In Electoral Disputes, State Justices Are Less Reliable GOP Allies than the U.S. Supreme Court—That's the "Problem" the Independent State Legislature Claim Hopes to Solve

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Scholars have identified serious drawbacks to the independent state legislature (ISL) claim, which precludes state-court review of election laws, thus preventing state guarantees like "free and fair elections" from being enforced. Considering its flaws, we ask why ISL would be pursued so fervently and why the Supreme Court, in *Moore v. Harper*, adopted a version of it. Examining data that compare election-law outcomes in federal and state supreme courts, we found that state supreme court justices, even if Republican, are not reliable supporters of the GOP electoral agenda. The Roberts court, by contrast, has voted in the GOP-supported direction in most election-law cases it has decided. This, we argue, is why ISL is promoted so vigorously: it takes electoral disputes—such as who can vote, what the rules for counting are, and such—out of the hands of state courts and places them squarely into the hands of the Supreme Court, a reliable partisan ally.

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With the appointment of Amy Coney Barrett in 2020, the Supreme Court has, for the first time in history, a majority of

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self-described originalist justices, three of whom were nominated by a president who failed to win the majority of votes cast and confirmed by a portion of the Senate representing a minority of the national population. While ours has never been a system driven by pure majority rule, there have always been paths through which the public can press its values on the decision-making institutions that govern it, whether by voting, by organizing social movements, or by forming coalitions to persuade legislators. In the current moment, by contrast, a confluence of four factors puts the nation on a collision course with its own democratic intuitions: judicial insistence upon imposing 18th-century values, no matter how much they diverge from current social mores; systematic denial to national majorities of the opportunity to determine political outcomes by virtue of increasingly robust structural impediments such as gerrymandering, the Electoral College, and equal suffrage in the Senate (Gould and Pozen 2022); entrenched partisan polarization exacerbated by an increasingly partisan Supreme Court (Devins and Baum 2019; Hasen 2019); and the utter impossibility of constitutional amendment.

American democracy cannot be expected to sustain the immense pressure that this quartet of stressors places upon it. It is a pressure cooker with no release valve. We argue that, if the Court wishes to avoid constitutional crisis, it should begin to incorporate into its interpretations of structural provisions some consideration of the needs and commitments of democracy, and not rigidly pay obeisance to contested interpretations of text or original understanding that seem inextricable from partisan bias and oblivious to the realities of modern-day governance. The judicial supremacy that the justices increasingly promote is a real threat to self-government both in appearance and in reality.

As just one example, we study a case that could become a major factor determining the success or failure of democracy itself in the 2024 election: the so-called "independent state legislature" (ISL) claim. As we discuss in detail below, the ISL claim suggests that state legislators—not state courts or other state government officials—have the final say over the legality of the rules state legislatures set for the conduct of elections. The ISL claim therefore authorizes federal courts to overturn state court rulings regarding state election laws. The ISL claim has given rise to a great deal of concern among constitutional scholars (e.g., Krass 2022; Litman and Shaw 2022; Smith 2022), precisely because its serious implications for broad structural values, like federalism and election integrity, are not among the kinds of questions the current Supreme Court has shown a willingness to consider before issuing sweeping interpretations of the Constitution's text. Though the Supreme Court did not fully embrace the ISL claim in *Moore v. Harper* (2023), it did not completely repudiate it either, leaving open the possibility for the Court to play an outsized role in congressional and presidential elections to come—at the Court's discretion.

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In what follows, we describe the most compelling concerns that have been voiced by critics of the ISL claim and add our own. To these doctrinal arguments, we provide empirical evidence regarding the likely behaviors of state and federal courts. Drawing on electoral cases in the U.S. Supreme Court Database and an original data set of state election-law disputes, we demonstrate that state supreme courts have been far less predictable in their decisions than has the U.S. Supreme Court, a pattern that might explain why the ISL claim has gained traction at this historical moment. We conclude that, in addition to all of the compelling theoretical arguments that have been leveled against ISL, there is also a powerful pragmatic one: the ISL—even the version adopted by the Court in *Moore*—would place the determination of contested issues about an election's procedures not in the hands of the people, not in the hands of the states, not even in the hands of Congress—but in the grasping clutches of the federal courts, controlled by the U.S. Supreme Court, which is deciding election law cases in a more partisan manner than ever before.[1] Post-*Moore*, in which the justices affirmed a circumscribed role for state courts in reviewing state legislatures' election-related policies,[2] this pattern is more important than ever.

The Doctrinal Argument

The ISL claim rests on two clauses in the U.S. Constitution, one involving congressional elections and the other presidential elections. Article I (§4.1) provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*. . . ." Article II (§ 1.2) says that "Each State shall appoint" electors to the Electoral College "in such Manner *as the Legislature thereof may direct*. . . ." Proponents of ISL argue that the plain text of those two clauses entitles state legislatures *alone* to make the rules for federal elections and precludes state courts from even ruling on the lawfulness of the legislative actions under the state's own constitution or laws. Accordingly, the argument goes, if the state courts rule on the legality, under state law, of election laws passed by a legislature, then federal courts are authorized to step in and override those state court rulings in the name of the federal constitution.

The seeds of this idea first surfaced in the 2000 case of *Bush v. Gore*. At that time, Justice Kennedy, in oral argument, was quick to raise the alarm about the danger of the ISL claim. "It seems to me essential to the republican theory of government that the constitutions of the United States and the states are the basic charter, and to say that the legislature of the state is unmoored from its own constitution and it can't use its courts . . . it seems to me a holding which has grave implications for our republican theory of government." When the decision in *Bush v. Gore* was issued, Justice Rehnquist wrote a concurring opinion, joined by Justices Scalia and Thomas, offering a slightly muted version. In his version of ISL, the "legislature" language in the Elections Clause meant that a state court's "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."

Justice Kennedy's word of caution matured into a flurry of structural constitutional concerns about the implications of the newly minted tactic, which, in its extreme version, precluded all state-court review of state legislation enacted under the Elections Clause (e.g., Amar and Amar 2022; Krass 2022; Shapiro 2022; Smith 2002, 2022; Weingartner 2023). Former Court of Appeals Judge Luttig (2022), no liberal, has warned that "such a doctrine would be antithetical to the Framers' intent, and to the text, fundamental design, and architecture of the Constitution." Many have demonstrated that the language of the constitutional provision does not require a reading that denies that state legislatures are creatures of state constitutions and must always be understood to act consistently with their own enabling documents (Amar and Amar 2022; Shapiro 2022).

The principal scholarly arguments against adoption of the ISL claim, as developed in the literature over the past year, are essentially three. First, scholars argued that it does violence to the text and history of Articles I and II. The public meaning of state "legislature" was well accepted at the founding as "an entity created and constrained by the state constitution" (Amar and Amar 2022, 19). Thus, an action by a state legislature in violation of its own constitutional limits would not have been considered to be truly an act of the legislature at all. Moreover, the Supreme Court long ago held that the "legislature" language of Article II still requires state legislative enactments to go through their normal legislative process in the state, which can include being subjected to gubernatorial veto (*Smiley v. Holm* 1932).

The second set of concerns centered around the chaos and unintelligibility that adoption of ISL would sow. States commonly pass time, place, and manner provisions governing both state and federal elections in one law. Indeed, many states issue single ballots listing candidates for both state and federal office. This result was apparently anticipated and lauded by some of the framers, including Hamilton, who referenced the convenience of simultaneous state and federal elections in Federalist No. 61 (Amar and Amar 2022). But, as one critic points out, states are not free to employ laws that violate their own constitutions, and yet, if a state law were to be so invalidated by the state courts, ISL would have that state law remain in effect for federal elections (Shapiro 2022). Thus, a single law governing a single election could be both valid and invalid at the same time. The upheaval of electoral rules and lack of accountability are evident in that situation.

The third major set of objections to the ISL claim involved its inconsistency with basic constitutional commitments to federalism.[3] If the Constitution had intended to depart from the basic rule that states oversee state law, one would think there would be a clear statement to that effect. State courts have consistently been viewed as the authoritative arbiters of state law, a principle that is reflected in the independent-and-adequate-state ground doctrine, which eschews U.S. Supreme Court review of judgments that rest on state-law grounds. Litman and Shaw (2022) demonstrate that the ISL upends that commitment even more dramatically than first meets the eye. Not only would it allow federal courts to intervene and supplant state courts in the interpretation of their own laws, but it could actually impose on states the Supreme Court's preferred (and

controversial) methodology as well. Litman and Shaw elaborate that ISL could require state courts to employ textualism when they interpret their own laws, even when the state is committed to other methodological practices; otherwise, a federal court might view their interpretation as a "significant departure" that justifies federal intervention.

To these weighty structural objections to the adoption of the ISL claim, we add one that is immanent in all of them and is our central concern here: the ISL (including *Moore*'s version) represents a significant expansion of the power of the U.S. Supreme Court over federal elections. It leaves to the Court the last word on election-affecting questions such as whether voters in a particular state will have their votes counted, will have access to early voting, will be able to vote by mail, or will be able to get assistance in the preparation of their ballot. Innumerable state-law claims such as those are at issue within the black box of the ISL and are all at risk of being definitively resolved by the U.S. Supreme Court. And, as two of us have shown in prior work, the current Court is the most power-hungry and partisan Court in modern history (Brown and Epstein 2023). Thus, we seek to add to the literature that we have summarized here by considering why the ISL has suddenly garnered so much interest from conservative donors (Stone 2022) and why a majority of justices in *Moore* showed openness to this interpretation of a 230-year-old text that had never, until the highly partisan debacle of the Bush–Gore election (*Bush v. Gore* 2000), given rise to any similar understanding (Howe 2022).

The "Rehnquist" version of the ISL claim, which had reared its head in the hurried and highly politically charged crucible of the 2000 Florida ballot count, clearly captured the interest of some of the current justices at oral argument in *Moore* in December 2022. Recall that the proponents of that version, while acknowledging that normally "comity and respect for state courts compel us to defer to the decisions of state courts on issues of state law," had argued, in *Bush v. Gore*, that the Constitution's use of the word "legislature" empowered the U.S. Supreme Court to step in and override a state court's ruling about the meaning of a state law if that ruling was deemed—by the federal court—to be a "significant departure." It turns out that the Bush briefing team urging the view that Article II of the Constitution precluded the Florida court from exercising jurisdiction—versions of which had been twice rejected by the Supreme Court[4]—included then-lawyers, now-Justices Brett Kavanaugh, John Roberts, and Amy Coney Barrett (Biskupic 2022).

Now, with the Court's decision in *Moore*, it is important to notice that that very trio of justices appear to have insisted on retaining some version of their brainchild as advocates 20 years earlier—even as they joined the liberal justices in rejecting the ISL claim as such. A significant discontinuity results: the six-person majority in *Moore* initially rejected, soundly, the arguments underlying the ISL claim by relying on historical understanding, precedent, and past practice. Thus, it confirmed, as the objectors to ISL had urged, that "when state legislatures prescribe the rules concerning federal elections, they remain subject to the ordinary exercise of state judicial review." At the same time, however, the Court tacked on a key qualification to that holding: that the state court's exercise of its

powers under the state constitution would present a federal question over which the Supreme Court could assert its authority if the state court "transgress[ed] the ordinary bounds of judicial review."

The constitutional basis for that retention of federal-question authority is not clearly articulated in the Court's opinion. "We have an obligation to ensure that state court interpretations of [state] law do not evade federal law," it stated. The federal law that it might evade, however, appears to be only the Elections Clause itself.[5] And it is unclear what limits the Court thinks the Elections Clause imposes. The Court elaborates only to say that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." What would such arrogation look like? Would it include a state court's use of some method of statutory interpretation other than the Court's favored textualism, as warned by Litman and Shaw (2022)? It is very hard to know, and the Court declined to offer any test or insight at all. *That leaves us with doctrine that says, in effect, that the Supreme Court will decide—in the heated context of a disputed election and with no prior guidelines—whether a state court has properly applied its own law.* It is difficult to imagine a larger hole through which a very large truck could be driven: *the Court will decide*.

So, while there are many sighs of relief that the Court did not accept the ISL in its full form, the compromise that it reached leaves our doctrinal concerns largely unallayed. There are also politically pragmatic reasons for disquiet, which we lay out below.

The Empirical Argument

As we have outlined, there are many problems with the ISL claim; why would anyone promote it, and why did the Court adopt it, in a modified form, in *Moore*? Our hypothesis is that Republicans are promoting the theory because it leads to policy results that Republicans favor. Put differently, the "independent state legislature theory" is not only "antithetical to . . . the text, fundamental design, and architecture of the Constitution" (Luttig 2022), it is part of a broader GOP strategy to gain and maintain political power by manipulating the judiciary and, more broadly, subverting the democratic process.

The logic is as follows. Confronted with various electoral challenges (especially a declining voter base), the GOP has sought to impose various barriers to the franchise and whittle away campaign-finance regulations (Hicks et al. 2015; Peretti 2020)—moves widely regarded as contributing to the "degradation of American democracy" (Klarman 2020; see also Manheim and Porter 2019). As a substantive matter, research shows that restricting access to the vote via photo ID laws, shorter early-voting periods, absentee ballot restrictions, and so forth, effectively suppresses turnout among core Democratic voters: the young, the less wealthy, and people of color (Bentele and O'Brien 2013; Brady and McNulty 2011; Fraga and Miller 2022). The anything-goes approach to campaign giving and spending, too, tends to have democracy-distorting effects, including *quid pro*

quo corruption and wealth-based inequities (Hasen 2004, Issacharoff 2010; for a review, see Dawood 2015). Finally, as a procedural matter, efforts to quash the vote and unleash money into campaigns could be seen as antithetical to representative democracy because both are wildly unpopular among the electorate.[6]

In the middle of the 20th century, the U.S. Supreme Court—the Warren Court—likely would have balked at these blatant efforts to damage democracy. By all accounts, the justices back then seemed to understand that the Court "is at the peak of its institutional legitimacy when it intervenes to bolster democracy," not degrade it (Klarman 2020, 178; see also Adelman 2019).

But that was then; this is now. Because the GOP has succeeded in its concerted effort to pack the U.S. Supreme Court with steadfast Republicans—including three architects of the ISL claim—the party could now reasonably expect the Court, under Chief Justice John Roberts, to be a dependable ally, all too willing to uphold barriers to the vote and invalidate campaign-finance regulations.

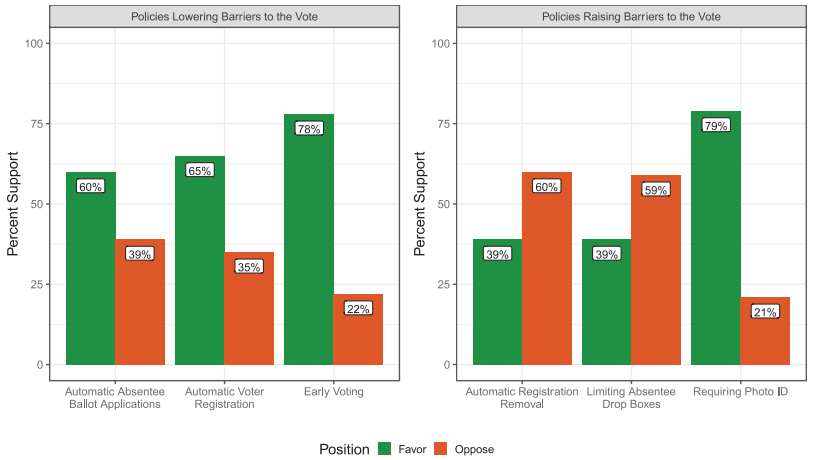
That would seem to be enough to ensure GOP success. But an obstacle remained: the state supreme courts. In many electoral matters they, not the federal courts, are supposed to have the final say. Unlike the U.S. Supreme Court, though, these courts may not be especially reliable GOP partners. Why not?

The most obvious answer is that Democrats have historically dominated the state courts. In Gibson and Nelson's (2021) extensive data set, consisting of 37,000 votes by state supreme court justices between 1990 and 2015 equality cases, 56 percent of the judges were Democrats and 44 percent Republicans. (During those same years, by contrast, Democratic appointees held at most only 44 percent of the seats on the U.S. Supreme Court.) Looking solely at a subset of the Gibson-Nelson data, labeled "election law," 58 percent of the votes were cast by Democratic justices and 42 percent by Republicans.[7]

It almost goes without saying that Democratic state justices would seem unlikely GOP partners in the party's quest to block the vote and flood money into campaigns with the goal of winning elections (Peretti 2020). What may be less obvious is that it is not only Democratic justices who are likely resisters of voting barriers and massive injections of money in campaigns; Republican state judges may be equally unwilling to go along. That is because many justices, unlike state legislators, must run in statewide elections to keep their job, and so statewide public opinion necessarily figures into their decisions. As Devins and Mansker (2010, 455) put it, "Most state supreme court justices have no choice but to take into account 'The Will of the People.'" Studies show that "the Will of the People" tends to support increased access to voting and less infusion of donor money into campaigns—the opposite of the GOP agenda.

Starting with the imposition of barriers to the vote, 2022 Gallup poll data reveal that most Americans favor making voting easier, not harder (Willcoxon and Saad 2022). Except for photo ID laws, not one of the policies imposing barriers to the vote—just the sort of barriers that the Republican Party supports—received the endorsement of most Americans. But policies lowering barriers—policies the Republican Party opposes—were quite popular, as Figure 1 shows.

FIGURE 1
Americans' Support for Election-Law Policies, July 2022



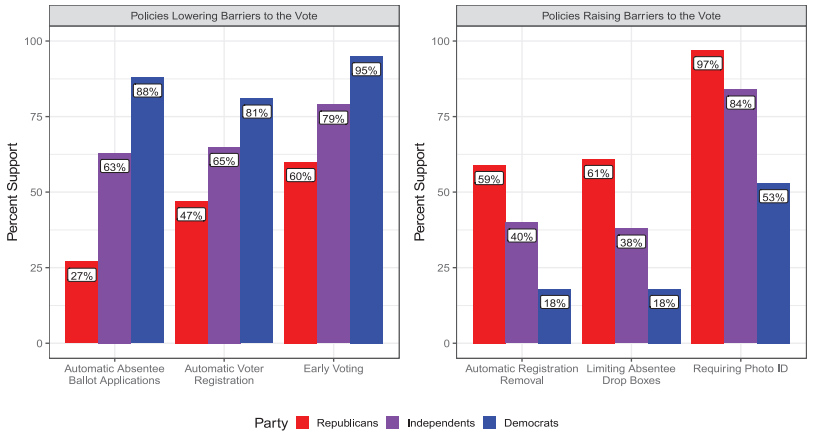
SOURCE: Willcoxon and Saad (2022).[a]
NOTE: The Gallup poll question was, "In general, do you favor or oppose each of the following election-law policies?" See the online article for the color version of this figure.
[a]The full question wordings were:

- *Automatic Absentee Ballot Applications:* Sending absentee ballot applications to all eligible voters prior to an election.
- *Automatic Voter Registration:* Enacting automatic voter registration, whereby citizens are automatically registered to vote when they do business with the Department of Motor Vehicles or certain other state agencies.
- *Early Voting:* Early voting, which gives all voters the chance to cast their ballot prior to Election Day.
- *Automatic Registration Removal:* Removing people from voter registration lists if they don't vote in any elections over a five-year period.
- *Limiting Absentee Drop Boxes:* Limiting the number of drop boxes or locations for returning absentee ballots.
- *Requiring Photo ID:* Requiring all voters to provide photo identification at their voting place in order to vote.

Not surprisingly, partisan differences emerge for most of the policies, as Figure 2 makes clear. But crucially, Independents are more in line with Democratic than Republican voters: the Independents too disfavor removing people from voter registration lists and favor automatic voter registration, early voting, and absentee ballots. Because Republican justices in many states need the votes of Independents to keep their jobs, they may be just as disinclined as their Democratic colleagues to go along with the GOP's plans to limit the franchise.

The same may hold for the GOP's mission to eradicate campaign-finance laws—a mission that is not popular among Americans. The Pew Research Center reports that more than 77 percent would like to see "limits on the amount of money individuals and groups can spend on campaigns," and 65 percent believe

FIGURE 2
Americans' Support for Election-Law Policies by Partisan Identity, July 2022



SOURCE: Willcoxon and Saad (2022).
NOTE: The Gallup poll question was, "In general, do you favor or oppose each of the following election-law policies?" See the online article for the color version of this figure.

that "new laws could be written that would be effective in reducing the role of money in politics" (Jones 2018). Again, differences between Republicans and Democrats emerge, but the gap is not very wide. Seventy-one percent of Republicans and Republican-leaning Independents favor limits on campaign spending, as do 85 percent of Democrats.

Considering the difficulties the GOP faces in the state courts—the domination of Democrats and the fact that the justices, unlike state legislators, must face voters in statewide elections—the ISL claim is the perfect solution. It effectively insulates state electoral policy from oversight by state courts and leaves only the federal courts—with ultimate control in the U.S. Supreme Court—to rule on the validity of those legislative policies. The ISL claim (and the Court's *Moore* decision), in other words, substitutes a seemingly highly reliable GOP ally—the unelected and unaccountable (GOP) U.S. Supreme Court—for the far shakier elected state high courts.

Empirical Assessment

This at least is our argument. Assessing it requires two steps:

(1) A demonstration that the current U.S. Supreme Court is a trusted GOP ally in election-law disputes.
(2) A demonstration that the state supreme courts aren't especially dependable allies.

The U.S. Supreme Court

When it comes to the Roberts Court's resolution of election-law disputes, we hardly write on a blank slate. Scores of informed commentators have concluded that the contemporary Court has been an unambiguous and determined supporter of the Republican Party. Veteran *Los Angeles Times* Supreme Court correspondent Savage (2021) put it this way: "The sum of the court's rulings on elections could give the Republican Party a significant edge as it seeks to recapture control of . . . the White House in 2024." Biskupic (2021), an equally astute Court observer, agreed: the Court's election decisions continued to "cut[] to the heart of democracy and generally benefit conservatives over liberals, Republican voters over Democratic voters."

On the scholarly side, Klarman (2020, 178–79) claims that "some of the Supreme Court's finest historical moments have involved safeguarding democracy." But "unfortunately, today's Republican justices seem insensitive, or even hostile, to this conception—at a time when threats to democracy emanate from the Republican Party." Of the eight ways identified by Klarman in which the modern Court has contributed to the "degradation of American democracy six concern elections, voting, and campaign finance reform." Peretti (2020), among others, concurs.

And now even judges feel compelled to comment. Writing in the *Harvard Law & Policy Review*, Judge Lynn Adelman (Eastern District of Wisconsin) (Adelman 2019, 131) blasted the Roberts Court for conducting an "assault on Democracy":[8]

> Instead of working to strengthen democracy, the Supreme Court over which Chief Justice Roberts presides, is substantially contributing to its erosion. The Court has done this in two ways, first by [eviscerating] the landmark Voting Rights Act, [upholding] strict voter identification laws, and authoriz[ing] states to purge thousands of people from the voting rolls. The second way in which the Court is weakening democracy is by reinforcing the enormous imbalance in wealth and political power . . . through its campaign finance decisions.

Likewise, Judge Mark Walker, in an opinion invalidating Florida voting restrictions, wrote, "This Court recognizes that the right to vote, and the VRA [Voting Rights Act] particularly, are under siege." He followed that claim with cites to several U.S. Supreme Court decisions, including "*Shelby Cnty., Ala. v. Holder* . . . (2013) (gutting the VRA's preclearance regime)."[9]

However plausible the journalistic, scholarly, and judicial commentary, most of it relies on a hand-selected cases like *Shelby County*. Our argument, in contrast, requires quantifying the extent to which the Court has advanced the GOP agenda across all cases relating to barriers to the vote and campaign-finance regulations/violations.

To this end, we used the U.S. Supreme Court Database (Spaeth, et al. 2022) to identify decisions, issued between the 1953 and 2021 terms, involving voting and campaign-finance regulations.[10] This search ultimately yielded 74 cases. Falling into the "voting" category are a wide array of laws aimed at limiting the franchise.

These include English literacy tests (e.g., *Cardona v. Power* 1966), property ownership requirements (e.g., *Kramer v. Union Free School Dist*. 1969), moral turpitude restrictions (*Hunter v. Underwood* 1986), and photo ID laws (*Crawford v. Marion County Election Bd.* 2008). Most cases in the "campaign finance" bucket ask the Court to rule on the constitutionality of regulations, but a few center on violations of laws limiting campaign contributions (e.g., *United States v. International Union* 1957).

Next, we categorized each decision (and each justice's vote) as opposing or favoring the Republican Party's agenda. Decisions that work against the GOP's interest, sometimes called "democracy-protective" decisions (Chemerinsky 2023), are those that invalidated barriers to the vote (pro-vote) or upheld campaign-finance regulations (pro–campaign finance). Decisions in the GOP's favor are the opposite.

Figure 3 displays the results by the four chief justice eras between the 1953 and 2021 terms, and they are quite stark. Until the Roberts Court, nearly three-quarters of the Court's decisions were democracy-protective: pro-vote and pro–campaign finance regulations (38/53). True to its reputation, the Warren justices led the way at 85 percent, meaning that only three of their 20 election cases favored the Republican Party's agenda. The percentage of democracy-protective decisions dropped during the GOP-dominated Burger and Rehnquist Courts but never fell below 50 percent. In fact, statistically speaking, no significant differences emerge among any of the three eras, not even between Warren and Burger.[11]

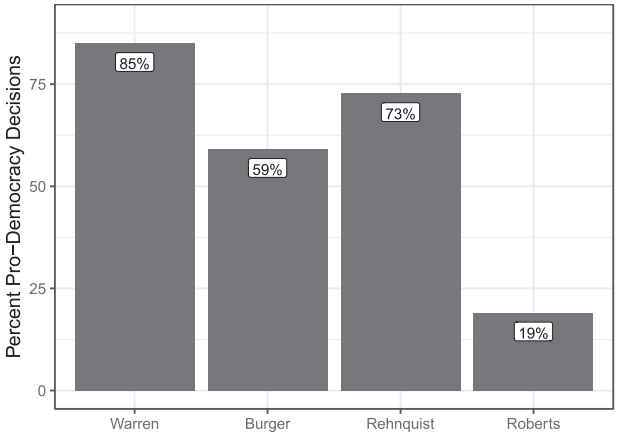
In line with what the informed commentary has perceived, the Roberts Court is the clear outlier. Although it is not the first Republican-dominated Court, the percentage of prodemocracy decisions—19—it issued is significantly lower than either those of the Burger or Rehnquist Court; the Roberts era is the least democracy-protecting era of the past eight decades, perhaps of all time. Put another way, the GOP *seems* to have an ally in the Roberts Court: it rules the party's way in the vast majority of these cases (17/21).

We emphasize "seems" because of the possibility that the difference between the current Court and its predecessors traces to the mix of electoral cases. Table 1 explores this possibility by dividing the cases into the two major categories: voting and campaign finance.

The data show that the Roberts Court was more inclined to invalidate restrictions on campaign spending than restrictions on voting (9 percent versus 30 percent). Nonetheless, even for the voting disputes, the Roberts Court's 30-percent support rate is substantially lower than any of its predecessors: a 54-percentage-point difference between it and the Warren Court, a 37-percentage-point difference from the Burger Court, and a 45-percentage-point difference compared to the Rehnquist Court. And it is the only era in which the Court upheld more voting restrictions than it struck down.

What is driving the Roberts Court's antidemocracy posture? Klarman (2020) and Peretti (2020), among others, point to the Court's committed Republican partisans, and our data confirm their hypothesis, as Figure 4 displays. There we

FIGURE 3
Percentage of Decisions Invalidating Barriers to the Vote or Upholding Campaign-Finance Regulations, by Chief Justice Era



NOTE: Number of decisions: Warren = 20, Burger = 21, Rehnquist = 11, and Roberts = 21.

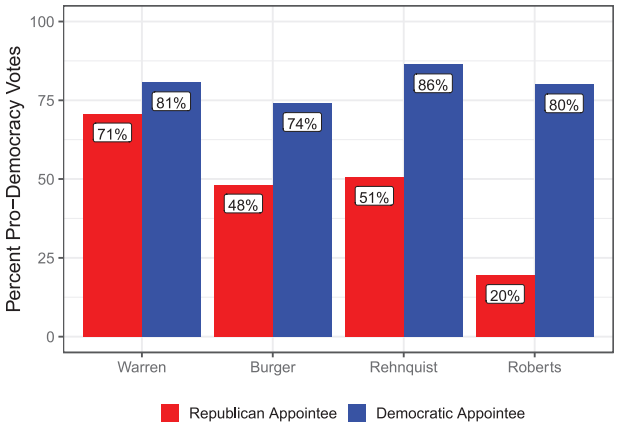
TABLE 1
Percentage of Decisions in Favor of Access to the Vote and Campaign-Finance Regulation, by Chief Justice Era

Chief Justice Era	% Pro–Access to the Vote (*N*)	% Pro–Campaign Finance Laws (*N*)
Warren	84	100
	(19)	(1)
Burger	67	50
	(12)	(10)
Rehnquist	75	71
	(4)	(7)
Roberts	30	9
	(10)	(11)
Average	67	41
(Total)	(45)	(29)

show the percentage of democracy-protecting votes cast by Republican and Democratic appointees during each chief justice era.

Notice that the blue bars are always higher than the red bars, indicating that Democratic appointees consistently voted more often to invalidate barriers to the vote and to uphold campaign-finance restrictions. The differences between Democratic-appointee and Republican-appointee votes are significant overall and during all eras except the Warren Court years.

FIGURE 4
Percentage of Votes Cast by U.S. Supreme Court Justices Invalidating Barriers to the Vote or Upholding Campaign-Finance Regulations, by Political Party and Chief Justice Era



NOTE: The terms of each court era are displayed in Figure 1. Number of votes: Warren (**R**epublicans = 82, **D**emocrats = 93), Burger (Rs = 139, Ds = 54), Rehnquist (Rs = 77, Ds = 22), and Roberts (Rs = 123, Ds = 65). See the online article for the color version of this figure.

Considering these data, it is possible that there is nothing unique about the Roberts Court. Partisan differences on voting issues are to be expected. But—and this is a big but—during the other three decades, even the Republican appointees cast the majority (or nearly so) of their votes in the prodemocracy direction. Not so of the Roberts Republicans: only two out of every 10 of their votes could be classified as democracy-protecting. Put in statistical terms: the Roberts Republicans were significantly more likely than Republicans in any other era to uphold voting restrictions and invalidate campaign-finance laws.

The Roberts justices are distinct in yet another way: the divide between the Republican and Democratic appointees is far wider than it is for any other era. The 60-percentage-point gap between the Roberts Republicans and Roberts Democrats is six times that of the Warren Court's, over double the Burger Court's, and about 1.5 times the Rehnquist Court's partisan divide.

Taken collectively, the data provide little reason to doubt the existing commentary: relative to all other eras of the past eight decades, the Roberts Court (or more pointedly its Republican majority) is a reliable ally in the GOP's quest to impose restrictions on the vote and invalidate restrictions on money in campaigns. As the ISL claim is at bottom a technique that effectively insulates GOP legislatures from challenge when they impose restrictive voting rules, it fits neatly into the Roberts Court's established pattern.

State supreme courts

The data seem to provide evidence consistent with the first part of our argument: the Republican Party can count on the U.S. Supreme Court and its Republican members in its quest to gain and maintain political power. If the same holds for the state supreme courts and their Republican members, the ISL claim would not have been necessary, because state courts would simply ratify whatever barriers the state legislature chose to impose.

As we have suggested, however, reasons exist to doubt that the state courts will be as willing allies as the U.S. Supreme Court: not only does it seem unlikely that Democratic state justices would be any more willing to go along than Democratic U.S. justices are; it is also possible that even Republican state justices are less aligned with the GOP's goals because key voters support campaign-finance regulations and disapprove of barriers to the vote.

To be sure, bits and pieces of evidence exist to the contrary. Douglas (2016, 33), for example, finds that state judges tend to follow their partisan "predilections" in voter ID cases; Peretti (2016) finds much the same. Then again, Gibson and Nelson's comprehensive data on election-law disputes in state high courts between 1990 and 2015 turn up no significant differences based on partisan identity: 58 percent of the Democratic judges' votes and 56 percent of the Republican judges' votes were "proequality."

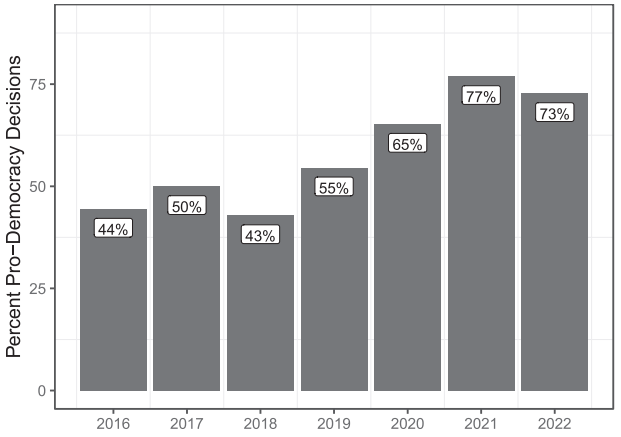
Although useful, the Gibson and Nelson (2021) data are not especially well-suited for our purposes. Where we are interested in more modern conditions, their data end in 2015. Also, because they used Lexis's broad "Election and Voting" category to identify the cases, the resulting data set, yes, contains campaign-finance and voting disputes, but also many that are not central to our study (e.g., titles of ballot initiatives, candidate qualifications for primaries, term limits for officeholders[12]).

For these reasons, we collected our own data using various search terms in Lexis to isolate state supreme court decisions centering on barriers to the vote and campaign finance between 2016 and 2022. We supplemented this search with cases retrieved from Ohio State University's Moritz College of Law's comprehensive archive of major election law disputes (at electioncases.osu.edu). These procedures produced 760 judge-votes in 114 cases in 38 states.

With the cases/votes in hand, we drew on Gibson and Nelson's data set to assign to each justice a party identity (Democrat or Republican). For justices who were not in their data set, we followed Gibson and Nelson's (2021, 303, notes 90 and 91) approach.[13]

We begin the analysis, as we did with the U.S. Supreme Court, with case outcomes. Figure 5 shows the results for the seven years represented in our study. Overall, the state courts reached prodemocracy decisions in 61 percent of the cases (69/114). During the same years (terms), the percentage in the U.S. Supreme Court was 29. Moreover, there is a noticeable upswing since 2019. For 2021 and 2022, the percentages for state courts are far closer to the Warren Court than to the Roberts Court—meaning that in some of the very years that the Republican Party upped its efforts to suppress the vote, the state courts moved in the opposite direction.

FIGURE 5
Percentage of Decisions Invalidating Barriers to the Vote or Upholding Campaign-Finance Regulations in the State Highest Courts, by Year



NOTE: Number of decisions: 2016 = 9, 2017 = 10, 2018 = 14, 2019 = 11, 2020 = 46, 2021 = 13, and 2022 = 11.

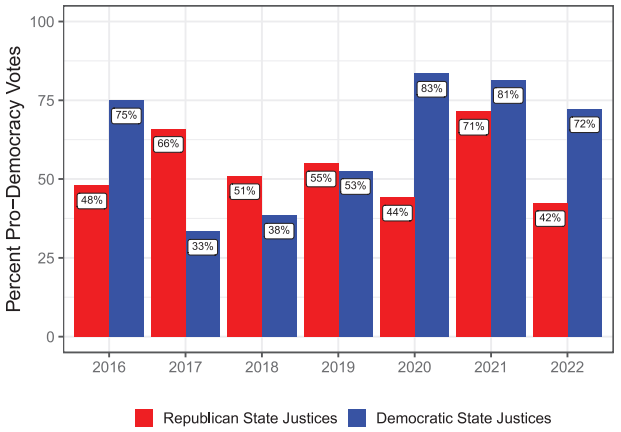
Do these findings hold for Republican *and* Democratic justices? Yes and no, as Figure 6 shows. The "no" part is that for four of the seven years in the data set the Democrats more frequently voted in a prodemocracy direction than the Republicans did. Moreover, across all seven years, the Democrats were significantly more likely to cast prodemocracy votes than the Republicans were (67 percent versus 52 percent).

The "yes" part is twofold. First, the differences between the Democratic and Republican justices are not significant in the expected direction for four of the seven years. And note that, in some years, the Republicans actually cast a greater percentage of prodemocracy votes than the Democrats did. Second, in no year did the state Republicans come even close to the Roberts Court Republicans in their support for the GOP's electoral plans. In fact, over the time period covered by our data, Republican state justices ruled nearly as frequently *against* their party as they did for it (49 percent versus 51 percent).

Discussion

The U.S. Constitution is nearly 235 years old, and the Constitution's reference to the role of state legislatures in setting election laws has not changed. What has changed is the landscape of U.S. elections and the Republican Party's willingness to change election laws to gain and consolidate political power. But it is not just *elected* Republicans who have participated in this political project. As our analysis has shown, the recent election-law decisions by the Republican-appointed

FIGURE 6
Percentage of Votes Cast by State Justices Invalidating Barriers to the Vote or Upholding Campaign-Finance Regulations, by the Party of the Appointing President and Year



NOTE: Number of votes: 2016 (**R**epublicans = 25, **D**emocrats = 32), 2017 (Rs = 24, Ds = 24), 2018 (Rs = 51, Ds = 39), 2019 (Rs = 20, Ds = 57), 2020 (Rs = 197, Ds = 121), 2021 (Rs = 49, Ds = 27), and 2022 (Rs = 33, Ds = 36). See the online article for the color version of this figure.

Roberts Court justices mark a level of antidemocracy voting on the U.S. Supreme Court unseen in modern history.

Our position—bolstered by existing commentary and data—is that the ISL claim is more a political project than a principled legal argument. Because, as we have seen, state supreme court justices are in far less lockstep with Republican elite positions on election law, they represent a risk to a Republican Party whose hold on its policymaking majorities is tenuous (Lee 2016). And, in a country with stark political polarization and tight electoral margins, even a single unfavorable decision in a key swing state can cost a political party the presidency and/or control of Congress. For this reason, eliminating as much risk in election-law litigation as possible is important to maintaining control of political power in modern America.

The ISL claim is designed to do just that. By taking the final say over election rules and procedures away from state courts and putting it in the hands of the Roberts Court, Republican elites (and law professors) have identified a powerful way to take the final say over election procedures away from the people's elected officials—be they legislators or state judges—and instead put them in the hands of the "least democratic branch" of the government. As a political project, the ISL claim may be a winning strategy, but for those who care about the quality of democracy in the U.S., it is anything but.

Although the Supreme Court rejected the most extreme versions of the ISL claim in its *Moore* decision, it embraced a broad—and vague—position that still limits the ability of state courts to decide election-law cases. State courts will have

no guidance as to what the Supreme Court will regard as the "ordinary bounds of judicial review," which could affect the robustness of their own enforcement of state law. And no matter what they choose to do, *Moore* allows for the possibility that the inevitable flood of election-law litigation that will surround the 2024 elections will find its final arbiter in the reliably partisan U.S. Supreme Court rather than the much less predictable state supreme courts.

We began our article by expressing concern that a set of rigid interpretive methodologies designed to take no account of the structural and political well-being of our democracy creates a pressure cooker with no release valve. Our study has revealed the ISL claim, relying almost entirely on a mechanical understanding of a single word in the Constitution, to be a threat to democracy because it increases the likelihood of victory for partisan efforts to suppress votes. The *Moore* case should have been an occasion for the Court to recall that "some of [its] finest historical moments have involved safeguarding democracy" (Klarman 2020, 178–79). But instead, it opted for judicial supremacy.

Notes

1. The ISL has been inserted into briefs in at least eight cases since the Supreme Court granted *certiorari* to hear *Moore v. Harper* in June of 2022 (Brower 2022).

2. As the Court wrote in *Moore*, "State courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."

3. Against these concerns, the "leading defense" of the ISL claim (according to Baude 2022) relies heavily on the Constitution's use of the term "legislature," which, on its face, answers the question. As support for this interpretation, the author suggests that the framers wanted voting rights to be decided by elected officials and points in support to the delegation in Section 5 of the 14th Amendment of the enforcement power to Congress, which he argues reflects the same intuition. This defense does not explain, however, why the Supreme Court, despite the Constitution's commitment to "Congress" of the enforcement power, has never viewed that as a rejection of judicial review and has not hesitated for a nanosecond to invalidate congressional enactments passed under Section 5 when it thought it appropriate to do so (see *City of Boerne v. Flores* 1997; *Shelby County v. Holder* 2013). The article also argues that ISL furthers framers' goals concerning federal elections and reflects 19th-century understandings (Morley 2020).

4. In *Ohio ex rel. Davis v. Hildebrant* (1916), the Court had held that the "legislature" language in Article I did not preclude a state procedure allowing a public referendum to review a state election law. And in 1932, in *Smiley v. Holm*, it had held that a state election law was still subject to veto by the governor under state constitutional procedure, despite the Article II use of the term "legislature."

5. If the state court issued a holding that itself violated a *separate* federal constitutional right, that holding could clearly be invalidated by a federal court, but not because of the Elections Clause; it would be because of the Supremacy Clause plus whatever constitutional right the court had violated, such as the Equal Protection Clause. The examples the Court offers in support of its retention of jurisdiction are of this sort, involving individual rights that are violated by a state-court action.

6. We provide supporting public opinion data below.

7. But in the data set we created for this study for the years 2016 to 2022 (detailed in the following section), the percentages were nearly reversed: 44 percent for the Democrats and 56 percent for the Republicans. These data echo a finding in Gibson and Nelson (2021): the decline in Democratic dominance on state supreme courts over the past three decades. Then again, in the most recent year in our data set (2022), Democrats cast a slightly greater percentage of the vote than Republicans did.

8. The Seventh Circuit's judicial council "publicly admonished" him for criticizing the Court's decisions on voting access campaign finance. In response, Adelman walked back the attack, writing that parts of the article "were inappropriately worded" (Vielmetti 2020).

9. *League of Women Voters of Fla., Inc. v. Lee* (2022). Both this case and the Adelman fallout are detailed in Biskupic (2023).

10. We began with four issue areas in the database (Voting, Voting Rights Act of 1965, Ballot Access, and Campaign Finance) and reviewed all the cases in those categories. We retained only those involving barriers to the vote and regulations on campaign finance. We included all decisions except orders issued on emergency applications.

11. Here and throughout, we use the term "significant" only when $p \leq .05$.

12. Respectively *Hunnicutt v. Myers* (2002), *Wright-Jones v. Nasheed* (2012), *Bradfield v. Wells* (1992).

13. For only two judges in our data set were we unable to assign a partisanship.

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