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Notes

VOTER DUE PROCESS AND THE "INDEPENDENT" STATE LEGISLATURE

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ABSTRACT—In a series of opinions surrounding the 2020 presidential election, multiple U.S. Supreme Court Justices broke from precedent to signal support of the "independent state legislature theory" (ISLT), a formerly obscure interpretation of state legislatures' power over the administration of federal elections. Proponents of the ISLT allege that the U.S. Constitution grants state legislatures plenary power in federal election contexts—including the power to discount ballots, redraw legislative maps, or appoint alternative slates of presidential electors. Although the Court denied certiorari in each case, across the denials four current Justices dissented because they considered the ISLT to be a proper interpretation of Article II power. More recently, state litigants have sought to win the Court's endorsement of the ISLT to preserve maps from the 2020 redistricting cycle that state courts found unconstitutional. Finally, ahead of the 2022 term, the Court granted certiorari in *Moore v. Harper*, a North Carolina redistricting case that centers on the ISLT question.

These developments are, in a word, unsettling. This Note assumes for the sake of argument that the Court will endorse some version of the ISLT in the near future, through *Moore v. Harper* or a similar vehicle. It argues that potential election-subversion scenarios, even if undertaken by a Court-endorsed "independent" state legislature, are nevertheless textually constrained by the Due Process Clauses of the Fifth and Fourteenth Amendments. That is, a legislature acting under color of the ISLT would violate voters' due process "liberty" interests if it invokes the ISLT to manufacture antidemocratic outcomes. In so doing, this Note expands upon established due process frameworks in the voting context—including settled expectations, detrimental reliance, and fundamental fairness—and applies these principles to the novel context of the ISLT. By addressing a variety of textual and practical considerations in this developing area, this Note is the first to provide workable and credible constraints to limit independent legislatures from subverting well-settled democratic processes.

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INTRODUCTION

Discussion surrounding the "independent state legislature theory" (ISLT)[1] has reached a fever pitch. The once-obscure theory, a strained reading of state legislatures' power over the administration of federal elections, is obscure no more. Indeed, the ISLT has now captured the

[1] This Note does not endorse the ISLT as a sound application of constitutional law. Other commentators have referred to the theory as the "independent state legislature doctrine" (ISLD). *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 9 (2020). Instead, this Note follows more contemporary literature that emphasizes the concept as being merely a "theory" or a "notion" in light of its paucity of precedential weight or authority. *See, e.g.*, Ethan Herenstein & Thomas Wolf, *Supreme Court Should Shut Down Latest Bid to Rewrite Elections Clause*, BRENNAN CTR. FOR JUST. (Mar. 3, 2022), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-should-shut-down-latest-bid-rewrite-elections-clause [https://perma.cc/Y883-KN2U] ("The theory is baseless."). Accordingly, this Note treats all general and academic uses of the ISLT and ISLD interchangeably.

national spotlight: first, through a series of "shadow docket"[2] opinions surrounding the 2020 presidential election; and second, via the U.S. Supreme Court's recent decision to grant certiorari in *Moore v. Harper*, a North Carolina redistricting case that aims to inject the ISLT into federal election law jurisprudence.[3]

Proponents of the theory allege that the Constitution grants state legislative bodies plenary power in federal election contexts through the "plain meaning"[4] of the Article I Elections Clause[5] and the Article II Electors Clause.[6] The clauses, read together, vest complete control over federal election administration in each state's "Legislature." The textual debate centers on whether the word refers *only* to the state's institutional legislative body itself (the ISLT view) or to the lawmaking process of the state *as a whole*, including state court decisions, state constitutions, and direct democracy initiatives (the prevailing view). In effect, the theory could allow an "independent" state legislature to act unilaterally—notwithstanding election laws codified by state constitutions, executives, and courts—in a variety of federal election administration contexts. For example, a legislature could select its own slate of presidential electors notwithstanding the results of that state's popular vote, uphold or strike down newly drawn state legislative maps, or otherwise override established state election laws and state court orders.

The ISLT's ascension is cause for considerable concern for several reasons. First, adoption of the ISLT subverts over a century of jurisprudence and conventional public understanding of federal election administration. Second, a full endorsement would grant state legislatures virtually exclusive control over the administration of federal elections; in the current hyper-partisan climate, this could pose significant damage to American

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[2] The "shadow docket" is the colloquial name, coined by Professor William Baude, for the Court's emergency-relief docket. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5 (2015).

[3] Harper v. Hall, 868 S.E.2d 499, 572 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901, 2901 (2022).

[4] *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 505 (2021) [hereinafter Morley, *Doctrine*] (remarking that the ISLT "may impose a plain meaning canon of interpretation for state laws governing federal elections, and may allow federal courts to review state courts' interpretations of such provisions to prevent substantial unexpected departures from their text"); *see also* Michael T. Morley, *The Intratextual Independent Legislature and the Elections Clause*, 109 NW. U. L. REV. 847, 847 (2015) [hereinafter Morley, *Intratextual*] (arguing that an "intratextual analysis of the Constitution reveals that the term 'legislature' is best understood as referring solely to the entity within each state comprised of representatives that has the general authority to pass laws").

[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 . . . ." (emphasis added)).

[6] *Id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors [to select the President] . . . ." (emphasis added)).

democracy.[7] Third, independent state legislatures acting under color of federal power would be an unacceptable intrusion of federal jurisdiction into state court jurisdiction and would run afoul of basic principles of federalism.[8] At bottom, the power to change election rules mid-election is simply unfair and antidemocratic on its face.[9] Moreover, because the right to vote has also traditionally been coupled with the right to have one's vote meaningfully *counted*,[10] the looming threat of the removal of that right justifies the widespread anxiety surrounding ISLT adoption.

Distressingly, such antidemocratic measures became part of the political playbook after the 2020 election.[11] Building upon these efforts, state litigants have recently sought to win the Court's official endorsement of the ISLT in order to preserve otherwise unconstitutional maps in the current redistricting cycle.[12] The Court, in likely recognition of these litigants' unyielding invocations of the theory, is now poised to respond to the question

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[7] A full endorsement could grant newly unmoored legislatures power to supplant states' popular votes with their own election outcomes, for example, by discounting certain classes of ballots or providing for alternative slates of electors for the Electoral College. *See, e.g.*, Ian Millhiser, *The Fate of American Elections Is in Amy Coney Barrett's Hands*, VOX (Mar. 4, 2022, 8:00 AM), https://www.vox.com/22958543/supreme-court-gerrymandering-redistricting-north-carolina-pennsylvania-moore-toth-amy-coney-barrett [https://perma.cc/ML3J-U5WF] (calling the ISLT a "worst-case scenario for democracy"); Ariane de Vogue, *Is the Supreme Court Ready to Upend the Power of State Courts in Disputes over Federal Elections?*, CNN (Mar. 2, 2022, 5:53 PM), https://www.cnn.com/2022/03/02/politics/supreme-court-election-law-north-carolina/index.html [https://perma.cc/YJ6D-S5R2] (discussing how adoption of the ISLT could "embolden state legislatures to pass laws that would violate voters' rights under state constitutions for any reason including partisan advantage").

[8] Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1260 (remarking that "the ISLT would interpose the federal courts between state courts and state law, arrogating to the federal courts the authority to interpret state law, and to do so according to the federal courts' preferred methodology").

[9] RICHARD POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 159 (2001) ("Nothing is more infuriating than changing the election rules after the outcome of the election, conducted under the existing rules, is known.").

[10] *See* United States v. Mosley, 238 U.S. 383, 386 (1915) ("We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.").

[11] *See* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F., 265, 265 (2022) (discussing the "risk that the 2024 presidential election, and other future U.S. elections, will not be conducted fairly and that the candidates taking office will not reflect the free choices made by eligible voters under previously announced election rules," in part because of former President Donald Trump's false claims that "the 2020 election was stolen").

[12] While recent invocations of the ISLT spring largely from Republican litigants, some Democrats have also invoked the theory. *See, e.g.*, Memorandum of Law in Opposition to Petitioners' Supplemental Brief Addressing Remedies at 12, Harkenrider v. Hochul, 173 N.Y.S.3d 109 (2022) (No. E2022-0116CV) (arguing that the Elections Clause "does not allow this Court to change the Congressional election calendar").

in full.[13] As Justice Brett Kavanaugh has observed, "The issue is almost certain to keep arising until the Court definitively resolves it."[14]

Until recently, the ISLT enjoyed limited doctrinal or academic support.[15] Prior to the 2020 presidential election, Chief Justice William Rehnquist's concurrence in *Bush v. Gore*—in which he prominently supported the ISLT interpretation of Article II power—was the most notable exception to the general consensus that has long discredited the theory.[16] When the Court faced the question directly in the Article I context in 2015, it echoed historical precedent to hold that "Legislature" refers to *all* lawmaking bodies and processes of the state, including state constitutions and direct democracy initiatives (the latter having created Arizona's redistricting commission at issue in the case).[17] Chief Justice John Roberts's dissent espoused the opposite view, however, arguing for a strict and hyper-literal interpretation of Article I's "Legislature" as being limited only to the state's legislative body, previewing the ISLT view.[18]

But the Court's ideological makeup has changed significantly since 2015. Attempting to capitalize on this shift, numerous Republican-backed state litigants cited the ISLT in partisan efforts to skew their candidates' results in close races during the 2020 election—including those of former President Donald Trump.[19] Though the Court denied certiorari in each of

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[13] *See* Moore v. Harper, 142 S. Ct. 1089, 1089–90 (2022) (Alito, J., dissenting from denial of application for stay) ("There can be no doubt that this question is of great national importance. But we have not yet found an opportune occasion to address the issue.").

[14] *Id.* at 1089 (Kavanaugh, J., concurring in the denial of application for stay).

[15] *See, e.g.*, Note, *"As the Legislature Has Prescribed": Removing Presidential Elections from the* Anderson-Burdick *Framework*, 135 HARV. L. REV. 1082, 1086 n.34, 1087, 1099 (2022) (conceding that the ISLT is not widely embraced but advocating for plenary state legislative control over federal election administration, stating that "though a hands-off approach carries risks for democracy, it is nonetheless required as a matter of textual fidelity"); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v Gore *Defended*, 68 U. CHI. L. REV. 613, 619 (2001) (noting that "no case, prior to *Bush v Gore*, had passed on the proper interpretation of the Article II, Section 1, Clause 2 requirement" at the heart of the ISLT).

[16] *See* 531 U.S. 98, 112–15 (2000) (Rehnquist, C.J., concurring); *see also* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam) (discussing state legislatures' authority under the Article II Electors Clause).

[17] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2673–77 (2015) (holding that the ISLT is at odds with the "fundamental premise that all political power flows from the people").

[18] *Id.* at 2677–78 (Roberts, C.J., dissenting).

[19] *See* Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay at 1, 4–5, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 155) (alleging that Georgia, Michigan, Pennsylvania, and Wisconsin violated the U.S. Constitution by changing election procedures through nonlegislative means and thus violating the ISLT); Privileged and Confidential: January 6 Scenario, Memorandum from John Eastman, Dir., Ctr. for Const. Juris.,

these cases, collectively four Justices dissented from the denials because they considered the ISLT to be the proper interpretation of Article II power.[20] These four Justices' explicit endorsements of the ISLT—and, potentially, those of a majority-making fifth or sixth Justice in *Moore v. Harper*—require examination of this potential state-legislative-power rationale moving forward.

Accordingly, this Note assumes for the sake of argument that the Court will endorse some version of the ISLT in the near future, either through *Moore v. Harper* or another vehicle. This Note argues that potential election-subversion scenarios, even if undertaken by a Court-endorsed independent state legislature, are nevertheless textually constrained by the Due Process Clauses of the Fifth and Fourteenth Amendments. In application, a legislature acting under color of the ISLT would violate voters' due process "liberty" interests if the theory were invoked to ignore legally cast ballots, override state court decisions regarding newly drawn maps, or otherwise manufacture antidemocratic outcomes. In so doing, this Note expands upon established due process principles in the voting context—including "settled" expectations, detrimental reliance, and fundamental fairness—and applies them to novel contexts surrounding the ISLT. By addressing a wider variety of textual and practical considerations in this increasingly concerning area of law, this Note is the first to provide courts and litigant voters with workable doctrinal tools to limit independent legislatures from subverting well-settled democratic processes. It also aims to join the growing chorus of scholars, practitioners, and voters clamoring against a Court endorsement of the ISLT.

This Note proceeds as follows. Part I provides a brief historical background of the ISLT and its twenty-first-century emergence, with a particular emphasis on litigation surrounding the 2020 election and the current redistricting cycle. Part II asserts that a due process rationale is likely the strongest limiting principle for the ISLT, focusing in particular on voters' settled expectations and reliance interests in previously recognized due process frameworks. Part III explores three potential scenarios in which a state legislature could seek to intervene in a federal election, focusing on how these established due process frameworks would operate in contested-

https://s3.documentcloud.org/documents/21066248/eastman-memo.pdf [https://perma.cc/BG5L-KKUT] (outlining the steps former Vice President Mike Pence could take to keep former President Trump in power under the ISLT).

[20] *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.); Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021) (Thomas, J., dissenting from denial of certiorari).

election litigation. Finally, Part IV discusses lingering timing issues and explores how the Court could use the *Purcell* principle to avoid definitively resolving the ISLT question altogether.

I. THE ISLT IN CONTEXT

In seeking to place the ISLT in its broader historical and academic context, Part I presents a brief history of the theoretical and textual rationales underpinning its recent revival. First, it examines past invocations of the theory in notable court decisions spanning from the Civil War to the 2000 presidential election, and, consequently, the Roberts Court's first ruling on the theory in 2015. Next, it examines its timely resurgence in litigation surrounding the 2020 election and the current redistricting cycle, focusing on various shadow docket opinions by the four more-conservative-leaning Justices and the impending *Moore v. Harper* case. Finally, it presents the modern academic debate around the ISLT.

A. Historical Invocations

Although the Court had largely rejected the ISLT prior to its reemergence in 2020, its earliest interpretations were somewhat less clear. In the post-Reconstruction Era case *McPherson v. Blacker*, for instance, the Court adopted a more absolute reading of legislatures' Article II powers, noting that the Electors Clause "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of the appointment of presidential electors.[21] In that case, the Michigan state legislature instituted a modified-district system in place of the previous statewide winner-take-all system, resulting in a challenge by the federal government.[22] The Court ruled in favor of the legislature's new plan, citing the Electors Clause.[23] At the same time, however, the *McPherson* Court in dicta took a holistic reading of the Article II "Legislature," stating that "the combined result [of the act of appointment] is the expression of the voice of the State, a result reached by direction of the legislature, to whom the whole subject is committed."[24]

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[21] 146 U.S. 1, 27 (1892). *But see* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1146 (5th ed. 2016) ("Much constitutional water has flowed over the dam since *McPherson*, and most of it has addressed an expanded set of constitutional interests in substantive voting rights.").

[22] *McPherson*, 146 U.S. at 4–5. The new plan superimposed two large districts on top of the existing Congressional districts, with each district electing a presidential elector.

[23] *Id.* at 27, 36.

[24] *Id.* at 26. Chief Justice Rehnquist cited this reading of the Presidential Electors Clause in his concurrence in *Bush v. Gore*, noting that a "significant departure from the legislative scheme for

Thus, with the *McPherson* Court's logic seemingly at odds with its result, courts generally refused to accept arguments based on the independent-legislature rationale in the decades that followed.[25] State courts also largely rejected the theory.[26]

With the exception of two cases that brought an even *more* expansive reading of "Legislature" to include direct democracy initiatives and state constitutional directives,[27] the Court did not meaningfully reengage with the "independent-legislature" question until the *Bush* cases surrounding the 2000 presidential election. In *Bush v. Palm Beach County Canvassing Board*, the Rehnquist Court suggested that state legislatures acting pursuant to their Article II power to appoint presidential electors would likely not be restricted by state constitutional constraints.[28] Mere days later in the landmark case *Bush v. Gore*, Chief Justice Rehnquist, writing in concurrence for himself and two other Justices, wrote that state legislatures—as an institutional "branch of a State's government"[29]—enjoy sole power over states' administration of federal elections under Article II.[30] Chief Justice Rehnquist's rendering of the ISLT gained limited support in the years following the decision, and commentators have argued that it is inconsistent with prior understandings of state legislatures' Article II power.[31]

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appointing Presidential electors presents a federal constitutional question." 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

[25] Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 732, 779–80 (2001) ("During the first decades of the twentieth century, and in spite of the *McPherson* dicta, courts faced with more palatable legal outcomes . . . refused to accept arguments based on the independent legislature concept.").

[26] Morley, *supra* note 1, at 9; *see, e.g.*, Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694–95 (Ky. 1944) (holding that state referenda are part of the "legislative authority of the State" with respect to the word "Legislature" in Article II). Despite this permissive reading of a legislature to extend beyond the traditional institution, the *O'Connell* court admitted that it had "no certainty" that its conclusions about the legislature's independence were in fact "correct." *Id.* at 696.

[27] Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569–70 (1916) (holding that the term "legislative power" under the Ohio Constitution is vested not only in the General Assembly but also in the people by referendum); Smiley v. Holm, 285 U.S. 355, 367–68 (1932) (holding that the veto power of the state governor is a "lawmaking function" under Article I if, under the relevant state constitution, the governor has that power in the making of state laws).

[28] *See* 531 U.S. 70, 77–78 (2000) (per curiam).

[29] 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("[T]here are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them.").

[30] *See id.* ("Article II, § 1, cl. 2, provides that '[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct,' electors for President and Vice President." (alteration in original) (quoting U.S. CONST. art. II, § 1, cl. 2)).

[31] Reflecting such criticism, Hayward H. Smith argues that "the *Bush* opinions conspicuously fail to offer any compelling textual, doctrinal, or policy rationale for [the ISLT's] existence." Smith, *supra* note 25, at 737.

Fifteen years later, the Roberts Court faced, and rejected, the ISLT textual issue directly. In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*), the Arizona legislature challenged an independent redistricting commission's constitutionality.[32] The legislature argued that the Article I Elections Clause precluded its creation in the first place.[33] The Court disagreed, with Justice Ruth Bader Ginsburg stating in her majority opinion that "it would be perverse to interpret the term 'Legislature' in the Elections Clause so as to exclude lawmaking by the people."[34] Rather, a legislature encompasses *all* legislative authority conferred by the Arizona Constitution, including initiatives adopted by the people themselves. Moreover, Justice Ginsburg argued, "[t]he history and purpose of the Clause weigh heavily against" excluding the people from a state's legislative process, asserting that it is "the animating principle of our Constitution that the people themselves are the originating source of all the powers of government."[35]

Chief Justice Roberts, in dissent, asserted that the majority provided no support for its theory that a state legislature could delegate its Article II power to the people.[36] Because the creation of the commission excluded the legislature from the redistricting process, the Chief Justice argued, it was unconstitutional under Article II.[37] In this way, Chief Justice Roberts's dissent echoes an even stricter textual approach than many proponents of the ISLT advocate.[38]

B. Reemergence in the 2020 Election

Until the 2020 election, the showdown in *AIRC* between the competing ideological wings of the Court offered the last word in the ISLT debate. But the Court has changed significantly since that case was decided, and litigants

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[32] 135 S. Ct. 2652, 2658–59 (2015).

[33] *Id.*

[34] *Id.* at 2675.

[35] *Id.* at 2671.

[36] *Id.* at 2678–79 (Roberts, C.J., dissenting); *see also id.* at 2687 ("The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, 'the Legislature' is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process." (quoting U.S. CONST. art. I, § 4, cl. 1)).

[37] *Id.* at 2679 ("Both the Constitution and our cases make clear that 'the Legislature' in the Elections Clause is the representative body which makes the laws of the people." (quoting U.S. CONST. art. I, § 4, cl. 1)).

[38] *See* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 84 (2016) (noting that even if it didn't want to adopt the dissent's position, the Court "could have reached any number of moderate or compromise rulings" instead).

and jurists throughout the federal courts accordingly "resurrected the doctrine from its rest" in the final weeks of the 2020 election.[39]

For instance, Trump-era Justices Brett Kavanaugh and Neil Gorsuch expressed support for a restrictive reading of the term "Legislature," joining Justices Clarence Thomas and Samuel Alito, who dissented in *AIRC* along similar reasoning.[40] Notable opinions from these Justices in the weeks preceding the 2020 presidential election appeared on the Court's shadow docket for orders requesting emergency relief and are particularly instructive.

First, in *Democratic National Committee v. Wisconsin State Legislature*, the Court refused to vacate the Seventh Circuit's stay against a federal district court that had extended Wisconsin's absentee-ballot-receipt deadline by six days due to the COVID-19 pandemic.[41] In a lengthy footnote in his concurrence, Justice Kavanaugh endorsed Chief Justice Rehnquist's view that Article II power is conferred to the state legislature alone.[42] Citing both *Bush v. Gore* and *McPherson*, Justice Kavanaugh asserted that "[t]he text of Article II means that . . . a state court may not depart from the state election code enacted by the legislature" and that "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws."[43] Justice Gorsuch expressed similar views in his concurrence, writing that "[t]he 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."[44] In this way, both Justices would grant state legislatures a level of deference in federal election administration not previously recognized by the Court.[45]

Second, in the North Carolina case *Moore v. Circosta*, Justice Gorsuch, joined by Justice Alito, expressed a similarly restrictive view limiting the

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[39] Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1753 (2021) (noting that proponents of the ISLT "heaped on majoritarian reasoning" to ground their arguments).

[40] *See* 135 S. Ct. at 2697–98 (Thomas, J., dissenting) (asserting that the ballot initiative in this case was "unusually democracy-reducing" and noting the Court's inconsistency regarding the legal treatment of ballot initiatives generally).

[41] 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

[42] *Id.* at 34 n.1 ("As Chief Justice Rehnquist explained in *Bush v. Gore*, the important federal judicial role in reviewing state-court decisions about state law in a federal Presidential election 'does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*.'" (quoting 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring))).

[43] *Id.*

[44] *Id.* at 29 (Gorsuch, J., concurring in denial of application to vacate stay).

[45] *See* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 64 (2021) ("Although other justices did not sign on to these two concurrences, the case suggests that *Anderson-Burdick* itself may be on life support, replaced by a standard that simply defers to state legislatures in their election administration.").

Article II "Legislature" to the traditional institutional body.[46] In that case, the North Carolina General Assembly sought a stay against the State Board of Elections, which had relaxed absentee-ballot-receipt deadlines that the Assembly had passed earlier that summer.[47] Justice Gorsuch remarked that such "last-minute election-law-writing-by-lawsuit. . . . offend[ed] the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators" and did "damage . . . to the authority of legislatures."[48] Here, as in his concurrence in *Wisconsin State Legislature*, Justice Gorsuch appeared to endorse an even stricter reading of Article II than did Chief Justice Rehnquist.[49]

Two contemporaneous cases from Pennsylvania are also instructive in ISLT vote-counting and doctrinal development. In *Republican Party of Pennsylvania v. Boockvar*, an appeal from a Pennsylvania Supreme Court decision extending the state's absentee-ballot-receipt deadline, Justice Alito —joined by Justices Gorsuch and Thomas—endorsed a robust view of the ISLT. He stated that state legislatures have full power to determine federal election rules even where it contravenes a state constitution.[50] Similarly, in a postelection case regarding mail-in-ballot deadlines, Justice Thomas began his dissent from the Court's denial of certiorari by opining that "nonlegislative officials in various States took it upon themselves to set the rules" in the 2020 election.[51] Citing Justice Alito's statement in *Boockvar* and Chief Justice Rehnquist's concurrence in *Bush v. Gore*, Justice Thomas endorsed a similar view that the U.S. Constitution alone grants state legislatures the authority to regulate federal elections.[52] Taken together, these

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[46] 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting). In addition to the Elections Clause, Justice Gorsuch cited the North Carolina Constitution, which he asserted "expressly vests all legislative power in the General Assembly, not the Board or anyone else." *Id.* at 47.

[47] *Id.* at 46–47.

[48] *Id.* at 48.

[49] *See* Douglas, *supra* note 45, at 78 ("This view seems to go even further than Chief Justice Rehnquist's concurrence: Justice Gorsuch suggested that the North Carolina State Board of Elections has no authority whatsoever to '(re)writ[e] election laws' given the Constitution's command that 'only the state "Legislature"' may determine the manner of appointing electors." (alteration in original) (quoting *Circosta*, 141 S. Ct. at 47 (Gorsuch, J., dissenting))).

[50] 141 S. Ct. 1, 2 (2020) (statement of Alito, J.) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.").

[51] Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021) (Thomas, J., dissenting from denial of certiorari).

[52] *Id.* at 733. Justice Thomas stated further that the "petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the [U.S.] Constitution by overriding 'the clearly

uncompromising endorsements of Article II power under the ISLT would effectively allow state legislatures to evade state courts' judicial review as a result of their federally conferred power.[53]

For now, it is unclear how open-ended a reading of ISLT power the Court might endorse—for instance, would a legislature's plenary power include the power to contravene settled state law regarding the fair counting of ballots?[54] Whichever version it adopts, however, it is likely that future voters will be caught in a constitutional showdown between state legislatures, state courts, and increasingly partisan interests.

During the current redistricting cycle, state litigants have repeatedly invoked the ISLT in petitions to the Court, citing to the aforementioned shadow docket cases and requesting that it stay lower court rulings on unconstitutional maps.[55] And now, with *Moore v. Harper* fully briefed and set for argument in the 2022 term, the Court appears poised to resolve what it views to be the proper balance of power between state-level institutions in election contexts.

In *Moore v. Harper*, the North Carolina state legislature sought relief from the Court in order to preserve congressional maps that the state supreme court had struck down as unconstitutional, invoking the ISLT as its principal rationale for appeal.[56] The question at the heart of the case centers on the meaning of the term "Legislature" in the Article I context, specifically regarding the scope of state legislative power—and the corresponding limits of state court power—over the redistricting process.[57] A result upholding the

expressed intent of the legislature.'" *Id.* (quoting Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring)).

[53] *See* Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 690–91 (2016) ("The ISLD, taken to its logical conclusion, would prevent . . . any election-related action by state courts, executives, or local governments that might conflict with the wishes of the legislature.").

[54] *See id.* at 705 (noting that the logic of the Rehnquist concurrence suggests when there is a "collision between the legislature's determination pursuant to its constitutional grant of authority for federal elections and a provision of the state constitution . . . the legislature's determination wins").

[55] *See, e.g.*, Emergency Application for Stay Pending Petition for Writ of Certiorari at 1, Moore v. Harper, 142 S. Ct. 1089 (2022) (No. 21A455) (citing Justice Gorsuch's pro-ISLT shadow docket concurrence in *Democratic National Committee v. Wisconsin State Legislature* as a central basis for granting certiorari); *see also* Emergency Application to Justice Alito for Writ of Injunction at 19, Toth v. Chapman, 142 S. Ct. 1355 (2022) (No. 21A457) (invoking the ISLT in its argument that the Elections Clause grants "the Legislature" of Pennsylvania, not the Pennsylvania Supreme Court, the power to draw new congressional maps).

[56] *See* Petition for Writ of Certiorari at 1–5, *Moore*, 142 S. Ct. 2901 (No. 21-1271).

[57] The "Question Presented" in *Moore v. Harper* reads:

> Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof," U.S.

ISLT, however, is also likely to extend to the Article II definition of "Legislature" in presidential election contexts, as courts have tended to use the textual definitions of the word in each clause interchangeably.[58]

Because there now appears to be a majority of Justices that support a pro-ISLT reading of the word "Legislature," these developments warrant canvassing the range of possible scenarios that an independent legislature might pursue—along with possible avenues of redress that harmed voters could credibly claim—in contested-election contexts.

C. The Academic Debate

Commentary highlighting the inherent danger of the theory has only grown in recent years.[59] Most scholars agree that the meaning of "Legislature" in both the Article I and Article II contexts has historically referred to a state's broader lawmaking process as a whole, not merely its traditional institutional legislative body.[60] Hayward H. Smith, for example, revisited his influential and comprehensive history of the ISLT in a recent paper, concluding that "history demonstrates beyond cavil that the Founding generation understood that 'legislatures' would operate as normal legislatures, not independent legislatures, with respect to both procedure and substance."[61]

Indeed, despite its reemergence in *Bush*—the main holding of which the Court intended as a jurisprudential outlier with limited precedential heft[62]—scholars in this area generally regard the ISLT as lacking textualist

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CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

142 S. Ct. 2901 (2022).

[58] *See* Morley, *Intratextual*, *supra* note 4, at 863 (remarking that "the word legislature as it appears throughout the Constitution, including in the Elections Clause and Presidential Electors Clause" refers "solely and exclusively to a state's general lawmaking body comprised of elected representatives").

[59] *See, e.g.*, Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 447–48 (2022) (using historical evidence to debunk the substance–procedure dichotomy and other various theses arising out of the ISLT); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 1 SUP. CT. REV. 1, 17 (2021) (arguing that the ISLT contradicts original constitutional understandings, state legislative practice, and pre-*Bush v. Gore* precedent).

[60] *See, e.g.*, Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 616–17 (2008) (arguing that "these precedents . . . represent a rejection of a narrow textualist approach to the meaning of Article II" and "[t]he two leading cases in the Article I, section 4 context support the 'Legislature as legislative process' reading of the Constitution").

[61] Smith, *supra* note 59, at 580.

[62] *See* Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) (remarking that the Court's equal-protection holding was "limited to the present circumstances").

appeal in light of both the heavy weight of countervailing precedent and the adverse consequences of its adoption.[63] The ISLT has been variously described as "a lawless power grab by the federal courts masquerading as deference to a romanticized vision of the state legislature that fails to take state institutional design choices seriously on their own terms"[64] and "a radical and baseless legal theory [that] could upend the country's most essential democratic process."[65] In July 2022, a collection of prominent law professors and counsel from the Brennan Center for Justice testified before the Congressional Committee on House Administration to warn about the dangers of the theory.[66] Taken together, the ISLT word is clearly out: What was once an obscure theory is now on the front of many Court watchers'—and likely many average voters'—minds.[67]

A notable exception breaking from this academic consensus is Professor Michael T. Morley, who has written numerous articles and amicus briefs in support of the theory's textual and historical validity.[68] Professor Morley argues that state constitutions "cannot limit a legislature's power to regulate most aspects of federal elections" because the Elections Clause and the Presidential Electors Clause "confer power over federal elections specifically upon state legislatures."[69] His thesis is grounded in a strict, plain-

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[63] *See* Hasen, *supra* note 60, at 610 (noting that "despite the apparent clarity of the meaning of the term 'Legislature,' . . . the Supreme Court has read the term 'Legislature' more broadly to include the 'legislative process' of the state"); Persily et al., *supra* note 53, at 690 (arguing that "a literal reading of the Elections Clause" would "be both bizarre and dangerous").

[64] Litman & Shaw, *supra* note 8, at 1237.

[65] Thomas Wolf & Ethan Herenstein, *The Case That Could Blow Up American Election Law*, ATLANTIC (July 11, 2022), https://www.theatlantic.com/ideas/archive/2022/07/how-supreme-court-could-upend-integrity-our-elections/670472/ [https://perma.cc/F7JW-QF47].

[66] *The Independent State Legislature Theory & Its Potential to Disrupt Our Democracy*, COMM. HOUSE ADMIN. (July 28, 2022), https://cha.house.gov/committee-activity/hearings/independent-state-legislature-theory-and-its-potential-disrupt-our [https://perma.cc/FG2Z-FQX5] (presenting video testimony by Richard Pildes, Carolyn Shapiro, and Eliza Sweren-Becker).

[67] *See, e.g.*, Nina Totenberg, *Supreme Court to Take On Controversial Election-Law Case*, NPR (June 30, 2022), https://www.npr.org/2022/06/30/1106866830/supreme-court-to-take-on-controversial-election-law-case?t=1660500724260 [https://perma.cc/2BMF-C7MR] (reporting on how the Court "agreed to hear a case that could dramatically change how federal elections are conducted"); Adam Serwer, *Is Democracy Constitutional?*, ATLANTIC (July 23, 2022), https://www.theatlantic.com/ideas/archive/2022/07/will-moore-vs-harper-help-republicans-rewrite-election-law/670544/ [https://perma.cc/V8R6-PGM4] (noting that "[i]n *Moore v. Harper* the Supreme Court will decide if anyone besides itself should be able to adjudicate American election law").

[68] *See, e.g.*, Morley, *supra* note 1, at 13–15 (providing textual, historical, and normative justifications for the ISLT); Morley, *supra* note 38, at 80–82 (arguing that the Court in *AIRC* "unnecessarily" rejected the ISLT).

[69] Morley, *supra* note 1, at 8–9.

meaning interpretation of the clauses to refer only to the traditional institutional state legislature.[70]

In a more recent piece, Professor Morley defended the ISLT further, stating that it "is best understood as a general principle that gives rise to a range of different potential corollaries," but he qualified his assertions by saying that the ISLT "need not be accepted or repudiated wholesale."[71] Significantly, he notes that legislatures remain subject to the "implied internal restrictions" of the Clauses themselves, in addition to "explicit federal constitutional restrictions such as due process, equal protection, and the voting rights amendments."[72] Indeed, this Note explores one crucial caveat in Professor Morley's work—explicit due process protections—as a direct counterpoint to unqualified approval of the theory.[73]

II. VOTER RELIANCE INTERESTS AND THE DUE PROCESS RATIONALE

Given the heightened risk of partisan election subversion following the 2020 election and the increasingly partisan tactics of state legislatures during the current redistricting cycle, a workable constraint on an independent legislature's power is needed to guard against potentially antidemocratic outcomes. This Part asserts that the Due Process Clauses under the Fifth and Fourteenth Amendments offer such a constraint. It begins by discussing the established due process frameworks of settled expectations, detrimental reliance, and fundamental fairness. Next, it examines how these frameworks apply in various election contexts.

A. Settled Expectations and the Right to Vote

Since the Court's adoption of the one-person, one-vote rationale,[74] election-related litigation has turned largely on equal protection concerns.

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[70] *See id.* at 24 ("Within the realm of realistic possibilities, however, a plain-meaning interpretation of those clauses would not allow a state that retains its traditional institutional legislature to assign ultimate authority over the regulation of federal elections to some other entity.").

[71] Morley, *Doctrine*, *supra* note 4, at 501.

[72] Morley, *supra* note 1, at 27.

[73] *See also* Brief of Amici Curiae the Republican National Committee, the NRCC & the North Carolina Republican Party in Support of Petitioners at 27, Moore v. Harper, 142 S. Ct. 2901 (2022) (No. 21-1271) [hereinafter RNC Amicus Brief] (recognizing that any "broad authorities conferred on state legislatures under the Elections Clause are subject to other constraints enshrined in the U.S. Constitution . . . includ[ing] the Equal Protection and Due Process Clauses of the Fourteenth Amendment").

[74] *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"); Reynolds v. Sims, 377 U.S. 533, 562–63 (1964) ("Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. . . . Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.").

The development is understandable, given that most litigation surrounding the regulation of the political process—either in redistricting, election administration, or ballot counting—has centered on disparate treatment of voters or invidious discrimination based on race.[75] Claims based on a theory of due process, however, may now be more viable in the contested-election context.[76] Insofar as the right to vote is considered "fundamental,"[77] courts and scholars alike have asserted that one's "liberty" interests under the Due Process Clauses of the Fifth and Fourteenth Amendments provide an arguably closer constitutional foothold in election contexts.[78] After all, elections are administered with the implicit expectation that they will be conducted in a fundamentally fair and legitimate manner,[79] and the Court has long since held that the right to vote also includes the right to have one's vote *counted* after one's ballot has been legally cast.[80]

Moreover, although the Court in *Bush v. Gore* reached its holding on equal protection grounds, commentators have noted that concerns over the

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[75] *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 747 n.6 (1983) (Stevens, J., concurring) ("The 'one person, one vote' rule, like the Equal Protection Clause in which it is firmly grounded, provides protection against more than one form of discrimination. . . . The primary consequence of the rule has been its protection of the individual voter, but it has also provided one mechanism for identifying and curtailing discrimination against cognizable groups of voters."); Anderson v. Celebrezze, 460 U.S. 780, 789, 792 (1983) (establishing a tiered balancing test for Fourteenth Amendment claims regarding third-party candidate registration deadlines); Burdick v. Takushi, 504 U.S. 428, 430 (1992) (establishing the same for write-in candidates); Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) (declining to order a recount on equal protection grounds, citing interests of uniformity and noting that "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied").

[76] *See* Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 596 (2001) ("A number of scholars have suggested that the Court's entire equal protection jurisprudence in the area of voting rights may be little more than a Warren Court recasting of substantive due process concerns in more palatable doctrinal language.").

[77] *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (describing the right to vote as "a fundamental matter in a free and democratic society" and stating that "any alleged infringement . . . must be carefully and meticulously scrutinized").

[78] *See, e.g.*, United States v. Texas, 252 F. Supp. 234, 250 (W.D. Tex. 1966) (three-judge district court), *summarily aff'd*, 384 U.S. 155 (1966) ("[I]t cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause."); *Wesberry*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."); Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 563 (2001) ("It is hardly a leap from acknowledging the status of voting rights as fundamental for equal protection purposes to recognizing voting as a protected form of liberty under the Due Process Clause."); Sarah Milkovich, *Electoral Due Process*, 68 DUKE L.J. 595, 615 (2018) ("When an election challenger uses state law vehicles to challenge elections and election policies, she has purportedly already been deprived of her most precious liberty interest.").

[79] *See* Griffin v. Burns, 570 F.2d 1065, 1078 (1st Cir. 1978) ("[D]ue process is implicated where the entire election process—including as part thereof the state's administrative and judicial corrective process—fails on its face to afford fundamental fairness.").

[80] *See supra* note 10.

rules being changed "mid-game" might be more closely rooted in due process.[81] Professor Pamela Karlan has argued that the Court sought an equal-protection holding for more politically expedient reasons—namely, that it intended "to wrap its decision in the mantle of its most popularly and jurisprudentially successful intervention into the political process: the one-person, one-vote cases."[82] Moreover, by pursuing an equal protection rationale, the Court was able to invoke "the specter of unfair treatment of voters" based on nonuniform ballot counting procedures throughout Florida.[83] In so doing, the Court's *Bush v. Gore* holding created an exceptional version of the one-person, one-vote rule[84]—a rule that has not been applied as stringently in subsequent cases.[85] Applied to a scenario in which a legislature attempts to interpose its own election outcome in place of a popular vote, equal protection is likely an inadequate remedy: If *everyone's* votes are discounted, it would be hard to make a claim for disparate treatment.[86]

Instead, due process provides a remedy for both a fundamentally unfair *process* (procedural due process) and the undue deprivation of a *substantive* right (substantive due process). In the voting context, litigants could potentially pursue either route depending on the violation: If a voter's ballot was discounted as a result of an unfair *process*, she may have a procedural due process claim. If she is prevented from exercising her *substantive* right to vote, courts can effectively redress violations of the relevant "liberty"

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[81] Karlan, *supra* note 7676, at 599 (remarking that, although a due process claim was not addressed by the *Bush v. Gore* Court, "it was embraced de facto by the Chief Justice and Justices Scalia and Thomas, whose Article II-based concurrence offered a presidential election-specific version of the argument that changing electoral rules in midstream is unconstitutionally unfair to candidates and voters").

[82] *See id.* at 600–01. Professor Karlan argues that if the Court was going to proceed in stopping a recount, "it had to use a constitutional provision with a pedigree. The Equal Protection Clause provided exactly that." *Id.* at 601.

[83] *Id.*

[84] *See* Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 252 n.110 (2020).

[85] *See* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 379, 388–91 (2001); *see also* Morley, *supra* note 84, at 237–43 (noting "the Supreme Court has never cited *Bush v. Gore* in a majority opinion" and that "some courts [are] hesitant to rely on the Uniformity Principle in the context of election cases.").

[86] *Cf.* Morley, *supra* note 84, at 249 (asserting that *Bush v. Gore*'s expansive equal-protection holding—what Professor Morley calls the Uniformity Principle—"is obviously not violated when all voters within a jurisdiction are subject to the same rules and procedures"); Karlan, *supra* note 76, at 600 ("The form of equality [*Bush v. Gore*'s holding] created was empty: it treated all voters whose ballots had not already been tabulated the same, by denying *any* of them the ability to have his ballot counted.").

interests surrounding the act of voting itself.[87] Given the Court's recent vocal skepticism toward substantive due process doctrine, however, claims following the latter theory may be less successful in practice.[88] Instead, by framing the harm as a procedural due process violation, a litigant voter would be grounding her injury in more tangible harms, namely the deficient processes of the state's election administration.

Other due process frameworks are similarly instructive for generating a due process claim in the ISLT context, itself a form of electoral due process. As Professor Samuel Issacharoff notes, it is embedded within the "general due process obligation that parties . . . have settled expectations as to what their rights and duties are."[89] In other words, one's rights must be sufficiently vested or relied upon—settled—for any expectation interests or due process protections to attach. Indeed, due process claims traditionally protect individuals against laws that improperly *unsettle* the "vested rights" or other reliance interests that those individuals might have.[90] As Professor Ned Foley has observed, the due process principle of "vested rights" is "broad enough that it is capable of encompassing changes in voting rules that inappropriately unsettle reasonable expectations concerning the operation of the voting process."[91] A due process claim in the election context would address a voter's settled expectations that her vote be legally counted—that her right to vote actually "vests" based on either her prior personal experience or the more broadly experienced history of the American voting process.[92] In sum, due process in the election context is an amalgamation of a voter's settled expectations of—and reasonable reliance upon—a

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[87] *See* Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995) (per curiam) ("The right of suffrage is a fundamental political right . . . . If, however, the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated . . . ." (internal quotation marks omitted) (first quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); and then quoting Curry v. Baker, 802 F.2d 1302, 1315 (11th Cir. 1986))).

[88] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (remarking that "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*").

[89] Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1843 (2006); *see also id.* at 1843 n.18 ("Settled expectations as one animating principle of due process stretches as far back as Hobbes.").

[90] Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 731 (2017).

[91] *Id.*

[92] *See* NAT'L TASK FORCE ON ELECTION CRISES, A STATE LEGISLATURE CANNOT APPOINT ITS PREFERRED SLATE OF ELECTORS TO OVERRIDE THE WILL OF THE PEOPLE AFTER THE ELECTION 2 (2020), https://www.electiontaskforce.org/state-legislature-paper [https://perma.cc/JTM7-S9MW] ("By 1832, every state in the union except for South Carolina had enacted laws providing for the selection of electors through a popular election, and for well over a century, laws in *every* state have provided for the selection of electors through a popular election.").

fundamentally fair elections process that allows her to exercise her vested right to vote.

This may be particularly relevant to rules changes in the ISLT context given the likely hyper-partisan nature of any rules changes. As Professor Foley argues, a due process balancing test for changes to voting rules would thus allow courts to "weigh the extent to which voters have come to rely on existing voting procedures against the government's asserted reasons for wanting to change those procedures"—including partisanship.[93] Such a reliance would be even stronger when the voting procedures being changed are deeply rooted in the electorate, and a voter's reasonable expectations are that much more settled.[94]

Across legal contexts, courts also have a strong general presumption against these types of rules changes.[95] So-called "retroactive" laws[96] raise several concerns: (1) the protection of vested rights or other settled expectations from future "arbitrary" litigation, and (2) the preservation of the Due Process Clause's protection against fundamental unfairness.[97] In stark contrast to prospective legislation, retroactive legislation casts past behavior under a harsh new standard, upsetting otherwise-settled expectations and reliance interests.[98] Specific to a contested-election context, in which the legality of hastily passed or hyper-partisan-inflected postelection laws may be at issue, a due process claim addressing a voter's "liberty" interests and reliance on well-settled expectations provides the most promising framework for future litigants.[99]

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[93] Foley, *supra* note 90, at 739.

[94] *Id.* ("If the voting procedures are long-standing and deeply rooted, such that the electorate's reliance interests are strong, and the change that the legislature wishes to make is significant (and not merely minimal in nature), then the government should be required to offer a strong nonpartisan justification for making the change.").

[95] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.").

[96] Retroactive laws are different than retrogressive laws, which are historically more often seen in the context of Voting Rights Act claims. *See* Foley, *supra* note 90, at 736 ("There is an analytic difference, to be sure, between *retroactive* laws, which purport to reach back in time to change the legal consequence of previous circumstances, and *retrogressive* laws, which make future conditions more burdensome than those of the past.").

[97] *Id.* at 734–35.

[98] *See* Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.").

[99] *See* Karlan, *supra* note 76, at 597–98 ("If the right to vote is now understood as a fundamental aspect of the liberty the Due Process Clause protects—and the Court has recognized that analysis of liberty interests is deeply informed by tradition, as reflected in longstanding federal and state practices—

B. Electoral Due Process and Mathews–Burdick *Balancing*

Given that due process rights translate neatly into election-related contexts, what might an electoral due process claim look like in the context of an ISLT-related election dispute? For starters, any answer implies the possibility of redressability in the courts.[100] While federal courts may be wary of entering the "political thicket" to adjudicate election results—particularly if the Court grants full Article I or Article II deference to an independent legislature—the situation is markedly different when a constitutional deprivation is at issue.

Such constitutional deprivations are traditionally addressed as procedural due process claims. Under the balancing test established in *Mathews v. Eldridge*, the first two factors addressed in a procedural due process claim consider the degree of deprivation of the "liberty" or property interest at issue for both individual litigants and the government.[101] The third factor concerns whether, after weighing the relevant individual and governmental interests, any additional procedures would effectively redress the harm alleged.[102] Accordingly, many procedural due process claims seek redress in the form of a court hearing.[103]

Procedural due process claims are also viable in the election context. In a recently published student note, Sarah Milkovich argued for a hybridized version of the *Mathews* balancing test for procedural due process that incorporates the balancing of state interests and voter burdens from the landmark election law case *Burdick v. Takushi*.[104] Such a *Mathews–Burdick* balancing test would center on an idea of *electoral* due process, wherein a combination of procedural and substantive burdens on the right to vote are equally weighed within a due process framework. In essence, federal courts

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then a Court sensitive to our traditions of ordered liberty should find a substantive liberty interest in voting to elect the President. That interest, as it has evolved and solidified, outweighs an Article II interest in replacing popular election with some other method of selecting electors that over the last two centuries has fallen into desuetude.").

[100] *See* Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 838 (2016) ("As a matter of the process due, the procedural due process requirements for a plaintiff's claims of substantive constitutional violations generally include the availability of judicial process.").

[101] *See* 424 U.S. 319, 332–35 (1976) (establishing a balancing test for procedural due process that weighs the government's interest against an individual's right to a predeprivation hearing and the risk of error in the proposed remedy, while also recognizing a due process property interest in welfare benefits).

[102] *Id.* at 335.

[103] *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–28 (1981) (applying the *Mathews* test but limiting the requirement of appointed counsel in predeprivation hearings to cases where the litigant may lose her physical liberty if she loses the litigation).

[104] *See* Milkovich, *supra* note 78, at 625–26; *Mathews*, 424 U.S. at 334–35; Burdick v. Takushi, 504 U.S. 428, 434 (1992) (establishing a balancing test that weighs the state's interest in a given election law against voters' constitutional rights under the First and Fourteenth Amendments).

would combine the procedural burden with any evidence that vote deprivation occurred.[105] An electoral due process framework would thus require the state to provide a compelling interest, per *Burdick*, for refusing to remedy an election administration process that resulted in vote deprivation under *Mathews*.[106] In this way, courts could take a more accurate accounting of the due process harms that occur when a voter's "liberty" interests are violated if her legally cast ballot is discounted.

Such a framework is naturally adapted to the novel context of the ISLT. A court applying such a balancing test in the ISLT context would weigh whether the late-breaking rules changes at issue are such a compelling state interest that they outweigh voters' due process rights. This would likely be a high bar for state litigants to meet. The Roberts Court, however, has more recently expressed a greater willingness to defer to states' interests when assessing burdens in voting.[107] This balance may shift, however, depending on both the nature of the rule change itself and the time at which the new law is passed relative to the election date, as this Note will address in Parts III and IV.

III. APPLYING DUE PROCESS FRAMEWORKS TO THE ISLT

In practice, courts and litigants would likely have difficulty navigating the uncharted waters of election litigation in the ISLT context. But by relying on familiar frameworks already established in the due process context, they would not have to venture far beyond existing case law to adjudicate their claims. With these due process frameworks as a guide, Part III analyzes three different rules-change scenarios that an independent legislature might seek to pursue.

Each scenario starts from the following hypothetical. During a presidential election, a voter goes to her local polling place to cast her ballot for president. She does so legally, following the state laws as written to ensure that her ballot is counted. Once her vote is submitted, she then relies on the reasonable expectation that it will be meaningfully counted (that her right to have her vote counted will "vest"). At the same time, she also places her reliance on a fair state administration of that election (namely, that it will

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[105] *See* Milkovich, *supra* note 78, at 634.

[106] Milkovich would go even further, asserting that "any severe burden—procedural, factual, or a combination thereof—on the right to vote should be considered a *per se* constitutional deprivation" that "warrants, and indeed compels, federal court intrusion into the political thicket for the sake of preserving equally representative democracy." *Id.* at 635 (emphasis added).

[107] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2346 (2021) (holding that Arizona statutes limiting ballot collection were not discriminatory under Section 2 of the Voting Rights Act because they amounted to the "usual burdens of voting.").

honor the rules as they were at the time when she cast her ballot). At some point either before or after she casts her ballot, however, her state's legislature decides to exercise its new power under the ISLT to change the law pertaining to the state's presidential election process—directly jeopardizing her ballot's validity.

Using this premise as a starting posture, three scenarios involving our hypothetical legislature's rules changes emerge as the most concerning for American democracy. First are preelection (or ex ante) rules changes that fundamentally change the way an election is run—including, for instance, a change to the appointment process for presidential electors that changes the popular vote for President into an advisory vote. Second are postelection (or ex post) rules changes altering the appointment process after ballots have already been cast, effectively shifting the rules mid-game. Third is the more unlikely "cancelled election" scenario, in which a state legislature abandons administering a vote for the presidential election altogether and chooses to appoint its electors directly.

A. Ex Ante Rules Changes

One way that an independent state legislature could seek to exert its plenary power over an election outcome is through the passage of disruptive, hyper-partisan state laws prior to the election. Such an ex ante approach could include, for example, a change to the process by which electors for a presidential candidate are chosen long before election day.

An Arizona bill introduced in 2021 proposed to do just that. The bill sought to enable an "advisory" popular vote to be held for presidential electors, by which the legislature would retain the explicit power to appoint its own presidential electors by simple majority regardless of the popular-vote outcome.[108] Such an "express disclaimer" of a nonbinding popular vote poses a difficult question for the average voter over whether her vote would actually be counted, although courts have recognized reasonable expectations despite such disclaimers in nonelection contexts.[109] The due process implications of such a scenario in the election context, however, are a bit murkier: Would a voter still have a reasonable expectation of her vote

[108] *See* H.B. 2720 § 3, 55th Leg., 1st Reg. Sess. (Ariz. 2021) at 9:31 to :38:

> [T]he Legislature retains its legislative authority regarding the office of presidential elector and by majority vote at any time before the presidential inauguration may revoke the Secretary of State's issuance or certification of a presidential elector's certificate of election. The Legislature may take action pursuant to this subsection without regard to whether the Legislature is in regular or special session or has held committee or other hearings on the matter.

[109] *See, e.g.*, Perry v. Sinderman, 408 U.S. 593, 599–603 (1972) (discussing the potential for reasonable expectations of continued employment despite an explicitly finite contract).

being counted if she knows—or constructively could have known—ahead of time that her vote is merely advisory?[110]

To be sure, there is substantial evidence that a voter's expectation that her vote would be counted—and not merely advisory—is sufficiently settled given the longstanding practice of selecting presidential electors via popular vote.[111] For a state to successfully enact a change like Arizona's bill proposes, the statute codifying the traditional method of appointing electors would need to be repealed and then replaced with the new appointment method well in advance of the appointment of those electors.[112] Bringing a strong detrimental reliance claim thus becomes difficult in the ex ante scenario: The state could simply claim that voters were given sufficient notice to the rules changes in advance of the election being conducted. This scenario would pose a significant challenge to a litigant who chose to bring her claim after the election was administered with the ex ante law already in effect. Instead, her best hope would likely be levying a facial challenge to the law itself (and to hope that any relief from the law—in the form of a stay or otherwise—wouldn't *itself* get *Purcell*ed by the reviewing court).[113] As a result, a voter's reliance on outdated or defunct election rules might be founded less on due process protections than on generalized norms surrounding the state's administration of elections.[114]

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[110] As one commentator colorfully put it: "Is it still a due process violation if Lucy expressly tells Charlie Brown, before the attempted placekick, that she reserves the power to pull the football away at the last minute?" Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1071 n.76 (2021).

[111] *See* NAT'L TASK FORCE ON ELECTION CRISES, *supra* note 92, at 1–2 ("The practice of state legislatures directly appointing electors has long since been abandoned, and 'history has now favored the voter.'" (quoting Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam))).

[112] Regarding this scenario, Professor Foley has observed:

> [E]ven if the state legislature wants to return to a method of appointment with no gubernatorial involvement, the legislature first would need to repeal—by ordinary legislative methods—the statute that authorized appointment by means of a popular vote. Second, the legislature would need to change in this appointment method before, not after, electors had already been appointed by means of a popular vote. The legislature is always free to make this move for next time, but it cannot—at least not without violating the due process clause of the Constitution—undo an appointment of electors already made.

Edward B. Foley, *Preparing for a Disputed Presidential Election*, 51 LOY. U. CHI. L.J. 309, 319 (2019).

[113] *See* Merrill v. Milligan, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam), for the proposition that courts should not uphold or institute new election laws in the period near to an upcoming election); *see also* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016) (coining the phrase "*Purcell* principle" to describe the Court's increasing citing of *Purcell* to deny election law changes near elections); *infra* notes 155–163 and accompanying text (discussing the Court's uneven application of the principle).

[114] *See* NAT'L TASK FORCE ON ELECTION CRISES, *supra* note 92, at 2 ("The United States' long history of selecting presidential electors through a popular vote has established an important and fundamental democratic norm of citizens participating in choosing the president.").

The Court's degree of endorsement of the ISLT may also influence the outcome of this scenario. The appointment of presidential electors by popular vote has been deeply settled in every state for over a century.[115] A complete departure from this practice, as the pending Arizona bill proposes, would put a voter's settled expectations about her ballot being *counted*—and not merely being *advisory*—into direct conflict with the legislature's new law. The degree of deference a federal court is likely to give a state legislature thus hinges upon how strong a version of the ISLT the Court would be likely to endorse. Stronger versions of the theory would afford state legislatures the broadest deference to conduct federal elections as they choose—including overriding state courts or state constitutional law—or appoint presidential electors as they choose.[116] At the same time, the more an ex ante rules change deviates from fundamental norms, the more pressure the Court would face to achieve a nonpartisan result roughly in line with voters' expectations before the law went into effect. The strictest versions of the ISLT, however, would all but disregard these concerns.

A more complicated situation occurs when courts mandate rules changes on the eve of an election. The question then becomes whether the resulting court-made "new law" implicates due process reliance. Indeed, the pro-ISLT argument made by Justices Kavanaugh, Gorsuch, Alito, and Thomas on the eve of the 2020 election is squarely aimed at preventing such new law from overriding state legislatures. To be sure, the kind of court-mandated remedies expanding absentee deadlines in the midst of the 2020 pandemic were less restrictive examples of ex ante rules changes. As the numerous separation-of-powers showdowns over these changes suggest, however, the Supreme Court remains sharply divided over which ex ante rules changes it allows to take effect.

B. Ex Post Rules Changes

Postelection rules changes present the most worrying implementation of an independent legislature's power. Here, a legislature would seek to create new law *after* an election but before election certification, notwithstanding prior laws—or even *results*—already on the books. Such laws could take the form of throwing out certain classes of ballots (e.g., absentee or early voter), appointing an alternative slate of presidential electors, or rendering the popular vote advisory altogether. In such a scenario, the legislature may also take advantage of the hyper-partisan

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[115] *See id.*

[116] *See* Douglas, *supra* note 45, at 78 ("Thus, it is not clear whether a majority of Justices are willing to question any election rules that a state legislature does not promulgate.").

political and media climate—citing dubious claims of voter fraud, for instance—to cloak its passage of such laws in a patina of legitimacy.

We've already come frighteningly close to such an outcome. Late-breaking rules changes were marked as a potential "nightmare scenario" for the 2020 election by commentators discussing potential postelection legal showdowns between Trump and Biden.[117] Despite no court having yet granted a legislature ISLT-sanctioned power, challenges to ex post rules changes—that is, laws passed after ballots have been collected that have the potential to change an election outcome—have nevertheless occurred.[118]

An example at the local level is particularly instructive. *Griffin v. Burns* involved a dispute over whether absentee-balloting laws used in the general election for a local city council race in Providence, Rhode Island could also be applied to primaries.[119] The Secretary of State believed they should apply and made the absentee ballots available, resulting in roughly 10% of the primary voters actually using them to vote.[120] The absentee ballots ended up swaying the results of the election. When the losing candidate challenged the legality of the ballots, the Rhode Island Supreme Court ruled that state law did not expressly allow the use of absentee ballots in primary elections.[121]

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[117] Steven Rosenfeld, *Are We Headed Toward Another Bush-Gore Impasse in November 2020?*, NAT'L MEMO (May 12, 2020), https://www.nationalmemo.com/are-we-headed-toward-another-bush-gore-impasse-in-november-2020 [https://perma.cc/S3DU-GU26]. The article recounts how Professor Foley, one of the commentators at the conference, discussed the potential due process implications of a scenario in which legislatures in Michigan and Pennsylvania changed the process of selecting presidential electors after ballots had been cast:

> "Again, this is all hypothetical," Foley said. "But what if the Michigan legislature says, 'You know what? We just don't trust late-counted ballots. And so we are going to assert our authority under the federal constitutional Article II to appoint electors directly.' So now we have this conflict between the certified result from the secretary of state that said that Biden won Michigan, but we have the legislature in Michigan saying, 'No. We don't trust that result. We are going to appoint the Republican electors.' So now, the Democrats are going to federal court invoking the same concept of due process—'hey, don't change the rules'—as the Republicans cited in the scenario from Pennsylvania."

Id.

[118] *See, e.g.*, Griffin v. Burns, 570 F.2d 1065, 1067–68 (1st Cir. 1978) (examining the Rhode Island Supreme Court's decision to invalidate absentee ballots after the primary election occurred); Roe v. Alabama, 43 F.3d 574, 578–79 (11th Cir. 1995) (per curiam) (examining the Montgomery County Circuit Court's order to count unnotarized absentee ballots, against statutory mandate).

[119] *Griffin*, 570 F.2d at 1067.

[120] *Id.*

[121] As the First Circuit later characterized it:

> The change of practice, the court said, "occurred when the then secretary of state, without the support of an amendment to the statute, a judicial decision, or an opinion from the attorney general, decided sua sponte and without any announced rationale therefor that the time had arrived when electors should be allowed to cast absentee and shut-in ballots at party primaries."

Id. at 1068 n.4 (quoting McCormick v. State Bd. of Elections, 378 A.2d 1061, 1064 (R.I. 1977)).

Four days after the ruling, the Rhode Island legislature amended the law to allow for absentee balloting in primaries.[122] At the same time, Lloyd Griffin, whose victory was reversed by the state supreme court ruling, sued in federal court alongside the voters who used the absentee ballots. The district court held that the state supreme court violated the voters' constitutional rights and ordered a new primary election as an equitable remedy.[123]

Affirming on appeal, the First Circuit reasoned that "due process is implicated where the entire election process . . . fails on its face to afford fundamental fairness."[124] Moreover, because evidence had shown that those voters who cast absentee ballots would have voted in person had they known that the absentee ballots were prohibited, the court's reasoning turned on the voters' reasonable reliance on the voting practices as they existed when their ballots were cast.[125] It held, however, that "garden variety" election irregularities would not typically rise to the level of a constitutional violation.[126]

Roe v. Alabama presents a more recent example of how ex post rules changes interact with due process.[127] In that case, a dispute over contested absentee ballots arose in a statewide election.[128] The critical question centered on whether the state court's ruling—that the ballots were properly notarized—was consistent with existing state law regarding absentee ballots. The Eleventh Circuit determined that changes in state law, if permitted to stand, would "constitute a retroactive change in the [state's] election laws . . . implicating fundamental fairness issues."[129] In other words, the state court's postelection ruling would have changed preexisting state election laws to such an extent as to dilute already-cast votes in violation of the Fourteenth Amendment Due Process Clause.[130]

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[122] *Id.*; *see* 1977 R.I. Pub. Laws 153.

[123] *Griffin*, 570 F. 2d at 1069.

[124] *Id.* at 1078.

[125] *See id.* at 1076 ("[W]e are unwilling to reject appellees' claim merely on the fiction that the voters had a duty, at their peril, somehow to foresee the ruling of the Rhode Island Supreme Court invalidating their ballots.").

[126] *Id.* at 1076–77.

[127] 43 F.3d 574, 581 (11th Cir. 1995) (per curiam).

[128] *Id.* at 578.

[129] *Id.* at 581.

[130] For more on the vote dilution theory of due process in *Roe*, see Richard H. Pildes, *Judging New Law in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 707 (2002).

Significant in the *Roe* court's holding is its theory of detrimental reliance.[131] The court wrote that a postelection rules change would have the effect of "disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement."[132] That is, the voters—and the candidates themselves—relied on a settled and agreed-upon process that dictated the ways in which they campaigned or voted.[133]

Also significant in the *Roe* court's holding is its theory of federal judicial review of state law in the contested-election context. Echoing the court in *Griffin*, the court reasoned that, "[g]enerally, federal courts do not involve themselves in garden variety election disputes."[134] The exception occurs when "the election process itself reaches the point of patent and fundamental unfairness," in which case due process has been violated.[135] The court qualified its reasoning, however, stating that "[s]uch a situation must go *well beyond the ordinary dispute* over the counting and marking of ballots."[136]

In contrast to the ex ante rules-change scenario, here, any legislative change to election procedures after our hypothetical voter casts her ballot directly and significantly frustrates her settled expectations and attendant reliance interests.[137] In the ex post scenario, the legislature decides to alter its appointment process *after* it had already established the rules of the game. Following the logic from *Griffin* and *Roe*, our voter would likely have little difficulty showing that a mid-game rules change discounting her ballot transcends "garden variety" concerns in election administration and that the legislature's actions are sufficiently severe as to violate fundamental

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[131] As Professor Richard Pildes has observed, the detrimental reliance in this context can manifest in two ways. First, when voters act in reliance on a well-founded belief that state law required X to cast a valid vote, and the state concludes after the election that X was *not* actually required. Second, it can manifest where Y is a permitted form of voting, but the state concludes after ballots are cast that Y is *not* permitted after all. In either situation, because voters relied to their detriment on the reasonable and well-grounded expectation that state law was X or Y, their due process rights "of fair notice with regard to conditions on the right to vote" have been violated. *Id.* at 710–11.

[132] *Roe*, 43 F.3d 574 at 581.

[133] *See* Brown v. O'Brien, 469 F.2d 563, 569 (D.C. Cir. 1972) ("If the party had adopted [the rule change] prior to the . . . primary election, the candidates might have campaigned in a different manner . . . . Voters might have cast their ballots for a different candidate; and the State of California might have enacted an alternative delegate selection scheme.").

[134] *Roe*, 43 F.3d at 580 (internal quotation marks omitted) (quoting Welch v. McKenzie, 765 F.2d 1311, 1317 (5th Cir. 1985)).

[135] *Id.*

[136] *Id.* (emphasis added).

[137] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

fairness.[138] Moreover, a legislature instituting such a rules change would uncouple the right to vote from the right to have one's vote meaningfully counted—a contravention of long-established Court precedent.[139]

As noted, an ISLT endorsement could provide ample opportunity to litigate late-breaking rules changes that, like *Griffin* and *Roe*, extend far beyond the ordinary dispute. More than this, however, these cases illustrate how due process claims can work to resolve contested-election contexts writ large, pointing to a potential path forward for litigants notwithstanding the existence of independent legislatures in the future.[140]

A voter's due process reliance interests are thus at their zenith in the ex post rules-change scenario. Her reasonable expectation of the administration of the election process as it was mutually understood at the time when she cast her ballot is not minimized simply because the rules change was implemented by an independent legislature. Not even an absolutist textual reading of Article I or Article II would provide for the creation of new law in the postelection context that supersedes voters' existing Fourteenth Amendment protections.[141] Put simply, even plenary power has a clear constitutional—and textual—limit.

C. Cancelled Election Scenarios

As the most unorthodox of the potential scenarios in a presidential election, a state might opt to cancel its administration of the election altogether and assign its presidential electors directly.[142] If legislation

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[138] *See Roe*, 43 F.3d at 580–81.

[139] *See supra* note 10.

[140] *See* Pildes, *supra* note 130, at 706 ("The *Griffin* and *Roe* cases are the strongest court of appeals decisions that support a constitutional role for federal courts in overseeing potential 'new law' that arises in the midst of elections and election disputes.").

[141] Hayward H. Smith states as follows:

> [F]ederal courts have required a much stronger showing of ex post facto creation of "new law" than that required, in the name of Article II, by the *Bush II* concurrence. Thus, even as a manifestation of *dis*respect for state courts, the super-strong version of the independent legislature doctrine must depend on some positive characteristic of Article II legislatures which would, in Professor Pildes' words, "justify a greater federal court willingness to find 'new law' [under Article II] than do the general provisions of the Fourteenth Amendment."

Smith, *supra* note 25, at 740–41 (quoting Pildes, *supra* note 130, at 726).

[142] This scenario presents some major issues:

> Once a state has held an election, a state legislature's post-Election Day appointment of its own preferred slate of electors not only would contravene this fundamental democratic norm; it would also violate federal law requiring that all states must appoint their electors on Election Day, *i.e.*, the "Tuesday [next] after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

NAT'L TASK FORCE ON ELECTION CRISES, *supra* note 92, at 2 (quoting 3 U.S.C. § 1).

affirmatively changing the elections process of the state passes in sufficient advance of the national election day, it would theoretically give sufficient notice to voters that might frustrate claims of detrimental reliance similarly to the ex ante scenario.[143]

At first glance—and given the surprisingly smooth administration of the 2020 election[144]—fears of such a scenario actually coming to pass may seem exaggerated. Given the likely political toll, chances are slim that even a recklessly partisan legislature would cancel its state administration of the presidential election altogether.[145] Nonetheless, it is worth addressing the cancelled election possibility within the broader framing of Article II power to spotlight the full range of powers available to a legislature if the Court were to offer an unqualified ISLT endorsement.

In many ways, of course, such an act is a "political nonstarter."[146] It is unlikely, for instance, that a sufficiently large number of voters would continue endorsing their preferred state legislators if those legislators subsequently restricted the ability to vote wholesale. In the midst of the uncertainty surrounding the pandemic, however, such an extraordinary

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[143] To extend Professor Levitt's metaphor, *supra* note 110, at 1071 n.76, if Lucy tells Charlie Brown that she won't be placing the football for him to kick in the first place, it will be harder for Charlie to claim that she caused him an injury.

[144] Christina A. Cassidy, Anthony Izaguirre & Julie Carr Smyth, *States Cite Smooth Election, Despite Trump's Baseless Claims*, AP NEWS (Nov. 11, 2020), https://apnews.com/article/election-2020-donald-trump-virus-outbreak-general-elections-elections-4060823b211ce91959b26f46efb73636 [https://perma.cc/VWQ9-EKUK] (reporting state officials' comments that the 2020 election "unfolded smoothly across the country and without any widespread irregularities"). The article quotes Ben Hovland, a Trump-appointed Democrat on the Election Assistance Commission, as saying that the 2020 general election was "one of the smoothest and most well-run elections that we have ever seen, and that is remarkable considering all the challenges." *Id.*

[145] Beyond political optics, there is reason to doubt that state legislatures adequately represent a majority of the state's interests even under normal circumstances. Professor Miriam Seifter argues that state legislatures are "almost always a state's least majoritarian branch" due to the "combination of districting schemes, geographic clustering, and extreme gerrymandering" that often result in minority rule. *See* Seifter, *supra* note 39, at 1733. Professor Seifter notes that proponents of the ISLT—including, notably, Justice Gorsuch—defend its grant of plenary power on the premise that state legislatures more adequately represent the will of the people than "largely unaccountable bodies" like the judiciary. *See id.* at 1753 (quoting Moore v. Circosta, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting)). Seifter notes further: "The state-legislatures-as-pinnacle-of-democracy argument does not work when the legislature speaks for a statewide minority. And the independent state legislature doctrine is more likely to come up in such states, because closely contested elections and divided government provide the natural reasons to raise it." *Id.* at 1795–96.

[146] Hasen, *supra* note 11, at 286 (noting that "it would be profoundly antidemocratic to take away voters' ability to vote for the most important office in the United States, and legislators who sought to do so would likely face the voters' wrath").

gesture by a state legislature appeared more within the realm of possibility.[147] As Professor Richard Hasen warned in a pre-2020 election paper, a legislature (or presidential candidate) could claim, for instance, that administering an election would be detrimental to public health and safety, or that any votes cast would be at risk of being manipulated by fraud.[148] Dubious claims of voter fraud, in particular, were instrumental to President Trump's postelection campaign to sow doubt over the 2020 results.[149] Or, similarly, a legislature might assert that new election procedures—e.g., relaxing absentee-ballot restrictions—violate its powers under Article II, and that it now seeks to abandon its statewide election and appoint electors directly as a prophylactic measure.[150]

As a constitutional issue, the voter reliance question is more unclear in the cancelled election scenario. Even absent the ISLT, state legislatures have broad discretion about the "Time" and "Manner" for holding elections.[151] While not holding an election may frustrate a voter's reasonable expectations that she would be able to cast her ballot for president, since there has been no ballot cast, a finding of reliance would require a different theory than in the previous two scenarios. Instead of a settled expectation that her ballot would be counted, for example, a voter could assert a reasonable reliance on her state providing her with a means for voting for president as a voter in her neighboring state would. In this way, she is relying on the state to maintain its prior election practices or else be inconsistent with other states. But such an inchoate reliance is unlikely to be legally binding in the ISLT context. Moreover, a strong endorsement of the ISLT from the Court might have a chilling effect on lower federal courts that may otherwise be sympathetic to such claims.

By contrast, a stronger, more nationally rooted argument would be to assert a broader vested interest in voting for the president on our national Election Day. In this context, a state's retrogression to selecting electors without a popular election would break with over a century of voting

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[147] *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 271 (2020) ("[I]t is much easier to imagine legislative reclamation of the right to appoint presidential electors directly [given the pandemic] . . . rather than allowing the election to go forward.").

[148] *See id.*

[149] *See* Doug Bock Clark et al., *Building the "Big Lie": Inside the Creation of Trump's Stolen Election Myth*, PROPUBLICA (Apr. 5, 2022, 5:00 AM), https://www.propublica.org/article/big-lie-trump-stolen-election-inside-creation [https://perma.cc/932R-ZNH2] (reporting the extent to which leading advocates of Trump's rigged election theory touted evidence they knew to be disproven, disputed, or dismissed as dubious).

[150] Hasen, *supra* note 147, at 271. This would echo Chief Justice Rehnquist's concurrence in *Bush*. *See* Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring).

[151] *See* U.S. CONST. art. I, § 4.

practices in every state.[152] Pursuing such a claim, however, presents complex questions regarding the not-so-easily-severable state and federal interests of voters. In a post-ISLT-endorsement landscape, how would courts balance state and federal citizenship in the voting context? More than anything, these nationally flavored reliance claims would provide yet another opportunity for federal courts—and inevitably the Supreme Court—to reenter the political thicket from which they have assiduously sought to withdraw.[153]

Returning to our familiar due process frameworks, any injury accruing from reliance interests would have to be defined in the *negative* if no ballots are cast before the legislature changes its election process—something that was expected to happen did not happen. Reliance, then, would be based not on the single occurrence of a process but on the reasonable expectation of that process *reoccurring*. A legislature's change to its appointment process by statutorily refusing to hold an election would therefore occur before such affirmative acts inducing voter reliance are taken.

In this way, withholding an election is a more extreme version of the ex ante scenario. Instead of an "advisory" vote, there is simply no vote at all. If a litigant voter believes she has a right to vote for President and the state legislature simply disagrees, she would face a similarly high hurdle in demonstrating prior mutual understanding of the electoral process. Such a gesture from the legislature would have the effect of *unsettling* what she presumed was a well-settled expectation in her right to vote. Instead, the voter's expectation that an election should nevertheless be conducted relies more heavily on foggily defined norms and traditions, or else a more generalized entitlement to the right to vote in a presidential election. Whether such an injury amounts to a constitutional violation remains unclear because of the potential difficulties of asserting detrimental reliance or pinpointing an unconstitutional process in the negative.

IV. EXPANDING *PURCELL* AND ADDITIONAL NOTES ON TIMING

Finally, the timing of the passage of a major election law rules change relative to election day would directly affect its ability to withstand judicial scrutiny in an ISLT world. The idea that courts should not issue orders that change election rules close to the start of voting has become known as the

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[152] *See* NAT'L TASK FORCE ON ELECTION CRISES, *supra* note 92, at 2.

[153] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2489 (2019) (declaring partisan gerrymandering to be a political question and asserting that there are "no legal standards discernible in the Constitution for making such judgments"). Correspondingly, Professor Hasen argues that a Court majority newly sympathetic to the ISLT might also decide that Electoral College vote counting is a political question best left to Congress. *See* Hasen, *supra* note 147, at 271 n.13.

"*Purcell* principle."[154] In recent years, the Court has deployed this principle under the guise of preventing voter confusion.[155] There is plausibly some merit to this, given the logistical complexity of voting. Voters—and, by extension, courts—are right to demand clear and consistent election rules. After all, modern due process doctrine is built on theories of notice and fundamental fairness.

As numerous commentators have noted, however, the Court's invocation of the *Purcell* principle has not been evenly applied.[156] Indeed, the period of time that would be considered "too near" to an election has ranged from one week[157] to nine months.[158] This "near"-ness may also depend on the remedy: Enjoining an absentee-ballot law is a substantially different exercise than litigating a newly drawn legislative map.[159] Nevertheless, given this range, which types of election law changes the Roberts Court *would* allow in the preelection context as a result of its newly zealous adherence to *Purcell* is unsettled. But following the Court's reasoning in *Merrill v. Milligan*, a legislature looking to institute sweeping changes to election laws prior to an

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[154] See *supra* note 113 for more on the *Purcell* principle.

[155] Moore v. Circosta, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting).

[156] *See, e.g.*, Hasen, *supra* note 113, at 428–29 (arguing that the Court should apply more consistent legal standards to requests for emergency relief); Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 212 (2020) ("The Court erred in applying the *Purcell* principle in litigation arising from an unexpected election emergency.").

[157] In a notable preelection shadow docket decision from 2020, Justice Kavanaugh cited *Purcell* to strike down an extension to an absentee-ballot deadline in the week prior to Wisconsin's primary election. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

[158] In the 2022 redistricting case *Merrill v. Milligan*, for example, Justice Kavanaugh, writing in concurrence on the Court's shadow docket, stayed a three-judge district court panel's injunction that had invalidated Alabama's newly drawn congressional maps. Kavanaugh remarked that requiring the state to draw another map would run afoul of *Purcell*, despite that the general election that would make use of those maps was over nine months away. *See* Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (remarking that the "traditional test for a stay does not apply . . . in election cases when a lower court has issued an injunction of a state's election law in the period close to an election"). Justice Kagan disagreed: "Alabama is not entitled to keep violating Black Alabamians' voting rights just because the court's order came down in the first month of an election year." *Id.* at 888–89 (Kagan, J., dissenting).

[159] *But see Merrill*, 142 S. Ct. at 888 (Kagan, J., dissenting) (remarking that staying the implementation of Alabama's legislative map "is not like *Purcell* because we are not just weeks before an election" (internal quotation marks omitted) (quoting Singleton v. Merrill, Nos.: 2:21-cv-1291-AMM and 2:21-cv-1530-AMM, 2022 WL 272636, at *11 (N.D. Ala. Jan. 27, 2022))). Justice Kagan took particular issue with Justice Kavanaugh's invocation of *Purcell* to circumvent the Court's traditional standard for emergency stays: "This Court is wrong to stay [the] decision based on a hastily made and wholly unexplained prejudgment that it is ready to change the law." *Id.*; *see also id.* at 882 (Roberts, C.J., dissenting) ("[T]he District Court properly applied existing law in an extensive opinion with no apparent errors for our correction.").

election would have to do so sufficiently in advance of that election in order to guard against a potential *Purcell* challenge.

To maintain a consistent rule regarding late-breaking election rules in the ISLT context—and assuming that courts will continue to look to *Purcell* for guidance in election disputes—the principle should thus be expanded to encompass voter confusion concerns *after* ballots are cast. Doing so would provide a further safeguard against potential partisan abuses by an independent legislature in postelection contexts. Moreover, because courts' use of *Purcell* is rooted in preelection judicial restraint, the broader goal of preventing voter confusion should remain the same in the postelection context, except where voters' fundamental rights—including due process, equal protection, and the right to vote—are at stake. The novel question that the ISLT poses, then, lies in how the Roberts Court will balance preserving the *Purcell* principle against its growing deference to state legislatures in election administration.[160]

Recent developments in cases from the current redistricting cycle, however, signal that the Court may be comfortable using *Purcell* to grant even *broader* deference to state legislatures—specifically, by granting emergency stays to enjoin federal court challenges to state maps.[161] But the Court's creative docketing may result in a distinction without a difference. Despite initially declining to resolve *Moore v. Harper* on the emergency docket,[162] the Court nevertheless opted to take up the case on the merits with full briefing and oral argument the following term.

In view of these developments—and given the Court's aversion to election rules changes writ large—an expansion of *Purcell* to account for voter confusion in postelection contexts involving an independent state legislature would be prudent. Certainly, doing so would be in keeping with

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[160] *See* Douglas, *supra* note 45, at 78 ("Thus, it is not clear whether a majority of Justices are willing to question any election rules that a state legislature does not promulgate.").

[161] This development also underscores broader concerns over the Court's continued use of its emergency-relief docket to adjudicate election law disputes. *See* Steve Vladeck, *Brett Kavanaugh's Defense of the Shadow Docket Is Alarming*, SLATE (Feb. 8, 2022, 4:32 PM), https://slate.com/news-and-politics/2022/02/the-supreme-courts-shadow-docket-rulings-keep-getting-worse.html [https://perma.cc/K8X6-K9LB]. Such rulings are not fully briefed or decided on the merits, and they lack the same precedential power. *See* Baude, *supra* note 2, at 11–14 (noting that the emergency orders process is "sometimes ad hoc or unexplained"). Nevertheless, state litigants in election law cases are increasingly eager and willing to invoke these decisions as if they have legitimate precedential force. *See supra* note 55.

[162] Denial of Application for Stay at 1, *Moore*, 142 S. Ct. 1089 (No. 21A455) (Kavanaugh, J., concurring in denial of application for stay) ("I believe that the Court should grant certiorari in an appropriate case—either in this case from North Carolina or in a similar case from another State. If the Court does so, the Court can carefully consider and decide the issue next Term after full briefing and oral argument.").

Purcell's alleged purpose and preserve consistency in its application across election contexts. Significantly, it would also reenforce due process principles of notice and fundamental fairness in postelection disputes, which would be especially meaningful in an ISLT world.

Finally, invoking *Purcell* to strike down late-breaking rules changes may even allow the Court to avoid facing the ISLT question directly in the first place. Instead, the Court could use *Purcell* as a prudential off-ramp by refusing to rule on the merits. This judicial abstention would leave voters' reliance interests intact and the full scope of state legislatures' Article I and II powers undetermined. Although the use of *Purcell* in the ISLT context would undeniably carry a political valence, the Court may nevertheless be attracted to such mechanisms to avoid answering complex questions of federalism, due process, and federal-court power in contested elections.[163]

In the absence of such an expansion of *Purcell*, however, due process provides the most promising doctrinal constraint on an antidemocratic legislature. While the Court may not have an appetite for another institutional showdown of the likes of *Bush v. Gore*, the national hyper-partisan legal and political climate may nevertheless precipitate such a battle in coming elections. Given this unfortunate reality, due process protections and voters' reliance interests may play an increasingly central role in any manner of election disputes to come—ISLT-related, garden variety, or otherwise. By relying on established due process frameworks, voters and courts may emerge more capable of limiting any damage to the democratic process.

CONCLUSION

With *Moore v. Harper* looming, the Court now has its chance to address the ISLT issue on the merits. But however the case is resolved, any real-world consequences of an independent legislature warrant serious scrutiny. Additionally, any forward-looking examination of the ISLT requires a limiting principle that constrains legislatures' most damaging impulses.

Due process provides such a limit. It not only protects a voter's reliance on the reasonable expectation that she will be able to exercise her right to vote—it guarantees that her vote will be *counted*. Notwithstanding the Court's ruling in *Moore v. Harper*, this Note argues that the Constitution provides workable, textual constraints on legislative power in federal election contexts, including redistricting and presidential elections. Specifically looking at rules changes across varied election scenarios, this

[163] This is unlikely, however, given members of the Court's stated desire to "resolve" the ISLT question. *See id.*; Denial of Application for Stay at 1, *Moore*, 142 S. Ct. 1089 (No. 21A455) (Alito, J., dissenting).

Note asserts that voters' settled expectations of a fundamentally fair elections process—combined with established reliance interests inherent to the voting process itself—provide a credible and administrable due process constraint on independent legislatures.

Assuredly, the political toll of a Supreme Court endorsement of the ISLT would be high. The ISLT drumbeat is loudest among Republicans,[164] and more expansive voting laws (e.g., relaxed early voting and absentee-ballot provisions) tend to favor Democratic candidates.[165] Against this backdrop, a Roberts Court ruling that cleaves along familiar partisan lines is likely to have a corrosive effect on the Court's already-flagging legitimacy with the public.[166] And following the massive public response to the controversial decisions of the October 2021 term, motivations to preserve the Court's institutional legitimacy should now be even higher.[167]

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[164] *See, e.g.*, RNC Amicus Brief, *supra* note 73, at 1 (supporting endorsement of the ISLT in *Moore v. Harper*).

[165] This leads to the phenomenon colloquially referred to as the "blue shift." *See* John A. Curiel, Charles Stewart III & Jack Williams, One Shift, Two Shifts, Red Shift, Blue Shift: Reported Election Returns in the 2020 Election 1 (July 9, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3888756 [https://perma.cc/TFC9-VWQN] (describing the blue shift on election night 2020: "late-arriving results were more favorable to the Democratic candidate Joe Biden than reported results soon after the polls were closed"). *But see* Alan I. Abramowitz, *Assessing the Impact of Absentee Voting on Turnout and Democratic Vote Margin in 2020*, UVA CTR. POL. (Feb. 25, 2021), https://centerforpolitics.org/crystalball/articles/assessing-the-impact-of-absentee-voting-on-turnout-and-democratic-vote-margin-in-2020/ [https://perma.cc/N3Z4-EXXF] (concluding that "the sharp increase in absentee voting in 2020 wasn't disproportionately beneficial to either presidential candidate").

[166] *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2254 (2019); Barry Friedman, *The Coming Storm over the Supreme Court*, N.Y. TIMES (Oct. 8, 2018), https://nyti.ms/2IN5WZm [https://perma.cc/6H2H-NQDL].

> Chief Justice John Roberts clearly understands the political implications of a court out of step with the populace. Though his views are profoundly conservative, the chief justice nonetheless has . . . moderat[ed] the impact of his colleagues on the right, even voting 'left' himself at critical moments, as he did to uphold President Obama's health care plan and to limit law enforcement searches of cellphone records.

Id.

[167] *See, e.g.*, Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html [https://perma.cc/739S-LHKW] (noting public confidence in the Court fell 25% after the leaked draft of the *Dobbs* decision but before the formal decision—the lowest in the nearly fifty years Gallup has conducted the survey); Robert Knight, *Supreme Court Unleashes the Left's Outrage*, WASH. TIMES (July 1, 2022), https://www.washingtontimes.com/news/2022/jul/1/supreme-court-unleashes-the-lefts-outrage/ [https://perma.cc/A3PN-MJZR] (noting President Biden and the those on the left were "apoplectic" from the Supreme Court's rulings on abortions and guns); David Cole, *Egregiously Wrong: The Supreme Court's Unprecedented Turn*, N.Y. REV. (Aug. 18, 2022), https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole/ [https://perma.cc/PB87-NRV8] (labeling the Court's 2021 term as having a "disastrous effect").

Because of this dynamic, the Court should foreclose the possibility of *any* of the scenarios explored in this piece coming to pass by declining to endorse the ISLT in all its forms. Preserving the non-ISLT status quo would retain the normal checks and balances inherent to state-level separation of powers, all but assuring that any such democracy-threatening scenarios remain off the table.

While it is exceedingly unlikely that the Roberts Court would risk *further* institutional damage by sanctioning the wholesale disenfranchisement of a state's voters, the ISLT may yet give courage to those legislatures eager to try. And whether the Court intends to or not, emboldening those legislatures will only undercut the Court's express desire to exit the business of adjudicating political matters.[168] Given that litigation surrounding an independent legislature would likely go "well beyond the ordinary dispute," federal court involvement is all but assured.[169]

But these are not ordinary times. And any theory of election administration whose logical endpoint puts partisan power on a collision course with due process is bound to undermine confidence in the judiciary—and more likely than not American democracy itself.[170]

In this light, additional discussions about the rise of antidemocratic partisan actors and the appropriate balance of state and federal power in national elections are needed.[171] Other developments relating to these areas, including the evolving standards around *Purcell* and the Roberts Court's desire to preserve its own legitimacy, also warrant further study. Nevertheless, it remains indisputable that state actors—independent legislature or otherwise—cannot violate voters' fundamental due process rights. The only question is how far courts will go to defend them.

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[168] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) ("Sometimes, however, 'the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.'" (quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion))).

[169] Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995) (per curiam).

[170] *See* Brief of Professor Richard L. Hasen as Amicus Curiae Supporting Respondents at 27, Moore v. Harper, 142 S. Ct. 1089 (2022) (No. 21-1271) ("Petitioners' Elections Clause theory not only threatens voter confidence in the integrity of the election process and in the judiciary; it also may pave the way for other efforts to subvert free and fair elections in the United States.").

[171] *See* Litman & Shaw, *supra* note 8, at 1260 (remarking that "the ISLT would interpose the federal courts between state courts and state law, arrogating to the federal courts the authority to interpret state law, and to do so according to the federal courts' preferred methodology"). Additionally, it stands to reason that if a state legislature were to apply its own exceptional rule to act with federally conferred "plenary power" in elections, it could not then *disclaim* that same federally conferred authority in order to evade federal judicial review.