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Abstract

The Independent State Legislature (ISL) Theory has been one of the hottest topics in election law, with conservative thinkers championing a strong version of the theory. In Moore v. Harper*, the Supreme Court had the opportunity to turn this controversial theory into actual doctrine. The Court, though, declined to adopt a maximalist version of the theory and declined to reject it outright. Instead, it offered a vague standard that gives close to zero guidance as to where, between these two poles, the doctrine sits. Several scholars and commentators have responded to the opinion with a mix of relief, because the conservative Court rejected the most extreme version, and wariness, because the Court left room for federal courts to use the theory to undermine voting rights. This commentary challenges and adds to this narrative in a couple of ways. First, it shows that the political and policy implications of the ISL Theory are more complex and uncertain than often assumed. For example, in addition to other complicating scenarios, future cases could see liberals invoking the theory in federal court to rectify conservative state court decisions on fraudulent vote dilution. This commentary offers an explanatory theory that shows the Court may have opted for a vague doctrine in part to preserve flexibility in this uncertain decision-making environment. Second, this commentary highlights one cost of a vague ISL*

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doctrine – an increased risk of outcomes that confuse and disenfranchise voters. Both claims are descriptive. They discuss benefits and risks that have been overlooked or insufficiently analyzed in the literature on the ISL Theory.

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INTRODUCTION

The Independent State Legislature (ISL) Theory has been one of the hottest topics in election law.[1] Conservative thinkers have championed a strong version of the theory that would reduce state court powers to review state election laws for violations of the state constitution.[2] Critics have attacked the theory on originalist, consequentialist, and civil rights grounds.[3] In *Moore v. Harper*,[4] the Supreme Court had the opportunity to turn this controversial theory into actual doctrine. The Court, though, declined to adopt a maximalist version of the theory and

1. *See*, e.g., Franita Tolson, *The "Independent" State Legislature in Republican Theory*, 10 TEX. A&M L. REV. 549 (2023); Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 137 (2023) ("During the litigation surrounding the 2020 election, the independent state legislature theory (ISLT) emerged as a potentially crucial factor in the presidential election."); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 135, 136 (2023) ("Following the 2020 presidential election, an obscure and potentially revolutionary constitutional theory reemerged. According to the so-called 'independent state legislature' (ISL) theory, the Constitution, through Article I, Section 4 (the Elections Clause) and Article II, Section 2 (the Electors Clause) . . . ."); 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, 4 (2022); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571 (2022) (discussing independent state legislature theory); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1794–99 (2021) ("Yet the independent state legislature argument returned with a bang in the final weeks of the 2020 election."); Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1056 (2021) ("The strong version of this "independent state legislature" notion imagines the legislature empowered by its federal constitutional designation to select electors free of any substantive or procedural constraints in the state constitution, wholly independent from gubernatorial or state judicial interference."); Joshua Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 60–61 (2021) ("There was also a reinvigoration of the "independent state legislature" doctrine, which posits that state legislatures have plenary power to regulate federal elections without interference from state courts.").

2. *See*, *e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020).

3. *See supra* note 1.

4. 600 U.S. 1 (2023).

declined to reject it outright.[5] Instead, it offered a vague standard that gives close to zero guidance as to where, between these two poles, the doctrine sits.[6] Several scholars and commentators have responded to the *Moore v. Harper* opinion with a mix of relief, because the Court rejected the most extreme version, and wariness, because the Court left plenty of room for federal courts to wield the theory to undermine voting rights.[7]

This commentary challenges and adds to this narrative in a couple of ways. First, it shows that the political and policy implications of the ISL Theory are more complex and uncertain than often assumed. It offers an explanatory theory that shows the Court may have opted for a vague doctrine in part to preserve flexibility in this uncertain decision-making environment. Second, this commentary highlights a hidden cost from a vague ISL doctrine – an increased risk of outcomes that confuse and disenfranchise voters. Both claims are descriptive, not normative. They discuss benefits and risks that have been overlooked or insufficiently analyzed in the literature on the ISL Theory.

This commentary proceeds as follows. Part I briefly explains the ISL Theory. It then summarizes the *Moore v. Harper* Court's rejection of a strong version of the theory in favor of a vague ISL doctrine. Part II offers two theories for why the Court opted for vagueness. One theory is the obvious point that internal deliberations did not produce a stable majority. The more novel and important contribution is the theory that vagueness provides benefits to a Court wary of adopting a clear rule because the policy implications from the ISL Theory are complex and uncertain. Part III shows how a vague ISL doctrine

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5. *See id.*

6. *See infra* Part I.B.

7. *See*, *e.g.*, Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts of Bush v. Gore: How Moore v. Harper Haunts State and Federal Constitutional Interpretation of Election Laws*, WAKE FOREST L. REV. (forthcoming 2024) (manuscript at 1) (on file with author) ("When the Supreme Court granted certiorari in *Moore v. Harper*, early warning systems went off in state supreme courts around the country announcing the potential this case had to eliminate state constitutional review of state voting rights legislation that in any way implicated federal elections."); *The Supreme Court, 2022 Term—Leading Cases*, 137 HARV. L. REV. 290, 296 (2023); Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, SLATE (June 27, 2023), https://perma.cc/P8TM-S8C9.

increases the risk of voter confusion and disenfranchisement. Part IV concludes.

I. THE ISL THEORY AND *MOORE V. HARPER*

A. *The ISL Theory in Brief*

The ISL Theory is rooted in the text of the Elections and Electors clauses.[8] These clauses grant state legislatures the power to set the election rules for federal elections.[9] The Elections Clause provides that the time, place, and manner of federal congressional elections is "prescribed in each State by the Legislature thereof."[10] The Electors Clause provides that the method of selecting presidential electors is determined in "[e]ach State . . . in such [m]anner as the Legislature thereof may direct."[11] While the clauses do not share identical language, they are conceptually similar, with both allowing state legislatures some domain over the rules for federal elections.[12]

Proponents of a strong ISL Theory point to the use of the word "Legislature" in the clauses and argue this means that the power to regulate federal elections belongs to state legislatures specifically, not the states generally and not state entities other than the legislature.[13] In the past several years, the theory has arisen in the context of state courts reviewing state election

8. *See* U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2 ("Presidential Electors.").

9. *See id.* art. I, § 4, cl. 1; *id.* 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

10. *Id.* art. I, § 4, cl. 1.

11. *Id.* art. II, § 1, cl. 2.

12. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 826–39 (2015) (Roberts, C.J., dissenting) ("The Elections Clause both imposes a duty on States and assigns that duty to a particular state actor: In the absence of a valid congressional directive to the contrary, States must draw district lines for their federal representatives.").

13. *See* Morley, *supra* note 2, at 1 ("Rather, it grants that authority specifically to the "Legislature" of each state.").

laws, or congressional maps, for state constitutional violations.[14] Proponents of a strong ISL Theory claim that state legislatures are not bound by state constitutional provisions when they craft election rules or draw maps for federal elections.[15] While they concede the legislatures are still subject to federal constitutional provisions, they assert state legislatures acting in this context are free from state constitutional constraints.[16]

Litigation out of Pennsylvania in 2020 illustrates how the theory could operate to override a state supreme court's interpretation of its state constitution. Pennsylvania has an election-day-receipt law, which means mail ballots are timely only if they are received by election day.[17] Because of mail delays from the COVID-19 pandemic and budgetary issues at the postal service, the Pennsylvania Supreme Court held 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.[18] It enjoined the rule for the election and ordered implementation of a postmark rule, under which ballots were timely if postmarked

14. *See*, e.g., Moore v. Harper, 600 U.S. 1 (2023) ("[W]e afford [deference to] state court interpretations of state law, but note[] "areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1 (2020) (mem.).

15. *See* Morley, *supra* note 2, at 90–92 ("Under such an approach, only a state's institutional legislature may regulate federal elections—no other entities or processes (e.g., public initiatives or referenda) may be involved—and the state constitution may not impose substantive restrictions on the scope of the legislature's authority.").

16. *Id.*

17. *See* 25 PA. STAT. ANN. § 3146.6(c) (West 2020). ("Except as provided under 25 Pa. C.S. § 3511 (relating to receipt of voted ballot), a completed absentee ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election."); *id.* § 3150.16(c) ("Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.").

18. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 365–66, 371 (Pa. 2020) ("As the poll watcher county residency requirement does not burden one's constitutional voting rights, the regulation need only be shown to satisfy a rational basis for its imposition.").

by election day.[19] The Republican Party asked the U.S. Supreme Court to reverse the court's decision on ISL grounds, claiming it was unconstitutional because it departed from the ballot deadline set by the legislature.[20] The issue became moot when the number of ballots that arrived after election day were insufficient to change the outcome of the election, and the Court never took up the full merits of the case.[21] Nevertheless, the relief requested by the Republican Party illustrates how a strong ISL Theory could enable a federal court to invalidate a state high court opinion that applied state constitutional principles to an election rule set by the state legislature.

B. *The* Moore v. Harper *Court Chooses Vagueness Over a Strong ISL Theory*

In *Moore v. Harper*, the Supreme Court addressed whether the Elections Clause means that state courts cannot review congressional districts, crafted by state legislatures, for violations of state constitutional law.[22] The case arose out of North Carolina, where the state supreme court had held that the congressional maps were a partisan gerrymander that violated the state constitution.[23] After the U.S. Supreme Court agreed to hear the case, a flurry of scholarly papers emerged to

19. *See id.* at 371 ("After consideration, we adopt the Secretary's informed recommendation of a three-day extension of the absentee and mail-in ballot received-by deadline to allow for the tabulation of ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on Election Day . . . .").

20. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1 (2020) (mem.) ("A month ago, the Republican Party of Pennsylvania and the Pennsylvania Senate leaders asked this Court to stay the Pennsylvania Supreme Court's decision pending the filing and disposition of a petition for certiorari.").

21. *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021) (mem.) ("The motions of Donald J. Trump for President, Inc. for leave to intervene as petitioner are dismissed as moot.").

22. *See Moore*, 600 U.S. 1 (2023).

23. *See id.* at 7–9. Several groups of plaintiffs challenged North Carolina's congressional districting map as an impermissible partisan gerrymander. *Id.* The plaintiffs brought claims under North Carolina's Constitution, which provides that "[a]ll elections shall be free." Art. I, § 10. Relying on that provision, as well as the State Constitution's equal protection, free speech, and free assembly clauses, the North Carolina Supreme Court found in favor of the plaintiffs and struck down the legislature's map. *Id.* The Court concluded that North Carolina's Legislature deliberately drew the State's congressional map to favor Republican candidates. *Id.*

critique the theory on multiple fronts. Some showed that the theory lacks originalist support.[24] Others emphasized the impact on voting rights.[25] While our constitutional system generally provides dual federal-state protections for civil rights, a strong ISL Theory would eviscerate state constitutions as a safeguard by holding that their protections do not apply to the election rules that state legislatures set for the federal elections in their states.[26] Still others emphasized practical consequences of the theory, such as difficulties administering an election where state constitutional law applied to one set of races on a ballot (state and local) but not another (federal).[27]

The *Moore v. Harper* Court did not adopt the feared strong version of the ISL Theory, instead opting for vagueness.[28] Writing for the majority, Chief Justice Roberts rejected the claim that the Elections Clause exempts state legislation from state judicial review under state constitutions. State legislatures, he wrote, remain constrained by the "ordinary exercise of state judicial review."[29] The Court, though, recognized that the ISL Theory does some work.[30] It held that the Elections Clause places some limits on state court review of election laws, but it declined to adopt a clear rule on where these limits are: "We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[31] The Court did not adopt a precise test for

24. *See*, e.g., Weingartner, *supra* note 1, at 163 (explaining how "[t]he first step in discerning the role of state constitutions under the Elections and Electors Clauses is to determine, to the extent possible, the text's original meaning").

25. *See* Marisam, *supra* note 1, at 601–09 (discussing the impact of the ISL Theory on the nonenforcement of voting rights).

26. *Id.*

27. *See* Shapiro, *supra* note 1, at 185–90 ("Under the ISLT, if a state court finds some or all of a statute unconstitutional under the state constitution, the statute would still apply to federal elections.").

28. *See* Moore v. Harper, 600 U.S. 1, 22–28 (2023) ("We are asked to decide whether the Elections Clause carves out an exception to this basic principle. We hold that it does not. The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.").

29. *Id.* at 22.

30. *See id.* at 36 (refusing to completely denounce the ISL Theory).

31. *Id.*

when state courts go too far, declaring the issue "complex and context specific."[32] The Court did not even decide whether the North Carolina Supreme Court had gone too far in striking down the legislature's map.[33] While *Moore v. Harper* was pending at the U.S. Supreme Court, a new Republican majority had taken control of the state high court and withdrawn its opinion on the gerrymander.[34] This provided a basis for the Supreme Court to punt on even this narrow issue.[35]

Justice Kavanaugh wrote a solo concurrence in which he recognized that the Court would need to create "a more specific standard" and offered a proposal.[36] Justice Thomas dissented, joined in part by Justices Alito and Gorsuch.[37] On the merits, they endorsed the reasoning behind a strong version of the ISL Theory.[38] They wrote approvingly of the textualist logic supporting the proposition that a state cannot "place state-constitutional limits on the times, places, and manners of holding congressional elections that 'the Legislature' of the State has the power to prescribe."[39]

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32. *Id.*

33. *See id.* ("We decline to address whether the North Carolina Supreme Court strayed beyond the limits derived from the Elections Clause. The legislative defendants did not meaningfully present the issue in their petition for certiorari or in their briefing, nor did they press the matter at oral argument.").

34. *See id.* at 13 ("The Court withdrew its opinion . . . concerning the remedial maps, and 'overruled' its decision.").

35. *See id.* at 36–37 ("Although counsel attempted to expand the scope of the argument in rebuttal, such belated efforts do not overcome prior failures to preserve the issue for review.").

36. *See id.* at 38–40 (Kavanaugh, J., concurring) ("In the future, the Court should and presumably will distill that general principle into a more specific standard such as the one advanced by Chief Justice Rehnquist.").

37. *See id.* at 40 (Thomas, J., dissenting) (arguing that the question before the Court was moot).

38. *See id.* at 51 ("The only power that we ever could have exercised here was to modify the adjudicated rights and liabilities of the parties with respect to the claims in this action. Because we plainly cannot do so, no matter what we think about the Elections Clause, this proceeding is moot.").

39. *Id.* at 56.

II. AN INTERNAL AND EXTERNAL THEORY FOR THE VAGUE ISL DOCTRINE

Why did the Court eschew a clear rule, one way or the other, in favor of a vague doctrine that provides little or no guidance? This commentary presents two, mutually inclusive, theories. First, there is a theory internal to the Court's deliberations—the Court did not have five votes to agree on clearer language. Second, there is a theory based on the external impacts of a Court decision—the Court opted for vagueness because of complexities and uncertainties about the political and policy implications of the ISL Theory.

The first theory is obviously true. The six justices in the majority could not even agree on whether the North Carolina Supreme Court had gone too far in this case, let alone how to craft a precise rule that would govern future cases.[40] Even if one assumes that the three more liberal justices (Sotomayor, Kagan, and Jackson) were prepared to act as a cohesive bloc to approve the state court's decision, they did not have the two additional votes to get there. And, clearly, the three conservative dissenters (Thomas, Alito, and Gorsuch) did not have two additional votes to turn their position into a majority. The remaining three justices (Roberts, Kavanaugh, and Barrett) may not have been a cohesive group on this topic. While Justice Barrett's views were not previously known, Roberts and Kavanaugh had publicly disagreed about the scope of the ISL Theory in shadow docket orders from the 2020 election.[41] But we do not need to try to read tea leaves and speculate to see an obvious point: no single, clear doctrinal rule for the ISL Theory had five votes.

The second theory focuses on the complex and uncertain implications of turning the ISL Theory into legal doctrine with nationwide policy implications. Much of the public discourse has portrayed the theory as an esoteric, anti-democratic pet of

40. *See id.* at 37 (majority opinion) ("Although counsel attempted to expand the scope of the argument in rebuttal, such belated efforts do not overcome prior failures to preserve the issue for review.").

41. *See* Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring); *id.* at 34 n.1 (Kavanaugh, J., concurring).

conservative Republicans.[42] There are several ways, though, where the reality is more complex. Adoption of a strong ISL Theory would empower both Republicans and Democrats to enact more gerrymandered maps.[43] In addition, voting rights doctrine could take future turns that would see Democrats invoking the ISL Theory to thwart conservative state courts.[44] And, the ISL Theory could appear in a range of election administration disputes that do not resemble the types of cases that have landed on court dockets so far. In the face of such complexity and uncertainty, vagueness allows the Court to maintain flexibility.

It is easy to understand how the perception of the ISL Theory as a Republican weapon came into being. In 2000, in *Bush v. Gore*,[45] Chief Justice Rehnquist relied on a version of the theory to provide one reason to halt the recount in Florida and ensure Republican nominee George Bush's victory.[46] In 2020, Republicans invoked the theory when they asked the Court to reverse the Pennsylvania Supreme Court's order extending the deadline for mail ballots, which were believed to heavily tilt Democratic.[47] And, in *Moore v. Harper*, Republicans relied on the theory to attempt to shut down the state court challenge to their partisan gerrymander.[48]

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42. *See* Nick Corasaniti, *20 Democratic Senators Ask Supreme Court to Reject Once-Fringe Theory in Elections Case*, N.Y. TIMES (Oct. 26, 2022), https://perma.cc/8KE8-Q24T ("The brief, filed by Senator Amy Klobuchar of Minnesota, draws parallels to the checks and balances of the federal government—especially Congress—as a clear indication that the so-called independent state legislature theory runs afoul of the Constitution.").

43. *See Moore*, 600 U.S. at 36–37 (refusing to give state legislatures complete independence, thus making it more difficult for state legislatures to unilaterally act on their own accord).

44. *Id.*

45. 531 U.S. 98 (2000).

46. *See* Bush v. Gore, 531 U.S. 98, 111, 113 (2000) (Rehnquist, C.J., concurring) (discussing constitutional analysis of state independence in federal elections).

47. *See* Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1, 1 (2020) (mem.) ("A month ago, the Republican Party of Pennsylvania and the Pennsylvania Senate leaders asked this Court to stay the Pennsylvania Supreme Court's decision pending the filing and disposition of a petition for certiorari.").

48. *See* Moore v. Harper, 600 U.S. 1, 1 (2023) ("The legislative defendants then filed an emergency application in this Court, citing the Elections Clause

However, a maximalist ISL Theory also would have provided some political benefits to Democrats. Eliminating state court review of congressional maps could have freed some Democratic legislatures to gerrymander, without worrying that their state courts would strike them down.[49] The theory also could have enabled Democratic gerrymanders in blue states with independent redistricting commissions.[50] At its strongest, the theory provides that only state legislatures, not other entities like redistricting commissions, can draw congressional districts. The Supreme Court rejected this position in 2015, in a 5-4 decision that upheld the constitutionality of Arizona's redistricting commission.[51] But, when *Moore v. Harper* was heard, the composition of the Court had changed, and the petitioners suggested the Court should overrule this precedent.[52] If the Court had accepted this invitation, liberal states that use independent commissions, California being the biggest example, would have had to scrap their maps and let their legislatures draw new ones.[53] It is not hard to imagine that a California legislature controlled by elected Democratic officials would draw a more favorable map for Democrats than an independent commission would. Overall, a strong ISL Theory would make it easier for both Republicans and Democrats to gerrymander.

In addition to its effects on gerrymandering, possible developments in voting rights doctrine could complicate the standard political narrative about who benefits from application

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and requesting a stay of the North Carolina Supreme Court's decision. This Court declined to issue a stay, but later granted certiorari.").

49. *See supra* note 43 and accompanying text.

50. *See supra* note 43 and accompanying text.

51. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (holding that the Elections Clause does not hinder the people of Arizona from conferring redistricting authority to an independent commission as opposed to the state's representatives).

52. *See* Brief for Petitioners at 40 n.9, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271) ("To the extent the Court were to find that some portion of the Arizona opinion is contrary to Petitioners' position in this case, and that the case is not distinguishable, the Court should overrule it.").

53. *See* Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 ELECTION L.J. 472, 474–75 (2012) (explaining the Citizens Redistricting Commission created by California's Voters FIRST Act).

of the ISL Theory. Republicans have been pushing a novel theory of fraudulent vote dilution that would allow courts to enjoin election rules seen as too liberal.[54] The theory is that it is unconstitutional for a state to enact a law that improves access to the ballot to such an extent that it makes fraud too easy.[55] The remedy in such cases could be an order requiring the state to limit access to the ballot, perhaps in ways that would dampen turnout among Democratic voters.[56] While federal courts have not embraced the theory, it is not hard to imagine a future in which conservative partisans on state benches embrace fraudulent vote dilution claims to strike down liberal voting laws. In this scenario, it could be Democrats asking a federal court to reverse a conservative state court on the grounds that it transgressed accepted bounds of judicial review. That is, it would be Democrats relying on the ISL Theory.

The theory's implications could become even more complicated if litigants started invoking it in more routine election administration disputes. Consider an issue that arises on many election days—whether a state court should order extended hours for a precinct because of complications, such as voting machine malfunctions or a lack of ballots at the location.[57] Imagine that a state court extends a precinct's closing time by an hour or two because voting had been delayed. This could raise an ISL issue, because the state court order might depart from precinct hours set by the legislature. This type of judicial oversight of hyperlocal election administration looks a lot different than cases involving statewide gerrymanders or

54. *See* Jason Marisam, *Fraudulent Vote Dilution*, 2 FORDHAM L. VOTING RTS. & DEMOCRACY F. 197 (forthcoming 2024) (describing the argument that an election rule is unconstitutional when it allows fraudulent ballots to be cast, thereby diluting the strength of valid ballots); *see also* Nicholas O. Stephanopoulos, *The New Vote Dilution*, 96 N.Y.U. L. REV. 1179, 1185 (2021) (explaining the notion that taking measures to increase ballot access serves to "handicap Republicans and generate fraud").

55. *See* Marisam, *supra* note 54, at 198.

56. *See, e.g.*, Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.) (denying Texas's request for the Supreme Court to block four states from voting in the electoral college pursuant to the court's original jurisdiction on grounds that they lacked standing).

57. *See, e.g.*, Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 26 (2016) (citing arguments that the use of voting machines violated an individual's voting rights under the Texas constitution).

statewide injunctions. The Court might have found it difficult, or unwise, to craft one clear rule that would apply in all these contexts.

The descriptive point here is that the political and policy implications of the ISL Theory are not as clear as they may have appeared from its recent history. If cautious Supreme Court justices had some sense of these uncertainties and complexities, they may have opted for a vague standard to preserve flexibility. Language from the majority opinion suggests the justices may have had this type of concern on their minds: "We do not adopt these or any other [more specific] test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific."[58] On its face, this suggests a majority that was aware the ISL Theory could arrive in different vehicles and generate complex or uncertain policy outcomes.

III. VAGUENESS AND THE RISK OF VOTER CONFUSION AND DISENFRANCHISEMENT.

Vagueness can have its advantages in the law, especially if the alternative is a clear but suboptimal rule.[59] Given a choice between an unequivocal endorsement of a strong ISL Theory and vagueness, there are good reasons to prefer the latter. At the same time, vagueness has its costs. In this context, the vagueness of the ISL doctrine increases the risk that a set of events will lead to voter confusion and potential disenfranchisement.

To illustrate, imagine that, long before election day, a lawsuit in state court challenges a state election law for violating the state constitution. The law could be a strict deadline for mail ballots, a requirement that absentee voters provide a listed excuse to receive their ballot, a requirement that a witness certify a voter's mail ballot, or some other regulation on casting a valid ballot. Assume the optimal outcome as a

58. *Moore*, 143 S. Ct. at 2089.

59. *See generally* Scott Soames, *Philosophical Foundations of Language in the Law* (Andrei Marmor & Scott Soames eds., 2011), https://perma.cc/H4PV-YNQN (explaining that vagueness is of central importance to lawmakers and often needed to pursue the purposes of making norms).

matter of constitutional law, the one that fully protects the state constitutional right to vote, would favor the plaintiffs and produce an injunction against the law. The state court takes this optimal approach. Voters are informed of the state court decision and adjust their expectations about what they need to do to submit a valid ballot. However, close to or even after election day, a federal court nullifies the state court decision on ISL grounds, holding that the state court transgressed the ordinary bounds of judicial review when it enjoined the state law. As a result, the state court decision does not apply to the federal races on the ballot. Election officials do not have the time or means to fully educate voters about the change in the rule. A significant number of voters cast their ballots believing the rule announced by the state court is still in force. These ballots, though, are now invalid.

Under this hypothetical, the bad outcome would not have happened with a clearer ISL doctrine.[60] If a strong ISL doctrine had been in place, the state court would have known it lacked the authority to review the state election law as to federal elections.[61] Alternatively, if a clear rule had given state courts broad authority, the state court could have crafted an injunction that provided relief but stayed within the outer boundaries of its powers.[62] The vagueness of the ISL doctrine left the hypothetical court with little guidance and no clear markers to alert it when it was in danger of going too far.

The Eighth Circuit case *Carson v. Simon*,[63] about the rules for Minnesota's 2020 election, provides a real-world example. In the summer of 2020, a state court judge approved a consent decree to change Minnesota's election-day-receipt rule to a postmark rule, similar to litigation that would eventually unfold in Pennsylvania that year.[64] The Republican Party and Republican National Committee immediately petitioned for accelerated review at the Minnesota Supreme Court.[65] But they soon voluntarily dismissed their appeal and waived their rights

60. *See supra* notes 13–16 and accompanying text.
61. *Id.*
62. *Id.*
63. 978 F.3d 1051 (8th Cir. 2020).
64. *Id.* at 1054.
65. *Id.* at 1056.

to litigate the issue in any forum.[66] With the matter seemingly resolved, election officials mailed ballots to voters with instructions stating that their ballots would count if they were postmarked by election day.[67] However, about one month before the election, two electors for President Trump challenged the state court order in federal court on ISL grounds, claiming the state court changed the deadline set by the legislature.[68] Just five days before election day, an Eighth Circuit panel called into question the legitimacy of the state court order under the ISL Theory and ordered the segregation of all absentee ballots received after election day, in case the court later found them invalid.[69] Public officials scrambled to urge voters to submit their ballots as soon as possible.[70] However, it was likely too late for some voters who still had their absentee ballots at home, or who had just put them in the mail, to ensure their ballots arrived on time.[71] Thankfully, the presidential election in Minnesota did not turn on the validity of ballots arriving after election day, and the issue became moot.[72] If the election had been closer, though, the federal court could have invalided hundreds or thousands of ballots cast in reliance on the state court order and the instructions provided with their ballots.[73]

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66. *Id.*

67. *Id.* at 1055.

68. *Id.* at 1056.

69. *Id.* at 1054.

70. *See* Stephen Montemayor, *Federal Judges Order Minnesota's Post-Election Day Ballots to Be Held*, STAR TRIBUNE (Oct. 30. 2020), https://perma.cc/SPX9-SH73 (describing Governor Tim Walz's plea for voters to submit ballots as soon as possible).

71. *See* Axel Hufford, *What's Going on with the Postal Service?*, LAWFARE (Sept. 1, 2020), https://perma.cc/7KCA-Z4JY (explaining how the U.S. Post Office advised states that "if state law requires ballots to be returned by Election Day, voters should mail their ballots no later than Tuesday, October 27").

72. *Compare Outstanding Absentee and Mail Ballots in 2020 General Election*, OFF. MINN. SEC. STATE (Nov. 10, 2020), https://perma.cc/H6NV-69XG (counting 228,578 outstanding absentee and mail-in ballots statewide in Minnesota as of 11/10/2020) [hereinafter *Absentee and Mail Ballots*], *with 2020 General Election Results*, OFF. MINN. SEC. STATE (Nov. 10, 2020), https://perma.cc/Z4GA-HEH2 (accounting for Joe Biden's margin of victory over Donald Trump at 233,012 votes).

73. *See Absentee and Mail Ballots*, supra note 72, and accompanying text.

A vague ISL doctrine can put state courts in a position of wanting to enforce state voting rights, while not knowing how far they can go before running afoul of federal limitations. While lower courts know there is always some risk of reversal by a higher court, the ISL Theory provides a basis for federal courts to override a state court opinion outside the normal appellate review process. More problematically, federal court intervention can occur late in an election year, as happened in *Carson v. Simon*. This can create a significant risk of voter confusion and disenfranchisement. While clarity in the ISL context has its drawbacks, so too does vagueness.

CONCLUSION

One standard response to *Moore v. Harper* has been a mix of relief, because democracy and voting rights dodged a bullet, and caution, because the Court left the door wide open for future ISL-based attacks on voting rights in federal courts.[74] This commentary complicates this picture in a couple of ways. It shows that the potential political and policy implications of the ISL Theory are complex and uncertain. In this decision-making environment, a vague ISL doctrine can have its benefits. At the same time, vagueness has its risks. It can contribute to a situation that produces voter confusion and disenfranchisement. The ISL Theory undoubtedly will arise in future cases. When it does, judges may wield it to damage voting rights and disenfranchise voters, safeguard those rights and ensure ballot access, or mostly disregard the theory. The outcome may depend on the context in which the theory arises, as well as the wisdom of the presiding judges.

74. *See, e.g.*, Ari Savitzky & Kristi Graunke, *Explaining* Moore v. Harper*, the Supreme Court Case that Could Upend Democracy*, ACLU (Dec. 6, 2022), https://perma.cc/3UEG-MQSF (explaining the threats to democracy arising from voting law challenges based on ISL Theory).