Fordham Law Voting Rights and Democracy Forum

Volume 1 | Issue 2

March 2023

The Looming Threat of the Independent State Legislature Theory and the Erosion of the Voting Rights Act: It is Time to Enshrine the Right to Vote

Javon Davis
Boston College Law School

THE LOOMING THREAT OF THE INDEPENDENT STATE LEGISLATURE THEORY AND THE EROSION OF THE VOTING RIGHTS ACT: IT IS TIME TO ENSHRINE THE RIGHT TO VOTE

*Javon Davis**

Over the last decade, the emergence of an imperial United States Supreme Court—currently armed with the largest conservative majority since the 1930s—has radically reshaped federal voting rights protections. During the litigation surrounding the 2020 election, however, an obscure threat reemerged. The fringe independent state legislature ("ISL") theory is a potentially revolutionary constitutional theory that could lead to widespread voter disenfranchisement. Proponents of the theory, including Supreme Court Justices, posit, in part, that the United States Constitution vests state legislatures with plenary power to construct rules for federal elections—unbound by state constitutions and free from state judicial review.

Once a refuge for vulnerable voters, recent Supreme Court decisions have left no question that federal courts are restrained in the fight against the increasing number of voter suppression measures enacted by state legislatures. Although the reaction from political leaders has focused on federal legislation, this Article contends that even stronger protections are required at this critical moment. With attacks on the franchise in state legislatures and the Nation's judiciary, voting rights advocates must lead a national conversation around amending the United States Constitution to affirmatively grant the right to vote.

Accordingly, this Article argues that robust federal legislation and a constitutional amendment enshrining an affirmative right to vote would settle a centuries-long debate about the accessibility of our constitutional democracy's most essential feature and bring the United States up to par with other democracies.

INTRODUCTION 152

I. FEDERAL ELECTIONS AND THE U.S. CONSTITUTION 155

A. The Constitution, the Supreme Court, and the Development of the Independent State Legislature Theory..... 156

---

* J.D. Candidate, 2023, Boston College Law School; M.P.A., 2016, Virginia Commonwealth University; B.S., 2014, Virginia Commonwealth University. I would like to thank Jason D'Andrea, Sarah Seo, and the other editors and staff of the *Voting Rights and Democracy Forum* for their thoughtful guidance throughout the editing process. I would also like to thank the attorneys, advocates, and organizers fighting to protect and strengthen our democracy throughout the country.

B. The 2020 Election Cycle and the Independent State Legislature Theory 159
II. DWINDLING PROTECTIONS AND EMERGING THREATS 162
A. Voter Protections at the State Level 163
B. The Supreme Court's Erosion of the Voting Rights Act 164
1. *Shelby County v. Holder* 165
2. *Brnovich v. Democratic National Committee*..... 165
C. Signals from the High Court..... 166
III. POSSIBLE SOLUTIONS TO PROTECT VOTERS 170
A. Federal Legislation..... 170
B. Amending the U.S. Constitution..... 173
CONCLUSION.....176

INTRODUCTION

As the most litigated in the Nation's history, the 2020 election uniquely tested the United States' democratic norms and institutions.[1] Even before Election Day, over 400 state and federal lawsuits were filed to challenge various state election rules and procedures.[2] And in the days immediately following the election, President Donald J. Trump refused to concede, promising that his campaign would litigate the electoral results in several key swing states.[3]

Although former President Trump and his acolytes no doubt failed in these suits,[4] the applicability of the "independent state

---

[1] *See* Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS FRONTLINE (Oct. 28, 2020), https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history [https://perma.cc/FB2Q-34TB].

[2] *See id. See generally* Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335 (2021).

[3] *See* Rosalind S. Helderman, *All the Ways Trump Tried to Overturn the Election – and How It Could Happen Again*, WASH. POST (Feb. 9, 2022), https://www.washingtonpost.com/politics/interactive/2022/election-overturn-plans [https://perma.cc/YTF2-7YXE].

[4] On January 6, 2021, hours before the assault on the United States Capitol, USA Today provided an assessment of sixty-two suits (sixty-one of which ultimately failed) filed challenging the 2020 election results. William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election

legislature" ("ISL") theory arose in several cases.[5] Proponents of the novel theory ground their reasoning in Article I's Elections Clause[6] and Article II's Presidential Electors Clause.[7] Largely relying on textual arguments, supporters of the theory posit that the mention of "Legislature" in both Clauses should be understood as a vesting of authority solely to a state "institutional" or "formal" legislature[8] in setting the rules for federal elections.[9] While raising the ISL theory did not allow President Trump to alter the election's outcome, proponents see the theory as an opportunity to suppress certain voters without triggering the typical checks and balances: state constitutions and state judicial review.[10]

With the resurgence of the ISL theory, voting rights advocates must develop new means to protect voters and ensure that all citizens have access to the ballot box. This is especially true given the possibility that the United States Supreme Court may embrace at least some consequential features of the theory in *Moore v. Harper*,[11] a North Carolina redistricting case brought by

---

-numbers/4130307001 [https://perma.cc/8ZGS-MQEX]. For an additional analysis of the 2020 election lawsuits, see Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS INST. (Nov. 30, 2021), https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out [https://perma.cc/N5UM-MYT7].

[5] *See, e.g.*, Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020); Leah M. Litman & Katherine Shaw, *Interpretation in the States: Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1240–42 (2022); Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 162–75 (2023).

[6] 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.").

[7] 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.").

[8] In other words, state assemblies and state senates. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 90 (2020).

[9] *See generally* Ethan Herenstein & Thomas Wolf, *The 'Independent State Legislature Theory,' Explained*, BRENNAN CTR. FOR JUST. (June 30, 2022), https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained [https://perma.cc/YLD9-NBYY]. Beyond this text, proponents invoke nineteenth-century practice along with the "structure and political theory underlying the Constitution." Morley, *supra* note 8, at 14.

[10] *See* Herenstein & Wolf, *supra* note 9. *See also* Litman & Shaw, *supra* note 5, at 1236.

[11] No. 21-1271 (U.S. argued Dec. 7, 2022). Soon after oral arguments, the North Carolina Supreme Court agreed to rehear the case, prompting legal scholars to believe that the U.S. Supreme Court could moot the case before rendering an

Republican state lawmakers.[12] In *Moore*, the petitioners contend that, under the theory, state legislatures cannot "even delegate power to other state actors . . . to implement state election laws where the legislature fails to address an issue."[13] Ultimately, if the Court in *Moore* embraces some version of the ISL theory, the implications for the Nation's democracy will be far-reaching and "likely destabilizing" to the country's election system.[14]

Considering the Supreme Court's curtailment of the Voting Rights Act of 1965[15] ("VRA") and the all but certain acceptance of at least some features of the ISL theory,[16] this Article contends that

---

opinion. *See, e.g.*, Richard Hasen, *Unfortunately, the Biggest Election Case of the Supreme Court Term Could be Moot*, SLATE (Feb. 6, 2023, 5:50 AM), https://slate.com/news-and-politics/2023/02/moore-v-harper-supreme-court-election-case-moot.html [https://perma.cc/N8ZK-TD2X]. On March 20, 2023, the parties submitted additional briefing after the U.S. Supreme Court "issued an order asking the parties to address the following question: Does the Court still have the legal authority ('jurisdiction') to decide the case?" *Parties in* Moore v. Harper *Submit Additional Briefing to U.S. Supreme Court*, DEMOCRACY DOCKET (Mar. 20, 2023), https://www.democracydocket.com/news-alerts/parties-in-moore-v-harper-submit-additional-briefing-to-u-s-supreme-court [https://perma.cc/7VVG-ZW5L]. As of this writing, litigation in both the U.S. Supreme Court and North Carolina Supreme Court is ongoing.

[12] Brief for Petitioner at 21, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) [hereinafter Moore Petitioner's Brief].

[13] Helen White, *The Independent State Legislature Theory Should Horrify Supreme Court Originalists*, JUST SEC. (June 30, 2022), https://www.justsecurity.org/81990/the-independent-state-legislature-theory-should-horrify-supreme-courts-originalists [https://perma.cc/ZQZ4-GYBG] (summarizing the petitioners' arguments in *Moore*); Moore Petitioner's Brief, *supra* note 12, at 26. *See also* Kristen de Groot, Moore v. Harper*: Voting Rights, Election Law, and the Future of American Democracy*, PENN TODAY (July 28, 2022), https://penntoday.upenn.edu/news/moore-v-harper-voting-rights-election-law-and-future-american-democracy [https://perma.cc/PCE3-GRVS].

[14] This is a challenge to a ruling by the North Carolina Supreme Court to strike down the congressional map generated by the North Carolina state legislature. Harper v. Hall, 868 S.E.2d 499, 510 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022). The state legislators are arguing, in part, that the state supreme court lacks the power to invalidate the congressional maps under the ISL theory. *See* Moore Petitioner's Brief, *supra* note 12, at 1. For more background see *U.S. Supreme Court Schedules Oral Argument* for Moore v. Harper, DEMOCRACY DOCKET (Oct. 18, 2022), https://www.democracydocket.com/news-alerts/u-s-supreme-court-schedules-oral-argument-for-moore-v-harper [https://perma.cc/5PVA-AQM2].

[15] Pub. L. No. 89-110, 79. Stat. 437 (codified as amended at 52 U.S.C. §§ 10101–10702). *See also infra* Part II.B (discussing the Supreme Court rulings that weakened the VRA); Myrna Pérez, *7 Years of Gutting Voting Rights*, BRENNAN CTR. FOR JUST. (June 25, 2020), https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights [https://perma.cc/HPC5-8V8S].

[16] *See* Tierney Sneed & Ariane de Vogue, *Takeaways from* Moore v. Harper, *the Historic Supreme Court Arguments on Election Rules*, CNN (Dec. 7, 2022, 4:03 PM), https://www.cnn.com/2022/12/07/politics/takeaways-moore-harper-supreme-court/index.html [https://perma.cc/L5KR-8ZDN].

voters are poised to fall victim to increased voter suppression laws with even fewer opportunities to challenge them. Ultimately, to protect the right to vote, this Article posits that advocacy campaigns must turn their efforts to pass federal legislation—and likely a constitutional amendment—to affirmatively grant the fundamental right to vote in federal elections.[17]

Part I provides an overview of the constitutional text and history at issue in the ISL theory's application. Furthermore, Part I details the ISL theory's path to *Moore*. Part II lays out the potential consequences if the Court embraces a version of the ISL theory and contextualizes it with recent Supreme Court decisions that weakened the VRA. Finally, Part III argues that given the ISL theory's threat to voting rights and democracy, advocates must consider taking drastic measures, including garnering support around the passage of a constitutional amendment to affirm the right to vote in federal elections.

I. FEDERAL ELECTIONS AND THE U.S. CONSTITUTION

The U.S. Constitution recognizes states' primary role in administering federal elections.[18] Indeed, the administration of federal elections is highly decentralized and varies considerably at the state and local levels.[19] In presidential elections, for example, "a crazy quilt of decentralized election laws dictates . . . who the winner is in the election of inarguably the most powerful person on the planet."[20]

First, Part I.A examines the two primary constitutional Clauses pertaining to state administration of federal elections and the Supreme Court's interpretation of the Clauses over the last

---

[17] The U.S. Constitution, for example, does not provide a right to vote in presidential elections. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."). *See also* Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 968–69 (2016) (detailing that state legislatures previously directly appointed presidential electors). This Article argues that a constitutional amendment that grants that right is necessary to protect voters. *See infra* Part III.B.

[18] *See* U.S. CONST. art. I, §§ 2, 4; *id.* art. II, § 1; *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[19] *See* Sonia Montejano et al., *Presidential Election Disruptions: Balancing the Rule of Law and Emergency Response*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. (forthcoming 2023) (manuscript at 11–13) (on file with authors).

[20] Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 101, 132 (2005).

century. Part I.B then explores the modern revival of the ISL theory and how the Supreme Court could apply it.

A. The Constitution, the Supreme Court, and the Development of the Independent State Legislature Theory

Only a few places in the U.S. Constitution directly speak to how states should conduct elections. First, Article I's Elections Clause provides that "[t]he "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[21] Second, Article II's Presidential Electors Clause provides that "[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to select the president and vice president.[22] Although states lack inherent power to regulate federal elections, these two Clauses provide states with "a direct grant of authority."[23]

The term "Legislature" in the Elections and Electors Clauses has generated debate since the Founding.[24] Various scholars have attempted to ascertain a more precise definition by reviewing historical debates and the Constitution's ratification.[25] Notably, the ISL theory was born out of a dispute involving soldiers voting from outside their home states during the Civil War.[26] The U.S. House Elections Committee, acting under the House's authority to be the "Judge of the Elections, Returns, and Qualifications of its own Members[,]" sided with a state supreme court that had declared that its state legislature had the power to allow out-of-state soldiers to vote during the war.[27] Nonetheless, the theory did not take hold.[28]

In 1916, the U.S. Supreme Court weighed in. In *Ohio ex rel. v. Hildebrant*,[29] the Court ruled that, under the Elections Clause, it is permissible for voters to use a state constitution's referendum process to nullify a state legislature's federal redistricting plan.[30] In doing so, the Court expressly rejected the argument that the state legislature had exclusive power to enact or repeal laws governing

---

[21] U.S. CONST. art. I, § 4, cl. 1.
[22] U.S. CONST. art. II, § 1, cl. 2.
[23] Michael Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 132 (2015).
[24] *See generally* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 1091 (2022).
[25] *See e.g.*, Hayward Smith, *Issues in the Wake of Florida 2000: History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 741 (2001).
[26] *See id.* at 769.
[27] *Id.* at 769–71.
[28] *See id.*
[29] 241 U.S. 565 (1916).
[30] *See id.* at 566–70.

federal elections under the Elections Clause.[31] Thus, *Hildebrant* authorizes states to "enact laws governing federal elections through any process that the state constitution includes within the state's 'legislative power,'" regardless of whether the legislature took action.[32]

A few years after *Hildebrant*, the Supreme Court revisited a similar issue in *Smiley v. Holm*.[33] *Smiley* concerned a challenge to a gubernatorial veto of a federal redistricting bill passed by the state legislature.[34] The *Smiley* Court ruled that the governor's veto was permissible because the state constitution incorporated vetoes as part of its legislative process.[35] Specifically, the Court held that a legislature's use of its power under the Elections Clause concerning congressional elections should follow the normal processes for enacting laws laid out in the state constitution.[36]

While these rulings in the early twentieth century appeared to settle the issue, recent signals from the Court point to the possibility of imminent change. The interpretation of "Legislature" in the Elections Clause, for example, has drawn the most recent attention.[37] Still, its placement in the Electors Clause played a role in the controversial *Bush v. Gore*[38] decision.[39] In *Bush v. Gore*, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, concurred separately to argue that Article II gave state legislatures powers and duties independent from, and not restrained by, state constitutions or state judiciaries.[40] Scholars contend that Chief Justice Rehnquist's concurrence was the genesis of the modern revival of this interpretation of the Constitution.[41]

In a five-to-four opinion, the Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[42] *(AIRC)* upheld a citizen petition amending the state constitution to

---

[31] *See id.* at 569. *See also* Morley, *supra* note 23, at 132.
[32] Morley, *supra* note 23, at 132–33 (citing *Hildebrant*, 241 U.S. at 568–69).
[33] 285 U.S. 355 (1932).
[34] *See id.* at 368.
[35] *See id.*
[36] *See id.* at 367. Additionally, the Court stated: "We find no suggestion in the [Elections Clause] of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the state has provided that laws shall be enacted." *Id.* at 367–68.
[37] *See, e.g.*, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022).
[38] 531 U.S. 104 (2000).
[39] *See* Vikram D. Amar & Akhil R. Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, SUP. CT. REV. 1, 14–15 (2021).
[40] *See* 531 U.S. at 112–13 (2000) (Rehnquist, C.J., concurring).
[41] *See, e.g.*, Amar & Amar *supra* note 39, at 1–9; Shapiro, *supra* note 5, at 156–57.
[42] 576 U.S. 787 (2015).

create an independent redistricting commission.[43] The state legislature argued that the "the Legislature thereof" language in the Elections Clause gave it sole authorization to prescribe regulations for congressional redistricting.[44] But the Court rejected this argument, reasoning that the Elections Clause was not adopted to diminish the power of the people, from which all political power flows.[45] While the ruling tracked *Hildebrant* and *Smiley*, the most telling part was the dissenting opinion penned by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito.[46] Chief Justice Roberts's dissent embraced the state legislature's argument and revived what is now known as the ISL theory.[47]

Finally, in *Rucho v. Common Cause*,[48] the Court held that partisan gerrymandering was a nonjusticiable political question.[49] The majority opinion, however, expressed the view that "provisions in . . . state constitutions can provide standards and guidance for state courts to apply" to protect voters from overreaching legislators.[50] In validating state courts' ability to prevent bad-faith actions by state legislatures, the Court directly rebuffed the ISL theory.[51]

Although rejected by the Court in *AIRC* and *Rucho*, and despite longstanding precedent to the contrary,[52] the litigation surrounding the 2020 presidential election roused the dormant theory.[53] In *Moore*, the ISL theory has finally reached the Supreme Court.[54]

---

[43] *See id.* 824.
[44] *Id.* at 816.
[45] *See id.* at 824.
[46] *See id.* (Roberts, C.J., dissenting). In his dissent, the Chief Justice argued that the meaning of "the legislature" in the Elections Clause is unambiguous and refers to the elected representative body of the states. *Id.* at 829.
[47] *See id*.
[48] 139 S. Ct. 2484 (2019).
[49] *See id.* at 2506–07.
[50] *Id*. at 2507.
[51] *See* Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J. OF L. & PUB. POL'Y 135, 147 (2023).
[52] *See supra* Part I.A.
[53] *See Hearing on the Independent State Legislature Theory and its Potential to Disrupt Our Democracy Before the H. Comm. on Admin.*, 117th Cong. 1–2 (2022) (statement of Eliza Sweren-Becker, Voting Rights & Elections Counsel, Brennan Center for Justice) (stating that the theory generated debate after then-President Trump's campaign and other members of the Republican Party advanced the theory in challenging the 2020 election results); Weingartner, *supra* note 51, at 136–37.
[54] *See* Litman & Shaw, *supra* note 5, at 1240–42.

B. The 2020 Election Cycle and the Independent State Legislature Theory

In cases concerning the 2020 election, several Justices put forth "more extreme" versions of the ISL theory than Chief Justice Rehnquist did in his *Bush v. Gore* concurrence.[55] In particular, the Court's "originalist faction," including Justices Thomas, Alito, Gorsuch, and Kavanaugh, signaled support for some version of the theory.[56]

In late 2020, for example, a dispute over deadlines for absentee ballots in Pennsylvania drove several Justices to breathe new legitimacy into the theory.[57] After the Pennsylvania Supreme Court extended the absentee ballot deadline based on the state constitution's guarantee of "free and equal elections,"[58] Justice Alito suggested that the court's extension violated the Elections Clause.[59] Joined by Justices Thomas and Gorsuch, Justice Alito argued that the state court exceeded its authority, reasoning that the U.S. Constitution gives state legislatures, "not state courts," the power to make rules for federal elections.[60] Otherwise, Justice Alito posited, it "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 elections.[61]

Likewise, both Justices Gorsuch and Kavanaugh appeared to endorse the theory in a case about absentee ballot receipt deadlines

---

[55] Shapiro, *supra* note 5, at 163 (noting that Justices "Thomas, Alito, Gorsuch, and (to a lesser extent) Kavanaugh . . . appeared to endorse the maximalist" ISL theory, and "[u]nlike Chief Justice Rehnquist, they did not consider legislative intent."). For an analysis on the potential ramifications concerning the scope of the ISL theory, see *Hearing on the Independent State Legislature Theory and Its Potential to Disrupt Our Democracy Before the H. Comm. on Admin.*, 117th Cong. 3–11 (2022) (statement of Richard H. Pildes, Professor of Constitutional Law, New York University School of Law).

[56] White, *supra* note 13.

[57] *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1–2 (2020) (mem.) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in denial of motion to expedite consideration of petition for certiorari); Goldfeder, *supra* note 2, at 352–57 (detailing the legal challenges in Pennsylvania).

[58] *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 370–71 (Pa. 2020).

[59] *See Republican Party of Pa.*, 141 S. Ct. at 1–2 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in denial of motion to expedite consideration of petition for certiorari) (writing that the Court should rule on the case's merits because of the "strong likelihood that the State Supreme Court decision violates the Federal Constitution").

[60] *Id.*

[61] *Id.*

in Wisconsin.[62] On an appeal from a federal district court's decision to change the state's absentee deadline, for example, Justice Kavanaugh echoed former Chief Justice Rehnquist's position in *Bush v. Gore*: contending that "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws."[63] Further, Justice Kavanaugh argued that state courts "may not depart from the state election code enacted by the legislature."[64]

Justice Gorsuch went further in his dissenting opinion in a North Carolina case involving the state board of elections' decision to extend the deadline to receive absentee ballots.[65] Specifically, Justice Gorsuch suggested that the state election board had no authority to "(re)writ[e] election laws" enacted by the state legislature.[66] Referencing the Elections Clause, Justice Gorsuch accused the state elections board and the state court of "egregious" actions and of "work[ing] together to override a carefully tailored legislative response to the COVID-19 emergency."[67]

Additionally, several federal appellate and district courts heard arguments promoting the ISL theory during the 2020 election cycle.[68] The Eighth Circuit, for example, opined on the theory when it reversed a district court's ruling that the Minnesota Secretary of State had the authority to extend an absentee ballot deadline.[69] The court ruled that only the legislature—not state election officials—can alter election rules.[70] Similarly, three Fourth Circuit judges wrote in dissent to specify that the Elections and Electors Clauses grant power only to a "specific entity" in "each state: the 'Legislature thereof.'"[71]

---

[62] *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28–30 (2020) (Gorsuch, J., joined by Kavanaugh, J., concurring in denial of application to vacate stay); *Id.* at 30–40 (Kavanaugh, J., concurring in denial of application to vacate stay).

[63] *Id.* at 34 n.1 (citing Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C. J., concurring)).

[64] *Id.* at 34.

[65] *See* Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief).

[66] *Id.* at 47.

[67] *Id.*

[68] *See, e.g.*, Carson v. Simon, 978 F.3d 1051, 1054 (8th Cir. 2020); Hotze v. Hollins, 2020 WL 6437668, at *4–5 (S.D. Tex. Nov. 2, 2020), *aff'd in part, vacated in part sub nom.* Hotze v. Hudspeth, 16 F.4th 1121 (5th Cir. 2021).

[69] *See Carson*, 978 F.3d at 1054–60.

[70] *See id.* at 1060 ("[O]nly the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota . . . . [I]t is not the province of a state executive official to re-write the state's election code, at least as it pertains to selection of presidential electors.").

[71] Wise v. Circosta, 978 F.3d 93, 111–12 (4th Cir. 2020) (en banc) (Wilkinson, Agee, and Neimeyer, J.J., dissenting).

Further, in an October 2020 federal district court suit, plaintiffs in Texas invoked the theory to disqualify over 100,000 ballots already cast in Harris County, Texas.[72] The plaintiffs argued that the county exceeded its authority when it established procedures allowing for drive-in voting.[73] The Texas Supreme Court had rejected a challenge to this procedure, reasoning that drive-in voting did not violate the state election code when used in early voting.[74] While the district court ruled that the plaintiffs lacked standing, the court stated that, had it ruled on the merits, it would have disallowed drive-in voting on Election Day because, unlike the relief sought for early voting, the county would have lacked authority to implement this practice.[75]

During oral arguments in *Moore*, the Justices' line of questioning seemingly expressed little appetite for embracing the most extreme version of the ISL theory.[76] Many commentators, however, believe the Court will embrace at least some version of the theory in its upcoming decision.[77] If this were to happen, state legislatures would be permitted to burden the right to vote with little to no oversight from state courts.[78] This outcome is particularly stark, given the Court's recent decisions, and will ultimately tie the hands of state judiciaries.[79]

---

[72] *See generally* Complaint for Emergency Injunctive Relief, Hotze v. Hollins, No. 4:20-CV-03709, 2020 WL 6437668 (S.D. Tex. Nov. 2, 2020) (alleging a violation of Article I's Elections Clause in a challenge to Harris County allowing drive-in voting); *Hotze*, 2020 WL 6437668 at *4.

[73] *See Hotze*, 2020 WL 6437668 at *4–5; *Recent Case:* Hotze v. Hollins, HARV. L. REV. BLOG (Nov. 14, 2020), https://blog.harvardlawreview.org/recent-case-_hotze-v-hollins [https://perma.cc/TEP3-NQAV].

[74] *See Hotze*, 2020 WL 6437668 at *4–5.

[75] *See id*. State courts have also embraced the theory in recent years. For example, the Rhode Island and Nebraska supreme courts have issued opinions that endorse the theory in evaluating election procedures. *See* Morley, *supra* note 23, at 149.

[76] *See, e.g*., Mac Brower, *Four Takeaways:* Moore v. Harper *Oral Argument*, DEMOCRACY DOCKET (Dec. 8, 2022), https://www.democracydocket.com /analysis/four-takeaways-moore-v-harper-oral-argument [https://perma.cc/398B-WFU5].

[77] *See* Vikram D. Amar, *Post-Argument Analysis in the* Moore v. Harper *Case Raising the So-Called "Independent State Legislature" (ISL) Theory: What Might the Court Do?*, JUSTIA (Dec. 13, 2022), https://verdict.justia.com/2022 /12/13/post-argument-analysis-in-the-moore-v-harper-case-raising-the-so-called-independent-state-legislature-isl-theory-what-might-the-court-do [https://perma .cc/57H6-PN9E]

[78] *See id*.

[79] *See infra* Parts II.B.1, II.C.2.

II. DWINDLING PROTECTIONS AND EMERGING THREATS

If the Court embraces the ISL theory, the effects could be devastating for both voters and election administrators alike.[80] Taken to its logical extreme, any election decision made by a state body or actor, such as an independent redistricting commission, would be invalid.[81] This would sow chaos and confusion in election administration, as longstanding election practices would seemingly no longer be enforceable.[82] A holding that supports the theory could invalidate all state laws and voter-passed constitutional provisions that regulate federal elections.[83]

Under the ISL theory, state legislatures would be constitutionally prohibited from delegating authority to other state actors to produce election rules and regulations, resulting in inflexibility during emergencies and times of crisis.[84] For instance, during the COVID-19 pandemic, a Kentucky law allowed the governor and secretary of state to alter the manner of elections because of the state of emergency.[85] Such actions may be disallowed in future emergencies if the Court embraces the theory.[86] Simply put, the theory would be disruptive, leading to uncertainty in election administration.[87]

State constitutions establish state legislatures, and seemingly, legislatures are bound by state constitutions.[88] Thus, the theory presents questions about prospective outcomes if a state legislature defies a constitution that embodies strong voting rights protections.[89] A full embrace, or strong version, of the ISL theory, would change longstanding practices and give state legislatures unfettered powers over the franchise.[90]

First, Part II.A discusses the role that state courts have played in protecting vulnerable voters from harmful legislative

---

[80] *See* Joshua Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL OF RTS. J. 59, 84 (2021).
[81] *See id*.
[82] *See id. See also* Morley, *supra* note 8, at 6 (noting that other approaches to implementing the theory are less extreme). For instance, Professor Morley contends that courts could allow for state constitutions to define what processes and entities are considered the "legislature" for election related rules. *Id.* at 91. Additionally, Morley reasons that courts could decide that state constitutions can play a role in federal elections but cannot impose substantive limitations on the state legislature. *Id.* at 24.
[83] *See* Douglas, *supra* note 80, at 84.
[84] *See id*.
[85] *See id*. (citing KY. REV. STAT. ANN. § 39A.100(l) (West 2021)).
[86] *See id*. at 84.
[87] *See id*. at 83.
[88] *See id*.
[89] *See id*.
[90] *See supra* Part II.

actions. Part II.B then examines two important cases from the Supreme Court that have dampened the impact of the VRA. Lastly, Part III.C explores this impact and what could be next for the VRA in future decisions.

A. Voter Protections at the State Level

As federal voting protections dwindle in the twenty-first century, states play an increasingly significant role in preventing voter suppression, racial gerrymandering, and other voting infringements. States, through both their constitutions and courts, work to safeguard the franchise from bad-faith state actors.[91] State constitutions often provide greater protections for individual rights than the U.S. Constitution.[92] Accordingly, voting rights advocates have worked on adding protections to state constitutions, such as affirmatively establishing the right to vote.[93]

The Florida Constitution, for instance, prohibits partisan gerrymandering.[94] Other state constitutions, such as Arizona and California, transfer redistricting authority to independent commissions.[95] And state courts in Pennsylvania and North Carolina have interpreted their constitutional provisions to prohibit partisan gerrymandering.[96] While state constitutions and state courts currently protect citizens from anti-voter laws, the ISL theory could eliminate these protections and allow for free rein by partisan state legislatures and, in some interpretations, rogue governors.[97]

The theory's adoption would be a drastic change, affecting the most vulnerable and disadvantaged voter populations. State courts have played a critical role in ensuring that state lawmakers do

---

[91] *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions . . . are a font of individual liberties, their protections often extending required by the Supreme Court's interpretation of federal law.").

[92] *See id.* at 491, 495; Morley, *supra* note 8, at 6.

[93] *See* Morley, *supra* note 8, at 6–8.

[94] *See id*. at 7.

[95] *See id*. at 8 n.13.

[96] *See id*.

[97] Though the enactment of the Electoral Count Reform and Presidential Transition Act ("ECRA") in December 2022 may address the "rogue governor problem." *Independent State Legislature Theory*, FORDHAM L. VOTING RIGHTS & DEMOCRACY F., https://fordhamdemocracyproject.com/independent-state-legislature-theory [https://perma.cc/8YC6-ZKC2] (last visited Mar. 20, 2023) (noting that the ECRA identifies "a single executive official to issue and transmit the 'certificate of ascertainment' of electors . . . and prohibits that official from certifying 'the wrong candidate' since the outcome would 'not be consistent with state election law in place' on Election Day.").

not disadvantage these voters.[98] During the 2021 redistricting cycle, for example, state courts protected voters from unfair redistricting maps and other voter suppression methods.[99] Indeed, the supreme courts of North Carolina, Wisconsin, New York, Kansas, and Ohio invalidated gerrymandered maps and legislation that infringed on the right to vote.[100] State courts have, of course, also protected voters outside the redistricting context.[101]

Ultimately, with state courts and state constitutions playing such a pivotal role in voting rights protections, the ISL theory could hinder these backstops from ensuring that partisan state lawmakers do not unfairly impact voting practices and procedures.

B. The Supreme Court's Erosion of the Voting Rights Act

In the words of Justice Kagan, the U.S. Supreme Court has treated "no statute worse" in recent years than the VRA.[102] Soon, the VRA may no longer be a source of relief for voters. In *Shelby County v. Holder*,[103] the Court invalidated Section 4's preclearance formula, which mandated that certain jurisdictions with histories of racial discrimination in voting receive preclearance from the U.S. Department of Justice ("DOJ") before making changes to their election laws.[104] And in 2021, the Court's ruling in *Brnovich v. Democratic National Committee*[105] further narrowed the VRA's reach.[106] Each decision is discussed in turn.

---

[98] *See* Michael Macagnone, *State Courts Continue Redrawing Maps, as Supreme Court Backs Off*, ROLL CALL (Feb. 2, 2022, 1:01 PM), https://rollcall.com/2022/02/10/state-courts-continue-redrawing-maps-as-supreme-court-backs-off [https://perma.cc/2NMU-RXP5].

[99] *See id*.

[100] *See id*.

[101] *See N.H. Supreme Court Strikes Down Voting Law as Unconstitutional*, N.H. PUB. RADIO (July 2, 2021, 12:09 PM), https://www.nhpr.org/nh-news/2021-07-02/n-h-supreme-court-strikes-down-voting-law-as-unconstitutional [https://perma.cc/3YW3-SJ4M]. For example, the New Hampshire Supreme Court invalidated a law passed by the legislature that would require new residents to show proof of residency before they could cast a ballot. *See* N.H. Democratic Party v. Secretary of State, 174 N.H. 312, 332 (2021). Ultimately, the New Hampshire Supreme Court struck down the law, reasoning that the law proved to be excessively burdensome to voters and failed to provide a precise governmental interest. *See id.*

[102] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting).

[103] 570 U.S. 529 (2013).

[104] *See id.* at 557; Erwin Chemerinsky, *Making it Harder to Challenge Election Districting*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 13, 16–17 (2022).

[105] 141 S. Ct. 2321 (2021).

[106] *See* Chemerinsky, *supra* note 104, at 17 (noting that the Court's decision in *Brnovich* "made it much harder to use Section 2 of the VRA to challenge racially discriminatory electoral processes.").

1. *Shelby County v. Holder*

The VRA has faced several court challenges throughout its lifespan, but remained largely intact for almost fifty years.[107] In 2013, however, in a five-to-four ruling, the Court held that Section 4's preclearance formula was unconstitutional.[108] The *Shelby County* Court took issue with the age of the formula, which was devised in 1965, despite the Nation changing "dramatically" since that era.[109] The Court viewed the preclearance requirements as "extraordinary" and "unprecedented," and expressed dismay that the VRA's requirements had not eased after the racial progress made since the VRA's passage.[110]

Notably, the *Shelby County* Court stated that its decision "in no way affects the permanent, nationwide ban on racial discrimination in voting found in [Section] 2."[111] Eight years later, however, the *Brnovich* Court limited Section 2's reach.[112]

2. *Brnovich v. Democratic National Committee*

In *Brnovich*, the Court diminished the power of Section 2 of the VRA by making it harder to challenge discriminatory voting laws.[113] *Brnovich* involved a challenge to voting restrictions enacted by the Arizona state legislature after the *Shelby County* decision.[114] The restrictions prohibited voters from voting in a different precinct than their own, and prohibited the collection of mail-in ballots by anyone other than an election official, mail carrier, or a voter's family member, household member, or caregiver.[115]

The plaintiffs claimed that Arizona's invalidation of ballots cast in the wrong precinct and its ballot-collection restrictions adversely impacted Native American, Hispanic, and Black

---

[107] *Shelby Cnty.*, 570 U.S. at 540.
[108] *See id.* at 557.
[109] *Id.* ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").
[110] *Id.* The DOJ, who were the Respondent-Defendants, argued that part of the success of Section 5 of the VRA was its deterrent effect. *See id.* at 550. Section 5 required jurisdictions with a history of racial discrimination in voting to get preclearance from the DOJ before altering voting practices and procedures. *See* Chemerinsky, *supra* note 104, at 17. But the Court disagreed with this assertion, reasoning that it would render Section 5 unreviewable by the courts entirely. *See Shelby Cnty.*, 570 U.S. at 550.
[111] *Shelby Cnty.*, 570 U.S. at 557.
[112] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2330 (2021).
[113] *See id.*
[114] *See id.* at 2334.
[115] *See id.*

citizens.[116] But the *Brnovich* Court downplayed the impact of these restrictions and interpreted Section 2 in a way that could allow state actors to avoid scrutiny.[117] The *Brnovich* majority agreed with the lower court's finding that the restrictions were facially neutral and only imposed burdens that one would typically associate with voting.[118]

For voting rights advocates, the *Shelby County* and *Brnovich* decisions tell an ominous tale of the Court's views on the right to vote and the troubles on the horizon.

C. Signals from the High Court

In *Shelby County*, the majority pointed to the racial progress made since the VRA's passage as a means to say that Section 4's coverage formula was no longer necessary.[119] Specifically, the Court assumed that the attitudes around minority voting had changed for those in charge of creating electoral practices and procedures.[120] Read charitably, however, the majority misunderstood the willingness of some states to find facially neutral methods to make it more difficult for non-white communities to vote while maintaining a sense of deniability.[121]

The effect of the *Shelby County* decision was felt instantly: several states acted quickly to enact laws that would disenfranchise certain voters.[122] Chief Justice Roberts justified gutting Section 5 because Black voter turnout exceeded white voter turnout in several preclearance states during the 2012 presidential election.[123] Ironically, since the *Shelby County* ruling, this is no longer the case

---

[116] *See id.*
[117] *See id.*
[118] *See id.* at 2335.
[119] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 547 (2013).
[120] See *id.* at 582 (Ginsberg, J., dissenting).
[121] *See id.* at 573; *The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/7QU7-8A8N].
[122] *See The Effects of* Shelby County v. Holder, *supra* note 121 (noting three previously covered states began planning for and enforcing photo identification laws within hours of the ruling).
[123] *See Shelby Cnty.*, 570 U.S. at 534. For example, in the previously covered states of Louisiana, Georgia, Alabama, and South Carolina, Black voter turnout ranged from one to six percent higher than white voters. *See* Kevin Morris et al., *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Aug. 20, 2021), https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights [https://perma.cc/H44J-EPPM].

in most of those jurisdictions.[124] While voter turnout, of course, depends on a myriad of factors, the trends that Chief Justice Roberts used to justify the decision have rapidly changed, pointing to the prematurity of the decision and the incorrect assumptions made by the *Shelby County* majority.

In *Shelby County*, the Court alluded to an updated formula necessary to enforce Section 5's preclearance requirement.[125] Congress should honor that request to restore this pivotal aspect of the VRA, as states have demonstrated that such oversight is required to protect voters.[126] It is unclear, however, whether the Court would uphold an updated formula. Indeed, from the Court's recent opinions, opponents may reasonably assume that the Court's view—that the Nation has "dramatically" changed—fundamentally undermines the need for the VRA.[127]

Additionally, the scheme outlined by the *Brnovich* Court will likely be stretched to its extremes, as the Court effectively provided a shield for states to implement discriminatory voting laws.[128] Based on the considerations laid out by the majority, it is foreseeable that some states could enact laws that would have a disparate impact on minority voters—yet those laws would be upheld as long as the effects appear insignificant between white and non-white voters.[129] But as Justice Kagan mentions in her *Brnovich* dissent, elections in many states are incredibly close, and the seemingly small disparate impacts could be a deciding factor in electoral outcomes.[130] Still, it appears that the Court would only find that a law violates Section 2 if, with animus, it explicitly targeted minority voters.[131] The leeway *Brnovich* gives the states regarding Section 2 will be enough to sway elections and disenfranchise voters who deserve the ability to exercise their right to vote without facing extreme difficulty.[132]

---

[124] *See* Morris et al., *supra* note 123 ("[T]he white-Black turnout gap in these states reopened in subsequent years, and by 2020, white turnout exceeded Black turnout in five of the six states.").
[125] *See Shelby Cnty.*, 570 U.S. at 550–51.
[126] *See The Effects of* Shelby County v. Holder, *supra* note 121.
[127] *Shelby Cnty.*, 570 U.S. at 547.
[128] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338 (2021).
[129] *See id.*
[130] *See id.* at 2367 (Kagan, J., dissenting).
[131] *See* Brnovich*: A Significant Blow to Our Freedom to Vote*, LEAGUE OF WOMEN VOTERS (Sept. 2, 2021), https://www.lwv.org/blog/brnovich-significant-blow-our-freedom-vote [https://perma.cc/WF7R-ET5Q].
[132] *See supra* text accompanying notes 128–131; Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse than People Think*, THE ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330 [https://perma.cc/H8MT-784Y].

The *Brnovich* Court signaled that federal courts would not be a part of the fight against voter suppression measures seen prevalently since *Shelby County*.[133] In its current Term, the Supreme Court has another opportunity to weaken the VRA in *Merrill v. Milligan*.[134] This time in the redistricting context, the Court will again have a chance to reevaluate how congressional maps can be drawn under the VRA.[135] But the Court already provided a signal in an earlier ruling in *Merrill* in February 2022.[136] Specifically, the Court stayed a three-judge district court order—which included two judges appointed by former President Trump—that the state redraw its congressional districts because its original map violated the VRA.[137] The Court invoked the "*Purcell* principle"[138] in its stay, "even though the first primary elections were still months away."[139] As a result, in a five-to-four ruling, the Court's stay allowed the "discriminatory Alabama map to be used in the 2022 elections."[140]

Given the trend from other recent VRA cases, the statute could be on its last leg.[141] States know this too, which is arguably why several states, such as Georgia, Oklahoma, and Florida, have

---

[133] *See Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021 [https://perma.cc/7ZVL-6VKZ].

[134] No. 21-1086 (U.S. argued Oct. 4, 2022). *See also* Merrill v. Milligan, BRENNAN CTR. FOR JUST. (July 18, 2022), https://www.brennancenter.org/our-work/court-cases/merrill-v-milligan [https://perma.cc/2DLB-XXWH]. In *Merrill*, a group of Black voters and organizations challenged Alabama's newly passed congressional map. *Id.* The federal district court ruled in their favor, holding that the map violated Section 2 of the VRA and ordered the Alabama legislatures to create a map that would include more representation for Black Alabamans. *Id.*

[135] No. 21-1086 (U.S. argued Oct. 4, 2022).

[136] 142 S. Ct. 879 (2022).

[137] *See* Singleton v. Merrill, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022), *cert. granted sub nom.* Merrill v. Milligan, 142 S. Ct. 879 (2022).

[138] Commonly referred to as the "*Purcell* principle," the principle contends that "federal courts should not issue changes to state and local election practices just before an election." Chemerinsky, *supra* note 104, at 14. Justice Kavanaugh, joined by Justice Alito, argued that the *Purcell* principle compelled the Court to grant the stay: "It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and redo a State's election laws in the period close to an election." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays).

[139] Shapiro, *supra* note 5, at 198 ("[T]he scope of *Purcell* is deeply unclear, and the Justices invoking it do not appear to be applying it evenhandedly.").

[140] Chemerinsky, *supra* note 104, at 13.

[141] *See* Caroline Sullivan, *Three Takeaways:* Merrill v. Milligan *Oral Arguments*, DEMOCRACY DOCKET (Oct. 5, 2022), https://www.democracydocket.com/analysis/three-takeaways-merrill-v-milligan-oral-arguments [https://perma.cc/5363-6LME].

enacted laws that voting rights organizations argue have a disparate impact on minority voters.[142]

Finally, in early December 2022, the Court heard oral arguments in *Moore*, a case that possibly[143] allows the Court to rule on the merits of the ISL theory.[144] While many Justices appeared to question the validity of the theory in its most extreme form, a more narrow embrace of the theory is possible.[145] But while some would find solace in a narrow ruling, voting rights advocates and opponents of the ISL theory argue that any endorsement threatens democracy.[146]

A compromise position would still empower state legislatures to disenfranchise voters and remove power from other state branches meant to serve as a check.[147] The theory's proponents argue that a narrow approach would preserve "procedural" interventions like a governor's authority to veto a bill or voters' power to reject legislation by referendum.[148] Proponents also contend that state courts would be allowed to enforce a "specific" constitutional provision, but must leave "general" or "open-ended" provisions up to the legislature.[149] Critics, however, believe that these two narrower approaches would be difficult to administer and leave the door open for voter suppression efforts from state legislatures.[150] But as the Court's February 2022 *Merrill* stay demonstrates, even a maximalist ISL theory is not required for the Court to "leap into action every time it disagrees with a state court."[151]

In *Shelby County* and *Brnovich*, the Supreme Court has weakened the VRA, leaving some voters increasingly vulnerable to the effects of the ISL theory. Voting is the crux of democracy, so drastic measures should be considered to protect it. Voting rights proponents should advocate for strong legislative solutions and

---

[142] *See Voting Laws Roundup: October 2021*, *supra* note 133 (explaining the legislation that states have enacted that increases the risks of partisan interference in elections and either imposes or increases the likelihood of election-related penalties).

[143] As discussed in the Introduction, as of March 2023, the U.S. Supreme Court may moot the case. *See supra* note 11 and accompanying text.

[144] *See* Sneed & de Vogue, *supra* note 16.

[145] *See id.*

[146] *See* Eliza Sweren-Becker & Ethan Herenstein, *There Is No 'Lite Version' of the 'Independent State Legislature Theory,'* BRENNAN CTR. FOR JUST. (Dec. 6, 2022), https://www.brennancenter.org/our-work/analysis-opinion/there-no-lite-version-independent-state-legislature-theory [https://perma.cc/57DZ-J98R].

[147] *See id.*

[148] *Id.*

[149] *Id.*

[150] *See id.*

[151] Shapiro, *supra* note 5, at 198.

work to garner support around amending the Constitution to affirmatively grant the right to vote to all Americans.

III. POSSIBLE SOLUTIONS TO PROTECT VOTERS

Given all the attacks on voting rights, advocates and lawmakers must act boldly to protect vulnerable voters from losing their ability to participate in democracy. Historically, Americans have mobilized behind several movements to grant the right to vote to women and minorities.[152] Today, we may be approaching another instance of mass mobilization around voting rights. Part III details two possible solutions to organize such mobilization, including passing federal legislation and amending the Constitution to affirmatively enshrine the right to vote.

A. Federal Legislation

After the enactment of the VRA in 1964, the United States benefited from robust voter protections against bad-faith state actors. Once again, federal legislation must be enacted to expand access to the ballot box and get ahead of bad-faith partisan state actors.[153]

The first legislation introduced in the 117th Congress included several pro-voting measures, including implementing automatic voter registration ("AVR"),[154] expanding early voting,[155] and creating independent redistricting commissions.[156] The For the People Act of 2021 ("H.R. 1"), took a holistic approach to overhaul the Nation's election system.[157] Proposed as a remedy to the rampant voter suppression tactics seen throughout the country,[158]

---

[152] *See* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U.L. REV. 1549, 1550–53 (2020); Paula Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, 20 GEO. J. L. & PUB. POL'Y 91, 107 (2022).

[153] *See generally* Douglas, *supra* note 80, at 85.

[154] H.R. 1, 117th Cong., §§ 1011–1021 (2021). For a brief analysis on establishing federal automatic voter registration, see Adam Drake, *Increasing Voter Investments in American Democracy: Proposals for Reform*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 18, 21–23 (2022).

[155] H.R. 1, § 1611.

[156] *Id.* §§ 2411–2415.

[157] *See generally* H.R. 1; *Annotated Guide to the For the People Act of 2021*, BRENNAN CTR. FOR JUST. (Mar. 18, 2021), https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021 [https://perma.cc/2R86-LT32].

[158] In 2021, for example, at least nineteen states passed thirty-four laws "restricting access to voting." *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021 [https://perma.cc/

H.R. 1 aimed to reform and nationalize election processes and procedures.[159] Importantly, H.R. 1 would have, in part, modernized our Nation's election infrastructure, restored the VRA to its full strength, overhauled federal ethics rules, and reduced partisan gerrymandering.[160]

H.R. 1 would have implemented AVR, putting the United States in line with comparable democracies.[161] With only two-thirds of the voting age population currently registered, H.R. 1 could have driven up voter turnout—especially in states with stringent voter identification laws.[162] For example, Oregon was the first state to implement some form of AVR in 2016.[163] In the 2022 midterm election, Oregon had the highest voter turnout rate in the Nation, with 61.5 percent of all eligible citizens casting a ballot.[164] H.R. 1 would have greatly protected voters and democracy in many regards, but the bill's expansiveness made it challenging to garner the requisite support to move it through the legislative process.[165]

After failing to pass H.R. 1, Congress considered the narrower John Lewis Voting Rights Advancement Act ("JL VRAA") to reinvigorate Section 5 of the VRA by modernizing the formula as the *Shelby County* Court deemed necessary.[166] The updated formula proposed through the JL VRAA would have held states and political subdivisions accountable for voting rights violations during the previous twenty-five calendar years.[167] This

---

9QM5-AYFY]. In 2022, at least eight states enacted eleven "restrictive voting laws" and at least seven states enacted twelve "election interference laws." *Voting Laws Roundup: December 2022*, BRENNAN CTR. FOR JUST. (Feb. 1, 2023), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022 [https://perma.cc/Z2SW-DUEY].

[159] *See* Wendy R. Weiser et al., *Congress Must Pass the 'For the People Act,'* BRENNAN CTR. FOR JUST. (Mar. 18, 2021), https://www.brennancenter.org/our-work/policy-solutions/congress-must-pass-people-act [https://perma.cc/VUR2-7NXM].

[160] *See generally* H.R. 1.

[161] *See* Jon Schwarz, *The "For the People Act" Would Make the U.S. a Democracy*, THE INTERCEPT (Feb. 14, 2021, 8:00 AM), https://theintercept.com/2021/02/14/democracy-voting-campaign-finance-hr1 [https://perma.cc/2ZT5-Q5HD].

[162] *See id.*

[163] *See* OR. REV. STAT. § 247.017 (2017). *See also* Drake, *supra* note 154, at 21–23 (discussing the success of Oregon's AVR implementation).

[164] *See Oregon's Voter Turnout Led Nation in 2022 Election*, ASSOCIATED PRESS (Jan. 5, 2023), https://apnews.com/article/2022-midterm-elections-oregon-ca5859e8fb1ec5f0469fe747ff9ffa23 [https://perma.cc/5369-XCYD].

[165] *See* Marc Tracy, *By Choice and Circumstance, Democrats Put Voting Rights on the Ballot*, N.Y. TIMES (Aug 11, 2021), https://www.nytimes.com/2021/07/13/us/politics/democrats-for-the-people-act.html [https://perma.cc/HX8G-LB7P].

[166] H.R. 4, 117th Cong. (2021). *See also* Paige E. Richardson, *Preclearance and Politics: The Future of the Voting Rights Act*, 89 U. CIN. L. REV. 1089, 1100–02 (2021) (providing analysis of H.R. 4).

[167] H.R. 4, § 5; Richardson, *supra* note 166, at 1102.

scheme would have safeguarded the formula from attacks of antiquation by evaluating jurisdictions based on recent actions.[168] Additionally, the states and political subdivisions found to require preclearance would have only been subject to federal oversight for ten years—or until they could demonstrate that they no longer violated the statute.[169]

To evaluate the covered states and political subdivisions, the JL VRAA would have implemented several factors to consider, including changes to jurisdictional boundaries, voting locations, language accessibility, election methods, and other common strategies used to suppress voters.[170] The JL VRAA would have viewed the factors under a results or effects test, not an intent test, thus lowering the burden for the DOJ or plaintiffs to bring suit.[171]

The updated coverage formula would have also been applied to all fifty states ensuring that certain regions were not singled out.[172] This national approach addresses a major issue highlighted by the *Shelby County* majority and would have undercut future challenges to the statute's constitutionality.[173] Turning the JL VRAA into law would be a significant step forward in returning the voting landscape to the pre-*Shelby County* era—where voters were more protected from instances of vote dilution and vote denial.[174]

In the 118th Congress, introducing and enacting either H.R. 1 or the JL VRAA would turn the tide in favor of vulnerable voters. But voting rights proponents worry that federal legislation would not be enough on its own given the Court's recent record.[175] Despite scholarly arguments that Congress has solid constitutional authority to regulate elections under the Elections Clause[176]—along with the Fourteenth and Fifteenth Amendments[177]—the Court's likely acceptance of at least some version of the ISL theory could quickly diminish the positive effects of any federal legislation.[178]

---

[168] H.R. 4, § 5.
[169] *Id.*
[170] *Id.* § 6.
[171] *Id. See also* Richardson, *supra* note 166, at 1102.
[172] Additionally, the updated coverage formula would have protected voters in states that were not deemed problematic when the original VRA passed. *See* Kaitlin Barnes, *On the Road Again: How* Brnovich *Steers States Towards Increased Voter Restrictions*, 81 MD. L. REV. 1265, 1298 (2022).
[173] *See id.* at 1299.
[174] *See The John Lewis Voting Rights Advancement Act*, BRENNAN CTR. FOR JUST. (Dec. 22, 2021), https://www.brennancenter.org/our-work/research-reports/john-lewis-voting-rights-advancement-act [https://perma.cc/M2NP-GAPS].
[175] *See* Douglas, *supra* note 80, at 86.
[176] *See id.*; Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 392 (2019).
[177] *See* Douglas, *supra* note 80, at 86. *See generally* Nicholas Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1 (2021).
[178] *See* Douglas, *supra* note 80, at 86.

B. Amending the U.S. Constitution

Should the Court embrace the ISL theory, voting rights proponents should turn their efforts to support a constitutional amendment that affirmatively grants the right to vote in presidential elections.[179] As discussed in Part I, the U.S. Constitution does not explicitly grant the right to vote; instead, voting is only mentioned in the negatives: states shall not, for example, abridge the right to vote because of race[180] or sex.[181] While several amendments address voting-related discrimination, these amendments are too weak to meet our Nation's current reality—the new risks of election subversion and ever-increasing voter suppression legislation.[182] As scholars continue to debate the purpose and scope of the Fifteenth and Nineteenth Amendments, it is clear that neither has been persuasive to courts concerning the protection of vulnerable communities.[183]

The United States is an outlier compared to most other democracies, which affirmatively grant the right to vote in their constitutions.[184] This fact, coupled with recent voting rights jurisprudence, demonstrates that the Constitution does not sufficiently protect voters.[185] Given the impending threats, our Nation is at a timely juncture to renew efforts to amend the Constitution to affirmatively provide the right to vote.[186] A

---

[179] *See id.*

[180] U.S. CONST. amend. XV.

[181] U.S. CONST. amend. XIX.

[182] *See generally* Crum, *supra* note 152, at 1551–53; Monopoli, *supra* note 152, at 107; Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, HARV. L. REV. F. 265, 265–66 (2022) (categorizing the potential mechanism by which election losers may subvert elections and providing legal and political solutions). *See also* Gilda Daniels, *Democracy's Destiny*, 109 CAL. L. REV. 1067, 1098–99 ("The frequency with which the right [to vote] is addressed and amended [in the Constitution] speaks to the need for an affirmative right to vote.").

[183] *See generally* Crum, *supra* note 152, at 1550–53; Monopoli, *supra* note 152, at 107.

[184] Indeed, over 135 countries affirmatively grant the right to vote to their citizens. *See* John Nichols, *Time for a 'Right to Vote' Constitutional Amendment*, THE NATION (Mar. 5, 2013), https://www.thenation.com/article/archive/time-right-vote-constitutional-amendment [https://perma.cc/9FZ8-N3L8].

[185] *See supra* Parts II.B.1, II.C.2. (discussing the rulings in *Shelby County* and *Brnovich*).

[186] In 2001, former U.S. Representative Jesse Jackson, Jr. introduced a right-to-vote amendment that would have, in part, affirmatively granted the right to vote. Before his exit from Congress, Representative Jackson introduced the amendment in six consecutive congressional sessions. *See, e.g.*, H.R.J. Res. 28, 110th Cong. (2008). In two congressional sessions, it had over fifty co-sponsors. *See* MOLLY

constitutional amendment is essential to protect voters from partisan actors seeking to quash certain groups from voting.[187]

Following *Shelby County*, there has been some interest in Congress to advance such an amendment. In 2017, U.S. Representative Mark Pocan introduced an amendment affirmatively granting the right to vote to every citizen of legal voting age in any public election held in their jurisdiction.[188] U.S. Senators Richard Durbin and Elizabeth Warren introduced a similar amendment in the leadup to the 2020 presidential election that added to the Pocan amendment by inserting sections to expand the amendment's impact.[189] The Right-to-Vote Amendment ("RTV Amendment") would have affirmatively granted the right to vote and, importantly, provided more protections from bad-faith state actors working against equal access to the franchise.[190] Furthermore, the RTV Amendment would have ensured that any election practice or procedure that limits the franchise would be subject to the "strictest level" of judicial review.[191]

Notably, the RTV Amendment would have given Congress the power to enforce the amendment's provisions, opening the door for initiatives and programs outlined in H.R. 1.[192] Since many in the judiciary adhere to "textualism" and "originalism,"[193] more precise and contemporary protections in the Constitution could alter the trajectory of the current jurisprudence around voting rights. Although other constitutional amendments were previously introduced, the RTV Amendment's proposed language goes the furthest and can provide for the greatest protection.[194]

HAILEY, A CONSTITUTIONAL RIGHT TO VOTE: THE PROMISE OF HOUSE JOINT RESOLUTION, FAIRVOTE 16–17 (2013), https://d3n8a8pro7vhmx.cloudfront.net/fairvote/pages/139/attachments/original/1450455166/RTV_Policy_Brief_Mollie_Hailey.pdf?1450455166 [https://perma.cc/2BJX-58SG].

[187] *See* Douglas, *supra* note 80, at 87.

[188] H.R.J. Res. 74, 115th Cong. (2017).

[189] S.J. Res. 75, 116th Cong. (2020).

[190] Press Release, Dick Durbin, U.S. Senate, *Durbin Introduces Joint Resolution to Enshrine Right to Vote in U.S. Constitution* (Aug. 5, 2020), https://www.durbin.senate.gov/newsroom/press-releases/durbin-introduces-joint-resolution-to-enshrine-right-to-vote-in-us-constitution [https://perma.cc/34ZY-G8R4]. Although the Court has ruled the right to vote as fundamental, it does not apply the highest level of scrutiny to cases. *See* Daniels, *supra* note 182, at 1101. Rather than applying strict scrutiny, the Court employs a balancing test commonly known as the *Anderson-Burdick* test. *See id.* (citing Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992)).

[191] *See* Daniels, *supra* note 182, at 1102.

[192] *Id.*

[193] *See* Douglas, *supra* note 80, at 88.

[194] In the same session, a House Resolution was introduced that proposed an amendment that would insert the right to vote in presidential elections for residents of all United States territories. *See* H.R.J. Res. 24, 116th Cong. (2020).

At the time of its introduction, proponents of the RTV Amendment argued that it defended against voter suppression, thus ensuring a more representative government.[195] Adding language to the Constitution that affirmatively grants the right to vote could mend a decentralized election system fueled by inequality to the detriment of voters of color.[196] A proposal similar to the RTV Amendment could lead to robust national standards that would minimize voters' vastly differing experiences in the over 10,000 voting jurisdictions across our Nation.[197]

Amending the Constitution in a time with such extreme polarization seems farfetched, but given its importance, democracy protectors must think big.[198] After all, passing the Nineteenth Amendment granting women the right to vote took generations.[199] Creating a movement in support of an amendment like the RTV Amendment would push Americans to view our Nation's electoral system as more equal and less polarizing.[200] Although a future RTV Amendment ratification is unlikely, the movement and messaging around the effort could force public officials at all levels to achieve its goals.[201] While the organizing effort around the Equal Rights Amendment fell short in the 1970s, the effect led to state and federal laws geared toward women's social, political, and economic advancement.[202] The same could be true of a similar effort to protect voters.[203] For instance, the movement could lead to more statewide voting rights acts[204] and state constitutional amendments.[205]

---

[195] *See* Richard L. Hasen, Opinion, *Bring on the 28th Amendment*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/2020/06/29/opinion/sunday/voting-rights.html [https://perma.cc/JGK9-5V4X].

[196] *See id.*; Daniels, *supra* note 182, at 1098–1104.

[197] *See Right to Vote Amendment*, FAIRVOTE, https://fairvote.org/archives/reform_library-right_to_vote_amendment [https://perma.cc/MJE4-CWRX] (last visited Mar. 20, 2023).

[198] *See* Hasen, *supra* note 195.

[199] *See id.*

[200] *See id.*

[201] *See generally* Jonathan Soros, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY: J. IDEAS (2013), https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote [https://perma.cc/7MJL-RF9D] (last visited Mar. 20, 2023).

[202] *See id.*

[203] *See id.*

[204] New York passed its own John R. Lewis Voting Rights Act in June 2022 after the federal analog stalled. *See* Maysoon Khan, *New York Passes Landmark Voting Rights Legislation*, ASSOCIATED PRESS (June 20, 2022), https://apnews.com/article/voting-rights-new-york-congress-3817014bdb762ce24feba4cbc89728f0 [https://perma.cc/2PCA-43DC].

[205] In November 2022, Michigan voters passed a referendum that altered the state constitution to include a "nine-day window for early in-person voting." Carol

The litigation during and after the 2020 general election—and the subsequent tests on the Nation's democratic institutions—raised awareness about the unequal voting systems in the United States. Leaders must cultivate these discussions to spark a movement that motivates people to rally around a new constitutional amendment that would promote fairness and equality in federal elections and ensure the right to vote for every citizen.

CONCLUSION

Without the protection of the VRA, the ISL theory poses an existential threat to voters—especially those in marginalized communities. If no action is taken through federal legislation or a constitutional amendment, voters will have little recourse to defend their access to the ballot box. To change the trajectory of the battle for voting rights, federal lawmakers must take action to revive the VRA.

Furthermore, leaders must act to begin the national conversation around the ratification of a constitutional amendment that would ensure that every eligible citizen has the right to vote—without the risk of interference or suppression from partisan state actors. While amending the Constitution is a bold and challenging task, it may prove to be essential to ensure that the United States continues to have a government of, for, and by the people.

Thompson, *Proposal 2: Expansion of Voting Rights in Michigan Passes*, THE DET. NEWS (Nov. 8, 2022, 9:29 PM), https://www.detroitnews.com/story/news/politics/michigan/2022/11/09/expansion-of-voting-rights-gains-early-favor/69614461007 [https://perma.cc/A8DH-NC6X].