debates, Madison's concern was a response to South Carolina's attempt to "retain their

[224] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814–15 (2015).
[225] *See id.* at 815.
[226] *Id.* (quoting 2 FARRAND'S RECORDS, *supra* note 86, at 241); *see also* Eliza Sweren-Becker & Michael Waldman, *The Meaning History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1006 (2021).

ability to" keep their "malapportioned" legislature.[227] The Elections Clause addressed this problem by empowering Congress to alter the time, place, and manner of elections as necessary.

Proponents of the Elections Clause were also worried about "voter suppression tactics by state lawmakers that would make it harder for voters to be heard."[228] During the ratification debates, federalists feared that states could, for example, move polling locations to inaccessible areas or require voice votes rather than secret ballots.[229] Congressional power to regulate federal elections was necessary to "insure free and fair elections."[230]

Absent from these debates, however, was any discussion about the power of state legislatures vis-à-vis other state actors. Instead, the historical record reflects the Framers' fears of unchecked state legislatures. While congressional oversight was one mechanism by which states could be checked, the Framers understood that state legislatures were bound by their states' constitutions as well, as the *Moore* Court explained. As such, there is no historical support for the idea that the judicial review by state courts in this context should be any different or more narrow than it is in other contexts.

The text and history of the Electors Clause is similar. The debates centered on how the president would be elected and who would appoint electors.[231] The Framers discussed various options regarding who should choose electors, ranging from "the people" to "State Executives" to the "Legislatures of the States."[232] While they ultimately opted for the present language (which directs states to "appoint [electors] in such manner as the Legislature thereof may direct"[233]), there is no evidence that the Framers sought to free state legislatures from other checks and balances on their power.[234]

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[227] *Ariz. State Legislature*, 576 U.S. at 815.
[228] Sweren-Becker & Waldman, *supra* note 226, at 1011.
[229] *Id.*
[230] *Id.* (quoting 2 RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 537 (Merrill Jensen ed., 1976)).
[231] *See* Weingartner, *supra* note 5, at 177–78; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 748–52 (2002).
[232] Weingartner, *supra* note 5, at 179 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1911)).
[233] U.S. CONST. art. II, § 1, cl. 2.
[234] Weingartner, *supra* note 5, at 179.

Instead, amidst debates over popular versus legislative appointments of electors, the Electors Clause embodies a "rather ambiguous compromise [that] resort[ed] to familiar language in the Articles of Confederation."[235] As the Framers knew, under the Articles of Confederation, some states had appointed electors through their state legislatures, and other had them appointed directly by the people.[236] These different understandings of "Legislature" were echoed in the Electors Clause ratification debates: while Hamilton believed that "the people would select electors[, o]thers thought that the state legislatures would select the electors."[237] Thus, there was no fixed meaning of "Legislature" when the Clause was being drafted and debated. This history of the Electors Clause severely undercuts ISLT proponents' argument that the Framers meant to immunize state legislatures from normal checks and balances.

The centuries since the Constitution's ratification further elucidate state understandings of the Elections and Electors Clause. As Michael Weingartner has explained, state constitutions have consistently regulated federal elections.[238] These amendments covered various election law issues, including vote by ballot,[239] redistricting,[240] universal male suffrage,[241] and voter qualifications.[242] And these amendments arose both from state legislatures and ballot initiatives.[243] Critically, state courts have continuously given these constitutional provisions force by exercising judicial review over state legislation.[244]

History and practice bear out that state legislatures have never been understood to enjoy unchecked power over federal elections. To the contrary, the Framers were especially concerned about the consequences of absolute state control over election regulations, and state practice in the centuries since evinces their understanding that state legislatures are bound by state constitutions. In short, the history of the Clauses illustrates the importance of

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[235] Smith, *supra* note 231, at 757.
[236] *Id.* at 754.
[237] *Id.* at 747.
[238] *See* Weingartner, *supra* note 5, at 181–87.
[239] *Id.* at 182 & n.292.
[240] *Id.* at 183 & nn.298–300.
[241] *Id.* at 184 & n.304.
[242] *Id.* at 184 & n.309.
[243] *Id.* at 185.
[244] *See id.* at 188–91.

checks and balances on state legislative power, including national and intra-state limitations on that power, and judicial review has long been one of those checks on state legislatures.

C. State Separation of Powers

By arguing that state courts engaging in ordinary judicial review risk arrogating states legislatures' powers for themselves, ISLT proponents take the position that the Elections and Electors Clauses create a heightened separation of powers regime for election law governing federal elections, and that this regime must be policed by federal courts. This echoes Chief Justice Rehnquist's *Bush v. Gore* concurrence in which he wrote that while state separation of powers questions typically do not raise "questions of federal constitutional law," the Electors Clause is one "exceptional case[] in which the Constitution imposes a duty or confers a power on a particular branch of a State's government."[245]

But this view of state separation of powers is unfounded and conflicts with the Constitution's text and history and longstanding Supreme Court precedent respecting state separation of powers. Any analysis of what state court actions fall within the "ordinary bounds of judicial review" must be sensitive to the diversity of state approaches to separation of powers.

While there is no "separation of powers" clause in the Constitution,[246] the Court has long understood the Constitution to "prohibit[] one branch [of the federal government] from encroaching on the central prerogatives of another."[247] The Court has relied on separation-of-powers principles to limit the powers of each branch,[248] including the judiciary.[249] Aside from enforcing the boundaries of each branch, the Court also relies on separation of

[245] Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).
[246] Seila Law LLC v. CFPB, 591 U.S. 197, 227 (2020).
[247] Miller v. French, 530 U.S. 327, 341 (2000).
[248] *See, e.g.*, Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 255 (1991) (holding that congressional veto power over executive decisions violated the separation of powers); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (holding that "dual for-cause limitations on the removal of" certain executive officers violated the separation of powers).
[249] *See* Clinton v. Jones, 520 U.S. 681, 700 (1997) ("[T]he judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive, or permit the federal courts to resolve non justiciable questions." (footnotes omitted)).

powers and its own conception of the proper role of the federal judiciary vis-à-vis Congress to justify its own interpretive methodologies, such as textualism.[250]

Critically, however, these discussions of separation of powers are limited to the federal government and the federal Constitution. When it comes to the states, the Court's approach to separation of powers is completely different. The separation of powers principles in the federal constitution do not apply to the states.[251] On the contrary, "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."[252] The Court has repeatedly refused to involve itself in state separation of powers disputes and underscored the importance of states' powers to design their own governments as they see fit without interference from the federal government.[253] The only constitutional limit on state governance structures is the requirement that states have a republican form of government,[254] and the Court has held claims under the Guarantee Clause to be nonjusticiable.[255]

In *Highland Dairy Farms v. Agnew*,[256] for example, the Court rejected the argument that the Virginia legislature's delegation to a commission to regulate the prices of milk and cream was an

[250] *See* Litman & Shaw, *supra* note 5, at 1246 & nn.64–65; Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89, 109 (2002).
[251] Sweezy v. State of New Hampshire *ex rel.* Wyman, 354 U.S. 234, 255 (1957) (opinion of Warren, C.J.); *see* Litman & Shaw, *supra* note 5, at 1252.
[252] Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937); Litman & Shaw, *supra* note 5, at 1261.
[253] *See, e.g.*, *Sweezy*, 354 U.S. at 255 (opinion of Warren, C.J.) ("[T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments."); Dreyer v. People, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state."); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").
[254] *See* U.S. CONST. art. IV, § 4.
[255] *See Agnew*, 300 U.S. at 612; *see also* Deborah Jones Merritt, *The Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70 (1988).
[256] 300 U.S. 608, 612 (1937).

unlawful delegation of legislative power.[257] The Court explained that "[t]he Constitution of the United States in the circumstances here exhibited has no voice upon the subject"[258] and deferred to the ruling of the state's highest court upholding the delegation.[259]

Indeed, the Court made this clear in one of its earliest cases under the Elections Clause. In *Ohio ex rel. Davis v. Hildebrandt*,[260] the Court held that the Elections Clause did not prohibit Ohio's voters from disapproving of a congressional redistricting law via popular referenda.[261] Before reaching the constitutional holding, however, the Court swiftly rejected the state's argument that, under state law, the referendum was not part of the state's legislative power.[262] The Court concluded that the Ohio Supreme Court's holding that the referendum was legislative under the state's Constitution was "conclusive on that subject."[263] In doing so, the Court refused to insert itself into state law questions about how legislative power is classified.

The Court's refusal to police state separation of powers makes sense in our diverse federalist system. From the Founding Era, the federal government and state governments have had different approaches to enforcing separation of powers. When the Framers were drafting the Constitution, "six of the original states had included in their state constitutions express separation of powers clauses."[264] Madison believed, however, that "a mere demar[c]ation" was not enough to prevent "encroachments" by one branch into another.[265] Thus, the federal Constitution, in lieu of an express separation of powers provision, focused on the internal structures of the branches to ensure that each could guard against the concentration of power in another.[266]

Structural features of state governments fundamentally differ from the federal government in ways that render federal

[257] *Id.* at 611–12.
[258] *Id.* at 612.
[259] *Id.* at 613 ("A judgment by the highest court of a state as to the meaning and effect of its own Constitution is decisive and controlling everywhere.").
[260] 241 U.S. 565, 569 (1916).
[261] *See id.*
[262] *See id.* at 567–68.
[263] *Id.* at 568.
[264] Michael P. Cox, *State Judicial Power: A Separation of Powers Perspective*, 34 OKLA. L. REV. 207, 211 (1981).
[265] *Id.* (quoting THE FEDERALIST NO. 48, *supra* note 95, at 338 (Madison)).
[266] *See id.* at 212 (discussing THE FEDERALIST NO. 51, *supra* note 95 (Madison)).

conceptions of separations of powers inapplicable and inappropriate. One particularly acute difference—and one particularly relevant to ISLT—is between state and federal judiciaries. The Supreme Court has long interpreted Article III to include limits on federal judicial power, which together comprise the justiciability doctrine.[267] These limitations, per the Court, ensure that federal courts do not exceed their constitutionally prescribed role and encroach on the democratic branches.[268]

But Article III does not apply to state courts, so what may amount to an arrogation of power in the federal system may not raise the same concerns under state law. Therefore, many state judiciaries allow courts to hear disputes that federal courts cannot.[269] For example, while advisory opinions are impermissible under Article III, some states allow for advisory opinions and authorize governors and legislatures to request opinions from state supreme courts.[270] Federal and state courts also differ with respect to what they consider nonjusticiable political questions.[271] Partisan gerrymandering litigation illustrates this contrast. In *Rucho v. Common Cause*,[272] the Court held that partisan gerrymandering claims are nonjusticiable political questions under the federal Constitution,[273] and in the years since, state courts have addressed the same issue under their state constitutions in different ways.[274]

Beyond justiciability doctrines, state judiciaries differ from federal judiciaries in a critical respect: most state judges are

[267] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1835–36 (2001).
[268] *See id.* at 1836.
[269] *Id.* at 1836.
[270] *See* Litman & Shaw, *supra* note 5, at 1250; Hershkoff, *supra* note 267, at 1845.
[271] *See id.* at 1861–65.
[272] 588 U.S. 684 (2019).
[273] *See id.* at 718.
[274] *Compare* Rivera v. Schwab, 512 P.3d 168, 187 (Kan. 2022) (holding partisan gerrymandering claims to be nonjusticiable under the state's constitution); Brown v. Sec'y of State, 313 A.3d 760, 763 (N.H. 2023) (same); *and Harper III*, 886 S.E.2d 393, 401 (N.C. 2023) (same), *with* Grisham v. Van Soelen, 539 P.3d 272, 289 (N.M. 2023) (holding partisan gerrymandering to be justiciable under the state's constitution); *and* Graham v. Adams, 684 S.W.3d 663, 680–81 (Ky. 2023) (same). For an overview of state court partisan gerrymandering litigation, see generally Yurij Rudensky, *Status of Partisan Gerrymandering Litigation in State Courts*, STATE COURT REPORT (Dec. 18, 2023), https://statecourtreport.org/our-work/analysis-opinion/status-partisan-gerrymandering-litigation-state-courts.

elected.[275] Thus, state judges are accountable to the people, whereas federal judges are purposefully insulated from political pressures. This matters because much of federal justiciability doctrine is based on protecting popularly-elected branches of government from undemocratic federal judges,[276] a rationale inapplicable to most state courts. Moreover, the Court's preferred interpretive methodology—textualism—is justified in part by its deference to the text enacted by a democratically-accountable Congress as opposed to indulging the interpretive preferences of federal judges.[277] Because state judges are elected, this justification for textualism has less force for state judiciaries.[278]

State government structures differ from the federal government in several other respects, and these differences underscore why federal conceptions of separations of powers are inapplicable to the states. For one, constitutional amendment procedures in some states are far less onerous than that for the federal Constitution, making it much easier for the legislature or the people to reverse state court decisions on state constitutional law.[279] State legislative processes are also distinct, including features such as gubernatorial line-item vetoes, unicameral legislatures, ballot initiatives, and popular referenda.[280] As Litman and Shaw note, while state government structures do not diverge from the federal government's in every aspect, it is nevertheless important to recognize that there is "no basis for the assumption that the rules, principles, and doctrines that have developed with specific reference to features of the federal system apply to the states."[281]

In sum, attempting to define the "ordinary bounds of judicial review" by looking to federal law and Article III is irreconcilable with the Court's long history of respecting state separation of powers regimes and the diversity of state governmental structures. Ultimately, whether a state court usurps the legislature's power is a question of state law, and *Moore* does not authorize the Court to

[275] Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principles in State Constitutions*, 119 MICH. L. REV. 859, 873 (2021); Litman & Shaw, *supra* note 5, at 1250.
[276] *See* Hershkoff, *supra* note 267, at 1836.
[277] Litman & Shaw, *supra* note 5, at 1249.
[278] *Id.* at 1250.
[279] *See* Bulman-Pozen & Seifter, *supra* note 275, at 878–79.
[280] *See* Litman & Shaw, *supra* note 5, at 1251; Bulman-Pozen & Seifter, *supra* note 275, at 876–77.
[281] Litman & Shaw, *supra* note 5, at 1251.

impose its own conception of judicial power on state courts only in disputes concerning federal elections.

D. Federal Respect for State Law

Finally, the scope of the ordinary bounds of judicial review must accord with our federalist system's fundamental respect for states' sovereignty, an essential component of which is states' prerogative to develop and enforce their own laws.

The importance of state law in our federal judicial system and the limits of federal power were made clear in the Court's landmark decision in *Erie Railroad Co. v. Tompkins*.[282] Before *Erie*, federal courts sitting in diversity would apply general federal common law as opposed to state common law.[283] This empowered federal courts with "the duty to scrutinize state court interpretations of state law and license to reject those interpretations, depending on the source of state law."[284] *Erie* resoundingly rejected that approach and made clear that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."[285] And critically, the *Erie* Court emphasized that "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."[286] One of *Erie*'s foundational holdings is that, like Congress, federal courts are not empowered by the Constitution to displace state law via federal common law and, accordingly, must apply state law as pronounced by a state's highest court in diversity cases.[287]

This is, of course, not to say that states and state laws are immune from federal constraints. For one, several constitutional provisions, including and especially the Reconstruction

[282] 304 U.S. 64 (1938).
[283] *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842).
[284] Schapiro, *supra* note 250, at 114.
[285] *Erie*, 304 U.S. at 78.
[286] *Id.*
[287] *See id.*; *see also id.* ("Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence."); Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 n.7 (1941) ("In determining what is the law of a state, we look to the decisions of lower state courts as well as to those of the state's highest court . . . .")

Amendments, give Congress broad authority to enact legislation that affects states.[288] And under the Constitution's Supremacy Clause,[289] federal law trumps conflicting state law. But the Supreme Court's deep respect for federalism is considered alongside the federal government's interest in preemption and has led the Court to put in place doctrinal rules that require courts to proceed cautiously before striking down a state law on this ground. For example, when federal courts consider whether federal law preempts state law, they operate under a presumption against preemption.[290] The Court has also protected state governments from federal overreach in other ways. The Court's anti-commandeering doctrine, for example, was adopted to limit when and how the federal government can direct state actors to implement federal regulations.[291] Therefore, any analysis about the ordinary bounds of judicial review must necessarily take federalism principles into account as well.

This entrenched respect for state sovereignty matters because states have broad powers to legislate and protect their citizens, including through state constitutional protections that do not exist under the federal Constitution. State constitutions vary widely among states and include many more limits on state governments and protections for its citizens than the federal constitution.[292] Importantly, even where state and federal constitutions parallel each other, states are under no obligation to mirror federal constitutional jurisprudence.[293] The federal Constitution sets the floor, and, as long as they abide by that limit,

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[288] *See, e.g.*, U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2.
[289] *See id.* art. VI.
[290] *See* Arizona v. United States, 567 U.S. 387, 398–99 (2012) ("In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." (internal quotation marks omitted)); Wyeth v. Levine, 555 U.S. 555, 565 (2009).
[291] *See, e.g.*, Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 543, 471 (2018) ("[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority."); Haaland v. Brackeen, 599 U.S. 255, 281 (2023) ("It is well established that the Tenth Amendment bars Congress from 'command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.'" (quoting Printz v. United States, 521 U.S. 898, 935 (1997))).
[292] *See* JEFFEREY S. SUTTON, 51 IMPERFECT SOLUTIONS 16 (2018); William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).
[293] SUTTON, *supra* note 292, at 16.

states are free to interpret their constitutions to provide greater protections than the federal counterpart.[294]

This is especially salient in the election law context because state constitutions contain explicit voting rights guarantees that are more protective than our federal charter. All state constitutions contain a provision expressly enshrining the right to vote,[295] and twenty-six constitutions include provisions providing for free elections.[296] Because of these and various other provisions relating to popular sovereignty and accountability, state constitutions contain democratic commitments that go beyond those contained in our federal constitution.[297] And state courts play an important—though certainly not exclusive—role in ensuring that state constitutional protections for democracy are enforced.[298]

Indeed, the Supreme Court recognized the existence and importance of state-level protections for democracy in *Rucho*. When the Court held that federal courts cannot hear partisan gerrymandering claims, it looked to states for solutions.[299] The Court cited state constitutional provisions and other state laws that target partisan gerrymandering as potential avenues to address a practice the Court noted was "incompatible with democratic principles."[300]

What does this all mean for the Elections and Electors Clauses? For one, any interest under the Clauses must be compatible with federal courts' longstanding respect for state sovereignty, and a reading of *Moore* in which federal courts displace state supreme courts' application of their states' laws is not.

ISLT proponents encourage federal courts to second-guess state court determinations on state law based on an amorphous and ill-defined vision of how courts should adjudicate cases. But, as

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[294] *Id.*; *see also* Brennan, *supra* note 292, at 500 ("[S]tate courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.").
[295] Bulman-Pozen & Seifter, *supra* note 275, at 870 & n.55.
[296] *Id.* at 871 & n.59.
[297] *See id.* at 879, 894–95. Professors Bulman-Pozen and Seifter identify these commitments as popular sovereignty, majority rule, and political equality. *See id.* at 880.
[298] *See id.* at 908–09.
[299] *See* Rucho v. Common Cause, 588 U.S. 564, 720 (2019).
[300] *Id.* at 718; *see id.* at 719–20.

Erie made clear, federal courts have no business interfering with states' prerogative to develop their own law.[301] As Professor Robert Shapiro argued in the aftermath of *Bush v. Gore*, federal courts imposing a preferred interpretive methodology on state courts would be akin to imposing a federal common law of adjudication on the states.[302] This is plainly inconsistent with *Erie* and federalism.[303] And as Litman and Shaw have explained, state courts have approached constitutional and statutory interpretation in a variety of ways since their inception.[304] In some cases, state statutes even direct courts on how to interpret state laws.[305] Simply put, there is no basis in the Clauses or elsewhere in the Constitution to authorize federal court supervision of state courts and state election law, and any purported interest in policing state courts is irreconcilable with basic federalism principles.

* * *

While the *Moore* Court was not clear about what exactly constitutes a transgression of the ordinary bounds of judicial review, *Moore*'s reasoning, considered alongside history and our tradition of respect for state sovereignty, reveals that there is nothing special about state legislatures that requires federal courts to protect them from checks from other state bodies acting within their power under state constitutions.

Thus, while ISLT proponents will surely attempt to exploit *Moore*'s recognition of the narrow exception for state court evasion, the reality is that there will rarely be a state court decision on election law that exceeds the bounds of ordinary judicial review. After all, there are many legitimate approaches to judging, and the Constitution does not empower federal courts to micromanage how state courts pursue the job of judicial review under their state charters. Instead, longstanding principles of federalism give states broad leeway to develop and enforce their own laws, including through judicial review. Therefore, in the vast majority of cases, federal court intervention on Elections or Electors Clause grounds will not be warranted.

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[301] *See* Schapiro, *supra* note 250, at 119.
[302] *See id.*; *see also* Litman & Shaw, *supra* note 5, at 1256–57.
[303] *See id.* at 1256–57.
[304] *See* Litman & Shaw, *supra* note 12, at 895–900.
[305] Litman & Shaw, *supra* note 5, at 1257.

CONCLUSION

This Article argues that, despite the *Moore* Court's reservation of power for itself to review state court decisions implicating federal elections, *Moore* leaves very little for ISLT proponents to latch onto. *Moore* recognized the Court's longstanding but narrow power to review and, if necessary, displace state court decisions on state law when state courts are evading federal interests, and it made clear that the Elections Clause is not exempt from that framework. But *Moore* also made clear that the federal interest that underlies the Elections Clause is very narrow and only guards against transgressions of the ordinary bounds of judicial review that amount to a state court arrogation of power to itself.

Any review of state court decisions, then, turns on the scope of the ordinary bounds of judicial review, and as *Moore*, history, and fundamental principles of federalism make clear, once a state legislature or other state lawmaking body passes a law pertaining to federal elections, nearly all state court action reviewing that law under the state constitution will fall plainly within those bounds. Therefore, state court judicial review will almost never run afoul of the Elections or Electors Clauses. Put differently, the Supreme Court will rarely, if ever, have the authority under the narrow evasion exception to displace state court decisions on state law in these cases.

Ultimately, *Moore* did more than resoundingly reject the premises underlying ISLT. By grounding future review under the Elections Clause in the evasion framework and defining the federal interest underlying the Clauses in narrow terms, the *Moore* Court made clear that its authority to review state court decisions under the Elections Clause is very tightly circumscribed. *Moore* and the first principles it vindicated do not permit federal courts to second-guess how state courts construe their foundational charters.