

LEADING CASES

CONSTITUTIONAL LAW

Elections Clause — Independent State Legislature Theory — Moore v. Harper

“[T]he biggest threat to US democracy since January 6.”¹ “[A] theory that could upend elections.”² “It’s Hard to Overstate the Danger of the Voting Case the Supreme Court Just Agreed to Hear.”³ These headlines highlight that many feared the Court would adopt the “Independent State Legislature Theory” (ISLT) — a theory that, in its maximalist form, would let state legislatures write congressional election rules without regard for state constitutional limits and with no role for state judicial review.⁴

These fears now seem mostly moot. Last Term, in *Moore v. Harper*,⁵ the Supreme Court held that state courts may exercise “ordinary judicial review”⁶ of state rules governing congressional elections.⁷ This ruling rejected the maximalist ISLT, preserving state courts’ power to strike down election laws — such as partisan gerrymanders or schemes to skew ballot counting — if they violate the state’s constitution. One once-fearful commentator now sees *Moore* as a “resounding and reverberating victory for American democracy.”⁸ But the case is not so simple. While *Moore* stops some threats to fair elections, it asserts a muscular vision of federal judicial power that raises new democratic difficulties.

The Constitution’s Elections Clause states that the “Times, Places and Manner” of congressional elections “shall be prescribed in each

¹ Ian Millhiser, *A New Supreme Court Case Is the Biggest Threat to US Democracy Since January 6*, VOX (June 30, 2022, 10:47 AM), <https://www.vox.com/23161254/supreme-court-threat-democracy-january-6> [<https://perma.cc/QU6X-F2LA>].

² Hansi Lo Wang, *The Supreme Court Is Weighing a Theory that Could Upend Elections. Here’s How*, NPR (Jan. 22, 2023, 5:00 AM), <https://www.npr.org/2023/01/22/1143086690/supreme-court-independent-state-legislature-theory-moore-v-harper> [<https://perma.cc/DZ99-JWPW>].

³ 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 PM), <https://slate.com/news-and-politics/2022/06/supreme-court-dangerous-independent-state-legislature-theory.html> [<https://perma.cc/S6VP-PT6P>].

⁴ See *The Independent State Legislature Theory and Its Potential to Disrupt Our Democracy: Hearing Before the H. Comm. on H. Admin.*, 117th Cong. 16 (2022) (statement of Richard H. Pildes, Sudler Family Professor of Constitutional Law, New York University School of Law). This comment’s use of “ISLT” refers to this maximalist version. For a description of the range of ISLT theories, see *id.* at 16–22.

⁵ 143 S. Ct. 2065 (2023).

⁶ *Id.* at 2090.

⁷ *Id.* at 2081.

⁸ See Dahlia Lithwick, *The Supreme Court’s Latest Decision Is a Big Fat Rebuke to Donald Trump’s Jan. 6 Claims*, SLATE (June 27, 2023, 6:05 PM), <https://slate.com/news-and-politics/2023/06/state-legislature-theory-donald-trump-rejected.html> [<https://perma.cc/4HG3-E7F2>] (quoting Judge J. Michael Luttig).

State by the Legislature thereof.”⁹ Maximalist ISLT proponents take “Legislature” to mean that the legislature alone has the power to write these election rules — with no role for state constitutions or state courts enforcing them.¹⁰ This simple reading has serious stakes.¹¹ Under the ISLT, state courts would be precluded from invalidating congressional gerrymanders,¹² and state ballot initiatives could not grant redistricting authority to independent commissions.¹³ More extremely, state legislatures might reject how courts count ballots¹⁴ or unmoor election results from the popular vote¹⁵ — potentially subverting the will of the voters.

In 2021, the North Carolina legislature began the ISLT’s winding path to the Supreme Court by drawing new congressional districts under its Elections Clause authority.¹⁶ Voting groups sued, alleging the Republican-passed maps were a partisan gerrymander violating the state constitution.¹⁷ The Wake County Superior Court denied plaintiffs’ claims: while the map was “carefully designed to maximize Republican advantage,” the court held partisan gerrymandering nonjusticiable under the state’s constitution.¹⁸

The North Carolina Supreme Court reversed in *Harper v. Hall*¹⁹ (*Harper I*). Writing for the majority, Justice Hudson²⁰ held that partisan gerrymandering was both justiciable and unconstitutional, violating the state constitution’s free speech, free assembly, equal protection, and free elections clauses.²¹ The majority also rejected defendants’ ISLT argument — that the Elections Clause leaves the content of the congressional

⁹ U.S. CONST. art. I, § 4, cl. 1. Congress may also “by Law make or alter such Regulations.” *Id.*

¹⁰ See Hasen, *supra* note 3.

¹¹ See Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 137 (2023) (describing “chaos-inducing” aspects of ISLT).

¹² In recent years, state courts in Alaska, Maryland, North Carolina, and Pennsylvania have struck down partisan-gerrymandered maps. See Aidan Calvelli, *Rucho’s Report Card* 13–16 (Dec. 19, 2022) (unpublished manuscript) (on file with the Harvard Law School Library).

¹³ States that have created independent commissions via popular initiative include Arizona and Michigan. See *Independent Redistricting Commissions*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/democracy/accountability/independent-redistricting-commissions> [https://perma.cc/N88P-4AV3].

¹⁴ In 2020, the Pennsylvania legislature cited the ISLT in a petition for certiorari seeking to overturn the state supreme court’s ruling extending the absentee ballot deadline. See *Petition for a Writ of Certiorari at i, Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020) (No. 20-542).

¹⁵ See, e.g., Hasen, *supra* note 3. While the Republican National Committee’s amicus brief in *Moore* claimed that the ISLT did not let legislatures dictate electoral outcomes, see *Brief of Amici Curiae the Republican National Committee et al. in Support of Petitioners at 4, Moore*, 143 S. Ct. 2065 (No. 21-1271), an amicus brief by the conservative Claremont Institute suggested this power was possible, see *Brief of Amicus Curiae the Claremont Institute’s Center for Constitutional Jurisprudence in Support of Petitioners at 2, Moore*, 143 S. Ct. 2065 (No. 21-1271).

¹⁶ *Moore*, 143 S. Ct. at 2074.

¹⁷ *Id.*

¹⁸ *Id.* at 2075 (quoting *Harper v. Hall*, 868 S.E.2d 499, 522, 524 (N.C. 2022)).

¹⁹ 868 S.E.2d 499.

²⁰ Justice Hudson was joined by Justices Ervin, Morgan, and Earls.

²¹ *Harper I*, 868 S.E.2d at 509–11 (quoting N.C. CONST. art. I, §§ 10, 12, 14, 19).

maps solely to the legislature — finding the theory “repugnant to the sovereignty of states . . . and the independence of state courts.”²² Because the majority found the 2021 map was an unconstitutional gerrymander, it enjoined the map and remanded to the trial court to oversee the legislature’s redrawing of the maps.²³

After the legislature adopted a new congressional map in February 2022, the Wake County Superior Court found the map still violated *Harper I* and implemented its own interim plan to ensure lawful districts for the 2022 elections.²⁴ The legislature appealed to the state supreme court; the United States Supreme Court also granted certiorari on whether the Elections Clause allows the state court to review the legislature’s map.²⁵ In the meantime, the North Carolina Supreme Court in *Harper v. Hall*²⁶ (*Harper II*) affirmed that the remedial map was unconstitutional and upheld the interim plan.²⁷

However, after the 2022 elections, the state supreme court flipped from a 4–3 Democratic majority to a 5–2 Republican one.²⁸ In early 2023, that court agreed to rehear *Harper*.²⁹ In the third life of *Harper v. Hall*³⁰ (*Harper III*), Justice Newby, writing for the majority, “overruled” *Harper I*, finding partisan gerrymandering nonjusticiable under the North Carolina Constitution; the court then “withdr[ew]” *Harper II*, leaving it to the legislature — without reinstating the plans struck down in *Harper I* — to draw new congressional maps, which it could now do free of a state constitutional prohibition on partisan gerrymandering.³¹

The United States Supreme Court then affirmed *Harper I*’s ISLT judgment in *Moore v. Harper*.³² Writing for the majority, Chief Justice Roberts³³ held that the Elections Clause does not exempt congressional maps from the “ordinary exercise of state judicial review” under state constitutions.³⁴

²² *Id.* at 551.

²³ *Id.* at 510.

²⁴ *Moore*, 143 S. Ct. at 2075 (citing *N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426, 2022 WL 2610499, at *19–20 (N.C. Super. Ct. Feb. 23, 2022)).

²⁵ *Id.* at 2075–76 (citing *Moore v. Harper*, 142 S. Ct. 2901 (2022) (mem.); *Harper v. Hall*, 881 S.E.2d 156, 181 (N.C. 2022)).

²⁶ 881 S.E.2d 156.

²⁷ *Id.* at 162.

²⁸ Ethan E. Horton & Eliza Benbow, *Two Republicans Win Seats on the NC Supreme Court, Flipping Majority*, DAILY TAR HEEL (Nov. 9, 2022, 2:32 AM), <https://www.dailytarheel.com/article/2022/11/city-nc-supreme-court-2022-election-results> [<https://perma.cc/GYR4-83M4>].

²⁹ *Moore*, 143 S. Ct. at 2076.

³⁰ 886 S.E.2d 393 (N.C. 2023). In this comment, *Harper I* refers to the February 2022 decision outlawing partisan gerrymandering, *Harper II* is the December 2022 decision rejecting the remedial map, and *Harper III* is the April 2023 decision finding partisan gerrymandering nonjusticiable.

³¹ *Id.* at 401; see also *id.* at 448.

³² 143 S. Ct. at 2089–90.

³³ Chief Justice Roberts was joined by Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson.

³⁴ *Moore*, 143 S. Ct. at 2081.

The Court first held that even though the North Carolina Supreme Court had overruled the decision giving rise to *Moore*, the case was not moot. While *Harper III* overruled *Harper I*'s reasoning, it did not prevent state courts from reviewing maps passed pursuant to the Elections Clause or disturb *Harper I*'s injunction against the 2021 plan.³⁵ So, since *Harper I*'s final judgment that the Elections Clause allowed state courts to review congressional maps remained intact, the Court could still grant relief (by adopting ISLT) — making the issue not moot.³⁶

The Court then addressed the merits. Chief Justice Roberts began by identifying a “fundamental principle” of our legal system: that courts have a “duty” to review the constitutionality of laws — including state courts enforcing state constitutions.³⁷ To the Court, the question was whether the Elections Clause “carves out an exception to this basic principle.”³⁸ It answered no: state legislatures remain constrained by the “ordinary exercise of state judicial review.”³⁹

First, the Court concluded that state legislatures are constrained by state constitutions. Focusing on precedent, the majority noted that state redistricting legislation has long operated within state constitutional requirements “with respect to the enactment of laws,” including judicial review, gubernatorial veto, and popular initiative.⁴⁰ Confirming recent precedent from *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁴¹ the Court held that any entity tasked with redistricting “remained subject to constraints set forth in the State Constitution.”⁴² While the Elections Clause authorizes state legislatures to regulate congressional elections, laws made under this authority are subject to the same state constitutional constraints that regulate all state lawmaking.⁴³

Then, the Court rejected defendants’ argument that state constitutions could impose procedural constraints on legislatures (such as gubernatorial vetoes), but not substantive constraints (such as prohibitions on gerrymandering).⁴⁴ The Court’s precedents drew no distinction between substance and procedure; instead, they held broadly that lawmaking

³⁵ *Id.* at 2077–79.

³⁶ *Id.* at 2077. The Court requested additional briefing on its jurisdiction after the state supreme court agreed to rehear *Harper I* and *Harper II*, and again when it decided *Harper III*. *Id.* at 2076.

³⁷ *Id.* at 2079–81 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court found this duty from *Marbury v. Madison*, the Federalist Papers, and early state cases invalidating state laws. *See id.*

³⁸ *Id.* at 2081.

³⁹ *Id.*

⁴⁰ *Id.* at 2081–83 (quoting *Smiley v. Holm*, 285 U.S. 355, 373 (1932)) (citing *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808, 816–18 (2015)).

⁴¹ 576 U.S. 787.

⁴² *Moore*, 143 S. Ct. at 2083 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. at 808, 817–18).

⁴³ *Id.* at 2083–85.

⁴⁴ *Id.* at 2085–86.

must meet all requirements set out by state constitutions.⁴⁵ Moreover, the majority saw no principled way to distinguish substance from procedure, as “[t]he line between procedural and substantive law is hazy.”⁴⁶

Finally, the Court concluded that Founding-era history proved that legislatures can be limited by state constitutions in regulating congressional elections.⁴⁷ Delaware and Maryland, for example, had constitutional provisions regulating federal elections, demonstrating that state legislatures lacked sole control.⁴⁸ And other states mandated that federal elections be “by ballot,” again limiting legislatures’ regulatory authority.⁴⁹ Since the Framers knew of these provisions, the Court assumed that the Framers did not intend for the Elections Clause to silently render them null.⁵⁰

The Court rejected the absolutist ISLT claim that state legislatures are fully exempt from state constitutions when regulating congressional elections. Still, the Court found the Elections Clause places some limits on state court review.⁵¹ Despite a “general rule” of accepting state court interpretations of state law, the Supreme Court claimed “an obligation to ensure that state court interpretations of that law do not evade federal law.”⁵² In the Elections Clause context, that means federal courts must ensure 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.”⁵³ The Court did not, however, adopt an exact test for when state courts exceed Elections Clause authority, as it found the issues “complex and context specific.”⁵⁴ The Court then declined to decide whether *Harper I* “transgress[ed] the ordinary bounds of judicial review” in striking down the map since the parties had not briefed the issue.⁵⁵

Justice Kavanaugh wrote a solo concurrence to discuss how he would determine whether a state court had transgressed the ordinary exercise of judicial review.⁵⁶ In general, he believed federal courts should “defer[]” but not “abdicat[e]” their reviewing role.⁵⁷ In particular, he

⁴⁵ *See id.*

⁴⁶ *Id.* at 2086 (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring)).

⁴⁷ *Id.* at 2086–88.

⁴⁸ *Id.* at 2087.

⁴⁹ *Id.* (quoting GA. CONST. art. IV, § 2 (1789)).

⁵⁰ *See id.*

⁵¹ *Id.* at 2088.

⁵² *Id.* at 2088–89. Federal courts here retain a “duty” they “must not abandon” to “exercise judicial review.” *Id.* at 2090.

⁵³ *Id.* at 2089.

⁵⁴ *Id.* The Court cited approvingly to Chief Justice Rehnquist’s concurrence in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), which would negate state court rulings that “impermissibly distort[] [state laws] beyond what a fair reading require[s].” *See Moore*, 143 S. Ct. at 2089 (quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring)).

⁵⁵ *Moore*, 143 S. Ct. at 2089.

⁵⁶ *Id.* at 2090–91 (Kavanaugh, J., concurring).

⁵⁷ *Id.* at 2090.

advocated for the approach outlined in Chief Justice Rehnquist’s *Bush v. Gore*⁵⁸ concurrence — asking “whether the state court ‘impermissibly distorted’ state law ‘beyond what a fair reading required.’”⁵⁹ He also argued that *Moore*’s “transgress” standard applies to state court interpretations of constitutions and statutes, an issue the majority did not clearly resolve.⁶⁰ He then clarified his view that assessing whether the state court distorted state law requires comparing the decision to preexisting state law, an issue the majority did not explicitly address.⁶¹

Justice Thomas dissented.⁶² He saw *Moore* as a “straightforward case of mootness” because the Elections Clause holding “no longer makes any difference” to the underlying case⁶³: *Harper III* resolved which maps governed upcoming elections, leaving no relief for the Court to grant.⁶⁴ On the merits, Justice Thomas endorsed a stronger ISLT. To him, since states’ power over federal elections comes from the U.S. Constitution, and since “Legislature” means the “lawmaking power” under the state constitution, a constitution may define that lawmaking power to include judicial review but cannot prescribe the substantive content of laws dictated under it.⁶⁵

Justice Thomas then worried that *Moore* “portends serious troubles ahead for the Judiciary.”⁶⁶ By extending federal court supervision into state constitutional (not just statutory) law, and by making federal courts define “ordinary [state] judicial review,” *Moore* will “federaliz[e]” state constitutions, “swell[ing] federal-court dockets with state constitutional questions”⁶⁷ in “politically acrimonious and fast-moving” controversies.⁶⁸ This role could leave the “winners of federal elections [to] be

⁵⁸ 531 U.S. 98.

⁵⁹ *Moore*, 143 S. Ct. at 2090 (Kavanaugh, J., concurring) (quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring)).

⁶⁰ *Id.* at 2091. This debate illustrates the differences between *Bush*- and *Moore*-style ISLT: In *Bush*, the question involved the *Electors* Clause and a state court interpreting a state statute. See *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (quoting U.S. CONST. art. II, § 1, cl. 2). In *Moore*, the question involved the *Elections* Clause and a state court interpreting a state constitution. See *Moore*, 143 S. Ct. at 2089. On Justice Kavanaugh’s reading, *Moore* could have a wider reach, applying to thousands of state court and administrative decisions interpreting unclear election laws. See Brief of Professor Richard L. Hasen as Amicus Curiae Supporting Respondents at 7–12, *Moore*, 143 S. Ct. 2065 (No. 21-1271).

⁶¹ *Moore*, 143 S. Ct. at 2091 (quoting *Bush*, 531 U.S. at 114, 121 (Rehnquist, C.J., concurring)). Here, Justice Kavanaugh proposed something like an “anti-novelty” principle, under which “novelty [is] a mark against” a law or regulation. See Leah Litman, *Anti-novelty, The Independent State Legislature Theory in Moore v. Harper, and Protecting State Voting Rights*, ELECTION L. BLOG (July 3, 2023, 7:42 AM), <https://electionlawblog.org/?p=137239> [<https://perma.cc/5ZDK-PDPG>].

⁶² *Moore*, 143 S. Ct. at 2091 (Thomas, J., dissenting). Justice Thomas was joined by Justice Gorsuch, and by Justice Alito in Part I on the issue of mootness.

⁶³ *Id.* at 2092.

⁶⁴ *Id.* at 2092–94.

⁶⁵ *Id.* at 2100–03.

⁶⁶ *Id.* at 2104.

⁶⁷ *Id.* at 2106 (quoting *id.* at 2081 (majority opinion)).

⁶⁸ *Id.* at 2105.

decided by a federal court's expedited judgment."⁶⁹

Moore's rejection of the maximalist ISLT thwarted some threats to democracy.⁷⁰ By preserving state judicial review, *Moore* lets courts stop legislatures from unconstitutionally gerrymandering maps or interfering in election outcomes.⁷¹ In reaching that result, however, *Moore* expanded federal courts' authority — making a subtle power grab that gives an arguably antidemocratic federal judiciary a troubling new role in federal elections.

Moore's new standard expands federal courts' authority by giving them final say over state election law.⁷² The Court began by lauding a *Marbury*-like “fundamental principle[]” of state judicial review⁷³ and fully rejecting the ISLT invention of unreviewable legislatures.⁷⁴ Then the Court hedged, adopting an ISLT-lite standard that lets federal courts determine when state courts “transgress the ordinary bounds of judicial review.”⁷⁵ The majority framed this as simply applying federal courts' “duty to safeguard” the Federal Constitution,⁷⁶ in line with “other areas” in which federal courts claim ultimate supervisory authority over state law.⁷⁷ But none of those areas have anything to do with the Elections Clause — which the Court had just shown preserves state courts' role as ultimate arbiters of their own constitutions — making *Moore* a novel expansion of federal judicial power. Moreover, for support, *Moore*

⁶⁹ *Id.* at 2106.

⁷⁰ See Marc Elias, *Revisiting Moore v. Harper and the Threats to Democracy*, DEMOCRACY DOCKET (July 11, 2023), <https://www.democracydocket.com/opinion/revisiting-moore-v-harper-and-the-threats-to-democracy> [<https://perma.cc/4QHD-4ZZ5>] (“[A]nyone who cares about free and fair elections should rejoice.”).

⁷¹ See Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571, 572–74 (describing how ISLT could strip away voting rights protections from state constitutions); see also Franita Tolson, *The “Independent” State Legislature in Republican Theory*, 10 TEX. A&M L. REV. (forthcoming 2023) (manuscript at 22) https://papers.ssrn.com/abstract_id=4226098 [<https://perma.cc/MG92-6LTE>] (“[The] theory allows the state legislature to disregard the preferences of the people . . . [, which are] at the core of . . . our system of republicanism.”).

⁷² That the Court ruled on the case at all further shows the central role it envisioned for itself. Since no ruling in *Moore* could have changed North Carolina's maps, the opinion was purely advisory. See *Moore*, 143 S. Ct. at 2092 (Thomas, J., dissenting). The mootness holding was especially jarring given that state law seemed to invite judicial review by establishing state court procedures for hearing congressional redistricting challenges. See N.C. GEN. STAT. § 1-267.1(a) (2023).

⁷³ *Moore*, 143 S. Ct. at 2081 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁷⁴ *Id.* at 2081–88.

⁷⁵ *Id.* at 2089.

⁷⁶ *Id.* at 2088–89.

⁷⁷ *Id.* at 2088 (citing, inter alia, *Tyler v. Hennepin County*, 143 S. Ct. 1369, 1375 (2023) (Takings Clause); *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (Contracts Clause)). These areas of federal interference are intended to be exceptions. Cf. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875) (“State courts are the appropriate tribunals . . . for the decision of questions arising under their local law . . .”).

turned to *Bush v. Gore*,⁷⁸ staking the federal judiciary’s new role on a self-avowedly nonprecedential opinion⁷⁹ critiqued for flouting federalism.⁸⁰ While rejecting the ISLT appears to protect state courts, *Moore*’s new standard subjugates them beneath new federal court powers.

Adding this layer of review could elevate federal courts’ influence in election disputes. Because the Court chose not to define its “transgressing” standard, state court litigants have an incentive to add Elections Clause claims atop state law challenges, in case a new theory sticks.⁸¹ And if Justice Kavanaugh is right that *Moore* applies to constitutional and statutory challenges, federal courts may have to decide debates over scores of state judicial and administrative interpretations of election laws.⁸² While most federal claims may be easily dismissed,⁸³ the recent explosion in election litigation⁸⁴ and the mountain of newly passed voting laws⁸⁵ could give federal courts a role in countless new cases.⁸⁶ In these cases, *Bush*-esque interventions could loom, leaving federal courts to decide the election rules — and thus, perhaps, the election results — in contests countrywide.⁸⁷

Together, the Court’s defense of judicial review and expansion of federal court authority⁸⁸ add antidemocratic potential atop *Moore*’s defense of democracy. Recently, a growing group of scholars have assailed

⁷⁸ This citation marked the first time *Bush* appeared in a Supreme Court majority opinion. See Richard L. Hasen, *There’s a Time Bomb in Progressives’ Big Supreme Court Voting Case Win*, SLATE (June 27, 2023, 12:44 PM), <https://slate.com/news-and-politics/2023/06/supreme-court-voting-moore-v-harper-time-bomb.html> [<https://perma.cc/JWW3-H8UR>].

⁷⁹ See *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam) (“Our consideration is limited to the present circumstances . . .”).

⁸⁰ See, e.g., Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 18 (2022).

⁸¹ *Moore*, 143 S. Ct. at 2089 (choosing to “not adopt” any “test” in this “complex and context[-]specific” area); Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It’s Not All Good News.*, N.Y. TIMES (June 28, 2023), <https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html> [<https://perma.cc/RK5H-PHVR>].

⁸² See *Moore*, 143 S. Ct. at 2090–91 (Kavanaugh, J., concurring); Brief of Professor Richard L. Hasen as Amicus Curiae Supporting Respondents, *supra* note 60, at 7–12.

⁸³ *Moore*, 143 S. Ct. at 2106 (Thomas, J., dissenting) (“In most cases, . . . state-constitutional questions [will] be quickly resolved with generic statements of deference to the state courts.”).

⁸⁴ See Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L.J. 150, 150–51 (2022).

⁸⁵ See *Voting Laws Roundup: June 2023*, BRENNAN CTR. FOR JUST. (June 14, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-june-2023> [<https://perma.cc/VTW3-BY2X>].

⁸⁶ If Justice Kavanaugh is right that the law reviewed in *Moore*-like cases must be the law preexisting the challenged court decision, see *Moore*, 143 S. Ct. at 2090–91 (Kavanaugh, J., concurring), then state supreme courts will likely introduce novel rules in *state* election cases before implanting them into *congressional* ones — a needless two-step that illustrates how looming federal review could distort state judging.

⁸⁷ See Pildes, *supra* note 81.

⁸⁸ Had *Moore* adopted ISLT, it also would have “dramatically expand[ed] the power of the federal judiciary” over election rules. See Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1236.

federal courts as unelected and unaccountable — and thus undemocratic.⁸⁹ On this view, *Moore* is unavoidably troubling, as it could leave judges who are disconnected from the democratic process in charge of that process across each of the fifty states. Other democracy advocates do not call courts inherently undemocratic but frequently criticize the Roberts Court for working against voters.⁹⁰ On this view, *Moore* is still worrisome, as it puts an increasingly conservative Court — one that has drastically narrowed the Voting Rights Act, enabled partisan gerrymandering, and invited increased campaign spending⁹¹ — in position to nudge elections toward the Justices' partisan preferences.⁹² All these advocates would oppose the gerrymandering and election subversion that *Moore*'s rejection of a maximalist ISLT stopped. But the uncertain and potentially expansive new role for the federal judiciary creates more democratic tension than the initial reaction to the case suggests.⁹³ And *Moore*'s popular reception might legitimate future judicial intervention in ways that undercut support for reclaiming democratic authority from courts.⁹⁴

More broadly, the reality that *Moore*'s “win” relied on an antidemocratic Court to stop antidemocratic legislatures highlights the distorted position democracy defenders face: putting any branch in charge of election rules carries democratic risks. Those who laud legislatures⁹⁵ must contend with how gerrymandered legislatures are themselves counter-majoritarian⁹⁶ — as North Carolina's next map could give Republicans

⁸⁹ See, e.g., Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 200–04 (2021); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1734–38 (2021).

⁹⁰ See, e.g., Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 113–16 (2020); Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 178–231 (2020). See generally CAMPAIGN LEGAL CTR., *THE SUPREME COURT'S ROLE IN UNDERMINING AMERICAN DEMOCRACY* (2022).

⁹¹ See Stephanopoulos, *supra* note 90, at 113–16 (citing, inter alia, *Shelby County v. Holder*, 570 U.S. 529 (2013); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019); *Citizens United v. FEC*, 558 U.S. 310 (2010)).

⁹² See Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 51–52 (2020).

⁹³ For a few particularly positive responses, see Elias, *supra* note 70; @judgeluttig, TWITTER (June 28, 2023, 12:14 PM), <https://twitter.com/judgeluttig/status/1673726425072013312> [<https://perma.cc/X537-EX9G>].

⁹⁴ See, e.g., Douglas Keith, *A Legitimacy Crisis of the Supreme Court's Own Making*, BRENNAN CTR. FOR JUST. (Sept. 15, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making> [<https://perma.cc/52H3-QDV6>] (“When the public perceives the Court's decisions as legitimate, it puts pressure on elected officials to follow those decisions . . .”).

⁹⁵ State legislatures have been on the cutting edge of progressive voting laws. See, e.g., Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. (forthcoming Nov. 2023) (manuscript at 5–12) (charting rise of state voting rights acts, which go beyond federal Voting Rights Act), https://papers.ssrn.com/abstract_id=4459538 [<https://perma.cc/CE5V-Z37V>].

⁹⁶ See Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1774–77 (2021); Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1421–23 (2020).

71% of congressional seats if they receive around 50% of the votes.⁹⁷ Those who see state courts as majoritarian⁹⁸ must face how elected judges can be captured and impinge on majority-supported rights — as *Harper III*'s partisan reversal⁹⁹ (and the North Carolina Supreme Court's history of dark-money influence¹⁰⁰) illustrates. Those who hope federal courts can unblock the political process¹⁰¹ must face the ways federal supremacy can cabin states' ability to pursue creative voting rights policies beyond federal protections¹⁰² or preempt debates over what makes their democracy fair¹⁰³ — as *Moore*'s looming *Bush*-like interventions portend.

These complications illustrate how *Moore* can be both a victory for American democracy and a threat to it. In today's "new countermajoritarian difficulty"¹⁰⁴ — where structural barriers to fair representation lurk everywhere — defending democracy is like a game of whack-a-mole: stopping a democratic threat somewhere raises a new one elsewhere. The mole *Moore* targeted — legislatures' federal election interference — makes immediate sense given the risk of mischief in 2024.¹⁰⁵ But the mole *Moore* unearthed — greater federal judicial power in elections — leaves democracy's defenders with more work to do.

⁹⁷ Michael Wines, *North Carolina Gerrymander Ruling Reflects Politicization of Judiciary Nationally*, N.Y. TIMES (May 2, 2023), <https://www.nytimes.com/2023/04/28/us/north-carolina-supreme-court-gerrymander.html> [https://perma.cc/X629-A3D6].

⁹⁸ See Seifter, *supra* note 96, at 1771–74.

⁹⁹ See *Harper v. Hall*, 886 S.E.2d 393, 431 (N.C. 2023).

¹⁰⁰ See Billy Corriher, *State Supreme Court Races: Big Issues, Big Money*, GOVERNING (Oct. 14, 2022), <https://www.governing.com/now/state-supreme-court-races-big-issues-big-money> [https://perma.cc/KD9W-98AL]; cf. JANE MAYER, DARK MONEY 336 (2016) (describing dark money that helped flip North Carolina Supreme Court in 2010s).

¹⁰¹ See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 144–47 (noting Court's proper role striking down racist state voting laws).

¹⁰² See Litman, *supra* note 61; cf. Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44–48 (2010) (arguing state contestation over policies adds to national political discourse).

¹⁰³ James Thayer, for example, might argue judicial minimalism forces healthy political contestation over the meaning and scope of democracy. See Samuel Moyn & Rephael G. Stern, *To Save Democracy from Juristocracy: J.B. Thayer and Congressional Power After the Civil War*, 38 CONST. COMMENT. (forthcoming 2023) (manuscript at 53–59), https://papers.ssrn.com/abstract_id=4342763 [https://perma.cc/92YE-XZ7L].

¹⁰⁴ See Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2324–25 (2021) (noting political polarization and Court decisions that interfere with majority representation).

¹⁰⁵ Cf. Jennifer Agiesta, *CNN Poll: Americans' Confidence in Elections Has Faded Since January 6*, CNN (July 21, 2022, 6:00 AM), <https://www.cnn.com/2022/07/21/politics/cnn-poll-elections/index.html> [https://perma.cc/2ZBW-3YXR] (“Most Americans lack confidence that the results of US elections reflect the will of the people . . .”).