

“QUITE LITERALLY, OUR JOB”: *MOORE V. HARPER* AND THE FRAGILITY OF JUDICIAL FEDERALISM

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The Supreme Court’s decision in *Moore v. Harper* categorically rejected sweeping claims by proponents of the independent state legislature theory (ISLT) that would have eliminated the historical role of judicial review by state courts in election law cases concerning federal elections. Yet, the Court added a cryptic caveat to the end of the opinion, noting that state courts must remain within the bounds of “ordinary judicial review” (OJR). This Essay will review what state courts have said about *Moore* since the case was decided. It will also explore how advocates of the ISLT have attempted in these cases to equate OJR with a generic version of judicial activism. This Essay argues that claims about so-called activism and restraint are utterly common in state court litigation and cannot coherently mark the boundaries of what is ordinary. It argues that this reading of OJR is not only conceptually problematic and incompatible with judicial federalism, but opens the door to relitigating *Moore* in ways inconsistent with the decision’s strong affirmation of judicial review by state courts.

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INTRODUCTION

A palpable but only partial sigh of relief could be heard in many quarters when the Supreme Court decided *Moore v. Harper*¹ in 2023.

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1. 143 S. Ct. 2065 (2023).

The ruling rejected the most robust versions of the independent state legislature theory (ISLT), ones that would have given state legislatures unprecedented autonomy in crafting election laws.² The arresting proposition pressed by advocates of that doctrine was that the Elections Clause of the Federal Constitution should be understood to disqualify state courts from deciding cases involving state elections laws affecting federal elections and thus sideline them from the historic role they have played in judicial review in this area.³ The linchpin of this theory is the reference to “state legislatures” in Article I, Section 4 of the Constitution.⁴ The prospect of giving state legislatures such a *sui generis* kind of plenary power, just a year before a presidential election in a time of extreme polarization, was fraught for obvious reasons. The *Moore* majority rejected that notion.⁵ The ruling did not quiet all concerns, however, because a core—and puzzling—tension lies at the heart of Chief Justice John Roberts’s opinion. Having at length traced and affirmed the pedigree and importance of judicial review by state courts, the opinion abruptly swerved at the end to set out a limiting principle. “[S]tate courts do not have free rein,” the Court said, and “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.”⁶ After emphatically affirming the prerogative of state courts to act and rule as they have done for centuries, in other words, the Court proceeded to announce a cryptic limitation on that power that is difficult to reconcile with judicial federalism. The question that limiting principle raises is an obvious one: What is within the category of “ordinary judicial review” (OJR),⁷ and how much latitude does this new doctrine give federal courts to second-guess state courts on questions of state statutory and constitutional law? At what point has a state court “arrogated” to itself the role of the legislature? In a larger sense: To what degree have state

2. *Id.* at 2081; see Carolyn Shapiro, *State Law and Federal Elections After Moore v. Harper*, 99 N.Y.U. L. REV. 2049, 2050–51 (2024).

3. See Brief for Petitioners at 13–18, *Moore v. Harper*, 143 S. Ct. 2065 (2023) (No. 21-1271), 2022 WL 4084287.

4. Article I, Section 4, also known as the Elections Clause, provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4. ISLT likewise draws upon the Electors Clause in Article II, Section 1, which empowers each state to appoint electors “in such Manner as the Legislature thereof may direct.” *Id.* art. II, § 1. *Moore*, however, was focused only on the Elections Clause. *Moore*, 143 S. Ct. at 2074.

5. *Moore*, 143 S. Ct. at 2079–85.

6. *Id.* at 2088–89.

7. *Id.* at 290; see Shapiro, *supra* note 2, at 2059–63 (probing “how wide open the door” was left in *Moore*).

courts been newly subordinated to the Supreme Court in deciding questions of *state* law in this domain?

Early reactions to *Moore* have focused on the enigma of OJR. Understandably so. The ability of the Court to decide an election based on whether a state court ruling meets the OJR standard, especially in the run up to, or aftermath of, voting, is an explosive and deeply unsettling one. Immediately after the *Moore* ruling, two leading election law scholars sounded notes of caution. Richard Hasen’s article called the OJR caveat a “time bomb,” noting it could “allow for a second bite at the apple in cases involving the outcome of presidential elections.”⁸ He worried that “[e]very expansion of voting rights in the context of federal litigation will now yield a potential second federal lawsuit with uncertain results.”⁹ Along similar lines, Richard Pildes argued that while “[j]udicial minimalism can be a virtue in many contexts,” it is quite the opposite in the context of elections, where advance clarity about the rules is necessary to “minimize voter confusion; bolster the ability of election officials to communicate clear, consistent messages to voters; enable political campaigns to organize efforts to mobilize voters; and avoid continual litigation over unclear rules or doctrines.”¹⁰ He lamented that “[n]o great feat of lawyering will be required to transform disputes in federal elections about the actions of state election officials or state courts into federal constitutional claims that assert those state actors have ‘gone too far’ in their interpretation of state constitutions or state statutes.”¹¹ Other scholars since have sounded similar notes.¹² On these accounts, the porousness of the OJR standard, and the charged context of hotly contested elections, make for a menacing combination.

8. Richard L. Hasen, Opinion, *There’s a Time Bomb in Progressives’ Big Supreme Court Voting Case Win*, SLATE (June 27, 2023, 12:44 PM), <https://slate.com/news-and-politics/2023/06/supreme-court-voting-moore-v-harper-time-bomb.html> [<https://perma.cc/7XBN-R78D>].

9. *Id.*

10. Richard H. Pildes, Opinion, *The Supreme Court Rejected a Dangerous Elections Theory. But It’s Not All Good News*, N.Y. TIMES (June 28, 2023), <https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html>.

11. *Id.*

12. See, e.g., Leah M. Litman & Katherine Shaw, *The “Bounds” of Moore: Pluralism and State Judicial Review*, 133 YALE L.J.F. 881, 893 (2024) (arguing that *Moore*’s ambiguous limitation on state courts could lead the Supreme Court in future cases to impose an “interpretive straitjacket on the states”); 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 Elections Laws*, 59 WAKE FOREST L. REV. 61, 122 (2024) (arguing that *Moore* allows the Court to “essentially substitut[e] its judgment for . . . state supreme court’s statutory and[] constitutional review of elections” which “violates fundamental principles of federalism”).

On the other hand, some scholars view *Moore* as having left very little doubt about the scope of its main holding. Vikram Amar, for example, has argued that the analytical structure of the opinion would simply make it difficult to develop a robust set of limitations.¹³ Having rejected the logic of the core ISLT claim that the Federal Constitution grants state legislatures autonomy in making election rules, Amar asserted, the Court would be hard pressed to find grounds in the Elections Clause itself to hem in state courts.¹⁴ He emphasized, moreover, that in discussing the limitations on state court authority, the majority opinion used words like “‘evade,’ ‘circumvent,’ and ‘sidestep’—terms that suggest a requirement of intentional and conscious manipulation by state courts before a substantial federal constitutional question would be presented.”¹⁵ Other scholars have likewise argued that the OJR limitation is exceedingly narrow because it is only triggered when a state court acts to *evade* a federal interest.¹⁶

This Essay explores how *Moore* and the OJR principle have been interpreted by those principally regulated by it: state courts. My focus will be on state supreme courts, who have the final word on state law questions. How, thus far, are these courts managing the tension between the main holding extolling the virtues of state court review and the uncertain OJR limitation imposed on that holding? To be sure, there is not a vast body of caselaw to probe; *Moore* is less than two years old. But a major national election followed *Moore*. This Essay will suggest that the dynamics of state court litigation in 2024 reveal that the OJR principle is not only in tension with the bulk of the opinion, but also potentially *in tension with itself*. I say this because, thus far, arguments made by those seeking a capacious reading of the OJR limitation have involved an utterly “ordinary” form of legal argumentation: claims that a particular reading of a state statute or constitution should be rejected because it would, in some sense, be “activist” or constitute “judicial policymaking.” Litigants opposing state court rulings in recent cases

13. See generally Vikram David Amar, *The Moore the Merrier: How Moore v. Harper’s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2023 CATO SUP. CT. REV. 275.

14. *Id.* at 284–85.

15. *Id.* at 289.

16. See, e.g., David H. Gans, Brianne J. Gorod & Anna K. Jessurun, *Moore v. Harper, Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. REV. (forthcoming 2025); Michael Weingartner, *Second-Guessing State Courts in Election Cases: Arrogation and Evasion Under Moore v. Harper*, 56 ARIZ. ST. L.J. (forthcoming 2025); cf. Z. Payvand Ahdout & Bridget Fahey, *Layered Constitutionalism*, 124 COLUM. L. REV. 1295, 1331 (2024) (suggesting the OJR limitation would only come into play in the face of bad faith actions by the state court). For a careful set of suggestions about how litigators should approach OJR in ways that protect federalism and democracy, see Shapiro, *supra* note 2, at 2063–81.

have employed *Moore*’s language about courts “arrogat[ing] to themselves the power vested in state legislatures”¹⁷ as the rough equivalent of a familiar phrase in legal and political discourse: “legislating from the bench.” Indeed, that precise phrase appeared in a recent petition for certiorari filed by proponents of ILST in Pennsylvania.¹⁸ That phrase and style of argument are as pervasive in state court jurisprudence as they are in the federal domain. They reflect common, essentially generic rhetorical devices employed to object to a particular reading of a legal text by claiming it has been chosen to further a judge’s policy preferences. Justice Kagan made this point during the oral argument in *Moore*, noting how often it is that judges say other judges with whom they disagree are “engaged in policymaking rather than in law.”¹⁹ The very ubiquity of such claims is what makes it so paradoxical in the OJR context. An argument that is itself an *ordinary* and routine part of interpretive arguments by lawyers and judges cannot coherently mark the boundaries of what is beyond the “ordinary.”

This Essay proceeds in two parts. Part I briefly traces the road to OJR. Here it includes a review of an influential—and unusually bipartisan—amicus brief filed by the Conference of the Chief Justices that dramatically underscored the theme of judicial federalism that runs through *Moore* and ISLT. Part II turns to considering how OJR has thus far been received in state courts. It begins by looking at the language of OJR itself, in search of what clues—if any—it might communicate to state courts about the new boundaries the Supreme Court will police. It then turns to looking at state supreme court opinions that have cited *Moore*. While no state supreme court decision has thus far relied on the case or adopted a controlling interpretation of it, we can glean important insights from opinions and briefs. This Part focuses principally on litigation in Pennsylvania and Montana in 2024. In both states, litigants contested the meaning of OJR and, in both, Republican litigants asked the U.S. Supreme Court to step in. Although the Court has thus far not done so, these cases offer a first look at how litigants seeking to avoid state court

17. *Moore v. Harper*, 143 S. Ct. 2065, 2073 (2023).

18. Petition for a Writ of Certiorari at 12, *RNC v. Genser*, No. 24-786 (U.S. Jan. 21, 2025) (characterizing dissents cited to support petitioners’ OJR argument as “point[ing] out that the majority was legislating from the bench”).

19. See Transcript of Oral Argument at 158–59, *Moore*, 143 S. Ct. 2065 (No. 21-1271) (“Every single one of us on this bench has written opinions at times saying that other judges, whether it’s other judges on this Court or lower court judges, have engaged in policymaking rather than in law. And, I mean, it’s just sort of one of those things that judges say when they really disagree with another opinion. If you say acting as a legislature, not as a court, these really are things—it’s not just this Court, it’s every court—these are things that judges say to each other all the time.” (cleaned up)). For a review of recent Supreme Court opinions in which Justices in the majority and dissenting opinions trade accusations of making “policy” and debate what is within the scope of “the proper role of the judiciary,” see Kafker & Jacobs, *supra* note 12, at 85–89.

judicial review in this area are trying to operationalize the OJR limitation. The reading these litigants offer, I will argue, are a recycled set of arguments about claimed judicial activism that are familiar parts of ordinary statutory and constitutional disputes in the state courts. These arguments cannot be reconciled with *Moore*'s professed respect for the historical role of state courts in judicial review. And, these arguments appear to reflect an attempt to relitigate *Moore* itself, in which ILST proponents had argued, among other things, that the North Carolina Supreme Court had engaged in "unfettered policymaking" that violated the Federal Constitution.²⁰ Because these arguments rely on claims that are utterly ordinary in state court litigation, they offer a self-contradicting interpretation of OJR.

I. THE EMERGENCE OF ORDINARY JUDICIAL REVIEW (OJR)

A. A Brief Look at Moore

The road to *Moore* has been chronicled in detail elsewhere.²¹ For our purposes, the key point is that the Court rejected ISLT for two principal reasons. First, the majority opinion traced the Court's own caselaw and found it inconsistent with the claims at the heart of ISLT. The opinion emphasized that the Court's past decisions in *Ohio ex rel. Davis v. Hildebrant*,²² *Smiley v. Holm*,²³ and *Arizona State Legislature v. Arizona Independent Redistricting Commission*²⁴ had rejected the claim that, by virtue of the Elections Clause, state legislatures are not subject to other restrictions imposed by the state constitution.²⁵ Second, the Court emphasized the rich history of judicial review under state constitutions in state courts.²⁶ It noted that, "[w]ere there any doubt, historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause."²⁷ After canvassing this history, the Court concluded that "[l]egislatures, the Framers recognized, 'are the mere creatures of the State Constitutions, and cannot be greater than their creators.'"²⁸ Based on these two factors,

20. See Brief for Petitioners, *supra* note 3, at 46.

21. See, e.g., Shapiro, *supra* note 2, at 2053–63; Amar, *supra* note 13, at 278–82.

22. 241 U.S. 565 (1916).

23. 285 U.S. 355 (1932).

24. 576 U.S. 787 (2015).

25. *Moore v. Harper*, 143 S. Ct. 2065, 2081–86 (2023).

26. *Id.* at 2086–88.

27. *Id.* at 2086.

28. *Id.* at 2083–84 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 88 (Max Farrand ed., Yale Univ. Press 1911)).

Moore rejected a reading of the Federal Constitution that would vest “exclusive authority in state legislatures, unchecked by state courts.”²⁹

After devoting the bulk of the opinion to making these points, the Chief Justice rather abruptly switched gears in the final part of the opinion and went from affirming the centrality of judicial review to newly circumscribing its boundaries. This passage is key:

State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause. But federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, *state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution*.³⁰

In defense of the idea that some limitation could be appropriate, the opinion went on to offer up examples of cases in which state court decisions had been rejected by the Court because they were found to *evade* federal law. Cases in this category included ones under the Takings Clause, Contracts Clause, and independent and adequate state grounds doctrine.³¹ In each, the Court suggested, the state court could not cloak itself in state autonomy if its purpose was to evade a federal constitutional requirement.³²

But the Court did not specify under what circumstances a state court could be found to be “evading” the Elections Clause. Nor did the Court offer any other clues to the meaning of OJR. Indeed, while taking note of different formulations of ISLT-based limitations embraced by Chief Justice Rehnquist and Justice Souter in their respective opinions in *Bush v. Gore*,³³ Chief Justice Roberts explicitly declined to either accept or reject them.³⁴ Because the North Carolina redistricting scheme challenged in the underlying litigation was no longer in place, the Court had no need to decide whether that decision had, in fact, exceeded the boundaries of OJR. Both because it deemed the OJR issue as not before the Court and because it deemed the questions “context specific,” the majority neither opined on those formulations nor offered clues to how

29. *Id.* at 2087.

30. *Id.* at 2089–90 (emphasis added).

31. *Id.* at 2088–89.

32. *Id.*

33. 531 U.S. 98 (2000).

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

it might.³⁵ It held “only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.”³⁶

For his part, Justice Kavanaugh, in concurring, suggested that the Court would need to adopt a more specific standard to implement the OJR limitation. He argued that there was likely to be no meaningful daylight between Chief Justice Rehnquist’s “impermissibl[e] distort[ion]” standard from *Bush v. Gore*, Justice Souter’s “‘limits of reasonable’ interpretation” standard from that same case, and a “truly aberrant” standard proffered by Solicitor General Elizabeth Prelogar in *Moore*.³⁷ He thought they would all likely lead to the same result. Pointedly, however, he said he “would adopt Chief Justice Rehnquist’s straightforward standard,” noting that “[a]s able counsel for North Carolina stated at oral argument, the Rehnquist standard ‘best sums it up.’”³⁸ Justice Kavanaugh also specified that the Rehnquist standard should apply not only to questions of state statutory interpretation like the one that arose in *Bush v. Gore*, “but also to state court interpretations of state constitutions.”³⁹ Finally, he adopted Chief Justice Rehnquist’s argument that, “in reviewing state court interpretations of state law, ‘we necessarily must examine the law of the State as it existed prior to the action of the [state] court,’” thus suggesting—provocatively—that state courts might not be permitted to adopt new or novel readings of state law and remain within the scope of OJR.⁴⁰ Justice Kavanaugh’s invitation has not been lost on ISLT supporters. The “impermissible distortion” standard has consistently been embraced by litigators representing the Republican Party who seek a broad reading of OJR.⁴¹

35. *Id.*

36. *Id.*

37. *Id.* at 2090 (Kavanaugh, J., concurring) (first quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); and then quoting *Bush*, 531 U.S. at 133 (Souter, J., dissenting)). Justice Kavanaugh added in a footnote:

I doubt that there would be a material difference in application among the standards formulated by Chief Justice Rehnquist, Justice Souter, and the Solicitor General, given the similarities in the three standards, at least as described above. To be sure, different judges may reach different conclusions in an individual case about whether a particular state court interpretation is impermissible under the chosen standard. But I doubt that the precise formulation of the standard—assuming it is Chief Justice Rehnquist’s, Justice Souter’s, or the Solicitor General’s—would be the decisive factor in any such disagreement.

Id. at 2090 n.1 (Kavanaugh, J., concurring).

38. *Id.* at 2090–91 (Kavanaugh, J., concurring).

39. *Id.* at 2091 (Kavanaugh, J., concurring).

40. *Id.* (Kavanaugh, J., concurring) (alteration in original) (quoting *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring)).

41. *See infra* Section II.C.

B. A Nudge Toward OJR?

As is suggested by the inclusion of an ambiguous OJR standard in the *Moore* majority opinion, the question of how to reconcile the claims of ISLT supporters with basic principles of judicial federalism featured prominently in the briefing and oral argument in *Moore*. One amicus brief drew special attention: The Conference of the Chief Justices, representing the chief justices of all fifty states, weighed in.⁴² It was striking, given current polarization, that all fifty chief justices could agree on what to say in a case that had such strong partisan overtones. In a brief filed on behalf of neither party, the Conference urged the Court either to reject the doctrine entirely or to adopt a standard of review that is “exceedingly deferential.”⁴³ They pressed themes of judicial federalism: “State sovereignty,” they argued, “includes the power of each State to structure its own government and determine the relationships between the legislative and judicial branches.”⁴⁴ The Conference implored the Court to hold that, as long as a state court used “tools traditionally used by judicial officers,” its decision should be respected, even if the state court’s “chosen approaches and ultimate decisions are not precisely the same as those that would be reached by a federal court.”⁴⁵ When such tools are used, the brief argued, “state courts, like federal courts, are not legislating or promoting their own policy interests or preferences; they are exercising judicial power and seeking to enforce the policies in the laws of their states.”⁴⁶ In that situation, “[f]ederal judicial review of state court decisions about state election laws should respect the state judiciary’s framework and approach and defer to the outcomes of those processes except in extraordinary circumstances.”⁴⁷ At one point the brief suggested that federal courts should let state court decisions stand “unless there exists no plausibly defensible basis for the court’s determination and the decision infringes a clear federal interest.”⁴⁸

This brief was explicitly raised at oral argument by Justice Kavanaugh, who—as his concurrence later reflected—was probing for the appropriate standard to use if the Court adopted some version of

42. See Brief of *Amicus Curiae* Conference of Chief Justices in Support of Neither Party, *Moore*, 143 S. Ct. 2065 (No. 21-1271).

43. *Id.* at 5, 19.

44. *Id.* at 19.

45. *Id.* at 19, 23.

46. *Id.* at 23.

47. *Id.*

48. *Id.* at 19.

ISLT.⁴⁹ It was also raised by Neal Katyal, arguing against ISLT.⁵⁰ He, along with Solicitor General Prelogar, also made repeated references to the idea that in the “ordinary” case of judicial review, understood as an “ordinary” part of checks and balances, the Supreme Court should defer to the state courts on matters of election law.⁵¹ Those references proved prescient and may well have helped to shape the standard the Court ultimately adopted.

II. THE OJR LIMITATION IN STATE COURTS

A. *The Mysterious Limit of “Ordinariness”*

As state courts confront *Moore*’s OJR principle, they must wrestle with what message the Supreme Court is sending them about limits on their power to decide questions of state law. As a starting point, the vacuousness of the adjective “ordinary” seems hard to miss. As is familiar to judges and lawyers called upon to interpret it in various areas of law,⁵² the term itself is vague and porous. Two contemporary public law doctrines that are favorites of the current Supreme Court nicely illustrate the elusiveness of the word “ordinary” as a doctrinal lever and suggest ways in which state courts will find little guidance in the words of the OJR principle itself. I raise these doctrines not to suggest the Court will analogize to them in developing an OJR jurisprudence, but because they illustrate relevant problems with the term itself.

First, consider “ordinary meaning,” the phrase that underpins contemporary textualism. In assigning meaning to statutory language, recent cases have emphasized that the focus should be on the “ordinary meaning” of the words, which the Court has said equates to something like how the ordinary speaker of English would use the words.⁵³ As scholars have noted, even avowedly textualist Justices who embrace the normative centrality of “ordinary meaning” frequently disagree in key cases about the “ordinary” meaning of a term.⁵⁴ This was vividly illustrated in *Bostock v. Clayton County*,⁵⁵ the landmark case about whether discrimination against LGBTQ employees based on sexual

49. Transcript of Oral Argument at 56–57, *Moore*, 143 S. Ct. 2065 (No. 21-1271).

50. *Id.* at 106.

51. *Id.* at 81, 84, 99, 111, 113, 122 (statements of Neal Katyal); *id.* at 168–69, 172–73, 178–89 (statements of Solicitor General Elizabeth Prelogar).

52. To name a few of many: “ordinary care” in tort law, as well as the “ordinary course of business” and “ordinary income” in tax law.

53. See Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 367 (2023).

54. *Id.* at 369.

55. 140 S. Ct. 1731 (2020).

orientation or gender identity falls within Title VII’s ban on discrimination “because of [an] individual’s . . . sex.”⁵⁶ Justice Gorsuch’s majority opinion famously said Title VII did apply,⁵⁷ while separate dissents by Justices Alito and Kavanaugh vigorously disagreed. All three firmly claimed the mantle of “ordinary” meaning but diverged on what that meant. Justice Kavanaugh complained that Justice Gorsuch was employing “literal,” not “ordinary meaning,”⁵⁸ and Justice Alito criticized Justice Gorsuch for not focusing on how “ordinary people” would have used the term at the time of enactment.⁵⁹ *Bostock* is hardly the only example of disagreements on the contemporary Court about what constitutes ordinary meaning, and the methodological dispute among the three Justices barely scratches the surface of disagreements about how ordinary meaning might be applied.⁶⁰ *Bostock*, however, is a vivid example of how debates about “ordinariness,” under the bright lights that accompany a salient public issue, can produce controversy and claims of selectivity and result-orientation.⁶¹

A second analogy might flow from another statutory interpretation doctrine popular with the current Supreme Court majority: the major questions doctrine. The ideas that shape that doctrine have evolved over many years and were consolidated in *West Virginia v. EPA*.⁶² In that case, Chief Justice Roberts made the distinction between the “ordinary” and the “extraordinary” the centerpiece of the doctrine:

In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are “extraordinary cases” that call for a different approach—cases in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason

56. *Id.* at 1737–38 (quoting 42 U.S.C. § 2000e–2(a)).

57. *Id.* at 1737.

58. *Id.* at 1834 (Kavanaugh, J., dissenting).

59. *Id.* at 1766 (Alito, J., dissenting). For more on textualists disagreeing in *Bostock*, see Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).

60. See, e.g., *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021); *Sackett v. EPA*, 143 S. Ct. 1322 (2023). For a more extensive cataloguing of the differences among textualists, see William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611 (2023).

61. Professors William Eskridge and Victoria Nourse have, for example, focused on the problem of “textual gerrymandering,” a term they use for “cherry-picking” context while interpreting statutory text to achieve a certain result. William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1718, 1731–33 (2021).

62. 142 S. Ct. 2587 (2022).

to hesitate before concluding that Congress” meant to confer such authority.⁶³

In the passages that followed, Chief Justice Roberts synthesized a number of past cases that he saw as embracing the principle that in “extraordinary” cases of special economic or political significance, Congress would not have delegated authority to an administrative agency without providing a clear statement of its intent to do so.⁶⁴ Like ordinary meaning in textualism, this extraordinariness standard gives the Court a handy lever to shape the outcome in high-profile public controversies. It has been especially prominent in, and has perhaps the clearest implications for, environmental law, where so much agency activity has great economic significance.⁶⁵ But its recent application to bar loan forgiveness in *Biden v. Nebraska*⁶⁶ offers another example of its use to let the Court decide how to resolve a hotly contested question of public policy with strong partisan resonance.⁶⁷

The important point is that, as Justice Kagan has argued, principles like the major questions doctrine function as “get-out-of-text-free cards,” to be deployed when desired to invalidate an administrative policy.⁶⁸ It need not be used all the time to have a significant effect in shaping regulatory policy to the Court’s liking; its lurking availability and selectivity are key parts of what makes it problematic. And so it may be with OJR, if capaciously understood. Few would expect the Court to get into the business of routinely policing state court decisions in election cases under this principle. But that does not mean state courts will not be laboring in the shadow of OJR and be asked to decide in salient election law cases whether adopting a particular approach would exceed its bounds. The very elasticity and opaqueness of the principle are likely to create, for state courts, a puzzling but prevalent specter hanging over election cases.

B. Post-Moore Decisions and the Broader Context of State Court Judicial Review

With that baseline of uncertainty in mind, we can now turn to asking how the OJR principle has, thus far, been interpreted in state supreme

63. *Id.* at 2608 (alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

64. *Id.* at 2607–09.

65. *See, e.g., Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

66. 143 S. Ct. 2355 (2023).

67. *Id.* at 2375.

68. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

court litigation since *Moore* was decided. As of January 2025, *Moore* has been cited in eight state supreme court opinions.⁶⁹ None of these cases were decided based on *Moore*, but these citations provide useful information about what state courts are, thus far, taking from the decision. This section will look more deeply at two of these cases,⁷⁰ but as a first cut, it is notable that most opinions have cited *Moore in support* of their power of judicial review, not as a limitation on it. Opinions by justices in Alaska,⁷¹ New Mexico,⁷² Pennsylvania,⁷³ New York,⁷⁴ Utah,⁷⁵ and Montana⁷⁶ have cited *Moore* as affirming their power to decide

69. See cases cited *infra* notes 71–79.

70. These cases are *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, 545 P.3d 1074, *cert. denied*, No. 24-220, 2025 WL 247449 (U.S. Jan. 21, 2025), and *Genser v. Butler Cnty. Bd. of Elections*, 325 A.3d 458 (Pa. 2024) (*cert. petition filed* Jan. 21, 2025).

71. *Bickford v. State*, No. S-18776, 2025 WL 18582, at *3–4 (Alaska Jan. 2, 2025) (unpublished opinion) (noting that *Moore* recognizes that state courts have the broad “power to void laws incompatible with constitutional provisions” because the court retains “the judicial authority accorded [it] by our constitutional form of government,” notwithstanding the Elections Clause (quoting *Moore v. Harper*, 143 S. Ct. 2065, 2081 (2023))).

72. *Grisham v. Van Soelen*, 2023-NMSC-027, ¶¶ 35–36, 38, 539 P.3d 272, 285–86 (affirming the power of state courts to review a challenge to congressional redistricting as partisan gerrymander brought under the state constitution, citing *Moore*’s language that “[s]ince early in our Nation’s history, courts have recognized their duty to evaluate the constitutionality of legislative acts” and “[w]hen legislatures make laws, they are bound by the provisions of the very documents that give them life” (quoting *Moore*, 143 S. Ct. at 2079, 2083)).

73. *Genser*, 325 A.3d at 486 (Dougherty, J., concurring) (expressing support for the majority’s interpretation of the statute and confidence that the state court has not “so exceed[ed] the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to the state legislature” (quoting *Moore*, 143 S. Ct. at 2090)).

74. *Hoffmann v. N.Y. State Indep. Redistricting Comm’n*, 234 N.E.3d 1002, 1034–35 (N.Y. 2023) (Cannataro, J., dissenting) (citing *Moore* for the proposition that the Supreme Court has found that “while redistricting may traditionally be a legislative function, *state courts* are the appropriate tribunals to hold state legislatures to compliance with state constitution redistricting requirements”).

75. *League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, ¶ 218, 554 P.3d 872, 921 (finding strict scrutiny appropriate to review a legislative attempt to curtail a redistricting initiative and citing *Moore* for the principle that “[w]e will continue to carry our ‘duty to evaluate the constitutionality of legislative acts’” (quoting *Moore*, 143 S. Ct. at 2079)).

76. *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 38 n.7, 545 P.3d 1074, 1091 n.7 (rejecting the Montana Secretary of State’s argument that the Elections Clause barred state court review of challenged provisions regulating voting and citing *Moore* for the proposition that the “Elections Clause does not insulate state legislature from the ordinary exercise of judicial review” (quoting *Moore*, 143 S. Ct. at 2081)); see also *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 52, 557 P.3d 440, 464 (McKinnon, J., concurring) (in nonelection law case, citing *Moore* in support of judicial review of restrictive abortion laws).

election law cases. These citations have emphasized that, in the words of Utah's highest court, state courts have a "duty to evaluate the constitutionality of legislative acts."⁷⁷

By contrast, courts in Kentucky⁷⁸ and New Hampshire⁷⁹ have cited *Moore* in support of their deferential approaches to the challenges before them. Both cases involved claims that legislative redistricting plans constituted partisan gerrymanders. In *Graham v. Secretary of State*,⁸⁰ the Kentucky Supreme Court cited *Moore*'s OJR language in identifying the need for the court to "remain mindful of the United States Supreme Court's recent guidance on the proper role of state judiciaries."⁸¹ The court went on to apply the forgiving standard of rational basis review and uphold the legislative plan. In *Brown v. Secretary of State*,⁸² the New Hampshire Supreme Court followed the approach to partisan gerrymandering claims set out by the U.S. Supreme Court in *Rucho v. Common Cause*⁸³ and held the claim to be a nonjusticiable political question.⁸⁴ In so doing, the court cited *Moore* in a footnote, declaring that the Supreme Court has "an obligation to [e]nsure that state court interpretations of [state] law do not evade federal law."⁸⁵ While neither case held that *Moore* had foreclosed them from striking down a partisan gerrymander under the state constitution, both cited the case in support of a posture of institutional deference and ultimately let the legislature's redistricting plan stand.

As a group, these post-*Moore* state supreme court cases reflect a familiar dichotomy in constitutional discourse. The language in the first set of decisions stresses the normative importance of judicial review in a separation of powers scheme, while the second set emphasizes the institutional need for judicial restraint. That dichotomy is in some sense built into the *Moore* majority opinion, which is principally devoted to the former but ends on a note that might be assimilated to the latter. I do not suggest that OJR *should* be read to stand in for "judicial restraint." Arguments offering a narrower interpretation and focused on whether a state court deliberately evaded federal rights strike me as far more persuasive and are certainly more compatible with the rest of the

77. *Utah State Legislature*, 2024 UT 21, ¶ 218, 554 P.3d at 921 (quoting *Moore*, 143 S. Ct. at 2079).

78. *Graham v. Sec'y of State*, 684 S.W.3d 663, 676 (Ky. 2023).

79. *Brown v. Sec'y of State*, 313 A.3d 760, 799 n.3 (N.H. 2023).

80. 684 S.W.3d. 663 (Ky. 2024).

81. *Id.* at 675–76.

82. 313 A.3d 760 (N.H. 2023).

83. 139 S. Ct. 2484 (2019).

84. *Brown*, 313 A.3d at 771–75, 781.

85. *Id.* at 779 n.3 (second alteration in original) (quoting *Moore v. Harper*, 143 S. Ct. 2065, 2088 (2023)).

opinion.⁸⁶ But reading OJR as some loose version of a principle of judicial restraint is a likely interpretation by proponents of ISLT looking for a second chance to press for state legislative autonomy in the domain of election law. Indeed, as we will see, that is precisely how post-*Moore* ISLT advocates have tried to spin OJR in court as they seek, *sub silentio*, to relitigate *Moore* itself.

State courts interpreting *Moore*, like those above, are working in a milieu in which arguments about judicial activism and restraint frequently appear in public law cases. These kinds of arguments are recurring parts of state court litigation, as they are in federal cases. Phrases commonly used to condemn certain results as the product of “judicial activism” in some form or fashion show up in hundreds of state court opinions, ranging across multiple areas of law. The phrase “legislating from the bench,” and language asserting that courts neither “sit as a superlegislature” nor should engage in “judicial policymaking,” for example, reflect well-known examples.⁸⁷ The frequency of such arguments should not be surprising. For decades, arguments about the appropriate role of courts have occupied a prominent place not only in political and academic debates,⁸⁸ but in lawyers’ toolkits and judges’ rhetoric as well. In constitutional law, these are part of the standard repertoire of arguments, and often take the form, broadly speaking, of arguments concerning prudence, structure (including the proper functioning of democracy and the separation of powers), values and principles, or consequences.⁸⁹ In the realm of statutory interpretation, these arguments commonly take the form of exhorting courts to honor

86. See sources cited *supra* notes 13, 16.

87. As of March 14, 2024, searches of the State Cases database in Westlaw showed numerous uses of the following phrases: “Judicial activism!” (662 case results); “Sit as a superlegislature” (335 case results); “Legis! from the Bench” (296 case results); “Judicial lawmaking” (201 case results); “Judicial policymak!” (139 case results).

88. The literature on “judicial activism” is vast and includes analyses from different perspectives. See, e.g., Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (intellectual history); STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* (2009) (empirical analysis); Jane S. Schacter, *Putting the Politics of Judicial Activism in Historical Perspective*, 2017 S. CT. REV. 209 (historical analysis); Neil Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010) (political perspective).

89. These formulations are drawn from the work of Philip Bobbitt, Richard Fallon, and Jack Balkin, each of whom has written about the “catalog of standard forms of constitutional argument that lawyers and judges regularly employ.” For an overview, see Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 178–79, 182–84 (2018) (setting out the approaches of Bobbitt and Fallon, adding his own, and comparing the rhetorical differences).

“legislative supremacy” and avoid “judicial policymaking.”⁹⁰ These kinds of arguments are often assimilated to constitutional originalism and statutory textualism,⁹¹ but they have a much wider ambit and can be deployed across ideologies and methodologies.⁹²

Some examples drawn from the domain of state election law cases nicely capture the form of these arguments. Redistricting cases decided under state constitutions have been especially likely to be infused with claims of this sort. In a West Virginia decision upholding a redistricting plan under state constitutional attack, the dissenting Justice complained that the plan diluted the voting power of certain voters,⁹³ but the majority underscored how “properly limited and circumspect” the court’s role should be and emphasized that it has “consistently held that it does not ‘sit as superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation.’”⁹⁴ In a Florida case, the state supreme court struck down the challenged redistricting plan and rejected what it saw as the dissent’s “derisive criticisms,” amounting to an accusation that the majority had resorted to a “creative maneuver designed to overstep its proper bounds, done in order to usurp the Legislature’s role.”⁹⁵ For its part, the dissent characterized the majority opinion as “teeming with judicial overreaching” and causing “serious damage to our constitutional structure” because the “functioning of the judicial process is deformed and the separation of powers is breached in an unprecedented manner.”⁹⁶

In redistricting cases, charges of activism tend to be heated, but perhaps never more so than in *Clarke v. Wisconsin Elections Commission*,⁹⁷ the Wisconsin Supreme Court’s 2023 decision striking

90. On the canonical role of legislative supremacy in statutory interpretation, see Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594, 597 (1995) (describing as a common part of traditional approaches to statutory interpretation the idea that policy choices made by elected officials should be “uncluttered by judicial policymaking that masquerades as interpretation”).

91. Cf. Litman & Shaw, *supra* note 12 (arguing against an interpretation of OJR that requires state courts to use textualist and originalist approaches to interpretation).

92. For an analysis of ideological and partisan shifts over time in ideas about judicial activism, see Jack R. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019).

93. *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 399 (W. Va. 2012) (Benjamin, J., concurring and dissenting in part).

94. *Id.* at 377 (quoting *Boyd v. Merritt*, 354 S.E.2d 106, 108 (W. Va. 1986)).

95. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 415–16 (Fla. 2015).

96. *Id.* at 420, 425 (Canaday, J., dissenting).

97. 2023 WI 79, 998 N.W.2d 370.

down the Legislature’s plan for redrawing the state’s legislative districts.⁹⁸ The decision was a 4–3 vote, and the majority justified its conclusion in the logic of judicial restraint. The opinion asserted that specific language in the state constitution required contiguity that was absent in the plan, noted that “practically any dictionary” supported the majority’s interpretation of that term, and concluded that it would “decline to chip away at such a consequential districting requirement by approving an exception not found in our constitution’s text.”⁹⁹ Multiple dissents used highly charged language to accuse the majority of activism. Chief Justice Annette Ziegler declared that “[t]his deal was sealed on election night,” referring to the recent judicial election when control of the high court moved from one party to the other.¹⁰⁰ She said the decision of “four robewearers” to “grab power and fast-track” this case “smacks of judicial activism on steroids.”¹⁰¹ Striking a similar theme, Justice Rebecca Bradley accused the majority of “seizing the exclusive constitutional roles of the legislature and the governor” and “anointing itself an all-powerful committee of four to supplant the political choices of the coordinate branches.”¹⁰² A third dissent, by Justice Brian Hagedorn, called the decision a “sad turn” for the court because it had “dive[d] headlong into politics, choosing to wield the power it has while it has it.”¹⁰³

Claims about judicial activism in election cases are by no means limited to the redistricting context, even if they may be especially caustic in that setting. This rhetoric crops up in other election cases, too, and the charge of activism can come from the left as well as the right. Take, for example, decisions about whether a state constitution permits voter identification laws. Majorities on the state supreme courts in Wisconsin and Arkansas upheld these laws and confronted charges of judicial activism from their dissenting colleagues.¹⁰⁴ A dissenting Justice in Wisconsin chided the majority for “rewrit[ing] [the law] to make it constitutional” and argued “[t]hat task [wa]s for the legislature.”¹⁰⁵ In Arkansas, the dissenting Justice criticized the majority for “[r]esorting to penumbras when the text of the constitution [wa]s silent on the subject,” characterizing this as “judicial activism.”¹⁰⁶ Similarly, in a Minnesota

98. *Id.* ¶ 3, 998 N.W.2d at 379.

99. *Id.* ¶¶ 15–16, 25–26, 35, 998 N.W.2d at 381–82, 385, 389.

100. *Id.* ¶ 78, 998 N.W.2d at 401 (Ziegler, C.J., dissenting).

101. *Id.* ¶ 79, 998 N.W.2d at 402 (Ziegler, C.J., dissenting).

102. *Id.* ¶ 207, 998 N.W.2d at 447 (Bradley, J., dissenting).

103. *Id.* ¶ 264, 998 N.W.2d at 474 (Hagedorn, J., dissenting).

104. *See League of Women Voters of Wis. v. Walker*, 2014 WI 97, 851 N.W.2d 302; *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509.

105. *Walker*, 2014 WI 97, ¶ 93, 851 N.W.2d at 322 (Abrahamson, C.J., dissenting).

106. *Martin*, 2018 Ark. 283, at 14–15, 556 S.W.3d at 518 (Hart, J., dissenting).

case holding that canvassing boards lacked the power to correct certain kinds of voter errors, the dissenting Justice found inconsistencies in the court's reasoning and accused it of "legislating from the bench."¹⁰⁷

It is worth pausing to note that one might think state court judges ought not be subject to the same strictures of judicial restraint as federal judges. The vast majority of states have judicial elections of some sort, and these elections, over time, have come increasingly to resemble elections for political office in various respects.¹⁰⁸ And there are a set of other functions carried out by state judges that might be thought to give them more policymaking legitimacy than their federal counterparts, including the fact that state constitutions are more easily amended in most states (making instances of judicial "activism" more readily correctable by voters); state courts retain wider common law powers; and many state courts regulate the bar and have broad supervisory powers over courts that allow them to engage in policy-laden forms of civil and criminal justice reform.¹⁰⁹

There are, to be sure, significant arguments that these differences make the whole paradigm of judicial activism versus restraint ill-suited to the context of state courts.¹¹⁰ But there is little evidence in the language of judicial decisions that state court justices themselves reject this dichotomy. In fact, state judges typically resist the label of "activist" and do not seek to justify their decisions in any logic of justified activism.¹¹¹

107. *Coleman v. Ritchie*, 758 N.W.2d 306, 309 (Minn. 2008) (Page, J., dissenting).

108. See Jane S. Schacter, *Polarization, Nationalization, and the Constitutional Politics of Recent State Supreme Court Elections*, 2022 WIS. L. REV. 1311.

109. On institutional differences between state and federal courts, see Adam B. Sopko, *Catalyzing Judicial Federalism*, 109 VA. L. REV. ONLINE 144 (2023).

110. In the context of ISLT and *Moore*, see Litman & Shaw, *supra* note 12, at 893 (assailing *Moore*'s OJR limitation as placing state courts in an "interpretive straightjacket" and ignoring that in many states, voters chose those to whom they want to assign interpretive responsibilities). For a review of such arguments in different domains, see Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1237–54 (2012) (statutory interpretation); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2064–76 (2010) (constitutional law).

111. In the realm of statutory interpretation, see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1860 (2010) (noting that one reason elected judges tend to adopt interpretive approaches similar to those of appointed judges is that "the apparent neutrality of such regimes and the way in which they purport to limit judicial discretion may help judges to defend against political charges of activism"); Bruhl & Leib, *supra* note 110, at 1222 (noting the "normative intuition" that modes of judicial selection are irrelevant to judges' interpretive approach "finds tentative support in existing judicial practice: although there are some variations in method from state to state, the judges themselves do not seem to regard their electoral status as an important

That does not mean the unique institutional characteristics of state courts should not be normatively relevant to how OJR is defined, but it does offer some explanation for the absence of any rhetoric about activism and restraint in state supreme court opinions that differs from what is found in federal opinions.

*C. ISLT Advocates and OJR in Montana and
Pennsylvania Litigation*

Litigation in 2024 in two states, in particular, provides a useful window into how ISLT proponents are framing OJR. As cases in Montana and Pennsylvania reflect, ISLT advocates are equating OJR with quotidian ideas of judicial activism and are doing so in ways that allow them to essentially rehearse claims they made and lost in the *Moore* case itself.¹¹² In both states, these advocates lost in state court and sought review in the Supreme Court. In the Montana case, the writ of certiorari was denied in January 2025.¹¹³ In the Pennsylvania case, the Supreme Court denied an emergency stay in November 2024,¹¹⁴ and ISLT proponents filed a petition for certiorari in January 2025.¹¹⁵

1. Montana

In *Montana Democratic Party v. Jacobsen*,¹¹⁶ the Montana Supreme Court considered the constitutionality of laws eliminating same-day registration, restricting the forms of acceptable voter ID (including disqualifying student ID cards), barring registration by young voters who would turn eighteen by the date of the election but were not eighteen when registered, and prohibiting paid absentee ballot collection.¹¹⁷ Plaintiffs challenged these as inconsistent with the right to vote protected by, among others, a state constitutional clause guaranteeing that “[a]ll

determinant of their interpretive approach”). In the realm of constitutional interpretation, see Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1888 (2023) (noting that “[s]tate judges now regularly parrot” approaches drawn from the federal domain and “invoke the dreaded possibility of ‘judicial activism’”).

112. See *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, 545 P.3d 1074, cert. denied, No. 24-220, 2025 WL 247449 (U.S. Jan. 21, 2025); *Genser v. Butler Cnty. Bd. of Elections*, 325 A.3d 458 (Pa. 2024) (cert. petition filed Jan. 21, 2025).

113. *Jacobsen v. Mont. Democratic Party*, No. 24-220, 2025 WL 247449 (U.S. Jan. 21, 2025) (mem.).

114. *RNC v. Genser*, No. 24A408, 2024 WL 4647792 (U.S. Nov. 1, 2024) (mem.).

115. See Petition for a Writ of Certiorari, *supra* note 18. As this Essay goes to print, the Supreme Court has not acted on the petition.

116. 2024 MT 66, 545 P.3d 1074.

117. *Id.* ¶¶ 5–8, 545 P.3d at 1082–83.

elections shall be free and open.”¹¹⁸ The state supreme court held that heightened scrutiny should be applied, with some of the provisions being subjected to strict scrutiny and others to intermediate scrutiny.¹¹⁹ In so doing, the court emphasized the idea of judicial federalism, quoting Justice Brennan’s canonical article, *State Constitutions and the Protection of Individual Rights*.¹²⁰ The court explicitly defended its prerogative to “diverge from the minimal protections offered by the United States Constitution when the Montana Constitution clearly affords greater protection—or even where the provision is nearly identical.”¹²¹ Far from understanding *Moore* to bar that decision, the majority emphatically cited the case in this part of the opinion,¹²² relying on *Moore*’s reference to the historical idea that “[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void.”¹²³

In a subsequent part of the opinion, the majority briefly addressed OJR in a footnote. The footnote was in response to the State’s argument that rational basis scrutiny should be applied because article IV, section 3 of the Montana Constitution specifies a role for the Legislature in enacting election law.¹²⁴ In rejecting this argument, the court said in relevant part:

The Secretary devotes one page of its nearly 90-page brief to argue that the Elections Clause of the United States Constitution prevents our review of these four laws. We wholly reject this argument. Like the responsibility granted to the Legislature in Article IV, Section 3, of the Montana Constitution, the Elections Clause is subject to other provisions of our Constitution, such as the right to vote. Indeed, “constitutional provisions governing the exercise of political rights [are] subject to constant and careful scrutiny.” . . . The United States Supreme Court has recently revisited this argument and held that the “Elections Clause does not insulate state

118. MONT. CONST. art. II, § 13.

119. *Jacobsen*, 2024 MT 66, ¶¶ 46, 48, 63, 101, 106, 112, 119, 545 P.3d at 1093, 1095–96, 1103–05, 1107.

120. *Id.* ¶ 16, 545 P.3d at 1085 (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)).

121. *Id.*

122. *Id.* (citing *Moore v. Harper*, 143 S. Ct. 2065, 2081 (2023)).

123. *Moore*, 143 S. Ct. at 2081 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 93).

124. That provision states: “The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process.” MONT. CONST. art. IV, § 3.

legislatures from the ordinary exercise of state judicial review.”¹²⁵

Justice Dirk Sandefur disagreed on most of the claims and wrote a lengthy dissent, but he did not argue that the majority had exceeded the bounds of OJR. He instead argued that the court should have adhered to federal precedent instead of developing its own approach to the state constitutional right to vote.¹²⁶ At its core, the dissent disputed that there was any role for strict scrutiny in the case.¹²⁷ Wielding classic rhetoric about judicial restraint, Justice Sandefur’s dissent accused the majority of engaging “in an unprecedented exercise of unrestrained judicial power overriding public policy determinations made by the Legislature in the exercise of its constitutional discretion”; of impermissibly acting “as a ‘super-legislature’”; and of believing that it had the power “in its infinite wisdom—not the Legislature in accordance with its express constitutional authority—to decide” questions of election policy.¹²⁸ Given the vigor of the dissent and the fact that the state had asserted an ISLT claim, it is striking that the dissent did not invoke OJR. It suggests that Justice Sandefur did not see an OJR violation necessarily flowing from what he clearly did see as unwarranted judicial activism.

The State framed its claims in terms of traditional ideas of judicial activism. It argued, for example, that “[t]he separation of powers and respect for the Legislature’s policymaking rol[e] requires deference to the Legislature’s reasons for enacting statutes,”¹²⁹ and that “balancing” policy considerations is a “function this Court should leave to the Legislature.”¹³⁰ The State argued that rational basis, not strict scrutiny, should have been applied and asserted that deferential review was

125. *Jacobsen*, 2024 MT 66, ¶ 38 n.7, 545 P.3d at 1091 n.7 (alteration in original) (citations omitted) (first quoting *Smiley v. Holm*, 285 U.S. 355, 369 (1932); and then quoting *Moore*, 143 S. Ct. at 2081).

126. *Id.* ¶¶ 129, 142–47, 166, 545 P.3d at 1109–10, 1116–21, 1132 (Sandefur, J., concurring in part and dissenting in part).

127. *Id.* ¶¶ 163, 166, 545 P.3d at 1129, 1132 (“[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.’ . . . Accordingly, to evaluate a state legislative enactment that merely burdens the exercise of the right to vote, rather than substantially interferes with it, ‘a more flexible standard’ of constitutional review is necessary.” (emphasis omitted) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992))).

128. *Id.* ¶¶ 74, 171, 545 P.3d at 1125, 1134–35 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

129. Appellant’s Reply Brief at 31, *Jacobsen*, 2024 MT 66, 545 P.3d 1074 (No. DA 22-0667).

130. *Id.* at 20.

appropriate.¹³¹ After making these arguments at some length, the State offered brief ISLT arguments. The opening brief, filed before *Moore* was decided, devoted two paragraphs to essentially restating its arguments for deferential review in the vocabulary of the Elections Clause.¹³² The reply brief, filed after *Moore* was decided, injected OJR into the argument. The State fashioned an odd claim that application of strict scrutiny in the case itself violated OJR by flipping the presumption of constitutionality in a way, the appellant suggested, that is inconsistent with the Elections Clause.¹³³ The appellant, that is, not only disagreed with the application of strict scrutiny—an established judicial approach—but attempted to place its usage beyond the bound of OJR.

After the Montana Supreme Court struck down the challenged laws, the State petitioned for certiorari. The petition asked the U.S. Supreme Court to select a more particularized standard for OJR and argued it should adopt the “impermissible distortion” formulation adopted by Justice Rehnquist¹³⁴ and favored by Justice Kavanaugh in *Moore*.¹³⁵ In ways that underscore the tight connection advocates are making between OJR and common arguments about judicial activism, the petition repeatedly cited Justice Sandefur’s disagreement for its claims about the majority’s activism, even though that dissent had not itself broached *Moore*, OJR, or the Elections Clause at all.¹³⁶ Indeed, in support of its argument that the Supreme Court should take the case and adopt the impermissible distortion standard, the State’s petition cited general authority about deference and judicial restraint taken from other areas of law.¹³⁷ Those opposing certiorari, by contrast, said the case involves an “utterly ordinary ruling that the two Montana statutes run afoul of the Montana Constitution because they impermissibly interfere with fundamental rights and do not survive strict scrutiny.”¹³⁸ It said, as well, that the application of general constitutional language to specific issues

131. The argument about rational basis pervades both the Opening and Reply briefs. See *id.* at 27–32; Appellant’s Opening Brief at 18–21, 41–51, 72, 86, *Jacobsen*, 2024 MT 66, 545 P.3d 1074 (No. DA 22-0667).

132. Appellant’s Opening Brief, *supra* note 131, at 87.

133. Appellant’s Reply Brief, *supra* note 129, at 51–53.

134. See *Bush v. Gore*, 531 U.S. 98, 115 (2000) (per curiam) (Rehnquist, C.J., concurring).

135. Petition for a Writ of Certiorari at 5, 13–14, *Jacobsen*, No. 24-220, 2025 WL 247449 (U.S. Jan. 21, 2025) (quoting *Moore v. Harper*, 143 S. Ct. 2065, 2090 (2023) (Kavanaugh, J. concurring)).

136. *Id.* at 20–22.

137. See *id.* at 18 (noting that “deference [is] due the legislative process” (quoting *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2171 (2020) (Gorsuch, J., dissenting))).

138. Brief in Opposition by the Montana Democratic Party & Mitch Bohn at 1, *Jacobsen*, No. 24-220, 2025 WL 247449 (U.S. Jan. 21, 2025).

“is the very essence of judicial review.”¹³⁹ The structure of these arguments—the State arguing for judicial deference to the legislature and the plaintiffs arguing for the court’s important role in judicial review—takes us back to the classic dichotomy with which this section began.¹⁴⁰

2. Pennsylvania

During the 2024 election, Pennsylvania was a key swing state and saw much more litigation than Montana.¹⁴¹ In the lead-up to, and aftermath of, the 2024 election, there were multiple cases focusing on aspects of mail-in balloting. Some raised issues of statutory interpretation, others of state constitutional law. This subsection will focus on *Genser v. Butler County Board of Elections*,¹⁴² a statutory interpretation case. Pennsylvania also saw extensive litigation regarding the constitutionality of certain aspects of the mail-in balloting rules, with some of that litigation still pending in the Supreme Court of Pennsylvania.¹⁴³ The structure and substance of the arguments about OJR in these constitutional cases share some of the key characteristics in *Genser* explored below.¹⁴⁴

The ways in which advocates can try to force commonplace statutory interpretation arguments into the OJR framework was on vivid display in *Genser*. The case raised the question of whether a person whose mail-in ballot had a defect and would not be counted could choose to later vote by provisional ballot.¹⁴⁵ Two eligible voters had attempted to vote in the

139. *Id.* at 2, 14.

140. *See supra* text accompanying notes 86–91.

141. A list of the many state court lawsuits filed and links to the opinions they generated can be found on the Unified Judicial System of Pennsylvania’s website. *Election 2024*, UNIFIED JUD. SYS. PA., <https://www.pacourts.us/election-2024> (last visited Feb. 22, 2024).

142. 325 A.3d 458 (Pa. 2024) (cert. petition filed Jan. 21, 2025).

143. In *Center for Coalfield Justice*, the Supreme Court of Pennsylvania will decide whether voters have a constitutional right to be informed if the county elections officials find their mail ballot defective and will not count it. *See Ctr. for Coalfield Just. v. Wash. Cnty. Bd. of Elections*, No. 259 WAL 2024 (renumbered No. 28 WAP 2024), 2024 WL 4406776 (Pa. Oct. 5, 2024) (briefing completed Oct. 11, 2024), *granting allocatur* to No. 1172 C.D. 2024, 2024 WL 4272040 (Pa. Commw. Ct. Sept. 24, 2024). In *Baxter v. Philadelphia Board of Elections*, the same court will decide whether disqualifying a voter’s mail-in ballot because the voter failed to date the envelope violates the state constitution; the lower court found that the dating requirement lacked a purpose and did not relate to whether the ballot was timely. *See Baxter v. Phila. Bd. of Elections*, Nos. 395–96 EAL 2024 (renumbered No. 2 EAP 2025), 2025 WL 224388 (Pa. Jan. 17, 2025), *granting allocatur in part* to Nos. 1305, 1309 C.D. 2024, 2024 WL 4614689 (Pa. Commw. Ct. Oct. 30, 2024).

144. In light of space limitations, I will limit my review to *Genser* only.

145. *Genser*, 325 A.3d at 461.

2024 primary election by mail-in ballots in Butler County.¹⁴⁶ Because they did not place their ballots into the provided secrecy envelopes, as required by the Pennsylvania Election Code, those ballots—often termed “naked ballots”—could not be counted.¹⁴⁷ A state law prohibited mail-in ballot packets from being opened until Election Day, but a scanning machine was able to predict the absence of the secrecy envelope once the ballot was returned, and the voters then received an automatic email telling them of the error.¹⁴⁸ The email indicated that their mail-in ballots would not be counted because of the problem, but they could cast a provisional ballot at their polling place on Election Day.¹⁴⁹ Both voters cast such provisional ballots in the 2024 presidential primary election and were subsequently informed by the Butler County Board of Elections that the ballots would not be counted because of their timely received, but fatally defective, mail-in ballots.¹⁵⁰

The issue in *Genser* turned on how to reconcile multiple statutory provisions in the state’s Election Code. Section 3150.16(b)(2) states that “[a]n elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot” under the provisional ballot provisions of the Code.¹⁵¹ “[T]he county board of elections,” under § 3050(a.4)(5)(i), “shall count the [provisional] ballot if [it] confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.”¹⁵² Section (a.4)(5)(i), however, is subject to exceptions, including the one at issue in this case. Subclause (ii) provides an exception when “the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.”¹⁵³

The voters and the Democratic Party argued they should be permitted to use a provisional ballot because their mail-in ballot would not be counted, meaning they had not “cast” that ballot in a meaningful way.¹⁵⁴ The County Board and the Republican Party argued that it was

146. *Id.* at 461–62.

147. 25 PA. STAT. AND CONS. STAT. § 3150.16(a) (West 2025) sets out the requirements for a mail-in ballot to be accepted. The relevant components here are that a voter must place their marked ballot first “into the Secrecy Envelope, seal the Secrecy Envelope, and then place the Secrecy Envelope in the Declaration Envelope.” *Genser*, 325 A.3d at 461.

148. *Genser*, 325 A.3d at 461–62.

149. *Id.* at 462.

150. *Id.* at 462–63.

151. § 3150.16(b)(2).

152. § 3050(a.4)(5)(i).

153. § 3050(a.4)(5)(ii)(F).

154. Brief of the Pennsylvania Democratic Party at 17, *Genser v. Butler Cnty. Bd. of Elections*, 325 A.3d 458 (Pa. 2024) (Nos. 26–27 WAP 2024).

of no consequence that the mail-in ballots were defective and would not be counted. All that mattered was that they were “timely received.”¹⁵⁵

Briefing in the Supreme Court of Pennsylvania looks in most respects like any garden variety case involving a statute of uncertain meaning. Lawyers and law students would recognize the arguments as sitting in the heartland of statutory interpretation. Both sides offered their own understanding of a 2020 state court precedent ruling defective mail-in ballots to be a nullity, not subject to cure.¹⁵⁶ And both made the full run of statutory interpretation arguments, including distilling principles from the Statutory Construction Act codified by the General Assembly.¹⁵⁷ In terms of emphasis, the voters and the Democratic Party closely parsed the text, arguing that a ballot being “cast” is not the same thing as its being “timely received.”¹⁵⁸ They also emphasized the need for a holistic interpretation of the text that harmonizes all its provisions; the centrality of the legislature’s intent in creating the provisional ballot; the importance of preserving the right to vote; the absurdity of the result their opponents sought; and the principle that text should be read to avoid constitutional difficulties, among others.¹⁵⁹ For their part, the County Board of Elections and Republican National Committee argued that the “timely received” clause was unambiguous and should be dispositive.¹⁶⁰ They also stressed the impractical consequences of the voters’ interpretation because mail ballots, by law, cannot be officially opened until the morning of Election Day.¹⁶¹ But they emphasized with special vigor the institutional argument that we have seen so often asserted in statutory interpretation cases: the idea that if a court adopts a particular reading of the statute, it will be straying into illegitimate policymaking. This idea underwrote repeated references in the brief to “usurping” a role that “belongs to the General Assembly,” to rejecting the making of election law by “judicial fiat,” and to leaving to the Legislature the policy

155. Principal Brief of Appellants at 25–26, *Genser*, 325 A.3d 458 (Nos. 26–27 WAP 2024).

156. See *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374, 380 (Pa. 2020). In *Genser*, the plaintiff voters and Democratic Party distinguished curing a ballot from casting a provisional ballot, which the election code separately addresses. The defendants said the case was not distinguishable and should be applied to prevent a vote by provisional ballot.

157. See Statutory Construction Act of 1972, 1 PA. CONS. STAT. §§ 1501–991 (2025). This lengthy interpretive code gave both sides principles to invoke.

158. Brief of the Pennsylvania Democratic Party, *supra* note 154, at 17–26.

159. See, e.g., *id.* at 17–26 (textual parsing); *id.* at 21 (harmonizing provisions); *id.* at 2 (centrality of intent); *id.* at 27 (absurdity); *id.* at 28–29 (constitutional avoidance).

160. Principal Brief of Appellants, *supra* note 155, at 24–26.

161. *Id.* at 37–42.

question of whether to allow voters who make a mistake to use a provisional ballot.¹⁶²

In the final two paragraphs of their brief to the Supreme Court of Pennsylvania, the County Elections Board and the Republican National Committee proceeded as had the State in Montana’s *Jacobsen* case. They essentially recycled their statutory interpretation arguments and recast them in the vocabulary of *Moore*’s OJR limitation.¹⁶³ And, as had the State in *Jacobsen*, the appellants pressed the impermissible distortion standard favored by Justice Kavanaugh.¹⁶⁴ In this way, ordinary statutory interpretation arguments paradoxically morphed into claims purporting to define what is beyond the realm of the ordinary.

The Supreme Court of Pennsylvania upheld the decision of the state’s intermediate appellate court.¹⁶⁵ The opinion made multiple references to the Statutory Construction Act, itself enacted by the General Assembly, and placed special emphasis on section 1921. That section makes legislative intent controlling and identifies text as the best guide to intent.¹⁶⁶ The court also placed central emphasis on its *Pennsylvania Democratic Party* decision,¹⁶⁷ the 2020 case in which the court held “naked” ballots like the ones at issue in this case to be “void” and “invalid.”¹⁶⁸ In light of that conclusion, the majority reasoned that because the voters’ naked ballots in this case were void by force of prior law, it could not be said that the voters had “cast” a ballot in a meaningful sense.¹⁶⁹ “A void ballot is not a ‘ballot,’” the court asserted, and it would not serve the statute’s purpose to treat it otherwise.¹⁷⁰

The court concluded that the result pressed by the Board and Republican National Committee would produce an “absurd result,” while the court’s reading would produce an outcome consistent with the statute’s purpose.¹⁷¹ In the words of the majority: “While Appellants and their amici argue that ‘election integrity’ mandates that Electors’

162. *Id.* at 16, 20, 23, 42.

163. *Id.* at 45–46.

164. *Id.*

165. *Genser v. Butler Cnty. Bd. of Elections*, 325 A.3d 458, 461 (Pa. 2024).

166. *Id.* at 479 (citing 1 PA. CONS. STAT. §§ 1921(a)–(b)). The court considered other aspects of the interpretive code, including provisions marshaled by the County Elections Board and Republican Party, but none swayed it from its reading of the relevant provisions.

167. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); *see Genser*, 325 A.3d at 480 (citing *id.* at 378).

168. *Pa. Democratic Party*, 238 A.3d at 374–80.

169. *Genser*, 325 A.3d at 480, 484.

170. *Id.* (“[V]oid mail-in ballots cannot be afforded legal effect. Because Electors failed to comply with the mandatory Secrecy Envelope requirement, they failed to cast a ballot.”).

171. *Id.* at 482.

provisional ballots not be counted, we are at a loss to identify what honest voting principle is violated by recognizing the validity of one ballot cast by one voter.”¹⁷²

The majority opinion did not address the brief reference to *Moore* in the appellants’ brief. Two other justices did. In a concurrence, Justice Kevin Dougherty asserted that the majority’s approach “effectuates the intent of our General Assembly to enable provisional voting” and rejected the notion that because the dissenters disagreed with the majority’s analysis, the ruling fell outside the scope of OJR.¹⁷³ In a tone of some exasperation, Justice Dougherty went on to say that “merely resolving a state statutory interpretation question duly raised by the litigants in a case on our normal appellate docket” could not reasonably be seen as beyond OJR, because “[t]hat is, quite literally, our job.”¹⁷⁴ That quotation inspires the title of this Essay because it succinctly captures the problem created by a capacious reading of OJR that equates it with generic—though opportunistic—claims of judicial policymaking.

Justice Sallie Updyke Mundy dissented and invoked *Moore*, arguing that the majority had “exceeded the bounds of statutory interpretation and supplanted the power vested in our General Assembly.”¹⁷⁵ She argued that the majority effectively read into the statute a requirement that an “absentee or mail-in ballot must be valid and not void,” when in fact all that mattered was that it was “timely received.”¹⁷⁶ For her, this reading was “too divorced” from the text and therefore triggered the OJR exception.¹⁷⁷

Justice Brobson wrote a lengthy dissent contesting the majority’s interpretation. He accepted the reading of the statute adopted by the appellants and made the same basic point as Justice Mundy, but—like Justice Sandefur dissenting in *Jacobsen*—he did not argue that these points constituted a violation of the OJR limitation. Instead, he used the more familiar phrases and arguments that are part of bread-and-butter statutory interpretation. He expressed his objection in these institutional terms:

[T]his Court is not at liberty to make additions or modifications to the unambiguous statutory language in order to effectuate that result. To the extent that the General Assembly’s chosen language represents bad policy, is unfair, or is inconsistent with

172. *Id.* at 485 (footnote omitted).

173. *Id.* at 486 (Dougherty, J., concurring) (emphasis omitted).

174. *Id.* (Dougherty, J., concurring).

175. *Id.* (Mundy, J., dissenting).

176. *Id.* at 487 (Mundy, J., dissenting) (quoting 25 PA. STAT. AND CONS. STAT. § 3050(a.4)(5)(ii)(F) (West 2025)).

177. *Id.* at 487–88 (Mundy, J., dissenting).

the overarching intent of the Election Code, Appellees' complaints in this regard are better directed to that branch of government.¹⁷⁸

In their application to the U.S. Supreme Court for a stay, the County Board and Republican National Committee continued the theme that shaped their argument to the Supreme Court of Pennsylvania, but they more fully recast it in the vocabulary of OJR.¹⁷⁹ This was, of course, necessary because they needed a federal claim to obtain Supreme Court review. But it is worth noting that their briefing shifted from mostly a Justice Brobson frame to a full-on Justice Mundy frame. The basic substance, however, did not change. Their stay application laid out their statutory interpretation case but expressed it in terms of the impermissible distortion standard favored by Justice Kavanaugh.¹⁸⁰ The application also faulted as “outlandish” the state supreme court’s reliance on the word “void” in its own 2020 opinion about defective mail ballots,¹⁸¹ but did not reckon with how common it is in statutory interpretation for courts to cite precedent as part of an attempt to interpret statutes in ways that cohere with the legal landscape that surrounds them.¹⁸²

In opposing the requested stay, the voters pointedly assailed the idea that a disagreement about how to interpret a statute could trigger an OJR objection.¹⁸³ Noting the traditional tools of construction used by the court, the voters’ brief called it “risible” to brand the state court as acting beyond OJR.¹⁸⁴ The Supreme Court denied the stay shortly before the election.¹⁸⁵ Justice Alito, joined by two other members of the Court, supported that disposition but issued a separate statement noting that the state supreme court had issued “a controversial interpretation of important provisions of the Pennsylvania Election Code” that applicants claimed “flout[ed] the plain meaning of the state election code,” in

178. *Id.* at 500–01 (Brobson, J., dissenting) (footnote omitted).

179. Emergency Application for Stay Pending Disposition of a Petition for a Writ of Certiorari at 14, 29, *RNC v. Genser*, No. 24A408, 2024 WL 4647792 (U.S. Nov. 1, 2024).

180. *Id.* at 27.

181. *Id.* at 8–9, 14.

182. See Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1225 (2016). For empirical analyses of Supreme Court practice documenting the heavy use of precedent for purposes like this, see Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 235 (2010); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 28–29 (1998).

183. See Response in Opposition of Genser & Matis at 25, *Genser*, No. 24A408, 2024 WL 4647792 (U.S. Nov. 1, 2024).

184. *Id.*

185. *Genser*, No. 24A408, 2024 WL 4647792 (U.S. Nov. 1, 2024) (mem.).

violation of *Moore*.¹⁸⁶ Justice Alito noted, however, that the case concerned only two voters’ ballots in a primary that had been long since resolved, so it could not serve as the basis for a broader ruling.¹⁸⁷

In late January 2025, the County Board and Republican National Committee filed a petition for certiorari in the case.¹⁸⁸ Unsurprisingly, they continued to invoke OJR. They asked the Court to adopt a specific measure to decide OJR claims and argued for the impermissible distortion standard favored by Justice Kavanaugh.¹⁸⁹ Ideas about “legislating from the bench” pervade the petition—both explicitly in one place,¹⁹⁰ and in different verbal formulations throughout.¹⁹¹ Much about the case remains grounded in the kinds of utterly ordinary debates about statutory interpretation that take place in state courts every day—debates about the application of interpretive rules, conflicting textual provisions, the role of intent, the relevance of precedent, the definition of absurd results, and more. It seems implausible that this set of workaday arguments could lead to a finding that the majority in any meaningful sense exceeded the bounds of OJR, but the question remains to be decided.

CONCLUSION

The central question after *Moore* is how much is left of ISLT. The cryptic OJR standard does not itself answer the question. This Essay has argued that understanding OJR as a loose proxy for some version of judicial restraint is incoherent because of how utterly ordinary arguments about activism versus restraint are in state court litigation about constitutional and statutory questions. If the Court meant to shelter “ordinary” judicial review from routine oversight by federal courts, these kinds of arguments should be rejected.

186. *Id.* (statement of Alito, J.).

187. *Id.* (statement of Alito, J.).

188. *See* Petition for a Writ of Certiorari, *supra* note 18.

189. *See id.* at 19–21.

190. *Id.* at 12.

191. *Id.* at 16–28.

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