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### Textualism, Judicial Supremacy, and the Independent State Legislature Theory

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# TEXTUALISM, JUDICIAL SUPREMACY, AND THE INDEPENDENT STATE LEGISLATURE THEORY

LEAH M. LITMAN\* & KATHERINE SHAW\*\*

This piece offers an extended critique of one aspect of the so-called “independent state legislature” theory. That theory, in brief, holds that the federal Constitution gives state legislatures, and withholds from any other state entity, the power to regulate federal elections. Proponents ground their theory in two provisions of the federal Constitution: Article I’s Elections Clause, which provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,” and Article II’s Presidential Electors Clause, which provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” Proponents defend the theory as consistent with the text and structure of the Constitution, as well as some nineteenth-century practice.

While the independent state legislature theory (ISLT) purports to elevate state legislatures in the name of popular sovereignty and democracy, in fact it dramatically expands the power of the federal judiciary at the expense of both. At base, the ISLT is primarily a claim of authority on the part of federal courts: it inverts a core principle of judicial federalism by maintaining that the federal Constitution empowers federal courts to override the judgments of state courts, state executive-branch officials, and state voters about the meaning of state law. In the hands of the current Supreme Court, this assertion of interpretive supremacy imposes on the states a narrow mode of statutory interpretation—textualism—whose key justifications are largely inapplicable to the states, with their myriad and varied institutional arrangements.

The ISLT is fatally inconsistent with basic precepts of both federalism and the separation of powers. But more than that, the ISLT is a lawless power grab by the federal courts masquerading as deference to a romanticized vision of the state legislature that fails to take state institutional design choices seriously on their own terms.

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## INTRODUCTION

This piece offers an extended critique of one aspect of the so-called “independent state legislature” theory. That theory, in brief, holds that the federal Constitution grants to state legislatures, and withholds from any other state entity, the power to regulate federal elections. Proponents ground the theory in two provisions of the federal Constitution: Article I’s Elections Clause, which provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,”<sup>1</sup> and Article II’s Presidential Electors Clause, which provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .”<sup>2</sup> Beyond this constitutional text, defenders of the theory invoke “the structure and political theory underlying the Constitution,”<sup>3</sup> as well as some nineteenth-century practice, as support for the view that the legislature is the only organ of state government that may regulate federal elections.<sup>4</sup>

While the independent state legislature theory (ISLT) purports to elevate state legislatures in the name of popular sovereignty and democracy, it actually dramatically expands the power of the federal judiciary at the expense of both. At base, the ISLT is primarily an assertion of interpretive primacy on the part of the federal courts. Indeed, a core component of the ISLT, properly understood, is that the federal Constitution empowers federal courts to override the judgments of state courts, state executive-branch officials, and state voters about the meaning of state law. This assertion of power inverts a core principle of judicial federalism, and in the hands of the current Supreme Court, imposes a narrow mode of statutory interpretation—textualism—that, whatever its merits in the federal system, is an exceedingly poor fit with the myriad and varied institutional arrangements in the states.

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1. U.S. CONST. art. I, § 4, cl. 1. The clause goes on to provide that “the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” *Id.*

2. U.S. CONST. art. II, § 1, cl. 2.

3. Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 14 (2020).

4. *Id.* During the 2020 election cycle, four members of the current Supreme Court seemed to indicate their approval of the theory. See Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 266, 289 & n.128 (2022).

As we show in what follows, the ISLT is fatally inconsistent with basic principles of both federalism and the separation of powers. But more than that, the ISLT is a lawless power grab by the federal courts masquerading as deference to a romanticized vision of the state legislature that fails to take state institutional design choices seriously on their own terms.<sup>5</sup>

We should note that in this short piece, we bracket the many forceful critiques of the ISLT grounded in constitutional structure, history, and political theory.<sup>6</sup> Our focus is primarily on interpretive methods and their interaction with institutional design and constitutional structure. For that reason, we discuss constitutional structure only to the extent that it relates to imposing a particular interpretive method on the states.

In addition, we do not offer a direct critique of a potential scenario in which a state legislature, relying on Article II, seeks to assign to itself the power to directly appoint presidential electors, including *after* voters have cast their votes. That would, without doubt, represent one of the most high-stakes, antidemocratic, and lawless contexts in which a version—to be sure, a fringe version—of the ISLT might be deployed. But, as far as we understand the rationales for such a move—which was reportedly considered and urged by a number of Trump advisors and supporters, including Ginni Thomas, in the aftermath of the 2020 election<sup>7</sup>—they do not entail claims that state entities have misinterpreted

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5. Cf. Mark A. Lemley, *The Imperial Supreme Court 1* (July 28, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4175554](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4175554) (“The common denominator across multiple opinions . . . is that they concentrate power in one place: the Supreme Court.”).

6. See, e.g., Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023) (manuscript at 5), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4047322](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322); 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, 2; Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL’Y (forthcoming 2023) (manuscript at 4), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4044138](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1002 (2021); Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3902163](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902163); Franita Tolson, *The ‘Independent’ State Legislature in Republican Theory* (Sept. 30, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4226098](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4226098).

7. Barton Gellman, *The Election That Could Break America*, ATL. (Sept. 23, 2020), <https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/> [<https://perma.cc/384V-DXGG>] (quoting the Pennsylvania state Republican party chairman as describing direct legislative appointment of electors as “one of the available legal options set forth in the Constitution,” and a state Republican party leader reporting conversations about legislative appointment with the Trump national campaign); Emma Brown, *Ginni Thomas, Wife of Supreme*

state laws. They rest instead on the distinct (though related) claim that state legislatures' authority to prescribe the method of appointing presidential electors is plenary. And, they maintain, that plenary authority is somehow unconstrained by basic notions of due process and democracy, or other constitutional provisions, like Article II's express assignment to Congress of the power to set the time for choosing presidential electors.<sup>8</sup> As profoundly misguided as such a claim is,<sup>9</sup> debunking it is not our project here. Our focus is the independent state legislature theory, not its warped variant, the anti-democratic state legislature theory, which might be better described as the state-legislatures-as-the-end-of-democracy theory.

Putting to one side this warped variant, the ISLT may be invoked in a number of different ways. Our critique is implicated most when a federal court considers a claim that a state court or state agency has exceeded its authority by misinterpreting and therefore departing from a state statute regulating federal elections, at least as the federal court interprets the state statute. This might happen where a state agency takes some action that it believes is authorized by a state statute regulating federal elections, or where a state court interprets such a statute. Often, this strand of the ISLT is invoked when a state court or state executive-branch official interprets the state statute in light of a state constitutional provision related to voting, or even concludes that a state statute is invalid on the basis of a state constitutional provision related to voting, and the federal court concludes that the state interpreter failed to sufficiently adhere to the state statute as the federal court understands it. That is the posture in which the doctrine has been deployed in a number of recent cases.

The dynamics may be somewhat distinct under other circumstances—where, for example, a state court has drawn maps that will be used for federal congressional elections after the political process has failed to produce a viable or legally sound map, and the allegation is that the federal Constitution requires the state legislature alone to create such a map.<sup>10</sup> Such claims often sound in the idea at the core of the

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*Court Justice, Pressed Ariz. Lawmakers to Help Reverse Trump's Loss, Emails Show*, WASH. POST (May 20, 2022, 11:52 AM), <https://www.washingtonpost.com/investigations/2022/05/20/ginni-thomas-arizona-election-emails/> [<https://perma.cc/H5TG-B6DL>].

8. U.S. CONST. art. II, § 2, cl. 4. Congress has set that date as the Tuesday after the first Monday in November. 3 U.S.C. § 1.

9. See J. Michael Luttig, *The Republican Plan to Steal the 2024 Election*, CNN, <https://www.cnn.com/2022/04/27/opinions/gop-blueprint-to-steal-the-2024-election-luttig/index.html> (Apr. 27, 2022, 9:09 AM).

10. This fall, the Supreme Court will address this issue in a case out of North Carolina. Petition for Writ of Certiorari, *Moore v. Harper*, 142 S. Ct. 2901 (2022) (No. 21-1271); see also Jamelle Bouie, *Next Time Trump Tries to Steal an Election, He Won't*

ISLT—namely, that state entities other than the legislature lack the authority writ large to regulate federal elections—without alleging a misinterpretation or misapplication of state law. But our focus is on cases where federal courts believe that a state entity or official has misinterpreted or departed from a state statute as the federal courts understand it.

### I. THE EMERGENCE OF THE ISLT

Before turning to our critique of the ISLT, we first provide a brief overview of its origins. The theory traces back to the litigation over the 2000 presidential election in the state of Florida, and in particular to Chief Justice Rehnquist’s concurring opinion, which both Justice Scalia and Justice Thomas joined, in *Bush v. Gore*.<sup>11</sup> The per curiam opinion in that case held that what it described as “standardless manual recounts” violated the equal protection clause, and a bare majority of five Justices stopped the recounts and handed George W. Bush the victory on that basis.<sup>12</sup> Because of that disposition, the Court did not address another question on which it had granted cert:

Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State “in such Manner as the Legislature thereof may direct.”<sup>13</sup>

Chief Justice Rehnquist’s concurring opinion, however, did address that question, arguing that Article II supplied an additional basis on which to reverse the Florida Supreme Court. Pointing to the importance of the election of the president and vice president, “the only elected officials who represent all the voters in the Nation,”<sup>14</sup> together with Article II’s provision that “[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct,’ electors for President and Vice President,”<sup>15</sup> the concurrence concluded that, “[a] significant departure from the legislative scheme for appointing Presidential electors presents

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*Need a Mob*, N.Y. TIMES, (July 8, 2022), <https://www.nytimes.com/2022/07/08/opinion/trump-democracy-states.html>.

11. 531 U.S. 98 (2000).

12. *Id.* at 103.

13. Brief for Petitioners at i, *Bush v. Gore*, 531 U.S. 98 (No. 00-949) (quoting U.S. CONST. art. II, § 1, cl. 2).

14. *Bush v. Gore*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)).

15. *Id.*

a federal constitutional question.”<sup>16</sup> The concurrence reasoned that because this was one of the rare instances in which “the Constitution imposes a duty or confers a power on a particular branch of a State’s government,”<sup>17</sup>—here, the state legislature—“the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”<sup>18</sup> The concurrence offered no support from case law or principles of constitutional interpretation for this startling assertion.

Many informed commentators, as well as several federal judges, assumed that *Bush v. Gore*, including the Rehnquist concurrence, was essentially a ticket good for one case and one case only.<sup>19</sup> But then came the 2020 election.<sup>20</sup>

Some Justices first signaled a renewed interest in the ISLT in litigation arising out of Wisconsin. In the first round of the litigation, in April 2020, the Supreme Court stayed a district court order that had extended an absentee-ballot-return deadline to account for COVID-19 concerns; the Court’s per curiam opinion staying the injunction made no

16. *Id.* at 113.

17. *Id.* at 112.

18. *Id.* at 113.

19. *See id.* at 109 (per curiam opinion) (“Our consideration is limited to the present circumstances.”); *see also, e.g.*, Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378–79, 387 (2001) (“Nor was the Court merely silent on the issue of *Bush v. Gore*’s precedential value. It expressly denied the case had any precedential value, something the Court could have suggested more subtly in distinguishing *Bush v. Gore*’s facts in future cases to come before it.”). One court of appeals invalidated a state’s voting practices—in light of *Bush v. Gore*—over a dissent that “question[ed] the precedential value of *Bush v. Gore*.” *Stewart v. Blackwell*, 444 F.3d 843, 881 (6th Cir. 2006) (Gilman, J., dissenting). The case went en banc before becoming moot, and the panel opinion was vacated. *Stewart v. Blackwell*, 473 F.3d 692, 692 (6th Cir. 2007).

20. Even before 2020, however, several Supreme Court Justices invoked the ideas underlying or adjacent to the ISLT when deciding constitutional questions. First, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Supreme Court held, by a seven-to-two vote, that the federal National Voter Registration Act (NVRA) preempted Arizona’s proof-of-citizenship requirement for voting. 570 U.S. 1, 15 (2013). But in dissent, Justice Thomas raised the question whether the NVRA infringed on state legislatures’ ability to set conditions or qualifications on voting in violation of Article I, § 4. *Id.* at 29, 36 (Thomas, J., dissenting). He would not have reached that question because it had not been raised, but he argued that the constitutional issues he identified required construing the federal statute more narrowly. *See id.* at 36. Then in 2015, the Court upheld a state constitutional provision that assigned the power to draw districts to an independent redistricting commission. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 813 (2015). Chief Justice Roberts, writing for four dissenters, would have held that the Elections Clause, Article I, § 4 of the Constitution, required the legislature, rather than an independent commission, to draw districts. *Id.* at 825 (Roberts, C.J., dissenting).

mention of the ISLT, primarily relying instead on the *Purcell* principle.<sup>21</sup> As the general election approached later that year, and with the COVID-19 pandemic still raging, the Wisconsin Elections Commission decided to send absentee ballot applications to every voter.<sup>22</sup> In light of the likely increase in the number of absentee ballots cast, as well as postal service delays and the state's experience with the April primary, a district court again extended the deadline for receipt of absentee ballots.<sup>23</sup> The Seventh Circuit stayed the injunction,<sup>24</sup> and in October, the Supreme Court denied the request to vacate the stay.<sup>25</sup> The Supreme Court's October order produced no majority opinion, but two Justices in the majority wrote separately to invoke the ISLT. Justice Gorsuch's concurrence suggested there was a possible constitutional problem with the Wisconsin Elections Commission's decision to accommodate voters in light of the pandemic because "[t]he Constitution provides that *state legislatures*—not federal judges, not state judges, not state governors, *not other state officials*—bear primary responsibility for setting election rules."<sup>26</sup> And Justice Kavanaugh's concurrence explicitly invoked the ISLT, favorably citing Chief Justice Rehnquist's concurrence in *Bush v. Gore*<sup>27</sup> and asserting federal-court authority to review state courts' interpretations of state election law: "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws."<sup>28</sup>

Several Justices subsequently invoked the ISLT in a case out of North Carolina. As in Wisconsin, the postal service announced that it might be unable to timely deliver completed absentee ballots that had complied with North Carolina's rules for absentee voting. In light of that statement, several plaintiffs sued the North Carolina Board of Elections in state court, seeking an injunction to extend the receipt deadline for

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21. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). For a recent discussion of the "*Purcell* principle," which the Court has used to limit lower courts' ability to change election rules near in time to elections, see Wilfred U. Cordrington III, *Purcell in Pandemic*, 96 N.Y.U. L. REV. 941 (2021).

22. See Patrick Marley, *Wisconsin Elections Commission Approves Sending 2.7 Million Absentee Ballot Request Forms to Voters*, MILWAUKEE J. SENTINEL (June 17, 2020, 5:29 PM), <https://www.jsonline.com/story/news/politics/2020/06/17/wisconsin-elections-commission-finalize-mailing-absentee-ballot-request-forms/5329007002/> [<https://perma.cc/ATW9-NYPK>].

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

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

25. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020).

26. *Id.* at 29 (Gorsuch, J., concurring) (emphases added).

27. *Id.* at 34 n.1 (Kavanaugh, J., concurring).

28. *Id.*



absentee ballots.<sup>29</sup> The plaintiffs invoked the state constitution as the basis for the requested injunction.<sup>30</sup> The plaintiffs and defendants ultimately settled on an agreement to extend the absentee ballot receipt deadline, and the state court signed off on the parties' settlement.<sup>31</sup> A group of state legislators then sought to intervene, arguing that the state court lacked the authority to approve the settlement without their consent because the legislature had to set the rules regarding federal elections.<sup>32</sup> They sought a stay from the U.S. Supreme Court, and the Court denied the stay over noted dissents by Justices Alito, Gorsuch, and Thomas.<sup>33</sup> The legislators then challenged the state court judgment in federal court; once again, the federal courts, including the Supreme Court, declined to stay the state court's decision.<sup>34</sup> Justice Gorsuch, joined by Justice Alito, dissented, once again invoking the ISLT.<sup>35</sup>

The ISLT also surfaced in litigation in Pennsylvania. There, a group of voters obtained an injunction from the Pennsylvania Supreme Court, which concluded that the state constitution required the secretary of state to extend the deadline for receipt of absentee ballots.<sup>36</sup> In the period following Justice Ginsburg's death, but before the confirmation of Justice Barrett, the U.S. Supreme Court divided four to four over whether to stay that decision; because the Court was evenly divided, no stay was issued.<sup>37</sup> In the statement explaining the reasons Justices Alito, Thomas, and Gorsuch voted to grant the stay, Justice Alito explicitly invoked the ISLT:

The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts

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29. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 20 CVS 8881, 2020 WL 10758664, \*1–2 (N.C. Super. Ct. Oct. 5, 2020).

30. *Id.* at \*3.

31. *Wise v. Circosta*, 978 F.3d 93, 97 (4th Cir. 2020).

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

33. *See Berger*, 141 S. Ct. at 658. The state supreme court also denied a stay. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, 848 S.E.2d 496, 497 (N.C. 2020) (mem.).

34. *Moore v. Circosta*, 494 F. Supp. 3d 289, 331 (M.D.N.C. 2020), *injunction pending appeal denied sub nom. Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), *stay denied*, 141 S. Ct. 46 (2020).

35. 141 S. Ct. at 47 (Gorsuch, J., dissenting).

36. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386 (Pa. 2020).

37. *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020).

the authority to make whatever rules it thought appropriate for the conduct of a fair election.<sup>38</sup>

## II. TEXTUALISM AND THE ISLT

This Part begins with an overview of textualism, then explains how the ISLT effectively requires state courts to use the federal courts' preferred version of textualism when interpreting state laws regarding federal elections. It then discusses the federalism and separation of powers issues that arise from requiring state courts to adopt the federal courts' preferred method of statutory interpretation when state courts are interpreting state laws. In brief, the premises of textualism do not map neatly onto the states; mandating textualism does not respect state institutional design choices about how to allocate interpretive and decision-making authority within state systems of government; and there is no adequate legal basis for the federal courts to issue statutory interpretation edicts to state courts about how to interpret state law.

### A. *Textualism: An Overview*

We begin with a brief overview of textualism, which in recent years has emerged as the nominal winner of the long-standing “statutory interpretation wars”<sup>39</sup> on the United States Supreme Court. The strain of textualism that now claims dominance is sometimes referred to as “new textualism,”<sup>40</sup> and it is of fairly recent vintage. Although new textualism has been around in some form since the 1980s,<sup>41</sup> Justice Scalia and co-author Bryan Garner’s *Reading Law*, a leading authority for today’s textualists, was not published until 2012.<sup>42</sup> And, despite Justice Elena

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38. *Id.* at 1 (statement of Alito, J.). After the election was over, Justices Alito, Gorsuch, and Thomas would have granted certiorari to hear the case and address ISLT issues. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 738 (2021) (Alito, J., dissenting from denial of certiorari); *id.* at 732–33 (Thomas, J., dissenting from denial of certiorari).

39. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1555, 1638 (2020); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 732 (2010).

40. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 623 (1990).

41. *Id.*

42. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). According to a Westlaw search of cases—“Reading Law: The Interpretation of Legal Texts”—as of October 18, 2022, *Reading Law* appears in 1,352 federal cases, 1,053 state cases, and 11 cases in territories for a total of 2,416 cases. Within the federal cases, the Supreme Court cites the book 40 times, the Courts of Appeals cite the book 664 times, and the District Courts cite it 547 times. The remaining 101 federal citations come from bankruptcy courts, courts of federal

Kagan's famous 2015 line, "we are all textualists now,"<sup>43</sup> it was not until former President Trump managed to appoint three new justices to the Supreme Court that there appeared to be anything approaching a solid textualist majority on that court.<sup>44</sup>

The new justices have changed the landscape dramatically. Justices Gorsuch, Kavanaugh, and Barrett were all avowed textualists before joining the Court. As a nominee, Neil Gorsuch was hailed by the conservative legal establishment as an "ardent textualist" and a "worthy heir to Justice Scalia."<sup>45</sup> After his first full term on the Court, Justice Gorsuch published *A Republic, If You Can Keep It*, which defended textualism at length.<sup>46</sup> As a judge on the D.C. Circuit, Brett Kavanaugh wrote in the *Harvard Law Review* that, thanks to the "extraordinary influence of Justice Scalia," statutory interpretation had "improved dramatically over the last generation."<sup>47</sup> Amy Coney Barrett, whose academic writings marked her as a clear textualist,<sup>48</sup> proudly proclaimed about Justice Scalia, "his judicial philosophy is mine too."<sup>49</sup>

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claims, courts of international trade, military courts, tax courts, and courts of appeals for veterans claims.

43. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:30 (Nov. 25, 2015), [https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb\\_title](https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb_title). See *infra* text accompanying notes 76–79 for Justice Kagan's revised assessment.

44. See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010) ("[T]extualism, . . . despite its significant impact on modern statutory interpretation, has failed to emerge as the dominant methodology in the U.S. Supreme Court's interpretive battles."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29 (2006) ("Justices Scalia and Thomas are the only self-identified textualists on the Supreme Court.").

45. Ramesh Ponnuru, *Neil Gorsuch: A Worthy Heir to Justice Scalia*, NAT'L REV. (Jan. 31, 2017, 9:33 PM), <https://www.nationalreview.com/2017/01/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir/> [<https://perma.cc/MF5K-66RR>].

46. NEIL GORSUCH WITH JANE NITZE & DAVID FEDER, *A REPUBLIC, IF YOU CAN KEEP IT* 132 (2019) ("Textualism honors only what's survived bicameralism and presentment—and not what hasn't. The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge's policy preferences.").

47. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review).

48. See, e.g., Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) ("Textualists consider themselves bound to adhere to the most natural meaning of the words at issue because that is the way their principal—the people—would understand them.").

49. Marcia Coyle, "His Judicial Philosophy is Mine": Amy Barrett Touts Scalia in Remarks from Rose Garden, LAW.COM (Sept. 26, 2020, 5:27 PM), <https://www.law.com/nationallawjournal/2020/09/26/his-judicial-philosophy-is-mine-amy-barrett-touts-scalia-in-remarks-from-rose-garden/?slreturn=20220021175107> [<https://perma.cc/9K7X-S63S>].

The key claim of the new textualism—a once-insurgent,<sup>50</sup> now dominant, method—is that judges interpreting statutes should limit themselves to the “plain meaning” of the words of the statute in question. As Scalia and Garner wrote in *Reading Law*: “[t]extualism . . . begins and ends with what the text says and fairly implies.”<sup>51</sup> In the words of Dean John Manning, another textualist, “textualists choose the letter of the statutory text over its spirit.”<sup>52</sup> In Justice Gorsuch’s formulation in *Bostock v. Clayton County*, “[o]nly the written word is the law . . . .”<sup>53</sup>

Proponents of textualism offer their method as an alternative to once-dominant modes of statutory interpretation like purposivism or intentionalism. They define textualism largely by what it does *not* permit: in its pristine official formulation, textualism does not permit inquiry into the intent or purpose of drafters, nor does it allow for consideration of the consequences of adopting different interpretations. Scalia and Garner argue that when interpreting a statute, judges should “look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.”<sup>54</sup> When it comes to interpretive tools, legislative history is anathema; dictionaries and interpretive canons are revered.<sup>55</sup>

These textualist precepts contrast sharply with the basic principles of purposivism. As leading purposivists Henry Hart and Albert Sacks once argued, a court should “[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can, making sure, however, that it does not give the words . . . a meaning they will not bear.”<sup>56</sup> More recently, Judge Robert Katzmann’s book-length defense of purposivism emphasized that statutes have “purposes or objectives that are discernible” and that “the task of the judge is to make sense of legislation in a way that is faithful to Congress’s purposes,”<sup>57</sup> including by examining context and legislative history. And Victoria Nourse has

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50. Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 120 (“Not too long ago, textualism was an insurgent methodology.”).

51. SCALIA & GARNER, *supra* note 42, at 16.

52. John F. Manning, *Textualism & Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

53. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

54. SCALIA & GARNER, *supra* note 42, at xxvii.

55. *See* Gluck, *supra* note 44, at 1763.

56. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

57. ROBERT KATZMANN, *JUDGING STATUTES* 31 (2014); *see also* John Paul Stevens, *Law Without History?*, N.Y. REV. (Oct. 23, 2014), <https://www.nybooks.com/articles/2014/10/23/law-without-history/> [<https://perma.cc/3VRF-ZBVP>] (reviewing KATZMANN, *supra*).

defended a mode of “realist purposivism”<sup>58</sup> that is clear-eyed about the challenges of ascribing a single purpose to any congressional enactment, but nevertheless takes seriously congressional process and what she terms “legislative evidence.”<sup>59</sup>

Textualists do not merely reject other modes of statutory interpretation, like Hart and Sacks-style purposivism,<sup>60</sup> and pragmatic<sup>61</sup> or dynamic<sup>62</sup> modes of statutory interpretation. They go much further, insisting that their method alone can guarantee both “interpretive predictability” and “cabined judicial discretion.”<sup>63</sup> Some textualists maintain, in addition, that certain features of our system of separated powers essentially *require* the federal courts to use textualism.<sup>64</sup> On this view, only textualism is consistent with the constitutionally prescribed process for enacting federal legislation—bicameralism and presentment<sup>65</sup>—and it is the only method that respects the limited role of unelected judges in the federal system.

Textualists make two related claims for the constitutional imperative of textualism (and its close corollary, the constitutional prohibition on the use of legislative history). The first focuses on the lawmaking process

58. VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 50 (2016).

59. *Id.*

60. HART & SACKS, *supra* note 56 (suggesting that courts “[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can, making sure, however, that it does not give the words . . . a meaning they will not bear”).

61. *See, e.g., Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring).

62. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1538 (1987) (“Dynamic statutory interpretation offers quite a different focus from traditional theories of statutory interpretation . . . it treats the evolutive context as a persuasive source of statutory meaning which should be considered in addition to the statute’s text and legislative history.”).

63. Gluck, *supra* note 44, at 1762; *see also* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020) (describing that textualism is the method that is most capable of “constrain[ing] judicial discretion and thus a judge’s proclivity to rule in favor of the wishes of the political faction that propelled her into power.”); Molot, *supra* note 44, at 25 (“[T]extualist criticism of strong purposivism resembled *Erie’s* criticism of *Swift*. Just as the general federal common law came to be viewed as ‘little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject,’ so too did textualists highlight the way in which purposivist readings of statutes tend to confuse Congress’s statutory instructions with the policy preferences of purposivist judges.”) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

64. *See, e.g.,* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68–69 (1994).

65. *Id.* (stating that “[t]he Constitution limits what counts as ‘law[,]’” which is limited to text enacted “by two Houses of Congress and one President”) (emphasis omitted); *see also* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1349 (2019).

prescribed in Article I, Section 7. In Judge Frank Easterbrook's formulation, because "the Constitution limits what counts as 'law'" through "the structure of our Constitution," namely agreement by both houses and the president, the Constitution commands that judges limit themselves to the text that emerges from that process, refraining from speculation about purposes or consequences and refusing to consider sources other than the enacted text itself.<sup>66</sup>

The second strain of the claim that textualism is constitutionally required is grounded in nondelegation principles; it suggests that judicial consultation of legislative history, particularly of sources like committee reports, raises concerns from the perspective of the separation of powers, and specifically the nondelegation doctrine.<sup>67</sup> On this view, when courts credit the articulated views of a subset of Congress, like a congressional committee, they allow Congress to self-delegate in contravention of constitutional nondelegation principles.<sup>68</sup>

In the next Part, we offer an extended refutation both of the applicability of these arguments to the states, and of the suggestion that federal courts have license to correct insufficiently textualist decisions by entities like state courts. But it is worth pausing to note that, despite this general sketch of the professed interpretive philosophies of a majority of members of the contemporary Supreme Court, it is impossible to miss that probing beneath textualism's surface claims reveals significant variety, as well as remarkable inconsistency, in actual practice.<sup>69</sup>

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66. Easterbrook, *supra* note 64. While Easterbrook refers to "law" generally, he seems to be talking about federal law in particular, since the Constitution requires federal law, but of course not state law, to be the product of a two-house-plus-president-or-override process.

67. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997).

68. For a refutation of both of these arguments, see Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 325 (2014).

69. *E.g.*, Franklin, *supra* note 50, at 123 ("[T]extualism is no more capable of providing a neutral truthmaker or of cabining the influence of evolving social values than any other leading method of statutory interpretation."); *id.* at 125 ("Textualism and public meaning originalism do not offer more objectivity or determinacy than their more explicitly dynamic counterparts, however. What they offer is the illusion of those characteristics."); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1733 (2021); *see also* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 284 (2021) ("[J]udicial populism insists that there are clear, correct answers to complex, debatable problems. It disparages the mediation and negotiation that characterize democratic institutions and rejects the messiness inherent in a pluralistic democracy. Instead, it simplifies the issues legal institutions address and claims special access to a true, single meaning of the law."); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1278 (2020) ("[T]hose Justices commonly considered textualist or textualist leaning at times engage in a form of backdoor purposivism, or at least speculation about legislative intent, that looks surprisingly similar to the intent speculation inherent to traditional purposivism.");

Consider self-styled leading textualist Neil Gorsuch’s “stunningly atextual”<sup>70</sup> opinion concurring in the Court’s decision to enjoin a COVID-19 vaccine-or-testing mandate:<sup>71</sup> over the course of seven pages, the opinion made one passing reference to the statute that gives the Occupational Safety and Health Administration (OSHA) the authority to issue emergency temporary standards, and entirely failed to cite the statutes that give the agency the general authority to regulate workplace safety.<sup>72</sup> Rather than ask about the meaning of the relevant statutes, it framed the question as “whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people.”<sup>73</sup> In answering that question, the opinion relied on a vote in a single house of Congress—a particularly unreliable form of legislative history, even for those inclined to consider legislative history—a dubious characterization of an OSHA brief in an earlier case,<sup>74</sup> and most importantly, what it viewed as the requirements of what is sometimes called the “major questions” doctrine, a doctrine that substantially disempowers agencies from addressing whatever a court might deem issues “of vast economic and political significance,”<sup>75</sup> even where Congress has enacted statutes whose text and purpose seem to empower agencies to do just that.

The full Court formally embraced and announced the major questions doctrine later that year in *West Virginia v. EPA*.<sup>76</sup> That doctrine operates as a strong clear statement rule under which courts do not seek to ascertain the best meaning of the words in the statute; instead, they ask only whether Congress specifically authorized certain agency actions that the Court deems to be “major.”<sup>77</sup> The doctrine is so

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Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [<https://perma.cc/4BFQ-FKDE>] (“Judges tend to deny the creative—the legislative—dimension of judging, important as it is in our system, because they do not want to give the impression that they are competing with legislators, or engaged in anything but the politically unthreatening activity of objective, literal-minded interpretation, using arcane tools of legal analysis.”); Anita Krishnakumar, *Some Brief Thoughts on Gorsuch’s Opinion in NFIB v. OSHA*, ELECTION L. BLOG (Jan. 15, 2022, 8:06 AM), <https://electionlawblog.org/?p=126944> [<https://perma.cc/59VG-WY89>] [hereinafter Krishnakumar, *Brief Thoughts*].

70. Krishnakumar, *Brief Thoughts*, *supra* note 69.

71. *Nat’l Fed’n. of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin. (NFIB v. OSHA)*, 142 S. Ct. 661 (2022) (Gorsuch, J., concurring).

72. *Id.* at 668.

73. *Id.* at 667.

74. *Id.* at 667–68.

75. *Id.* at 667 (cleaned up).

76. 142 S. Ct. 2587, 2610 (2022).

77. See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 22–32), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4165724](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724).

stunningly atextualist,<sup>78</sup> it led Justice Kagan, in a vigorous dissent, to announce that she “was wrong” when she (famously) “remarked that ‘we’re all textualists now.’”<sup>79</sup>

Or take the case of *Bostock v. Clayton County*,<sup>80</sup> in which each opinion—Justice Gorsuch’s opinion for the Court, and the separate dissents by Justices Alito and Kavanaugh—claimed the mantle of textualism, and yet offered entirely different analyses and reached entirely different conclusions.<sup>81</sup> To the extent that one of textualism’s key selling points has long been that it offers predictability and constrains judicial discretion, the many strains of textualism on display in *Bostock* should give one serious pause.<sup>82</sup>

Henry Hart and Albert Sacks once famously observed that, “[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”<sup>83</sup> That is, if anything, truer than ever in the context of today’s “textualist” court.<sup>84</sup>

### *B. Textualism’s Inapplicability to State Courts*

As detailed above, textualism is justified in large part by reference to core structural features of the federal system: judges are unelected; legislators are democratically accountable; the lawmaking process is governed by some clear constitutional commands (bicameralism; presentment) and some unarticulated yet significant constitutional principles (separation of powers; nondelegation). These structural features by no means apply in all their particulars to the states.<sup>85</sup> And yet the ISLT would project onto the states the current Supreme Court’s preferred version of textualism even though the structural arguments for textualism in the federal system do not mechanically apply—and in some

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78. See *id.* at 25; *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (describing the doctrine as a “get-out-of-text-free card”).

79. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

80. 140 S. Ct. 1731 (2020).

81. *Id.* at 1738; *id.* at 1761 (Alito, J., dissenting); *id.* at 1823 (Kavanaugh, J., dissenting).

82. Cf. Franklin, *supra* note 50, at 125 (highlighting that, over time, textualism “alters the parameters of what counts as a plausible interpretation of the text”).

83. HART & SACKS, *supra* note 56, at 1169.

84. In addition, empirical studies have cast doubt on textualism’s assumptions about the drafters of legislation. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905 (2013); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 575–76 (2002).

85. See JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 8–11 (2022).



instances do not apply at all—to the states. The ISLT thus appears to require the state courts to adopt textualism without adequate justification.

To start, in the vast majority of the states, judges of the highest court stand for election—some partisan, some nonpartisan, and some retention.<sup>86</sup> In those states in which judges run for office statewide, they are selected by many more voters than the average member of a state legislature, or in many cases more than the voters who selected a majority of the state legislature.<sup>87</sup> The point is not that elected judges “represent” voters in precisely the same way legislative representatives do,<sup>88</sup> or are imagined to do.<sup>89</sup> It is that the judicial selection procedures in the states do not reflect the same choices and values as the decision to insulate federal judges from popular selection and direct political accountability, which is one of the justifications for textualism in the federal system.

States deviate in countless other ways from the federal system when it comes to the allocation of power and authority. To take just a few examples, some state courts routinely render advisory opinions;<sup>90</sup> some state courts exercise enforcement discretion; and state courts serve a range of administrative and even quasi-legislative functions that would be unimaginable in the federal system.<sup>91</sup> In contrast to the federal executive, all state executives are to some degree plural:<sup>92</sup> citizens in most states vote for multiple statewide officials, sometimes dozens beyond the governor and lieutenant governor.<sup>93</sup> In contrast to the federal system, many state legislators are subject to term limits.<sup>94</sup> And as Miriam Seifter and Jessica Bulman-Pozen have shown, state constitutions deviate

86. THE COUNCIL OF STATE GOV'TS, 52 THE BOOK OF THE STATES 206–10 (2020); see also JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 1–4 (2012).

87. See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2117–18 (2010).

88. *Id.* at 2048–49.

89. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1756 (2021).

90. Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845 (2001).

91. Michael C. Pollack, *Courts Beyond Judging*, 46 B.Y.U. L. REV. 719, 730 (2021).

92. William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006) (“The states . . . employ a divided executive that apportions executive power among different executive officers not subject to gubernatorial control.”); see also Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 282 (2014).

93. See Marshall, *supra* note 92.

94. See *The Term-Limited States*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx> [https://perma.cc/ZTS5-R5CE] (last visited Oct. 8, 2022); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

from the federal constitution in the degree to which they embrace, sometimes explicitly, notions of “popular sovereignty, majority rule, and political equality.”<sup>95</sup>

States also deviate from the federal system in ways more directly relevant to questions about methods of interpretation. First, the lawmaking process, which is central to the justifications for textualism in the federal system, looks fundamentally different in many states from the federal model. Unlike the president, most governors can use the “item veto” to disapprove portions of appropriations bills and sometimes other kinds of legislation.<sup>96</sup> This means that the product that emerges from state legislative processes is not the pristine result of a set of fixed rules of procedure or allegedly unknowable compromises and legislative bargains to which the chief executive has either agreed in toto or had a veto overridden. Instead, the text of the enacted law itself may reflect only a subset of the larger bill initially passed by the legislature. Similarly, bicameralism, a core feature of the federal lawmaking process, is not invariably a feature of state lawmaking, as Nebraska’s unicameral legislature makes clear.<sup>97</sup> In addition, principles of nondelegation have long operated differently in the states than in the federal system, with some states enforcing the nondelegation doctrine more vigorously than the federal courts, sometimes with different sorts of justifications offered than those invoked in the federal system.<sup>98</sup>

The point of all of this is not that every state’s structural features are profoundly different from the federal system; indeed, many state institutions and procedures closely mirror their federal counterparts. But there is no requirement that they do so, and there is likewise 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.

At a more fundamental level, many of the institutional-design choices reflected in the federal system were animated by a desire to restrain the legislature vis-a-vis other branches. In the words of Federalist 48, the legislature, “everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex,” was most in need of restraint; it was “against the enterprising ambition of this department that

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95. Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. (forthcoming 2022) (manuscript at 5); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861–62 (2021) [hereinafter Bulman-Pozen & Seifter, *Democracy Principle*].

96. Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1175–76 (1993).

97. Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 95, at 873 n.67.

98. Seifter, *supra* note 89, at 1747–49.

the people ought to indulge all their jealousy and exhaust all their precautions.”<sup>99</sup>

In response to these concerns, the Constitution both imposed substantive limits on congressional powers and adopted lawmaking procedures that were, in the words of the Supreme Court, “finely wrought and exhaustively considered.”<sup>100</sup> On the substantive side, the Constitution granted a set of powers to Congress rather than presuming that Congress would have the police power. On the procedural side, Congress’s ability to effectuate those powers was constrained by the requirement of bicameralism, ensuring double review of legislation and support from majorities (or today a Senate supermajority) of the members of two very differently composed chambers. In addition, the requirement of presidential approval (or large supermajorities in each chamber to override presidential disapproval) was designed to serve as yet another check or limitation on the process of lawmaking. These substantive and procedural limitations have both federalism and separation of powers dimensions: they restrain the federal legislature both from intruding upon the states and from undermining liberty. And beyond these limitations, the Constitution’s broader separation-of-powers principles have been interpreted as largely restraining the extent to which any branch of the federal government may intrude upon or exercise the powers of another.<sup>101</sup>

But these concerns and dynamics do not apply wholesale to the states. To begin, states *do* possess the general police power: “the state legislatures are not limited, even in theory, to any listing of enumerated powers.”<sup>102</sup> Second, as the United States Supreme Court has acknowledged, separation-of-powers dynamics are entirely distinct in the states.<sup>103</sup> In contrast to the federal Constitution’s implicit separation-of-powers principle, the majority of state constitutions contain explicit

99. THE FEDERALIST NO. 48, at 333–34 (James Madison) (Jacob E. Cooke ed., 1961).

100. *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

101. *See id.*; *Bowsher v. Synar*, 478 U.S. 714, 722, 726 (1986).

102. John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1226 (1993).

103. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (plurality opinion) (“[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.”); *Prentis v. Atl. Coast Line R.R.*, 211 U.S. 210, 255 (1908) (“We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.”). *But see* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 54 (1998) (“[I]t is something of an overstatement to say that the principle of separation of powers has *no* application to the states.”).

separation-of-powers clauses,<sup>104</sup> and those clauses have been interpreted in ways that deviate significantly from the federal system. And in many states, an important check on the legislature comes not through other formal institutions of government but from people directly, who act through various mechanisms of direct democracy, like ballot initiatives and referenda, mechanisms that are entirely absent in the federal system.<sup>105</sup>

Despite these distinctions, assumptions about lawmaking from the federal system permeate and are inextricable from the ISLT, which entirely disregards these significant differences between the state and federal systems. The ISLT's insistence on textualism as the one true method—despite the lack of articulated constitutional bases for the theory in states—offers one window into the theory's lawlessness.

The ISLT makes a constitutional issue out of state courts' apparent departures from the federal courts' rigid form of textualism without much if any justification. Consider, for example, Chief Justice Rehnquist's non-sequitur in *Bush v. Gore*, which maintained that, under the Election Clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."<sup>106</sup> But why would that be? The Article II provision he invoked says only that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct, electors for President and Vice President."<sup>107</sup>

What if the state legislature has directed state courts to *not* interpret a state's election laws in accordance with textualism? As the next section shows, some state legislatures have done just that. That reality illustrates how Article II does not and cannot mean that "the text of the election law itself . . . takes on independent significance."<sup>108</sup> A state legislature might direct that state courts adopt a more flexible, purposive style of statutory interpretation. Or a state legislature might willingly incorporate state constitutional law as a background principle or constraint on state legislation, including state election law. Either way, the state legislature has directed that the text of election law is not independently significant. The entire conceit of the ISLT is that a state *legislature* is the entity tasked with creating a state's election rules and governing structures. But in reality, this version of the ISLT gives to the *federal courts*, not the state

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104. Shaw, *supra* note 92, at 230–31.

105. Seifter & Bulman-Pozen, *supra*, at 95 ("To elevate the people above their legislative representatives, state constitutions . . . provide opportunities for direct popular lawmaking. . . . Today, direct democracy permeates state constitutions in the form of provisions for constitutional or statutory initiative, legislative or popular referendum, recall, and constitutional convention.").

106. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

107. *Id.* at 112 (quoting U.S. CONST. art. II, § 1, cl. 2).

108. *Id.* at 113.

legislature or any other state office, the power to construe a state's rules regarding federal elections.

But the ISLT is an affront to federalism over and above the fact that it imposes the federal courts' preferred interpretive method on the states while ignoring state institutional design choices. In mandating that interpretive method, the ISLT denies to state courts the interpretive latitude that the federal courts assert for themselves even as they maintain some ostentatious fealty to textualism. Despite supplying several different paeans to textualism, the current Court undeniably diverges from textualism in some cases, often to further particular constitutional or systemic values the Court identifies as sufficiently important to offset the relative importance of textualism.<sup>109</sup> The ISLT denies that same authority to the state courts without an adequate basis.

### *C. Affirmative Separation of Powers Concerns With the ISLT*

The separation of powers principles undergirding textualism do not map neatly onto the states, and they accordingly do not justify a requirement that states adhere to textualism as an interpretive methodology (including when it comes to the law regarding federal elections). The ISLT also carries with it constitutional problems that sound in the separation of powers, since under the ISLT, the federal courts would effectively require state courts to adhere to the federal courts' preferred methodology of interpreting statutes when the state courts interpret state laws governing elections.

As this section explains, statutory interpretation "methodologies," how courts interpret statutes, are properly understood as a type of judge-made common law. Judges craft rules about how statutes should be interpreted, including under the methodology of textualism. These rules might include the idea that courts should presume that a legislature's failure to explicitly mention one remedy means that the law does not provide for that remedy; the rules might also include the notion that courts should not presume that a legislature gave an agency the authority to decide a question of vast economic or political significance.<sup>110</sup> These rules do not derive from some codified legal text; they are, instead,

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109. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–10 (2022) (looking to legislative intent when more than a textual basis for agency action is necessary); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338–40 (2021) (announcing a legal test to determine violations of the Voting Rights Act that includes five factors nowhere in the text); Litman & Deacon, *supra* note 77 (describing the major questions doctrine); Leah M. Litman, "Hey Stephen," 120 MICH. L. REV. 1109, 1128 n.99 (2022) (book review) (describing *Brnovich*).

110. Gluck & Schultz, *supra* note 84, at 932, 990.

judge-made, common-law rules about the interpretation of legal texts.<sup>111</sup> It is one thing for federal courts to adopt and apply this sort of federal common law to federal cases involving federal statutes and federal law. But it is entirely another for federal courts to require state courts to adopt federal common law, rather than the states' own body of judge-made common-law rules about the interpretation of state legal texts. Doing so represents an unwarranted and unjustified assertion of law-making authority by the federal courts.

The separation of powers concerns with the ISLT arise from the relationship between the methodologies of statutory interpretation and federal common law. Federal common law refers to federal law that has not been codified in a written enactment.<sup>112</sup> The Supreme Court's canonical decision in *Erie Railroad v. Tompkins*<sup>113</sup> established that there is no general common law, and that federal courts should not freely make federal common law.<sup>114</sup> Subsequent cases have clarified that federal courts should not exercise the power to make federal common law unless a matter implicates an important federal interest, and there is the potential for a substantial conflict between the federal interest and the application of state law.<sup>115</sup>

Today, the reasons for skepticism about federal common law sound largely in the separation of powers. Making law is generally thought to be a legislative act better suited for Congress; federal courts accordingly try to abstain from exercising the power to make law absent compelling reasons to do so.<sup>116</sup> A stronger version of this claim is that the Constitution vests the legislative power, the power to make law, in Congress, and not the federal courts; and therefore, when federal courts engage in unauthorized, unwarranted exercises of federal common lawmaking, they offend the constitutional allocation of authority by

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111. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013).

112. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. METZLER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 635 (7th ed. 2015) (noting that modern scholars "have offered a range of definitions of federal common law," but using the term to mean "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to [written federal laws]").

113. 304 U.S. 64 (1938).

114. *Id.* at 78–79.

115. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 504–06 (1988); *Clearfield Trust Co v. United States*, 318 U.S. 363, 366–67 (1943). Under that framework, federal courts may exercise federal common lawmaking powers where the liability of federal officers is at stake, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), or the rights and duties of the United States are; these are instances where the application of fifty different legal standards and the resulting disuniformity would be particularly worrisome. *Clearfield Trust*, 318 U.S. at 366–67.

116. *See supra* note 115 and accompanying text; Gluck, *supra* note 111, at 809.

exercising a power that is lodged in another branch of government.<sup>117</sup> Justice Thomas summarized this view in a 2020 concurrence describing the Court’s 1971 *Bivens* opinion as “a relic of the heady days in which this Court assumed common-law powers,”<sup>118</sup> to essentially “exercise[] legislative power vested in Congress.”<sup>119</sup>

But when federal courts require state courts to adopt a particular methodology for interpreting state statutes, federal courts are also “exercising legislative power” by projecting federal common law, judge-made law, onto the states. Abbe Gluck has forcefully argued that there are aspects of “statutory interpretation methodology,” including the methodology that calls itself textualism, that are best understood as “some kind of judge-made law.”<sup>120</sup> As Gluck has recounted, many of the canons of statutory interpretation, including those used by the modern day textualists, “bring external, judge-created legal norms into the decision-making process for statutory cases.”<sup>121</sup> Gluck has accordingly encouraged “a common law conceptualization of interpretive methodology,”<sup>122</sup> pointing specifically to the canons and the interpretive framework described in Scalia and Garner’s *Reading Law* as examples of federal common law regarding the interpretation of statutes.<sup>123</sup>

Gluck’s argument that statutory interpretation methodologies are a species of federal common law supplies an additional layer to the separation of powers analysis of the ISLT. The ISLT effectively requires states to adopt a particular methodology—the one selected by the federal courts—when interpreting state law. That produces an arrangement that runs counter to *Erie*.<sup>124</sup> Under Gluck’s conceptualization, many aspects

117. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323–24 (2001).

118. *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

119. *Id.* at 752.

120. Gluck, *supra* note 111, at 757–58; Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1907–09 (2011) [hereinafter Gluck, *Intersystemic Interpretation*]; see also Aaron-Andrew P. Bruhl, *Interpreting State Statutes in Federal Court*, NOTRE DAME L. REV. (forthcoming) (manuscript at 4–5), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3978040#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978040#).

121. Gluck, *supra* note 111, at 762; see also Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 826–27, 829–30 (2017).

122. Gluck, *supra* note 111, 757–58, 809 (“*Erie*’s animating concerns about forum shopping, outcome determinacy, and vertical uniformity . . . arise when federal courts decide what interpretive methodology applies to state statutes.”); Gluck, *Intersystemic Interpretation*, *supra* note 120. Other scholars have disputed this. Connor Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1810–11 (2010).

123. See generally SCALIA & GARNER, *supra* note 42.

124. See Gluck, *supra* note 111, at 755.

of statutory interpretation methodologies, including textualism, reflect judge-made common law. Accordingly, under *Erie*, when federal courts interpret state laws, they should adopt state methods of statutory interpretation.<sup>125</sup> Doing otherwise, Gluck argues, would fail to apply the (common) law of the states when federal courts decide a question of state law.<sup>126</sup> Yet the ISLT, rather than requiring federal courts to apply state interpretive methodologies when interpreting state law, would require states to use federal methods of statutory interpretation when interpreting state law.<sup>127</sup>

Indeed, under the ISLT, the federal courts may be displacing more than just state common law. They may be displacing state legislative enactments as well. Some state legislatures have enacted statutes that provide for state courts to use particular methods of statutory interpretation when interpreting state laws.<sup>128</sup> Some state courts have likewise created guidelines for how state statutes should be interpreted.<sup>129</sup> The ISLT displaces both state legislative enactments and state judicial decisions about how state statutes should be interpreted—arrogating massive and unjustified authority to the federal courts without sufficient constitutional authorization. And these variations on state interpretive authority underscore how the ISLT, despite its claims, does not elevate state legislatures. It elevates the federal courts and their preferred approach to statutory interpretation and election law.

### III. FEDERALISM AND THE ISLT

In addition to the concerns that sound in the separation of powers, the ISLT also presents potent federalism problems. The ISLT upends the deeply rooted principle that states should be the final arbiters of the meaning of state law.<sup>130</sup> The thinness of the arguments for the ISLT—from text, history, and elsewhere—are even more apparent when viewed against that principle.<sup>131</sup> Given the well-established, foundational rule that states are the final arbiters of the meaning of state law, one would expect

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125. Gluck, *Intersystemic Interpretation*, *supra* note 120, at 1926.

126. Gluck, *supra* note 111, at 791.

127. *See, e.g.*, Robert A. Schapiro, *Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie*, 34 LOY. U. CHI. L.J. 89, 92–93 (2002); Amar & Amar, *supra* note 6, at 55 (“[T]here is in this domain no general federal interest in implementing any particular intra-state separation-of-powers regime or any specific textual interpretive methodology.”).

128. *See infra* sources cited note 169.

129. *See* Gluck, *supra* note 111, at 779–80.

130. *See* Amar & Amar, *supra* note 6, at 18 (“[I]t does not mean business as usual, in which federal courts almost invariably accept state law as pronounced by state adjudicatory entities.”).

131. *See* sources cited *supra* note 6.



the constitutional text to be clear if it granted federal courts the authority to serve as the final arbiters of the meaning of state law in some circumstances. Yet, nothing about the text of the Elections Clause or Presidential Electors Clause purports to elevate the federal courts above state courts or other state interpreters.

There are other serious federalism problems with the ISLT, including how it effectively requires states to allocate decision-making authority among state institutions in a particular way, which flies in the face of the idea that states have considerable latitude in structuring their governmental systems. Moreover, rather than enhancing popular sovereignty or democracy, the ISLT undermines both—by (selectively) elevating the comparatively less democratic state institution at the expense of other organs of the state and by requiring the state courts to adopt an interpretive method that is opaque and conceals important decision points. In the hands of the current Court and currently gerrymandered state legislatures, the ISLT operates as like a one-way ratchet that would allow the federal courts to seize authority to review state decisions that expand citizens' ability to elect the candidates of their choice. No sensible conception of federalism supports that lopsided scheme.

#### *A. Federalism and Interpretive Authority Over State Law*

Requiring state courts to adopt a particular methodology when interpreting state laws is in considerable tension with the division of interpretive authority between state and federal courts with respect to state law. One foundational and enduring principle of federalism is that state courts are supreme when it comes to the meaning of state law. This principle was reflected in the Judiciary Act of 1789, the first congressional statute regarding the federal courts.<sup>132</sup> In the provision granting the Supreme Court jurisdiction over certain state court judgments, Congress specified that the Supreme Court could review a claim under the “Constitution, treaty, statute, or commission,” but that “no other error shall be assigned or regarded as a ground for reversal,”

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132. The 1789 Act has been called “probably the most important and satisfactory act ever passed by Congress.” Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52 (1923) (quoting Henry B. Brown, *The New Federal Judicial Code*, in REPORT OF THE THIRTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 339, 345 (1911)); see also Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1742 (2015) (noting that “a good deal of federal courts scholarship and jurisprudence focuses on the . . . first Judiciary Act of 1789 in particular[] as enormously important, if not determinative of many questions at the heart of the federal courts canon”).

a restrictive clause that limited the Supreme Court's ability to review questions of state law.<sup>133</sup>

Subsequent cases make clear that this principle reflects constitutional values. In *Murdock v. City of Memphis*,<sup>134</sup> the Supreme Court addressed the effect of the 1867 Reconstruction Congress's amendments to the 1789 Judiciary Act,<sup>135</sup> which deleted the restrictive clause.<sup>136</sup> The Court concluded that the amended statute still did not generally authorize the Supreme Court to review state law questions decided by state courts.<sup>137</sup> The Court intimated that "there were those [in Congress] who believ[ed] that the Constitution gave no right to the Federal judiciary to go beyond the line marked by the omitted clause"<sup>138</sup>—that is, that the Constitution did not allow the Supreme Court to freely review questions of state law in state court cases. The Court underscored that it would not attribute to Congress the choice to authorize a federal court to review a state court's interpretation of state law because "[t]he 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."<sup>139</sup> That principle is still reflected in modern adequate and independent-state-ground doctrine, which holds that the United States Supreme Court will not review state court judgments that rest on independent state-law grounds that are adequate to support the state court judgment.<sup>140</sup> The adequate and independent state ground doctrine recognizes that the state courts are comparative experts in state law and state law may rightfully diverge from federal law.<sup>141</sup>

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133. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (codified as amended at 28 U.S.C. § 1257). Note that the Supreme Court may conduct a limited review of so-called antecedent questions of state law that tee up, and are a threshold to reaching, a federal question. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 112, at 488 ("[W]here a state law ruling serves as an antecedent for determining whether a federal right has been violated, some review of the basis for the state court's determination of the state-law question is essential if the federal right is to be protected against evasion and discrimination.").

134. 87 U.S. (20 Wall.) 590 (1875).

135. *Id.* at 591.

136. Act of Feb. 5, 1867, ch. 28, § 2, 39 Stat. 385, 386–87 (codified as amended at 28 U.S.C. § 1257).

137. *Murdock*, 87 U.S. (20 Wall) at 630–32.

138. *Id.* at 618–19.

139. *Id.* at 626.

140. *Michigan v. Long*, 463 U.S. 1032, 1040–42 (1983).

141. *Id.* at 1039–40 (explaining that "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar" and so "[r]espect for the independence of state courts . . . ha[s] been the cornerstone[] of this Court's refusal to decide cases where there is an adequate and independent state ground").

A wide range of doctrines and statutes reinforce the point that it is for state courts, not federal courts, to decide how to interpret state law.<sup>142</sup> Abstention doctrines allow the federal courts to decline to hear cases that raise unsettled questions of state law. In *Railroad Commission of Texas v. Pullman Co.*,<sup>143</sup> the Supreme Court held that federal courts should decline to adjudicate cases where the resolution of an ambiguous question of state law could obviate the need to decide a federal constitutional question.<sup>144</sup> Such cases, the Court reasoned, were more properly heard first by state courts: “[r]eading the [state] statutes and the [state] decisions as outsiders without special competence in [state] law” was not preferred because “the last word on the statutory authority . . . belongs neither to us nor to the district court but to the [state] supreme court.”<sup>145</sup> The scope of permissible suits against state officers for injunctive relief also reflects the principle that questions about the meaning of state law belong in the state court system. While private citizens can obtain prospective injunctive relief against state officers for violating federal law,<sup>146</sup> they cannot obtain similar injunctive relief against state officers for violating state law.<sup>147</sup> One reason for that dichotomy is, according to the Court, because it 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.”<sup>148</sup> While state courts are viewed as presumptively competent to adjudicate questions of federal law, it is telling that there is no such presumption when it comes to federal-court competence to resolve state-law questions.<sup>149</sup>

Yet the ISLT would interpose the federal courts between state courts and state law, arrogating to the federal courts the authority to interpret state law, and to do so according to the federal courts’ preferred methodology. That much is readily apparent from even the most general statements of the ISLT in judicial opinions. Chief Justice Rehnquist’s

142. See, e.g., *Green v. Lessee of Neal*, 31 U.S. (6 Pet.) 293, 298 (1832) (holding that federal courts must respect state courts’ interpretations of state statutes).

143. 312 U.S. 496 (1941).

144. *Id.* at 499–501.

145. *Id.* at 499–500.

146. *Ex Parte Young*, 209 U.S. 123, 148 (1908).

147. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105–06 (1984).

148. *Id.* at 106.

149. See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and A New Synthesis*, 124 U. PA. L. REV. 45, 56 (1975) (“The Madisonian Compromise was based, therefore, on the assumption that lower federal courts need not exist because state courts could always stand in their stead to provide adequate remedies and dispense justice as needed”). Proponents of ISLT seem eager to abandon these long-standing principles. See, e.g., *Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting) (arguing that the North Carolina state courts incorrectly interpreted provisions in the North Carolina constitution because the court’s “explanations have the hallmarks of legislation”).

concurrence in *Bush v. Gore* loudly proclaimed that, under ISLT, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”<sup>150</sup> And invoking that concurrence, Justice Kavanaugh likewise insisted that the ISLT “requires federal courts to ensure that state courts do not rewrite state election laws.”<sup>151</sup>

### *B. Federalism and State Governance Structures*

The idea that states enjoy interpretive primacy over questions of state law reflects another, related principle of federalism that the ISLT also upends—that the states enjoy considerable autonomy in how they choose to structure their government systems, including their courts. As Part I explained, how a state chooses to structure its court system has implications for how state law is and should be interpreted. Here too, many doctrines reflect the understanding that states enjoy substantial latitude in allocating decision-making authority within and among state institutions. Consider the Supreme Court decisions grappling with whether a state court’s interpretation of a state criminal statute applies retroactively to cases that have become final.<sup>152</sup> Federal court interpretations of federal criminal statutes necessarily apply retroactively because, in the federal system, Congress, not the courts, makes criminal law.<sup>153</sup> But in a series of cases, the Court has made clear that, because state judicial systems may be structured differently than the federal judicial system, the same principles of statutory interpretation and retroactivity do not straightforwardly apply to the state court system.<sup>154</sup> The Court’s decisions pointed to the various structural features of state courts that differentiated them from their federal counterparts—including how “state courts act[] in their common law capacity much like

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150. 531 U.S. 98, 113 (2000) (Rehnquist, J., concurring).

151. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 34–35 n.1 (2020) (Kavanaugh, J., concurring).

152. *E.g.*, *Fiore v. White*, 531 U.S. 225, 227–28 (2001) (per curiam).

153. *Bousley v. United States*, 523 U.S. 614, 620–21 (1998).

154. *See, e.g.*, *Metrish v. Lancaster*, 569 U.S. 351 (2013); *Rogers v. Tennessee*, 532 U.S. 451 (2001); *see also* Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 492 & n.353 (2018). *Fiore v. White* did not end up deciding the retroactivity question, because there, the U.S. Supreme Court certified the question to the Pennsylvania Supreme Court, which determined that the state court’s interpretation of state law did not announce a new rule, but rather had determined what the criminal law meant at the time *Fiore*’s conviction became final (such that everyone conceded that the Due Process Clause required the state to establish those elements beyond a reasonable doubt). *Fiore*, 531 U.S. 228–29 (resolving the case based on certified answer). The Court arrived at a similar conclusion in *Bunkley v. Florida*, 538 U.S. 835, 840–42 (2003) (per curiam).

legislatures in the exercise of their lawmaking function.”<sup>155</sup> “Such judicial acts,” the Court explained, “whether they be characterized as ‘making’ or ‘finding’ the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements.”<sup>156</sup>

Even doctrines that impose some limits on states’ ability to structure their court systems recognize that states retain considerable latitude in those structural decisions. Under the valid excuse line of cases, state courts may not decline to hear federal claims unless the courts have a valid excuse for doing so.<sup>157</sup> But the cases recognize that “[s]tates retain substantial leeway to establish the contours of their judicial systems,”<sup>158</sup> which allows them to structure their courts in ways that may lead the courts to decline to hear federal claims.<sup>159</sup> Recent scholarship has underscored the wide variation that exists among state and local court systems, which further strains analogies to federal judicial counterparts.<sup>160</sup> Alexandra Natapoff’s study of municipal courts, for example, highlighted how much criminal municipal courts have in common with state executive or legislative departments—commonalities that outweigh their similarities to federal courts—and demonstrated how municipal courts depart from the structural principles governing federal courts.<sup>161</sup>

The principle that states may structure state judicial systems in ways that depart from the organization of the federal judicial system reflects

155. *Rogers*, 532 U.S. at 460 (summarizing defendant’s argument before adopting it as a premise in subsequent reasoning).

156. *Id.* at 461. Because state courts perform different functions than their federal counterparts, the Court declined to impose strict ex post facto principles on state courts interpreting state criminal law, opting for more flexible due process standards requiring only fair notice. *See id.* at 459–62. *See generally* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965 (2019) (debunking the idea that there are no common law crimes in the United States).

157. *See, e.g., Testa v. Katt*, 330 U.S. 386, 392–94 (1947); *Haywood v. Drown*, 556 U.S. 729, 738–41 (2009). A “valid excuse” does not include a state rule that discriminates against federal law or substantively disagrees with the policy underlying federal law. *Id.* at 740–41.

158. *Haywood*, 556 U.S. at 736.

159. They may decline to hear claims by out-of-state residents, even when they involve federal law. *Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 386–88 (1929). And local courts with similarly limited jurisdiction may bounce federal law claims as well. *Herb v. Pitcairn*, 324 U.S. 117, 120–21 (1945).

160. *See, e.g.,* Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1034 (2020).

161. Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 994–1010 (2021); *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 685 (2014); Pollack, *supra* note 91, at 724 (“State court judges engage in decisionmaking in a whole host of non-adversarial settings outside of the traditional context of dispute resolution.”).

several basic features of federalism: First, there are benefits that flow from having a diversity of arrangements in how states structure their governance systems—including state judicial systems—and how state governments allocate interpretive authority over state law.<sup>162</sup> While the literature on federalism is often couched in terms of the benefits of having different substantive policies, there are also benefits from having different processes for producing policies and for interpreting state law.<sup>163</sup> Second is expertise. State laws are better understood by the people familiar with them—people who may also be more familiar with how decision-making authority and interpretive authority are distributed within the state. Third is sovereignty. While sovereignty may be an over-inclusive and often imperfect term to describe the states,<sup>164</sup> here it means only that the states have the authority to create laws and to create systems for interpreting and implementing those laws. All of the doctrines and statutes surveyed in this section reflect the importance of these principles—and demonstrate that states have, and should have, interpretive primacy over state laws, including the authority to decide how they should be interpreted.<sup>165</sup>

This backdrop helps to underscore why the ISLT does not, as some defenders insist, ensure the primacy of the legislature. Rather, it imposes the federal courts, and their preferred method of statutory interpretation, on the states, rather than elevating the state legislature vis-a-vis other state entities or offices.<sup>166</sup> For example, some state legislatures have enacted statutes that require state courts to adhere to particular methods of interpretation when interpreting state statutes that do not correspond to the federal courts' preferred method of statutory interpretation.<sup>167</sup> The

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162. Cf. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102–03 (2005) (“Second-order diversity involves variation among decisionmaking bodies, not within them. It favors interorganizational heterogeneity not intraorganizational heterogeneity.”).

163. See *id.*; see also SUTTON, *supra* note 85, at 1–8.

164. See generally DON HERZOG, SOVEREIGNTY, R.I.P. ix–x (2020) (rejecting a classic theory of sovereignty).

165. One might say that these doctrines suggest states should get the final say over the interpretation of any particular state law but are agnostic about whether states get to choose how to interpret any state law—*i.e.*, about the process states use for interpreting state law. But, deciding what a state law means entails making a choice about how the law should be interpreted: according to which method, which sources to consult, and other considerations. So, it would be odd to cleave off choices about what interpretive methodology states use to interpret state laws from an ultimate decision about the meaning of any particular state law.

166. Cf. Amar & Amar, *supra* note 6, at 18 (“The theory gives near carte blanche to *federal* judges, when the key point of Article II’s election language . . . was to empower *states*.”).

167. See, e.g., 1 PA. CONS. STAT. § 1921(a) (2022) (requiring more purposive interpretation in some circumstances); OR. REV. STAT. § 174.020(3) (2009) (limiting consideration of legislative history); TEX. GOV’T CODE ANN. § 311.023 (West 2005); *id.*

ISLT would prevent the legislature from making that choice by manufacturing a constitutional issue any time the state courts did not apply a particular strain of textualism when interpreting state election laws; the textualist-enthusiast federal courts could claim that the state courts “rewrote” state election law because the state courts had deigned to apply the statutory interpretation methodology established by the state legislature.

That is far from the only scenario in which the ISLT, rather than elevating the state legislature, instead establishes the federal courts as superintendents of the state election apparatus (at least for federal elections). For example, a state legislature could have incorporated state constitutional provisions into state legislative enactments.<sup>168</sup> Or it could have made any number of other decisions to share authority over election rules, such as by authorizing independent redistricting commissions or state courts to draw districts.<sup>169</sup> Far from reinforcing popular sovereignty and democracy, as proponents of the ISLT have suggested, the ISLT jettisons those values on the basis of the federal courts’ preferred method of statutory interpretation.

Even if the ISLT did empower the state legislature vis-a-vis other arms of the state, that would carry its own federalism concerns.<sup>170</sup> Federal courts do not have the general authority to restructure state governments and allocate decision-making authority within the states as they see fit.<sup>171</sup> Indeed, the Supreme Court has suggested there are unique constitutional federalism concerns with Congress or the courts tinkering with a state’s governance structures, including how the state chooses to allocate governing authority within state government.<sup>172</sup> Scholars have made a similar claim, arguing that congressional and judicial efforts to

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§§ 312.005, 312.006(a); see also H.B. 5033, 2003 Gen. Assemb., Reg. Sess. (Conn. 2003); Gluck, *supra* note 44, at 1786 (“Every state legislature in the nation has enacted a number of canons of construction.”).

168. Shapiro, *supra* note 6 (manuscript at 6); Amar & Amar, *supra* note 6, at 32.

169. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 826 (2015) (Roberts, C.J., dissenting).

170. See, e.g., Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 41 (1988) (“The guarantee clause, moreover, restricts the federal government’s power to interfere with the organizational structure and governmental processes chosen by a state’s residents.”).

171. Shapiro, *supra* note 6 (manuscript at 8–9).

172. E.g., *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (“How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”); *Missouri v. Lewis*, 101 U.S. 22, 30 (1879) (“Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government.”).

elevate some state decisionmakers over others pose particular federalism concerns.<sup>173</sup>

Yet that is precisely what the independent state legislature theory would do—mandate that states structure their governmental systems in particular ways. The theory could forbid states from adopting a governmental system (like the federal one) under which state laws are subordinate to state constitutional provisions.<sup>174</sup> One possible variant of this strand of the ISLT, floated recently by Justice Alito in a dissent from denial of certiorari, would be that state courts could not subordinate state laws to general or vague state constitutional provisions.<sup>175</sup>

This particular iteration of the ISLT would place the federal courts in the absurd position of determining when particular state constitutional provisions are open and vague, such that state courts exceed their authority when they rely on them to construe state statutes.<sup>176</sup> This inquiry could not be administered in a principled or coherent way, in part because it would require the Justices to assess each individual state constitutional provision—a matter they are concededly not experts in. State constitutional provisions may also be permissibly interpreted by state courts even when the provisions are framed more generally. Yet this iteration of the theory imagines that the federal courts could create some sort of federal constitutional line distinguishing narrow and specific state constitutional provisions from more open-ended ones. The federal constitution makes no such distinction, and federal courts should not invent one. This variant of the ISLT would be yet another mechanism for the federal courts to restrict state institutional design choices in the name of the federal courts' preferred interpretive approach;<sup>177</sup> here, the ISLT

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173. Merritt, *supra* note 170, at 10–11; Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1603–04 (2015).

174. See, e.g., *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 738 (2021) (Alito, J., dissenting from denial of certiorari) (raising constitutional concerns about a state supreme court decision invalidating an election law provision on state constitutional grounds); see also Amar & Amar, *supra* note 6, at 20 (“So too, as a backdrop principle, state peoples and state constitutions are masters of state legislatures.”).

175. *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from denial of application for stay) (criticizing North Carolina Supreme Court for relying on constitutional provisions that do not “say[] anything about partisan gerrymandering, and all but one make no reference to elections at all”). As a side note, the sheer number of proposed variants of the ISLT seems to confirm that the ISLT is an idea in search of a legal basis, rather than a principle of law.

176. See Petition for Writ of Certiorari at 4, *Moore v. Harper*, 142 S. Ct. 2901 (2022) (No. 21-1271) (arguing that state courts may not rely on “on vague and abstract state constitutional language requiring ‘free’ or ‘fair’ elections to essentially create their own election code”).

177. So too would a newly minted variant of the independent state legislature theory its proponents have termed the ‘constitutional’ state legislature doctrine. See William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good*



would prevent states from adopting and state courts from enforcing generally worded constitutional provisions in the context of federal elections.

Or consider the question of state institutional-design choices around election administration more specifically. As a matter of practice, state legislatures devolve nearly all of their administrative authority for election administration—on everything from where to site voting locations, to what kind of opportunity to give voters to cure ballot defects, to how far from vote-counting official election observers must remain—to local authorities or to state administrative agencies.<sup>178</sup>

Under the independent state legislature theory, the legislature must be the body to make election law—not the people through state constitutional provisions, not state courts interpreting those provisions, not agencies or local administrators exercising authority delegated by the legislature or conferred by the state constitution. The theory could forbid states from structuring a governmental system in a way that gave state courts interpretive latitude over state law, and contemplated that legislative enactments would be authoritatively construed by state courts.<sup>179</sup> Furthermore, the theory could forbid states from structuring their governmental system in a way that allowed state or local officials to exercise delegated authority to conduct elections.<sup>180</sup> It could also

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*Option in Its Most Divisive Case*, ATL. (Oct. 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/> [https://perma.cc/B3CP-FLW7]. Under that theory, state legislatures might (or might not, based on subsequent posts) be able to delegate certain functions such as drawing district lines to other state offices, including the state courts. See Will Baude, *The Constitutional State Legislature Doctrine*, REASON: VOLOKH CONSPIRACY (Oct. 13, 2022, 10:32 AM), <https://reason.com/volokh/2022/10/13/the-constitutional-state-legislature-doctrine/> [https://perma.cc/6CEZ-E9UU]. Here too, this variant would constrain state institutional design choices with no basis in law, compromising core principles of federalism. See N.C. Gen. Stat. § 120-24(a1) (authorizing state courts to “impose an interim districting plan”); *id.* § 1-267.1 (authorizing state courts to review legislative redistricting efforts). Without the power to draw maps, some state courts have effectively lost the power to review districting maps in the face of intransigence from independent redistricting commissions, legislatures, and federal courts. See Michael Douglas, *Redistricting: Ohio Chief Justice O’Connor Finds Flaws in Reasoning of Federal Judges*, AKRON BEACON J. (June 5, 2022, 6:00 AM), <https://www.beaconjournal.com/story/opinion/columns/2022/06/05/ohio-redistricting-panel-gets-pass-federal-court/7482727001/> [https://perma.cc/2KKL-JJUJ].

178. Shapiro, *supra* note 6 (manuscript at 18).

179. See *id.* (manuscript at 38) (critiquing ISLT cases on the ground that they “failed to address what the state legislatures actually did when they passed election laws,” including whether the legislatures incorporated state constitutional provisions and principles into laws).

180. See, e.g., *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (raising constitutional concerns with Wisconsin Elections Commission’s decisions to send absentee ballot applications because “[t]he Constitution provides that state legislatures .

require state actors performing their roles under a state's election-administration scheme to interpret state statutes using the current U.S. Supreme Court's preferred textualist method and tools.

The independent state legislature theory would effectively commandeer the states to structure and even operate their governments in particular ways—with a legislature that is divorced from other decision-making bodies and supreme to those other bodies. It is worth considering how the Court might react to a federal statute that sought to do the same thing. What would the Court do if Congress were to enact a law directing states to make all policy decisions through the legislature, rather than through state constitutions, state courts, or state executive branches, notwithstanding state constitutional provisions to the contrary?<sup>181</sup> It is difficult to imagine that the Court would uphold the statute. And for good reason: such a statute would fly in the face of the notion that states enjoy broad autonomy and flexibility to structure their governmental systems.<sup>182</sup>

There are also serious reasons to doubt that the Framers would have empowered the state legislatures vis-a-vis all other state offices, as the ISLT purports to do. Recall Madison's famous fears about factions, where "a number of citizens, whether amounting to a majority or a minority of the whole, . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."<sup>183</sup> Factions may be more of a problem in state legislatures than in the federal legislature, and also more of a problem in state legislatures than in state

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. . . not other state officials . . . bear primary responsibility for setting election rules"); *Moore v. Circosta*, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting) (questioning whether the legislature "could delegate its Election Clause authority to" the Board). *But see* Krass, *supra* note 6.

181. *See generally*, Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999) (cataloguing constitutional and policy arguments for and against federal law being able to delegate federal powers to specific state or local institutions in contravention of the state legislature).

182. By way of an example: the Supreme Court has held that Congress violated the principle that states can structure their own governments, including the power *to select the location of a state's capitol*, when it predicated admission to the union on conditions relating wholly to matters under state control. *Coyle v. Smith*, 221 U.S. 559, 565 (1911) ("The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers."); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1216–29 (2016) (explaining why *Coyle* should be read as a Tenth Amendment case). If the Tenth Amendment does not permit the federal government to tell the states where to locate their state capitol, it probably does not permit the federal government to tell the states how to structure their governmental bodies and allocate decision-making authority among them.

183. THE FEDERALIST NO. 10, at 48 (James Madison) (Ian Shapiro ed., 2009).

executive offices or judicial ones. Federalist No. 10 warned of the “violence of faction,” a “dangerous vice” that produces “instability, injustice, and confusion introduced into the public councils.”<sup>184</sup> The Guarantee Clause also obligates the United States to guarantee every state a republican form of government.<sup>185</sup> Both suggest some hesitation or fear on the part of the constitutional drafters of empowering state legislatures so dramatically.

The ISLT represents a federalism about-face in more ways than one. Consider the ISLT alongside the Court’s partisan gerrymandering decision, *Rucho v. Common Cause*,<sup>186</sup> which held that partisan gerrymandering presented a nonjusticiable political question for the federal courts.<sup>187</sup> Discussing the history of “electoral district problems,” *Rucho* declared, “[a]t no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.”<sup>188</sup> Proponents of the ISLT position the federal courts as the arbiters of how states may conduct federal elections, even though, according to the *Rucho* Court, the Framers had apparently never “heard of courts doing such a thing.”<sup>189</sup> Indeed, *Rucho* specifically maintained that while *federal courts* could not address partisan gerrymandering, *state courts* could do so, and by relying on state constitutions no less: “[p]rovisions in state statutes and *state constitutions* can provide standards and guidance for *state courts* to apply.”<sup>190</sup> In other words, *Rucho* assured the country that while it was a problem for federal courts to address partisan gerrymandering, state courts could continue to do so. The ISLT is fatally inconsistent with that discussion in *Rucho*. For the Court to embrace the ISLT would represent a blatant federalism bait and switch. With one hand, the Court would be saying that it is a problem for federal courts to review state legislative actions that impede citizens’ ability to elect the candidates of their choice, but, with the other, that it is somehow a constitutional *requirement* for federal courts to review state executive or state judicial actions that enhance citizens’ ability to elect the candidates of their choice. That is not a coherent—much less a defensible—vision of judicial federalism.

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184. *Id.* at 47.

185. U.S. CONST. art. IV, § 4.

186. 139 S. Ct. 2482 (2019).

187. *Id.* at 2508.

188. *Id.* at 2496.

189. *Id.*

190. *Id.* at 2507 (emphases added).

*C. Federalism and Democracy*

Finally, there may be particular concerns with imposing uniformity on the states and requiring this particular method of interpretation with respect to election law. Several scholars of interpretation have forcefully argued that the Supreme Court's wooden brand of textualism obscures various choices that courts make in the course of interpreting legal texts. Bill Eskridge and Victoria Nourse have labeled one such device "textual gerrymandering," which occurs when courts choose what text they are interpreting (i.e., a discrete word or a larger phrase), as well as the context in which to read the text (in light of the whole act, whole code, and/or larger corpus of statutory law).<sup>191</sup> Cary Franklin highlighted a similar practice in the Supreme Court's decision in *Bostock v. Clayton County*,<sup>192</sup> which interpreted Title VII to prohibit discrimination on the basis of sexual orientation and gender identity.<sup>193</sup> Franklin, too, exposes the "shadow decision points" at which courts make "generally unacknowledged, often outcome-determinative choices about how to interpret statutory text,"<sup>194</sup> allowing the Court to "mask" its exercise of discretion, "render[ing] the exercise of that discretion [less] visible and thus [less] professionally and democratically accountable."<sup>195</sup>

Obscuring or masking the choices that courts make in interpreting legal texts is problematic enough in the federal system. But it has additional negative consequences in state court systems where many judges are supposed to be democratically accountable for their decisions.<sup>196</sup> State court judges are subject to reappointment processes and retention elections; their work is supposed to be evaluable and evaluated by politicians and voters.<sup>197</sup> Deploying a method of interpretation that obscures how they are actually reaching decisions significantly undercuts those structural systems of accountability.

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191. Eskridge & Nourse, *supra* note 69, at 1736; see also Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1412 (2017); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism*, 106 CALIF. L. REV. 1, 10–13 (2018) (identifying the related phenomenon of "enriching" text).

192. See Franklin, *supra* note 50, at 126.

193. 140 S. Ct. 1731, 1754 (2020).

194. Franklin, *supra* note 50, at 126.

195. *Id.* at 128.

196. See, e.g., Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1063, 1067–68 (2010) (noting historical development of judicial elections as a mechanism to strengthen judicial review, based on ideas about democracy).

197. Pozen, *supra* note 87, at 2070–71.

## CONCLUSION

The dangerousness and lawlessness of the independent state legislature theory is difficult to overstate. This piece has focused on just one aspect of this problem—how the ISLT, without adequate justification or sufficient basis, projects onto the states a method of interpretation that does not account for state institutional design choices, disregards state governance structures, and flouts basic precepts of federalism and the separation of powers.

But what, then, do the relevant provisions of Article I and Article II do? If the constitutional provisions mentioning state legislatures do not require state legislatures to control federal elections to the exclusion of other state entities or actors, what do the provisions do instead? Without purporting to offer a definitive account of the two provisions, we briefly survey three possibilities, all of which underscore that the constitutional text does not mandate the ISLT, and that the ISLT is not the only way to give effect to the language of the Elections and Presidential Electors Clauses.

One possibility would be to understand these clauses using an origination theory, under which state law regarding federal elections must *originate* in the state legislature, but may also involve other state actors, including state administrators who implement it, or state courts who interpret or even invalidate it.<sup>198</sup> Under this theory, the Elections and Presidential Electors Clauses would be satisfied so long as there is *some* legal text enacted by the state legislature at the beginning of the interpretive process. But so long as an administrator or governor was exercising some authority they believed was provided for by statute, or so long as a state executive official or judicial officer was purporting to interpret a statute or measure a statute against a constitutional provision, the Elections and Presidential Electors Clauses would have nothing more to say about the matter.

A second possibility would be to graft the extremely rare, limited, and deferential review of state law questions that is reflected in the adequate and independent state ground doctrine onto the Elections and Presidential Electors Clauses. Under adequate and independent state ground doctrine, the Supreme Court (and federal habeas courts) do not review questions of state law *de novo*. Rather, they look for extreme instances of malfeasance or something gone obviously awry in the state courts to the detriment of a federal right—a truly novel state

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198. *Cf. Sissel v. U.S. Dep't of Health & Hum. Servs.*, 799 F.3d 1035, 1049, 1060–64 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) (concluding the Affordable Care Act “originate[d] in the House, as required by” the Origination Clause because, “[a]lthough the original House bill was amended and its language replaced in the Senate, such Senate amendments are permissible”).

interpretation without any fair or substantial support in the written text of a law or rule, or in state court decisions; or evidence of intentional manipulation of a state court rule to disadvantage a particular litigant or to disfavor certain federal protected rights.<sup>199</sup> In *Bush v. Gore*, Justice Ginsburg described the prototypical examples of the kinds of state law interpretations that would merit federal court review:

Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee v. Hunter's Lessee*, *NAACP v. Alabama ex rel. Patterson*, and *Bouie v. City of Columbia*, cited by The Chief Justice, are three such rare instances. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee*, which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. The Virginia court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin v. Hunter's Lessee*. *Patterson*, a case decided three months after *Cooper v. Aaron*, in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support." *Bouie*, stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws—criminalizing conduct not covered by the text of an otherwise clear statute—was "unforeseeable" and thus violated due process when applied retroactively to the petitioners.

The Chief Justice's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold. As Justice Breyer convincingly explains, this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court. The

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199. See generally FALLON, MANNING, METZLER & SHAPIRO, *supra* note 112, at 509–24, 529–46.

Florida Supreme Court concluded that counting every legal vote was the overriding concern of the Florida Legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South.<sup>200</sup>

Under an AISG-like interpretation of the Elections and Presidential Electors Clauses, the federal courts could not superintend state courts' interpretation of state election laws outside of truly extreme circumstances, such as where a state court looked at a magic 8-ball or rolled a dice to decide what a statute meant. Put differently, federal courts could review state court decisions for something like "indefensibility."<sup>201</sup>

A third possibility is that the Elections and Presidential Electors Clauses present nonjusticiable political questions, at least with respect to state legislatures' authority over the rules regarding federal elections. This approach would recognize that, in part because interpretive questions are difficult and often produce reasonable disagreement, there is not a judicially manageable standard to determine when a state legislature has sufficiently directed the manner of appointing electors and the conduct of federal elections and when the legislature has not.

Our point here is not to defend or settle on one of these interpretations. It is merely to point out that the ISLT is not the only way of making sense of the relevant constitutional text, or even a particularly sensible way of making sense of the constitutional text given the extent to which it inverts core principles of judicial federalism and separation of powers without clear textual authorization. Indeed, in what seems like something of an irony, the ISLT, while purporting to project textualism onto the state courts, is itself an example of failed textualism. Among other things, proponents of the ISLT often ignore the mandatory versus permissive nature of the Elections Clause relative to the Presidential Electors Clause: Article I's 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,"<sup>202</sup> whereas Article II's Presidential Electors Clause, which provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof *may* direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."<sup>203</sup> So the Presidential Electors clause does not

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200. *Bush v. Gore*, 531 U.S. 98, 139–41 (2000) (Ginsburg, J., dissenting) (cleaned up).

201. *Metrish v. Lancaster*, 569 U.S. 351, 360 (2013).

202. U.S. CONST. art. I, § 4, cl. 1 (emphasis added). The clause goes on to provide that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.*

203. *Id.* art. II, § 1, cl. 2 (emphases added).

require the legislature to direct the appointment of presidential electors, even if the Elections Clause requires the legislature to prescribe the times, places and manner of congressional elections. The ISLT also rests on the worst form of decontextualization—isolating the word “legislature” from two clauses, and then reading the word out of its context and without reference to the rest of the constitutional text, which in the case of the Elections Clause, specifically acknowledges that another entity (Congress) may set rules regarding federal elections. There is no constitutional basis for requiring state courts to engage in such interpretive fallacies, in particular at the expense of federalism, the separation of powers, and potentially democracy itself.