Second-Guessing State Courts in Election Cases: Arrogation and Evasion Under *Moore v. Harper*

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Federal court deference to state court interpretations of state law is one of the core tenets of judicial federalism. There are only a handful of exceptions under which federal courts may independently review a state court's determination of state law. In Moore v. Harper*, the Supreme Court recognized a new exception, holding for the first time that state court interpretations of state election laws and state constitutions are subject to review by federal courts to ensure that state courts do not "transgress the ordinary bounds of judicial review" in a way that "arrogate[s] to themselves the power vested in state legislature to regulate federal elections." This major shift in the relationship between state and federal courts portends increased scrutiny of state court decisions on issues of state election law. Despite this, the Supreme Court declined to articulate a standard for when or how federal courts might review state court election law decisions. Instead, the Court gestured to dicta from* Bush v. Gore *and the standards applied in other areas where federal courts may review state court decisions. The Court's lack of clarity injects dangerous uncertainty into the election landscape and calls into question the fundamental relationship between state and federal courts.*

This Article examines the issues raised by Moore *and offers a framework for how federal courts should approach state court election law decisions. It begins by reviewing federal caselaw, constitutional text, and Founding-Era court practice to offer a working definition of "arrogation" and the "ordinary bounds" of judicial practice. It then follows* Moore*'s lead by examining analogous areas of law in which federal courts review state court*

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determinations of state law and distills from these two justifications for federal second-guessing of state courts: evidence that the state court is evading federal law and federalization of otherwise state-law questions.

Based on these findings, this Article proposes a two-prong test for Moore *claims under which federal courts may only probe into the merits of a state court's interpretation of state election law where (1) there is evidence that the state court has tried to evade federal law or frustrate the will of a state legislature, and (2) the state court's decision arrogates some legislative authority or function that could not have been the product of ordinary judicial interpretation.*

INTRODUCTION

In *Moore v. Harper*, the Supreme Court rejected the most extreme version of the Independent State Legislature Theory and reaffirmed that when state legislatures exercise their authority under the Elections and Electors Clauses to regulate federal elections, they remain subject to the constraints of state constitutions and to review by state courts.[1]

But *Moore* also warned that state courts "do not have free rein" when interpreting state law.[2] The Court emphasized the need to "respect" the Constitution's "deliberate choice" to vest authority over federal elections in state legislatures.[3] The majority further held that federal courts could step in to ensure state courts stay within "the ordinary bounds of judicial review" so as to not "circumvent" the Constitution or "arrogate to themselves" the lawmaking power otherwise granted to state legislatures.[4]

Moore, then, marks a narrow but significant departure from one of the core tenets of judicial federalism: that federal courts defer to state courts on matters of state law.[5] The Supreme Court declined, however, to articulate a clear standard for either when or how a federal court might review a state court decision affecting federal elections.[6] It did not even determine whether the North Carolina Supreme Court's decision at issue in *Moore* was unconstitutional.[7] The closest the Court came was to gesture to various lines of cases under which federal courts have exercised review over state court determinations of state law in other contexts.[8] The lack of a clear standard in *Moore* will no doubt invite a bevy of federal challenges to state court election law decisions, injecting a troubling degree of uncertainty into the already fraught election landscape.

Since *Moore* was handed down, several commentators have expressed concern over the Court's omission, with most focused on what standard a

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1. 600 U.S. 1 (2023). *See generally* Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 YALE L.J.F. 881, 883 (2024) (describing how the Independent State Legislature Theory "maintains that the Federal Constitution gives to state legislatures, and withholds from other entities, the power to regulate Federal elections").

2. *Moore*, 600 U.S. at 34.

3. *Id.*

4. *Id.* at 35–36.

5. *See, e.g.*, Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RSRV. L. REV. 1, 10 (1984).

6. *Moore*, 600 U.S. at 36.

7. *Id.*

8. *Id.* at 34–36.

federal court should apply when reviewing a state court's interpretation of a state election law.[9]

This scholarly focus on how to review state court interpretations of state law is understandable. While the *Moore* petitioners did not argue that the North Carolina Supreme Court misinterpreted the state's constitution, the oral argument discussed at length what standards might apply to federal review of a state court's interpretation of state law.[10] This discussion focused in part on the *substance* of a state court's decision—that is, whether the state court got it right.[11] The state respondents and the United States both insisted that the standard here should be high, with state courts being reversed only where their decision demonstrates "such a sharp departure from the state's ordinary modes of constitutional interpretation that it lacks any fair and substantial basis in state law"[12] or where a "state court isn't really functioning through the process of ordinary judicial review."[13]

The *Moore* majority expressly declined to adopt any of these standards or to articulate any other test for the "correctness" of a state court's interpretation of state law.[14] It did, however, cite the opinions of Chief Justice

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9. *See, e.g.*, Litman & Shaw, *supra* note 1; Richard Hasen, *Breaking: Supreme Court Decides* Moore v. Harper*, Rejecting Maximalist Version of Independent State Legislature Theory But Giving Federal Courts a Chance to Second Guess Some State Rulings as "Transgressing the Ordinary Bounds of Judicial Review,"* ELECTION L. BLOG (June 27, 2023, 7:18 AM), https://electionlawblog.org/?p=137093 [https://perma.cc/MR6V-GEKZ]; Richard Pildes, *The Court's Mixed Message on the Independent State Legislature Theory*, ELECTION L. BLOG (June 27, 2023, 7:40 AM), https://electionlawblog.org/?p=137096 [https://perma.cc/82JS-JQCV]; Derek Muller, *Moore v. Harper Vindicates Rehnquist's Opinion in Bush v. Gore*, ELECTION L. BLOG (June 27, 2023, 8:46 AM), https://electionlawblog.org/?p=137104 [https://perma.cc/X4UC-8RJY]; Ned Foley, *Moore v. Harper and the Need for Clarity*, ELECTION L. BLOG (June 28, 2023, 4:19 AM), https://electionlawblog.org/?p=137143 [https://perma.cc/7U5H-2T8A]; Carolyn Shapiro, *Moore v. Harper and State Courts*, ELECTION L. BLOG (June 29, 2023, 2:30 PM), https://electionlawblog.org/?p=137192 [https://perma.cc/5VGE-WM3E]; Michael Weingartner, *Textualism and Anti-Novelty Under Moore v. Harper*, FORDHAM L.: VOTING RTS. & DEMOCRACY PROJECT (Aug. 9, 2023, 10:30 AM), https://fordhamdemocracyproject.com/2023/08/09/textualism-and-anti-novelty-under-moore-v-harper-2 [https://perma.cc/Y4LC-335G]; Bruce Ledewitz, *Moore News About the Independent State Legislature Doctrine*, 62 DUQ. L. REV. 327 (2024); Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts of* Bush v. Gore: *How* Moore v. Harper *Haunts State and Federal Constitutional Interpretation of Election Laws*, 59 WAKE FOREST L. REV. 61 (2024).

10. *See* Transcript of Oral Argument at 7–146, 166–80, *Moore*, 600 U.S. 1 (No. 21-1271) [hereinafter *Moore* Transcript].

11. As discussed in greater detail below, the Justices also discussed whether a state court decision might usurp legislative authority. *See infra* notes 26–30 and accompanying text.

12. *Moore* Transcript, *supra* note 10, at 130.

13. *Id.* at 169.

14. *Moore*, 600 U.S. at 36.

Rehnquist and Justice Souter in *Bush v. Gore*.[15] There, the Chief Justice would have reversed the Florida Supreme Court's interpretation as "impermissibly distort[ing]" the law "beyond what a fair reading required."[16] In contrast, Justice Souter would have upheld the Florida Supreme Court's interpretation because, in his view, it did not "transcend[] the limits of reasonable statutory interpretation to the point of supplementing the statute enacted by the 'legislature' within the meaning of [the Electors Clause]."[17] Justice Kavanaugh, in his concurring opinion in *Moore*, expressly favored Chief Justice Rehnquist's approach.[18]

Given the Court's interest in the topic, there has been a great deal of intrigue surrounding what substantive standard the Supreme Court might ultimately apply to *Moore* claims.[19] Less attention has been paid, however, to what the *Moore* majority actually held, which was 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."[20] Unlike the debate over statutory interpretation in *Bush*, the *Moore* holding does not speak in terms of the "correctness" of a state court's decision but rather in terms of whether the state court has crossed the line between judicial and legislative action or "circumvent[ed] federal constitutional provisions."[21] Put another way, *Moore* held that the Elections and Electors Clauses impose on states a narrow separation-of-powers principle under which state courts, at least in the context of federal elections, must respect state legislatures as the bodies in which the federal constitution vests primary policymaking authority. As the *Moore* majority explained, a state court violates those limits not where it gets the law wrong but where it uses its interpretive authority to "circumvent federal constitutional provisions" or otherwise "evade federal law" by "arrogat[ing]" to itself the power the constitution assigns to state legislatures.[22]

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15. *Id.* at 35–36.
16. Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).
17. *Id.* at 133 (Souter, J., dissenting).
18. *Moore*, 600 U.S. at 38–40 (Kavanaugh, J., concurring).
19. The strict textualism approach advocated by Chief Justice Rehnquist in *Bush* and by Justice Kavanaugh in *Moore* is largely inconsistent with the historical practice of state courts and would raise significant practical concerns for state election administration. *See* Weingartner, *supra* note 9. In *Bush*, Justice Souter put forward a far more deferential standard under which state court interpretations would stand unless inherently unreasonable. Though Justice Kavanaugh suggested in his *Moore* concurrence that these two formulations would not differ much in their application, the very different outcomes in *Bush* suggest otherwise.
20. *Moore*, 600 U.S. at 36.
21. *Id.* at 35.
22. *Id.* at 34–35.

At the heart of *Moore*, then, are two distinct questions related to federal review of state court decisions.[23] The first is the question of what substantive standard a federal court should apply to a state court's interpretation of state election law. The second is the arguably more consequential threshold question of *when* a federal court should exercise such review at all.

This Article provides a framework for answering both questions. It begins by offering working definitions of "arrogation" and of the "ordinary bounds" of judicial practice based on federal caselaw, the text and history of the Elections and Electors Clauses, and historical state court practice. Based on this evidence, it concludes that "arrogation" in the constitutionally proscribable sense requires more than mere misinterpretation, but rather that a state court engages in some kind of core legislative activity that cannot be supported by ordinary interpretative tools. It also demonstrates that early state court practices were highly pluralistic, with state courts applying a wide range of interpretive methods and drawing on a variety of extratextual sources of meaning. All of this suggests that the Elections and Electors Clauses should not be read to either require state courts to apply a particular interpretive method, such as textualism, or to prohibit methods that have a close historical analog.

This Article then turns its focus to the important threshold question of *when* a federal court should second-guess a state court decision. It does so by picking up where the *Moore* majority left off and examining the various analogous areas of law in which the Supreme Court has exercised and cabined its review of state court interpretations of state law.[24] These decisions reveal two justifications for federal second-guessing of state courts. First, federal courts have exercised review where there is evidence that a state court was attempting to evade federal law. Second, federal courts have exercised review

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23. *Moore* also implicates interpretations of state law made by state actors other than courts, such as executive officials and boards of election. The proper test that might be applied to such interpretations is beyond the scope of this Article and will be addressed in a future piece.

24. In doing so, this Article builds on a series of earlier works exploring federal second-guessing both in the aftermath of the *Bush* decision and since. *See, e.g.*, Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 493 (2001); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613 (2001); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661 (2001); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003); Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80 (2002); E. Brantley Webb, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192 (2011).

where enforcement of federal law requires transforming what would otherwise be a state law issue into a federal question. Of these two justifications, only the former—evidence of evasion—is an appropriate fit for *Moore* claims. The Elections and Electors Clauses do not transform state election laws into federal issues, meaning federal courts should only question a state court interpretation of a state election law where there is evidence that the state court has sought to evade the federal constitution.

From these principles, this Article articulates a two-step approach for *Moore* claims. At step one, a federal court should look for evidence of state court evasion of federal law. If it finds none, the inquiry ends, and the state court decision remains in place. If, however, there is evidence of possible evasion, the federal court proceeds to step two, in which it examines the state court's decision to see if it constitutes actual arrogation of a purely legislative function, rather than ordinary judicial interpretation. Only if there is evidence of both evasion *and* arrogation should a federal court turn to the merits and engage in an independent review of state law.

I. *MOORE* AND THE ANTI-ARROGATION PRINCIPLE

Moore's holding—that state courts may not "arrogate" legislative power by "transgress[ing] the ordinary bounds of judicial review"—is not a standard of review or an interpretive method.[25] Rather, it is best understood as a federal principle of state separation of powers and a constitutional limit on state judicial action. *Moore* defines a particular constitutional violation—"arrogating" legislative authority—and identifies the mechanism by which state courts do so—by stepping outside the "ordinary bounds" of judicial practice.

The Justices discussed this "Anti-Arrogation Principle"[26] at length in the *Moore* oral arguments. Justice Jackson identified the question as whether a state court has "usurped" state legislative power.[27] Justice Alito questioned whether certain state court actions might amount to "exercising legislative power."[28] And Justice Kavanaugh considered whether a state court that egregiously misinterprets a state law might "no longer act[] as a court exercising the normal judicial review function" and instead act as a

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25. *Moore*, 600 U.S. at 36.

26. I borrow this apt term from G. Michael Parsons. *See* Mike Parsons, *Moore v. Harper and the 'Anti-Arrogation Principle*,*'* ELECTION L. BLOG (June 30, 2023, 10:18 AM), https://electionlawblog.org/?p=137207 [https://perma.cc/5XJT-WB44].

27. *Moore* Transcript, *supra* note 10, at 162.

28. *Id.* at 80.

"legislature."[29] These same concerns are reflected in the *Moore* majority's discussion of analogous areas of law and the "concern that state courts might read state law in such a manner as to circumvent federal constitutional provisions."[30]

Moreover, as discussed below, the cases cited by the *Moore* majority describing other areas in which federal courts may review state court interpretations of state law all turn not on the correctness of a state court's interpretation, but on whether there is evidence of an effort by a state court to evade federal law.[31]

There are important reasons to re-frame the *Moore* inquiry to focus on whether a state court has engaged in arrogation rather than whether a state court's interpretation of state law is "correct." As Justice Kagan explained in the *Moore* oral argument, "very good judges on very good courts can find it incredibly easy to disagree with each other."[32] Using arrogation as a touchstone instead of correctness avoids overturning state court interpretations based on mere disagreement. It also accounts for federal courts' relative disadvantage when it comes to interpreting state law with which they are unfamiliar and avoids thorny problems associated with federal courts selecting and enforcing a particular interpretive methodology on state courts. Chief Justice Rehnquist, in his *Bush* concurrence, suggested that a strict form of textualism should be applied to state election statutes.[33] But not only does textualism not necessarily reflect the will of state legislatures,[34] it does not necessarily reflect state law, particularly in states where state legislatures themselves have explicitly rejected textualism by enacting laws requiring courts to use non-textual sources.[35] Analyzing a body of state law and interpretive methods and reviewing a state court interpretation for compliance is a highly complicated matter, one that federal courts should avoid by engaging in substantive review only after identifying possible arrogation.

This Part offers some much-needed definition to *Moore*'s anti-arrogation principle. First, it examines how the Supreme Court has defined "arrogation" in the separation-of-powers context with respect to federal courts. From this

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29. *Id.* at 122.
30. *Moore*, 600 U.S. at 35.
31. *See infra* Section II.A.
32. *Moore* Transcript, *supra* note 10, at 158.
33. *See* Bush v. Gore, 531 U.S. 98, 114–15 (2000) (Rehnquist, C.J., concurring).
34. *See* Weingartner, *supra* note 9 ("[A]pplying strict textualist and anti-novelty approaches would undercut the intent of state legislatures and produce anomalous court interpretations that depart significantly from 'ordinary' judicial review.").
35. *See, e.g.*, 1 PA. CONS. STAT. § 1921 (2023).

precedent, it is clear that "arrogation" in the constitutionally proscribable sense refers to one branch's usurpation of another branch's primary authority, such as a court ignoring or blatantly re-writing a statute enacted by the state legislature.[36] It does not, however, refer to actions that are properly within a branch's own constitutional ambit.

Second, this Part begins the work of demarcating the "ordinary bounds" of judicial practice. It does so by examining the text and history of the Elections and Electors Clauses, along with early state court practice, to understand the judicial practices that were "ordinary" in the Founding era. This history demonstrates that the "ordinary bounds" of judicial practice were quite capacious, with courts applying a diverse range of pluralistic interpretive methodologies to statutes and state constitutions and relying on sources of meaning that went far beyond mere text.

Taken together, this evidence demonstrates that for a state court to violate *Moore*'s anti-arrogation standard, it must both engage in judicial practices that go beyond the outer bounds of what existed at the Founding and it must do so in a way that usurps primary legislative authority, as opposed to merely exercising a judicial function.

A. Anti-Arrogation in Federal Courts

To the extent that *Moore*'s anti-arrogation principle imposes a narrow separation-of-powers rule on state governments in the context of election laws, it charts new constitutional ground. The only other constitutional provisions that limit the separation of powers within states are the Guarantee Clause[37] and the Due Process Clause,[38] neither of which have been applied to limit the interpretive authority of state courts.[39] Accordingly, federal courts

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36. *Moore* also implicates election laws that are enacted via popular referendum outside of the ordinary legislative process. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 792–93 (2015), the Supreme Court held that the term "legislature" as used in the Elections Clause included the state initiative process. Whether and how *Moore*'s anti-arrogation principle might apply to voter-initiated election laws is beyond the scope of this Article and will be addressed in a future piece.

37. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

38. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

39. The Guarantee Clause is silent as to *how* state governments should be organized, and the Supreme Court has long held that the interpretation of this clause is a nonjusticiable political question. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (holding that "the Constitution of the United States . . . has treated the subject as political in its nature[] and placed the power in the

have not defined what "arrogation" of legislative power by a state court would look like.

There is, however, considerable Supreme Court precedent discussing the arrogation and usurpation of legislative authority by courts with respect to federal law. These cases are, of course, grounded in federal separation-of-powers principles and are an imperfect fit for state governments that employ a much wider range of structural arrangements.[40] But these cases are nonetheless instructive for helping to define the rough boundaries separating interpretation from arrogation and, in particular, what does *not* constitute arrogation.

First and foremost, "a court does not usurp legislative power simply by misinterpreting the law in a given case."[41] If the opposite were true, every judicial decision reversed on appeal would amount to a separation-of-powers violation. Courts also do not arrogate legislative power simply because their decisions may be criticized as reaching conclusions based on their own policy preferences.[42] As Justice Kagan pointed out during the *Moore* oral arguments, "[E]very single one of us on this bench has written opinions at times, you know, saying that other judges . . . have engaged in policymaking rather than in law. And, I mean, it's just sort of one of the things that judges say when they really disagree with another opinion."[43] This criticism alone, however, does not amount to the kind of "arrogation" that would violate constitutional separation-of-powers principles.

Second, a court does not "arrogate" legislative power when it acts according to an express statutory mandate or delegation. The United States

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hands of" the political branches). Some commentators have suggested that the Guarantee clause implies that state governments should be organized at least somewhat like the federal government in terms of the division of power amongst three branches, though even these commentators agree that this would not require identical separation-of-powers doctrines to apply to states. *See, e.g.*, Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 58–59 (1998); Louis H. Pollack, *Judicial Power and "The Politics of the People*,*"* 72 YALE L.J. 81, 88 (1962).

Some commentators have also observed that the Fifth and Fourteenth Amendment Due Process Clauses were historically understood to preclude legislatures from usurping judicial power, such as by enacting private or retroactive laws affecting property rights or by abrogating common law procedural protections. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1727 (2012). But these clauses have never been applied to limit state judicial action under separation-of-powers principles.

40. *See, e.g.*, David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1200–01 (1992).

41. Jones v. Hendrix, 599 U.S. 465, 487 (2023).

42. For an extended discussion of recent cases in which members of the current Supreme Court have done so, see Kafker & Jacobs, *supra* note 9, at 85–89.

43. *Moore* Transcript, *supra* note 10, at 158–59.

Supreme Court does not "arrogate" legislative power when it promulgates procedural rules pursuant to the Rules Enabling Act.[44] Nor does a court engage in arrogation when it exercises sentencing discretion pursuant to a congressional statute,[45] or when it interprets a federal statute according to interpretive rules enacted by Congress.[46] Even if there may be questions as to whether Congress may constitutionally delegate a particular power or prescribe a particular rule,[47] the fact remains that a court that complies with a Congressional statute does not "arrogate to itself" legislative authority.

Rather, as Supreme Court precedent demonstrates, "arrogation" in its constitutionally proscribable sense, refers to an unauthorized seizure by the judiciary of lawmaking authority beyond what ordinary interpretation might produce. In *Loving v. United States*, the Supreme Court provided a helpful framework for understanding "arrogation" within the broader separation-of-powers context.[48] There, the Court defined arrogation as "one branch of the Government . . . intrud[ing] upon the central prerogatives of another," and contrasted arrogation with merely "impair[ing] another [branch] in the

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44. 28 U.S.C. §§ 2071–2075, 2077; *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 14–16 (1941) (upholding the Rules Enabling Act against a nondelegation challenge). Earlier congressional delegations of procedural rulemaking authority have similarly been upheld. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48–50 (1825); Bank of the U.S. v. Halstead, 23 U.S. (10 Wheat.) 51, 62–65 (1825).

45. *See, e.g.*, Beckles v. United States, 580 U.S. 256, 266–67 (2017); United States v. Booker, 543 U.S. 220, 233 (2005); Apprendi v. New Jersey, 530 U.S. 466, 481–82 (2000); Mistretta v. United States, 488 U.S. 361, 363 (1989).

46. *See, e.g.*, 1 U.S.C. §§ 1–8 (2000 & Supp. II 2002) (defining various terms for purposes of the U.S. Code); 34 U.S.C. § 10472(1)(A) (requiring courts to use "the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders" to interpret the term "mental illness"); 42 U.S.C. § 1981 note (Legislative History for 1991 Amendment) ("No statements other than the interpretive memorandum . . . shall be considered legislative history of . . . this Act . . . ."); 15 U.S.C. § 2403 (providing that "[t]he laws . . . of the United States shall be so interpreted as to give full force and effect" to the Federal Government's policy of "stimulat[ing] a high rate of productivity growth"); *see also* Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 793–94 (2008).

47. *Compare, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2359–64 (2022) (discussing the *Wayman* case as an example of Congress's constitutional authority to delegate certain powers to other branches, including the federal courts), *with Does the Rules Enabling Act Violate the Non-Delegation Doctrine?*, JOSH BLACKMAN (Jan. 28, 2015), https://joshblackman.com/blog/2015/01/28/does-the-rules-enabling-act-violate-the-non-delegation-doctrine [https://perma.cc/6S6R-52LE] (expressing skepticism of *Wayman*). *Compare also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (arguing that Congress can and should mandate rules for the interpretation of federal statutes), *with* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97 (2003) (critiquing Professor Rosenkranz's view).

48. 517 U.S. 748 (1996).

performance of its constitutional duties."[49] Put another way, arrogation goes beyond the ordinary checks and balances by which different branches might hinder one another and requires one branch of government to seize the power of another for its own use. This distinction maps cleanly onto *Moore*'s reasoning—a court engages in "arrogation" when it takes on a lawmaking function but does not do so when it merely engages in interpretation, even where that interpretation is wrong or contrary to the legislature's intent.[50]

To constitute arrogation, a court must do more than get the law wrong—it must engage in some form of legislative activity, such as judicial rewriting of a statute to give it an effect that a fair reading, even applying the ordinary tools of construction, cannot bear. In the federal context, for example, a court may arrogate legislative authority by reading into a statute an implied cause of action not found in the statute's text,[51] or by applying a canon of statutory interpretation in a way that gives a statute an objectively unreasonable construction.[52]

Another example of arrogation, one potentially relevant to *Moore* claims, may occur when a court exercises its equitable powers in a way that contravenes statutory text. Consider a pair of equitable doctrines, equitable tolling and laches, as they relate to a statute of limitations. Where a statute includes a limitations period, equitable tolling lengthens that period under appropriate circumstances.[53] The doctrine of laches, on the other hand, is an equitable defense that has historically only come into play where a legislature has *not* specified a limitations period.[54] In these cases, laches steps in to fill a legislative gap by preventing parties who engage in unreasonable delay from bringing suit.[55]

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49. *Id.* at 757.

50. *See* Moore v. Harper, 600 U.S. 1, 35–36 (2023).

51. *See, e.g.*, Hernandez v. Mesa, 589 U.S. 93, 100 (2020) ("[W]hen a court recognizes an implied claim for damages on the ground that doing so further the 'purpose' of the law, the court risks arrogating legislative power.").

52. *See, e.g.*, Heckler v. Matthews, 465 U.S. 728, 741–42 (1984) (noting that the constitutional avoidance canon does not "license a court to usurp the policymaking and legislative functions of duly elected representatives" and rejected a saving construction where Congress's intent "plainly demonstrate[d]" a different reading).

53. *Compare, e.g.*, Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 95–96 (1990) (holding that employment discrimination case against the government could be equitably tolled), *with* United States v. Brockamp, 519 U.S. 347 (1997) (holding that equitable tolling does not apply to extend the statute of limitations for tax refund claims).

54. *See, e.g.*, United States v. Mack, 295 U.S. 480, 489 (1935) ("Laches within the term of the statute of limitations is no defense at law.").

55. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.4(4), at 103–04 (2d ed. 1993).

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the Supreme Court held that the doctrine of laches could not be invoked in a copyright infringement suit where the Copyright Act included a three-year limitations period.[56] In doing so, the Court explained the differences between equitable tolling and laches and their implications for separation of powers. Equitable tolling, the Court noted, is a longstanding principle that "is read into every federal statute of limitation" and is understood as "a rule of interpretation tied to that limit."[57] Put another way, because Congress understands and expects that equitable tolling will be applied to every statute of limitations, courts that do so do not infringe on legislative authority. Laches, on the other hand, "originally served as a guide when no statute of limitations controlled the claim" and so could "scarcely be described as a rule for interpreting a statutory prescription."[58] So if a court were to apply laches in the face of a clear statute of limitations, it would have the effect of "overriding" legislation by creating a new rule where Congress had already spoken.[59]

The foregoing examples—and, indeed, any cases opining on arrogation by federal courts—are imperfect fits for state courts, where the structural arrangements between different branches of government are very different. Nonetheless, they illustrate the basic principle that arrogation requires a court to engage in some form of core legislative action beyond what ordinary interpretation alone might produce. This aligns with the Supreme Court's holding in *Moore* that a state court only engages in arrogation where it transgresses the "ordinary bounds" of judicial practice.[60] It is to that subject we now turn.

B. The "Ordinary Bounds" of Judicial Practice: History and Practice

If the anti-arrogation principle is best understood as a state separation-of-powers rule imposed by the Elections and Electors Clauses, an analysis of the text and original meaning of those clauses is vital to understanding the nature and scope of the principle and the relationship between state courts and state legislatures.

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56. 572 U.S. 663, 667 (2014).

57. *Id.* at 681 (quoting Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)).

58. *Id.* at 681–82.

59. *Id.*; *see also* SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 580 U.S. 328, 335 (2017) ("Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill.").

60. Moore v. Harper, 600 U.S. 1, 36 (2023).

Likewise, as *Moore* itself illustrated, history and tradition—particularly the practice of state courts prior to or soon after the Founding—is highly probative of the "ordinary bounds of judicial review."[61] This Section considers both sources of meaning in turn.

1. The Elections and Electors Clauses

The petitioners in *Moore* and proponents of a maximalist version of the Independent State Legislature Theory advanced a strict literalist interpretation of the Elections and Electors Clauses to argue that state courts and state constitutions could not constrain state legislatures when regulating federal elections.[62] The Supreme Court rejected this approach and relied instead on a combination of precedent and historical practice. That same approach ought to apply when determining the nature and scope of any anti-arrogation principle derived from these clauses.

Most importantly, the history surrounding the Elections and Electors Clauses does not suggest that the Framers either understood or intended for these clauses to disrupt or alter the relationships between state legislatures and other branches of state government.[63] Rather, the Framers' principal concern was the relationship between state legislatures and Congress.[64]

The Elections Clause was crafted against the backdrop of the Framer's concerns with unchecked authority over federal elections and their distrust of state legislatures in particular.[65] A principal aim of the Elections Clause was to divide authority over federal elections between state legislatures and Congress to prevent either from manipulating laws to favor certain candidates.[66] The Anti-Federalists were concerned that if Congress were given plenary authority over its own elections, it might enact rules designed to entrench its members in power.[67] Federalists, on the other hand, saw state legislatures as the greater threat, citing examples of malapportionment

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61. *See id.* at 19–22.

62. *See id.* at 26.

63. *See* Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 135, 172–79 (2023).

64. *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 23–40 (2010).

65. *See* Weingartner, *supra* note 63, at 177.

66. *See id.* at 173–74.

67. *See id.* at 174.

schemes in Connecticut, South Carolina, and Rhode Island.[68] For the Federalists, Congress, with its national character and dual chambers, was the most effective check on mischief by the states.[69] Importantly, the Federalists also emphasized the checks on Congress's authority, which included federal courts and the federal constitution.[70]

Likewise, there was no discussion during the debate over the Electors Clause about state separation of powers. Rather, the debate focused on whether members of the Electoral College should be directly elected, legislatively appointed, or selected in some other manner.[71] The concluding language of the Electors Clause—providing that electors be "appoint[ed] in such manner as [the State] Legislature may direct"—was proposed just two weeks before the end of the Convention and approved without meaningful discussion.[72]

The historical record also suggests that, while the *Moore* majority was correct that the Framers made a "deliberate" choice to vest primary authority over federal elections in state legislatures, the reason for this decision had less to do with any special solicitude for state legislatures and more to do with convenience. At the time of the Founding, there existed no national electoral mechanisms; national elections under the Articles of Confederation had been handled by state legislatures.[73] Continuing this practice under the new Constitution, albeit with significant checks, was thus a pragmatic and convenient choice,[74] particularly given the difficulty of crafting national standards.[75]

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68. *See id.* at 175; 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 27, 49–51 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

69. *See* Weingartner, *supra* note 63, at 176; 2 ELLIOT'S DEBATES, *supra* note 68, at 26–27.

70. *See* Weingartner, *supra* note 63, at 177; 4 ELLIOT'S DEBATES, *supra* note 68, at 71.

71. *See* Weingartner, *supra* note 63, at 178–79; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 748–57 (2001).

72. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 493–94, 500–29 (Max Farrand ed., 1911).

73. *See* ARTICLES OF CONFEDERATION of 1781, art. V, para. 1 ("For the more convenient management of the general interests of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress . . . .").

74. *See* THE FEDERALIST NO. 59, at 301 (Alexander Hamilton) (Ian Shapiro ed., 2009) (explaining that the Elections Clause grants primary authority over federal elections "to the local administrations" because "in ordinary cases, and when no improper views prevail, [it] may be both more convenient and more satisfactory").

75. *See* 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1260 (John P. Kaminski et al. eds., 1993) (statement of James Madison) ("[I]t was thought that the regulation of time, place, and manner of electing the Representatives, should be uniform

Neither the history nor the original meaning of the Elections or Electors Clauses offers any support for the idea that those clauses were understood or intended to dictate or alter the separation of powers within state governments, even with respect to the regulation of federal elections. There is nothing whatsoever to suggest, for example, that these Clauses require state courts to apply any particular interpretive methods or prohibit them from developing novel interpretations and applications of state law. To the contrary, the Framers consistently took state legislatures and state governments as they found them, recognizing and accounting for their institutional flaws and merits.[76] This suggests that the Elections and Electors Clauses do not prescribe any particular separation of powers principles, but rather incorporate the status quo at the Founding.

2. Early State Judicial Practice

Moore's emphasis on history and practice strongly suggests that any anti-arrogation principle should also be rooted in the historical practice of state courts, both before and after the Founding and in the centuries since. This includes both the methods that state courts used to interpret state statutes and how state courts exercised judicial review to ensure that state laws complied with state constitutions. Consistent with *Moore*, this history should shed light on the outer contours of the "ordinary bounds" of judicial practice. And at a minimum, any state court practice that existed at the Founding, or that has a close historical analogue, would likely lie within those "ordinary bounds."

a. Judicial Review

In rejecting the argument that state courts could not enforce state constitutional constraints to invalidate state election laws, the *Moore* majority looked to the practice of state judicial review close to the Founding.[77] The early cases cited by the Court are striking both in the diversity of methodologies applied, the lack of reliance on constitutional text, and in the application of generalized constitutional principles, all of which suggests that from the Founding the "ordinary bounds" of judicial review have been capacious.

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throughout the Continent," but "[i]t was found impossible to fix" such uniform rules "in the Constitution").

76. *See* Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring); U.S. CONST. art. IV, § 4.

77. *See* Moore v. Harper, 600 U.S. 1, 19–22 (2023).

The *Moore* majority first singled out *Trevett v. Weeden*,[78] a 1786 case from the Rhode Island Supreme Court, as providing what "may well have been the most prominent discussion of judicial review at the time of the Philadelphia Constitutional Convention" and serving as "a model for James Madison, Alexander Hamilton, and others who would later defend the principle of judicial review."[79] *Trevett* involved a constitutional challenge to a Rhode Island statute that required acceptance of the state's paper money and provided for actions to recover penalties *without a jury*.[80] This challenge was notable because at the time, Rhode Island lacked any written constitution, meaning there was no text to interpret. Instead, the arguments in favor of judicial review were decidedly non-textualist, drawing on notions of natural law and an assertion of the right to a jury trial as a fundamental constitutional right.[81] These arguments prevailed: the Rhode Island Supreme Court dismissed the case, and its justices later expressed their views that the statute was unconstitutional.[82]

The *Moore* majority also cited *State v. Parkhurst*, an 1802 New Jersey Supreme Court case that arose out of a contest between two men who claimed the same office of court clerk.[83] Aaron Ogden, the initial court clerk, had been elected to the United States Senate in 1800, but never resigned his position as clerk.[84] The next year, the state legislature enacted a statute providing that state officials elected to Congress would be deemed to have vacated their offices, and another clerk, Jabez Parkhurst, was appointed.[85] Ogden challenged the statute as an unconstitutional ex post facto law.[86] The New Jersey Supreme Court recognized that a statute retroactively declaring an office vacated could be unconstitutional in the situation where an individual was capable of holding two offices at once, but concluded that the offices in question—a state court clerk and a United States senator were "incompatible and inconsistent, and cannot be exercised by the same person at the same

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78. The *Trevett* case was not reported. The details of the case are drawn from a widely circulated pamphlet published by the prevailing attorney, James Varnum. *See* JAMES M. VARNUM, THE CASE, TREVETT V. WEEDEN (1787), *reprinted in* BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417 (1971).

79. *Moore*, 600 U.S. at 20.

80. For a more thorough treatment of the *Trevett* case, see William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 476 (2005). Professor Treanor's article was also cited approvingly by the *Moore* majority. *See Moore*, 600 U.S. at 20, 22.

81. *See* Treanor, *supra* note 80, at 477.

82. *See id.* at 478.

83. 9 N.J.L. 427 (Sup. Ct. 1802).

84. *Id.* at 435.

85. *Id.*

86. *Id.* at 444.

time."[87] The Court did not base this determination on any constitutional or statutory text, but rather looked to state-court precedent, legal treatises, "[a]ncient grants and local customs and usages" and "general principle[s]."[88]

The *Moore* majority also cited *Vanhorne's Lessee v. Dorrance*, a 1795 Pennsylvania Supreme Court case that addressed whether a state Board of Property appointed by the legislature could determine the value of land in a property dispute.[89] The Court began by reading from several state constitutional provisions declaring general principles of property rights and declaring a right to jury trial over property disputes between individuals,[90] and distilling from them a general principle that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man."[91] From there, the court relied on "the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract," in addition to the state constitution, to hold that the legislature must compensate the owner of land seized by the state.[92]

Each of these cases cited by the *Moore* majority interpreted a state constitution based not on the constitutional text alone but rather by employing a diverse range of extratextual sources and interpretive methodologies. These courts saw their state constitutions as setting forth broad and capacious principles while also incorporating a multitude of sources, from reason and natural law to precedent and treatises to foreign authorities.

Early cases interpreting state constitutions in the context of elections tell a similar story. In *Henshaw v. Foster*, the Massachusetts Supreme Court considered whether a state constitutional requirement that ballots be "written" prohibited the use of pre-printed ballots.[93] The court held that printed ballots were constitutional, based in part on the fact that the word "written" could be interpreted to include printed ballots, but also by looking beyond the text to the intention of the constitution's framers and the principles espoused in the constitution, writing that it could not "apply to [the state constitution] such narrow and constrained views as may exclude the real object and intent of those who framed it."[94] The Massachusetts Supreme Court likewise relied on a combination of constitutional text, structure, and

87. *Id.* at 445.
88. *Id.* at 446.
89. 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795); Moore v. Harper, 600 U.S. 1, 27 (2023).
90. PA. CONST. arts. I, VIII, XI (1776).
91. *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 310.
92. *Id.* at 312.
93. 26 Mass. (9 Pick.) 312 (1830).
94. *Id.* at 317, 322.

general principles in *Parker v. Lovejoy* to hold that individuals living in unincorporated plantations could not vote for governor.[95]

An early Alabama Supreme Court case, *State v. Adams*, put the point even more clearly in a decision over whether the legislature could empower particular officers with casting deciding votes in the event of a tied election:

> It is obvious then, that a constitution must be liberally construed, with the view of effectuating the intention of its framers; and that the history of the times in which it was framed, the manner most efficient in securing its objects, the restraints intended to be imposed and the privileges intended to be granted, must all be taken into consideration in giving a construction to those instruments.[96]

And in an early case from New Hampshire concerning the constitutionality of a state law permitting absentee voting for soldiers, the court similarly looked to general principles, the "nature" of elections and the right to vote, and historical practice.[97]

These cases further illustrate that Founding-Era state courts engaged in far-reaching judicial review grounded in a variety of sources and interpretive methods, and that these courts regularly looked beyond constitutional text to the broader structure, purpose, and spirit of state constitutions. Any anti-arrogation principle therefore must account for and contemplate similar state court practices today.

b. Statutory Interpretation

The pluralism described above was by no means limited to judicial review. To the contrary, Founding-Era state courts employed the same degree of pluralism to statutory interpretation.

Professor Eskridge observes that, during the Founding Era, state courts exercised a range of interpretive methodologies, including purposivism, equitable interpretation, and principles of avoidance.[98] This was so because state courts—and states themselves—"reflected a wide diversity of structural arrangements."[99]

Early state court practice also regularly looked beyond the strict letter of a statute to examine its purpose or "spirit." These courts did not "consider

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95. *See* 3 Mass. 565 (1795).

96. 2 Stew. 231, 239 (Ala. 1829).

97. *In re* Opinions of Justices, 45 N.H. 595, 597–98, 600 (1864).

98. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1003–09 (2001).

99. *See* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1653 (2001).

[them]selves as bound by the strictly grammatical construction of the words of the act," but rather believed that "[t]he intention of the legislature should be our guide."[100] Several state supreme courts declared openly that "[a] thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers."[101] Invoking the "spirit" of a statute, courts regularly extended the reach of statutes to analogous situations beyond the scope of their literal text[102] or narrowed statutory language to prevent injury to individuals.[103]

Early state courts also applied various substantive canons of construction—nontextualist rules of interpretation that promote particular policy choices or favor particular outcomes. These canons included rules that required courts to interpret "remedial" statutes more liberally,[104] or to narrow statutes to avoid constitutional conflicts.[105]

One substantive canon that is particularly relevant to *Moore* claims is the so-called "Democracy Canon,"[106] under which a court will liberally interpret an election law to promote the right to vote. An early example is *In re Strong*, an 1838 Massachusetts Supreme Court case that interpreted a statutory requirement that candidates for county commissioner be inhabitants of different towns.[107] An election was held in which a majority of votes were cast for one Elisha Strong, but while some voters included Mr. Strong's town of residence on their ballots, others did not, and the Board of Examiners interpreted the statute to require that these two groups of ballots be counted separately.[108] The court rejected this interpretation as "too strict," and wrote

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100. Woodbridge v. Amboy, 1 N.J.L. 213, 214 (Sup. Ct. 1794); *see also* Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (Pa. 1786) (looking to "the words and spirit" of a statute along with "what is most consonant to equity, and least inconvenient"); Warder v. Arell, 2 Va. (2 Wash.) 282, 299 (1796) (considering "reason" and "spirit" of a law, in addition to "grammatical construction").

101. Jackson v. Collins, 3 Cow. 89, 92 (N.Y. Sup. Ct. 1824); *see also* Prohibitory Amendment Cases, 24 Kan. 700, 716 (1881) ("[T]hat which is not within the spirit [of a statute], but within the letter, is not a part of it.").

102. *See, e.g.*, Executors of Barracliff v. Administrator of Griscom, 1 N.J.L. 193 (Sup. Ct. 1793) (extending a statute providing for attorney's costs in suits of debt to include subsequent suits for failure to pay); Whiting v. Jewel, 1 Kirby 1 (Conn. 1786) (extending a state law that allowed affidavits to be taken out of court to permit affidavits to be taken out of *state*); Bracken v. Visitors of William & Mary College, 7 Va. (3 Call) 573 (1790) (holding that a College Board's authority to make policy extended to discretion to abolish particular departments or chairs).

103. *See* Eskridge, *supra* note 98, at 1021.

104. *See, e.g.*, Mayor of New York v. Lord, 17 Wend. 285, 292 (N.Y. Sup. Ct. 1837).

105. *See* Eskridge, *supra* note 98, at 1027.

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

107. 37 Mass. (20 Pick.) 484 (1838).

108. *Id.* at 489.

that the Board of Examiners ought to have construed the ballots "with liberality."[109] The court explained that nothing in the text of the statute required voters to list a candidate's place of residence and also that such an interpretation would run counter to the purposes of the statute, which was to give effect to the will of the voters.[110] Because there was no question that all the ballots were for the same candidate, the court held that they must all be counted as such.[111]

As these cases illustrate, state courts made use of a diverse range of methods and tools to interpret statutes, including election statutes. As with the equally varied approaches to constitutional interpretation and judicial review, the Framers of the federal Constitution were well aware of this diversity when they crafted the Elections and Electors Clauses and understood that, at the time of their enactment, this sort of pluralism demarcated the "ordinary bounds" of judicial practice.

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This history confirms that, per their original meanings, neither the Elections nor Electors Clauses alters the ordinary relationship between state legislatures and state courts. If anything, these Clauses demonstrate a distrust of state legislatures and an embrace of checks on state legislative power. Moreover, this history demonstrates that, at the time these Clauses were written, state courts exercised judicial review and interpreted state statutes using a variety of techniques, including several that departed from strict textualism. Against this background, it seems clear that *Moore*'s anti-arrogation principle should not preclude these practices, nor should it impose modern interpretive methodologies on state courts.

II. FEDERAL REVIEW OF STATE COURT DETERMINATIONS OF STATE LAW AND THE ANTI-EVASION PRINCIPLE

As a general principle, federal courts, including the Supreme Court, defer to state court interpretations and applications of state law. *Moore*'s anti-arrogation principle justifies a narrow exception to this rule, allowing for federal courts to review state court determinations of state law to ensure that state courts do not arrogate legislative authority. The question remains *when* a federal court should undertake such review. The *Moore* majority identified several other discrete areas of law in which the Supreme Court has asserted

109. *Id.* at 492, 494.
110. *Id.* at 493.
111. *Id.*

the authority to directly review a state court's interpretation of its own law.[112] In none of these areas, however, do federal courts have free reign to second-guess state court decisions. Rather, across all these areas of law, the Supreme Court has only permitted federal review of state court determinations of state law where one of two threshold findings have been made.

The first category of cases—and the most relevant to *Moore* claims—is those in which the Court has found evidence to suggest that a state court may be willfully evading or circumventing federal law or rights. The second category involves cases in which the enforcement of federal law or protection of federal rights requires transforming what would otherwise be state law issues into federal questions. This Part discusses both categories of cases and concludes that only the first justification for review of state court decisions—evidence of evasion—should be a necessary threshold requirement before any *Moore* claim may proceed to the merits.

A. Evading Federal Law

An unavoidable consequence of federalism is that states, and state courts, will have interests that are not aligned with those of the federal government. One of the animating concerns behind the crafting of Article III was that state courts and state judges may be biased towards their own states' interests or the interests of their citizens. In *Federalist No. 80*, for example, Alexander Hamilton expressed his view that there were some instances in which "the State tribunals cannot be supposed to be impartial," and that state courts' natural bias might "tie[] the courts down to decisions in favor of the grants of the State to which they belonged."[113] These concerns were reflected in Article III, with its grant of diversity jurisdiction,[114] and § 25 of the Judiciary Act of 1789, which provided for the United States Supreme Court to hear appeals from state court judgments on matters of federal law.[115]

Similarly, concerns of state-court bias have driven the development of a long line of cases holding that state courts may not interpret their own state's

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112. Moore v. Harper, 600 U.S. 1, 34–36 (2023).

113. THE FEDERALIST NO. 80, *supra* note 74, at 403 (Alexander Hamilton).

114. U.S. CONST. art. III, § 2; *see also* Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias*, 79 MO. L. REV. 119, 134 ("[I]t is clear that the whole grant of diversity jurisdiction in Article III was premised on state courts favoring their own litigants in party-based cases.").

115. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86. Specifically, § 25 limited the Supreme Court's appellate jurisdiction to cases in which a federal issue had been decided *against* the party who raised it. *Id.* at 86. This limitation remained in effect until repealed by Congress in 1914. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

law to circumvent or evade federal law. For well over a century, the Supreme Court has balanced the need to protect federal rights and the respect owed to state courts through a test often referred to as the "Fair Support Rule."[116] Under this rule, the Supreme Court will not engage in an independent review of a state court's determination of state law unless it has identified evidence of possible circumvention or evasion.[117]

The most common evidence of circumvention is inconsistency on the part of state courts—that is, where a state court blocks review of a federal claim based on a state rule that is applied in a manner that cannot be reconciled with prior practice. The Supreme Court has also considered whether a state rule is arbitrary or fails to advance legitimate state interests. Finally, the Supreme Court has considered external socio-political context such as state hostility to federal law or rights.

1. Inconsistency

In cases where a state court has applied a state-law rule to block consideration of a federal claim, the Supreme Court has often inquired into whether the state court regularly follows the rule.[118] A rule that is applied inconsistently, or that is applied at the discretion of state courts, provides evidence that a state court's decision may be driven by the court's own policy preferences, rather than the rule of law, and that the rule may have been employed to evade federal law.[119] This principle arises across several areas of law.

a. Adequate and Independent State Grounds

One of the most common areas in which the Supreme Court has independently reviewed a state court determination of state law based on evidence of evasion is in the context of the adequate-and-independent-state-grounds doctrine. Under this doctrine, the Supreme Court will refuse jurisdiction over a state court decision that denies a federal claim if that decision is based on purely state grounds, such as non-compliance with a state

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116. *See, e.g.*, Webb, *supra* note 24, at 1205 & n.44.

117. *See id.* at 1205.

118. *See* Ford v. Georgia, 498 U.S. 411, 423–24 (1991) (finding that a state procedural default rule is not adequate and independent unless it is "firmly established and regularly followed").

119. Walker v. Martin, 562 U.S. 307, 320 (2011) (explaining that state grounds are inadequate "when discretion has been exercised to impose novel and unforeseeable requirements").

procedural rule. Before doing so, however, the Supreme Court must determine whether the state grounds on which the state court's decision rests are both "adequate" to support the judgment and "independent" of federal law.[120]

To determine whether a state ground is "adequate," the Court must consider whether the state rule itself is valid. State rules that are arbitrary or impose significant burdens on litigants are not adequate.[121] This includes state rules that have been applied inconsistently.

For example, in *NAACP v. Alabama ex rel. Patterson*, cited by the *Moore* majority,[122] the Supreme Court considered whether the Supreme Court of Alabama had properly rejected the NAACP's appeal on procedural grounds.[123] The Alabama Supreme Court had held that the NAACP should have sought review of its constitutional claims by way of mandamus, yet the NAACP had sought certiorari.[124] The Supreme Court, however, held that this was an inadequate reason to block federal review because this holding could not be reconciled with past cases in which the Alabama Supreme Court had repeatedly held that constitutional claims could be reviewed on certiorari.[125]

The Alabama Supreme Court in *Patterson* effectively created a new procedural rule out of whole cloth to block consideration of the NAACP's federal claims. But the Supreme Court has also held that even a state procedural rule that is not novel may be inadequate if it is applied so inconsistently as to essentially be discretionary. In *Sullivan v. Little Hunting Park, Inc.*, for example, the Virginia Supreme Court blocked consideration of a constitutional racial discrimination claim on the grounds that opposing counsel had not been given adequate notice of transcripts being given to the trial judge.[126] The Supreme Court looked to prior Virginia decisions and found a number of cases in which the Virginia Supreme Court had allowed cases to proceed with similarly short notice and held that the notice rule was therefore inadequate.[127]

Likewise in *James v. Kentucky*, the Supreme Court held that a Kentucky state court's refusal to provide a jury instruction because the defendant had

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120. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874); Michigan v. Long, 463 U.S. 1032, 1038 (1983).

121. *See, e.g.*, Staub v. City of Baxley, 355 U.S. 313, 319–20 (1958); Felder v. Casey, 487 U.S. 131, 138 (1988).

122. Moore v. Harper, 600 U.S. 1, 35 (2023).

123. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455 (1958).

124. *Id.*

125. *Id.* at 456–57.

126. 396 U.S. 229, 231–32 (1969).

127. *Id.* at 233–34, 233 n.2.

requested an "admonition" was inadequate because prior caselaw showed that the distinction between "admonitions" and "instructions" under Kentucky law was "not always clear or closely hewn to."[128] In case after case, Kentucky courts had understood these terms to overlap and did not draw meaningful substantive distinctions between the two.[129] And in *Hawthorn v. Lovorn*, the Court held that the Mississippi Supreme Court could not refuse to hear a new claim raised for the first time on rehearing where it had agreed to do so just one year earlier.[130]

b. Contracts

The Contracts Clause of the U.S. Constitution prohibits states from "impairing" private contracts.[131] The Contracts Clause prohibits only *legislation* that impairs contracts, not judicial interpretations of legislation that may alter contract rights.[132] Nonetheless, because the content and creation of contracts are governed by state law, however, a state court may block consideration of a federal contract claim if it holds that the contract or contractual right at issue does not exist. In these cases, as in the adequate-and-independent-state-grounds context, the Supreme Court has looked to whether a state court's decision is inconsistent with prior caselaw.[133]

Indiana ex rel. Anderson v. Brand—also cited in *Moore*[134]—provides an illustrative example.[135] *Brand* concerned a public school teacher who had entered into a one-year employment contract with a township school in 1924 and continued to do so through 1933.[136] The contracts included a clause incorporating the state's tenure law, which provided that if a teacher served for five or more consecutive years under one-year contracts, tenure attached and the contracts became indefinite.[137] In 1933, Indiana passed a law

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128. 466 U.S. 341, 346 (1984).

129. *Id.* at 346–48.

130. 457 U.S. 255, 264–65 (1982).

131. U.S. CONST. art I, § 10.

132. *See, e.g.*, Fleming v. Fleming, 264 U.S. 29, 31–32 (1924) ("The effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the court now says it means."); Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924) (noting that the Contracts Clause "is directed only against impairment by legislation and not by judgments of courts").

133. *See, e.g.*, Appleby v. City of New York, 271 U.S. 364, 380 (1926) (stressing that the Supreme Court "must give [its] own judgment derived from [state statutes and court decisions] and not accept the present conclusion of the state court without inquiry").

134. Moore v. Harper, 600 U.S. 1, 35 (2023).

135. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

136. *Id.* at 97.

137. *Id.* at 97, 101–02.

repealing this tenure provision for township schools.[138] But by that time the teacher had already served for more than five years, and so she brought a suit asserting a contractual right to tenure.[139] The Indiana Supreme Court held that the tenure law did not create a contractual right and thus could be repealed without violating the Contracts Clause.[140] The Supreme Court reversed after looking to prior decisions by the Indiana Supreme Court, which had previously "uniformly held" that the tenure right was contractual.[141]

In contrast, where a state court's interpretation aligns with prior decisions, the Supreme Court has deferred to the state court's decision. In *Phelps v. Board of Education*, for example, the Supreme Court upheld the New Jersey Supreme Court's determination that New Jersey's teacher tenure law did not create a contract right, in part because prior decisions "have concurred in holding that [the tenure law] did not amount to a legislative contract."[142]

c. Property

The Takings Clause of the Federal Constitution provides that "private property [shall not] be taken for public use, without just compensation."[143] Because property rights, like contracts, are created and governed by state law, there exists the potential for state courts to evade the Takings Clause by reclassifying property or property rights via interpretations of state law. As with the Contracts Clause, the Supreme Court has generally deferred to state court determinations of property but has undertaken an independent review where a state court's decision is inconsistent with prior law.

Broad River Power Co. v. South Carolina ex rel. Daniel provides an illustrative example.[144] *Broad River* concerned a federal challenge brought by a power company to the South Carolina Supreme Court's interpretation of the state's franchise law that would have forced it to continue to operate a subsidiary that was no longer profitable, thereby depriving them of

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138. *Id.* at 98.

139. *Id.* at 97.

140. *Id.* at 98.

141. *See id.* at 104–07 ("The position of a teacher in the public schools is not a public office, but an employment by contract between the teacher and the school corporation. The relation remains contractual after the teacher has, under the provisions of a Teachers' Tenure Law, become a permanent teacher . . . ." (quoting Sch. City of Elwood v. State *ex rel.* Griffin, 180 N.E. 471, 474 (Ind. 1932))); Kostanzer v. State *ex rel.* Ramsey, 187 N.E. 337, 342 (Ind. 1933); State *ex rel.* Black v. Bd. of Sch. Comm'rs, 187 N.E. 392, 393–94 (Ind. 1933); Arburn v. Hunt, 191 N.E. 148, 149 (Ind. 1934).

142. 300 U.S. 319, 322–23 (1937).

143. U.S. CONST. amend. V.

144. 281 U.S. 537 (1930).

property.[145] The Supreme Court began by asserting its authority to ensure that the state court's decision "rests upon a fair or substantial basis" before delving into prior caselaw.[146] The Supreme Court ultimately found no evidence of evasion, as the South Carolina Supreme Court's decision did not "so depart[] from established principles as to be without substantial basis."[147]

Likewise, in *Fox River Paper Co. v. Railroad Commission*, when the Wisconsin Supreme Court dismissed a Takings claim brought by landowners based on a failure to comply with a statutory permit requirement, the Supreme Court upheld the decision after finding "no question of evasion of the [Takings Clause] issue."[148] Like in *Broad River*, the Court undertook an independent review of prior Wisconsin property decisions and found no "conflict of authority or inconsistency of judicial opinion on this subject as even to suggest that the court below adopted its view in order to evade the constitutional issue."[149]

These property cases illustrate that, as in the adequate-and-independent-state-grounds and Contracts Clause contexts, the Supreme Court has focused on inconsistency as evidence of evasion in cases concerning property rights. This remains so even though—as described below—the Court has also viewed some elements of property law as federalized questions.

d. Inconsistency Versus Novelty

The above cases demonstrate that, where federal interests are at stake, a state court decision that is inconsistent and irreconcilable with prior decisions may suggest an attempt to evade federal law. Importantly, however, this kind of inconsistency is not the same as mere novelty.[150] In none of these cases did the Supreme Court look on state rules with skepticism merely because they were new. Rather, in each case the Court identified a specific prior decision that was irreconcilable with the rule at issue. It was not enough in *Patterson*, for example, that the Alabama Supreme Court had created a new distinction

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145. *Id.* at 539.

146. *Id.* at 540.

147. *Id.* at 543.

148. 274 U.S. 651, 655 (1927).

149. *Id.* at 656.

150. In his *Moore* concurrence, Justice Kavanaugh suggested that novelty in state court decisions might be suspect under the Elections Clause. *See* Moore v. Harper, 600 U.S. 1, 38–40 (2023). As several commentators have pointed out, however, there are significant issues with an anti-novelty approach. *See, e.g.*, Weingartner, *supra* note 9; Rick Hasen, *Litman: "Anti-Novelty, the Independent State Legislature Theory in* Moore v. Harper*, and Protecting State Voting Rights*," ELECTION L. BLOG (July 3, 2023, 7:42 AM), https://electionlawblog.org/?p=137239 [https://perma.cc/NP8J-2WGJ].

between mandamus and certiorari; what mattered was that prior cases had expressly operated without that distinction.[151] Likewise, the decisions in *Brand* and *Phelps* each turned on whether prior cases had come out the other way.[152]

2. Arbitrariness and Legitimacy

The Supreme Court has also examined the substance of state rules to determine whether the rule advances a state interest that is sufficient to block federal review. Where a state court denies a federal claim based on a rule that is arbitrary or does not advance a legitimate state interest, this is evidence that the state court may be trying to evade federal law.[153]

In *Rogers v. Alabama*, for example, a Black man moved to quash his conviction on the ground that Black people had been excluded from his jury.[154] The state moved to strike this motion and the Alabama Supreme Court affirmed based on a rule that prohibited motions that were "unnecessarily prolix" (i.e., wordy).[155] The motion in question was two pages long.[156] The Supreme Court reversed, holding that this rule was insufficient to block federal review.[157]

Similarly, in *Douglas v. Alabama*, the Supreme Court held that an Alabama rule that would have required a defendant to repeat his Confrontation Clause objection multiple times after having it denied could not block federal review because "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair."[158]

In another example, in *NAACP v. Alabama ex rel. Flowers*, the Alabama Supreme Court refused to let a suit brought by the NAACP proceed based on

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151. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455–58 (1958).

152. *See* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 104–07 (1938); Phelps v. Bd. of Educ., 300 U.S. 319, 322–23 (1937).

153. *See* Henry v. Mississippi, 379 U.S. 443, 447–48 (1965) (holding that state application of procedural default rules against federal claims must serve "legitimate state interests"); Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978) (same).

154. 192 U.S. 226, 228–29 (1904).

155. *Id.* at 230.

156. *Id.*

157. *Id.* ("A motion of that length, made for the sole purpose of setting up a constitutional right, and distinctly claiming it, cannot be withdrawn for prolixity from the consideration of this court . . . .").

158. 380 U.S. 415, 422 (1965).

a failure to comply with a state rule that "where unrelated assignments of error are argued together and one is without merit, the others will not be considered."[159] The Alabama Supreme Court held that because the plaintiff had organized their brief using roman numeral headings, the assignments of error had been argued together and so could be dismissed.[160] Yet the Supreme Court held that this focus on roman numerals, while ignoring the overall structure of the brief—which clearly separated the assignments of error—was an insufficient reason to deny review.[161]

These and other cases[162] demonstrate that certain rules, regardless of how consistently they may be applied, are simply insufficient to prevent consideration of a federal claim. Moreover, where a state court relies on a rule that is arbitrary or otherwise fails to advance any legitimate interest, the Supreme Court has questioned "whether that ground of decision was the real one, or whether it was set up as an evasion, and merely to give cover to a refusal" to consider the federal claim.[163] As with inconsistently applied rules, arbitrary and illegitimate rules provide evidence of evasive intent warranting federal review.

3. Sociopolitical Context

In addition to looking to the face of a state court decision and the prior practice of state courts, the Supreme Court has also considered, albeit in a less conspicuous manner, the surrounding sociopolitical context. At various points in history, for example, states—and state courts—were openly hostile to federal law and rights, providing added reason for the Supreme Court to be wary of efforts at circumvention. Even in less politically charged circumstances, there are unavoidable contexts in which state and federal interests are not aligned, such as where federal law places express limits on

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159. 377 U.S. 288, 294–96 (1964) (quoting NAACP v. State, 150 So. 2d 677, 679 (Ala. 1963)).

160. *Id.*

161. *Id.* at 296–97.

162. *See, e.g.*, Michel v. Louisiana, 350 U.S. 91, 93 (1955) (finding a Louisiana state rule that provided just three days in which to file a motion to quash insufficient to block consideration of a federal claim); Staub v. City of Baxley, 355 U.S. 313, 320 (1958) (finding a Georgia rule requiring a plaintiff to list each individual section of an ordinance being challenged would "force resort of an arid ritual of meaningless form" and finding the rule arbitrary in any case because the Georgia Supreme Court had previously not enforced the rule in other contexts); Parrot v. City of Tallahassee, 381 U.S. 129, 129 (1965) (finding a rule that required dismissal of an appeal because of a certification error insufficient to bar federal review).

163. Rogers v. Alabama, 192 U.S. 226, 231 (1904).

state power. In these instances as well, the Supreme Court has arguably factored in the potential for evasive intent when deciding whether to review a state court's interpretation of state law.

a. Hostility to Federal Law and Rights

In her *Bush v. Gore* dissent, Justice Ginsburg identified a common theme among many historical cases in which the Supreme Court had "rejected outright an interpretation of state law by a state high court."[164] She observed that many of these cases had occurred in historical contexts in which state courts had demonstrated serious "recalcitrance" against federal authority or federal rights.[165] A review of these cases demonstrates that state hostility to federal law has been an important factor in the Supreme Court's willingness to second-guess state court determinations of state law.

i) The Early Treaty Cases

The earliest set of cases in which the Supreme Court asserted authority to review state court determinations of state law arose in the context of a heated conflict between states and the federal government over lands belonging to British subjects following the Revolutionary War. Southern states enacted legislation confiscating the land and property of British subjects, while the federal government entered into treaties with Britian to prevent such confiscation. In response, state courts across the South attempted to use state law to nullify the effect of these treaties.

This conflict is epitomized by a pair of cases arising out of a single land dispute, *Fairfax's Devisee v. Hunter's Lessee*[166] and *Martin v. Hunter's Lessee*.[167] At issue in these cases were the land holdings of Lord Fairfax, a British subject. Prior to his death in 1781, Lord Fairfax devised his land to his heir, Denny Fairfax.[168] In 1783, the United States and Britain entered into a treaty promising "no future confiscations" of British property.[169] Nonetheless, Virginia seized title to the land and ejected Denny Fairfax in 1789.[170] The question before the Supreme Court was whether any of a series of statutes enacted prior to the 1783 treaty had confiscated the property, in

164. 531 U.S. 98, 139–40 (2000) (Ginsburg, J., dissenting).
165. *Id.* at 140–41.
166. 11 U.S. (7 Cranch) 603 (1812).
167. 14 U.S. (1 Wheat.) 304 (1816).
168. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 607.
169. *Id.* at 608–09.
170. *Id.* at 607–08.

which case there would have been no treaty violation.[171] The Virginia Court of Appeals had interpreted the statutes as validly seizing the land, but the Supreme Court rejected the Virginia court's reading, holding instead that none of the statutes were sufficiently clear to constitute a valid confiscation.[172]

On remand, the Virginia Supreme Court outright refused to follow the Supreme Court's decision, holding that the Supreme Court lacked jurisdiction over the matter, including over the state law issue of title to the property.[173] The matter went up to the Supreme Court again in *Martin v. Hunter's Lessee*, and the Supreme Court again reversed, this time clearly asserting federal authority to review state courts where a federal question is presented.[174] The Court also asserted the authority to review not only the Virginia Supreme Court's construction of the federal treaty, but also of state law affecting title to the land, explaining that without this authority, federal law could "be evaded at pleasure."[175]

The *Hunter's Lessee* pair of cases arose during a period of "vociferous States' rights attacks on the Marshall Court."[176] These attacks were not limited to state courts; *Hunter's Lessee* was deeply unpopular in the South, to the point where it seemed possible that Congress might retaliate against the Court by limiting their jurisdiction or even amending the Constitution to limit judicial review.[177] In this context—and with the clear refusal by the Virginia Supreme Court to comply with a federal treaty—there was evidence of state court recalcitrance and evasion.

ii) The Commerce Clause Cases

During the early twentieth century, as the federal government asserted greater power under the Commerce Clause, there was a backlash from states and state courts seeking to evade federal law by protecting local interests.[178]

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171. *Id.* at 616.

172. *Id.* at 623–28.

173. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 305 (1816) (recounting the Virginia Supreme Court's opinion "that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States").

174. *Id.* at 351.

175. *Id.* at 357–58.

176. Bush v. Gore, 531 U.S. 98, 140 (2000) (Ginsburg, J., dissenting). For another example of early cases arising out of this tension between states and the Marshall Court, see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

177. *See* Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1760 (2001).

178. *See* E. Brantley Webb, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1210 (2011).

The Supreme Court responded by undertaking an independent review of both the facts and state law where it identified evidence of evasion.[179]

Several of these cases involved state efforts to circumvent federal prohibitions on interstate levies. Some states, for example, crafted "voluntary" payment agreements. In *Union Pacific Railroad Co. v. Public Service Commission*, the Missouri Public Service Commission charged the Union Pacific Railroad Company almost $11,000 to mortgage and use a half-mile stretch of interstate track.[180] The railroad sued, alleging that the fee constituted unlawful interference with interstate commerce, but the Missouri Supreme Court denied review, holding that the payment had been voluntary.[181] The Supreme Court, however, took an independent review of the facts, finding that the railroad's payment was not voluntary, but rather was made under duress.[182] The Supreme Court similarly engaged in an independent examination of the facts in other "voluntary" payment scheme cases in *Northern Pacific Railway Co. v. North Dakota ex rel. McCue*[183] and *Gaar, Scott, & Co. v. Shannon*.[184] And in a case arising under the Indian Commerce Clause, the Supreme Court reversed an Oklahoma state court's determination that a fee charged to an Indiana tribe was made voluntarily.[185]

The Supreme Court also undertook an independent review of state law in cases where state courts frustrated federal regulations under the guise of procedural rules. *American Railway Express Co. v. Levee* concerned a provision in a contract approved by the Interstate Commerce Commission that limited the liability of American Railway Express.[186] Despite this, a Louisiana state court found the Railway liable based on a state procedural rule that required the Railway to prove that damage was accidental.[187] The Supreme Court reversed, holding that "[t]he law of the United States cannot be evaded by the forms of local practice."[188] In other cases where state courts

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179. *See id.* at 1210–11.

180. 248 U.S. 67, 68–69 (1918).

181. *Id.*

182. *Id.* at 70.

183. 236 U.S. 585, 593 (1915) (holding that review was warranted "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it").

184. 223 U.S. 468, 469–71 (1912) (finding, after an independent examination, that there was a basis for the state court's determination that a foreign company's payment was voluntary).

185. Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 24 (1920).

186. 263 U.S. 19, 20 (1923).

187. *Id.* at 20.

188. *Id.* at 21.

blocked Commerce Clause claims based on state procedural rules, the Supreme Court likewise reversed after finding evidence of evasion.[189]

iii) The Civil Rights Cases

The Civil Rights movement was one of the most active periods in which the Supreme Court reversed state court efforts to evade federal law and rights. Since the end of the Civil War, state courts in the South had demonstrated persistent hostility to federal rights, reaching a high point during the 1960s.[190] The Supreme Court responded to this intransigence by undertaking an independent review of both the facts and state court determinations of law.

In several of these cases, the state court's factual reasoning was so implausible that it necessarily signaled an evasive intent. In *Carter v. Texas*, for example, the state court refused to allow a defendant to present any evidence that Black people had been excluded from the jury, only to later reject his claim for lack of evidence.[191] Similarly, in *Pierre v. Louisiana*, the Louisiana Supreme Court held that a Louisiana parish that had not had a Black juror in over forty years did not engage in racial discrimination based on its factual determination that there had simply been no qualified Black jurors.[192] The Supreme Court rejected this factual determination, finding it inconceivable that, in a parish that was nearly half Black, there could be no qualified Black jurors in forty years.[193]

Even where the Supreme Court found other evidence of evasion, such as inconsistency or arbitrariness, state court hostility to federal rights persists as a common justification for second-guessing state courts. In *Barr v. City of Columbia*, for example, the South Carolina Supreme Court refused to hear federal claims brought by sit-in protestors who alleged that their breach-of-peace convictions were unconstitutional because the defendants' exceptions were "too general."[194] The Supreme Court reversed after finding that the South Carolina Supreme Court had previously considered the merits of nearly

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189. *See, e.g.*, Davis v. Wechsler, 263 U.S. 22 (1923); Mich. Cent. R.R. Co. v. Mix, 278 U.S. 492 (1929); N.Y. Cent. R.R. Co. v. N.Y. & Pa. Co., 271 U.S. 124, 126 (1926); Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Rankin, 241 U.S. 319, 328 (1916); Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914); Vandalia R.R. Co. v. Indiana *ex rel.* City of South Bend, 207 U.S. 359, 367 (1907); Wabash R.R. Co. v. Pearce, 192 U.S. 179, 185–86 (1904).

190. *See The Civil Rights Act of 1964: A Long Struggle for Freedom, Civil Rights Era (1950–1963)*, LIBR. CONG., https://www.loc.gov/exhibits/civil-rights-act/civil-rights-era.html [https://perma.cc/7SRB-EDYC].

191. 177 U.S. 442, 448–49 (1900).

192. 306 U.S. 354, 359 (1939).

193. *Id.* at 360.

194. 378 U.S. 146, 148–49 (1964).

identical exceptions in a number of earlier cases.[195] Turning to the merits, however, the Supreme Court was clear that its reasoning—and its distrust of the state court—was based on "the frequent occasions on which we have reversed under the Fourteenth Amendment convictions of peaceful individuals who were convicted of breach of the peace."[196]

b. Favoring State Interests

States need not be openly hostile to federal law or rights to have an incentive to evade them. In several contexts, a state's own legitimate interests in its property, public fisc, or the enforcement of its own laws may create a temptation to evade federal law that might threaten those interests. Put another way, there will always be situations in which a state court has an incentive to avoid consideration of a federal right, regardless of the specific social or political context. However, the extent to which this inherent incentive to evade justifies federal review varies with context.

i) Contracts and Property

As discussed above, the U.S. Constitution prohibits states "impairing" private contracts.[197] It also prohibits states "tak[ing]" private property without just compensation, and "depriv[ing]" people of property without "due process of law."[198] States, of course, have an incentive to control the terms of their contractual obligations and to acquire property. And when such actions are challenged, state courts have an incentive to avoid having them struck down on federal grounds. Because both contracts and property are created and governed by state law, a state court can avoid the federal issue if it holds that the contract or property right in question did not exist as a matter of state law.

As discussed above, there are several examples of the Supreme Court exercising an independent review of state-law contract decisions where it identified inconsistencies or arbitrariness in a state court's interpretation of state law.[199] Even in these cases, though, the Court's reasoning suggests that it was at least in part motivated to do so based on a suspicion that state courts might be protecting state interests at the expense of federal rights.[200]

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195. *Id.* at 149.

196. *Id.* at 150.

197. U.S. CONST. art I, § 10.

198. *Id.* amends. V, XIV.

199. *See supra* notes 123–30 and accompanying text.

200. *See, e.g.*, Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206–07 (1863) (reversing a state court's contract ruling and declaring that "[w]e shall never immolate truth, justice, and the

Likewise, in several of its Takings cases, the Court has identified state court's potential motive to evade federal law as a justification for review.[201]

ii) The Full Faith and Credit Clause

The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other state."[202] This Clause requires states to faithfully apply both the judgments and laws of sister states.[203] States, of course, have some incentive to favor their own law and interpretive principles. Because a serious misconstruction of sister state law would violate the Full Faith and Credit Clause, however, federal courts have authority to review state court interpretations of other states' law.

Where a state court's interpretation of a sister state judgment is challenged, the Supreme Court has generally afforded only a modicum of deference to the challenged interpretation, relying instead on an independent review of the originator's state law.[204] The reason for this is that federal courts have the same familiarity with and capacity to interpret a state's law as any other state's courts.[205] Accordingly, at least in the context of sister state judgments, the Supreme Court has been more willing to reverse a state court's interpretation.[206]

In *Adam v. Saenger*, for example, the Supreme Court reversed a Texas court's holding that a California judgment was, under California law, invalid

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law, because a State tribunal has erected the alter and decreed the sacrifice"); Terre Haute & Indianapolis R.R. Co. v. Indiana *ex rel.* Ketcham, 194 U.S. 579, 589 (1904) (explaining that federal review of state court contract decisions was necessary to avoid "open[ing] an easy method of avoiding the jurisdiction of this court").

201. *See, e.g.*, Vandalia R.R. Co. v. Indiana *ex rel.* City of South Bend, 207 U.S. 359, 367 (1907) (noting the potential for cases "in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings"); Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 540 (1930) (identifying state court evasion as a justification for an independent federal review of a state court's property decision); Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944) (explaining that a state court's evasion of a constitutional issue is grounds for independent federal review of the state court's application of a local rule).

202. U.S. CONST. art. IV, § 1.

203. *See* William B. Sohn, *Supreme Court Review of Misconstructions of Sister State Law*, 98 VA. L. REV. 1861, 1861 (2012); Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1239–40 (2011); Note, *Misconstruction of Sister State Law in Conflict of Laws*, 12 STAN. L. REV. 653 (1960).

204. Note, *supra* note 203, at 653 & n.1.

205. *See* Barber v. Barber, 323 U.S. 77, 81 (1944).

206. Note, *supra* note 203, at 659.

due to improper service of process.[207] While the Court stated that it would give "deference" to the Texas court's decision, it could not accept it as conclusive.[208]

Similarly, in *Barber v. Barber*, the Supreme Court reversed a Tennessee court's determination that a North Carolina alimony judgment was not final under North Carolina law.[209] And in *Johnson v. Muelberger*, the Supreme Court reversed the New York Court of Appeals' holding that the child of a former marriage could collaterally attack a Florida divorce decree under Florida law after making its own independent assessment of Florida law.[210]

The Supreme Court has taken a very different approach, however, to cases challenging state court interpretations of the substantive law of sister states, rather than their judgments. Under the rule laid out in *Sun Oil Co. v. Wortman*,[211] the Supreme Court affords almost complete deference to state courts, without any kind of independent inquiry.

To understand the *Wortman* decision, it is necessary to begin with a predecessor case, *Phillips Petroleum Co. v. Shutts*.[212] *Shutts* involved two corporations that extracted gas from private land and sold it at prices set by the Federal Power Commission ("FPC"), with the landowners receiving royalties.[213] The corporations could petition the FPC to approve higher prices and were permitted to charge these higher prices while the FPC's decision was pending.[214] During this period, however, the corporations only had to pay royalties to landowners based on the lower prices.[215] As a result, the corporations held onto millions of dollars of unpaid royalties for significant periods of time, and when the FPC finally approved the higher rates, the corporations did not pay any interest to the landowners on the withheld royalties.[216]

The landowners filed a class action in Kansas, and the Kansas Supreme Court applied Kansas law to find that the appropriate rate of interest was seven percent, the same rate that the FPC paid its customers under a federal

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207. 303 U.S. 59, 67 (1938).
208. *Id.* at 64.
209. 323 U.S. 77, 87 (1944).
210. 340 U.S. 581, 587–89 (1951).
211. 486 U.S. 717, 731–34 (1988).
212. 472 U.S. 797 (1985).
213. *Id.* at 799–800.
214. *Id.*
215. *Id.* at 800. The reason for this was that it would be easier to pay the difference to landowners once the FPC approved a higher price than it would be to recoup the difference from landowners in the event the FPC rejected the higher prices. *See id.*
216. *Id.*

statute.[217] The problem, however, was that most of the landowners did not live in Kansas, but rather in states such as Texas, Oklahoma, and Louisiana, where local law appeared to require lower interest rates.[218] The corporations appealed to the Supreme Court, arguing that Kansas had improperly applied its own law.[219]

The Supreme Court agreed, finding that Kansas lacked a "significant aggregation of contacts" to the non-Kansas plaintiffs to constitutionally apply its own law.[220] Notably, the *Shutts* decision observed that the laws of the other states would likely differ as to the appropriate interest rate.[221]

On remand, the Kansas Supreme Court applied the law of its sister states but reached the same conclusion after holding that Texas, Oklahoma, and Louisiana would all imply an agreement between the corporations and the landowners to use the FPC rates, thus superseding any contrary state statutes.[222]

The corporations appealed again in *Wortman*, contending that Kansas had violated the Full Faith and Credit Clause by misconstruing the laws of its sister states.[223] This time, however, the Supreme Court affirmed, explaining that:

> To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention.[224]

Under this standard, it was not enough that Texas, Oklahoma, and Louisiana had all enacted clear statutes setting interest rates. Because none of these states had ever addressed the specific theory put forth by the Kansas Supreme Court—that there was an implied agreement to apply the FPC interest rates—there was no contradiction and thus no constitutional violation.[225]

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217. *Id.* at 801–03.
218. *Id.* at 815–18.
219. *Id.* at 803.
220. *Id.* at 818.
221. *Id.* at 817–18.
222. Shutts v. Phillips Petroleum Co., 732 P.2d 1286, 1312–13 (1987).
223. Sun Oil Co. v. Wortman, 486 U.S. 717, 719 (1988).
224. *Id.* at 730–31.
225. *Id.* at 731–34.

c. The Role of Sociopolitical Context

The foregoing cases sketch out a spectrum of sociopolitical contexts that range from the blatantly recalcitrant state courts of the Civil Rights movement to the relatively minor incentives to evade federal law found in the Takings and Full Faith and Credit cases. Depending on the degree to which context might have suggested evidence of evasion, the Supreme Court has looked on state court decisions with more or less scrutiny or deference.[226] But it is important to note that in none of these cases was sociopolitical context sufficient *on its own* to justify federal second-guessing. In each case, the Supreme Court also had evidence of evasion in the form of inconsistency or arbitrariness. Moreover, the Supreme Court has in some cases reviewed a state court's determination of state law based *solely* on inconsistency, without any suggestion that sociopolitical context came into play at all.

What role, then, does sociopolitical context play in the Supreme Court's willingness to second-guess a state court's determination of state law? In one sense, sociopolitical context simplifies the often difficult task of distinguishing between state court decisions that are merely incorrect and those that seek to evade federal law. An evasion inquiry is, in effect, a collateral attack on the motives of state court judges.[227] And there is often little evidence to be found in a state court record of a judge's motives apart from evidence of inconsistency or arbitrariness. But even in these cases, it may be difficult to tell whether, say, a state court has rendered an inconsistent decision because of a desire to evade federal law or because the judge simply erred. Sociopolitical context, particularly in cases where there has been repeated, consistent, or systemic evasion by state courts, makes it easier to draw an inference of evasion.

In another sense, relying to some degree on sociopolitical context furthers federalism principles. The mere fact that the Supreme Court has the authority to second-guess state courts and the obligation to ensure that federal law is being adhered to does not mean that the Court should routinely scrutinize every state procedural default or contract decision. Doing so would seriously damage the relationship between federal and state governments and undermine the basic assumption that state courts act in good faith to enforce and uphold federal law. Requiring some evidence of evasion before second-guessing state courts both limits federal intrusion on state judicial functions and provides justification for doing so. Similarly, by making deference turn

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226. *See* Webb, *supra* note 24, at 1219 (noting the Supreme Court's "heavy reliance on social-political context cues" in this area).

227. *Id.* at 1220.

at least in part on sociopolitical context, federal courts further protect judicial federalism principles from unnecessary encroachment absent extreme circumstances.[228]

B. Federalization of State Law Questions

A separate line of cases demonstrates a different justification for the federal second-guessing of state court determinations of state law. In certain areas of law, enforcement of federal law or rights requires transforming what would otherwise be a purely state-law issue into a federal question. In these circumstances, the Supreme Court may review a state court's determination of the state law issue to ensure that it complies with federal law.

The most common way that federalization occurs is where state law is antecedent to a federal issue.[229] The Contracts Clause, for example, prohibits state legislation that impairs private contracts.[230] But contracts themselves are governed by state law. The existence and substance of a contract is thus a state law issue that is antecedent to the federal issue of whether that contract has been unconstitutionally impaired. Because of this, the Supreme Court has long held that, for purpose of the Contracts Clause, the existence of a contract is itself a federal question that the Court may review without being bound by a state court's decision.[231]

Another way in which state law questions are federalized is when a federal law supersedes state law on an issue that would otherwise be governed purely by state law.[232] Where states enter into an interstate compact and Congress gives its consent, for example, the compact is transformed into federal law, displacing any contrary state law. Likewise, where a federal treaty prohibits states from taking some action, it becomes a matter of federal law whether the states have done so.

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228. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (stating that federal courts are "bound by" state court determinations of state law "except in extreme circumstances" such as instances of evasion); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945) (noting that such extreme circumstances may occur if a state-court interpretation of state law appears to be "an obvious subterfuge to evade consideration of a federal issue").

229. *See infra* Section II.B.1.

230. U.S. CONST. art. I, § 10.

231. *See infra* Section II.B.1.a.

232. *See infra* Section II.B.2.

1. State Law Antecedent to Federal Claims

One area in which the Supreme Court has historically reviewed state court determinations of state law involves cases in which state law is antecedent to some federal issue. The federal constitution, for example, protects certain rights which are themselves established and governed by state law. The Contracts Clause prohibits states from "impairing" private contracts;[233] the Takings Clause provides that "private property [shall not] be taken for public use, without just compensation;"[234] and the Due Process Clauses prohibit the government from depriving people of "property" without "due process of law."[235] Because the existence and scope of contract and property rights are governed by state law, a federal court must look to state law to determine if a right exists under state law before it can determine whether that right has been impaired.[236] Where a state court has ruled that a contract or property right does not exist under state law, a federal court may be called upon to review that determination.

a. Contracts

The Contracts Clause prohibits state legislation that impairs private contracts.[237] To determine whether such an impairment has occurred, a federal court must first determine if a contract exists.[238] The existence of a contract is thus a federal question for purposes of the Contracts Clause, even as contract law itself is governed by state law.[239] Where a state court has held that a contract did not exist, the Supreme Court may be called upon to review that determination.

The Supreme Court's approach to reviewing state court determinations of contract law generally takes one of two forms. In most cases, the Supreme

233. U.S. CONST. art. I, § 10.
234. *Id.* amend. V.
235. *Id.* amend. XIV.
236. *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
237. U.S. CONST. art. I, § 10.
238. *See* Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992).
239. *See id.* at 187; Irving Tr. Co. v. Day, 314 U.S. 556, 561 (1942).

Court has afforded significant deference to state courts.[240] Occasionally, however, the Court will independently review the state court's decision.[241]

In some cases, the Supreme Court has applied a kind of plain error analysis. In *Piqua Branch of the State Bank of Ohio v. Knoop*, for example, the Supreme Court considered whether a section of Ohio's general banking law, which required banks organized under the law to set off six percent of net profits to the state in lieu of taxes, constituted a contract.[242] The Ohio Supreme Court had held that the section did not constitute a contract.[243] The Supreme Court reversed, explaining that the language of the section was "susceptible of but one construction"—that of a contract.[244] The same issue returned to the Supreme Court again in *Jefferson Branch Bank v. Skelly*, whereupon the Court held, once again, that the language was "too plain to admit of any other construction" than that of a contract.[245]

Similarly, in *Terre Haute & Indianapolis Railroad Co. v. Indiana ex rel. Ketcham*, the Supreme Court reversed the Indiana Supreme Court's interpretation of a contract based on a plain reading of the text.[246] The Indianapolis Railroad Company had entered into a special charter with the state of Indiana in 1847, under which the railroad had absolute discretion to fix charges, with the caveat that the state legislature "may so regulate the tolls and freights" such that any profits above fifteen percent would be payable to the state.[247] The railroad operated under this charter until 1873, whereupon it was reorganized under the state's general railroad law, and in that time, the state did not exercise its right to claim surplus profits.[248] Then, in 1897, the Indiana legislature amended the original charter to turn the surplus into a debt.[249] The Indiana Supreme Court recognized that legislation could not retroactively change the terms of the railroad's charter without running afoul

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240. *See, e.g.*, Hale v. Iowa State Bd. of Assessment & Rev., 302 U.S. 95, 101 (1937) ("[W]e lean toward agreement with the courts of the state, and accept their judgment as to such matters unless manifestly wrong."); Phelps v. Bd. of Educ., 300 U.S. 319, 322–23 (1937) (stating that state court determinations as to the existence of a contract control unless "palpably erroneous").

241. *See, e.g.*, Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938) ("[I]n order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made . . . .").

242. 57 U.S. (16 How.) 369 (1853).

243. *See* Knoup v. Piqua Branch of the State Bank, 1 Ohio St. 603, 621 (1853).

244. *See Knoop*, 57 U.S. (16 How.) at 378.

245. 66 U.S. (1 Black) 436, 450 (1861) (quoting *Knoop*, 57 U.S. (16 How.) at 393 (Taney, C.J., concurring)).

246. 194 U.S. 579, 589 (1904).

247. *Id.* at 585–86.

248. *Id.* at 585.

249. *Id.* at 586.

of the Contracts Clause.[250] To avoid this "clearly unconstitutional" result, the Indiana Supreme Court interpreted the original charter as creating a debt and the 1897 amendments as merely providing a means of enforcement.[251] The Supreme Court disagreed, holding that based on the plain language of the charter,[252] the obligation to pay any surplus to the state was contingent on the state regulating the tolls and that the use of the term "may" meant that any such regulation was permissive, rather than mandatory.[253] Accordingly, the charter itself did not create any obligation, and the only way for the state to claim the debt would be by unconstitutional retroactive operation of the 1897 amendments.[254]

Later contract cases continued to invoke federalization as a justification for an independent review, even as they looked to prior state court decisions. In *Indiana ex rel. Anderson v. Brand*, for example, the Supreme Court considered prior Indiana cases that "uniformly held" that the state tenure law created a contractual right,[255] but also conducted its own independent assessment of the text of the tenure act, noting that the word "contract" was used over twenty-five times when describing the tenure right.[256]

The Supreme Court's most recent case examining state contract laws, *General Motors Corp. v. Romein*, likewise demonstrates that the Court treats the question of whether a contract exists for Contracts Clause purposes as a federalized issue.[257] In 1980, the Michigan legislature enacted a law increasing workers' compensation benefits.[258] Then, in 1981, the legislature passed a law allowing employers to reduce these benefits by the amount of wage-loss compensation received from other employer-funded sources.[259] General Motors and Ford used this law to reduce benefits for workers who had been injured prior to 1982, leading to a legal challenge and a 1985 decision by the Michigan Supreme Court allowing employers to reduce pre-

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250. *See* Terre Haute & Indianapolis R.R. Co. v. State *ex rel.* Ketcham, 65 N.E. 401, 403 (Ind. 1902).

251. *Id.*

252. While the Supreme Court took a plain language approach, the Indiana Supreme Court appears to have taken a more purposivist approach, holding that the intent of the charter was clearly to reserve railroad profits above fifteen percent to the state. *See id.* at 407 ("The intent of the law is the law.").

253. *Terre Haute*, 194 U.S. at 587–88.

254. *See id.* at 588–89.

255. 303 U.S. 95, 105–07 (1938).

256. *Id.* at 105.

257. 503 U.S. 181 (1992).

258. *Id.* at 183–84.

259. *Id.* at 184.

1982 benefits.[260] In response, the Michigan legislature enacted another law in 1987 that overturned the Michigan Supreme Court's decision and required the employers to refund the reduced benefits.[261] General Motors and Ford challenged this new law as a violation of the Contracts Clause, but the Michigan Supreme Court found that the law did not impair contractual rights.[262]

The Supreme Court affirmed, explaining that it saw "no reason to disagree with the Michigan Supreme Court's conclusion" that no contractual rights were implicated by the 1987 law.[263] Notably, while the *Romein* court considered some prior Michigan case law in reaching its decision—suggesting some concern with possible evasion—it ultimately seems to have relied on federal law and general principles of contract law to determine if the workers' compensation benefits were an implied contractual right.[264]

b. Property Rights

Like contracts, property rights are governed by state law. The Federal Constitution protects property rights in two ways. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation,"[265] and the Due Process Clauses prohibit the government from depriving persons of property without due process of law.[266]

The Supreme Court has long held that these clauses do not create property rights, but rather merely protect existing rights under state law.[267] Nonetheless, for the Court to enforce these constitutional guarantees, it must

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260. *Id.* at 184–85.

261. *Id.* at 185–86.

262. *Id.* at 186 (citing Romein v. Gen. Motors Corp., 462 N.W.2d 555 (1990)).

263. *Id.* at 187.

264. For example, on the issue of when parties to a contract assent to implied terms, the *Romein* court relied upon *Garrison v. City of New York*, 88 U.S. (21 Wall.) 196 (1874). *Romein*, 503 U.S. at 188. And on the issue of how and when private contracts incorporate state laws, the Court cited to *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977). *Romein*, 503 U.S. at 189.

265. U.S. CONST. amend. V.

266. *Id.* amends. V, XIV.

267. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) ("[T]he Constitution protects rather than creates property interests . . . ."); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); Demorest v. City Bank Farmers Tr. Co., 321 U.S. 36, 42 (1944).

be able to determine what property rights exist under state law.[268] While the Supreme Court has generally deferred to state court determinations as to the existence of property rights absent some evidence of circumvention or evasion,[269] the Court nonetheless recognizes that the existence of property rights is a federal question, even as it depends on "existing rules or understandings that stem from an independent source such as state law."[270]

In some cases, the Court has decided property rights issues based on general or federal law principles. In *Lucas v. South Carolina Coastal Council*, for example, the court held that, as a matter of federal law, a state's deprivation of all economically beneficial use for a property is equivalent to a deprivation of property.[271] In his dissent, Justice Blackmun went on to explain that that certain general or federal principles place constraints on state property law, such as the recognition that "the right to exclude others" is a fundamental aspect of a property right.[272]

In other cases, the Court has directly reviewed a state court's own interpretation of state property law. In *Board of Regents v. Roth*, for example, the Supreme Court undertook an independent assessment of a university employee's contract to determine whether it gave rise to a property interest in being renewed.[273]

Two other cases illustrate how the Court has treated the characterization of property as either private or public as a federalized issue. In *Webb's Fabulous Pharmacists, Inc. v. Beckwith*, the Court considered a Florida statutory scheme under which purchasers of insolvent corporations could deposit the proceeds of the sale with a state court while the purchaser filed an interpleader action against creditors.[274] Under Florida law, any interest generated on these funds in the meantime would be "deemed income of the office of the clerk of the circuit court."[275] The issue in *Webb's* was whether this interest constituted private property that the state had taken without just compensation. The Florida Supreme Court held that the interest was "public

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268. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 727 (2010) ("A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.").

269. *See supra* Section II.A.1.c (discussing property cases).

270. *Roth*, 408 U.S. at 577.

271. 505 U.S. 1003, 1015–17 (1992).

272. *Id.* at 1044 (Blackmun, J., dissenting).

273. 408 U.S. 564 (1972).

274. 449 U.S. 155 (1980); FLA. STAT. § 676.106(4) (1977) (repealed 1993).

275. FLA. STAT. § 28.33 (1973) (amended 2009).

money" because "the statute takes only what it creates."[276] The United States Supreme Court reversed, relying on "[t]he usual and general rule . . . that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal."[277] The Court supported this proposition with various cites to state and federal caselaw (though none from Florida).[278] In other words, it didn't matter to the *Webb's* Court whether the Florida Supreme Court's characterization of property as public or private was consistent with past state practice, only whether that characterization comported with general, federalized rules of property law.

Similarly, in *Phillips v. Washington Legal Foundation*, the Supreme Court considered a challenge to a Texas Supreme Court rule under which all Interest on Lawyers' Trust Accounts (also known as "IOLTA" accounts) had to be paid into a nonprofit to support legal services for low-income individuals.[279] This interest was generated from principal funds that were unquestionably the private property of clients, but under state law these funds would not have been able to earn interest other than through an IOLTA account.[280] The Court held that the IOLTA interest was private property, reiterating its view from *Webb's* that, under general rules of property law, "interest follows the principal," and that this rule was "firmly embedded in the common law of the various States."[281] The *Phillips* petitioners protested, however, that Texas had departed from this general rule in certain contexts, "such as income-only trusts and marital community property rules."[282] The Court, however, did not find these departures significant and dismissed them as either having their own "firm basis in traditional property law principles" or "a historical pedigree" in Texas.[283] Again, as in *Webb's*, the Court's decision in *Phillips* was firmly based in general, federalized principles of property law rather than an evasion-based framework that would have considered whether the Texas Supreme Court's decision was inconsistent with past practice.

Most recently, the Supreme Court suggested in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*[284]

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276. Beckwith v. Webb's Fabulous Pharmacies, 374 So. 2d 951, 952–53 (Fla. 1979).

277. *Webb's*, 449 U.S. at 162.

278. *Id.* at 162–63.

279. 524 U.S. 156, 162 (1998).

280. *See id.* at 163; *see also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 896 (2000).

281. *Phillips*, 524 U.S. at 165 & n.5.

282. *Id.* at 167.

283. *Id.* at 167–68.

284. 560 U.S. 702 (2010).

that the question of whether a claimed property right is "established" under state law is a federal question and that the Court may engage in an independent review of state law to decide this question, without deference to state law.[285]

Stop the Beach arose out of the Florida Legislature's Beach and Shore Preservation Act, under which cities could restore eroded beaches by depositing new sand.[286] This program also altered how beachfront property was defined. Under general principles of Florida law, the line separating private and public beachfront property is traditionally defined as the mean high-water line, or the average height of high tide over a nineteen-year period.[287] Under the Act, this line would be replaced by an "erosion control line" which acts as a reference for beach maintenance.[288] Pursuant to this Act, Walton County and the City of Destin obtained the necessary permits and began depositing sand onto affected beaches.[289] In response, six beachfront property owners brought suit in state court, alleging that this shift to an "erosion control line" constituted an uncompensated taking of their property rights with respect to the water in violation of the Florida constitution.[290] The Florida Supreme Court rejected this claim, holding that under Florida law the property owners did not have vested rights to either accretions to their land—such as from the deposited sand—or to have their property touch the water.[291]

Initially, the property owners raised no federal claims before the Florida Supreme Court; in a motion for rehearing, however, they argued that the Florida Supreme Court had impermissibly changed Florida property law to deprive them of their rights, amounting to a "judicial taking" in violation of the federal constitution.[292] When the Florida Supreme Court denied this motion, the property owners filed a petition for a writ of certiorari, which the Supreme Court granted.

Writing for a plurality, Justice Scalia agreed in principle that a court could violate the Takings Clause by changing property rights as surely as a legislature could. But although the property owners had argued that the standard should be whether a court's decision constituted a sudden or

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285. *See id.* at 714–15.

286. *See* FLA. STAT. §§ 161.011, 161.088 (2024).

287. *Id.* § 177.27(14)–(15).

288. *Id.* § 161.161(3)–(5).

289. *See* Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 & n.4 (Fla. 2008).

290. *Id.* at 1106 n.5, 1107.

291. *Id.* at 1109.

292. *See* Petition for Writ of Certiorari at app. 138–70, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010) (No. 08-1151).

unexpected change in law based on existing precedent, Justice Scalia took a different approach, writing that "[w]hat counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established."[293] In deciding whether a property right was established, Justice Scalia explained, no deference was due to the state court's decision.[294] Instead, Justice Scalia undertook an independent review of Florida property law, ultimately agreeing with the Florida Supreme Court that state law had not established the property owners' asserted rights.[295]

Justice Kennedy, joined by Justice Sotomayor, concurred in the judgment, though they did not adopt Justice Scalia's approach to the Takings Clause. Instead, Justice Kennedy contended that a state court decision that changes or eliminates "established" property rights would likely constitute a Due Process violation, rather than a Taking.[296] Notably, however, the concurrence joined Justice Scalia's independent review of Florida law in full, suggesting that even under a Due Process approach, Justice Kennedy accepted that an independent examination of state law was appropriate.[297]

2. Superseding State Law

a. Interstate Compacts

Under the Compact Clause, "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State."[298] Interstate compacts must therefore be approved by Congress, which transforms the compact into federal law.[299] Thus, the interpretation of interstate compacts presents a federal question, though state law nonetheless bears on the formation and obligations of a contract. The Supreme Court has recognized, however, that state courts cannot be the final arbiters of the rights

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293. *Stop the Beach*, 560 U.S. at 728 (plurality opinion).

294. *Id.* at 726 n.9.

295. *Id.* at 729–33. Interestingly, Justice Scalia's opinion did not even address the Florida Supreme Court's actual basis for its holding, which was that the asserted property right was actually a future contingent interest. Instead, Justice Scalia based his conclusion on a 1927 case regarding avulsions, a case that was never addressed by the Florida Supreme Court. This suggests that the Supreme Court may have wide latitude when reviewing state property law.

296. *Id.* at 737 (Kennedy, J., concurring) (first citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548–49 (2005) (Kennedy, J., concurring); and then citing Perry v. Sindermann, 408 U.S. 593, 601 (1972)).

297. *Id.* at 733.

298. U.S. CONST. art. I, § 10.

299. *See* Cuyler v. Adams, 449 U.S. 433, 438 (1981).

and obligations of their own state under a compact.[300] Accordingly, the Supreme Court must exercise independent review of any state court determination of state law, while affording deference to the state courts.[301]

But while the Supreme Court has asserted the power to independently construe state law as it relates to a compact, it has not had much occasion to do so, in part because the terms of an interstate compact supersede any contrary state law. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, for example, the Colorado Supreme Court held that a compact with New Mexico over water rights was invalid because it affected water appropriation rights protected by the state constitution.[302] The Supreme Court reversed, holding that the compact was binding on Colorado notwithstanding the state constitution.[303]

West Virginia ex rel. Dyer v. Sims provides another example.[304] There, West Virginia entered into a compact with seven other states to establish and fund a commission to control pollution in the Ohio River.[305] The West Virginia legislature ratified the compact, and, following Congressional consent, the West Virginia Governor executed the compact.[306] But the West Virginia Supreme Court held that the compact was unenforceable because it violated the state constitution's prohibitions against delegating the state's police power and contracting debts except in limited circumstances.[307] The Supreme Court explained that it had the power "to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States."[308] That said, the Court did not

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300. *See* Kentucky v. Indiana, 281 U.S. 163, 176–77 (1930) ("Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese*, and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved.").

301. *See id.* at 176.

302. 304 U.S. 92, 98–100 (1938); *see also* COLO. CONST. art. XVI, § 6 ("The right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied.").

303. *See Hinderlider*, 304 U.S. at 106 ("Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.").

304. 341 U.S. 22 (1951).

305. *Id.* at 24.

306. *Id.* at 25.

307. *See* State *ex rel.* Dyer v. Sims, 58 S.E.2d 766, 773–77 (W. Va. 1950).

308. *Dyer*, 341 U.S. at 28.

engage in an independent review of the West Virginia constitution.[309] On the delegation issue, the Court held—as it had in *Hinderlider*—that the terms of any compact entered into by West Virginia would bind the state as a matter of federal law.[310] And on the debt issue, the Court found that the compact in question would not conflict with the West Virginia constitution—even as construed by the West Virginia Supreme Court—because it had been carefully drafted so as to avoid the creation of any debt.[311]

Thus, while *Hinderlider* and *Dyer* stand for the proposition that the Supreme Court may independently interpret state law questions related to the formation of interstate compacts,[312] the Supreme Court has typically favored deference and avoidance over independent review.

b. Treaties

Treaties present another area in which a state law issue may be superseded by federal law. In a trio of early cases, the Supreme Court asserted its power to independently review underlying state law where necessary to give effect to treaty rights.

The first, *Smith v. Maryland*, involved a 1783 treaty between the United States and Britain that provided that there would be "no future confiscations" of property held by British subjects.[313] Prior to the treaty, Maryland enacted two statutes: the first declared that "all property within this state, belonging to British subjects, debts only excepted, shall be seized, and is hereby confiscated to the use of this state," and the second appointed commissioners to whom the confiscated property was given.[314] The question before the Supreme Court was whether these statutes confiscated the property of a British subject prior to the 1783 treaty.[315] The Supreme Court held that the statutes did, stating that "[i]t would seem difficult to [draft] a law more completely operative to [divest]" the property.[316] But although the Court

309. *But see* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 525 (2021) (asserting that the Supreme Court "[c]onstru[ed] the West Virginia Constitution for itself").

310. *See Dyer*, 341 U.S. at 31.

311. *See id.* at 32.

312. Justice Reed, concurring in *Dyer*, criticized the majority's asserted power to interpret state law; he argued that "[t]he interpretation of the meaning of [a] compact controls over a state's application of its own law through the Supremacy Clause and not by any implied federal power to construe state law." *Id.* at 33 (Reed, J., concurring).

313. 10 U.S. (6 Cranch) 286 (1810).

314. *Id.* at 306.

315. *Id.* at 305.

316. *Id.* at 306.

independently construed the state statutes, it did not offer any rationale for why independent review was permissible, or even necessary. Indeed, the Court did not even mention that the Maryland courts below had interpreted the statutes to reach the same conclusion.

The Court confronted this issue more directly in *Fairfax's Devisee v. Hunter's Lessee*.[317] As discussed above, this case concerned whether the state of Virginia violated a 1783 federal treaty with Britain promising "no future confiscations" of British property when it seized title to a parcel of land in 1789 that was previously owned by a British subject and devised to his heir.[318] The Virginia Supreme Court interpreted a number of pre-1783 state statutes as having already confiscated this land prior to the federal treaty, but the Supreme Court rejected these interpretations after an independent review.[319]

On remand, the Virginia Supreme Court refused to follow the Supreme Court's decision, holding in part that the Supreme Court lacked jurisdiction to review a state court's decision on a matter of state property law.[320] The Supreme Court again reversed, explaining that it could not "decide whether a title [to land] be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity."[321] "From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title."[322] As discussed above, this language can be read as expressing concerns over state court evasion.[323] But the Court also spoke in terms of federalization, explaining that whether or not the treaty covered a particular piece of land as a matter of federal law encompassed the question of whether the underlying title was good.[324] Put another way, the treaty transformed the state-law title issue into a federal question.

3. Justifications for Federalization

There are two ways to understand the Supreme Court's approach in the above cases. One is to ground the federalization of state law issues in necessity. A federal court cannot effectively protect federal constitutional

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317. 11 U.S. (7 Cranch) 603 (1812).
318. *See supra* Section II.A.3.a.i.
319. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 623–28.
320. *See supra* Section II.A.3.a.i.
321. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 358 (1816).
322. *Id.*
323. *See supra* notes 173–77 and accompanying text.
324. *Martin*, 14 U.S. (1 Wheat.) at 358 ("Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided?").

rights under the Contracts or Takings Clauses from state interference if state courts can simply reinterpret state law to circumvent those rights.

In another sense, federalization can be thought of as being rooted in the supremacy of federal law. When Congress consents to an interstate compact, the compact becomes federal law, meaning federal principles apply to interpret and enforce the compact.[325] Thus, in cases like *Kentucky* and *Hinderlider*, the Supreme Court treated any contrary state law as having been superseded.[326] This is not to suggest that state law is entirely irrelevant; as *Dyer* illustrates, the Supreme Court may consider state law in determining the validity of a compact, though the inquiry remains one of federal law.[327]

The Court's early treaty cases illustrate the same basic principle. Treaties are federal law, superseding any contrary state law. Thus, when the 1783 Treaty of Peace promised that there would be no future confiscations of the property of British subjects, it created its own conceptions of "property" and "confiscation," and it was a question of federal law whether Maryland or Virginia had unlawfully confiscated British property.[328]

The contracts cases can also be viewed through this lens. While contracts are created and governed by state law generally, the federal constitution arguably embodies its own conception of what constitutes a contract and thereby establishes a baseline which states may not transgress. The early contracts cases, for example, treat the formation and substance of contracts as federal questions.[329] In *Skelly*, the Supreme Court determined that Ohio's bank charter was a contract as a matter of federal law.[330] Likewise, in *Terre Haute*, the Court applied general—and arguably *federal*—contract principles to determine that Indiana's railroad charter had not created a debt.[331] And while later contracts cases afford more deference to state courts and past decisions,[332] the inquiry remains a federal one. Thus, in *Romein*, the Supreme Court applied both federal and Michigan law to assess whether a contract had

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325. *See* Cuyler v. Adams, 449 U.S. 433, 438 (1981).

326. *See* Kentucky v. Indiana, 281 U.S. 163, 176–77 (1930); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106–07, 110 (1938).

327. *See* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951).

328. *See* Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812).

329. *See, e.g.*, Irving Trust Co. v. Day, 314 U.S. 556, 561 (1942) (holding that the existence of a contract is a federal question); Appleby v. City of New York, 271 U.S. 364, 380 (1926) (holding that the question of contract formation may turn on either "general or purely local law").

330. Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 450 (1861).

331. *See* Terre Haute & Indianapolis R.R. Co. v. Indiana *ex rel.* Ketcham, 194 U.S. 579, 588–89 (1904).

332. *See* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938); Phelps v. Bd. of Educ., 300 U.S. 319, 322–23 (1937).

been formed and whether that contract implied a term obliging employers to pay workers' compensation.[333]

Likewise, the property cases illustrate that, while the federal constitution does not create property, it does embody certain principles for when a property right is established such that federal protection attaches. Hence, in *Stop the Beach*, both the plurality and concurrence appeared to agree that an independent examination of Florida law was appropriate to determine whether property rights had been established.[334]

But there are important limitations on federalization. One is that there must be some independent federal right or law to enforce.[335] In the contracts and property cases, for example, the federal constitution expressly constrains state action.[336] Likewise, treaties and interstate compacts are federal law and enforceable on their own terms.[337] In contrast, the Supreme Court has never held that a purely state law issue can be reviewed, even under the Due Process Clause, simply for its correctness.[338] Another limitation is that, for a state law issue to be transformed into a federal question, there must be some source of either general or federal law for a court to draw upon.[339] In the treaty and interstate compact contexts, for example, general principles of interpretation apply.[340] And to the limited extent that contract and property law are federalized, the Supreme Court has applied general principles—largely taken from the common law—to determine when a contract exists or when a property right has been established.[341]

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333. General Motors v. Romein, 503 U.S. 181, 181–82, 188 (1992). In *Romein*, the Court cited *Garrison v. City of New York*, 88 U.S. (21 Wall.) 196, 203 (1875), for general contract principles as to assent and *United States Trust Co. of New York. v. New Jersey*, 431 U.S. 1, 19 (1977), for general principles around private contracts incorporating state laws; but the Court also cited Michigan law for the proposition that Michigan does not otherwise imply such terms. *See* Brown v. Eller Outdoor Advert. Co., 360 N.W.2d 322, 326 (Mich. Ct. App. 1984); Wilson v. Doehler-Jarvis Div. of Nat'l Lead Co., 100 N.W.2d 226, 229–30 (Mich. 1960).

334. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 725 (2010); *id.* at 743 (Breyer, J., concurring).

335. *See* KEVIN J. HICKEY ET AL., CONG. RSCH. SERV., R45323, FEDERALISM-BASED LIMITATIONS ON CONGRESSIONAL POWER: AN OVERVIEW 1 (2023).

336. *See supra* Section II.B.1.

337. *See supra* Section II.B.2.

338. Am. Ry. Express Co. v. Kentucky, 273 U.S. 269, 272–73 (1927) ("The due process clause does not take up the laws of the several states, and make all questions pertaining to them constitutional questions, nor does it enable [the Court] to revise the decisions of the state courts upon questions of state law." (quoting Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 166 (1917))).

339. *See* HICKEY ET AL., *supra* note 335, at 3.

340. *See* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10807, INTERSTATE COMPACTS: AN OVERVIEW 3–4 (2023).

341. *See id.* at 2–4.

It is also worth noting that some of the federalization cases overlap with the Supreme Court's evasion inquiry. This is not surprising; states, after all, have a background incentive to avoid contractual obligations or to acquire property without compensating owners. They also have an incentive to assert the ability to withdraw from an interstate compact unilaterally. And even if states do not have an inherent reason to be hostile to federal treaties, the *Fairfax* line of cases illustrates that particular treaties may nonetheless be met with hostility by state courts. What is important to note about these overlapping cases is that the evasion and federalization rationales remain distinct. That is, where a state law issue is federalized, evidence of evasion is not necessary, even if it may also be present and might independently justify federal second-guessing.

C. Relevance to Moore *Claims*

The two justifications for Supreme Court review of state court determinations of state law—evasion and federalization—arise in various areas of law, each with unique considerations that affect which justifications the Court may rely on. Some areas of law, like the adequate-and-independent-state-grounds doctrine, only implicate evasion concerns, while others, like interstate compacts, only implicate federalization concerns. Some, like the Contracts Clause cases, may implicate both.

Any *Moore* claim would occur in the very different context of election law. Such a claim might arise amidst a disputed and hotly contested election and could challenge either a state court's interpretation of state law or an interpretation by a state executive official. *Moore* claims may also be brought to challenge a specific interpretation, the interpretive methodology applied by a state court, or even the remedy ordered.

This Part examines both the evasion and federalization justifications as they could relate to the election law context and concludes that only the evasion inquiry is an appropriate fit for *Moore* claims.

1. Evasion

Most of the Supreme Court's evasion cases focus on attempts by state courts to circumvent specific federal laws or to block consideration of a federal claim. In the *Moore* context, however, there is no specific federal law or claim implicated. Instead, the concern in a *Moore* case would be that a state court has evaded the Elections or Electors Clauses' vesting of legislative authority in the state legislature by arrogating that authority for itself or otherwise frustrating the state legislature's ability to carry out its function.

Framed this way, an evasion analysis appears to be an ideal fit for *Moore* claims. The *Moore* majority's focus on the Elections and Electors Clauses' "deliberate choice" to vest primary authority over elections in state legislators and its holding that these clauses are violated when state courts "arrogate" that authority aligns with the evasion inquiry's focus on circumvention and the motives of state courts, rather than the correctness of a state court decision.[342] Similarly, while *Moore* did not set forth any particular test for how to review state court determinations of state election law, it framed its list of potentially relevant cases in terms of the Court's "obligation to ensure that state court interpretations of that law *do not evade federal law*."[343]

2. Federalization

There are two possible ways in which the proper interpretation of a state election law might be transformed into a federal question under the Elections or Electors Clauses. First, the Supreme Court may decide that, just as certain language in an agreement constitutes a contract for purposes of the Contracts Clause, certain language in a state election law compels a particular interpretation for purposes of the Elections or Electors Clauses. For example, the Court could decide that all filing deadlines are mandatory and must be strictly construed. Second, the Supreme Court may decide, as a matter of federal law, that state courts must apply certain interpretive methods to state election laws, at least as they pertain to federal elections. This was Chief Justice Rehnquist's position in his *Bush v. Gore* concurrence,[344] and Justice Kavanaugh echoed a similar point in his *Moore* concurrence.[345]

Either approach, however, would raise serious problems. First, as discussed above, federalization of a state law question requires there to be some independent federal question, such as the Contracts Clause's express prohibition of state legislation impairing private contracts. Even if the Elections and Electors Clauses impose a federal anti-arrogation principle on state courts, it does not follow that these clauses transform the interpretation of every state election law into a federal question.[346] Moreover, federalizing

342. Moore v. Harper, 600 U.S. 1, 34, 36 (2023).

343. *Id.* at 34 (emphasis added). Notably, several of cases cited by the *Moore* majority can be viewed as evasion cases. *See id.* at 35 (citing Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938); Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457–58 (1958)).

344. 531 U.S. 98, 114–15 (2000) (Rehnquist, C.J., concurring).

345. *Moore*, 600 U.S. at 38–39 (Kavanaugh, J., concurring).

346. *Cf.* Am. Ry. Express Co. v. Kentucky, 273 U.S. 269, 272–73 (1927) (explaining that the Due Process Clause does not render the interpretation of all state laws a federal question).

the interpretation of state election laws would require federal courts to draw on some source of federal or general law.[347] But to the extent that federal rules of statutory interpretation derive from the structure of the federal constitution and federal separation-of-powers principles, they cannot be grafted wholesale onto state law without risking the possibility that federal courts would be themselves arrogating state legislative authority.[348] And unlike in the Contracts or Takings Clause contexts, where the Supreme Court has been able to rely on general or common law principles to discern if a contract or property right exists,[349] there are no such common law principles applicable to elections, which are governed wholly by statute.

Second, the Elections and Electors Clauses clearly apply only to state laws affecting federal elections. Most state laws affect both state and federal elections,[350] meaning any federally imposed interpretive rule would result in the same law being interpreted in different ways based on whether it is being applied to a state or a federal election, an unworkable scenario.

Third, because there is no obvious limiting principle for federalizing the interpretation of state election laws, either approach would justify federal second-guessing of hundreds, if not thousands, of election laws, rules, and regulations.

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The Supreme Court's evasion justification is an apt fit for *Moore* claims. Not only does it align best with *Moore*'s focus on arrogation and separation-of-powers concerns, but it brings with it a much-needed limiting principle that would ensure that federal courts only second-guess state courts where there has been a threshold finding of evidence of evasion. The federalization justification, in contrast, would be unworkable and highly disruptive.

Accordingly, as in a number of other areas of law, any federal second-guessing under *Moore* should only be justified under an evasion inquiry. This means that a state court's interpretation of a state election law should stand unless there is evidence in the form of inconsistency or arbitrariness—likely

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347. *See supra* Section II.B.3.

348. *See* Leah Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1256 (explaining that, because federal rules of statutory interpretation are a form of "judge-made law," applying them to state election statutes constitutes an exercise of legislative power).

349. *See, e.g.*, Gen. Motors Corp. v. Romein, 503 U.S. 181, 185–89 (1992) (contracts); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (property).

350. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-165 (2023) (regulating removal of voters from voter rolls in both state and federal elections).

coupled with appropriate sociopolitical context—that the state court is somehow evading the Elections or Electors Clause.

III. A TWO-STEP APPROACH FOR *MOORE* CLAIMS

Based on the foregoing, this Article proposes that federal courts should apply a two-step approach when considering a *Moore* claim:

At step one, the federal court must determine if there is evidence of evasion in the form of inconsistency or arbitrariness, considering any relevant sociopolitical context. If there is no evidence of evasion, the *Moore* inquiry ends, and the state court interpretation stands.

At step two, if there is evidence of possible evasion, the federal court must determine if the challenged decision constitutes arrogation—that is, usurpation of core legislative authority—and whether the decision exceeded the "ordinary bounds" of judicial practice. Only if a court finds both evidence of evasion *and* possible arrogation would the court then proceed to undertake an independent review of the state court's decision.

A. Step One: Evidence of Evasion

At step one, a federal court should look for evidence that a state court is attempting to evade federal law. Unlike in other evasion contexts, however, in a *Moore* claim the concern is not that a state court may be trying to evade a specific federal statute or constitutional right. Rather, the federal law being evaded in a *Moore* case would be the Elections or Electors Clauses and the narrow anti-arrogation principle they impose on state separation-of-powers. State courts would evade this principle by either directly arrogating legislative authority over federal elections or by wielding judicial power to improperly impair a state legislature's exercise of its constitutional authority.

There are at least four ways in which a state court might evade these Clauses to arrogate legislative authority. First, a court could completely disregard a state statute and substitute its own rule instead. This might occur where, for example, a state statute provides for only three days of early voting, but a court orders that thirty days be allowed. Second, a court could interpret a state statute so as to nullify the legislature's intent. An example of this might be if a court were to interpret a state requirement that candidates gather a certain number of signatures to obtain ballot access as directory rather than mandatory. Third, a court might interpret its own state constitution to strike down a state election law, such as by finding that a Voter ID law imposes too great a burden on the right to vote. Fourth, a court might exercise

its remedial authority in a way that contravenes a statute's text, such as by ordering a statutory deadline be extended.

It is important, however, to clarify that *none* of these examples necessarily constitute evasion. To the contrary, under the appropriate circumstances, each of these may well illustrate a perfectly appropriate exercise of judicial authority. These are simply the tools that a court might use to carry out an intent to evade the Elections and Electors Clauses.

It is also important to note that, in none of the examples above would the evasion inquiry turn on the correctness of a state court's interpretation of state law. True, a "correct" state court interpretation cannot be said to frustrate a state legislature or evade the federal constitution, but even a "wrong" interpretation may simply be the product of a reasonable disagreement that falls well within constitutional limits. Whether or not any of these actions amounts to evasion would depend on the state court's motives and whether there is evidence of evasive intent in the form of inconsistency, arbitrariness, or sociopolitical context.

1. Inconsistency

Where a state court interprets a state election law using a rule or standard that it only occasionally uses, or if it applies a particular interpretive methodology to some election statutes but not others, this may suggest that it is being driven by its own policy preferences. But unlike procedural rules that we expect will be followed in all instances, interpretive methods need not be applied in every case. A court might reach the same result using more than one approach, and indeed it would be unreasonable to require a court to run through the entire extensive list of interpretive tools in every case.

Consider, for example, the "Democracy Canon," an interpretive rule by which election laws are construed liberally in favor of voters.[351] Where a state election statute is especially clear and does not threaten the rights of voters in any way, a court may have no need to apply this canon. This does not mean that a later state court decision that does apply the canon would be suspect under *Moore*. Rather, the test for inconsistency should turn on whether prior decisions have either expressly declined to apply a particular methodology, applied a contrary methodology, or applied the same methodology to reach a fundamentally different result.

Importantly, the test for inconsistency would also not be a test for novelty. In his *Moore* concurrence, Justice Kavanaugh highlighted a portion of Chief

351. Hasen, *supra* note 106, at 71.

Justice Rehnquist's *Bush v. Gore* concurrence in which he wrote that federal courts reviewing state court interpretations "necessarily must examine the law of the State as it existed prior to the action of the [state] court."[352] But novelty itself is not evidence of circumvention. State courts refine, narrow, or overturn prior interpretations all the time when presented with new arguments or facts.[353] And any state court decision on an issue of first impression will necessarily carry with it some degree of novelty.[354]

To illustrate, consider two states with identically worded laws requiring candidates to file their paperwork fifty days before a primary election. Candidates in both states miss the deadline by one day, and in each state the state supreme court allows the candidates to appear on the ballot, holding that the state constitution requires that election laws be construed liberally so as to require only substantial performance. The only difference is that in State A, there has been a longstanding line of cases holding that filing deadlines are mandatory and must be construed strictly, while State B has never addressed this issue before. While both decisions would be novel in some sense, only the State A decision would be inconsistent with prior decisions.

2. Arbitrariness and Legitimacy

Most of the Supreme Court's cases dealing with arbitrary rules have arisen in the context of state procedural rules.[355] Where a state rule is arbitrary or fails to serve a legitimate state interest, the Court has held that it is inadequate to block consideration of a federal claim.[356]

In the *Moore* context, the focus of this inquiry would be on a state court's interpretive methodology rather than any procedural rules. The same basic principles, however, might still apply. The Supreme Court could decide that, under *Moore*, a state court cannot apply an interpretive rule or methodology to a state election law that is arbitrary or that does not serve a legitimate state interest.

Arbitrary interpretive rules would include those that risk granting too much discretion to state courts to substitute their own policy preferences for that of a state legislature. Consider, for example, an interpretive rule that a state court only applies in "close elections." Without clear guidelines for what

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352. Moore v. Harper, 600 U.S. 1, 39 (2023) (Kavanaugh, J., concurring).

353. *See* Weingartner, *supra* note 9.

354. *See id.*

355. *See supra* Section II.A.2.

356. *See* Henry v. Mississippi, 379 U.S. 443, 447 (1965); Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).

constitutes "close," state courts could effectively apply such a rule at their discretion.[357]

It is also not hard to imagine an interpretive rule that fails to serve a legitimate state interest. Consider an interpretive canon stating that ballot access statutes be construed more liberally in favor of incumbents, that absentee ballot rules should be construed more strictly for voters in less populous counties, or that certain requirements are nonmandatory for voters who are not native English speakers. The Supreme Court has long held that states do not have a legitimate interest in favoring some voters or candidates over others,[358] and this arguably extends to the interpretive rules employed by state courts.

Finally, interpretive rules that impose undue burdens on state legislatures would likely be suspect. The Supreme Court has held in numerous cases that procedural rules that place undue burdens on litigants seeking to assert federal rights in state court are inadequate.[359] The same reasoning can be applied to certain interpretive rules and methods. Consider, for example, a

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357. Compare this to the procedural rule at issue in *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964). Under that rule, "where unrelated assignments of error are argued together and one is without merit, the others will not be considered." *Id.* at 295. Whether or not different assignments of error are "argued together" proved to be an arbitrary distinction, with the Alabama Supreme court ignoring the clear structuring of the plaintiff's brief in favor of a formalistic focus on the use of roman numeral headings. *Id.*

358. *See, e.g.*, Cook v. Gralike, 531 U.S. 510, 514–15, 525–26 (2001) (striking down a state law that disadvantaged candidates who did not support a constitutional amendment imposing term limits on members of Congress); Anderson v. Martin, 375 U.S. 399, 401–02 (1964) (striking down a Louisiana law that would have required listing a candidate's race next to their name on a ballot). One exception to this principle is that the Supreme Court has recognized a legitimate state interest in preserving America's two-party system, meaning states may give preferential treatment to major parties and their candidates. *See, e.g.*, Jenness v. Fortson, 403 U.S. 431, 431–42 (1971) (upholding a Georgia law requiring candidates to collect signatures from five percent of eligible voters to appear on the ballot while recognizing the state's legitimate interests in preventing voter confusion, avoiding ballot overcrowding, and ensuring candidates demonstrate some support before appearing on the ballot). But even here there are limits, and a state may not so favor a major party that minor parties are effectively blocked from the ballot. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 24 (1968) (striking down an Ohio law that made it "virtually impossible for a new political party . . . to be placed on the state ballot").

359. *See, e.g.*, Brown v. W. Ry. of Ala., 338 U.S. 294, 295, 298 (1949) (finding that "a Georgia rule of practice to construe pleading allegations 'most strongly against the pleader'" could not be applied to suits under the Federal Employer's Liability Act because "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws"); Shuttlesworth v. City of Birmingham, 376 U.S. 339, 339 (1964) (finding inadequate a state procedural rule requiring certiorari petitions to be filed on "transcript paper"). For a more thorough treatment of the Court's undue burden approach to finding state procedural rules inadequate, see Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 264–77 (2003).

"magic words" requirement requiring a state legislature to use specific language or structure a statute in a particular way to express its intent in an election law.[360] Such a rule would intrude on legislative authority by ignoring the otherwise clearly expressed will of a legislature and impair state legislatures by requiring them to go back and amend or re-enact legislation.[361] If these burdens are not supported by some legitimate state interest, this may be evidence of evasive intent.

Most ordinary interpretive rules and canons, however, would be difficult to cast as either arbitrary or illegitimate. And even a rule like the Democracy Canon—which provides that state election laws should be construed liberally in favor of voters and the right to vote—should survive this test. There is nothing arbitrary about favoring the right to vote, and states have a legitimate interest in safeguarding this right. In several states, for example, the Democracy Canon has been codified by the legislature.[362] In others, a pro-voter rule of construction may derive directly from state constitutions.[363] It can hardly be said that a state court imposes an undue burden on a state legislature by applying a rule of construction set forth by statute or by the state constitution. Moreover, in states where a rule like the Democracy Canon has been applied consistently for decades, state legislatures are presumed to draft all election legislation expecting that it will be applied.[364]

3. Sociopolitical Context

For purposes of a *Moore* claim, at least two sociopolitical contexts are potentially relevant. The first—and most important—are institutional clashes

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360. The Supreme Court recently reaffirmed its position that federal courts may not impose a "magic words" requirement on Congress. *See* Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 48 (2024).

361. *Cf.* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 166–67 (2010) (stating that the use of "magic words" requirements or "aggressive" clear statement rules "violates the baseline rule of legislative supremacy").

362. *See* Rebecca Guthrie, *State Courts, the Right to Vote, and the Democracy Canon*, 88 FORDHAM L. REV. 1957, 1966, 1993 (2020) (identifying fourteen states in which the Democracy Canon has been codified by state legislatures, and twenty-two in which similar legislative enactments could support its use by courts).

363. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 912–13 (2021) (explaining that rules of interpretation similar to the Democracy Canon can be derived from democratic principles in state constitutions); Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1362 (explaining that the democracy principle may "provid[e] a canon of construction" in election cases).

364. *See* Guthrie, *supra* note 362, at 1967–80.

between state courts and state legislatures. It is not uncommon for there to be tension between state courts and state legislatures over particular pieces of legislation. Consider, for example, a scenario in which a state court applies an interpretive methodology like the Democracy Canon to hold that a candidate filing deadline is to be construed liberally. The state legislature then passes a new law stating that filing deadlines are now mandatory. If the state court were to insist that the deadline be construed liberally, even despite the new language, this may suggest evidence of evasion.

Similar institutional clashes may arise over specific interpretive methods themselves. Several state legislatures have, for example, enacted legislation prescribing specific interpretive methodologies for state courts to apply. State courts have not always complied with these rules and have on occasion asserted their own authority to decide what interpretive methods to apply.[365] Against this sort of backdrop, there may be reason to believe that a state court's interpretation of a state election law—contrary to the interpretive rules prescribed by the legislature—may be the product of an effort to circumvent the legislature.

The second relevant context is partisanship, such as where a state supreme court and state legislature are controlled by different parties. Obviously, the mere fact that a state court is controlled by a different party does not render its election law decisions inherently suspect. To the contrary, state supreme courts are expected to not favor any particular party. That said, partisanship may often explain significant policy differences between state courts and state legislatures, particularly on issues of interpretation. For example, say a state court strikes down a voter ID law as violating the state constitution. The state legislature then passes a state constitutional amendment—approved by voters—that expressly allows for voter ID laws. If the state court were to apply an arbitrary or inconsistent methodology to significantly narrow the effect of this new amendment, this may also be evidence of an effort to evade not only the state legislature but also the voters.

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365. In Texas, for example, the Code Construction Act expressly permits courts to consider non-textual sources such as legislative history to interpret a statute, whether or not it is considered ambiguous on its face. *See* TEX. GOV'T CODE ANN. § 311.023. The Texas Court of Criminal Appeals, however, prohibits consideration of legislative history absent ambiguity. *See* Boykin v. State, 818 S.W.2d 781 (Tex. Crim. App. 1991). Similarly, the Connecticut Supreme Court has largely continued to adhere to its purposivist approach to statutory interpretation despite the Connecticut legislature enacting a legislative override prohibiting consideration of "extratextual evidence" absent a finding of ambiguity. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1791–97 (2010).

The partisanship inquiry is complicated somewhat by the fact that many state court judges, unlike their federal counterparts, are elected, often on a partisan basis.[366] In these elections, voters explicitly consider how a candidate might vote on a particular issue or what interpretive methodology might be applied. In Wisconsin, for example, partisan gerrymandering was a key campaign issue for the 2023 election for the state supreme court.[367] The Democratic candidate won, flipping partisan control of the court,[368] and shortly thereafter, the court reversed a prior decision that had held partisan gerrymanders nonjusticiable and struck down a Republican gerrymander.[369] But while partisanship played a role in this judicial development, the court's decision does not necessarily signal an improper effort to evade or frustrate the state legislature. This is because, as the *Moore* court recognized, a state legislature has no authority to enact laws in violation of the state constitution.[370] At the core of the evasion inquiry is not whether a state court's decision is contrary to what the state legislature wanted. If it were, *any* decision striking down an unconstitutional law would be suspect. Rather, the key inquiry is whether a state court has used its interpretive authority in such a way as to avoid giving effect to a state legislature's exercise of legitimate authority.

It is important to emphasize again that the Supreme Court has never questioned a state court's interpretation of state law based *solely* on social or political contexts. There has always been some other evidence of circumvention, such as inconsistency or arbitrariness. In the election context especially, there is good reason for federal courts to be wary of suspecting state courts of partisan impropriety.

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366. *See generally Partisan Election of Judges*, BALLOTPEDIA, https://ballotpedia.org/Partisan_election_of_judges [https://perma.cc/C6YP-HMLZ] (noting eight states that elect judges on a partisan basis and ten states that operate via assisted appointment controlled by the governor).

367. *See Wisconsin Supreme Court Elections, (February 21, 2023 Primary)*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_Supreme_Court_elections,_(February_21,_2023_primary) [https://perma.cc/X4ZN-JLV9].

368. *See Liberal Judge Janet Protasiewicz Won a Seat on Wisconsin's State Supreme Court, Flipping the Body's Ideological Majority*, POLITICO (Nov. 26, 2023, 7:56 AM), https://www.politico.com/2023-election/results/wisconsin/supreme-court [https://perma.cc/U7MG-8TJV].

369. Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370 (Wis. 2023).

370. *See* Moore v. Harper, 600 U.S. 1, 25 (2023).

B. Step Two: Arrogation and the Ordinary Bounds of Judicial Practice

At step two, if a federal court has found some evidence of possible evasion by a state court, the question becomes whether the state court's action may constitute an arrogation of legislative authority and whether the state court has exceeded the ordinary bounds of judicial practice.

1. Arrogation

As discussed above, a court does not arrogate legislative authority simply because it gets the law wrong. Nor does it engage in arrogation by ordering a remedy derived from ordinary interpretive tools and equitable principles. Rather, arrogation in the constitutionally proscribable sense requires that a state court engage in some form of core legislative action, such as reading unsupportable new requirements, deadlines, or claims into a statute or crafting a remedy that the statute and equitable principles cannot support.[371] This would seem to exclude judicial interpretations that do not fundamentally add or subtract from the overall statute, such as interpretations of isolated, ambiguous words, phrases, or applications of existing caselaw to new sets of facts.

A state court also does not engage in arrogation where it acts pursuant to an express grant of statutory or constitutional authority or an express legislative delegation. In Virginia, for example, constitutional amendments passed by the General Assembly and approved by voters created an independent redistricting commission while also *requiring* that the state supreme court step in to draw maps in the event that the commission is unable to agree on a map or if the General Assembly rejects the commission's map twice.[372] Similarly, in several states, courts have express statutory authority to exercise emergency powers to conduct elections in the face of a natural disaster.[373] Moreover, in several states the legislature has enacted laws requiring courts to apply particular interpretive methods[374]—including in the context of elections.[375] State courts that comply with these statutes and

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371. *See supra* Section I.A.

372. VA. CONST. art II, § 6-A(g).

373. *See, e.g.*, N.C. GEN. STAT. § 163-27.1 (2023); 25 PA. STAT. AND CONS. STAT. § 3046 (West 2024).

374. *See, e.g.*, 1 PA. CONS. STAT. § 1921 (2024) (rejecting purely textualist interpretation and providing a list of extratextual sources for courts to consider).

375. *See, e.g.*, COLO. REV. STAT. § 1-1-103 (2023) (requiring that Colorado courts "liberally construe[]" the election code "so that all eligible electors may be permitted to vote").

constitutional provisions cannot be said to improperly arrogate legislative authority.

Importantly, while federal precedent may help define the scope of an anti-arrogation inquiry, the precise contours of such a test should look somewhat different when applied to state courts.

For example, one of the primary rationales behind the Supreme Court's limitation of implied claims for damages for constitutional violations under *Bivens*[376] is that judicial recognition of implied claims arrogates legislative authority.[377] Central to this reasoning is the distinction between the limited remedial authority of federal courts and that of state courts under the common law; as Justice Scalia explained in *Alexander v. Sandoval*, "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."[378] Indeed, state constitutions divide power among the three branches of government very differently,[379] and even at the time the federal constitution was drafted, state courts were understood to be the primary venues for remedying violations of both state and federal rights.[380] In line with these important differences, many states have recognized implied causes of action under their state constitutions that would be untenable under the Supreme Court's *Bivens* jurisprudence.[381]

Another example, one front-and-center in the election landscape, is justiciability. One of the primary justifications for the Supreme Court's justiciability doctrine under Article III is the need to ensure that federal courts do not intrude upon the political branches. In *Rucho v. Common Cause*, the

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376. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

377. Hernandez v. Mesa, 589 U.S. 93, 100 (2020) ("[W]hen a court recognizes an implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power.").

378. 532 U.S. 275, 287 (2001) (quoting Lampf v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)).

379. *See* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1200–01 (1992).

380. *See* Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1786 (2017) ("The Framers understood rights enforcement and remedy provision as the primary realm of state courts. They drafted Article III carefully to circumscribe the jurisdiction of federal courts.").

381. *See, e.g.*, Fed. Kemper Ins. Co. v. Brown, 674 N.E.2d 1030 (Ind. Ct. App. 1997); Newell v. City of Elgin, 340 N.E.2d 344 (Ill. App. Ct. 1976); Moresi v. Dep't of Wildlife & Fisheries, 567 So. 2d 1081, 1091–93 (La. 1990); Strauss v. State, 330 A.2d 646 (N.J. Super. Ct. Law Div. 1974); Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921 (Md. Ct. App. 1984); Corum v. Univ. of N.C., 413 S.E.2d 276 (N.C. 1992). *But see* Katzberg v. Regents of Univ. of Cal., 58 P.3d 339, 352 (Cal. 2002) (disallowing damages claims under the state constitution); Kelley Prop. Dev., Inc. v. Town of Lebanon, 627 A.2d 909, 922–23 (Conn. 1993) (same); Barrios v. Haskell Cnty. Pub. Facilities Auth., 432 P.3d 233, 239 n.24 (Okla. 2018) (same).

Supreme Court held that partisan gerrymandering claims are nonjusticiable political questions because, absent "judicially discoverable and manageable standards," federal courts would inevitably intrude on the political process.[382] At the same time, however, *Rucho* emphasized the role that state courts—to which Article III's justiciability doctrine does not apply—had already begun to play in addressing partisan gerrymandering claims.[383]

These examples illustrate that, in the context of any *Moore* claim, the differences between state and federal allocations of power mean that federal cases and rules of interpretations will not map perfectly onto state courts. Rather, to ascertain whether arrogation has occurred, a federal court should consider the unique structural arrangement of the state in question and any relevant state separation-of-powers doctrines. Such a review is likely to be complex and difficult for federal courts that are unfamiliar with a state's unique constitutional structure.

2. The Ordinary Bounds of Judicial Practice

Moore was clear that states courts do not arrogate legislative authority in violation of the Elections and Electors Clauses unless they "transgress the ordinary bounds of judicial review."[384] As outlined above, state courts at the founding applied a wide range of methods and interpretive tools both when engaging in judicial review and when interpreting statutes.[385] At a minimum, this historical practice should help to define the outer bounds of "ordinary" judicial practice at the Founding. Put another way, a state court would not violate *Moore* simply because it applies different methods than federal or other states might, so long as those methods fall within historical bounds.

Given the vast diversity of interpretive rules and methods in state courts at the Founding, there is little to support the position that the Elections or Electors Clauses mandate anything like the strict textualism suggested by Chief Justice Rehnquist or Justice Kavanaugh.[386] Likewise, there should be little to warrant a federal court's rejection of a particular state court method given the wide range of available historical analogues.

Which judicial practices, then, *would* transgress *Moore*'s "ordinary bounds?" There are at least two ways of approaching this question. The first is to apply a historical approach, asking if a challenged interpretive rule or

382. 588 U.S. 684, 684, 718–19 (2019).
383. *See id.* at 719.
384. Moore v. Harper, 600 U.S. 1, 36 (2023).
385. *See supra* Section I.B.
386. *See supra* note 19.

method has a Founding-Era analogue. This would likely represent a high bar given the pluralism prominent in state courts at the Founding, though of course, whether or not a historical practice is sufficiently analogous to a contemporary practice will depend on the level of generality with which the comparison is made.

The second approach would be to look not to Founding-Era judicial practices, but rather to consider the judicial practice of a particular state's courts over time to ascertain whether the interpretive method at issue is an outlier. Consider, for example, a state that in the past gave significant weight to legislative history when construing statutes but has long since disavowed the practice. If, in the context of a heated election dispute, a state court were to adopt a strained construction of an election dispute based solely on a reference to legislative history, this may well be outside the "ordinary bounds" of judicial practice, at least for that specific court. This test, of course, could overlap significantly with an evasion analysis if resorting to legislative history is also irreconcilable with recent practice.

Under either approach, however, the bounds of "ordinary" judicial practice should be defined by the historical practice of state courts. Doing so aligns both with *Moore*'s focus on history and tradition and with the original understanding of the Elections and Electors Clauses.

C. The Due Process Backstop

The two-part test articulated above sets a high standard for federal second-guessing under the Elections and Electors Clauses, one grounded in federalism and the state separation-of-powers concerns laid out in *Moore*. It is agnostic as to state court decisions that are simply wrong—even if egregiously so—and does not speak to the potential harm of a state court decision that suddenly and unexpectedly changes the rules of an election close to Election Day.

That this test does not account for novel state court interpretations of state law is not cause for concern, however, because the Elections and Electors Clauses are not the only means by which a federal court may exercise oversight over state court election decisions. Since the 1960s, the Supreme Court has recognized that the Due Process Clause protects against state court decisions that adopt new and unforeseeable changes in the law and frustrate settled expectations.[387] This independent source of federal authority does not depend on the Elections or Electors Clauses and does not consider the

387. *See* cases discussed *supra* notes 388–406.

correctness of a state court's decision. Rather, the Due Process line of cases considers only whether a particular judicial interpretation so frustrates settled expectations that it may not be applied retroactively.

The first in this line of cases is *Bouie v. City of Columbia*.[388] In *Bouie*, the South Carolina Supreme Court interpreted a state trespass statute prohibiting "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry" to apply to civil rights demonstrators who entered a lunch counter before the owner asked them to leave.[389] This construction was entirely novel, and so the Supreme Court held that it could not be applied retroactively to convict one of the demonstrators.[390] Importantly, the Court acknowledged that the South Carolina Supreme Court's interpretation was plausible and did not rule on a correct interpretation; rather, the Court's holding was premised entirely on the fact that the statute did not give "fair warning" that the conduct at issue was a crime.[391]

In holding that the South Carolina Supreme Court's novel construction could not be applied retroactively, the Supreme Court explained that it was incorporating Ex Post Facto principles into the Due Process Clause:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law . . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.[392]

While *Bouie* on its own might be read as standing for a broad principle that novel judicial constructions cannot be applied retroactively, the Supreme Court has clarified in subsequent cases that *Bouie*'s touchstone is whether individuals have fair warning of a possible state court construction of a law, based both on the text of a statute itself and prior case law.

In *Douglas v. Buder*, for example, a Missouri court had interpreted a statute that required individuals on probation to report any "arrests" to their probation officers as including traffic citations.[393] The Supreme Court, finding no prior Missouri caselaw to support such a construction, held that it could not be applied retroactively.[394] In contrast, where prior caselaw

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388. 378 U.S. 347 (1964).
389. *Id.* at 348–50.
390. *Id.* at 362.
391. *Id.* at 350.
392. *Id.* at 353–54.
393. 412 U.S. 430, 430–31 (1973).
394. *Id.* at 432.

suggests that a particular construction is foreseeable, the Due Process Clause does not prohibit retroactive application. *Rogers v. Tennessee* provides an illustrative example.[395] For years, Tennessee courts had applied a rule that barred prosecutions for homicide if a victim died more than a year after an injury, but in *Rogers*, the Tennessee Supreme Court abolished this rule in light of modern medicine's ability to more precisely determine the cause of death after more than a year.[396] A defendant whose victim died after a year and a day challenged this new construction, but the United States Supreme Court affirmed under *Bouie*, explaining that the change in law was not "unexpected [or] indefensible by reference to the law which had been expressed prior to the conduct in issue."[397] In reaching this conclusion, the Court observed that similar "year-and-a-day" rules had been abolished in multiple other jurisdictions.[398]

A related line of federal cases demonstrates that the Due Process Clause also protects against the retroactive application of new and unforeseeable state court interpretations of state election laws.[399]

The first of these cases, *Griffin v. Burns*, concerned a decision by the Rhode Island Supreme Court over absentee voting.[400] For years, Rhode Island had allowed for absentee voting in local elections, including in primaries; and in the leadup to the 1978 primary election, state officials had advertised the availability of absentee voting.[401] After the election was held and all absentee ballots cast, a candidate who had narrowly lost challenged the use of absentee ballots, and the Rhode Island Supreme Court held—for the first time ever—that absentee ballots were not permitted in primary elections under state law.[402] This decision was challenged in federal court as a violation of voters' Due Process rights, and the First Circuit held, without commenting on the correctness of the Rhode Island Supreme Court's decision, that it could not be applied retroactively to voters who had cast absentee ballots in justifiable reliance on past law and communications from state actors.[403]

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395. 532 U.S. 451 (2001).

396. *Id.* at 453–54.

397. *Id.* at 454–56 (quoting *Bouie*, 378 U.S. at 354).

398. *Id.* at 463–64; *see also* Rose v. Locke, 423 U.S. 48, 52–53 (1975) (finding that other jurisdictions interpreting the phrase "crime against nature" to include similar conduct provided the necessary warning to a defendant who had committed sexual assault).

399. *See* Michael Weingartner & Carolyn Shapiro, *After the Oral Argument in* Moore v. Harper, 54 U. TOL. L. REV. 387, 401–04 (2023).

400. 570 F.2d 1065 (1st Cir. 1978).

401. *Id.* at 1067.

402. McCormick v. State Bd. of Elections, 378 A.2d 1061, 1064 (R.I. 1977).

403. *Griffin*, 570 F.2d at 1078–79.

The Eleventh Circuit reached a similar conclusion in *Roe v. Alabama*, a pair of decisions arising out of the 1994 election for the Chief Justice of the Alabama Supreme Court.[404] For years, Alabama state officials had rejected absentee ballots that had not been properly notarized and witnessed, but the Alabama Supreme Court issued an order requiring that such ballots be counted.[405] The Eleventh Circuit held that such a drastic change in an election law, particularly after an election had already been held, implicated voters' Due Process rights and also disenfranchised voters "who would have voted but for the inconvenience imposed by the notarization/witness requirement."[406] As in *Griffin*, the Eleventh Circuit did not opine on whether the Alabama Supreme Court's decision was correct as a matter of state law. Instead, the Eleventh Circuit considered prior practice in the state to conclude that the Alabama Supreme Court's decision was an unforeseeable break from pre-existing "uniform state-wide practice."[407]

Together, the *Bouie* line of cases and the *Griffin* and *Roe* cases demonstrate that the potential harm to voters from a state court's new and unexpected interpretation of an election law can be mitigated without nullifying the state court's decision or calling into question its correctness. They should also dispel any concerns over the relative narrowness of the two-part test advanced in this Article for review under the Elections and Electors Clauses.

Moore and the Due Process cases complement one another by addressing different harms in different ways. *Moore*, with its focus on arrogation and separation of powers, protects against judicial encroachment on legislative authority, regardless of when it occurs. The Due Process cases, in contrast, focus on protecting voters' reliance interests from changes in law—even those that would pass muster under *Moore*—when they occur close to or after Election Day.

IV. CONCLUSION

Moore rejected the most extreme version of the Independent State Legislature Theory, which would have eliminated all state constitutional and judicial constraints on state laws governing federal elections. But in the Court's unwillingness to provide a clear approach for how federal courts might review state court election decisions to ensure that they do not arrogate

404. 43 F.3d 574 (11th Cir. 1995); 68 F.3d 404 (11th Cir. 1995).
405. *Roe*, 43 F.3d at 578.
406. *Id.* at 581.
407. *Roe*, 68 F.3d at 409.

legislative power, *Moore* has left election law in a dangerous state of uncertainty.

This Article begins the work of filling the void left by *Moore*. By grounding *Moore* claims in evasion and arrogation rather than on the correctness of a state court decision, this Article's two-step approach best aligns with the Constitution's text, historical practice, and the Supreme Court's caselaw. Moreover, this approach furthers principles of state sovereignty and judicial federalism and, in practice, would drastically limit frivolous *Moore* claims by allowing federal courts to intervene only where warranted.

Nonetheless, important questions about arrogation and evasion in the election context remain. As the *Moore* majority recognized, "[t]he questions presented in this area are complex and context-specific."[408] The Supreme Court will likely be called upon soon to articulate a more definite standard for challenges to state court election decisions. As this Article demonstrates, that standard should be one grounded in text, history, and respect for state courts.

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408. 600 U.S. 1, 36 (2023).