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### An Alternative to the Independent State Legislature Doctrine

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# An Alternative to the Independent State Legislature Doctrine

*Bruce Ledewitz\**

One of the most momentous actions taken by the United States Supreme Court in the last term was not deciding a case but granting review at the end of the term in *Moore v. Harper*, the North Carolina congressional redistricting case.<sup>1</sup> This is the case in which the Supreme Court appears likely to adopt some version of the Independent State Legislature Doctrine (Doctrine). In this essay, I will describe the actual case and the Doctrine. But I will also be offering an alternative to the Doctrine, one that I believe achieves some of the goals that the Justices who favor the Doctrine are pursuing, while avoiding the incoherencies in the Doctrine itself.

The important facts in *Moore* are straightforward. On November 4, 2021, the North Carolina General Assembly adopted a new congressional voting map based on 2020 Census data. At that time, the Republican Party controlled the legislature.<sup>2</sup> In the case below, a group of Democratic Party-affiliated voters and nonprofit organizations challenged the legislature's congressional map in state court pursuant to a state statute, alleging that the new map was a partisan gerrymander that violated the state constitution.<sup>3</sup> On February 14, 2022, the North Carolina Supreme Court ruled that the state could not use the map in the 2022 elections and remanded the case to the trial court for further proceedings.<sup>4</sup> The trial court adopted a new congressional map drawn by three court-appointed experts.

On February 25, 2022, prior to the state's primary election on May 17, Republican state legislators filed an emergency appeal with the U.S. Supreme Court, asking the Court to halt the state court's order until the Court could review the case. The Court denied the request.<sup>5</sup> Justices Samuel Alito, Clarence Thomas, and

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1. *Moore v. Harper*, 142 S. Ct. 2901 (2022).
2. *Harper v. Hall*, 868 S.E.2d 499, 513 (N.C. 2022).
3. *Id.* at 513–14.
4. *Id.* at 559–60.
5. *Moore*, 142 S. Ct. 2901.

Neil Gorsuch dissented.<sup>6</sup> In the dissent and in a concurrence in the denial by Justice Brett Kavanaugh, the Justices stated that the Doctrine was an important issue for the Court to resolve.

The question presented by the petition for a *writ of certiorari* in *Moore* was,

Whether a State’s judicial branch may nullify the regulations governing the “Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,” U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a “fair” or “free” election.<sup>7</sup>

The Supreme Court granted review on June 30, 2022.<sup>8</sup>

The question presented squarely raised the validity of the Doctrine. The Doctrine does not have a precise definition but can be understood as asserting that the federal Constitution gives state legislatures the authority to regulate federal elections, rather than any state source of authority.<sup>9</sup>

In one sense, this is obviously correct. States could not have inherent authority to regulate federal elections.<sup>10</sup> This authority must therefore come from the federal constitution. And when they legislate, states generally do so through their legislatures rather than the other two branches of state government.

But proponents of the Doctrine generally mean something more than this. The petitioners in *Moore* are suggesting that the Doctrine, if adopted, would interpret the word “Legislature” in two provisions of the U.S. Constitution, art. I, § 4 and art. II, § 1, as meaning the deliberative body of a state without regard to state constitutional, or other, limitations. The former provision, which is at issue in *Moore*, concerns the rules for holding elections for U.S. representatives and senators, including districting and the threat of partisan gerrymandering.

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6. See generally *Moore v. Harper*, 142 S. Ct. 1089 (2022) (mem.) (Alito, J., dissenting).

7. Petition for Writ of Certiorari at i, *Moore*, 142 S. Ct. 1089 (No. 21-1271), 2022 WL 846144, at \*i.

8. *Moore*, 142 S. Ct. 2901.

9. See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8–9 (2020).

10. *Id.* at 15.

The latter provision involves the selection of Presidential electors and provides as follows: “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.”<sup>11</sup> In theory, this provision would permit state legislative majorities to treat the popular Presidential vote in a state as purely advisory and to appoint their own partisan electors regardless of the outcome of the popular vote.<sup>12</sup>

There are, therefore, enormous potential stakes involved in the resolution of *Moore*. Since federal judicial review of partisan gerrymandering claims was already precluded by the political question holding in *Rucho v. Common Cause* in 2019,<sup>13</sup> if the Doctrine is approved by a majority on the Supreme Court, congressional district partisan gerrymandering will not be subject to any form of judicial review.

If that happens, only Congress could prevent, for example, a determined Pennsylvania General Assembly from creating a non-contiguous Congressional District combining a western Pennsylvania District with a number of voters from Scranton, a city in eastern Pennsylvania. Anyone who thinks this could not happen must never have seen Pennsylvania’s gerrymandered 7th District, set aside by the Pennsylvania Supreme Court under the state constitution in 2018, infamously known as Goofy kicking Donald Duck for its highly irregular shape.<sup>14</sup>

In fact, the Doctrine is so all encompassing that political partisans fail to realize its breadth. This has happened repeatedly in Pennsylvania. Republicans in cases in Pennsylvania invoked the Doctrine in opposing Pennsylvania Supreme Court decisions

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11. U.S. CONST. art. II, § 1, cl. 3.

12. This interpretation might run afoul of federal rights, of course:

Article II of the Constitution vests state legislatures with the authority to select presidential electors. This power is plenary, and the Constitution does not require states to give voters the right to directly select their preferred candidate for President. All states, however, have given their citizens the right to vote for presidential electors. When a state government confers the right to vote for presidential electors to its citizens, that right is fundamental and protectable under the Fourteenth Amendment of the Constitution.

Anh Duy Nguyen, “Whose Electors? Our Electors!”: *Due Process as a Safeguard Against Legislative Direct Appointment of Presidential Electors After an Election*, 63 B.C. L. REV. 407, 433 (2022).

13. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

14. See Trip Gabriel, *In a Comically Drawn Pennsylvania District, the Voters Are Not Amused*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/us/pennsylvania-gerrymander-goofy-district.html>.

adopting a new congressional districting map in 2018<sup>15</sup> and arguing for the unconstitutionality of that court's imposition of a three-day extension for the receipt of mail-in ballots in the 2020 election.<sup>16</sup>

But despite the reliance on the Doctrine in these high-profile cases, Republicans have more than once asked the state courts in Pennsylvania to set aside Act 77,<sup>17</sup> which instituted no-excuse mail in voting in Pennsylvania in 2019, as a violation of the Pennsylvania Constitution, without the faintest acknowledgment that at least in federal elections, such an action by a state court would seem to flout the Doctrine.<sup>18</sup>

And when a commonwealth court found Act 77 unconstitutional, that decision failed even to mention, let alone distinguish, the Doctrine.<sup>19</sup>

Simply put—according to the Doctrine—in federal elections, the General Assembly and not the state judges must decide whether mail-in voting is the rule in Pennsylvania. The General Assembly passed Act 77, and it must remain controlling until repealed by that same body.

I assumed that, given the grant of certiorari in *Moore*, the Pennsylvania Supreme Court would be forced to confront the Doctrine when the court reviewed the decision of the commonwealth court. That expectation was dashed. The court upheld Act 77 by a 5-2 vote in *McLinko v. Commonwealth* on August 2, 2022, without a single mention of the Doctrine in either the majority opinion or in the dissents.<sup>20</sup>

Whatever one's opinion of the consequences of adopting the Doctrine, there is not much doubt that the U.S. Supreme Court will do exactly that in *Moore* when the case is decided on the merits. The four Justices mentioned by the petitioners in *Moore* have all

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15. “Mr. Scarnati later refused by letter to turn over election data to the Pennsylvania Supreme Court [i]n light of the unconstitutionality of the court's Orders and the Court's plain intent to usurp the General Assembly's constitutionally delegated role of drafting Pennsylvania's congressional districting plan . . . .” Bruce Ledewitz, *A Lost Opportunity to Reach a Consensus on Gerrymandering*, JURIST (Feb. 13, 2018, 01:26:20 PM), <https://www.jurist.org/commentary/2018/02/pennsylvania-gerrymandering-bruce-ledewitz/>.

16. See *Republican Party v. Boockvar*, 141 S. Ct. 1, 1–2 (2020) (mem.) (Alito, J., concurring).

17. Act of October 31, 2019, Pub. L. No. 552, No. 77, 25 P.S. §§ 3150.11–3150.17.

18. The first such effort was mounted by U.S. Rep. Mike Kelly in an attempt to overturn the 2020 Pennsylvania Presidential election result. See Bruce Ledewitz, *Pa. Rep. Mike Kelly Came Closer Than You Think to Stealing the Election for Trump*, PA. CAP.-STAR (Jan. 28, 2021, 6:30 AM), <https://www.penncapital-star.com/commentary/how-pa-rep-mike-kelly-nearly-stole-the-election-for-trump-it-was-an-insult-to-the-voters-bruce-ledewitz/>.

19. *McLinko v. Dep't of State*, 270 A.3d 1243, 1273 (Pa. Commw. Ct. 2022).

20. *McLinko v. Dep't of State*, 279 A.3d 539 (Pa. 2022).

expressed support for the Doctrine in the past.<sup>21</sup> There is no reason to assume that Justice Amy Coney Barrett will break with her conservative fellow Justices on this issue, thus adding a fifth vote.<sup>22</sup>

In addition, as petitioners also mentioned, Chief Justice John Roberts dissented in one precedent arguably directly on point, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>23</sup> which, in permitting the voters to bypass the state legislature and establish an independent redistricting body, squarely rejected the Doctrine, though not by name.

So confident are the petitioners in *Moore* in the adoption of the Doctrine that they do not even bother to distinguish the Arizona redistricting case. They just assume a Court majority will send that case to the ash heap of history.

Despite this likely success, the Doctrine is both unworkable and incoherent. But it has, at its core, a genuine and admirable concern. I would now like to turn to a critique of the Doctrine and then offer an alternative approach that I feel addresses those legitimate judicial concerns.

As to the critique, the Doctrine exhibits the worst tendency of a simplistic textualism. Certainly, one could argue that the choice of the term “Legislature” in the text of the Constitution should be regarded as meaning something—that using the word “Legislature” is not the same as the simple use of the word “state,” for example. In terms of such an argument, it might even be concluded that Chief Justice Roberts had the better argument in his dissent in the Arizona redistricting case. After all, in that case, the state legislature was bypassed altogether by the voters.

However, in most of the cases that come up under the heading of the Doctrine, it is in fact the state legislature that is acting, only under one or another constraint. So, the question in these cases should be, what does the word “legislature” actually mean—what is a state legislature?

In answering that question, an originalist interpretation might begin by looking at the use of the word “legislature” in the framing

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21. See Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 26 LEWIS & CLARK L. REV. 405, 424–25 (2022) (collecting cases).

22. This comment was written before oral argument was heard in *Moore*. Several Justices, and especially Justice Barrett, expressed skepticism about the Doctrine. It now appears less likely that the Court will adopt it, at least in its fullest import. See Adam Liptak, *Supreme Court Seems Split Over Case That Could Transform Federal Elections*, N.Y. TIMES (Dec. 7, 2022), <https://www.nytimes.com/2022/12/07/us/supreme-court-federal-elections.html>.

23. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting).

era. But I do not agree that this is how constitutional interpretation should proceed. Rather, we should take our method from *Marbury v. Madison*.<sup>24</sup> In *Marbury*, Chief Justice John Marshall proceeded from first principles concerning written constitutions, free institutions, and the nature of law, before even looking at the text of the Constitution in deciding whether judicial review is authorized by it.<sup>25</sup>

Marshall's approach was structural and rational, which is closer to the nature of law than is an arid and abstract attempt at historical reconstruction. Beware of lawyers claiming to do history. They are usually just hiding commitments already present on other, unexamined grounds. When we want history, we should go to historians. Well, then, how should we understand what a state legislature is from the American experience?

The answer to that is pretty clear, and the framers would have agreed—a state legislature is a deliberative body created by a state constitution and subject to various kinds of constitutional and executive branch checks, including, often, some form of gubernatorial veto. State constitutional limits on legislatures were being enforced by state courts even before the Constitution was adopted<sup>26</sup> and in any event that would soon become the American norm.

Why should we think the framers looked at the nature of a state legislature in some radically different way? And given the overall nature of the constitutional project, why would we think that the framers would be drawn to an image of a state legislature independent of its normal state checks and balances? It would take an awful lot of historical evidence to convince me of such a counterintuitive conclusion.

Actually, since a state legislature draws all of its fundamental process norms from its state constitution, any other conclusion is impossible. Imagine the Pennsylvania House of Representatives drawing a congressional districting map and then announcing that its map is the final product of the Pennsylvania General Assembly, without any vote by the State Senate.

Clearly, that is not how the General Assembly is supposed to operate. But how would we know that other than by the creation in the State Constitution of two houses of the legislature?<sup>27</sup> And how

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24. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

25. *See generally id.*

26. *See* J.R. Saylor, *Judicial Review Prior to Marbury v. Madison*, 7 Sw. L. J. 88, 89 (1953) (“Another precedent for judicial review was that the state courts had been exercising this power prior to the Federal Convention.”).

27. PA. CONST. art. 11, § 1.



would the claim by the House in my hypothetical be refuted except by some form of state executive or state judicial counter action?

The petitioners in *Moore* seem to be aware of this problem. So, the Petition for Review argues not for the exclusion of all executive checks and state judicial review of state legislative action in the area of federal election regulation, but only for the exclusion of state judicial review under “vague” state constitutional provisions, such as the protection of the right to “free and equal” elections.<sup>28</sup>

Indeed, it may well be that the uncertainty over how to treat a Governor’s veto under the Doctrine is why certiorari was granted in *Moore*, in which there was no veto, instead of the parallel Pennsylvania congressional districting case,<sup>29</sup> in which a legislative map was blocked by Governor Wolf’s veto before the state supreme court stepped in.<sup>30</sup>

This implied vagueness limit on the reach of the Doctrine demonstrates both that the Doctrine does not work and that the proponents of the Doctrine are actually concerned with something else entirely that the Doctrine accomplishes indirectly.

The Doctrine is structural and for it to make any sense at all, gubernatorial vetoes and all state constitutional judicial review would have to be excluded. There could be no exception for judicial enforcement of “non-vague” state constitutional provisions.

The reference to “vague” state constitutional provisions suggests that what motivates the Doctrine is not some nonsensical structural argument about legislatures but rather the fear that a state court, in particular a state supreme court, might be substituting its own policy preferences—and maybe even worse, the state court majority’s partisan political commitments—for the policy preferences of the state legislature.

Obviously, the choice of the word “Legislature” by the framers locates such policy making authority in that branch of state government rather than in the judiciary.

Looking at the issue in terms of limiting the discretion of judges links the Doctrine with the rest of the conservative judicial project, including overruling *Roe v. Wade*<sup>31</sup> in *Dobbs v. Jackson Women’s*

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27. See Petition for Writ, *supra* note 7, at \*4.

29. *Carter v. Chapman*, 270 A.3d 444 (Pa. 2022).

30. Katie Huangpu, *Gov. Tom Wolf Vetoes Pennsylvania Congressional Map Sent to Him by Republicans*, SPOTLIGHT PA (Jan. 26, 2022), <https://www.spotlightpa.org/news/2022/01/pennsylvania-redistricting-congressional-map-veto/>.

31. *Roe v. Wade*, 410 U.S. 113 (1973).

*Health Organization*.<sup>32</sup> Indeed, originalism itself grew from the soil of just such fears of inappropriate judicial policymaking.<sup>33</sup>

If we think of the Doctrine as aimed at preventing judicial policymaking at the state legislature's expense, we have a much more workable standard than either the Doctrine itself or an amorphous term such as "vague" for deciding what constitutional provisions state courts can and cannot enforce.

This standard would suggest, for example, that the Pennsylvania courts were correct in their apparent assumption in the mail-in voting case that they had jurisdiction of the case despite the Doctrine. I do not know if the provisions the courts relied on to first strike down, and then uphold, mail-in voting could be considered vague, but it is very clear that the state constitutional issue of mail-in voting and the limits on absentee voting is a very close state constitutional issue, with strong textual and historical arguments on both sides. In no way could anyone accuse the state courts in this litigation of simply substituting their policy preferences for those of the General Assembly.

The fear of unbridled state supreme court discretion under vague state constitutional provisions also explains the basis for the Doctrine in Chief Justice William Rehnquist's concurrence in *Bush v. Gore*.<sup>34</sup> In that case, it certainly seemed that a partisan state supreme court was inventing procedures as it went along in an attempt to "find" enough votes—to quote President Donald Trump in a later similar quest<sup>35</sup>—to change the outcome of the 2000 Presidential vote in Florida and swing the national election to the Democratic Party candidate, Al Gore.

But if indeed judicial discretion is the issue, then we would be much better off dealing with the matter directly. The problem of state courts manipulating state law to interfere with federal interests is not unknown. It arises, for example, in the doctrine of the adequate and independent state procedural ground in habeas

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32. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2235 (2022) ("In interpreting what is meant by 'liberty,' the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about what the liberty that Americans should enjoy.").

33. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Amy Gutmann, 1st ed. 1997) ("The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society. And it is judges who determine those needs and 'find' that changing law.").

34. *Bush v. Gore*, 531 U.S. 98, 118 (2000) (Rehnquist, C.J., concurring).

35. Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffenspergercall-georgia.html>.

corpus cases through which state courts hold that federal claims are waived, sometimes by an arbitrary application of state procedural rules.<sup>36</sup>

The U.S. Supreme Court has always held that waiver of a federal claim under state law is itself a federal issue to be determined ultimately by the Supreme Court's consideration of the federal interests at stake compared to the interests of the state.<sup>37</sup>

The issue in *Moore*, and the other cases in which the Doctrine arises, is similar. The federal interest here is that discretion as to policy making in federal election law has been placed by the Constitution in the state legislature. Whenever a state court changes state election law, there is the potential for frustration of that federal interest. A good faith application of state constitutional provisions by a state court is permitted but making things up out of whole cloth to achieve a court's view of better policy, or worse, a partisan result, is not.

This standard would not be easy to apply of course, not least because the Supreme Court would be charging state courts essentially with bad faith. But judging from the tone, that seems to be what several of the Justices thought about the decision by the Pennsylvania Supreme Court in 2020 to extend by three days the time for mail-in ballots to be counted.<sup>38</sup> And if subjectivity and partisanship are really the concerns, it is far better to just say so than to invent a Doctrine completely at odds with everything we know about how state legislatures generally work.

And the bad faith conclusion need not be directly expressed. The rule could simply be that in order for a state court to disallow or otherwise change state election law in federal elections, the state court must demonstrate that its decision arises from established state constitutional sources and precedent.

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36. See *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (noting that discretionary state procedural rules are not automatically inadequate as a ground of waiver).

37. See *Lee v. Kemna*, 534 U.S. 362, 375 (2002).

38. Justice Alito wrote,

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.

*Republican Party v. Boockvar*, 141 S. Ct. 1, 2 (2020) (mem.) (Alito, J., concurring).

This standard is essentially where even some proponents of the Doctrine have ended up.<sup>39</sup>

I do not know how this standard would apply in *Moore* itself. But this is how we should be addressing the issue in that case, rather than by reference to the Doctrine.

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39. “The Constitution’s delegation of authority specifically to the ‘Legislature’ may impose outer limits on the extent to which state courts can adopt unexpected, implausible interpretations of state election laws governing federal elections.” Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 558 (2021). William Baude and Michael McConnell address the issue of judicial discretion without endorsing the Independent State Legislature Doctrine in full, in somewhat similar fashion to the effort in this paper, in a recent magazine article. William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, ATL. (Oct. 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/>.