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Moore v. Harper and the Consequential Effects of the Independent State Legislature Theory

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ARTICLES

MOORE V. HARPER AND THE CONSEQUENTIAL EFFECTS OF THE INDEPENDENT STATE LEGISLATURE THEORY

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In December 2022, the United States Supreme Court heard oral arguments in Moore v. Harper. *The case addresses whether the North Carolina Supreme Court possesses the authority to strike down a redistricting map drawn by the state legislature. Petitioners contend that the state legislature has no such authority under the United States Constitution, citing a novel interpretation of the Elections Clause known as the "independent state legislature" ("ISL") theory. The ISL theory is not a unified theory, but rather a constellation of related doctrinal positions that revolve around a core precept: ordinary governing principles by which state courts review the legality of state laws under state constitutions do not apply to state legislatures regulating federal elections.*

Proponents of the theory argue that the state legislature can exercise authority to regulate federal elections immune to the checks and balances that typically apply to state legislative action. In deciding Moore, *the Supreme Court could endorse some version of this theory, which would be profoundly disruptive to election administration at all levels and likely precipitate election chaos. This Article analyzes how validation of at least some version of the theory would upend election administration and impede local elections by effectively creating a two-tiered system for administering elections.*

If unchecked by state judicial or constitutional constraints, partisan state legislatures could erode state-based voting rights protections to the detriment of representative democracy. Though the exact effects on American democracy are difficult to fully predict, this Article concludes that a failure to emphatically rebuke Moore *would likely prove destabilizing to the Nation's election system.*

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INTRODUCTION

In December 2022, the United States Supreme Court heard oral arguments in *Moore v. Harper*,[1] a case considered as "the 800-pound gorilla" of election law.[2] *Moore* addresses whether the North Carolina Supreme Court has the authority to invalidate a congressional redistricting map drawn by the North Carolina General Assembly.[3] The state supreme court struck down the map, calling it an "egregious and intentional partisan gerrymander" violative of the state constitution.[4] The North Carolina General Assembly, citing an interpretation of the United States Constitution's Elections Clause[5] known as the "independent state legislature" ("ISL") theory,[6] contends that the state supreme court lacks the power to invalidate the congressional map because, under this theory, state legislatures have explicit federal constitutional authority to regulate federal elections, independent of state judicial constraints.[7]

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[1] No. 21-1271 (U.S. argued Dec. 7, 2022).

[2] Adam Liptak, *Supreme Court May Hear '800-Pound Gorilla' of Election Law Cases*, N.Y. TIMES (June 6, 2022), https://www.nytimes.com/2022/06/06/us/politics/supreme-court-state-legislatures-elections.html [https://perma.cc/5U97-LZ3Y].

[3] *See id.* To avoid confusion, this Article uses "General Assembly" when referring to the North Carolina state legislature and "legislature" or "state legislature" when referring to state legislatures collectively.

[4] Harper v. Hall, 868 S.E.2d 499, 510 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022).

[5] U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.").

[6] In 2001, Professor Hayward Smith coined the name "independent state legislature doctrine," intending it as a pejorative. Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 732 (2001).

[7] *See Independent State Legislature Theory*, FORDHAM L. VOTING RIGHTS & DEMOCRACY F., https://fordhamdemocracyproject.com/independent-state-legislature-theory [https://perma.cc/8YC6-ZKC2] (last visited Mar. 20, 2023); Brief for Petitioner at 1, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) [hereinafter Moore Petitioner's Brief] ("The Elections Clause provides, in

The ISL theory is not a unified theory, but rather a catch-all term for various theories and corollaries.[8] Broadly, the theory maintains that ordinary governing principles, by which state courts review the legality of state laws under state constitutions, do not apply to state legislatures regulating federal elections.[9] Moreover, proponents of the theory, drawing primarily on textualist analyses, argue that when the U.S. Constitution refers to a state "Legislature" in both the Elections[10] and Electors Clauses,[11] it refers solely to the representative legislative body—not the state lawmaking processes as prescribed by the state constitution.[12]

While a U.S. Supreme Court decision in *Moore* is expected by late June 2023, there is a possibility the case will be rendered moot.[13] In February 2023, the North Carolina Supreme Court granted a request from Republican state lawmakers to rehear the original case while the U.S. Supreme Court case is pending.[14] The

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unambiguous language, that the manner of federal elections shall 'be prescribed in each State by the Legislature thereof.' Yet . . . the North Carolina Supreme Court invalidated the state legislature's duly enacted congressional map and decreed that the 2022 election and all upcoming congressional elections in the State *were not* to be held in the 'Manner' 'prescribed . . . by the Legislature thereof,' but rather in the manner prescribed *by the state's judicial branch*. It is obvious on the face of the Constitution that this result is irreconcilable with that document's allocation of authority over federal elections.").

[8] *See* Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory*, 57 G. L. REV. (forthcoming spring 2023) (manuscript at *2), https://ssrn.com/abstract=4223731 [https://perma.cc/3GZZ-3EFP].

[9] *See id.* at *3.

[10] U.S. CONST. art. I, § 4, cl. 1 (providing that 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 [choosing] Senators").

[11] U.S. CONST. art. II, § 1, cl. 2 (providing that "Each State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors).

[12] *See* Vikram D. Amar & Akhil Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 34 (2021).

[13] *See* Richard L. Hasen, *Unfortunately, the Biggest Election Case of the Supreme Court Term Could Be Moot*, SLATE (Feb. 6, 2023, 5:50 AM), https://slate.com/news-and-politics/2023/02/moore-v-harper-supreme-court-election-case-moot [https://perma.cc/8VTU-FFAP].

[14] In North Carolina, supreme court justices are elected in partisan elections. After the 2022 midterm elections, the North Carolina Supreme Court shifted to a Republican majority. *See Supreme Court of North Carolina*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_of_North_Carolina [https://perma.cc/6XTQ-CWPH] (last visited Mar. 20, 2023). Because there were no changes in the underlying facts of the suit, some legal commentators contend that the state supreme court's rehearing of the case is an "unprecedented decision." *See, e.g.*, Madeline Greenberg & Rachel Selzer, *North Carolina Supreme Court to Rehear State-Level Redistricting Case Underlying* Moore v. Harper, DEMOCRACY DOCKET (Mar. 13, 2023), https://www.democracydocket.com/analysis/north-

rehearing, which took place on March 14, 2023, opens up the possibility that the state supreme court's decision denying the theory could be overruled, making the case moot and obviating the need for the U.S. Supreme Court to issue an opinion.[15] Even if *Moore* is mooted, the ISL theory will likely continue to hold sway in legal circles and be invoked in many contexts involving federal elections moving ahead.[16] Thus, an analysis of *Moore* and, more importantly, the broader implications of the theory, remains warranted.

Using *Moore* as a launch point, this Article analyzes the ISL theory and its implications. Part I provides context for *Moore*, detailing the relevant facts and preceding litigation. Part II then analyzes the theory, including its reemergence[17] and subsequent evolution through cases and scholarship.[18] Lastly, Part III examines the implications and effects if the U.S. Supreme Court does validate the theory, particularly the potentially disruptive effect on

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carolina-supreme-court-to-rehear-state-level-redistricting-case-underlying-moore-v-harper [https://perma.cc/4BMH-AJ2T].

[15] *See* Hansi Lo Wang, *How a Major Election Theory Case at the U.S. Supreme Court Could Get Thrown Out*, NAT'L PUB. RADIO (Feb. 6, 2023 5:36 PM), https://www.npr.org/2023/02/06/1154761167/moore-v-harper-independent-state-legislature-theory-north-carolina-court [https://perma.cc/4ND3-ZEPV].

[16] *See* Mac Brower, *North Carolinians and Legal Experts React to the State Supreme Court's Unprecedented Move*, DEMOCRACY DOCKET (Feb. 10, 2023), https://www.democracydocket.com/analysis/north-carolinians-and-legal-experts-react-to-the-state-courts-unprecedented-move [https://perma.cc/UDJ2-MAGL].

[17] *See infra* Part II. A version of the theory, albeit with some variations, arguably appeared in a few cases in the nineteenth and early twentieth centuries, though this remains a point of contention among scholars. *See, e.g.*, Baldwin v. Trowbridge, H.R. REP. NO. 39-13 (1866) (majority report), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866) (concluding that the absentee ballots at issue were valid because a state constitution could not limit the legislature's power to regulate federal elections); McPherson v. Blacker, 146 U.S. 1, 35 (1892) ("[F]rom the formation of the government until now the practical construction of the [Electors Clause] has conceded plenary power to the state legislatures in the matter of the appointment of electors."). *See generally* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021) [hereinafter *The Independent State Legislature Doctrine*]. *But see* Amar & Amar, *supra* note 12. Nonetheless, scholars widely agree that the theory fell into disuse and relative obscurity for most of the twentieth century following the Court's decision in *Smiley v. Holm*. 285 U.S. 355, 368–69 (1932) (holding that state laws governing federal elections may be subject to gubernatorial veto). *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 9–10 (2021).

[18] *See infra* Part II; Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 77 (2000) (per curiam); Bush v. Gore, 531 U.S. 98, 112–15 (2000) (Rehnquist, C.J., concurring). *See generally* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022).

nationwide, statewide, and local election administration and the likely erosion of state-based voting protections.[19]

I. *MOORE V. HARPER*

Following the 2020 census, the North Carolina General Assembly enacted new congressional districts.[20] Voters challenged the map as an unlawful partisan gerrymander violating the state constitution.[21] In December 2021, a state superior court, on the basis of nonjusticiability, declined to preliminarily enjoin the challenged map.[22] Although the court acknowledged that the map was an intentional partisan redistricting favoring Republicans in "at least 99.9999% of all possible maps,"[23] the court concluded that the state constitution provided no remedy for the partisan gerrymander.[24]

In February 2022, the respondents appealed to the state supreme court, which found the issue justiciable, emphasizing that state courts can review state laws governing federal elections for state constitutional compliance.[25] To find otherwise, the court asserted, would be "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts."[26] The state supreme court concluded that the General Assembly's congressional map was unconstitutional, declaring it an "egregious and intentional"[27] partisan gerrymander violating four state constitution clauses.[28] The North Carolina Supreme Court ordered the General Assembly and court-appointed Special Masters[29] to create remedial redistricting maps for the state superior

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[19] These are by no means the only potentially deleterious impacts. *See* Moore v. Harper, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/moore-v-harper-2 [https://perma.cc/3843-RNBM] (last visited Mar. 20, 2023) (providing amici for petitioners and respondents).

[20] *See* Petition for Writ of Certiorari at 6–7, Moore v. Harper, 142 S. Ct. 2901 (2022) (No. 21-1271) [hereinafter Moore Certiorari Petition].

[21] *See* Harper v. Hall, 868 S.E.2d 499, 508–09 (N.C. 2022).

[22] *See id.* at 510 (noting that the state superior court "allowed the maps to stand because it concluded that judicial action 'would be usurping the political power and prerogatives' of the General Assembly.").

[23] *Id.* at 520. For example, in an evenly split popular vote, the map guaranteed Republicans winning ten of North Carolina's fourteen congressional districts. *See id.*

[24] *See* Brief for Non-State Respondents at 8, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) [hereinafter Non-State Respondents' Brief].

[25] *See* Moore Certiorari Petition, *supra* note 20, at 10. *See also* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

[26] *Harper*, 868 S.E.2d at 551.

[27] *Id.* at 510.

[28] *See* Moore Certiorari Petition, *supra* note 20, at 9.

[29] These Special Masters hired political scientists, a mathematician, and a neuroscientist to assist with creating the remedial maps. *See id.* at 12.

court's consideration.[30] The superior court, however, struck down the General Assembly's remedial map for constituting a partisan gerrymander.[31] Instead, the state superior court adopted the map drawn by the Special Masters for the 2022 congressional election cycle.[32]

The General Assembly immediately petitioned the U.S. Supreme Court for a temporary stay, arguing that the state supreme court's actions—specifically, drawing and implementing its own redistricting map—nullified the legislature's "regulations of the manner of holding federal elections in the state and replace[d] them with new regulations of the judiciary's design."[33] This, the General Assembly asserted, was irreconcilable with the U.S. Constitution's Elections Clause.[34] This argument, known as the ISL theory, maintains that the Elections Clause grants constitutional authority to regulate congressional elections solely to the state legislature, not the state itself.[35] The Court denied the stay, though four Justices[36] acknowledged the theory and showed interest in granting certiorari.[37] The Republican state lawmakers petitioned,[38] and the

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[30] *See id.* at 10–12.

[31] The state supreme court adopted four specific statistical analyses that confirmed an "extreme partisan outcome" not attributable to "North Carolina's political geography." *Harper*, 868 S.E.2d at 522.

[32] *See* Moore Certiorari Petition, *supra* note 20, at 12.

[33] *Id.* at 13–14.

[34] *See id.* at 14.

[35] *See The Independent State Legislature Doctrine*, *supra* note 17, at 501. From this distinction, some proponents of the theory argue that state legislatures can regulate federal elections without being subject to typical checks and balances, such as judicial review, executive veto, and state constitutional constraints. *See infra* Part II. *See, e.g.*, Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131 (2015) (arguing that state constitutional provisions purporting to limit a state legislature's power to regulate federal elections violate the Elections Clause); Morley, *supra* note 17, at 3 (2021) (arguing that the U.S. Constitution does not allow states constitutions to regulate federal elections). *See generally A Guide to Recent Scholarship on the 'State Independent Legislature Theory,'* BRENNAN CTR. FOR JUST. (Oct. 14, 2022), https://www.brennancenter.org/our-work/research-reports/guide-recent-scholarship-independent-state-legislature-theory [https://perma.cc/TSM6-B6Y7].

[36] Those Justices were Alito, Thomas, Gorsuch, and Kavanaugh. *See infra* note 81; Hansi Lo Wong, *How the Supreme Court Could Radically Reshape Elections for President and Congress*, NAT'L PUB. RADIO (June 30, 2022, 10:47 AM), https://www.npr.org/2022/06/30/1107648753/supreme-court-north-carolina-redistricting-independent-state-legislature-theory [https://perma.cc/9KJA-NF4T].

[37] *See* Moore v. Harper, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring in denial of application for stay). *See id.* at 1089, 1091 (Alito, J., dissenting from the denial of application of stay).

[38] Broadly, the petition argued that the Court should grant certiorari because: (1) the Election Clause vests state legislatures with exclusive authority to set the rules governing elections; (2) the state court's imposition of their own map violated the

Court granted certiorari and held oral arguments in December 2022.[39] If the case is not mooted, a decision is expected by summer 2023.[40]

In *Moore*, the Supreme Court is likely[41] to answer the question of whether a state judiciary may nullify a state legislature's regulations governing federal elections and replace them with rules of a state court's own devising.[42] Many scholars and pundits from across the ideological and political spectrum agree that if the Supreme Court validates the ISL theory, it will upend election law, unleashing a wave of uncertainty and litigation.[43]

Elections Clause; (3) lower courts are divided over this recurring and critically important issue; and (4) this case is particularly suited to resolving the scope of the state legislature's authority under the Elections Clause. *See* Moore Certiorari Petition, *supra* note 20, at 14, 25, 27, 31.

[39] Oral arguments are, of course, an imperfect predictor for how the Justices will ultimately decide a case. Nonetheless, the Justices' lines of questioning during oral arguments may provide some insight. During the December 2022 oral arguments in *Moore*, legal commentators noted that Justices Thomas, Alito, and Gorsuch were receptive to the General Assembly's argument in favor of the theory, while Justices Sotomayor, Jackson, and Kagan remained staunchly opposed. Chief Justice Roberts and Justices Kavanagh and Barrett, however, appeared hesitant to embrace the petitioners' expansive, maximalist interpretation of the theory. *See* Quinta Jurecic, *A Case That Even This Supreme Court Seems Torn Over*, THE ATLANTIC (Dec. 8, 2022 11:03 AM), https://www.theatlantic.com/ideas/archive/2022/12/moore-harper-scotus-independent-state-legislature/672399/ [https://perma.cc/ND6S-FGCW]; Adam Liptak, *Supreme Court Seems Split Over Case That Could Transform Federal Elections*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/us/supreme-court-federal-elections.html [https://perma.cc/2DPS-T84K]; Matt Ford, *The Independent State Legislature Theory Had a Rough Day in Court*, NEW REPUBLIC (Dec. 7, 2022), https://newrepublic.com/article/169378/isl-theory-rough-day-court?utm_source=newsletter&utm_medium=email&utm_campaign=tnr_daily [https://perma.cc/Y5DE-X3C9].

[40] *See* Amy Howe, *Court Seems Unwilling to Embrace Broad Version of "Independent State Legislature" Theory*, SCOTUSBLOG (Dec. 7, 2022, 5:22 PM), https://www.scotusblog.com/2022/12/court-seems-unwilling-to-embrace-broad-version-of-independent-state-legislature-theory [https://perma.cc/Y42Z-LFC9].

[41] Conceivably, the Court could resolve *Moore* without directly validating or invalidating the theory. *See, e.g.*, *The Independent State Legislature Doctrine*, *supra* note 17, at 501. Professor Morley contends that the Supreme Court need not, and perhaps should not, accept or reject the entire theory, but rather selectively embrace narrow corollaries. *See id.* at 557–58. But, as discussed, the Court might decline to issue a decision in *Moore* altogether. *See* Hasen, *supra* note 13; Greenberg & Selzer, *supra* note 14.

[42] *See* Moore Certiorari Petition, *supra* note 20, at i.

[43] *See, e.g.*, Liptak, *supra* note 2; Alexa Corse, *Supreme Court to Hear Case on State Lawmakers' Power Over Elections*, WALL ST. J. (June 30, 2022, 1:50 PM), https://www.wsj.com/articles/supreme-court-to-hear-case-involving-state-lawmakers-power-over-elections-11656603486 [https://perma.cc/KGR2-W3U9].

II. THE INDEPENDENT STATE LEGISLATURE THEORY

The ISL theory is not a unified theory but rather a catch-all term for a variety of related, though distinct, doctrinal positions.[44] These distinct versions of the theory run the gamut from "strong" to "weak."[45] In other words, an extreme iteration of the theory holds that a state legislature is so "independent" that it can select presidential electors free of any state constitutional, judicial, or executive constraints and, in effect, unilaterally overturn the results of a presidential election held in the state.[46] Moreover, many proponents of a "strong" theory contend the U.S. Constitution prohibits state courts from exercising the power of judicial review on any state legislative enactments insofar as they apply to federal elections.[47] In contrast, a weaker version of the theory simply prioritizes state statutes, as reflective of legislative will, over some but not all judicial interpretations in disputes involving regulating federal elections.[48]

Indeed, this lack of a uniform theoretical framework among scholars, commentators, and political pundits has likely sown confusion and exacerbated the discursive Sturm und Drang surrounding the potential implications of *Moore*.[49] Nonetheless, iterations of the theory revolve around a core idea: ordinary governing principles by which state courts review state laws under state constitutions do not apply to state legislatures regulating federal elections.[50]

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[44] *See* Coenen, *supra* note 8, at *1.

[45] Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1056 (2021).

[46] *See id.* ("The strong version of this 'independent state legislature' notion imagines the legislature empowered by its federal constitutional designation to select electors free of any substantive or procedural constraints in the state constitution, wholly independent from gubernatorial or state judicial interference."). This corollary, which invokes the Electors Clause, focuses on the ability of state legislatures to appoint electors in the period between Election Day and the electoral vote. *See* J. Michael Luttig, Opinion, *The Republican Blueprint to Steal the 2024 Election*, CNN (Apr. 27, 2022, 9:09 AM), https://www.cnn.com/2022/04/27/opinions/gop-blueprint-to-steal-the-2024-election-luttig/index.html [https://perma.cc/E2LH-5QS9].

[47] *See* Coenen, *supra* note 8, at *3.

[48] *See* Levitt, *supra* note 45, at 1056–57.

[49] Testifying before Congress, Professor Richard Pildes stressed that the electoral and democratic ramifications of validating the theory depend significantly on which version the Court may recognize. *The Independent State Legislature Theory and its Potential to Disrupt Our Democracy: Hearing Before the H. Comm. on Admin.*, 117th Cong. (2022) (statement of Richard H. Pildes, Professor of Constitutional Law, New York University School of Law).

[50] *See* Coenen, *supra* note 8, at *3.

At times throughout the nineteenth and early twentieth centuries, courts and Congress invoked this theory, or some variation of it—most notably in *Baldwin v. Trowbridge*[51] and *McPherson v. Blacker*.[52] By the early twentieth century, however, the theory fell into disuse and relative obscurity,[53] only to be resurrected by the Supreme Court in the contentious litigation[54] surrounding the Florida recount in the 2000 presidential election.[55]

In *Bush v. Gore*,[56] Chief Justice Rehnquist's concurring opinion argued that by deviating from the text of the state's election law, the state supreme court had violated the Electors Clause

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[51] Baldwin v. Trowbridge, H.R. REP. NO. 39-13 (1866) (majority report), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866). During the nineteenth century, the House of Representatives would, on occasion, serve as a court to adjudicate contested election cases. Professor Hayward H. Smith argues that *Baldwin*, since overruled in subsequent Supreme Court decisions, should not be treated as precedent, principally because the House of Representatives in the 1860s acted in a demonstrably non-judicial manner and, thus, those decisions do not merit stare decisis. Smith, *supra* note 18, at 448.

[52] 146 U.S. 1, 35 (1892). Some scholars suggest that the theory is derived, in part, from "dubious dicta" in *McPherson*, and proponents have thus misunderstood and misused the case. *See* Mark Bohnhorst et al., *Gaping Gaps in the History of the Independent State Legislature Doctrine:* McPherson v. Blacker, *Usurpation, and the Right of the People to Choose Their President*, 49 MITCHELL HAMLINE L. REV. 257, 258 (2023).

[53] This desuetude and irrelevance followed *Hawke v. Smith*, 253 U.S. 221, 230–31 (1920) (holding that a state does not have authority to require the submission of a constitutional amendment ratification to a referendum under the state constitution) and *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932) (holding that state laws governing federal elections may be subject to gubernatorial veto).

[54] *See* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 77 (2000) (per curiam); Bush v. Gore, 531 U.S. 98, 112–15 (2000) (Rehnquist, C.J., concurring).

[55] *See generally* Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NAT'L PUB. RADIO (Nov. 12, 2018, 5:00 AM), https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting [https://perma.cc/72NW-BDPK].

[56] 531 U.S. 98 (2000). The events and various legal challenges surrounding the 2000 Florida recount were complex and a full recitation is not warranted. For a thorough discussion of the 2000 Florida recount, see JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION (2001). Relevant to this discussion is that Democratic candidate Al Gore had sought a manual recount of ballots in certain counties, which was denied by the trial court. *See Bush*, U.S. 98 at 100. The Florida Supreme Court granted the recount in Miami-Dade County and in certain circumstances in other counties. *See id.* However, the state supreme court did not issue uniform guidelines for assessing the ballots. *See id.* at 106. Shortly after the recount began, then-candidate George W. Bush requested the Supreme Court grant a stay. *See id.* at 100. The Supreme Court granted a stay and certiorari. *See id.* Upon review, the Court first held that manual recounts ordered by the Florida Supreme Court, without specific standards to implement such an order, did not satisfy the minimum requirement for non-arbitrary treatment of voters under Equal Protection Clause; second, the Court held that it would not be an appropriate remedy to remand the case to Florida Supreme Court for it to order a constitutionally proper contest. *See id.* at 98–103.

because the U.S. Constitution says that the state legislature determines how presidential electors are chosen.[57] Chief Justice Rehnquist, invoking a version of the theory,[58] maintained that if the state judiciary deviates from the state legislature's Article II authority, the Constitution authorizes the federal judiciary to intervene to protect the state legislature's constitutionally guaranteed role.[59] Under this Article II ISL reading, each state legislature is empowered to exercise its Article II power independent of the state constitution and the state judiciary interpreting that constitution.[60]

The Court's holding in *Bush v. Gore* was widely criticized, then and now,[61] though some conservative legal scholars have applauded the decision.[62] Notably, Chief Justice Rehnquist's invocation of the theory precipitated scholarship purporting to show textual and historical support.[63] These ideas continue to develop in certain academic quarters.[64]

In the years following *Bush v. Gore*, the Supreme Court substantially engaged with the ISL theory twice. First, in 2015, the

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[57] *See id.* at 112–15 (Rehnquist, C.J., concurring); Amar & Amar, *supra* note 12, at 14.

[58] Technically, the theory first appeared in earlier recount litigation. *See generally* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000) (per curiam).

[59] *See Bush*, 531 U.S. at 113 ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitution question."); Amar & Amar, *supra* note 12, at 14.

[60] *See* Amar & Amar, *supra* note 12, at 14.

[61] *See, e.g.*, Jed Rubenfeld, *Not as Bad as* Plessy. *Worse.*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 20–21 (Bruce Ackerman ed., 2002); Jeffrey Rosen, *Disgrace*, NEW REPUBLIC (Dec. 24, 2000), https://newrepublic.com/article/70674/disgrace [https://perma.cc/7XZ8-2RVC].

[62] *See, e.g.*, Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, *in* THE VOTE: BUSH, GORE, & THE SUPREME COURT 13 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

[63] *See generally* Richard A. Posner, *Florida 2000: The Election Deadlock and the Litigation That Ensued*, 2000 SUP. CT. REV. 1 (2001); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). Ample scholarship also exists challenging some of these analyses, particularly regarding the Framers' intent when drafting the Elections and Electors Clauses. *See, e.g.*, Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997 (2021); Rosemarie Zagarri, *The Historian's Case Against the Independent State Legislature Theory*, 64 B.C. L. REV. (forthcoming March 2023), https://ssrn.com/abstract=4245950 [https://perma.cc/9SAP-SK9U].

[64] *See, e.g.*, Morley, *supra* note 35; Nicholas P. Stabile, Comment, *An End Run Around a Representative Democracy? The Unconstitutionality of a Ballot Initiative to Alter the Method of Distributing Electors*, 103 NW. U. L. REV. 1495, 1498 (2009) (arguing that the debates in the Constitutional Convention and historical practice establish that institutional legislatures have the sole power to determine the manner in which a state can allocate its presidential electors among various candidates).

Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[65] *(AIRC)* ruled that under Article I, the people of Arizona—pursuant to their state constitution—could implement congressional redistricting through an independent commission created by popular ballot initiative.[66] Justice Ginsburg's majority opinion rejected the theory, making clear that when the Constitution refers to a state "Legislature" in the context of lawmaking, "Legislature" means a state lawmaking process as prescribed by the state constitution.[67] Justice Ginsburg emphasized that the Court has never held that the Elections Clause authorized a state legislature to defy provisions of its state constitution to regulate federal elections.[68] Thus, by extension, state courts—under their state constitutionally prescribed role—must be permitted to override unconstitutional congressional district maps drawn by state legislatures and redraw them to remedy state legislative failings.[69]

Four years later, in *Rucho v. Common Cause*,[70] the Court emphasized state courts' ability to force state legislatures to comply with state constitutional constraints, seemingly giving the ISL theory little credence.[71] Writing for the majority, Chief Justice Roberts acknowledged the role of state courts in enforcing the state constitution in congressional elections.[72] Chief Justice Roberts spoke positively about state measures that sought to address partisan gerrymandering, even if federal courts could not.[73] Specifically, Chief Justice Roberts emphasized that complaints about gerrymandering are not "condemn[ed] . . . to echo into a void"

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[65] 576 U.S. 787 (2015).

[66] *See id.* at 788–90.

[67] *See id.* at 816–18; Amar & Amar, *supra* note 12, at 34.

[68] "Nothing in [the Elections Clause] instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections *in defiance of provisions of the State's constitution*." *AIRC*, 576 U.S. at 817–18 (emphasis added).

[69] *See* Vikram David Amar, *Concluding Thoughts on the Invocation of the Independent-State-Legislature (ISL) Theory in the North Carolina Emergency Relief Application at the Supreme Court: Part Six in a Series*, JUSTIA (Mar. 14, 2022), https://verdict.justia.com/2022/03/14/concluding-thoughts-on-the-invocation-of-the-independent-state-legislature-isl-theory-in-the-north-carolina-emergency-relief-application-at-the-supreme-court-part-six-in-a-series [https://perma.cc/95W7-SDBL].

[70] 139 S. Ct. 2484 (2019). Specifically, *Rucho* involved a 2016 North Carolina congressional map that was struck down by a federal district court for being a partisan gerrymander. *Id.* at 2491–92. In a five-to-four decision, the Court held that partisan gerrymander claims are nonjusticiable because they represent political questions beyond the scope of federal courts. *Id.* at 2506–08.

[71] *See id.* at 2506–07.

[72] *See id.* at 2507.

[73] *See id.* (stating that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" against partisan gerrymandering claims).

because states can address the issue.[74] Chief Justice Roberts also cited a 2015 state supreme court case[75] that struck down a congressional districting plan as violating its state constitution.[76] In doing so, the Chief Justice expressly endorsed a state constitution's ability to constrain a state legislature.[77] Thus, *Rucho* clearly validates state courts' ability to interpret its state constitution to invalidate a state legislative action pertaining to federal elections, directly contravening stronger versions of the ISL theory.[78]

Under the ISL theory, such state constitutional and judicial constraints on congressional districting would be impermissible.[79] Notably, several Justices who have expressed an interest in validating the theory all joined Chief Justice Roberts's majority opinion.[80]

III. IMPLICATIONS OF VALIDATING THE INDEPENDENT STATE LEGISLATURE THEORY

Despite the seeming conclusiveness of *AIRC* and *Rucho*, four Justices have shown interest in possibly validating the ISL

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[74] "Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution." *Id.*

[75] *See* League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (2015).

[76] *See Rucho*, 139 S. Ct. at 2507. In his majority opinion, Chief Justice Roberts also praised state constitutional amendments in Michigan and Colorado that established multi-member commissions to create congressional maps. *Id.*

[77] *See* Amar & Amar, *supra* note 12, at 35.

[78] *See id.* at 36; Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV 1235, 1268 (2022) ("*Rucho* assured the country that while it was a problem for federal courts to address partisan gerrymandering, state courts could continue to do so. The [independent state legislature theory] is fatally inconsistent with that discussion in *Rucho*.").

[79] *See infra* Part III.

[80] *See id.* at 2491.

theory.[81] If the Court validates the theory in *Moore*,[82] the effects will be far-reaching, potentially upending nationwide, statewide, and local election administration and likely eroding state-based voting protections.[83]

First, Part III.A analyzes how validation of the theory would upend election administration nationwide by undermining hundreds of preexisting state constitutional provisions, judicial rulings, and laws enacted through direct democracy. Part III.B then discusses how validation of the theory would impede local elections by creating an impractical two-tiered system of election administration. Lastly, Part III.C explains how the theory would erode state-based voting rights protections.

A. Upend Election Administration Across the Nation

The *Moore* petitioners contend that state constitutions and judiciaries cannot impose limits on state legislatures' regulation of congressional elections.[84] Validation of this theory would threaten

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[81] These Justices are Kavanaugh, Alito, Thomas, and Gorsuch. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite consideration of petition for certiorari) ("The provisions of the [U.S.] Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections on be meaningless if a state court could override the rules adopted by the legislature."); Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732–33 (2021) (Thomas, J., dissenting) (stating that the "Constitution gives to each state legislature authority to determine the '[m]anner' of federal elections. Yet both before and after the 2020 election, nonlegislative officials in various [s]tates took it upon themselves to set the rules instead." (internal citation omitted)); Moore v. Circosta, 141 S. Ct. 46, 47 (Gorsuch, J., dissenting from denial of application for injunctive relief) (contending that a state elections board had no authority in "(re)writing election laws" enacted by the state legislature and that doing so "offend[ed] the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators."). For a discussion on the litigation in Wisconsin and Pennsylvania concerning the 2020 general election, see Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 345–57 (2021).

[82] *See supra* Part I.

[83] The potentially deleterious effects of validating the theory are myriad and cannot all be addressed here. *See, e.g.*, Brief for Am. C.L. Union, et al. as Amici Curiae Supporting Respondents, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) [hereinafter ACLU Amici Brief]; Brief for Am. Bar Ass'n as Amicus Curiae Supporting Respondents, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) [hereinafter ABA Amicus Brief].

[84] Specifically, the Moore petitioners contend that "[t]he text of the Constitution assigns to state legislatures alone the authority to regulate the times, places, and

or undermine hundreds of state constitutional provisions, judicial rulings, and laws enacted through direct democracy—such as referenda and popular initiative.[85]

First, the theory would nullify numerous state constitutional provisions. Nearly all state constitutions regulate congressional elections, many of which were adopted without legislative involvement.[86] For example, validation of the ISL theory may nullify state constitutional bans on gerrymandering, constitutionally-created independent redistricting commissions, and the constitutional right to a secret ballot.[87] These provisions would then need to be reenacted through the state legislature for the state to have a semblance of the same federal election regulatory scheme.[88] More than likely, however, these constitutional provisions would not be recodified chapter-and-verse, if at all, sowing confusion as to which state rules do or do not apply to federal elections, and precipitating a flood of litigation.[89]

Relatedly, the petitioner's theory creates enormous uncertainty over what role, if any, state courts can play in federal elections.[90] State election laws are often ambiguous, and issues routinely arise in implementation.[91] By extension, state courts and state and local election officials have resolved these ambiguities.[92] Yet the ISL theory allows no role for state actors other than the legislature in regulating federal elections.[93] Since legislatures

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manner of congressional elections—including the authority to draw congressional districts." Moore Petitioner's Brief, *supra* note 7, at 11 ("[W]hile the Framers could have conferred this authority on each State as a whole . . . they chose instead to specify a specific institution within each State as the repository of the power.").

[85] *See* Brief for Brennan Ctr. for Just. as Amicus Curiae Supporting Respondents at 8, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022).

[86] *See, e.g.*, ARIZ. CONST. art. VII, § 14. *Accord* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (*AIRC*), 576 U.S. 787, 823 (2015). *See also* Nathaniel Persily, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 720 (2016).

[87] *See* Ethan Herenstein & Thomas Wolf, *The 'Independent State Legislature Theory,' Explained*, BRENNAN CTR. FOR JUST. (June 30, 2022), https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained [https://perma.cc/4NUG-VSKX].

[88] *See* Nathaniel Bach & Richard L. Hasen, *The Supreme Court is Headed for a Self-Imposed Voting Caseload Disaster*, SLATE (Oct. 26, 2022, 11:07 AM), https://slate.com/news-and-politics/2022/10/supreme-court-voting-case-disaster-harper-moore.html [https://perma.cc/C7AZ-N6HY].

[89] *See* Brief for Loc. Gov't L. Professors as Amici Curiae Supporting Respondents at 11–15, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) [hereinafter Law Professors Amici Brief].

[90] *See* Non-State Respondents' Brief, *supra* note 24, at 95.

[91] *See* Brief for Professor Richard L. Hasen as Amicus Curiae Supporting Respondents at 7, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) [hereinafter Hasen Amicus Brief].

[92] *See id.*

[93] *See id.* at 3.

cannot feasibly create detailed regulations covering every conceivable aspect of federal election administration, states need state and local administrators and state courts to interpret governing provisions.[94]

But, under the ISL theory, each act of gap-filling or interpretation would become grounds for federal constitutional lawsuits challenging such interpretations by the state's judiciary or executive.[95] This potential avalanche of litigation concerning state election laws and their routine implementation would further undermine faith and trust in democratic processes.[96] In short, under the ISL theory, state courts' inability to interpret state election laws regulating federal elections would generate litigation, dramatically upending election administration nationwide.[97]

B. Impede Local Administration of Elections

Along with upending election administration nationwide, validation of the theory would impede the local administration of elections. Federal elections are conducted locally, overseen by county election boards and city officials, and often staffed by volunteers.[98] Validation of the ISL theory would complicate this process, leading to a two-tiered election administration system.[99] Under this system, some laws passed by the state legislature—and unchecked by state judicial review and constitutional constraints—would apply exclusively to federal elections.[100] A separate body of laws, such as state constitutional provisions enacted through forms of direct democracy, would apply to state and local elections.[101]

Since national, state, and local elections are often administered simultaneously, implementing this two-tiered system would burden local election officials and confuse voters.[102] For example, voters in one jurisdiction could conceivably cast a mail ballot for a state election while simultaneously being required to

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[94] *See id.*
[95] *See* Bach & Hasen, *supra* note 88.
[96] According to a July 2022 CNN poll, only 16 percent of Americans are "very confident" that national elections reflect the will of the people. Jennifer Agiesta, *CNN Poll: Americans' Confidence in Elections has Faded Since January 6*, CNN (July 21, 2022, 6:00 AM), https://www.cnn.com/2022/07/21/politics/cnn-poll-elections/index.html [https://perma.cc/UX3L-5JSA].
[97] *See* Non-State Respondents' Brief, *supra* note 24, at 74–75.
[98] *See* Brief for Nat'l Ass'n of Cntys., et al. as Amici Curiae Supporting Respondents at 2, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022).
[99] Law Professors Amici Brief, *supra* note 89, at 2.
[100] *See id.* at 2–3.
[101] *See id.*
[102] *See id.* at 11–12.

vote in person for federal contests.[103] Inevitably, ambiguities and contradictions concerning the federal tier of this two-tiered system would arise, the resolution of which is typically in the ambit of state courts and state and local election officials.[104] But since the theory allows no role for state actors other than the legislature in regulating federal elections, all interpretative and gap-filling measures would be the exclusive domain of the state legislature, federal courts, or Congress.[105] Consequently, resolving the inevitable uncertainties surrounding state laws exacerbated by a complex two-tiered system would be exceedingly more timely, costly, and arduous.[106]

Election administrators need clear and uniform rules to properly conduct elections, particularly given the Nation's highly decentralized election system that primarily relies on a legion of local officials and temporary workers.[107] Inconsistent interpretations of the same rules would undoubtedly introduce chaos.[108] Thus, validation of the ISL theory would also significantly impede local election administration.

C. Erode State-Based Voting Rights Protections

If validated, the ISL theory could enable partisan legislative majorities to erode state-based voting rights protections.[109] Proponents of the theory contend that a state "Legislature" in the context of the Elections and Electors Clauses refers solely to the institutional state legislature—not the legislative decision-making process within the state.[110] But the conception that state legislatures are not subordinate to the people or the state's governing documents is "radical"[111] and inconsistent with the federal Constitution's text

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[103] *See* Michael Thorning et al., *Independent State Legislature Theory Undermines Elections Principles*, BIPARTISAN POL'Y CTR. (Oct. 31, 2022), https://bipartisanpolicy.org/report/independent-state-legislature-theory [https://perma.cc/57VP-JTTJ].

[104] *See* Hasen Amicus Brief, *supra* note 91, at 7.

[105] *See id.* at 3.

[106] *See* Law Professors Amici Brief, *supra* note 89, at 13.

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

[108] *See* Brief for Bipartisan Current and Former Election Adm'rs as Amici Curiae Supporting Respondents at 4, Moore v. Harper. No. 21-1271 (U.S. argued Dec. 7, 2022).

[109] ABA Amicus Brief, *supra* note 83, at 3.

[110] *See* Amar & Amar, *supra* note 12, at 24.

[111] J. Michael Luttig, *There Is Absolutely Nothing to Support the 'Independent State Legislature' Theory*, THE ATLANTIC (Oct. 3, 2022), https://www.theatlantic.com/ideas/archive/2022/10/moore-v-harper-independent-legislature-theory-supreme-court/671625 [https://perma.cc/QA5S-B8PG].

and structure.[112] Indeed, there is scant evidence the Framers intended the Elections Clause to empower state legislatures to violate their own state constitutions.[113] On the contrary, extensive evidence establishes that, during the Founding, the term state "legislature" bore a clear public understanding as an entity created and constrained by state constitutions.[114] In the late 1770s, for example, new state constitutions were "universally understood as creations of the American people themselves."[115]

Nonetheless, proponents of the theory argue that when state legislatures exercise authority over federal elections, they are not subject to state court interpretations of state constitutions.[116] In this scenario, partisan majorities in state legislatures could gerrymander congressional districts—unchecked by state judicial review.[117] Moreover, these majorities could set rules for federal elections that ignore state constitutional protections, such as the right to unhindered voter registration or the right to a secret ballot.[118] This would subvert traditional state checks and balances: state courts would be disempowered to enforce state constitutional provisions protecting voting rights, and state legislatures would be constrained only by federal judicial oversight.[119] Moreover, since state courts would be foreclosed as a forum for federal voting rights protections, some state laws concerning federal elections—such as those pertaining to partisan gerrymandering[120]—could become effectively unreviewable.[121]

If the Supreme Court validates the ISL theory, it could enable legislatures to subvert voters' well-established state

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[112] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (*AIRC*), 576 U.S. 787, 789 (2015) (holding that the Elections Clause embraces the state legislative decision-making process).

[113] *See* Brief for State Respondents at 26–54, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) (showing that text, history, and precedent demonstrate that state legislatures must comply with their constitutions when executing Elections Clause duties).

[114] *See* Amar & Amar, *supra* note 12, at 19–20 (providing examples to support that, at the Founding, "the public meaning of state 'legislature' was clear and well accepted . . . [as] an entity *created and constrained by its state constitution*.").

[115] *See* Amar & Amar, *supra* note 12, at 19. Indeed, four of the six state constitutions that were adopted or revised after the federal Constitution's adoption in 1789 restricted state legislature power over federal elections. *Id.* For example, Delaware's Constitution of 1792 required voters to elect congressional representatives "at the same places" and "in the same manner" as state representatives. *Id.* at 22.

[116] *See* Coenen, *supra* note 8, at *3.

[117] ABA Amicus Brief, *supra* note 83, at 3.

[118] *Id.*

[119] *See* Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571, 577 (2022).

[120] *See supra* text accompanying notes 70–79.

[121] *See* ACLU Amici Brief, *supra* note 83, at 27–31 (arguing the petitioner's position would permit unchecked gerrymandering of congressional districts).

constitutional rights, with federal law—which is designed to serve as the floor for voting rights, not the ceiling—remaining the sole protection against legislative interference in free and fair elections.[122] Accordingly, validation of the theory could erode state-based voting rights protections, undermining rule-of-law constraints that protect the integrity of federal elections.[123]

CONCLUSION

With *Moore*, the Supreme Court may validate or rebuke the ISL theory. As discussed in Part II, the theory has different iterations and corollaries, but revolves around a core idea: ordinary governing principles by which state courts review the legality of state laws under state constitutions do not apply to state legislators regulating federal elections. Thus, some proponents of the theory argue that the state legislature can exercise authority over regulating federal elections immune to the normal checks and balances that typically apply to state legislative action—such as state judicial review, gubernatorial executive veto, and state constitutional constraints. As explained in Part III, if the Supreme Court validates this interpretation of the Elections Clause, the implications will be seismic and profoundly disruptive of election administration at all levels, likely precipitating election chaos.

If unchecked by state judicial or constitutional constraints, partisan state legislative majorities could erode state-based voting rights protections to the detriment of the Nation's representative democracy. Although the Constitution's text, the Nation's history, and Supreme Court precedent say otherwise, the Court seems poised to recognize at least some version of the ISL theory. While the exact effects on American democracy are difficult to fully predict, a failure to emphatically rebuke *Moore* would likely prove destabilizing to the Nation's election system.

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[122] *See* ABA Amicus Brief, *supra* note 83, at 25.
[123] *See id.* at 2.