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The Dangerous Independent State Legislature Theory

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Abstract

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THE DANGEROUS INDEPENDENT STATE LEGISLATURE THEORY

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ABSTRACT

In 2020, conservative justices and the Trump Campaign championed a theory, known as the independent state legislature doctrine, that claims voting rights protections in state constitutions do not apply to the election rules that state legislatures set for the federal elections in their states. Under the theory, state courts cannot review and enjoin these state election laws for state constitutional violations. This Article exposes the flaws and dangers of the Independent State Legislature Theory. It deconstructs the justifications for its utility, revealing them as undertheorized and based on flawed assumptions of legislative behavior and flawed understandings of constitutional and institutional design. As for the danger, while our constitutional system generally provides dual federal-state protections for civil rights, the Independent State Legislature Theory would effectively remove state constitutions as a safeguard for voting rights. In this way, the theory would make voting rights the least protected civil right.

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INTRODUCTION

One of the biggest open questions in election law is whether state constitutional provisions, such as those guaranteeing equal voting rights, apply to the rules that state legislatures set for the federal elections in their states.[1] The Elections and Electors Clauses of the U.S. Constitution give state legislatures the power to enact laws regulating federal elections.[2] Can state courts review these state election laws for violations of state constitutional law? Conservative scholars, justices, and the Trump Campaign have championed a theory, known as the independent state legislature doctrine, that posits the answer is no.[3] Because state legislatures derive their power over federal elections from the supreme federal constitution, the theory goes, state constitutions cannot restrain that power.[4]

If the U.S. Supreme Court adopted this theory, it would effectively remove state constitutions as a safeguard for voting

1. *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 502 (2021) (explaining that one of the biggest unanswered questions from the 2020 election was the viability of the Independent State Legislature Theory).

2. U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 2.

3. *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8–9 (2020) (the leading scholarly article in support of the Independent State Legislature Theory); Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (a memorandum order with separate concurrences and dissents explaining the current justices' views on the theory); Carson v. Simon, 978 F.3d 1051, 1054 (8th Cir. 2020) (noting that the theory was advanced by electors for Trump and endorsed by a divided panel of the Eighth Circuit).

4. *See* Morley, *supra* note 1, at 535.

rights.[5] Our constitutional system provides two sources of protection for civil rights—the federal constitution and state constitutions.[6] The Independent State Legislature Theory would eliminate the second level of protection and, in this way, make voting rights the least protected civil right.[7]

This Article exposes the flaws and dangers of the Independent State Legislature Theory.[8] It begins with a brief background on the Elections and Electors Clauses and their precedents.[9] This discussion sets up the question of whether state courts can enforce state constitutional guarantees on voting rights when reviewing generally applicable state election laws.[10]

The Article then discusses the justifications for the Independent State Legislature Theory.[11] In the literature, there has been some back and forth about whether the theory has originalist or historical support.[12] There has also been some back and forth on its pros and cons.[13] And, a growing body of research shows that the theory is

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5. *See id.* at 552.

6. *See, e.g.*, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986)

7. *See* Morley, *supra* note 1, at 549.

8. *See infra* Part II.

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part IV.

12. *See, e.g.*, Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 17 (2021); Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature-Theory*, GEORGIA L. REV. (forthcoming 2023); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y (forthcoming 2023); Morley, *supra* note 3; Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 454 (2022); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1001 (2021); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 672 (2001); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 764–75 (2001); Nathaniel F. Rubin, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57, 60 (2021); Franita Tolson, *The 'Independent' State Legislature in Republican Theory*, TEXAS A&M L. REV. (forthcoming 2023); Rosemarie Zagarri, *The Historian's Case Against the Independent State Legislature Theory*, BOSTON COLLEGE L. REV. (forthcoming 2023).

13. *See* Morley, *supra* note 3, at 32–37; Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 690 (2016); David A. Strauss, Bush v. Gore*: What Were They*

misguided and lacks support.[14] This Article offers the fullest deconstruction of the theory's utility. It draws on positive political theory and institutional design principles to reveal the flaws in the justifications that proponents have put forward for the theory.[15]

Next, the Article places the theory in the context of the modern conservative movement for control of the federal courts.[16] In the early twentieth century, when the Supreme Court was largely nonpartisan, it twice unanimously rejected aspects of the theory.[17] Conservative justices did not start to embrace it until 2000.[18] At that point, they had gained control of the Supreme Court, and application of the theory would entrench conservative oversight of voting rights litigation, because of how it disempowers state courts and elevates federal judicial oversight of election law.[19]

Finally, the Article discusses why the theory is so dangerous for voting rights: it would effectively eliminate state constitutions as a source of voting rights protections.[20] As the U.S. Supreme Court has rolled back voting protections at the federal level, the theory would close off state courts as an alternative forum for voting rights protections.[21] One introductory note on terminology. While some refer to the "independent state legislature *doctrine*," I refer to the "Independent State Legislature Theory." The word choice—doctrine vs. theory—matters.[22] The word "doctrine" suggests the view is

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Thinking?, 68 U. CHI. L. REV. 737, 748 (2001); Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 626 (2008).

14. *See, e.g.*, Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1794–99 (2021); Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1055 (2021); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 62 (2021).

15. *See* Morley, *supra* note 1, at 503–06.

16. *See infra* Part III.

17. *See* Morley, *supra* note 3, at 9–10.

18. *See id.* at 10.

19. *See id.* at 84.

20. *See infra* Part IV.

21. *See infra* Part IV.

22. *Compare Legal theory*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle under which a litigant proceeds, or on which a litigant bases its claims or defenses in a case."), *with Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A principle, esp. a legal principle, that is widely adhered to.").

embedded in established precedent.[23] I reject that word choice because the U.S. Supreme Court has not adopted independent state legislature readings of the Elections and Electors Clause in binding holdings.[24] I use the word "theory" because it more accurately reflects that this proposed reading of the clauses advances one view, a highly contested one, on how best to interpret the U.S. Constitution.[25] A main goal of this Article is to show that this contested theory is flawed and dangerous.

I. THE INDEPENDENT STATE LEGISLATURE THEORY AND CASELAW

This Part briefly summarizes the major aspects of the Independent State Legislature Theory, with reference to the text of the Electors and Elections Clauses.[26] It then discusses the relevant Supreme Court caselaw.[27] It tees up where things stand on the issue of whether the clauses prevent state courts from reviewing state election rules for violations of state constitutional provisions.[28] Finally, it unpacks the distinction the theory draws between federal court review and state court review of election laws.[29] One point here is that the theory allows federal courts to police election law decisions from state courts, even when they are made entirely on state law grounds.[30]

A. The Independent State Legislature Theory and the Elections and Electors Clauses

When a state legislature enacts a generally applicable election law, it is acting under two different sources of power: sovereign police powers reserved to the states and the Elections and Electors Clauses of the U.S. Constitution.[31] The police powers let the

23. *See Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A principle, esp. a legal principle, that is widely adhered to.").
24. *See infra* Part I.
25. *See* Morley, *supra* note 1, at 505.
26. *See infra* Section I.A.
27. *See infra* Subsection I.A.1.
28. *See infra* Subsection I.A.1.
29. *See infra* Subsection I.A.2.
30. *See* Morley, *supra* note 1, at 503–04.
31. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.").

legislature regulate elections for state offices, such as governor, attorney general, and state legislator.[32] The Elections and Electors Clauses let the legislature regulate federal elections for Congress and the presidency.[33]

The Independent State Legislature Theory starts with the text of the Elections and Electors clauses and homes in on their references to state legislatures.[34] The Elections Clause provides that the time, place, and manner of federal congressional elections is "prescribed in each State by the Legislature thereof."[35] The Electors Clause similarly provides that the method of selecting presidential electors is determined in "[e]ach State . . . in such [m]anner as the Legislature thereof may direct."[36] While their precise language differs, the two clauses are conceptually similar and are governed by the same precedent.[37] They both allow state legislatures to set rules for federal elections.[38]

The Independent State Legislature Theory points to the use of the word "Legislature" in the clauses and concludes that power to regulate federal elections belongs to the state legislatures specifically, not the states generally.[39] From this textual rendering, the theory leads to several propositions. First, state legislatures are the only state entities that can regulate federal elections.[40] A state, for example, cannot have an independent redistricting commission set federal congressional districts.[41] The legislature must do that job.[42]

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32. *See, e.g.*, Morley, *supra* note 1, at 503, 504 n.12.

33. *See id.* at 503.

34. *See* U.S. CONST. art. IV, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 2; Morley, *supra* note 1, at 503.

35. U.S. CONST. art. I, § 4, cl. 1. ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

36. U.S. CONST. art. II, § 1, cl. 2. ("Each 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.").

37. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting).

38. *See* U.S. CONST. art. IV, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 2.

39. *See Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 8390. *See generally* Morley, *supra* note 1; Morley, *supra* note 3.

40. *See, e.g.*, Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. 847, 847–48 (2015); Morley, *supra* note 3, at 90–92.

41. *See* Morely, *supra* note 40, at 849.

42. *See* Morely, *supra* note 3, at 90.

Second, other state actors cannot review and reject the election rules produced by a state legislature for federal elections in the state.[43] At its strongest, this would mean neither the governor through a veto, the public through a referendum, nor the state courts through judicial review could reject these laws.[44] Practically, if the legislature passed a generally applicable election law and one of these state actors rejected it, the rejection would only have effect as to state elections, under the theory.[45] The law passed by the legislature would still govern federal elections because, under the U.S. Constitution, rejection by something other than a legislative vote would have no effect.[46]

Third, legislatures are not bound by state constitutional provisions, at least when it comes to how federal elections are conducted.[47] This means that legislatures can ignore state constitutional constraints when they pass rules for federal elections.[48] It also means that state courts cannot enjoin these election laws for violations of state constitutional provisions, such as those that guarantee free and equal elections.[49]

B. The Theory and U.S. Supreme Court Caselaw

The U.S. Supreme Court has never accepted any of these three propositions.[50] But it has come close, and it might be getting closer.[51] This section traces the Court's caselaw, from 1892 through the 2020 election.

The first important precedent is the 1892 case of *McPherson v. Blacker*, which contains dicta providing support to both proponents and opponents of the theory.[52] In that case, the Court held that state legislatures have broad power, under the Electors Clause, to set the

43. *See, e.g.*, Morely, *supra* note 40, at 849.
44. *See* Morley, *supra* note 3, at 90.
45. *See id.*
46. *See id.*
47. *See id.* at 90–92; Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring) (mem.).
48. *See* Morely, *supra* note 3, at 90–92.
49. *See id.*
50. *See, e.g.*, McPherson v. Blacker, 146 U.S. 1, 34–36 (1892); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916); Smiley v. Holm, 285 U.S. 355 (1932).
51. *See, e.g.*, *McPherson*, 146 U.S. at 34–36; *Davis*, 241 U.S. 565; *Smiley*, 285 U.S. 355.
52. *See McPherson*, 146 U.S. at 34–36.

means for selecting presidential electors.[53] A legislature can choose whether electors are selected by popular vote statewide, by votes within districts, or by some other means, without violating federal law.[54]

While the Independent State Legislature Theory was not directly tested in the case, the opinion quoted from an 1874 Senate Report that appears to support the theory.[55] The report stated that the authority granted to legislatures by the Electors Clause "cannot be taken from them or modified by their state constitutions" and "can neither be taken away nor abdicated."[56] At the same time, though, the opinion contains dicta that cuts against the theory by suggesting the power granted by the clause belongs to the states themselves and is subject to state constitutional constraints.[57] The Court concluded: "In short, the appointment and mode of appointment of electors belong exclusively to the States under the constitution of the United States."[58] The Court also observed that the state "legislative power is the supreme authority, except as limited by the constitution of the State."[59]

On the issue of whether the Elections Clause prevents non-legislative actors from reviewing and rejecting state election laws, the Supreme Court issued two opinions in the early twentieth century.[60] Both opinions were unanimous, and both reached results contrary to the Independent State Legislature Theory.[61] The 1916 case of *Davis v. Hildebrant* involved an amendment to the Ohio Constitution that let the people of the state approve or reject any state legislation by public referendum.[62] After the public rejected legislation setting the districts for congressional elections, the question arose whether the Elections Clause, by assigning the state legislature the authority to regulate congressional elections, prevented the people of the state from reviewing the redistricting legislation.[63] The Supreme Court held that the public referendum did

53. *See id.* at 41–42.
54. *See id.* at 36.
55. *See id.* at 34–35.
56. *See id.* at 34–35 (quoting S. Rep. No. 43-395 (1874)).
57. *See id.* at 35.
58. *See id.* at 35.
59. *See id.* at 25.
60. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916); Smiley v. Holm, 285 U.S. 355 (1932).
61. *See Hildebrant*, 241 U.S. 565; *Smiley*, 285 U.S. 355.
62. *See Hildebrant*, 241 U.S. 567–68.
63. *See id.* at 565–68.

not violate the Elections Clause because the referendum was "part of the legislative power" in Ohio.[64] The case recognized that the people of a state can veto legislation enacted pursuant to a legislature's Elections Clause powers.[65]

The 1932 case of *Smiley v. Holm* raised the question of whether a governor could veto a state law redistricting for congressional elections.[66] The Supreme Court held that the governor's veto was part of the legislative process.[67] The case recognized that the governor of a state can review and veto legislation enacted pursuant to a legislature's Elections Clause powers.[68]

If a state's voters and its governor can review and reject state legislation, what about a state's courts? Can a state high court, in a case involving how a federal election is conducted in the state, review the application of state election laws? For a long time, there was no substantial debate that state courts can exercise their normal judicial review powers in this context.[69] That changed in 2000.[70]

That year, the outcome of the presidential election turned on the result in Florida, where a recount of an incredibly close election was underway.[71] Florida law set a deadline of seven days after the election for county canvassing boards to count the votes and report the results.[72] The Florida Supreme Court ordered an extension to give counties time to complete their recounts.[73] The U.S. Supreme Court remanded for the court to clarify how it thought the Florida Constitution could circumscribe the state legislative power, consistent with the Electors Clause.[74] Proponents of the Independent State Legislature Theory often point to this remand for support.[75] The problem with putting weight on this opinion, though, is that the

64. *See id.* at 567–69.
65. *See id.* at 566–67.
66. *See Smiley*, 285 U.S. 355.
67. *See id.* at 368–69.
68. *See id.*
69. *See* Morley, *supra* note 3, at 504 (noting that the Independent State Legislature Theory was largely dormant from the 1930s until 2000).
70. *See id.*
71. *See* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 74 (2000).
72. *See id.*
73. *See id.* at 75–76.
74. *See id.* at 78.
75. *See, e.g.*, Morley, *supra* note 3, at 80–81.

Court took no position on the ultimate issue, not even in dicta.[76] It is also undermined by what happened days later in *Bush v. Gore*.[77]

In *Bush v. Gore*, the Supreme Court ruled, per curiam, on equal protection grounds, but the Justices addressed an Electors Clause question in separate, non-controlling opinions.[78] The Florida Supreme Court had ordered a manual recount of ballots that had been fed through tabulating machines but had not produced a registered vote for president.[79] The U.S. Supreme Court held the court's recount procedures were too imprecise to comport with equal protection guarantees.[80]

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, went beyond the equal protection issue and asserted there was an Electors Clause issue: whether the Florida Supreme Court's recount procedures were unconstitutional because they departed from the scheme set by the state legislature, which has plenary authority under the Electors Clause.[81] He concluded the recount procedures violated the Electors Clause because they "significantly departed from the statutory framework."[82] Justices Breyer, Ginsburg, and Stevens disagreed that the Electors Clause stripped state courts of their normal judicial review functions.[83] In the end, neither side of the debate had enough for a majority.[84]

The Supreme Court next discussed the Independent State Legislature Theory in 2015 when it took up the question of whether a state can empower an entity other than the legislature to regulate aspects of federal elections.[85] Through a voter initiative, Arizona passed a constitutional amendment that removed redistricting authority from the state legislature and gave it to an independent

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76. *See generally Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70.

77. *See generally* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

78. *See id.* at 110–11.

79. *See id.* at 100–03.

80. *See id.* at 110.

81. *See id.* at 113 (Rehnquist, C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.").

82. *See id.* at 122 (Rehnquist, C.J., concurring).

83. *See id.* at 123–24 (Stevens, J., dissenting) ("The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in [the Electors Clause] of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it.").

84. *See generally id.*

85. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 813 (2015).

commission.[86] The Arizona legislature complained that the word "legislature" in the Elections Clause meant that only the state legislature could exercise this redistricting authority.[87] In a 5-4 decision, the Supreme Court held that the lawmaking power includes the initiative process, and the creation of a redistricting commission through that process does not violate the clause.[88] The dissents leaned heavily on the word "legislature" in the clause and insisted it refers to the actual institution of the legislature, not the law-making process.[89]

In 2020, the Supreme Court faced the question of whether state courts can review and enjoin state election laws, as applied to federal elections, for violations of state constitutional law.[90] While the Court did not produce any binding opinions, the Justices issued a series of illuminating orders, with concurrences and dissents, showing a strongly divided Court.[91] The first order came out of litigation about the deadline for absentee ballots to arrive in Pennsylvania.[92]

Pennsylvania has an election-day-receipt law, under which absentee ballots are timely only if they are received by election day.[93] The Secretary of State asked the state high court to extend the deadline to allow the counting of ballots postmarked by election day and received within three days, because of mail delays due to the Covid-19 pandemic and cuts to the postal service.[94] The Pennsylvania Supreme Court agreed, holding that the election-day-receipt rule, as applied in the pandemic election, overly burdened voting rights protected under the "Free and Equal Elections Clause" of the Pennsylvania Constitution.[95] The Republican Party applied to the U.S. Supreme Court for an emergency stay of the Pennsylvania

86. *See id.* at 787.
87. *See id.*
88. *See id.* at 824.
89. *See id.* at 826–27 (Roberts, C.J., dissenting).
90. *See* Democratic Nat'l Comm. V. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (mem.).
91. *See generally id.* (illustrating the division among the Justices regarding the operation of the Independent State Legislature Theory).
92. *See, e.g.*, Richard Pildes, *The Possibility of a Blockbuster Supreme Court Decision in the PA Election Case*, ELECTION L. BLOG (Oct. 19, 2020, 5:31 AM), https://electionlawblog.org/?p=117040 [https://perma.cc/8L2R-PE3A].
93. See 25 PA. STAT. AND CONS. STAT. ANN. § 3146.6(c), 3150.16(c) (West 2020).
94. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 365–66 (Pa. 2020).
95. *See id.* at 371.

high court's decision.[96] It argued that the court violated the Elections Clause by departing from the ballot deadline set by the legislature.[97] The Court issued a short order with no reasoning: the stay application was denied.[98] Justices Thomas, Gorsuch, Alito, and Kavanaugh would have granted the application.[99] With a 4-4 split, the Pennsylvania Supreme Court's opinion remained intact.[100] (At the time of the vote, Justice Amy Coney Barrett had not yet replaced Justice Ruth Bader Ginsburg.[101])

While the order contained no reasoning, some of the justices offered their thinking on the Independent State Legislature Theory days later, when the Court addressed litigation over Wisconsin's ballot deadline.[102] As in Pennsylvania, the question was whether Wisconsin should change from an election-day-receipt rule to a postmark rule for the election.[103] A federal court had issued an injunction ordering the change, but the Seventh Circuit had stayed the injunction.[104] The Supreme Court rejected an application to reinstate the deadline extension.[105]

Chief Justice Roberts wrote separately to explain why he had voted to let the Pennsylvania Supreme Court decision stand but not the Wisconsin federal court injunction, when both involved the same question of absentee ballot deadlines.[106] This explanation suggests the Chief Justice does not subscribe to the proposition that the Elections Clause prevents state courts from reviewing state election laws for violations of state constitutional rights.[107] But given the context—a very short statement on the Court's shadow docket in

96. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 643 (2020) (mem.).

97. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1 (2020) (mem.).

98. *See id.* at 2.

99. *See Boockvar*, 141 S. Ct. at 643.

100. *See id.*

101. *See Boockvar*, 141 S. Ct. at 1.

102. *See* Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 784 (W.D. Wis. 2020).

103. *See id.* at 783–84.

104. *See id.* at 817–18; *see also* Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 643 (7th Cir. 2020).

105. *See* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 28 (2020) (mem.).

106. *See id.* (Roberts, C.J., concurring in denial of application to vacate stay) ("While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations . . . .").

107. *See* U.S. CONST. art. I, § 4, cl. 1.

response to an emergency application—we do not have a full picture of his views.

We do know, though, that Justice Kavanaugh is a strong proponent of the Independent State Legislature Theory.[108] He explained why he believed the Pennsylvania court could not enjoin state election laws for violations of the state constitution: the "text of Article II means that 'the clearly expressed intent of the legislature must prevail' and that a state court may not depart from the state election code enacted by the legislature."[109] Justice Kagan, joined by Justices Breyer and Sotomayor, strongly disagreed.[110] She criticized Kavanaugh's approach for lacking clear textual or precedential support.[111]

Ultimately, the 2020 election produced no definitive opinion on the question of whether the Elections and Electors Clauses prevent state courts from reviewing and enjoining state election laws for state constitutional violations.[112] The Trump Campaign tried to get the Supreme Court to take up the issue, even after the 2020 election results were final, but, with no results at stake, the Court denied the petition for certiorari.[113] However, Justice Thomas and Justice Alito, joined by Justice Gorsuch, took the cert denial as an opportunity to write separately in support of the theory.[114] To any litigant counting votes, it appears that, as of now, there are a solid four votes in favor of the theory, with Justice Barrett, who has not yet written on the

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108. *See Wis. State Legislature*, 141 S. Ct. at 30–31 (Kavanaugh, J., concurring in denial of application to vacate stay).

109. *See id.* at 34 n.1 (Kavanaugh, J., concurring in the denial of application to vacate stay) (quoting Bush v. Gore, 531 U.S. 98, 120 (2000)).

110. *See id.* at 40 (Kagan, J., dissenting)

111. *See id.* at 46 n.7 (Kagan, J., dissenting).

112. *See id.* at 28.

113. *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021) (mem.). On the Court's preference to leave divisive election cases for a later day, see Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REV. 89, 129 (2009).

114. *See Degraffenreid*, 141 S. Ct. at 732 (Thomas, J., dissenting) ("The Constitution gives to each state legislature authority to determine the 'Manner' of federal elections . . . . Yet both before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules instead."); *id.* at 738 (Alito, J., dissenting); *see also* Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (mem.) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.").

theory, potentially in the position to cast the decisive vote.[115] Most recently, the Court has granted cert and heard argument in a case about whether the Independent State Legislature Theory prevents state courts from reviewing congressional maps drawn by state legislatures, to determine whether the maps violate state constitutional protections against gerrymandering.[116] The Court could use this case to adopt or reject the theory wholesale. Or, perhaps more likely, draft a narrower opinion that leaves key questions for future cases.

C. Federal Courts Under the Independent State Legislature Theory

In unpacking the Independent State Legislature Theory, it is important to distinguish the role envisioned for federal courts and state courts.[117]

One question is whether federal courts can review and enjoin state legislation for violations of federal constitutional or statutory law.[118] Michael Morley, a leading proponent of the Independent State Legislature Theory, suggests the answer is yes.[119] By granting election powers to state legislatures, the U.S. Constitution does not exempt legislatures from compliance with other federal constitutional provisions or statutory law, such as the Voting Rights Act.[120] To hold otherwise would seriously destabilize election law. It would suggest that a host of U.S. Supreme Court cases were wrongly decided and should have been rejected on the grounds that state legislatures have unreviewable, plenary authority.[121] I have not seen any scholarly suggestion that the Independent State Legislature Theory supports such an outcome. There does not appear to be any serious debate that federal courts can review and enjoin state election laws for federal violations.

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115. *See Degraffenreid*, 141 S. Ct. at 732, 738.

116. Petition for Writ of Certiorari at i, Moore v. Harper, No. 21-1271 (Mar. 17, 2022)

117. *See infra* Subsection I.A.2.

118. *See* Morley, *supra* note 1, at 503.

119. Morley, *supra* note 1, at 506–07 (stating that, when a state legislature regulates federal elections, it is bound by the federal constitution "and federal laws such as the Voting Rights Act").

120. *See id.*

121. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that state poll taxes violate the equal protection clause of the U.S. Constitution).

A second question is what federal courts can do when state courts issue orders interpreting or enjoining aspects of state election laws.[122] Here, proponents of the theory argue that federal courts have a key role: they police state courts to ensure they do not significantly depart from the exact text of what the legislature wrote.[123] Justice Kavanaugh emphasized this role in the shadow docket in 2020, writing that federal courts should halt state court orders that enjoin or alter state election laws because "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws."[124]

Kavanaugh's choice of the word "rewrite" here makes the federal courts' role seem innocuous.[125] It portrays federal courts as faithful defenders of the law against wayward state courts seeking to rewrite the state code.[126] However, one could just as easily, and perhaps more procedurally accurately, focus on how, under the theory, federal courts would prevent state courts from enjoining legislation that unconstitutionally burdens state voting rights.[127] Viewed from this procedural posture, it is clear the theory is doing some serious and controversial work.[128] It is not merely faithfully defending state laws.[129] It is insulating them from state court review for violations of state constitutional voting rights. Overall, the theory elevates federal courts and eliminates or severely diminishes the role of state courts.

II. THE INDEPENDENT STATE LEGISLATURE THEORY IS BASED ON FLAWED ASSUMPTIONS AND DESIGN PRINCIPLES

This Part unpacks the justifications that proponents of the Independent State Legislature Theory have put forward for its utility.[130] It shows that these justifications are undertheorized and based on flawed assumptions about legislative behavior and flawed understandings of constitutional and institutional design.[131] The focus

122. *See, e.g.*, Morley, *supra* note 3, at 81.
123. *See, e.g.*, *id.*
124. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring).
125. *See id.*
126. *See id.*
127. *Cf. id.*
128. *See id.*
129. *See id.*
130. *See infra* Part II.
131. *See infra* Part II.

here is on how these justifications do little or nothing to support the proposition that state courts cannot review and enjoin aspects of state election laws for violations of state constitutional law.[132]

A. Flexibility

One justification offered for the Independent State Legislature Theory is that it provides flexibility by freeing state legislatures from the shackles of state constitutional constraints.[133] If legislatures are bound by rigid constitutional provisions, they will have less room to adapt to local needs or changing circumstances.[134] The Independent State Legislature Theory allegedly ensures that legislatures can meet "local needs and exigencies."[135] The problem with this justification is that it is based on severely flawed assumptions about legislative behavior, and it does not accurately reflect the kinds of cases where the theory comes into play.[136]

First, legislatures are not known to be adaptive, flexible institutions.[137] It is a basic principle of constitutional and institutional design that legislatures are prone to inertia.[138] Even when there is movement, it can easily stall at any of the multiple veto points in the legislative process.[139] State court review of legislation can alleviate this problem.

To illustrate, consider this simple model of how flexibility is enhanced, not diminished, by allowing state court review. At Time 1, a state legislature enacts Election Rule A. At Time 2, societal circumstances change, and Election Rule A becomes more burdensome on the franchise than it was at Time 1. The chances of the legislature promptly updating the rule to adapt to the changed circumstances are low, due to legislative inertia and, perhaps, a self-

132. *See infra* Part II.

133. *See* Morley, *supra* note 3, at 32.

134. *See id.*

135. *See id.* (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 820, at 287–88 (1833)).

136. *See id.*

137. *See, e.g.*, Mirit Eyal-Cohen, *Unintended Legislative Inertia*, 55 GA. L. REV. 1193, 1195 (2021).

138. *See id.*

139. *See* Daniel A. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 903–06 (1987) (discussing the structural and rule-based constraints on the legislative process); Eyal-Cohen, *supra* note 137, at 1224–25 (discussing the various reactive sequences encompassed in the legislative process).

interested preference for the existing rule under which they were elected to office in the first place.[140] The chances of an updated rule increase, though, if injured actors can seek relief in state court. If the rule has become too burdensome, the court can issue an order enjoining its burdensome applications.

One comeback to this model might be that, under the theory, federal courts are still available to address changed circumstances.[141] But, if flexibility is the goal, it is promoted by maintaining state courts as a venue along with federal courts. The more actors who have the power to update a rule, the more potential flexibility and adaptability there is in a system.[142] Of course, there can be too much flexibility in a system.[143] But it is not clear why elevating federal courts and diminishing state courts would produce something close to an optimal level of flexibility, and I have not seen proponents of the theory make such a claim.

The primary flaw with the flexibility justification is highlighted by looking to the cases where judges or litigants have actually invoked the Independent State Legislature Theory in recent years.[144] In these cases, state court review enhanced, not diminished, flexibility.[145] Consider *Bush v. Gore*.[146] The problem was not that the state constitution prohibited the legislature from crafting a reasonable recount process.[147] The problem was that the process the legislature had designed might not have been up to the circumstances that arose in 2000.[148] The Florida Supreme Court adopted a new recount process tailored to the circumstances.[149] One can argue about whether the state high court was right doctrinally, morally, or practically. But it cannot be disputed that the state court brought flexibility to the situation.[150]

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140. *See* Eyal-Cohen, *supra* note 137 (exploring the inertial forces that make legislative changes difficult to implement).

141. *See* Morely, *supra* note 1, at 505.

142. *See, e.g.*, *id.*

143. *See, e.g.*, David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1381 (2011).

144. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam); Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020) (per curiam).

145. *See, e.g.*, *id.*

146. *See Bush*, 531 U.S. at 104 (explaining that the Florida Supreme Court adopted a new recount process in response to challenges with the previous process).

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

Or consider the litigation out of Pennsylvania in 2020.[151] There was strong evidence that new delays in mail service, due to the Covid-19 pandemic and cuts to postal service, could disenfranchise voters.[152] The U.S. Postal Service itself had written a letter alerting that there was a "significant risk" that "Pennsylvania voters who submit timely ballot requests will not have sufficient time to complete and return their ballot to meet the Election Code's received-by deadline."[153] The Pennsylvania Supreme Court responded by enjoining the usual election-day-receipt rule for absentee ballots and allowing the counting of ballots postmarked by election day and received within three days.[154] Again, one can argue about whether the state high court decision was right or wrong. But it is beyond dispute that, when faced with this new information and changed circumstances, it was the state court that showed flexibility.[155]

Some may look at those cases and say they prove that the Independent State Legislature Theory is needed to constrain activist state courts.[156] That argument, though, depends on your normative priors about how active courts should be in protecting voting rights and expanding access to the ballot. It is not about flexibility. My point here is that flexibility, as a justification for the theory, does not work. Flexibility is promoted by state court judicial review, not diminished.[157]

What about the problem of state constitutions establishing narrow, time, place, and manner mandates for elections? For example, if a state constitution banned all absentee voting, that could hamper advances in election administration through state legislation.[158] The Independent State Legislature Theory would solve

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151. *See generally* Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020) (per curiam) (explaining that the court implemented a three-day extension of absentee mail-in ballots that were postmarked on Election Day).

152. *See id.* at 371.

153. *See id.* at 364.

154. *See id.* 386.

155. *See generally Boockvar*, 238 A.3d 345.

156. *See generally* Morely, *supra* note 3 (illustrating the contention that the independent state legislature is a method to limit the efforts of state courts).

157. *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) (noting the importance of state court judicial review of voting rights in state constitutions).

158. *See generally* Commonwealth *ex rel.* Dummitt v. O'Connell, 298 Ky. 44 (1944) (discussing how, during World War II, a Kentucky constitutional provision requiring in-person voting at a precinct seemed to disenfranchise soldiers serving overseas, and how the Kentucky Supreme Court upheld a statute allowing

this problem by holding that the state constitution simply does not apply.[159] However, empirically, it does not appear that this is a real problem that needs solving today. Some state constitutions contain provisions denying voting rights to certain classes of people (*e.g.*, incarcerated people with felony convictions) or delegating authority over election administration to the state legislature.[160] But they generally do not get into the minutiae of election administration.[161] By contrast, state constitutions, almost universally, have provisions expressly protecting voting rights.[162] Allowing state courts to enjoin aspects of election laws, when they would violate these provisions, promotes flexibility.[163]

B. Political Accountability

Political accountability is, perhaps, the main justification given for the Independent State Legislature Theory.[164] Legislators are elected and accountable to the people of a state.[165] Allowing state courts to issue injunctions against legislated election rules undermines accountability because it empowers less accountable judicial actors, the argument goes.[166] Justice Gorsuch made this point in 2020, writing that empowering state legislators, not judges, was a "feature to the framers" that improved accountability.[167] But this argument is based on a flawed understanding of comparative judicial

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absentee voting for the soldiers, basing its analysis on the Independent State Legislature Theory and the sanctity of the right to vote).

159. *See, e.g.*, Morley, *supra* note 3 (suggesting that the Independent State Legislature Theory could address state constitutional provisions that impose burdensome obstacles on voting rights).

160. *See* Douglas, *supra* note 157, at 102 ("Some state constitutions also authorize legislatures to set out rules for registering voters or to provide for absentee balloting or early voting. Certain state constitutions deny voting rights to convicted felons or mentally incompetent persons. Finally, a few state constitutions allow the state's legislature to enact other 'necessary' voting procedures to root out fraud or protect the integrity of the election process. But at bottom, state constitutions include specific language granting voting rights to the state's citizen.").

161. *See id.*

162. *See id.* at 104.

163. *See id.*

164. *See* Morley, *supra* note 3, at 33.

165. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (mem.) (Gorsuch, J., concurring).

166. *See id.*

167. *See id.* at 29–30 ("Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot.").

accountability and of legislative biases.[168] It also is undertheorized and ignores the multi-dimensional complexities of accountability when it comes to state election laws and judicial review.[169]

First, the theory permits judicial review by federal courts for violations of the federal constitution, just not state court review for violations of the state constitution.[170] If the goal is political accountability, this is exactly backwards because state judges are more politically accountable than federal judges.[171] Federal judges have life tenure and are not subject to election.[172] By contrast, most state judgeships are elected or subject to state retention elections.[173] There is no question that state judges are generally more accountable politically than federal judges, as measured by their exposure to public elections.[174] If the Independent State Legislature Theory were meant to promote political accountability, it would not diminish the role of the more accountable state judges while elevating the role of the less accountable federal judges.[175]

Second, this political accountability logic could be used to justify no judicial review of any legislative action ever.[176] Clearly, our constitutional system rejects that approach.[177] We have a system where state courts are generally available to check legislative biases and ensure that state legislation meets state constitutional safeguards.[178] Why should election rules be removed from this general feature of our system? Political accountability does not make sense as an answer here because the biases that plague legislative

168. *Cf. id.*

169. *See* Douglas, *supra* note 157, at 128.

170. *See id.* at 142–43.

171. *See id.*

172. *See, e.g.*, Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 601 (2005).

173. *See generally* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1105 (2007) (showing that eighty-nine percent of state appellate and general jurisdiction trial judges were selected or retained through popular election).

174. *See* Resnik, *supra* note 172, at 594–95. *See generally* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008) (discussing the costs and benefits of judicial elections).

175. *See* Douglas, *supra* note 157, at 94.

176. *See generally* Douglas, *supra* note 157.

177. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29–30 (2020) (mem.) (Gorsuch, J., concurring).

178. *See* Douglas, *supra* note 157, at 139.

processes are at least as strong, if not stronger, in the election context.[179]

Here's why. When it comes to election rules, self-interested legislators have a strong motivation to enact rules that maximize their chances of reelection.[180] Once a rule is in place, change is unlikely and difficult, because any change requires cobbling together a majority of winning legislators willing to vote to change the rules that brought them into office in the first place.[181] Daryl Levinson and Benjamin Sachs have examined how legislators routinely rig election rules to entrench themselves in office in anti-democratic ways.[182] One common strategy is to enact rules that make it hard for their opponents' supporters to cast ballots.[183]

Because of this anti-democratic bug in our system, many scholars have argued that courts must police election rules to prevent legislators from improperly entrenching themselves in office.[184] Michael Klarman developed a framework for "anti-entrenchment review" of election rules.[185] His approach is premised on the theory that judicial review of election rules should enhance democratic values of majority rule.[186] Samuel Issacharoff and Richard Pildes similarly emphasize the need for courts to guard against "political lockups," where legislators capture "the basic structures and ground rules of politics itself."[187] Under these theories, judicial review of election laws can advance accountability by scrutinizing rules that might undemocratically entrench legislators in office.[188] If we are willing to sacrifice some amount of political accountability by having state judges review legislation on topics as varied as property rights, free speech, and privacy, accountability is not a good reason to remove election rules from the list of reviewable subjects. If

179. For additional detail on the biases inherent in political elections, see Morley, *supra* note 3.

180. *See generally* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015) (exploring the challenges posed by entrenchment in the electoral and legislative realms).

181. *See generally id.*

182. *See generally id.* (examining how legislators routinely rig election rules).

183. *See id.* at 414.

184. *See id.* at 416.

185. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502 (1997).

186. *See id.* at 492.

187. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648, 650 (1998).

188. *See id.* at 648.

anything, the risk of anti-democratic bias is higher in the election context than in other areas.

There is a third problem with the accountability justification. Political accountability dynamics in the context of elections and election law is complex.[189] Applying the Independent State Legislature Theory may actually end up undermining accountability by having unelected federal judges overturn decisions supported by multiple elected state officials, who might even be more accountable to the people than the state legislature.[190]

Consider the Pennsylvania case extending the absentee ballot deadline for 2020.[191] The Pennsylvania Secretary of State, the chief elections officer who is elected statewide, asked the state high court to order the extension.[192] She was represented by the state attorney general, another statewide elected officeholder.[193] The Pennsylvania Supreme Court consists of seven justices, all subject to state elections.[194] If the people of Pennsylvania strongly disagreed with the extension, they could punish the two statewide officers and justices at the ballot box.[195] But, if the U.S. Supreme Court had overturned the decision, there would have been no way for Pennsylvania voters who supported the extension to hold those justices accountable. On the whole, it is hard to see how a Supreme Court decision overturning the extension on Elections Clause grounds would have improved accountability.

C. Symmetry

Symmetry has also been given as a justification for the theory.[196] Here, the argument is that Congress and state legislatures have primary power over election rules in federal elections.[197] State courts cannot review and enjoin Congress's election rules.[198] So, it

189. *See id.* at 644.

190. *See* Seifter, *supra* note 14, at 1794–99 (describing how the prevalence of gerrymandered and minoritarian legislatures undermines the accountability justification for the Independent State Legislature Theory).

191. *See generally* Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

192. *See id.* at 365.

193. *See id.* at 349.

194. *See* PA. CONST. art. V, § 13.

195. *See id.*

196. *See* Morley, *supra* note 3, at 35–36.

197. *See id.* at 36.

198. *See id.* at 38.

brings symmetry to the system if state courts also cannot review and enjoin state legislatures' election rules.[199]

This is the most puzzling justification. Symmetry as a design feature has no intrinsic normative value. Symmetry itself is neither good nor bad. Our constitutional system is full of instances where there is symmetry and where there is not. For example, structurally, our three branches of government are asymmetrical—a legislature with two chambers, an executive branch with many levels of authority but with a single chief executive, and a judiciary with three levels of courts.

Even if symmetry itself were good, the Independent State Legislature Theory creates a gross asymmetry between federal courts and state courts.[200] Federal courts can review all manners of laws under the federal constitution, including election laws.[201] State courts can review all manners of laws under the state constitution, but not election laws.[202] There is no design principle on which this asymmetry is better than the asymmetry purportedly solved by the Independent State Legislature Theory.

D. Certainty

The final justification for the theory is certainty.[203] Certainty is an important value in the law generally and in election law specifically.[204] However, the Independent State Legislature Theory does not advance this value.[205]

Morley argues that the main certainty provided by the theory is that it ensures election laws are not subject to the quirks and idiosyncrasies of state constitutional law.[206] The problem with this

199. *See id.* at 36.

200. *See* Seifter, *supra* note 14, at 1780.

201. *See, e.g.*, *Comparing Federal & State Courts*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts [https://perma.cc/X6YJ-VUDB] (last visited October 31, 2022).

202. *See id.*

203. *See* Morley, *supra* note 3, at 36–37.

204. *See, e.g.*, Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 991–94 (2005) (discussing the benefits of having the election rules locked in place before voting and vote counting).

205. *See* Morley, *supra* note 3, at 37.

206. *See* Morley, *supra* note 3, at 37 ("[A state legislature's] acts may be judged according to a uniform body of known federal constitutional standards, subject to ultimate review in the U.S. Supreme Court, rather than according to

argument is that, while the theory eliminates any potential quirkiness from state constitutions, it helps entrench quirkiness from state legislation.[207] If a state constitution is quirky, the theory decreases the chances of a quirky outcome by ignoring that constitution.[208] But, if state legislation on election law is quirky, the theory increases the chances of a quirky outcome by making it harder to fix that quirk through judicial review.[209]

The theory would improve outcomes along this dimension if state constitutions were the greater source of quirk. However, I am not aware of any evidence that quirks in state election laws are more likely to come from state constitutions than state legislation. There is at least a strong theoretical possibility that the legislature is the greater source of quirk. The legislative process, with self-interested legislators eager to craft rules that increase their reelection chances, can produce welfare-reducing abnormalities.[210] A state constitutional process, whatever its flaws, might minimize or avoid the role of self-interested legislators.[211]

Morley has also suggested that the theory advances certainty because actors in the federal government and other states are more likely to accept the results in a system where the theory applies.[212] Morley does not specify who these federal and out-of-state actors are.[213] Perhaps he means the members of Congress who meet in joint session to accept the certified results of the presidential election.[214] Regardless, this formulation of certainty rests on highly tenuous assumptions that have not borne out in real life.

This argument assumes that federal or out-of-state actors will embrace federal court review of state legislation under federal constitutional provisions, just not state court review.[215] Looking at the real-world cases where the theory has arisen, this means these

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potentially esoteric, idiosyncratic, or otherwise unpredictable state constitutional restrictions.").

207. *See* Seifter, *supra* note 14, at 1733.

208. *See* Morley, *supra* note 3, at 37.

209. *See* Seifter, *supra* note 14, at 1733.

210. *See* Klarman, *supra* note 185, at 495.

211. *See id.* at 496.

212. *See* Morley, *supra* note 3, at 37 ("It is far easier for the federal government—and other states—to accept legislatures' actions impacting the federal government at face value when they do not need to consider those acts' substantive validity under state constitutions.").

213. *See id.*

214. *See id.* at 38.

215. *See* Morley, *supra* note 3, at 16.

actors would have accepted the U.S. Supreme Court decision in *Bush v. Gore*, just not the Florida Supreme Court's decision.[216] They would have accepted a decision by the U.S. Supreme Court invalidating Pennsylvania's ballot deadline order in 2020, but not the state high court's decision.[217] On what basis would these actors make this distinction? Morley offers none.[218]

It seems safe to assume that whether one prefers *Bush v. Gore* to the Florida high court's decision depends almost entirely on partisan identity and perhaps normative priors regarding a commitment to counting all votes.[219] *Bush v. Gore* is one of the most contentious decisions the Court has issued.[220] It determined the presidential election for Bush on novel legal grounds.[221] And, it was roundly decried as political hackery.[222] I have seen no evidence that relevant actors in the federal government disagreed with *Bush v. Gore* on substantive grounds but found it easier to accept because they preferred federal court intervention over state court intervention.

The same, I imagine, would have been true in 2020 for Pennsylvania. If the U.S. Supreme Court—with justices appointed by Trump—had overturned the state high court's ballot deadline at the request of the Trump Campaign, it seems safe to assume that Republicans and Trump supporters would have applauded the decision, but not Democrats.[223] With partisanship doing most of the work there, the certainty value does not seem to be doing much of anything.[224]

While certainty is an important value when it comes to timing in election law, the theory does not bring this kind of certainty either.[225] When changes to election rules are made close to an

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216. *See id.* at 85.

217. *See id.* at 67.

218. *See generally* Morley, *supra* note 3.

219. *See id.* at 82–83 (noting that the Justices' partisan allegiances may have influenced the holding in *Bush*).

220. *See* Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 44 (2007); *see, e.g.*, Schapiro, *supra* note 12, at 672; Strauss, *supra* note 12, at 748; Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 620 (2001).

221. *See* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. STATE. U. L. REV. 377, 378, 386–88 (2001).

222. *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 101, 102 (2001).

223. *See id.* at 134.

224. *See id.* at 134–35.

225. *See* Clark v. Pawlenty, 755 N.W.2d 293, 303 (Minn. 2008).

election, it can cause voters confusion about when and how to cast their ballots, and it can cause administrative difficulties for the local election officials who must scramble to adopt those changes.[226] Federal law deals with this through the *Purcell* principle, which establishes a presumption against issuing injunctions that bring last-minute changes to election laws.[227] State common law deals with this through the laches doctrine, which bars late and prejudicial challenges to election laws.[228] The Independent State Legislature Theory does not add to the work that these doctrines do on timing.[229]

The Independent State Legislature Theory also does not advance the related value of uniformity.[230] Each state has its own set of election rules, and the Independent State Legislature Theory does nothing to change that.[231] Michael Morley suggests the theory brings certainty by creating uniformity at the judicial review level.[232] It ensures election laws are reviewed under one set of federal standards, rather than fifty different state standards.[233] But this type of uniformity is superficial. It does not lead to a uniformity of election rules.[234] There will always be at least fifty sets of those.[235] It just leads to a smaller set of judges applying a smaller set of precedent to those fifty different sets of rules.[236] The individual litigants in a particular case may or may not appreciate the narrower universe of caselaw. But the voting public will not see or experience that uniformity.

III. SITUATING THE INDEPENDENT STATE LEGISLATURE THEORY IN THE CONSERVATIVE POLITICAL MOVEMENT

If the justifications for the Independent State Legislature Theory are weak and underspecified, what explains the recent push

226. *See id.* (noting the importance of certainty to alleviate public and administrative confusion during the election process).
227. *See* Purcell v. Gonzalez, 549 U.S. 1, 5–6 (2006).
228. *See, e.g.*, *Clark*, 755 N.W.2d at 299.
229. *See id.*
230. *See* Morley, *supra* note 3, at 37 (describing the uniform nature of federal law).
231. *See generally id.*
232. *See id.* at 37.
233. *See id.*
234. *See id.*
235. *See id.*
236. *See id.* at 25.

for courts to adopt it? Political motivations explain a lot.[237] This Part situates the development of the theory within the modern conservative judicial movement.[238] A key claim here is that justices in the early twentieth century, when the Court was less partisan, rejected aspects of the theory.[239] Conservative justices and political actors did not start to embrace the theory until around 2000.[240] At that point, politically conservative judges had greater control over the federal judiciary, and it was clear that adopting the theory, which empowers federal courts at the expense of state courts, would produce more conservative outcomes.

In the early part of the twentieth century, until 1937, the Supreme Court was, by and large, not a partisan institution.[241] The justices typically issued short, unanimous opinions, without dissent.[242] When there was dissent, it did not fall along political party lines.[243] During this time, the justices appointed by Democratic presidents did not vote in separate blocks from the justices appointed by Republicans.[244] While presidents may have appointed some justices to advance particular agendas, the strong and prevailing norm was nonpartisan, unanimous opinions.[245]

This norm can be seen in the two Elections Clause cases decided in that period.[246] In both cases, the Court unanimously rejected aspects of the Independent State Legislature Theory.[247] In the 1916 *Davis* case, the unanimous Court rejected the notion that, because the Elections Clause assigns power to state legislatures, it violates the Elections Clause to have the public review and reject a state law on redistricting through a public referendum.[248] In the 1932 *Smiley* case, a unanimous Court similarly rejected the notion that it

237. *See id.* at 13–14 (explaining the impact of political motivations on increasing support for the Independent State Legislature Theory).

238. *See infra* Part III.

239. *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court Into a Partisan Court*, 2016 SUP. CT. REV. 301, 301 (2016).

240. *See id.* at 358.

241. *See id.* at 310–13.

242. *See id.*; *see also* Cass. R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 773–84 (2015).

243. *See* Sunstein, *supra* note 242, at 773–84.

244. *See* Devins & Baum, *supra* note 239, at 312–13.

245. *See id.* at 313.

246. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 566–70 (1916); *see also* Smiley v. Holm, 285 U.S. 355, 373–75 (1932).

247. *See Davis*, 241 U.S. at 566–70; *Smiley*, 285 U.S. at 373–75.

248. *See Davis*, 241 U.S. at 568–70.

violates the Elections Clause to have the governor review and reject a state law affecting federal elections.[249] After these cases, arguments based on the Independent State Legislature Theory were largely abandoned and the theory forgotten.[250]

Fast forward several decades, past the relatively liberal Warren Court, to the Reagan administration. President Reagan made ideology the key criteria in selecting justices for the Court.[251] His administration wanted to remake the Court by filling it with staunchly conservative candidates.[252] Ideology was key to Reagan's decision to nominate strong conservatives, like Antonin Scalia, and to elevate William Rehnquist to Chief Justice.[253] For many years, Rehnquist, as justice and then chief justice, was a central player here.[254] His disagreement with civil rights advances, and his goal of rolling back what he saw as the judicial excesses of that era and advancing conservative positions, has been well documented.[255]

Following Reagan, a conservative legal movement came to dominate judicial appointments under Republican presidents.[256] A leading analysis found that there is a robust partisan split on the Supreme Court that has emerged in recent years that is largely attributable to the appointment of conservative Republican nominees.[257] Of course, the Court does not always rule in predictably conservative ways, and individual justices may depart from conservative ideology in idiosyncratic ways.[258] However, it is clear the conservative movement has succeeded when it comes to placing nominees on the Supreme Court.[259]

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249. *See Smiley*, 285 U.S. at 373–75.

250. *See* Morley, *supra* note 1, at 504; *see also* Morley, *supra* note 3, at 80–81.

251. *See* Devins & Baum, *supra* note 239, at 338.

252. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 89 (2007).

253. *See id.* at 278–79.

254. *See id.* at 277.

255. *See* Bernard Schwartz, *Rehnquist,* Runyon*, and* Jones*—The Chief Justice, Civil Rights, and Stare Decisis*, 31 TULSA L.J. 251, 255–57 (1995). *See generally* Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245 (1988).

256. *See* Devins & Baum, *supra* note 239, at 342

257. *See id.* at 306.

258. *See id.* at 347–48.

259. *See id.* at 306.

Democratic presidents have followed suit in considering ideological and political commitments among judicial nominees.[260] But they have not been as successful in placing their nominees on the Court.[261] Since 1980, Republican presidents have appointed ten new Justices, while Democratic presidents have named four.[262] Since Justice Thomas's appointment in 1991, "the Supreme Court has had a strong conservative majority," which has grown more conservative in the following decades.[263]

The success of the conservative movement in placing justices has two key effects relevant here: the Court is more likely to favor and adopt doctrines that will produce conservative outcomes, and it is more likely to embrace theories that entrench power in the conservative-controlled federal courts.[264] The Independent State Legislature Theory fits squarely into this development.[265] In 2000, Chief Justice Rehnquist, in his *Bush v. Gore* concurrence, joined by two other movement conservatives, Scalia and Thomas, strongly endorsed the long-forgotten Independent State Legislature Theory, claiming that a state court cannot review and enjoin a state election law that applies to a federal election.[266] The theory was not necessary to the outcome of that case, which was decided on equal protection grounds.[267] So why stake out such a strong position on the theory? It seems Rehnquist understood the potential significance of the theory and was planting the seeds for its development in conservative directions.[268]

The Independent State Legislature Theory is not inherently conservative.[269] It is only likely to produce conservative outcomes because of current background conditions—*i.e.*, conservative control of the federal courts.[270] The key move here is that the theory allows

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260. *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 221 (2019).

261. *See id.* at 219.

262. *See id.*

263. *See id.*

264. *See generally* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

265. *See* Morley, *supra* note 1, at 502–04.

266. *See* Bush v. Gore, 531 U.S. 98, 111, 113–15 (2000) (per curiam) (Rehnquist, C.J., concurring).

267. *See id.* at 105–06.

268. *See id.* at 112–22.

269. *See* Balkin & Levinson, *supra* note 264, at 491–92.

270. *See* Devins & Baum, *supra* note 239, at 306.

conservative justices to police opinions by more liberal state high courts.[271] When a state high court makes a voting rights decision, the conservative Supreme Court can review and reject it.[272] The U.S. Supreme Court has always had the final say when state courts enforce federal rights.[273] But the Independent State Legislature Theory gives the Court the final say even when state courts enforce state constitutional rights.[274] The Court can simply invoke the theory to reject the state opinions.[275]

At its politically crudest, the theory lets conservative justices reverse any state decision on voting rights that might have the effect of favoring Democratic candidates on the ballot.[276] One example here is again the Pennsylvania Supreme Court's 2020 decision to count ballots postmarked by election day and received within three days, instead of the usual election-day-receipt rule.[277] The court grounded its decision in the state constitution's guarantee for free and equal voting rights.[278] The Republican Party figured the extension favored the Democrats, who were more likely to vote by mail in 2020.[279] In a swing state like Pennsylvania, these ballots could have proven crucial.[280] Having lost at the more liberal state court, the Republican Party asked the conservative U.S. Supreme Court to step in and stay the decision because it violated the Independent State Legislature Theory.[281] The Court denied the stay in a 4-4 vote, with the tie leaving the state decision intact.[282] Amy Coney Barrett was not yet on

271. *See* Morley, *supra* note 1, at 515–17.

272. *See id.* at 520.

273. *See id.*

274. *See id.* at 515–17.

275. *See id.*

276. *See generally* Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020) (illustrating the power of the Independent State Legislature Theory with regards to the ability of federal courts to review state decisions on voting rights).

277. *See id.* at 370–71.

278. *See id.* at 374.

279. *See* Adam Liptak, *Supreme Court Tie Gives Pennsylvania More Time to Tally Some Votes*, N.Y. TIMES (Oct. 19, 2020), https://www.nytimes.com/2020/10/19/us/supreme-court-pennsylvania-voting.html [https://perma.cc/EY9C-J6AU] (describing the rule as a major victory for Democrats because they had been pushing to expand access to the ballot and absentee voting).

280. *See* Marc Levy, *Mail Ballot Fight Persists in Pennsylvania and Other Swing States, Sure to Slow Count*, THE MORNING CALL (Sept. 20, 2022, 4:04 PM), https://www.mcall.com/news/elections/mc-nws-pa-mail-ballot-issues-20220920-qhlapuwdrjbj7j4rbfgp5tdwf4-story.html [https://perma.cc/2M2X-D7NM].

281. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020).

282. *See id.*

the Court to cast the deciding vote.[283] Ultimately, the Supreme Court was one vote away from making sure that a state court could not issue a decision protecting state guarantees on voting rights in a way that might favor Democrats on the ballot.[284]

Despite pointing to conservative outcomes, the theory has not been fully embraced by all conservatives who have landed on the bench in the past few decades.[285] It is possible that a conservative judge might dislike the theory because it is in tension with principles of federalism, which have often found conservative support.[286] The theory tells states that their normal constitutional processes for reviewing state laws do not apply.[287] The early decisions on the Elections Clause—*Davis* and *Smiley*—avoided any federalism problems by finding that the state constitutional processes of public referendum and gubernatorial review do apply.[288] Chief Justice Roberts may have been referring to this precedent, and the federalism tension, when he explained his decision to join the more liberal justices in voting to let the 2020 Pennsylvania decision stand.[289]

IV. THE INDEPENDENT STATE LEGISLATURE THEORY AND THE UNDERENFORCEMENT OF VOTING RIGHTS

There is a large body of literature on the underenforcement of voting rights in federal courts.[290] This literature has focused on the substance of election law doctrine, the political preferences of judges, and a judicial ignorance of or hostility to racial justice.[291] The Independent State Legislature Theory is troubling because it

283. *See id.*; *see also Amy Coney Barrett*, BALLOTPEDIA, https://ballotpedia.org/Amy_Coney_Barrett [https://perma.cc/NQ6Q-PJ8V] (last visited Oct. 31, 2022).

284. *See Boockvar*, 141 S. Ct. at 643.

285. *See* Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 874–76 (2006).

286. *See id.*

287. *See* Ethan Herenstein & Thomas Wolf, *The 'Independent State Legislature Theory,' Explained*, BRENNAN CTR. FOR JUST. (Jun. 6, 2022), www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained [https://perma.cc/E8T7-R575].

288. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 568–70 (1916); Smiley v. Holm, 285 U.S. 355, 373–75 (1932).

289. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring in the denial of application to vacate stay).

290. *See* discussion *infra* Section IV.A.

291. *See* discussion *infra* Section IV.A.

exacerbates the underenforcement problem.[292] In our constitutional system, the general rule is that the federal constitution sets a floor when it comes to civil rights, and states can choose to provide greater protections through their constitutions.[293] The Independent State Legislature Theory would effectively remove state-level protections.[294] It would leave litigants and voters with the lower, underenforced floor set by the U.S. Supreme Court.[295] In this way, the theory would make voting rights the least protected civil right.

A. Theories on the Underenforcement of Voting Rights in Federal Court

Doctrinally, scholars have given at least three reasons why federal voting rights law has developed in ways that provide less than ideal protection. First, the U.S. Constitution does not contain an express provision on voting rights.[296] In federal voting rights cases, the claims are typically grounded in the Equal Protection Clause or the Voting Rights Act.[297] Under the Warren Court, the Supreme Court applied equal protection principles to eliminate some barriers to voting, such as barring poll taxes and establishing the principle of one person, one vote.[298] However, the lack of a straightforward federal right skews the legal analysis.[299] It can lead to an underenforcement of rights, as the legal reasoning is not grounded in people's essential voting rights.[300]

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292. *See* discussion *infra* Section IV.B.

293. *See infra* notes 340–344 and accompanying text.

294. *See* discussion *infra* Section IV.B.

295. *See* discussion *infra* Section IV.B.

296. *See* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982).

297. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

298. *See* Reynolds v. Sims, 377 U.S. 533, 533 (1964); *see also Harper*, 383 U.S. at 666.

299. *See* Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1346 (2001) ("The Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted.").

300. *See* Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 559 (2004). *See generally* Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004)

Second, while voting is a fundamental right, the federal courts rarely apply strict scrutiny in voting rights cases.[301] They typically apply a balancing test that balances the state interest in the election regulation against the burdens on the right to vote.[302] One problem with this standard is how courts require hard evidence from plaintiffs but accept ad hoc justifications from the state.[303] States can point to justifications, such as voter fraud, without providing hard evidence that those problems are real, while plaintiffs can only make their case with hard evidence that the statute imposes a heavy burden on them.[304] This stacks the scales against the voting rights litigants.[305]

Third, federal law can be read to favor as-applied election law challenges over facial challenges, which limits the scope of relief even when a plaintiff can come forward with enough evidence to make their case.[306] In *Crawford v. Marion*, the Supreme Court acknowledged that requiring a voter to present photo identification at the polls could, in some contexts, violate equal protection principles.[307] However, such a challenge would likely be "as applied."[308] This means that voters would have to show the comparative burdens were too great in their specific cases, and any relief they obtained would be limited to them, without statewide effect.[309]

Politically, voting rights are underenforced because of some judges' partisan motivations.[310] One theory of judicial decision-making in election law cases is that judges will make decisions that

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(describing how voting cases involve structural harms and political process claims that the Court lacks a sound framework to adjudicate).

301. *See, e.g.*, Anderson v. Celebrezze, Jr., 460 U.S. 780, 786 (1983).

302. *See id.* at 786; *see also* Burdick v. Takushi, 504 U.S. 428, 430, 434 (1992).

303. *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 101 (2009)

304. *See id.*

305. *See id.*

306. *See* Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 635–36 (2009).

307. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 185, 204 (2008).

308. *See* Hasen, *supra* note 303, at 101.

309. *See* Douglas, *supra* note 306, at 635–38.

310. *See* Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE, 50, 50, 70 (2020).

bolster the electoral prospects of their political party.[311] *Bush v. Gore* is an oft-cited example of justices casting votes along party lines to decide the outcome of an election.[312] Empirical studies, though, go far beyond this anecdotal example to support this theory of judicial decision-making.[313]

Consider Adam Cox and Thomas Miles's study of federal appellate decisions on Section 2 of the Voting Rights Act, under which federal judges decide whether a jurisdiction has engaged in discriminatory vote dilution based on race.[314] If a court finds liability, it typically requires changes to the dilutive voting standard or practice in ways that increase participation opportunities for racial minorities, which historically has benefited Democratic candidates.[315] Cox and Miles found that the likelihood that a federal judge will vote for the plaintiff in a Section 2 case is highly correlated with the partisanship of the president who nominated the judge.[316] Democratic appointees are significantly more likely than Republican appointees to vote for the plaintiff.[317]

Michael Kang and Joanna Shepherd conducted a study designed to minimize the effects of ideology and focus as strongly as possible on partisan loyalty from judges.[318] They looked at state court judges deciding candidate-litigated election disputes.[319] They found that "Republican judges are more likely to favor their own party in election cases by a statistically significant margin," regardless of whether the judges are elected or appointed.[320] The effect was not as strong for Democratic judges.[321] If Republican federal judges are similarly likely to make decisions that bolster Republican electoral chances, these judges will prove hostile to requests to expand access to the ballot or increase the voting power for non-white voters,

311. *See, e.g.*, Michael S. Kang & Joanna Shepherd, *The Long Shadow of* Bush v. Gore: *Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1413 (2016).

312. *See* Balkin, *supra* note 222, at 1407.

313. *See, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 147 (2006).

314. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008).

315. *See id.* at 19.

316. *See id.* at 21.

317. *See id.* at 22.

318. *See* Kang & Shepherd, *supra* note 311, at 1415.

319. *See id.*

320. *See id.* at 1417.

321. *See id.*

because these decisions would likely have the effect of helping Democratic candidates.[322]

Third, voting rights are underenforced from a racial justice perspective because conservative justices have discounted the racial bias that still plagues the system and elevated other concerns over anti-discrimination principles in voting rights cases.[323] The *Shelby County* opinion, striking down Section 4(b) of the Voting Rights Act, is a key example of this problem.[324] Section 4(b) dictated which jurisdictions in the U.S. were subject to the "preclearance" requirement of Section 5 of the Act, which gives the Department of Justice authority to review and "preclear" all new rules created by covered jurisdictions with a history of voter suppression.[325] The Department could block the rules that would have discriminatory effects.[326] For decades, preclearance eliminated voting laws that would have reduced voting opportunities for non-white citizens.[327] In 2013, though, the Court struck down Section 4(b), meaning no jurisdictions are now subject to preclearance under the statute.[328] The Court based its decision on the need to "preserve[] the integrity, dignity, and residual sovereignty of the States."[329] Scholars have pointed out how the opinion weighed this vague and contested notion of state dignity over racial justice.[330]

The 2021 *Brnovich* decision, another Voting Rights Act case, is a second example.[331] Section 2 allows plaintiffs to sue to challenge standards, practices, or procedures that minimize or cancel out the

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322. *See, e.g.*, *id.*

323. *See, e.g.*, Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 37 (2017).

324. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (describing the Court's assessment of various provisions of the Voting Rights Act).

325. *See* 52 U.S.C. § 10304(a), (b).

326. *See Shelby Cnty.*, 570 U.S. at 562.

327. *See* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 7 (2007).

328. *See Shelby Cnty.*, 570 U.S. at 557 (holding Section 4(b) unconstitutional and making the Section 5 prerequisite mostly moot).

329. *See id.* at 543 (quoting Bond v. United States, 564 U.S. 211, 221 (2011)).

330. *See* Hutchinson, *supra* note 322, at 37 ("The Court effectively extended solicitude to covered states to protect their dignity against the intrusion of a racial-justice statute.")

331. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (deciding the challenged statutes did not violate Section 2 of the VRA).

voting strength of minority groups.[332] The *Brnovich* Court laid out a series of principles that make it harder for a Section 2 plaintiff to make their case.[333] Justice Kagan's dissent was powerful and explicitly called out the racial implications of another conservative majority gutting another section of the Voting Rights Act.[334]

B. The Independent State Legislature Theory Would Leave Voting Rights Without Dual Constitutional Protections

Decades ago, Justice William Brennan observed that a main strength of our constitutional system is that it provides two sources of protection: the federal constitution and state constitutions.[335] While federal law sets a floor below which states cannot go, states are free to provide a level of civil rights protections that go beyond federal protections.[336] When federal courts underenforce a civil right, state courts can construe their constitutions to fill in the gap and provide the missing protections.[337]

For voting rights, some have pointed to the dual protections of our federal system as a possible corrective to the underenforcement problem in federal courts.[338] They have explicitly called on states to construe their constitutions as providing greater protections than federal law.[339] Joshua Douglas has written a leading article on this

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332. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R-C.L. L. REV. 439, 464 (2015).

333. *See Brnovich*, 141 S. Ct. at 2338–39 (establishing five provisions that must be shown for the totality of the circumstances test on decisions for voting equality).

334. *See id.* at 2366 (Kagan, J., dissenting) ("By declaring some racially discriminatory burdens inconsequential, and by refusing to subject asserted state interests to serious means-end scrutiny, the majority enables voting discrimination.").

335. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986).

336. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1041 (1983) (holding state court decisions can be upheld on independent, adequate, and separate grounds); *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that a State can use its police power and sovereign power to adopt in its own Constitution more expansive individual liberties than those offered by the federal Constitution); Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding certain rights are fundamental to justice and must be enforced at more than a watered-down level in the States).

337. *See* Douglas, *supra* note 157, at 95.

338. *See id.* at 104–05, 142.

339. *See id.* at 105.

point, arguing for a focus on state constitutions as a way to protect the right to vote.[340]

Unlike the federal constitution, nearly all state constitutions have provisions guaranteeing voting rights.[341] This gives state courts an express constitutional hook to depart from federal precedent and hold that state constitutional law provides greater voting rights protections.[342] Some states have taken this approach or at least appeared open to it.[343] The Missouri Supreme Court, for example, has concluded that the state constitution provides greater protection than its federal counterpart.[344] Meanwhile, the Minnesota Supreme Court, has been careful to acknowledge that, under particular facts and circumstances, its state constitution could do the same.[345]

All of this is normal, uncontroversial federalism 101 stuff. However, the Independent State Legislature Theory would create a major crack in these bedrock principles.[346] If the Supreme Court were to adopt the theory, state constitutional voting rights protections would crumble.[347] A key tenet of the theory is that state constitutions cannot limit what state legislatures enact under the Elections and Electors Clause.[348] The removal of state constitutional protections is baked into the theory.[349] The Supreme Court could issue a series of decisions rolling back or underenforcing voting rights, while simultaneously ensuring that state constitutions could not provide backup protections.[350]

The Independent State Legislature Theory would create a system where voting rights are the only civil rights that do not have the double protections of federal and state constitutional law.[351] Pause there for a moment. The fundamental right to vote would, in this

340. *See* Douglas, *supra* note 157, at 105.
341. *See id.* at 101.
342. *See id.* at 126.
343. *See, e.g.*, Weinschenk v. State, 203 S.W.3d 201, 212 (Mo. 2006).
344. *See id.*
345. *See* Kahn v. Griffin, 701 N.W.2d 815, 834 (Minn. 2005).
346. *See* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 63 (2021).
347. *See id.* at 78.
348. *See* Morley, *supra* note 3, at 16.
349. *See* Douglas, *supra* note 345, at 84.
350. *See id.* at 83 ("[T]he independent state legislature doctrine also makes little sense, in part because it removes the vital and more robust protection that state constitutions give to the right to vote.").
351. *See* Morley, *supra* note 3, at 16.

way, be the least protected civil right.[352] That is the extraordinary danger of the Independent State Legislature Theory.

This is not just a theoretical danger.[353] Voting rights groups, aware of the underenforcement problem in federal courts and the possibility that state constitutions can provide greater protections, often select state courts as their forum.[354] For example, in Minnesota in 2020, the NAACP and ACLU brought a lawsuit to protect voting rights and expand access to the ballot in state court, claiming violations of the state constitution.[355] The Minnesota Supreme Court has recognized that the state constitution can provide greater protections than the federal constitution on voting.[356] The Independent State Legislature Theory, though, would force them to litigate under the less-protective federal constitution and subject them to review by the more conservative federal judiciary.[357]

Proponents of the theory might argue that, under the theory, state constitutional protections would still exist but just for state elections.[358] There are a couple reasons why this would not bring much solace.[359] First, the theory would erode voting rights protections for the important elections of president, U.S. Senate, and Congress.[360] In many elections, the most important races would be the ones with the least civil rights protections.[361]

Second, as a practical matter, federal and state elections are held on the same day and the candidates typically appear on the same ballot.[362] State laws setting the rules for elections apply generally to both state and federal races.[363] It would prove difficult, and sometimes impossible, to provide a meaningful remedy that applied to state races but not federal ones.

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352. *See* Douglas, *supra* note 157, at 121.

353. *See* Douglas, *supra* note 346, at 76.

354. *See* Complaint for Declaratory and Injunctive Relief at 2, NAACP v. Simon, 62-CV-20-3625 (Minn. 2d Jud. Dist. 2020).

355. *See id.*

356. Kahn v. Griffin, 701 N.W.2d 815, 834 (Minn. 2005).

357. *See* Douglas, *supra* note 346, at 76–79.

358. *See* Morley, *supra* note 3, at 18–19.

359. *See, e.g.*, *id.*; Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U. CHI. L. REV. 37, 38 (2010).

360. *See* Morley, *supra* note 3, at 18–19.

361. *See id.*

362. These ballots may also cover lower-level local elections. *See* Berry & Gersen, *supra* note 359, at 38.

363. *See* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 Yale L.J. F. 171, 172 (2019).

Consider witness requirements for absentee voting.[364] In a few of the eleven or so states that require a witness to certify an absentee voter's ballot, there has been litigation over the constitutionality of the witness requirement—given the burdens it places on older voters who live alone or college students living out of state—and its limited effectiveness in preventing fraud.[365] If a state court held that the witness requirement violated the state constitution and enjoined its application for state races, how much good would that do if the voter still needed a witness to fill out the ballot bubbles for president and Congress? Or consider voter ID cases.[366] If a state court enjoined application of a voter ID law for state races, how could election officials ensure that a voter without a required ID only voted for the state offices once they entered the precinct? Overall, the election administration costs of maintaining two sets of ballots and two sets of rules for casting and counting those ballots (one for state races and the other for federal) would be severe.

CONCLUSION

The removal of state-level constitutional protections for a civil right should not happen lightly. The justifications for this kind of drastic move should be fully formed, compelling, and well supported. The Independent State Legislature Theory would effectively eliminate state-level constitutional protections for voting rights.[367] However, the justifications for the theory are undertheorized, flawed, and unsupported.[368] The theory cannot do the work that should be required before gutting a civil right as important and fundamental as voting.[369] The key aim of this Article is to expose the Independent State Legislature Theory as highly contested, severely flawed, and dangerous.

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364. *See, e.g.*, League of Women Voters of Va. v. Va. State Bd. of Elections, 458 F. Supp. 3d 442, 442, 454 n.13 (W.D. Va. 2020).

365. *See, e.g.*, Common Cause R.I. v. Gorbea, 970 F.3d 11, 13 (1st Cir. 2020); League of Women Voters of Va. Elections, 458 F.Supp.3d at 442, 454 n.13.

366. *See, e.g.*, Peter Dunphy, *The State of Voting Rights Litigation (July 2019)*, BRENNAN CTR. FOR JUST. (July 31, 2019), https://www.brennancenter.org/our-work/research-reports/state-voting-rights-litigation-july-2019 [https://perma.cc/F75Y-2RJT].

367. *See* discussion *supra* Part IV.

368. *See* discussion *supra* Part II.

369. *See* discussion *supra* Part II.