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THE INDEPENDENT STATE LEGISLATURE THEORY AND
PARTISAN GERRYMANDERING: HOW *MOORE V. HARPER*
MAY RESHAPE CONGRESSIONAL ELECTIONS

An Honors Paper for the Department of Government and Legal Studies

By Luke Porter

Bowdoin College, 2023

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INTRODUCTION

In the summer of 2018, Republican strategist Thomas Hofeller, age 75, died of cancer at his home in North Carolina. Described by the *New York Times* as the “Michelangelo of gerrymandering,” Hofeller had worked since the 1980s to create voting districts that favored the Republican party.¹ Working for the Republican party, he helped redraw voting maps in Alabama, North Carolina, Pennsylvania, Texas, and Virginia, among others.² Despite his long career, Hofeller would likely have become a footnote in gerrymandering history if it were not for his estranged anarchist daughter, Stephanie Hofeller. Shortly after his death, she discovered several of his thumb drives and hard drives, which she released to the press and made publicly available.

In life, Hofeller was tight-lipped. He took great lengths to avoid a clear paper trail. He would remind his employees and co-workers that “emails are the tool of the devil.” But Hofeller’s data were an open book. The files revealed an advanced redistricting machine, far beyond how Republican lawyers had described it. Hofeller had used incredibly precise racial and partisan data, combined with modern mapping software, to create deeply partisan maps that favored his party. Hofeller once said, “Redistricting is like an election in reverse. It’s a great event. Usually the voters get to pick the politicians. In redistricting, the politicians get to pick the voters.”³ Almost certainly the citizens in the states where he worked had no idea of Hofeller’s stealthy authority on their right to self-governance, but the legacy of his gerrymandering lives on in skewed voting maps and

¹ Michael Wines, “Thomas Hofeller, Republican Master of Political Maps, Dies at 75,” *The New York Times*, August 21, 2018, sec. Obituaries, <https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html>.

² Michael Wines, “Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question,” *The New York Times*, May 30, 2019, sec. U.S., <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.

³ Alvin Chang, “The Man Who Rigged America’s Election Maps,” *Vox*, October 17, 2019, <https://www.vox.com/videos/2019/10/17/20917852/gerrymander-hofeller-election-map>.

rancorous disagreement about electoral representation. Hofeller was not a public official. He was never elected. In fact, without the actions of his daughter, we may have never fully understood the role Hofeller played. And yet, Hofeller had immense influence on how people voted across the country. Hofeller is a reminder that American democracy is not straightforward.

Representative democracy is built on the premise of an informed electorate voting for politicians who write, enact, and enforce legislation. If necessary, an independent judiciary reviews this legislation to ensure that legislators have not exceeded the authority granted to them by state or federal constitutions. This is the basic formula of American democracy. Although a universal right to vote has only existed for around a century in America, voting is central to how our nation functions. And yet, voting is not a perfect process. While everyone of age is entitled to vote, procedural barriers can limit who votes and how that vote is counted. Many such barriers are enacted by politicians who seek to preserve or enhance their own power by degrading others' ability to vote. Last Term, the United States Supreme Court granted review over a case, *Moore v. Harper*, which has the potential to legitimize the attempts of state legislatures to draw congressional districts for partisan advantage.

The key issue in *Moore* is the constitutionality of a conservative legal theory called the Independent State Legislature Theory (ISLT). This theory posits that state legislatures are not bound by state courts and state constitutions when creating congressional districts. If taken further, the ISLT could eliminate all state-level checks and balances on state legislation relating to federal elections.

Although the ISLT is unestablished, it has gathered momentum over the last few years. In *Rucho v. Common Cause* (2019), the Supreme Court held that political gerrymandering poses a nonjusticiable question for federal courts, leaving issues of partisan gerrymandering to state courts.

The majority opinion held that “none of the proposed ‘tests’ for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable.”⁴ *Rucho* arrived shortly before the 2020 Census and the associated redistricting. Given federal courts’ refusal to adjudicate claims of political gerrymandering, litigants redirected their efforts to state courts. There have been several high-profile legal battles in states such as New York, Florida, and Ohio, in which litigants have contested maps on grounds of partisanship as well as racial discrimination, which federal courts may still review.⁵ The ISLT has gathered support among conservatives in the face of this new wave of state court litigation.

The question presented in *Moore* was whether the North Carolina Supreme Court was empowered to overrule the North Carolina Legislature’s redistricting decisions on the grounds of partisan gerrymandering. If state legislatures do not have to abide by state courts’ interpretations of state statutes and constitutions, state legislatures would have significantly great flexibility when drawing congressional districts. Furthermore, eliminating judicial review of partisan gerrymandering would eliminate one of the few checks and balances in the redistricting process. However, the ISLT remains a serious threat to redistricting, and to the right to vote, and the Supreme Court may rule on the validity of this theory in the very near future.

This paper is dedicated to documenting the Independent State Legislature Theory and its probable effects. As such, this paper will have three main chapters. Chapter I will explain the history of the Independent State Legislature Theory. This chapter will also analyze the legal arguments surrounding the ISLT, particularly as it was implemented in *Moore*. The relevant history involves precedents as recent as 2015 as well as cases that date back to the Civil War. The

⁴ *Rucho v. Common Cause*, No. 18–422 (Supreme Court 2019).

⁵ “Redistricting Litigation Roundup | Brennan Center for Justice,” accessed May 1, 2023, <https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0>.

discussion of the ISLT's history will provide insight into what form the Independent State Legislature Theory may take in a potential ruling.

Chapter II will illustrate the impacts of the various standards discussed in Chapter I. For example, it will analyze how the 2020 redistricting cycle might have been different if state courts were unable to act as a result of the Independent State Legislature Theory. This chapter includes an analysis of the immediate effects on redistricting, in states like North Carolina and New York (and the numerous other states which had their congressional districts drawn by courts). Chapter II will also discuss the relationship between partisan gerrymandering and political polarization.

The final chapter will discuss policy recommendations to mitigate the potential impacts discussed in Chapter II. This chapter will focus on state action, including the use of independent redistricting commissions. Chapter III will also outline potential frameworks for state-level legislation and state constitutional amendments. While this chapter will focus on state-level actions, it will also address the possibility (and limits) of federal action.

In sum, this paper aims to document the potential danger of the Independent State Legislature Theory and provide strategies to argue against the ISLT on a judicial level, as well as strategies for mitigating the harms of this damaging theory on a policy level.

CHAPTER I: THE TRAJECTORY OF THE INDEPENDENT STATE LEGISLATURE THEORY

I. OVERVIEW

This chapter will analyze the rise of the Independent State Legislature Theory (ISLT), from when it was a niche constitutional theory hinted at in *Bush v. Gore* (2000), to becoming the explicit subject of a pending Supreme Court case, *Moore v. Harper*. To understand this rise, this chapter will define the Independent State Legislature Theory, before analyzing the modern history and the historical evidence for the Independent State Legislature Theory. This analysis will be framed by a discussion of the pending Supreme Court case, *Moore v. Harper*, which will address the Independent State Legislature Theory. This chapter will conclude by examining potential implementations of an Independent State Legislature Theory.

II. INTRODUCTION OF *MOORE V. HARPER* AND THE INDEPENDENT STATE LEGISLATURE THEORY

a. INTRODUCTION OF THE INDEPENDENT STATE LEGISLATURE THEORY

It is in the face of this new wave of state court litigation that some litigants are advocating for the implementation of the Independent State Legislature Theory, an oft-rejected constitutional theory that would limit the powers of state courts and state governors over state legislatures. The Independent State Legislature Theory is vague but the core principle of all its possible variations is that state legislatures are subjected to fewer checks and balances when regulating congressional elections. This theory is a Constitutional argument about the interpretation of Article 1 Section 4, which states that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may

at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”⁶ The issue is the interpretation of the words “Legislature thereof.” Proponents of the Independent State Legislature Theory argue that because the ability to regulate time, place, and manner of Congressional elections was given directly to state legislatures, state courts and state constitutions cannot impact state legislatures’ decisions. The argument goes, so long as state legislatures are acting in a solely federal capacity, deriving their authority from the federal constitution, they should not be subject to state control. The Supremacy Clause of the Constitution reads “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land”⁷ The ability or inability for state courts to enforce state constitutions and state statutes has enormous importance for Congressional elections. If state legislatures were truly independent, it would eliminate nearly any mechanism of limiting political bias during the redistricting process. Extreme partisan gerrymandering, or the use of politically-biased districts, creates a disparity between elected officials and the electorate, undermining the core of democracy.

b. INTRODUCTION OF *MOORE V. HARPER*

The Independent State Legislature Theory is a timely issue given a pending Supreme Court case addressing it. *Moore v. Harper* asks the Supreme Court to review whether the North Carolina Supreme Court can overrule the North Carolina Legislature’s redistricting on the grounds of partisan gerrymandering. North Carolina is an important state for partisan gerrymandering cases as *Rucho* was in response to an extreme example of partisan gerrymandering in North Carolina. *Rucho* seemed to assign responsibility for handling partisan gerrymandering to state courts, and the North Carolina Supreme Court issued a ruling overturning the North Carolina districting. The

⁶ U.S. Const. art. I, § 4

⁷ U.S. Const. art VI

North Carolina Supreme Court ruled that the new districts “are unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North Carolina Constitution.”⁸ Seemingly in response to the U.S. Supreme Court, the North Carolina Supreme Court argued that “there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander”⁹ The dissent argued that this represents an “unprecedented expansion of judicial power.”¹⁰ Challenging the North Carolina Supreme Court, North Carolina state legislators have sued in federal courts, primarily basing their challenge on the Independent State Legislature Theory. This lawsuit asks that the Supreme Court rule that state legislatures are not bound by state courts’ interpretations of state constitutions.

The legal question posed by the Petitioners is “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. 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.”¹¹ In contrast, the respondents ask “Whether the Elections Clause of the U.S. Constitution forbids North Carolina courts from reviewing the validity of a legislatively enacted congressional redistricting plan under provisions of the North Carolina Constitution, and adopting an interim remedial plan, pursuant to state statutes providing for such judicial review and adoption of interim remedial plans.”¹² The Petitioners framing of this question

⁸ Harper v. Hall, No. NCSC-121 (North Carolina Supreme Court 2022).

⁹ Ibid, 6

¹⁰ Ibid

¹¹ Moore v. Harper. No. 21-1271. Brief for the Petitioner.

¹² Moore v. Harper. No. 21-1271. Brief for the Respondent.

uses language such as “vague” and “whatever it deems appropriate” to cast doubt upon whether or not Courts can adjudicate matters of partisan gerrymandering, while the respondents emphasize the issues of federalism, questioning whether the federal constitution (and federal courts) can “forbid” state courts from interpreting state statutes. The use of language such as “judicial review and adoption of interim remedial plans” serves to emphasize the ability of state courts.

The petitioners' argumentation relies primarily on two separate lines of reasoning. One is a textual argument, relying on the Article II, which states “Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.” Some conservative scholars read this as a Constitutional blank check to state legislatures. Given that the U.S. Constitution would supersede state constitutions, which often explicitly regulate how elections should be run, such a ruling would allow state legislatures greater leeway in matters of redistricting than nearly any other legislative area. One potential area of research is to understand what the Framers would have understood by state legislature, especially as the Constitution does not explicitly require division of powers in state governments. If legislature was understood to be a proxy for government rather than a bicameral legislative body, it would significantly undermine this theory. The second line of argumentation uses similar reasoning to *Rucho v. Common Cause*, citing concerns of judicial overreach. These concerns touch on the risks of judicial intervention—non-elected officials determining the fate of our elections—and the risks of politicizing the judicial branch by requiring the courts to engage in partisan decisions.

III. JUDICIAL CONTROL OF ELECTIONS AND FEDERALISM TRENDS

Moore v. Harper is ultimately about the relationship the federal government and its courts and constitution should have with states and state courts. State redistricting has historically been

subject to some federal control, but the degree of this control has shifted over time, with a recent reduction in federal authority. Federal control over states entails both legislative controls as well as judicial decisions. While state legislatures have general control over elections, state time, place, and manner regulations are still subject to Congressional control under the Article I § IV Elections Clause.¹³ One example of this is the establishment of a nationwide election day.¹⁴ But judicial decisions can also impact how states treat elections. For instance, a 1964 Supreme Court case, *Wesberry v. Sanders* ruled that within each state, congressional districts need to contain approximately equal numbers of people. This is often referred to as the “one person, one vote” rule.¹⁵

Despite the ability of the federal government to regulate elections, however, recent Supreme Court decisions on election law have generally reduced federal control over states and state redistricting. Since 2010, there have been major cases involving the implementation of the 1964 Voting Rights Act, which addresses racial voting inequities, and partisan voting gerrymandering. These cases have reduced federal authority. In *Shelby County v. Holder* (2012), the Supreme Court ended the use of preclearance under the Voting Rights Act, which required certain states, including Alabama, to have redistricting plans approved by a federal authority before they could be implemented.¹⁶ This gave greater leeway to the sixteen states which were subject to preclearance, at the expense of federal authority. In practice, this ruling reduced the authority of the federal judiciary to regulate state legislatures’ ability to redistrict.

¹³ U.S. Const. Art 1 § 4

¹⁴ 2 U.S. Code § 7: Time of Election.

¹⁵ Whitaker, L Paige, “Congressional Redistricting 2021: Legal Framework” (Congressional Research Service, n.d.), <https://crsreports.congress.gov/product/pdf/LSB/LSB10639>.

¹⁶ *Shelby County v. Holder*, No. 12-96 (Supreme Court 2012).

More recent rulings have limited the efficacy of the Voter Rights Act. In particular, *Brnovich v. DNC* (2021) limited §2 of the Voting Rights Act, by allowing changes in election practice, such as not allowing out-of-precinct ballots and prohibiting third-party ballot collection, which had a racially discriminatory impact but were, at least in theory not implemented to racially discriminate. In the majority opinion, Justice Alito argued “that facially neutral voting practices violate §2 only if motivated by a discriminatory purpose.”¹⁷ *Brnovich* weakens §2 and reduces federal control over redistricting. *Brnovich* is therefore another example of federal control over elections being reduced by recent judicial actions.

Perhaps the most important case for understanding *Moore v. Harper* is *Rucho v. Common Cause* (2019). In *Rucho v. Common Cause* (2019), the Supreme Court held that partisan gerrymandering, or the creation of politically biased districts, poses a nonjusticiable question for federal courts, leaving issues of partisan gerrymandering to state courts. The majority opinion states that “None of the proposed “tests” for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable.”¹⁸ Given Federal courts' refusal to handle partisan gerrymandering, litigants are now directing their efforts in state courts. There have been high-profile legal battles in states such as New York, Florida, and Ohio, contesting maps on grounds of political discrimination as well as racial discrimination, which Federal courts may still review.¹⁹ This decision reduced the ability of the federal judiciary system to review the actions of state legislatures and heightened the importance of state court decisions on partisan gerrymandering.

¹⁷ *Brnovich v. DNC*, No. 19–1257 (Supreme Court 2021).

¹⁸ *Rucho v. Common Cause.*, 3

¹⁹ “Redistricting Litigation Roundup | Brennan Center for Justice.”

Both *Shelby County* and *Rucho* fit into a broader trend of reducing the leeway Congress is granted. *Shelby County* required Congress to legislate with a more precise formula if it wanted to reinstate preclearance for certain states. *Rucho* ruled that there were no clear standards by which to adjudicate gerrymandering, rendering the Courts helpless. Specific Congressional action would be a potential remedy, however. Both decisions, therefore, require very specific policymaking from Congress. This trend can be seen in other areas of jurisprudence, such as the “Major Questions Doctrine.” In *West Virginia et al. v. Environmental Protection Agency et al.* (2022), the Court articulated the Major Questions Doctrine and overruled the Environmental Protection Agency (EPA)’s Clean Power Plan rule, which limited emissions from power plants.²⁰ The Court held that “Under that [the Major Questions Doctrine] ... courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”²¹ This use of the Major Questions Doctrine is a new jurisprudential approach and has enormous ramifications for administrative power,²² but fits into a larger trend of a conservative Supreme Court limiting the authority of the federal government.

Moore v. Harper, however, may be a potential outlier in these trends of federalism. Because *Rucho* prohibits federal courts from addressing partisan gerrymandering, the authority of state courts and state legislatures was greatly expanded. In theory, *Rucho* meant that state courts would be able to determine what is inappropriate partisan gerrymandering. *Moore v. Harper* has the potential to reverse that trend. Because *Rucho* reduced the authority of federal courts, it seemed to place greater authority in the hands of state courts. In contrast, a ruling that state courts must

²⁰ *West Virginia et al. v. Environmental Protection Agency et al.*, No. 20–1530 (Supreme Court 2022).

²¹ *West Virginia et al. v. Environmental Protection Agency et al.* (2022), 11

²² Daniel Deacon and Leah Litman, “The New Major Questions Doctrine,” *Law & Economics Working Papers*, January 1, 2022, 1.

abide by federal courts on issues of congressional redistricting would expand federal power. *Moore v. Harper* has the potential to expand the authority of the Supreme Court over state courts.

IV. INCEPTION OF THE INDEPENDENT STATE LEGISLATURE THEORY

While the question of the ISLT is being considered by the Supreme Court, this theory is relatively new. The history of the Independent State Legislature Theory (ISLT) began during the 2000 presidential election with *Bush v. Gore*. In a non-majority concurrence, Chief Justice Rehnquist argued that “in ordinary cases, the distribution of powers among the branches of a state’s government raises no questions of federal constitutional law, subject to the requirement that the government be Republican in character. See U. S. Const., Art. I, §4. But there 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.”²³ Because this argument was in a non-majority concurrence, it is not a binding precedent, but this argument was used by Justice Rehnquist to justify ignoring the Florida Supreme Court’s ruling, which called for an expanded recount of the ballots in the 2000 presidential election. This reasoning was used to argue that the Supreme Court had jurisdiction over matters of state law, not that state courts did not have jurisdiction over redistricting (even if the Supreme Court could overrule state courts). In other words, this quote does not imply that state courts do not have judicial review over state legislatures but does indicate that Justice Rehnquist believed that state legislatures may be operating in a federal capacity. Nonetheless, the idea that state legislatures were operating in a federal capacity--i.e., that congressional redistricting is a federal function—provides the basis for the modern conception of the Independent State Legislature Theory.

²³ *Bush v. Gore*, No. 00-949 (Supreme Court 2000), Rehnquist Concurring

V. HISTORICAL EVIDENCE FOR THE INDEPENDENT STATE LEGISLATURE THEORY

When attempting to analyze the validity of the Independent State Legislature Theory, it is helpful to review both the Founders' interpretation of the Elections Clause as well as more recent precedents. The hallmarks of a truly independent state legislature include seeing redistricting as a federal function, not being subject to state constitutions, and resilience against ballot initiatives reducing state legislative power. A review of precedent should look for evidence of these traits.

A review of relevant history and precedent reveals that the ISLT is a new understanding of "state legislature," and that there is little evidence of these specific practices. Furthermore, a review of precedent will show that there are cases affirming limitations on state legislatures.

Petitioners claim "state legislature" in the Elections Clause means that state legislatures are not subject to state-level checks and balances. Looking at the drafting of the Elections Clause can disprove that interpretation. Furthermore, a review of precedents and past practice provides insight into the legal arguments and helps show if the theory is grounded in the Constitution, as the petitioners in *Moore v. Harper* claim.

Reviewing the framing of the Elections Clause, there is no evidence that the Founders intended an Independent State Legislature Theory or even parts of the ISLT. Even at the time of the drafting of the Constitution, state legislatures existed and derived the entirety of their authority from state constitutions.²⁴ Furthermore, constraining state legislatures was a primary concern of the framers. Reframed, the Elections Clause is meant to constrain state legislatures. The Elections Clause provides the federal government with a mechanism to prevent the excess of state legislatures.²⁵ This makes it unlikely that the Framers would attempt to reduce the number of

²⁴ *Moore v. Harper*. Brief amicus curiae of Scholars of the Founding Era.

²⁵ *Ibid*, 20

checks and balances on state legislatures. Furthermore, it does not make sense to construe the establishment of an additional check on state legislature authority as the elimination of all remaining checks. At the time of writing, the Framers understood how state legislatures existed and operated, and likely would have understood them as created and bound by the constitutions that created them.

The lack of historical evidence is perhaps best characterized by petitioners' reliance on the so-called Pinckney Plan. Written by Charles Pinckney, a South Carolinian Founding Father, the Pinckney Plan is supposedly a proposed plan for the American government. In theory, it was one of the plans discussed during the 1787 Constitutional Convention.²⁶ The petitioners in *Moore* claim the Pinckney plan shows that the Founding Fathers changed the Elections Clause to read from "by each State" to "legislature thereof." If the Pinckney document was valid, this might show that the Founders intended to grant authority specifically to state legislatures, although it does not clarify if those state legislatures were still subject to checks and balances. However, the authenticity of this document is heavily disputed. It was even challenged at the time of its publication in 1818, 30 years after the Constitutional Convention. James Madison argued that "it was apparent that considerable error had crept into the paper."²⁷ Notably, "the "plan" ... bore a 1797 watermark,"²⁸ postdating its supposed origin by a decade. The Pinckney Plan is largely discredited as a source of evidence of the Constitutional Convention. That the petitioners have relied on a largely discredited document to prove the minutia of a word change signifies the lack of contemporary historical evidence for viewing state legislatures as independent.

²⁶ Hansi Lo Wang, "A Controversial Election Theory at the Supreme Court Is Tied to a Disputed Document," *NPR*, November 3, 2022, sec. Elections, <https://www.npr.org/2022/11/03/1130711272/supreme-court-independent-state-legislature-theory-elections-pinckney-plan>.

²⁷ Wang.

²⁸ *Moore v. Harper*. Brief amicus curiae of Scholars of the Founding Era.

A review of precedent also demonstrates the weakness of the petitioners' historical arguments. While no case has directly addressed the Independent State Legislature, some cases have addressed legislative control of elections in ways that can provide insight into the ISLT. The earliest cases which might be relevant to the ISLT are state-level Civil War voting cases, which generally hinged upon state legislatures' abilities to confer the right to vote to soldiers deployed out of their home states. This early battle over state legislature independence and absentee voting is unusual, however, because the voting habits of soldiers differed significantly from non-soldiers.²⁹ The soldier vote leaned strongly Republican and disenfranchising those votes would have benefited the Democratic party.³⁰ This created strong partisan incentives for state legislatures (and often state courts) which may have impacted the legal reasoning they used.

The soldier voting case which provides the clearest defense of state legislatures having greater authority when handling elections is from New Hampshire, whose soldiers fought for the Union. As scholars have pointed out, political concerns likely had a significant impact on legal jurisprudence, as Courts were hesitant to disenfranchise soldiers during the war.³¹ Potentially because of these political concerns, the New Hampshire Supreme Court held that enfranchising soldiers outside of state bounds "is not an exercise of [the New Hampshire State Legislature's] general legislative authority under the Constitution of the State, but of an authority delegated by the Constitution of the United States."³²

Notably, unlike the Independent State Legislature Theory, this decision does *not* imply that the New Hampshire state legislature was not bound by the New Hampshire state constitution.

²⁹ Frank Klement, "The Soldier Vote in Wisconsin during the Civil War," *The Wisconsin Magazine of History* 28, no. 1 (1944): 37–38.

³⁰ *Ibid*

³¹ Hayward Smith, "History of the Article II Independent State Legislature Doctrine," *Florida State University Law Review* 29, no. 2 (January 1, 2001): 766, <https://ir.law.fsu.edu/lr/vol29/iss2/14>.

³² *Ibid*, 767

Under the New Hampshire Supreme Court’s interpretation, the legislature is still subject to judicial review but is not deriving its authority to enfranchise from the state constitution. The New Hampshire Supreme Court wrote that the state legislature had the authority to regulate elections, “except so far as the legislative authority over the subject has been restrained by the Constitution of this State, or that of the United States.”³³³⁴ The New Hampshire legislature is still operating in the framework of the state constitution.

Furthermore, the strength of this precedent is limited not only by its wartime context but also as a state opinion rather than a federal one. This means that the precedent is not binding for all states and could be overruled by a federal court, which would take precedence when interpreting federal law.

The first time the federal government addressed the potential independence of state legislatures was in response to the Michigan state case *Baldwin v. Trowbridge* (1865).³⁵ Michigan’s state constitution mandated that voters vote “in the various townships or wards in which they resided,”³⁶ but soldiers were unable to do so during the war. The Republican-leaning soldier vote changed the outcome of the election, causing Trowbridge, the Republican candidate to be elected over the Democratic candidate, Baldwin.³⁷ Baldwin challenged the vote based on the Michigan constitution. Neither a Michigan state court nor a federal court ruled on the legitimacy of Trowbridge’s election. Instead, it was the U.S. House of Representatives that voted to affirm Trowbridge’s election. Both houses of Congress have the constitutional ability to judge the validity of the elections of their members. They draw this power under the authority of Article 1§

³³ Smith, “History of the Article II Independent State Legislature Doctrine,” 768.

³⁴ *Ibid*, 768

³⁵ *Ibid* 769

³⁶ *Ibid*

³⁷ “Baldwin, Augustus Carpenter,” History, Art, and Archives of the United State House of Representatives, accessed May 5, 2023, [https://history.house.gov/People/Listing/B/BALDWIN,-Augustus-Carpenter-\(B000085\)/](https://history.house.gov/People/Listing/B/BALDWIN,-Augustus-Carpenter-(B000085)/).

5, which states that “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,”³⁸ This decision implies that state legislatures can regulate the time, place, and manner of elections in direct opposition to state constitutions. This would be a strong defense of the independence of state legislatures if it came from a federal court. However, this discussion comes from the House of Representatives, rather than the judiciary. Under Article 1 § 5, each House of Congress has the authority to judge congressional elections, but the implementation of Article 1 § 5 has been ad-hoc and the import of these rulings is unclear.³⁹

While Article 1 § 5 grants Congress the power to adjudicate congressional elections, it does not grant Congress the power to interpret the Constitution, which is what *Baldwin v. Trowbridge* required. Congress has the authority to judge the validity of elections, but in *Baldwin v. Trowbridge*, the validity of the election is contingent upon the meaning of a separate clause of the Constitution. While Congressional writings and rulings may help determine how legal issues are viewed and implemented, this Congressional report does not technically constitute a legal precedent in the same way a judicial ruling would. The Supreme Court has indeed recognized the importance of legislative interpretations of the Constitution.⁴⁰ Professors Gersen and Posner write “A long history of a congressional practice is often taken as evidence that the Constitution does not prohibit that practice. Indeed, in exercising only narrow judicial review of statutes, the Supreme Court often emphasizes that it takes a deferential approach- implicitly acknowledging that Congress's judgment about the constitutionality of legislation deserves weight.”⁴¹

³⁸ U.S. Const. art. I, § 5

³⁹ Lisa Manheim, “Judging Congressional Elections,” *Georgia Law Review* 51 (January 1, 2017): 359.

⁴⁰ Jacob Gersen and Eric Posner, “Soft Law: Lessons from Congressional Practice,” *Stanford Law Review* 61 (January 1, 2008): 573.

⁴¹ Gersen and Posner, 612.

However, a review of the arguments used, combined with the broader context, reveals the weakness in this precedent. The majority report, which allowed the Michigan state legislature to supersede the Michigan state constitution, attempts to distinguish between state constitutional conventions and legislatures. If the power of a constitutional convention was separate from that of a legislature, the legislature would not be bound by the convention, given that it could ground all its authority in the Constitution. Conversely, if a convention was simply an exercise of legislative authority, then the legislature would be bound by itself.⁴² This latter option is more likely. State legislatures are not created in a vacuum. To provide a contingency argument, the majority report argued that even if state legislatures were theoretically bound by the outcomes of state conventions, those conventions lacked the authority to either expand or constrict legislature power, given the federal constitution.⁴³ If state legislatures derive their power from conventions, it is senseless that conventions would not be able to expand or constrict their authority, even if the state legislature was operating in a federal capacity when it handled issues of elections.

The minority report, writing that legislatures are bound by their constitutions, claims that the founders intended for the legislatures to be bound by state constitutions. Hayward Smith, a scholar on the Independent State Legislature Theory, writes that the minority report construes “Article I, Section 4's 'legislature' as a dependent legislature was consistent with not only the original purpose of the clause but also the 'the proper definition of the term,' the 'history' of the section, and precedent established by the Committee of Elections and the House.”⁴⁴

The majority report should be viewed with significant skepticism, even beyond the specific arguments. For one, Congress was responding to immense political pressure. Given the wartime

⁴² Smith, “History of the Article II Independent State Legislature Doctrine,” 771.:

⁴³ Smith, 771.

⁴⁴ Smith, 772.: 772

pressures of politics, as well as the traditional pressures for politicians to help maintain the majority positions of their own parties, the results of the House findings could have very easily been different if there was a different political make-up. Justice Ginsburg, criticizing any reliance on *Trowbridge v. Baldwin*, writes that “it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision.”⁴⁵ Furthermore, the House of Representatives is different as a fact-finding institution when compared to the Courts. We can see this in the majority report, which spends very little time analyzing how the framers envisioned state legislatures, or even analyzing legal precedent. The House report should be interpreted as a fundamentally political document. Professor Smith writes “As Justice Thomas once explained in similar circumstances, “[a]ctions taken by a single House of Congress in shed little light on the original understanding of the Constitution.”⁴⁶

This majority report was cited in the Supreme Court case *McPherson v. Blacker* (1892), which affirmed a Michigan case providing deference to the Michigan state legislature,⁴⁷ but not to argue for an Independent State Legislature Theory—in fact, potentially counter to an ISLT. The Supreme Court affirmed the Michigan legislature’s ability to choose presidential electors.⁴⁸ While this affirms the authority of the state legislature, it does not mean that the state legislature is not bound by checks and balances. And the decision explicitly notes how the Michigan legislature was acting within the bounds of the Michigan state constitution, implying that the state legislature was subject to state constitutions.

⁴⁵ *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015), 29

⁴⁶ Smith, “History of the Article II Independent State Legislature Doctrine,” 539.: 539

⁴⁷ *McPherson v. Blacker*, No. 1170 (U.S. Supreme Court 1892).

⁴⁸ *Ibid*

Through the 19th century, therefore, there is at times a vague deference to state legislatures but no judicial precedents arguing that state legislatures are incapable of delegation and are not subject to state constitutions or judicial review. These are the hallmarks of the current ISLT and there is no clear case that comes close to providing a defense for any of them.

During the 20th century, there is a clear trend of rejecting any semblance of an Independent State Legislature Theory. Two of the most important cases are *Hawke v. Smith* (1920) and *Smiley v. Holm* (1932).⁴⁹ Neither of these cases deals with the ISLT in its entirety but they demonstrate specific situations in which state legislatures were subject to checks and balances. At issue in *Hawke* was whether the ratification of a Constitutional amendment was subject to a referendum, as per a state constitutional requirement. The Court held that while legislative power had in part been placed in the people, it was not legislative power, but the state legislature which had the ability to ratify constitutional amendments. The Supreme Court defined the term legislatures as “the deliberative, representative bodies that make the law for the people of the respective states; the Constitution makes no provision for action upon such proposals by the people directly.”⁵⁰ *Hawke* distinguishes the ratification of a federal constitutional amendment from the traditional legislative path. While at first, this would seem to lend support to an Independent State Legislature Theory, given how it may carve out a unique constitutional role for state legislatures, overriding state constitutions, it undermines it. The difference is that the regulation of time, place, and manner represent a legislative function—i.e., “manner legislation.” Unlike with the ratification of an amendment, which provides two specific paths for a federal process, the Elections Clause simply cedes authority for manner regulations from the federal government to state legislatures.

⁴⁹ Smith, “History of the Article II Independent State Legislature Doctrine,” 549.:

⁵⁰ *Hawke v. Smith*, No. 582 (U.S. Supreme Court 1920).

While it still may seem like *Hawke* does not sufficiently clarify why state legislatures do not receive the same leeway they did in *Hawke* during redistricting, the Court clarified in *Smiley v. Holm* (1932), which ruled that a Minnesota redistricting process was subject to a gubernatorial veto, that state legislatures were subject to traditional checks and balances during the redistricting process. The Court held, that “it clearly follows that there is nothing in Article I, § 4, which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the governor as in other cases of the exercise of the lawmaking power. Accordingly, in this instance, the validity of House File No. 1456 cannot be sustained by virtue of any authority conferred by the Federal Constitution upon the Legislature of Minnesota to create congressional districts independently of the participation of the governor as required by the state constitution with respect to the enactment of laws.”⁵¹ This is an explicit rejection of state legislatures not being subject to traditional checks and balances when redistricting. If a legislature is subject to a state veto as outlined in a state constitution, it follows that the state legislature is subject to the entirety of the state constitution.

If the Court were to establish an Independent State Legislature Theory, the Court would likely have to directly overturn this precedent. Furthermore, overturning *Smiley v. Holm* would imply that all historical gubernatorial vetoes of congressional districts have been invalid. Even in just the 2020 redistricting process, this would have invalidated vetoes in several states. *Smiley v. Holm* remains the most relevant historical precedent on the leeway granted to state legislatures when redistricting. There were no further cases of note until the 21st century.

VI. MODERN RULINGS ON THE INDEPENDENT STATE LEGISLATURE THEORY

⁵¹ *Smiley v. Holm*, No. 617 (U.S. Supreme Court 1932).

But if the 20th century seemed to reject the Independent State Legislature Theory, how then is it being addressed in an upcoming case? The modern push for the Independent State Legislature Theory does not exist in a vacuum. While it may have appeared in *Bush v. Gore*, there have been cases since which have addressed parts of the ISLT, most notably in *Arizona State Legislature v. Arizona Independent Redistricting Committee* (2015). In 2000, Arizona voters used a ballot initiative to create an independent committee to handle redistricting. This removed that power from the Arizona state legislature.⁵² During the following redistricting process in 2010, the Arizona legislature sued the redistricting committee, claiming the redistricting committee was a violation of the Elections clause. The Supreme Court held in a 5-4 decision that “lawmaking power in Arizona includes the initiative process, and that both §2a(c) and the Elections Clause permit use of the AIRC in congressional districting in the same way the Commission is used in districting for Arizona’s own Legislature.”⁵³

This affirmation of the ability to delegate to an independent redistricting committee is an implicit rejection of the Independent State Legislature Theory, as it allows the Arizona electorate the power of redistricting, while a proponent of the ISLT would place that power solely in the hands of the state legislature. However, the majority opinion is highly contextual; rather than writing a sweeping rebuke of the ISLT, it is grounded in the Arizona state constitution. Justice Ginsberg writes, “The Arizona Constitution further states that “[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative.” Art. XXII, §14. Accordingly, “[g]eneral references to the power of the ‘legislature’” in the Arizona Constitution “include the people’s right (specified in Article IV, part 1) to bypass their elected

⁵² *Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13-1314 (U.S. Supreme Court 2015).

⁵³ *Ibid*

representatives and make laws directly through the initiative.”⁵⁴ But while this is seemingly contextual to Arizona, the broader implication is that legislatures are subject to the general law-making process when redistricting. Justice Ginsberg writes, “In sum, our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking, which may include the referendum and the Governor’s veto.”⁵⁵ This is a clear rejection of the ISLT, even if the phrase is not used. The majority opinion in *Arizona* even cites *Smiley v. Holm*, using it as a good precedent as recently as 2015.

It is true that while the Arizona State Legislature lost the case, the decision was 5-4. However, even the dissenting opinion is not a clear argument for the Independent State Legislature Theory. The dissent does not argue that state legislatures are not bound by traditional checks and balances, but that the use of a voter ballot initiative is a process separate from the legislative process. While the legislative process could still be bound by legislatively derived barriers (such as laws preventing gerrymandering) and by judicial interpretation of state constitutions and laws, but cannot be determined by an extra-legislature process, such as a ballot initiative. *Arizona State Legislature v. Arizona Independent Redistricting Commission* hinged upon the constitutionality of delegating redistricting authority, despite Article I §4,⁵⁶ rather than if state legislatures are subject to checks and balances. In this sense, the majority opinion of *Arizona Independent Redistricting Commission* rejects the Independent State Legislature Theory by affirming that the state legislature does not have complete authority over redistricting, but the dissent does not actually support the ISLT because it does not argue that state legislatures are not subject to governors’ vetoes and state courts.

⁵⁴ *Arizona State Legislature v. Arizona Independent Redistricting Commission*. (2015)

⁵⁵ *Ibid*, 19

⁵⁶ Derek Muller, “Legislative Delegations and the Elections Clause,” *Florida State University Law Review* 43, no. 2 (January 1, 2016): 718.

VII. *MOORE V. HARPER* AND CURRENT ARGUMENTS

While historical precedent does not favor an Independent State Legislature Theory, multiple justices appear open to ruling in favor of the ISLT in an ongoing case, *Moore v. Harper*. *Moore v. Harper*, which will allow the Court to directly address whether state legislatures are bound by state court decisions. This case will review the North Carolina Supreme Court's overruling of North Carolina's redistricting process, which the North Carolina Supreme Court held to be partisan. Despite two modern precedents which did not affirm the ISLT, the outcome is uncertain.⁵⁷ At least four justices have indicated a willingness to consider enshrining the ISLT as precedent.⁵⁸ In response to an application for a stay against the North Carolina State Supreme Court's decision, Justice Alito wrote "This Clause could have said that these rules are to be prescribed "by each State," which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power, as States are generally free to allocate state power as they choose. But that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously."⁵⁹ While the majority of the Court rejected an application for a stay, Justice Alito's opinion was joined by Justice Thomas and Justice Gorsuch. Justice Kavanaugh argued that rather than stay the North Carolina Supreme Court's ruling, "the Court should grant certiorari in an appropriate case—either in this case from North Carolina or in a similar case from another State."⁶⁰ Justice Kavanaugh agreed "that the underlying Elections Clause question raised in the emergency application is important, and that both sides have advanced serious arguments on the merits."⁶¹ In

⁵⁷ Katherine Shaw, Leah Litman, and Carolyn Shapiro, "A New Supreme Court Case Threatens Another Body Blow to Our Democracy," *Online Publications*, July 2, 2022, <https://larc.cardozo.yu.edu/faculty-online-pubs/22>.

⁵⁸ Shaw, Litman, and Shapiro.

⁵⁹ *Moore v. Harper*, On Application for Stay, No. No. 21A455 (Supreme Court 2022).

⁶⁰ *Moore v. Harper*, On Application for Stay.

⁶¹ *Moore v. Harper*, On Application for Stay.

other words, at least four Justices have already signaled a potential openness to the Independent State Legislature Theory.

Moore v. Harper has attracted significant national attention. This is reflected in the amici briefs submitted, with over half of states signing on to amici briefs. State stances on *Moore v. Harper* are sharply divided along partisan lines. Republican-leaning states Arkansas, Arizona, Alabama, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Utah have filed an amicus brief in support of the petitioners, represented by Moore but standing for the North Carolina House of Representatives.⁶² Each of these states has a legislature with Republican majorities in both chambers.⁶³ Similarly, each has a Republican governor and attorney general.^{64,65} This amicus brief argues that the North Carolina Courts were acting as a legislature when they redrew the redistricting lines. These states argue, “The Framers could have assigned the power over federal elections in the first instance to states, without specifying which entity of state government would have primary responsibility. But recognizing that prescribing the times, places, and manner of federal elections is fundamentally a legislative role, the Framers specified that this delegated power would be exercised by “the Legislature thereof.”⁶⁶ This amicus brief calls for the Supreme Court to “reverse the North Carolina Supreme Court’s opinion imposing a court-drawn map in place of a legislatively-enacted one.”⁶⁷ The focus

⁶² *Moore v. Harper*, Brief of Arkansas, Arizona, Alabama, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Utah as Amici Curiae in Support of Petitioners, No. 21-1271 (n.d.).

⁶³ “Legislatures at a Glance,” National Conference of State Legislatures, April 12, 2023, <https://www.ncsl.org/about-state-legislatures/legislatures-at-a-glance>.

⁶⁴ “Attorney General (State Executive Office),” Ballotpedia, accessed May 5, 2023, [https://ballotpedia.org/Attorney_General_\(state_executive_office\)](https://ballotpedia.org/Attorney_General_(state_executive_office)).

⁶⁵ “Partisan Composition of Governors,” Ballotpedia, accessed May 5, 2023, https://ballotpedia.org/Partisan_composition_of_governors.

⁶⁶ U.S. Const. art. I, § 4

⁶⁷ *Moore v. Harper*, Brief of Arkansas, Arizona, Alabama, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Utah as Amici Curiae in Support of Petitioners.

on courts redrawing district lines is potentially misleading, given that the North Carolina Supreme Court ruled that “the General Assembly shall now have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution.”⁶⁸ A North Carolina Superior Court did redraw redistricting lines, but only after the North Carolina Supreme Court ruled that the General Assembly would have the opportunity to redistrict according to the non-partisan guidelines outlined in *Harper v. Hall*.

In contrast, California, Colorado, Connecticut, Delaware, the District of Columbia, Illinois, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin filed an amicus brief in support of the respondents.⁶⁹ These states largely have legislatures with both chambers controlled by Democrats, but not universally.⁷⁰ Minnesota has a split legislature and Wisconsin has both chambers controlled by Republicans. However, both Minnesota and Wisconsin have Democratic governors and Democratic Attorney Generals. It is these officials who are largely responsible for articulating state stances on legal issues. No conservative attorney general filed an amicus brief supporting the respondents. These states argue Petitioners seek a novel rule requiring states to regulate the time, place, and manner of federal elections using only one arm of state government— their legislatures,⁷¹ and “even the somewhat narrower theories advanced by petitioners’ amici threaten enormously disruptive consequences: federalism will be undermined, single elections will be governed by different rules for state and federal races federal

⁶⁸ *Harper v. Hall*, NC Supreme Court, page 138, paragraph 223. 2022-NCSC-17, <https://cases.justia.com/north-carolina/supreme-court/2022-413pa21.pdf?ts=1644885392>

⁶⁹ Moore v. Harper, Brief of the District of Columbia, et al as Amici Curiae in Support of Respondents, No. 21-1271 (n.d.).

⁷⁰ “Legislatures at a Glance.”

⁷¹ Moore v. Harper, On Application for Stay.

court lawsuits in an emergency posture will multiply, and courts and parties alike will struggle to manage unworkable legal standards.”⁷²

VIII. POTENTIAL *MOORE V. HARPER* STANDARDS

These state-submitted amici briefs raise an important question— if the Court chooses to endorse the Independent State Legislature Theory, what variation of the Independent State Legislature Theory would the Court implement? Petitioners’ brief, past cases, and amicus briefs provide examples of potential approaches.

A. LEGISLATIVELY DRAWN DISTRICTS

Perhaps the most likely possibility is that the Court could affirm the judicial system’s ability to review Congressional redistricting but strike down the ability for courts to draw and implement Congressional districts themselves. This argument is articulated in the amicus brief submitted on behalf of Arkansas et al. This standard is a relatively narrow—if still radical--interpretation, even compared to the briefs of the Petitioner in *Moore v. Harper*. The state amicus brief focuses on the North Carolina Superior Court’s redrawing of districts, claiming that, while the North Carolina Supreme Court can interpret the North Carolina constitution and “clear text” of North Carolina statutes, the drawing of districts is a legislative function. Under this interpretation of the Independent State Legislature Theory, the North Carolina Supreme Court could still have ruled the North Carolina districts unconstitutional but should have required the North Carolina legislature to redraw the districts rather than appointing a special master to draw the districts. In other words, the courts could essentially veto partisan maps, but cannot redraw them themselves.

⁷² *Moore v. Harper*, On Application for Stay at 3–4.

While this is a narrower interpretation of the Independent State Legislature Theory, however, it is still a significant departure from current practice. Court-drawn districts are a regular part of redistricting. This practice has been used repeatedly during modern history. During the 2020 redistricting cycle, the Courts drew the districts in Connecticut, Pennsylvania, New York, North Carolina, Virginia, and Wisconsin.⁷³ During the 2010 redistricting cycle, courts drew congressional districts in Colorado, Connecticut, Florida, Kansas, Minnesota, Mississippi, Nevada, New Mexico, New York, Pennsylvania, and Virginia.⁷⁴

Judicial redrawing of congressional districts while unheard of before the 1960s, has become an established practice over the last half-century.⁷⁵ This rise in reliance on court-drawn congressional districts reflects two related phenomena. First, it reflects an increase in federal control over state elections during the 1960s, most notably with the 1965 Voting Rights Act. The passage of federal legislation regulating state legislature's actions increased the degree to which courts were forced to adjudicate redistricting claims. Landmark cases include *South Carolina v. Katzenbach* (1966), which upheld the Voting Rights Act.⁷⁶

The second phenomenon is the shift in the attitude of the Court. The liberal Warren court was far more willing to engage with redistricting. In 1946, when asked to address inequitable Congressional districts in Illinois, the Court wrote that "We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations based on which this Court, from time to time, has refused to intervene in

⁷³ "National Overview," *All About Redistricting* (blog), accessed May 2, 2023, <https://redistricting.ils.edu/national-overview/>.

⁷⁴ *Ibid*

⁷⁵ Nathaniel Persily, "When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans," *Faculty Scholarship at Penn Carey Law*, June 7, 2005, 1131, https://scholarship.law.upenn.edu/faculty_scholarship/74.

⁷⁶ *South Carolina v. Katzenbach*, No. 383 U.S. 301 (Supreme Court 1966).

controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meet for judicial determination.”⁷⁷ During the early 20th century, redistricting was generally understood as a political issue and therefore non-justiciable by the Courts.

However, when adjudicating redistricting in Tennessee in *Baker v. Carr* (1962), the Court wrote that “the question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking.”⁷⁸ *Baker* marked a shift in the role of the Courts’ willingness to arbitrate the redistricting process.⁷⁹ In other words, the amicus brief submitted on behalf of several conservative states would have the Court cast doubt on over half a century of past practice.

This approach, which prohibits redrawing of districts by state courts but does allow for judicial review of redistricting, could also limit state courts in other respects. The Court’s decision could place extreme importance on deference to state legislatures’ authority, allowing state courts to only contradict state legislatures when there is an explicit violation of state constitutions and/or a clear state statute, or based on federal grounds. In practice, this would mean that the federal Supreme Court would be instructing state courts on how deferent they should be to state legislatures. This would represent a significant federalism issue. It is also unclear how enforceable

⁷⁷ *Colegrove v. Green*, No. 328 U.S. 549 (Supreme Court 1946), 328

⁷⁸ *Baker v. Carr*, No. 369 U.S. 186 (Supreme Court 1962).

⁷⁹ Robert B. McKay, “Reapportionment: Success Story of the Warren Court,” *Michigan Law Review* 67, no. 2 (1968): 226, <https://doi.org/10.2307/1287416>.

such instructions would be, given the leeway state courts have when interpreting state constitutions.

B. DISTINCTION BETWEEN SUBSTANTIVE AND PROCEDURAL BARRIERS

The standard advanced by Petitioners in *Moore v. Harper* is a distinction between substantive and procedural barriers to redistricting. While this distinction can occasionally be difficult to parse, generally procedural barriers refer to concrete requirements outlined by statute or constitution while substantive barriers would require some degree of judgment, such as a determination if a district is fair. An example of a procedural barrier would be a gubernatorial veto. Article I Section 7 of the U.S. Constitution requires that “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it”⁸⁰ This is called the Presentment Clause and it represents a concrete procedural requirement to passing legislation. Under the Petitioner’s standard, state legislatures would still be bound by similar requirements in state constitutions. Conversely, the language from the North Carolina Supreme Court relies on the reading in concepts of fairness in the right to vote. The North Carolina Supreme Court held, “The foundational Democratic principles of equality and popular sovereignty enshrined in our Constitution’s Declaration of Rights vest in the people of this state the fundamental right to vote on equal terms.”⁸¹ This represents a substantive requirement because the North Carolina Supreme Court needs to determine what “equal terms” means.

⁸⁰ U.S. Const. Art 1 Sec 7

⁸¹ *Harper v. Hall* (2022). North Carolina Supreme Court. 2022-NCSC-121

Petitioners are likely advocating for this standard to avoid the significant quantity of precedents, such as *Arizona Redistricting Commission* (2015) and *Smiley v. Holm* (1932), which was regularly referenced in oral argument. *Smiley v. Holm* is a clear example of the principle above, as the Court held that state redistricting was still subject to a gubernatorial veto. Petitioners are also likely advancing this standard given how the Supreme Court handled substantive issues in *Rucho v. Common Cause*. In fact, much of the argumentation used during oral argument highlighted the similarities in reasoning between *Moore v. Harper* and *Rucho v. Common Cause*. Petitioners would like the Supreme Court to hold, like in *Rucho*, that substantive issues are not appropriate issues for the judicial system, because it requires the courts to legislate their own ideas of equity or fairness without manageable standards, while those judgments should be reserved entirely to the legislature.

This standard has multiple flaws. First, it is not internally coherent. If the Independent State Legislature Theory is truly a constitutional claim which relies on state legislatures operating in a federal capacity, it does not make sense that they would be subject to certain state constitutional requirements and not any other ones. This procedural vs substantive distinction is certainly not found in the text of the Elections Clause. Petitioners write that “while the federal Constitution allocates the authority to regulate federal elections to state legislatures, it of course does not create the state legislatures themselves.”⁸² This is used to imply that state legislatures are still bound by given procedural requirements, but that would imply that state legislatures are still bound by state constitutions, which create state legislatures. If this is true, it is unclear why state legislatures can selectively decide which constitutional provisions apply.

⁸² *Moore v. Harper* (2022). Brief of Petitioners, pg 24.

This standard also poses serious federalism issues. The petitioners' argument that substantive issues are different than procedural ones because it requires the judgment of the court is counter-productive. This argument would require federal courts to determine how state courts rule on their own constitution—in fact, it would limit state courts' abilities to apply parts of their own state constitutions. This would represent a significant expansion of federal judicial authority over state courts, which typically have ultimate authority over interpreting their own state constitutions. Ultimately state courts are the actors to decide if they have judicially manageable standards by which to interpret their own state constitutions. While this leaves state courts the ability to adopt a *Rucho*-like standard, it does not mean that the Supreme Court should unilaterally create that precedent for state courts.

C. COMPLETE LEGISLATIVE AUTONOMY

The most extreme potential standard for the Independent State Legislature Theory is a complete grant of authority to state legislatures, at the expense of state constitutions, state governors, and both state and federal courts. State legislatures would derive all authority to redistrict from the Elections Cause and would rely on the Supremacy Clause to override state constitutions. The Supremacy Clause states “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”⁸³ and ensures that the federal constitution supersedes state constitutions. If state

⁸³ U.S. Const. Art VI, Sec 2

legislatures were acting solely based on the federal constitution, that would make them unaccountable to state constitutions and potentially state courts.

The only constraints on state legislatures would come from federal regulation of elections and self-imposed restrictions. State legislatures would still be subject to the Voting Rights Act, for example. And state legislatures would still be bound by other federal constitutional election requirements, such as the 24th Amendment, which prohibits poll taxes.⁸⁴

⁸⁴ U.S. Const. 24th Amend.

CHAPTER II: THE PRACTICAL CONSEQUENCES OF THE INDEPENDENT STATE LEGISLATURE THEORY

I. OVERVIEW

Regardless of the standard adopted, the implementation of the Independent State Legislature Theory is likely to increase both the quantity and severity of partisan gerrymandering. This chapter will begin with an overview of redistricting and a brief discussion of one way to measure partisan gerrymandering. This chapter will then discuss the practical implications of three potential standards, discussed in order of magnitude, beginning with the narrowest standard and ending with the most extreme standard. This means that all authority for redistricting will be placed in the hands of the state legislature, without further check. While these standards were established in Chapter 1, the analysis here will differ from Chapter 1 because it will address practical implications rather than theoretical evidence and concerns.

II. BACKGROUND ON REDISTRICTING AND MEASURING GERRYMANDERING

a. THE STATE OF REDISTRICTING

Congressional redistricting is a process that happens in each state once every decade after each census, in accordance with changes in state populations. Census data can increase or decrease the number of congressional representatives each state has, and so redistricting occurs every decade. Even if a state maintains the same number of congressional representatives, census data allows districts to be better drawn to reflect various communities. Technology and increased access to data and mapping software such as ArcGIS have dramatically changed the practical

implementation of redistricting even in the last few decades.⁸⁵ Redistricting is determined individually in each state, with most states relying on state legislatures to draw district boundaries.

While generally states have significant leeway in how they draw districts, there are some requirements. For instance, Supreme Court has held that districts must be approximately equal in population.⁸⁶ Additionally there are legislative requirements, such as under the Voting Rights Act, which limits de facto disenfranchisement of African-Americans and other minorities. However, besides Voting Rights Act litigation and the judicially imposed requirement of “one person one vote,” there is very little federal control of redistricting.⁸⁷

This means that the states have each developed their own systems, and while there are similarities between many of them, the details of each process differ. Most states rely on their state legislatures to redraw congressional districts. In fact, 33 of the states give primary redistricting authority to state legislatures, although a minority of those states also use advisory committees to guide redistricting policy.⁸⁸ The majority of state legislatures are bound by gubernatorial vetoes, although North Carolina and Connecticut’s state legislatures are not.⁸⁹ 9 states use independent redistricting commissions.⁹⁰ This includes the Arizona Commission at issue in *Arizona Independent Redistricting Commission*. These commissions tend to be either bi-partisan or non-partisan. Redistricting commissions, often established through ballot initiatives, have the goal of

⁸⁵ Micah Altman, Karin MacDonald, and Michael McDonald, “From Crayons to Computers: The Evolution of Computer Use in Redistricting,” *Social Science Computer Review* 23, no. 3 (August 1, 2005): 334, <https://doi.org/10.1177/0894439305275855>.

⁸⁶ *Wesberry v. Sanders*, No. 22 (U.S. Supreme Court 1964).

⁸⁷ Eckman, Sarah J., “Congressional Redistricting Criteria and Considerations” (Congressional Research Service, November 15, 2021).

⁸⁸ “State-by-State Redistricting Procedures,” Ballotpedia, accessed May 2, 2023, https://ballotpedia.org/State-by-state_redistricting_procedures.

⁸⁹ “State-by-State Redistricting Procedures.”

⁹⁰ “State-by-State Redistricting Procedures.”

removing or distancing politicians. Elected officials may be subject to political pressures to maintain party dominance, limiting their incentive to redistrict in a non-partisan manner.⁹¹

b. ISSUES WITH REDISTRICTING

State legislatures are highly partisan institutions and therefore have significant partisan incentives to draw districts that benefit the majority party. Altering district boundaries can radically change the outcomes of congressional elections, as well as the elections of state representatives. This process is called gerrymandering. It usually involves packing as many opposing votes as possible into a few districts. The opposing party will win these districts by significant margins, wasting votes that could have been spent making other districts more competitive. Conversely, the gerrymandering party can “crack” their own voters into as many districts as possible while maintaining slim margins in each district. This means that voters are distributed efficiently for the gerrymandering party to win several districts with relatively few wasted votes. Gerrymandering can create extreme advantages for one political party. For example, in the 2018 Wisconsin state elections Democrats won 53% of all votes but won only 36% of state legislature seats. The Republican gerrymander was so extreme that despite winning the popular vote, Wisconsin Democrats barely controlled a third of the state congress.⁹²

Gerrymandering is a deep-rooted issue in American politics today. Partisan advantages for the majority party can be found in most states’ redistricting plans, although not all those advantages may be intentional.⁹³ Wisconsin is an example of a state-level gerrymander, rather than a congressional gerrymander, but state-level gerrymandering can have a significant impact on

⁹¹ “Independent Redistricting Commissions,” Campaign Legal Center, accessed May 5, 2023, <https://campaignlegal.org/democracy/accountability/independent-redistricting-commissions>.

⁹² Philip Bump, “Analysis | The Several Layers of Republican Power-Grabbing in Wisconsin,” *Washington Post*, December 4, 2018, <https://www.washingtonpost.com/politics/2018/12/04/several-layers-republican-power-grabbing-wisconsin/>.

⁹³ “Partisan Advantage Tracker,” Institute for Public Policy and Social Research- Michigan State University, accessed May 5, 2023, https://ippsr.msu.edu/partisan-advantage-tracker?sort=double_bonus#data.

federal politics. Because state legislatures usually control congressional redistricting, gerrymandering at the state level can lead to skewed redistricting at the federal level.

Some scholars argue that while gerrymandering distorts local politics, federal politics remain mostly unchanged. This theory posits that because blue and red states both gerrymander, the overall composition of Congress is relatively stable. Some studies do suggest that partisan impacts are relatively balanced at a federal level, even if there may be a slight conservative advantage.⁹⁴

But even if partisan impacts were politically symmetrical—i.e., while the representative make-up from individual states is changed, the overall make-up of Congress is relatively stable—the impact of partisan gerrymandering might change the type of candidates that are being elected by creating more polarized districts. Scholarship on the impact of partisan gerrymandering on the polarization of specific congressional representatives is largely inconclusive. Critics of this theory of gerrymandering point to comparable polarization in the Senate⁹⁵ and argue that gerrymandering can often lead to more competitive districts by maximizing potentially winnable districts for the party in charge.⁹⁶ This criticism makes intuitive sense because gerrymandering works by making margins as small as possible. Any vote above 50% is a wasted vote that cannot challenge the gerrymandering party's control of their districts. For example, take an imaginary state with 100 voters, evenly divided between Democrats and Republicans. These 100 voters are placed into 10 districts. If voters were evenly dispersed there would be 10 competitive districts. Instead, if 1

⁹⁴ Jowei Chen and David Cottrell, "Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House," *Electoral Studies* 44 (December 1, 2016): 329, <https://doi.org/10.1016/j.electstud.2016.06.014>.

⁹⁵ Nolan McCarty, Keith T. Poole, and Howard Rosenthal, "Does Gerrymandering Cause Polarization?," *American Journal of Political Science* 53, no. 3 (2009): 668, <https://doi.org/10.1111/j.1540-5907.2009.00393.x>.

⁹⁶ Seth E. Masket, Jonathan Winburn, and Gerald C. Wright, "The Gerrymanderers Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It," *PS: Political Science & Politics* 45, no. 1 (January 2012): 43, <https://doi.org/10.1017/S1049096511001703>.

district was entirely Republican and the other 9 districts were evenly distributed, Democrats would have a slight edge in the other 9 districts. Given a normal election, Democrats would be expected to win 9 districts to the Republican's 1. However, the margins in this hypothetical are incredibly slim and these 9 districts would likely be highly competitive.

In theory, the slim margins would lead to more competition and potentially more moderate candidates. Of course, the gerrymandered party would have less competitive districts and therefore more polarized candidates, but these districts would represent a smaller number of candidates.

But while intuitive, this theory may fail to address the more recent developments in gerrymandering. During the 2020 redistricting process, rather than maximize potential winning districts, the Republican party in particular prioritized maintaining control of districts, often consolidating voters, rather than spreading them thin.⁹⁷ This has empirically reduced the number of competitive districts, rather than increase them.⁹⁸

Part of this shift in the impact of gerrymandering has to do with technology. As law professor Michael Kang argues, “as recently as the 1980s, [district] drawers worked with pen, paper, and precinct-level aggregate data that limited the effectiveness of their handiwork.”⁹⁹ Now, “new computer capability has coincided with the re-emergence of hyper-partisanship to produce gerrymanders of unimaginable effectiveness.”¹⁰⁰ Redistricters have access to far more data and computing power than in prior decades. This allows for vastly more effective redistricting and means gerrymanders are more precise when creating districts. This means that while in the past

⁹⁷ Dora Mekouar, “Despite Huge Redistricting Advantage, Republicans Play It Safe,” VOA, November 2, 2022, <https://www.voanews.com/a/despite-huge-redistricting-advantage-republicans-play-it-safe-/6736897.html>.

⁹⁸ Michael Li and Chris Leaverton, “Gerrymandering Competitive Districts to Near Extinction,” Brennan Center for Justice, August 3, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction>.

⁹⁹ Michael S. Kang, “Hyperpartisan Gerrymandering,” *Boston College Law Review* 61, no. 4 (2020): 1141.

¹⁰⁰ Kang, “Hyperpartisan Gerrymandering.”

gerrymandering may have created more competitive districts, that is less and less true as technology improves.

Gerrymandering distorts representation, creating legislatures that do not accurately represent the electorate, and might encourage polarization by eliminating districts that require candidates to court voters of differing political parties. And, because gerrymandering impacts who is in office, it is difficult for voters to use civic engagement to counter gerrymandering. If gerrymandering is successful, it becomes self-reinforcing because the electorate is no longer able to elect its preferred candidates. In other words, gerrymandering undermines representative democracy, and given its very nature is difficult to eliminate through voting. These factors mean that redistricting is one of the issues central to American democracy.

c. MEASURING GERRYMANDERING

One of the challenges in mitigating gerrymandering is determining how to best quantify any partisan bias. The metric which this chapter will generally use for measuring gerrymandering is the efficiency gap. An efficiency gap is a common statistic meant to measure the degree to which districts are politically biased. While there are other possible metrics, the efficiency gap is a particularly effective statistic because it focuses on the result of redistricting, rather than focusing on ensuring the process is unbiased, such as requiring compact districts. An efficiency gap is calculated by totaling net wasted votes (i.e., votes which were cast for a losing candidate and votes which were not necessary to elect the winning candidate) and dividing the net wasted vote by the overall number of votes cast. The efficiency gap is used in this paper because it is outcome-oriented and is commonly used, creating a large body of research around it.

To demonstrate the efficiency gap, imagine a fictional state with four districts: districts A, B, C, and D. There are 200 registered Republicans and 200 registered Democrats in the state. Each

district has 100 voters. Let us say in a hypothetical election, district A was won by Democrats 92-8. In the remaining three districts Republicans win 64-36. The following table (Figure 1) shows the hypothetical districts and their political breakdowns:

District	Democrat Votes	Republican Votes
A	92	8
B	36	64
C	36	64
D	36	64
Total	200	200

Fig. 1. Chart of a hypothetical gerrymander with vote counts shown.

To determine the efficiency gap, you must calculate the wasted votes for each party. The number of wasted Democrat votes includes the unnecessary winning margin in District A and the votes cast for a losing candidate in Districts B, C, and D. In District A every Democrat vote above 51 (the votes required to win) was wasted. District A had 41 wasted votes. All Democrat votes in districts B, C, and D were wasted. Therefore, an additional 108 Democrat votes were wasted for a total of 191 wasted Democrat votes.

To calculate the Republican wasted votes one must take the votes cast for the losing candidate in district A and the excess votes in districts B, C, and D. In district A there were 8 wasted votes. In each of districts B, C, and D there were 27 wasted votes (all the votes above 51, which are required to win). In total, therefore, there were 47 wasted Republican votes.

Next, one must calculate the net votes wasted. In this case, as there were more Democrat votes wasted, you can subtract the Republican wasted votes from the Democrat wasted votes. $149 - 47 = 102$ and so there are a net 102 wasted Democrat votes. The following table shows the hypothetical districts and the wasted votes in each district.

District	Wasted Dem. Votes	Wasted Rep. Votes
A	$(92 - 51) = 41$	8
B	36	$(64 - 51) = 13$
C	36	$(64 - 51) = 13$
D	36	$(64 - 51) = 13$
Total Wasted Votes	149	47

Fig. 2. Chart of a hypothetical gerrymander with “wasted votes” shown.

The final step is to divide the wasted votes by the overall number of votes cast. In this hypothetical, there were 400 votes cast and 102 net wasted votes. $102/400 = .255$. We can convert this .255 into a percentage: 25.5%. That means that Republicans won around 25% more of the districts than they were expected to, given the equal number of voters for each party. This makes intuitive sense. If districts had been precisely accurate, Democrats and Republicans would have each won two districts. But, given the hypothetical partisan gerrymander, Republicans won an extra district or an additional 25% of the districts.

An efficiency gap is a good measure of gerrymandering because the more votes wasted, the less representative districts are of an electorate. The efficiency gap is not perfectly correlated with partisanship—there could be other reasons for a high number of wasted votes that do not rely

on politically biased gerrymandering. It could be, for instance, that a large liberal city will have a district that is impossible to draw in a competitive way, or in one election cycle a generational Democratic politician will manage to narrowly win a conservative rural district, causing most votes in a state to be wasted. While these criticisms may be true in specific instances, efficiency gaps are generally accurate and precise measures of the degree to which the voting preferences of an electorate are translated to representation, especially when averaging across a state's several districts.

Efficiency gaps have been proposed as an example of a potential judicially manageable standard before. They were the subject of a 2018 Supreme Court case, *Gill v. Whitford* (2018), although the Supreme Court held that the plaintiffs lacked standing, and the court never addressed the merits of the efficiency gap. When this Honors paper discusses biased districts, its understanding is based on the efficiency gap model, unless stated otherwise.

III. STANDARD I: COURT DRAWN DISTRICTS OVERTURNED

Recall from Chapter I that *Moore* is challenging the North Carolina Supreme Court's authority to review the North Carolina state legislature's redistricting. One of the most likely possibilities is that the Supreme Court will rule that while state courts can interpret the clear text of state statutes or state constitutions to overturn gerrymandered districts, *state courts may not draw districts themselves*. By this logic, even if courts are not allowed to redraw districts, they are still capable of ruling maps unconstitutional or illegal and remanding them to state legislatures with clear guidelines.

While this standard may sound relatively narrow, court-drawn congressional districts are relatively common. State courts can currently redraw state redistricting plans if those plans are invalid under federal law, state law, or state constitutions. Typically, state courts provide

significant time and deference to state legislatures when redistricting. However, if state legislatures fail to fix a map a state court has deemed illegitimate, the state court may redraw the map itself. Rather than have state supreme court justices redraw the maps themselves, courts typically appoint a special master. This special master will then draw congressional districts in accordance with the court's ruling, making sure to remedy the perceived faults with the original state legislature map. During the 2020 redistricting process, the districts of eight states, Connecticut, Minnesota, Pennsylvania, New Hampshire, New York, North Carolina, Virginia, and Wisconsin, were drawn by state courts using the process outlined above.¹⁰¹

Court-drawn maps are typically significantly less partisan than the maps they overturn and produce more balanced outcomes. For instance, during the 2020 redistricting cycle, a court-appointed special master in Pennsylvania drew the congressional districts such that Pennsylvania has 8 Republican-leaning districts, 6 Democratic-leaning districts, and 3 swing districts.¹⁰² The map initially proposed by the Republican legislature had 9 Republican-leaning districts and only 5 Democratic-leaning districts. Provided that the map proposed by the Pennsylvania state legislature passed, the Independent State Legislature Theory would have added an additional Republican representative to Congress. Given that Pennsylvania has a higher number of registered Democrats than Republicans,¹⁰³ both maps do not reflect the registered voting population of Pennsylvania. Nonetheless, the court-drawn maps better reflect registered voters, even if it still has a slight Republican bias. The court-drawn map has an efficiency gap of 1.6% in favor of

¹⁰¹ Chris Leaverton, "Who Controlled Redistricting in Every State," Brennan Center for Justice, September 19, 2022, <https://www.brennancenter.org/our-work/research-reports/who-controlled-redistricting-every-state>.

¹⁰² "Connecticut," *All About Redistricting Loyola Law School* (blog), accessed May 3, 2023, <https://redistricting.lls.edu/state/connecticut/>.

¹⁰³ Degraffenreid, Veronica, "2020 Report to the General Assembly Pennsylvania Department of State" (Secretary of the Commonwealth, June 30, 2021).

Republicans. In contrast, the legislature-drawn map has an efficiency gap of 6.6% in favor of Republicans.

New York, in contrast to Pennsylvania, had maps drawn by a Democratic legislature overturned by the New York Supreme Court for being partisan. The maps adopted by the state legislature had 20 Democratic-leaning districts and 4 Republican-leaning districts, while the maps drawn by New York courts had only 16 Democratic-leaning districts and 6 Republican-leaning districts. Due to a strong showing by Republicans in New York state, New York is currently represented by 15 Democrats and 11 Republicans, despite being a relatively blue state.¹⁰⁴ If the courts did not intervene in the New York redistricting there may have been four to five additional Democrats in Congress.

In other words, judicial drawing of districts is significant and has large impacts on federal representation. It is possible that when totaled, these direct changes do approximately cancel each other out at a federal level—i.e., if all states are gerrymandered, Congress will maintain a relative partisan balance. Even if that were true in a given redistricting cycle, gerrymandering is still having a negative impact on elections. For one, as previously discussed, these gerrymanders may be altering the nature of the candidates and making them extreme. But for another, not all representatives are identical, even if they are from the same party. Voters who have been gerrymandered out of a representative in North Carolina, for instance, may not be comforted to know that New York has elected an additional Democrat. That New York Democrat may not represent a North Carolinian Democrat. There may be regional political differences, and that New York Democrat is unlikely to fight for North Carolina infrastructure funding, for instance, in the same way, that a North Carolina Democrat would.

¹⁰⁴ “United States House of Representatives,” Directory of Representatives, accessed May 3, 2023, <https://www.house.gov/representatives>.

d. Impact of Standard I

It is difficult to quantify what the mathematical impact of standard I would be because we do not know how each state legislature would respond to judicial vetoes. A conservative decision may argue that courts will still be able to prevent gerrymandering, even if courts cannot draw districts themselves. They could do this by applying the clear text of state constitutions or state statutes. While in many instances this may be true, this argument should be viewed with skepticism. The ability to redraw districts provides courts with the leverage that is necessary to counter state legislatures. It is possible that state legislatures would conform to judicial requirements and produce non-partisan maps. It is also possible that if state legislatures are the only institution that can draw legislative maps, they may force courts to decide between accepting flawed maps or having no districts at the time of an election.

We can see evidence of this choice play out in several states. In particular, Ohio serves as a warning for eliminating court power to redraw state redistricting maps. After the gerrymandered 2010 redistricting process, Ohio amended its constitution to include anti-gerrymandering language. This language empowered Ohio voters to sue the 2020 gerrymandered redistricting process, but, despite favorable court decisions, the legislature succeeded in passing gerrymandered maps.¹⁰⁵ Ohio's constitutional amendments are a clear rebuke of gerrymandering, but unlike in New York or North Carolina, the Ohio Supreme Court did not have the authority to appoint a special master to redraw districts. In Ohio, only the state legislature is capable of drawing districts. Because the Ohio Supreme Court did not have a mechanism to force an alternative and because there was significant time pressure, the legislature strongarmed the judiciary into accepting deeply partisan maps. Because congressional elections must happen within a specific time frame, the Ohio

¹⁰⁵ Michael Li, "Anti-Gerrymandering Reforms Had Mixed Results | Brennan Center for Justice," September 19, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/anti-gerrymandering-reforms-had-mixed-results>.

state legislature essentially ignored the judicial decision and used partisan maps. Recent explicit anti-gerrymandering constitutional amendments and a favorable court decision were insufficient to mitigate the state legislature's gerrymandering. The court simply did not have the tools sufficient to enforce its ruling.

Ohio serves as a warning of removing this judicial tool to limit gerrymandering, but this trend can be seen in several other states as well. Ohio is a good example because it had recently passed anti-gerrymandering legislation, but three other states ignored state court rulings on gerrymandering and used potentially illegal district maps.¹⁰⁶ Georgia, Louisiana, and Alabama all used maps which had been considered illegitimate by their state judiciaries. Combined with Ohio, this may have added 5 to 7 additional Republican representatives during the most recent election.¹⁰⁷ These states took advantage of a Supreme Court policy that limits its intervention in elections, to eliminate risk of creating confusion.¹⁰⁸ While these illegitimate plans may be overturned later, congressional representatives from these districts will already be seated. This creates incumbents and provides some veneer of legitimacy. In order to overturn these districts, the court will appear to be contradicting the will of the electorate. Because courts are so worried about legitimacy, the legislatures' refusal to abide by the initial decision may make it more difficult for the courts to challenge the legislatures later.

One of the difficulties in determining the impact of Standard I is quantifying how frequently this would be an issue in a world without judicial review. It is possible that state legislatures would be more brazen in their attempts to gerrymander if they had greater leverage in the judicial process.

¹⁰⁶ Michael Wines, "Maps in Four States Were Ruled Illegal Gerrymanders. They're Being Used Anyway.," *The New York Times*, August 8, 2022, sec. U.S., <https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html>.

¹⁰⁷ Wines.

¹⁰⁸ *Purcell v. Gonzalez*, No. 06-532 (U.S. Supreme Court 2006).

As is, the circumstances required for courts to have to redraw districts are specific. Taking the six states which had their districts drawn by courts in 2020, they meet a few patterns. The first pattern is a political difference between state legislatures and their supreme courts. New York, North Carolina, Pennsylvania, and Wisconsin all fit this pattern. In New York, several conservative nominations by moderate Gov. Cuomo place the New York State Supreme Court significantly to the right of the very liberal legislature.¹⁰⁹ A recent election in Wisconsin has reduced conservatives' majority on the Wisconsin Supreme Court, allowing the liberal block to join with a moderate swing justice.¹¹⁰ In North Carolina, a conservative state, Democrats held a 4-3 majority through the redistricting process, although Republicans now hold a 5-2 advantage.¹¹¹ In Pennsylvania, the liberal Supreme Court implemented a more balanced map after the Democrat governor vetoed the conservative state legislature's plan. North Carolina, in particular, highlights this trend. Despite an initial ruling limiting the Republican gerrymander, the political makeup of the North Carolina State Supreme Court shifted to become more aligned with the Republican-controlled legislature. As a result, the North Carolina State Supreme Court went so far as to overrule itself and opened the door to another potential gerrymander.¹¹²

The second situation in which the courts draw district boundaries is when a state simply does not produce plans. This happened in both Connecticut and Virginia. Virginia, which requires a bipartisan commission to determine districts, refused to redraw plans, making way for a

¹⁰⁹ "A New Conservative Majority on New York's Top Court Is Upending State...", New York Focus, accessed May 3, 2023, <https://nysfocus.com/2022/07/07/court-of-appeals-conservative-bloc>.

¹¹⁰ Shawn Johnson, "Wisconsin Supreme Court Issuing Record Number of 4-3 Rulings," Wisconsin Public Radio, June 7, 2022, <https://www.wpr.org/wisconsin-supreme-court-issuing-record-number-4-3-rulings>.

¹¹¹ "Republicans Retake Control of North Carolina Supreme Court," AP NEWS, November 8, 2022, <https://apnews.com/article/north-carolina-state-courts-supreme-court-government-and-politics-176517442f012865f93d56e9c2827755>.

¹¹² Michael Wines, "North Carolina Gerrymander Ruling Reflects Politicization of Judiciary Nationally," *The New York Times*, April 28, 2023, sec. U.S., <https://www.nytimes.com/2023/04/28/us/north-carolina-supreme-court-gerrymander.html>.

conservative supreme court to draw districts, potentially creating a less bipartisan result.^{113, 114} Connecticut, has a liberal super-majority in its general assembly. In theory, this should be sufficient to pass new congressional districts. However, it also requires the use of a bipartisan eight-member committee to produce a plan. It is possible that some conservatives felt that a court ruling would create a more favorable map, although that did not end up being the case.¹¹⁵

In 2020, state courts, therefore, served both as pressure valves for states which would have otherwise had contentious legislative battles as well as a bulwark against hyper-partisan gerrymandering. In other words, the impact of banning this type of judicial intervention will shift political incentives for redistricting. Prohibiting courts from redrawing districts will likely increase partisan gerrymandering in states where the courts and legislatures differ politically. However, in states with bipartisan commissions, eliminating the potential use of courts as a safety valve may, in a few specific cases, decrease partisan gerrymandering by forcing greater cooperation.

IV. STANDARD II: SUBSTANTIVE JUDGMENTS OVERTURNED

The standard which petitioners are calling for in *Moore v. Harper* is to create a distinction between substantive and procedural barriers to redistricting. Procedural barriers are concrete actions required to accomplish legislation. This includes gubernatorial vetoes and legislation receiving a majority of votes. In this context, substantive barriers are those that involve judicial judgment to determine whether a district violates principles of fairness embedded in a state constitution, for instance. The distinction between procedural and substantive claims can be nebulous, but for the remainder of this paper, procedural will be used to refer to actions which are

¹¹³ “Virginia,” *All About Redistricting* (blog), accessed May 3, 2023, <https://redistricting.ils.edu/state/virginia/>.

¹¹⁴ “Supreme Court of Virginia,” Ballotpedia, accessed May 3, 2023, https://ballotpedia.org/Supreme_Court_of_Virginia.

¹¹⁵ Mark Pazniokas, “Court Shows No Interest in Remaking CT Congressional Map,” *CT Mirror*, January 27, 2022, <http://ctmirror.org/2022/01/27/court-shows-no-interest-in-remaking-ct-congressional-map/>.

clearly outlined, like whether a redistricting plan received sufficient votes or if the districts contain equal populations.

Conversely, the North Carolina State Supreme Court decision overruling the North Carolina districts provides a good example of a substantive decision. The North Carolina State Supreme Court wrote that “The foundational democratic principles of equality and popular sovereignty enshrined in our Constitution’s Declaration of Rights vest in the people of this state the fundamental right to vote on equal terms. N.C. Const. art. I, §§ 1 (equality and rights of persons), 2 (sovereignty of the people), 10 (free elections), 12 (freedom of assembly), 14 (freedom of speech), 19 (equal protection of the laws).”¹¹⁶ Within this constitutional framework, the North Carolina Supreme Court found the state legislature’s districts illegitimately partisan. However, the North Carolina Supreme Court did not have mathematical standards to work with, or a clear threshold for doing so. The majority opinion reads, “we expressly declined to “identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander.” *Id.* Rather than relying on certain measures dispositively, we emphasized that ultimately “[w]hat matters here . . . is that each voter’s vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body.”¹¹⁷ This is an excellent example of a substantive judgment. The court has read a fair election principle into its state constitution and has used that principle to overrule biased maps. Moore, who represents the North Carolina state legislature appealing the court-drawn maps, is hoping to portray substantive judgments as a form of legislation, rather than a clear application of the law.

¹¹⁶ *Harper v. Hall*. N.C. Supreme Court

¹¹⁷ *Harper v. Hall*. N.C. Supreme Court, 4

If petitioners are successful, one large possibility is that the Supreme Court holds that *state courts may only overrule state legislatures based on the clear text of a state statute or a state constitutional provision, without inserting their own judgments*. This means that the court could not make subjective judgments about fairness or partisanship but could identify if a specific statute or procedural element had been violated.

This standard would eliminate most of the anti-gerrymandering legislation and prevent state courts from reading election fairness into their state constitutions. This standard is presented as a more moderate option than disregarding the significant precedent surrounding state court control of redistricting, including *Smiley v. Holm* which affirmed a governor's veto ability, and *Arizona Independent Redistricting Commission* which allowed an independent redistricting commission to draw districts rather than the Arizona state legislature. But this standard really is not moderate—it is simply articulated to avoid potentially thorny precedents. The exact impact of such a provision is hard to quantify but using the 2010 and 2020 redistricting processes as examples, such a ruling could alter the makeup of Congress to a degree that would change which political party controls the House of Representatives.

Maryland provides a good example of how such a ruling would lead to more gerrymandering. In Maryland, a state court ruled an initial Democratic gerrymander unconstitutional and the state legislature created a more compliant and less partisan redistricting plan, which was approved.¹¹⁸ The Maryland state judge who wrote the decision relied on substantive concepts such as equal protection and the Maryland state constitution elections clause in order to overturn the

¹¹⁸ Ryan Best Rakich Aaron Bycoffe and Nathaniel, “What Redistricting Looks Like In Every State - Maryland,” FiveThirtyEight, August 9, 2021, <https://projects.fivethirtyeight.com/redistricting-2022-maps/>.

gerrymandered districts.¹¹⁹ The initial map had an efficiency gap of 16% favoring Democrats, while the map eventually adopted had an efficiency gap of 2.4% favoring Democrats.¹²⁰ In addition, the new map created an additional competitive district.¹²¹ The Maryland state judge did not have any specific standards outlined in the state constitution or any specific procedural issue to work with. While the Maryland state court relied on the state constitution's election clause, it had to make substantive judgments about fair elections. In other words, under the standard that the plaintiffs endorse, Maryland state courts would not have had the ability to overrule the 2020 partisan gerrymander. Nearly all the litigation surrounding partisan gerrymandering in the 2020 redistricting cycle relied on similar argumentation to this Maryland case study. And, given that there was significant litigation about redistricting in over 20 states during the 2020 redistricting cycle,¹²² such a legal standard would have dramatic impacts on individual states' gerrymandering.

It is interesting to note that the Maryland legislature was highly compliant with the court ruling and produced a more equitable map without the Maryland state court redrawing the districts. It is not contradictory to argue both that courts should be empowered to redraw districts due to legislative strongarming and to argue that court rulings have sometimes been successful without having to redraw districts. Ohio still serves as an example of the risks of not allowing courts to redraw districts.

An area which will require further litigation is when states have passed explicit anti-gerrymandering standards, without necessarily specifying how the court should interpret them. For instance, the Florida state constitution has multiple amendments meant to prevent

¹¹⁹ Meagan Flynn, Ovetta Wiggins, and Erin Cox, "Judge Throws out Maryland Congressional Map over 'Extreme' Gerrymandering," *Washington Post*, March 25, 2022, <https://www.washingtonpost.com/dc-md-va/2022/03/25/maryland-congressional-map-thrown-out-gerrymandering/>.

¹²⁰ Rakich, "What Redistricting Looks Like In Every State - Maryland."

¹²¹ Rakich.

¹²² Ryan Best Rakich Aaron Bycoffe and Nathaniel, "What Redistricting Looks Like In Every State," *FiveThirtyEight*, August 9, 2021, <https://projects.fivethirtyeight.com/redistricting-2022-maps/>.

gerrymandering.¹²³ Through voter initiative in 2010, Florida passed two amendments to its state constitution. Approved by Florida voters, these amendments targeted partisan gerrymandering and were intended to make redistricting less biased. These amendments required that state house districts and congressional districts be fair, equal in population, and use city, county, and geographical boundaries.¹²⁴ The amendments specifically stated “No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.”¹²⁵ While these standards require fairness, they do not specify a mechanism such as an efficiency gap by which to measure partisan gerrymandering. These amendments have had a mixed track record, successfully challenging gerrymandered districts from the 2010 redistricting process¹²⁶ and failing to prevent a highly partisan gerrymander in the 2020 redistricting process.

However, eliminating courts’ ability to make substantive judgments about gerrymandering would essentially overturn the Florida amendments. The lack of specificity requires the Florida Supreme Court to rely on substantive analysis rather than procedural analysis. In the 2015 Florida State Supreme Court case *League of Women Voters Florida v. Detzner*, the Florida State Supreme Court wrote that “circumstantial evidence is often essential in proving a conspiracy—and indeed may be the only type of evidence available. ... We set forth the pertinent facts in the record

¹²³ “Fair Districts Now,” Ballotpedia, accessed May 5, 2023, https://ballotpedia.org/Fair_Districts_Now.

¹²⁴ “Florida 2012 Redistricting,” *Redistricting Data Hub* (blog), accessed May 5, 2023, <https://redistrictingdatahub.org/tools/florida-2012-redistricting/>.

¹²⁵ Fla. Const. art III, § 20

¹²⁶ Andrew Prokop, “The Florida Supreme Court Just Made a Huge New Anti-Gerrymandering Ruling,” *Vox*, July 9, 2015, <https://www.vox.com/2015/7/9/8922811/florida-gerrymandering-supreme-court>.

because, collectively, the evidence that the challengers were able to uncover after a protracted discovery process demonstrates a different scenario than the entirely open and transparent process touted by the Legislature.”¹²⁷ In other words, the methods used by Florida rely on determining the intent of the state legislature, and less on statistical models. This makes sense because the Fair District Amendments do not specifically focus on the state judiciary—they are rules for the state using its judgment to determine when districts have violated the standards of fairness outlined in the Florida constitution.

This somewhat more nebulous approach to anti-gerrymandering creates two issues. The first, which is true regardless of the Independent State Legislature Theory, is that the lack of clear standards makes it easy for courts which share a political affiliation with the legislature to ignore gerrymandering. This can be done under the guise of judicial deference, the difficulties of determining intent, refusal to determine sufficient standards or just plain reject that there was gerrymandering.

This is similar to what happened during the Florida 2020 redistricting process. While a Florida trial court initially rejected the proposed map, which was drawn with partisan intent by Gov. Ron DeSantis, a Florida appeals court reinstated the map. The appeals decision did not even address the merits of the new proposed map. The state appeals court instead noted, “the need for certainty and continuity as election season approaches.”¹²⁸ The Florida State Supreme Court chose to not even address this case before the midterm elections. And, potentially problematically, the decision to not take up the 2020 redistricting case was largely decided by DeSantis’ own judicial nominations. This conflict of interest operates in two ways. First, DeSantis, or any governor

¹²⁷ League of Women Voters of Fla. v. Detzner, No. SC14-1905 (Florida State Supreme Court 2015).

¹²⁸ Farrington, Brendan, “Florida Appeals Court Reinstates DeSantis Congressional Map,” AP NEWS, May 20, 2022, <https://apnews.com/article/government-and-politics-congress-ron-desantis-al-lawson-florida-30df468cc9d3154000f81ea52c706296>.

interested in gerrymandering, is likely to nominate justices who are likely to be receptive to gerrymandering—in more polite terms, deferent to the executive or legislative on issues of redistricting. Second, it is possible that highly politicized judicial nominations may feel a sense of loyalty. Given the theoretical neutrality of the judicial branch, it should not be the immediate assumption. However, the Florida Supreme Court failed to counter a map which is clearly in violation of its state constitution. This issue exists irrespective of the Independent State Legislature Theory but does demonstrate the degree to which state legislatures and executives are willing to politicize the process.

The second limitation to the nebulous standards in the Fair District Amendments is that they are vulnerable to a conservative decision on the Independent State Legislature Theory. It is hard to imagine a judgment relying on the Fair District Amendments without requiring a substantive judgment. This is concerning for two distinct reasons. First, this is likely to lead to significantly more gerrymandering. Florida is, however, indicative of the limitations of anti-gerrymandering reform more broadly. Second, there are significant federalism concerns. The Florida Fair District Amendments were passed by a majority of the Florida voters and likely reflect the will of that electorate. While a U.S. Supreme Court decision limiting state courts to only enforcing substantive issues would not overrule the Fair District Amendments, it would likely render them functionally meaningless. This would result in a federal decision overruling a specific part of a state constitution, intruding on something which should be left to states.

The result of such a standard would cause an increase in the specificity of anti-gerrymandering legislation. A comparable example may be the Voting Rights Act. To mitigate states going to great lengths to disenfranchise African-Americans, the Voting Rights Act used a specific formula to determine which states needed approval to make changes to their redistricting. This formula

provided a mathematical way to ensure that states which were repeat offenders were required to have changes approved by the federal government before changes took effect.¹²⁹ The struggle against gerrymandering, at least in the short term, is likely to rely on state-level action. However, like the Voting Rights Act, new anti-gerrymandering legislation may begin to use formulas or rely on standards such as efficiency gaps. The more concrete the legislation is, the easier it will be for court decisions overruling gerrymandering to withstand this standard. In other words, the less judgment necessary from the courts, the easier it will be for the courts to overturn gerrymanders. And, when legislation is specific and clearly outlines when districts are in violation, it will make it more difficult for potential partisan courts to ignore gerrymandering. For instance, if Florida had used specific standards in its constitutional amendments, the Florida Supreme Court would have had less flexibility in allowing the biased 2020 Florida congressional districts. This type of specific legislation is not easy to pass, especially as complex legislation is hard to pass through ballot initiative and would require a state legislature limiting its own power.

V. STANDARD III: A COMPLETELY INDEPENDENT STATE LEGISLATURE

The final scenario, that *the Supreme Court gives state legislatures near unlimited authority over redistricting*, is highly unlikely. Petitioners have not asked for such a severe ruling, even if it is the natural conclusion of their arguments. However, it is worth including, even briefly, because *Moore v. Harper* could begin to set up a series of cases which could cement such a ruling. Conservative justices such as Justice Alito have signaled that they may be receptive to the Independent State Legislature Theory. We can look at Justice Alito's comments on the initial application to stay. The application to stay is a request from the petitioners for the Supreme Court to temporarily overrule the North Carolina Supreme Court until such time as *Moore v. Harper* is

¹²⁹ "About Section 5 Of The Voting Rights Act," The United States Department of Justice, August 6, 2015, <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

decided. in *Moore v. Harper*, Justice Alito wrote that “[*Moore v. Harper*] presents an exceptionally important and recurring question of constitutional law, namely, the extent of a state court’s authority to reject rules adopted by a state legislature for use in conducting federal elections. 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.”¹³⁰ Furthermore, Justice Alito writes of “the [North Carolina Supreme Court] concluded that “the only way that partisan gerrymandering can be addressed is through the courts.” *Ibid.* (emphasis added). These explanations have the hallmarks of legislation.”¹³¹ In fact, Justice Alito has explicitly stated that he is more receptive to the applicants’ argument, writing that “my judgment is that the applicants’ argument is stronger. The question presented is one of federal not state law because the state legislature, in promulgating rules for congressional elections, acts pursuant to a constitutional mandate under the Elections Clause.”¹³² Given how receptive Justice Alito appears to the Independent State Legislature Theory, the impacts of the more extreme scenario should be at least considered.

This ruling would radically alter the redistricting process in nearly every state. This standard would necessitate the overruling of *Smiley v. Holm* and *Arizona Independent Redistricting Commission*. This means that governors would lose the authority to veto state legislative maps and voter initiatives could no longer establish non-political commissions. Every single state would have to rely on state legislatures to determine districts and at a state level, there would be no check or balance on state legislative authority.

Under Standard III there would be a nearly complete shift of power from courts and independent commissions to state legislatures. This would reduce the authority of state executives,

¹³⁰ *Moore v. Harper*, On Application for Stay., Dissenting Opinion

¹³¹ *Ibid*

¹³² *Ibid*, 4

voters, and state jurists, but expand the authority of state congressional members. This would represent state gerrymandering and its most extreme. It would become more and more difficult for minority parties in each state to win seats, much less take control of state government. If the Supreme Court enforced this standard, there would truly be very few limits on state legislatures. Because this standard would establish state legislatures as operating in a federal capacity, only federal action would be able to regulate gerrymandering. This standard would deal incalculable damage to American democracy.

Standard III's impact may not be limited to partisan gerrymandering. If the Supreme Court chooses to give complete authority to the state legislatures to determine time, place, and manner of congressional elections, without review from courts, it is likely that state legislatures could control congressional elections in ways that would likely violate due process otherwise. For instance, so long as it was racially neutral—i.e., does not interfere with federal legislation or the 14th amendment—state legislatures would have far more ability to suppress votes. Without state judicial review, it is possible there could be no state challenges to legislative changes in ballot collection locations, time elections were held, or how poll workers choose to run polls. While this paper focuses on the impact the ISLT would have on partisan gerrymandering, the ISLT has huge implications for the time, place, and manner of state elections. State legislatures would have far more leeway to run elections in ways that lower turnout, and potentially shift the demographics of who is able to vote.

VI. SHORTCOMINGS OF THIS ANALYSIS

The precise impact of any of these standards is difficult to quantify because we do not know the extent to which the courts currently play a deterring role in preventing state legislatures from taking more extreme gerrymandering actions. In 2010, courts redrew districts in 12 states, rather

than the 6 states in 2020. It is possible that the threat of judicial intervention limited the extent to which some states gerrymandered. This potential impact is difficult to measure without limiting judicial authority. However, if the ability for state courts to redraw districts was eliminated, it is possible that legislatures would be more willing to draw lines aggressively, without concern for any anti-gerrymandering legislation, much of which does not specify specific standards.

Furthermore, the impact of any of these potential standards is likely to be tempered by the very nature of gerrymandering. Gerrymandering exists at a state level as well as a federal level, meaning that states which are highly gerrymandered at the state level are more likely to entrench a certain party, increasing their political influence and making them more likely to control all three branches of state government. Once a political trifecta is established, there are no longer political incentives to limit gerrymandering, making it much more difficult to enforce anti-gerrymandering regulation. This may reduce the degree to which judicial intervention limits partisan gerrymandering. In a state where the state supreme court, governor, and legislature are controlled by one political party, *Moore v. Harper* likely will not be the biggest barrier to countering partisan districts.

CHAPTER III: POLICY RECOMMENDATIONS

I. OVERVIEW

If the Supreme Court limits state courts' ability to regulate partisan gerrymandering, it will increase the authority of state legislatures and reduce the authority of state courts. This has implications for any organized attempt to combat partisan gerrymandering. This chapter will outline these implications, focusing on the use of ballot initiatives, and more precise policymaking. It will conclude with a discussion of potential federal action.

This analysis requires several assumptions about the Supreme Court's decision in *Harper v. Moore*. This chapter will assume that the Supreme Court has ruled in favor of the petitioner, that the North Carolina Superior Court overstepped its authority when it appointed a special master to redraw the North Carolina congressional districts. Without a clear ruling to address, this chapter will focus on mitigating Standards I and II from the prior two chapters. In the world of these policy recommendations, the Supreme Court has, at a minimum, prevented state courts from redrawing congressional districts, and, at a maximum, has prevented state courts from making substantive decisions about partisan gerrymandering.

Much of this discussion will not apply to standard III, which grants near unlimited authority to state legislatures and likely limits any delegation of that authority. This is the most worrying of the three standards discussed and would likely eliminate many of the mechanisms advanced against standards I and II. However, these mechanisms are still worth employing for two reasons. First, standard III is relatively unlikely, especially in this initial ISLT case. Standard III encompasses all facets of elections, from governor vetoes to the keeping of voter rolls. Given the scope of *Moore v. Harper*, it is unlikely that such a standard will be established. Second, the more

that the Supreme Court would have to eliminate in order to establish an extreme version of the ISLT, the more difficult it will be to justify.

As such, this chapter discusses three different mechanisms for addressing the Independent State Legislature Theory: (1) the use of independent redistricting commissions, (2) state-level constitutional amendments and legislation, and (3) potential federal action. The chapter concludes with a discussion of separation of powers and the potential Standard III.

II. OBSTACLES TO REFORM

Countering partisan gerrymandering is difficult. Even states which have passed anti-gerrymandering reforms, such as Florida and Ohio, have continued to struggle to prevent gerrymandered maps. This section will outline some of the challenges to effective policy-making. This, as well as the potential requirements of the ISLT, will inform the strategies presented later in the chapter.

First, it is difficult to pass anti-gerrymandering legislation. An advocacy strategy which relies on state legislation faces two significant, unavoidable issues. First, there are simply political barriers to passing legislation which limits state legislatures' authority since state legislatures would have to reduce their own authority; this is just an unlikely turn of events. When drawing new congressional districts, state legislatures inherently discuss partisan gerrymandering, which means that each redistricting cycle provides a case study of how state legislatures view gerrymandering. The status quo is evidence for the significant willingness of state legislatures to gerrymander. If state legislatures were truly interested in fighting their own worst tendencies, they would simply pass non-partisan maps, and there would be no gerrymandering. One traditional argument is that political pressure can alter how state legislatures operate. These arguments are at

least partially inapplicable here given how gerrymandering warps how an electorate can choose its own representation.

Second, even in those circumstances, state legislative barriers to gerrymandering are likely to be tenuous. Even if a state legislature passed laws prohibiting partisan gerrymandering, it could easily overturn those same laws. Unless there are heightened barriers to overturning a law, the state legislature can always simply pass two bills- the first weakening gerrymandering restrictions and the second drawing the districts. Especially when state legislation was put in place to restrict the authority of the incoming governing party, the incoming governing party has a clear partisan incentive to increase its own authority by repealing any anti-gerrymandering legislation.

Furthermore, asking state legislatures to redistrict their own authority may reduce the state's power nationally. If Florida Republicans gave up their highly partisan gerrymander, it would significantly strengthen the Democrats nationally and reduce the influence Florida Republicans have. This creates a prisoner's dilemma where even state legislators opposed to gerrymandering may still support specific gerrymandered districts until all states end their support for the practice. Put differently, there is a free-rider issue. While a state may benefit from other states limiting partisan gerrymandering, a state does not need to limit gerrymandering itself to receive those benefits. Federal politics is an antagonistic system, and each party has an incentive to maximize its own political advantage. This free-rider problem creates an incentive for states to not ban partisan gerrymandering.

Second, in addition to passing anti-gerrymandering legislation, there are also difficulties enforcing it. Florida represents an excellent example of the difficulty in containing partisan gerrymandering. Florida's constitution has clear anti-gerrymandering standards, and the redistricting process employs statistical methods to defend the fairness of the district maps.

Understanding how states like Florida continue to produce biased maps is key to figuring out how to dismantle partisan gerrymandering.

The Florida state constitution mandates that districts be “compact and, where feasible, follow existing political and geographical boundaries.”¹³³ In order to accomplish this, Florida uses several statistical measurements, including the Reock compactness score, Convex Hull measurement, and a Polsby-Popper score.¹³⁴ The statistical tests are all various ways of measuring how compact a district is. These are not mandated specifically and there are no mandated cutoffs for potential measurements, but these tests serve as a mathematical implementation of Florida’s constitutional amendments. Florida’s current maps, as discussed in Chapter II, are highly partisan and yet likely compliant with these specific standards. At the same time, Florida’s current congressional districts were drawn without transparency by Governor Ron DeSantis’ office, explicitly to reduce the number of minority voting districts in Florida, which tend to vote Democrat.¹³⁵ Although Governor DeSantis’ process is opaque, it appears that his maps were guided by highly partisan figures associated with the national Republican party.¹³⁶

Governor DeSantis, the Florida State Legislature, and the Florida State Supreme Court are all from the same party. In fact, Governor DeSantis appointed the majority of justices on the Florida State Supreme Court.¹³⁷ It is likely that this creates a conflict of interest, particularly with a leader demanding of loyalty, like Governor DeSantis. But even though Florida has anti-gerrymandering

¹³³ Florida State Const. Article III, Section 21

¹³⁴ “District Compactness Report,” District Compactness Report (Florida Senate, April 13, 2022), <https://redistrictingplans.flsenate.gov/download?planId=155&fileName=DistrictCompactnessReport.pdf>.

¹³⁵ Joshua Kaplan, “How Ron DeSantis Blew Up Black-Held Congressional Districts and May Have Broken Florida Law,” ProPublica, October 11, 2022, <https://www.propublica.org/article/ron-desantis-florida-redistricting-map-scheme>.

¹³⁶ Kaplan.

¹³⁷ Michelle Solomon, “DeSantis Appoints Judge for 2nd Time to Florida Supreme Court after Lawsuit in 2020,” WPLG, August 5, 2022, <https://www.local10.com/news/local/2022/08/05/desantis-appoints-judge-for-2nd-time-to-florida-supreme-court-after-lawsuit-in-2020/>.

standards, they were flexible enough to allow the Florida State Supreme Court to allow them for use in the 2022 election. In other words, anti-gerrymandering standards need to be robust enough to survive even when the government is under the control of a single party.

III. INDEPENDENT REDISTRICTING COMMISSIONS

a. POLICY GOALS

The goal of anti-gerrymandering advocacy should be to implement independent redistricting commissions. These remove the state legislatures from redistricting and are often accomplished without legislative action. These are bi-partisan or non-partisan commissions that are mandated to create non-partisan congressional maps. Political scientist Dr. Zhang writes “The independence of redistricting commissions has come to be understood as encompassing two key elements: (1) institutional insulation from the legislature and political influences more generally and (2) neutrality of personnel (i.e., who serves as commissioners).”¹³⁸ Independent redistricting commissions have empirically been far better than state legislatures at producing non-partisan outcomes. They have been floated by policy-makers and political scientists alike as a potential solution to partisan gerrymandering. Representative Lowenthal (CA-47) argued in a policy paper that “States that allow their legislatures to control the redistricting process are more likely to have “higher partisan bias, lower electoral responsiveness, and reduced public confidence in the electoral system,” compared to other countries or states with independent commissions.”¹³⁹

In an analysis of the 2020 redistricting cycle, political scientists Warshaw, McGhee, and Migurski found that states which used independent redistricting commissions had a significantly

¹³⁸ Rong Zhang, Emily, “Bolstering Faith with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms,” *California Law Review* 109 (2021): 989.

¹³⁹ Alan S. Lowenthal, “The Ills of Gerrymandering and Independent Redistricting Commissions as the Solution Policy Essay,” *Harvard Journal on Legislation* 56, no. 1 (2019): 15.

lower efficiency gap. The following figure from their analysis shows the extent to which an independent redistricting commission has empirically reduced the partisan bias in redistricting.

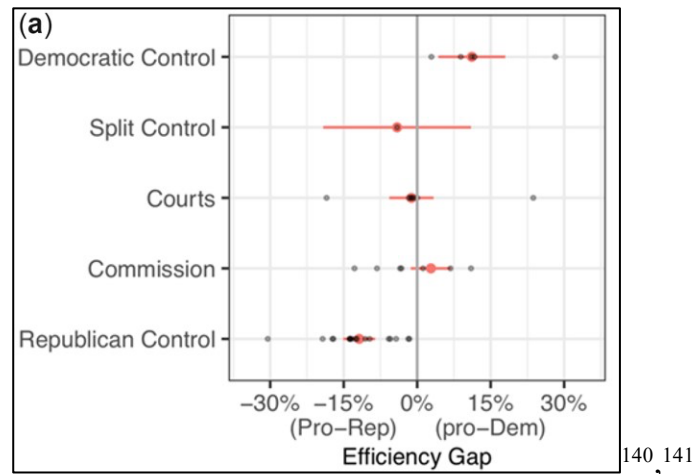


Fig. 3

The above figure shows efficiency gaps from the 2020 redistricting cycle broken down by different mechanisms of redistricting. This figure uses a regression to show the correlation between party control and the efficiency gap. Democratic control refers to a state where a Democrat-controlled legislature draws the districts. Republican control refers to states where a Republican-controlled legislature draws the districts. Split control refers to states where neither the Democrats nor Republicans entirely control the state legislature but redistricting is a legislative process. Courts refers to states where the electoral districts were drawn by a court. Commission refers to states where a redistricting commission draws the electoral maps. The x-axis uses the efficiency gap explained above to measure partisanship. Each gray dot represents a state. Only states with 3

¹⁴⁰ Warsaw, Christopher, Eric McGhee, and Michal Migurski, “Districts for a New Decade—Partisan Outcomes and Racial Representation in the 2021–22 Redistricting Cycle,” *Publius: The Journal of Federalism* 52, no. 3 (July 1, 2022): 440, <https://doi.org/10.1093/publius/pjac020>.

¹⁴¹ Figure depicted is Figure 2 Panel A from original paper. Original figure also contained a Panel B which depicted results for state-level elections rather than Congressional elections.

or more congressional districts were used. The red dots represent the mean partisanship for each type of control. The red lines demonstrate standard error of the mean.

This figure demonstrates that when the redistricting process is controlled by a political party, the redistricting process favors that political party. Democrat and Republican-controlled redistricting processes heavily bias the party which is in control of redistricting. When the process is not controlled by one party, however, the outcomes are relatively fair. When states used a commission, had their maps drawn by the courts, or had a legislature with split control, electoral districts had significantly lower efficiency gaps than redistricting processes controlled by one party.

This should guide policymaking moving forward and reform should prioritize the implementation of redistricting commissions. Currently, eleven states use some form of an independent redistricting commission. During the 2020 redistricting cycle, these states produced demonstrably fairer maps, with smaller efficiency gaps than states which did not use independent redistricting commissions.¹⁴²

There are, however, several features that can increase or decrease the efficacy of these commissions. For instance, in New York and Washington, the commissions' work can be overturned with a legislative super-majority.¹⁴³ A super-majority is intended as a potential check on the power of the commission. It is difficult to muster a super-majority and so, in theory, it would only be exercised if the independent redistricting commission overstepped its bounds. Furthermore, giving this authority to a super majority could function as a legislative failsafe if the commission fails to agree on maps. This can also give legislatures the ability to fine-tune districts

¹⁴² Warschaw, Christopher, McGhee, and Migurski, "Districts for a New Decade—Partisan Outcomes and Racial Representation in the 2021–22 Redistricting Cycle," 440.

¹⁴³ Spencer, Doug, "Who Draws the Lines?," All About Redistricting, Loyola Law School, accessed May 5, 2023, <https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/>.

if there are constituent concerns. For instance, Washington State allows a super-majority to modify districts but only affecting 2% of a district's population.¹⁴⁴ In theory this gives legislatures the ability to address very specific concerns but does not allow the legislature to shift the partisan balance.

However, giving legislatures any influence over the process reduces the effectiveness of independent redistricting commissions. Taking New York for example, if the state legislature denies the commissions' maps twice, the New York state legislature can draw their own maps. During the 2020 redistricting process, the New York legislature, which had a Democratic supermajority, used this loophole to simply reject the commission's maps and draw their own.¹⁴⁵ Complicating matters, the New York Commission could not agree on a set of appropriate maps. The redistricting commission produced two separate maps, one drawn by Democrats, and one drawn by Republicans.¹⁴⁶ It is possible that the knowledge of the Democratic super-majority provided an escape hatch for the commission, giving them a way to not compromise on fair maps. Because the commission knew that the super-majority existed and could create biased maps, it may have disincentivized cooperation.

Even though the legislatively drawn maps were ultimately overturned in court, as discussed in Chapter II, the 2020 New York redistricting process represented a failure of anti-gerrymandering reform. Allowing state legislatures the ability to overturn independent redistricting commissions' maps defangs independent redistricting commissions by allowing state legislatures to maintain control over the process. If New York had divided government, the independent redistricting

¹⁴⁴ "FAQ," Washington State Redistricting Commission, accessed May 5, 2023, <https://www.redistricting.wa.gov/faq>.

¹⁴⁵ Michael Li, "What Went Wrong with New York's Redistricting," Brennan Center for Justice, accessed May 3, 2023, <https://www.brennancenter.org/our-work/research-reports/what-went-wrong-new-yorks-redistricting>.

¹⁴⁶ Cuza, Bobby, "New York's Redistricting Process Gets off to a Rocky Start," Spectrum News, September 15, 2021, <https://www.ny1.com/nyc/all-boroughs/news/2021/09/16/new-york-s-redistricting-process-gets-off-to-a-rocky-start>.

commission may have been more effective, but independent redistricting commissions need to be immune to political pressures.

In contrast, several states have implemented measures to increase the independence of redistricting commissions. These include ensuring that the individuals in the commission are relatively non-political and requiring commissions to have an even partisan split. California's reforms represent a good example of how to insulate an independent redistricting commission from the political process. California has an independent redistricting commission with 14 members, including 5 Democrats, 5 Republicans, and 4 independents or third-party supporters.¹⁴⁷ Instead of being politicians or even civil servants, the redistricting commission is comprised of normal California citizens. These members are selected through a rigorous application process adjudicated by an Applicant Review Panel and a state auditor.¹⁴⁸ California citizens must first attest that they do not have a conflict of interest and then are allowed to submit essays detailing their expertise and motivation for wishing to serve on the commission. 120 applicants (40 Democrats, 40 Republicans, and 40 independents/third-party voters) are selected for interviews. After these interviews, half of the candidates are eliminated, again maintaining an even political breakdown. Next, the applications are sent to Republican and Democratic California House leadership. They may eliminate an additional 24 candidates if they wish to. Of the remaining applications, 3 Democrats, 3 Republicans, and 2 independents are randomly selected. These 8 commissioners select the remaining 6 to create the 14-person commission.¹⁴⁹ This even political breakdown, even though California is liberal-leaning, limits the degree to which the redistricting commission is

¹⁴⁷ "California" (Gerrymandering Project Princeton University), accessed May 2, 2023, <https://gerrymander.princeton.edu/reforms/CA>.

¹⁴⁸ "California."

¹⁴⁹ State of California, "FAQ | California Citizens Redistricting Commission," accessed May 2, 2023, <https://wedrawthelines.ca.gov/transition/faq/>.

liberal. The goal of this process is to select people who are qualified and likely to contribute to fair congressional maps.

There are rules for maintaining the independence of how the commission operates as well. The independent redistricting commission is forbidden to use partisan data or to favor a political party or specific candidate.¹⁵⁰ In other words, the goal of the California independent redistricting commission is to remove it as far as possible from politics. These stipulations are not the same in additional states with independent redistricting commissions, but advocates should look to ensure that similar regulations are put into place. Regulations should attempt to maintain neutrality, high-levels of competence, and ensure that the redistricters are not politicians. Empirically, as shown in the above figure, these commissions lead to less partisan outcomes.

Some scholarship encourages independent redistricting commissions to take lessons from recent gerrymanders and use technology to determine fair districts.¹⁵¹ Through the use of election data and mapping programs such as ArcGIS, redistricters can easily create thousands of random simulations. While this strategy has been used to great effect to create partisan districts, it can also be used to create fair districts. The use of computer simulations to create fair maps may help provide a layer of insulation against partisan redistricters. However, before cementing an algorithmic approach, advocates should be very careful to ensure that it won't be used in a facially neutral manner but for partisan advantage. For instance, perhaps a certain data set of voters is misleading or outdated. The use of that data set would be theoretically neutral but could produce a partisan outcome. Algorithms could therefore provide a veneer of bipartisanship while perhaps simply allowing partisanship. Additionally, given the number of independent redistricting

¹⁵⁰“California.”

¹⁵¹ Rong Zhang, Emily, “Bolstering Faith with Facts,” 1017.

commissions which function without such an approach, advocacy should not be insistent upon the use of algorithms to determine districts that mirror the political makeup of a state.

b. STRATEGIES TO CREATE INDEPENDENT REDISTRICTING COMMISSIONS

The most effective way to create independent redistricting commissions is through use of ballot initiatives, which *Arizona Redistricting Commission* upheld in 2015. 24 states allow citizens to directly vote on a statute or state constitutional amendment. Most of these states allow initiatives to be placed on the ballot if they get enough signatures. This number varies from state to state and can range from around 1-5% of the state's population.¹⁵² Advocacy money would be well spent to collect sufficient signatures to place independent redistricting commissions on the ballot. As discussed in Chapter I, Arizona provides a good case study of a state which used a ballot initiative to implement an independent redistricting commission. California's Proposition 20, which established an independent redistricting commission, is another example of citizen-initiated votes succeeding.¹⁵³ Independent redistricting commissions can occasionally be voted on without collecting signatures, but only if the state legislature refers to a state vote. For instance, in 1983 the Washington state legislature referred the issue to a state election and Washington state voters approved a constitutional amendment creating an independent redistricting commission.¹⁵⁴

In states without the ability for citizens to use ballot initiatives or vote on legislatively referred amendments, the path to an independent redistricting commission is more complicated. In these states, the only way to change policy is through state-level legislation. In these states, there is no clear current opportunity, but long-term advocacy can be comprised of a multi-prong

¹⁵² "Ballot Initiative," Ballotpedia, accessed May 2, 2023, https://ballotpedia.org/Ballot_initiative.

¹⁵³ "California Proposition 20, Congressional Redistricting Initiative (2010)," Ballotpedia, accessed May 2, 2023, [https://ballotpedia.org/California_Proposition_20,_Congressional_Redistricting_Initiative_\(2010\)](https://ballotpedia.org/California_Proposition_20,_Congressional_Redistricting_Initiative_(2010)).

¹⁵⁴ "Washington Redistricting Commission, SJR 103 (1983)," Ballotpedia, accessed May 2, 2023, [https://ballotpedia.org/Washington_Redistricting_Commission,_SJR_103_\(1983\)](https://ballotpedia.org/Washington_Redistricting_Commission,_SJR_103_(1983)).

approach of increasing public awareness, lobbying, and litigation. The goal should be to maximize the time the electorate spends thinking about issues of redistricting, with the aim to punish legislators who engage in gerrymandering. This is easier said than done but at a state level there is no other effective alternative.

IV. STATE CONSTITUTIONS AND STATE STATUTES

State policy can be created either in the form of legislation or state constitutional amendments. Advocacy should aim to influence both but should focus primarily on state constitutions, rather than relying on state legislation.

a. STATE LEGISLATION

As discussed above, there are significant drawbacks to relying on state legislation. State legislation is still better than nothing. It can be difficult to overturn legislation, even with a legislative majority. However, anti-gerrymandering advocates should not count on public pressure being sufficient to maintain of anti-gerrymandering legislation, particularly as the highly visible beneficiaries of partisan-gerrymandering (congressional representatives) are not the same legislatures which are enabling and executing gerrymandering (state legislatures). But besides public pressure, there are still other barriers to overturning state legislation. State laws are still subject to a governor's veto and occasionally even filibusters.¹⁵⁵

There are a few circumstances where state legislatures might be incentivized to pass anti-gerrymandering legislation. Political pressure and anti-gerrymandering sentiment could occasionally lead a state legislature to ban partisan gerrymandering. And there are other situations where a legislature might be incentivized to pass anti-gerrymandering legislation. Partisan gerrymandering makes it more likely that one party maintains complete control of a state for

¹⁵⁵ Stef W. Kight, "States Can Break Filibusters More Easily than the Senate," Axios, October 5, 2021, <https://www.axios.com/2021/10/05/filibuster-senate-state-legislature-rules-map>.

extended periods, but, in the event of a significant blue or red wave, a state legislature could switch hands politically. In the event of a transfer of power, or even under the threat of a power transfer, a state legislature could theoretically pass legislation limiting the opposition's party to draw districts in a partisan manner. Given gerrymandering's unpopularity,¹⁵⁶ anti-gerrymandering legislation could be popular and require high amounts of political capital to dismantle.

b. STATE CONSTITUTIONAL AMENDMENTS

State constitutional amendments have several advantages over state laws. For one, amendments are more durable. It is more complicated to amend a state constitution than it is to pass legislation. In addition to the creation of the state amendment, usually by a state legislature, although occasionally through a constitutional convention, amending a constitution requires voter approval in every state but Delaware.¹⁵⁷ This would provide a barrier against a state legislature repealing anti-gerrymandering legislation right before an important election cycle. This greater difficulty does cut both ways, as it makes it more difficult to pass in the first place. However, a constitutional amendment is worth this greater difficulty because it would supersede any state legislation to the contrary, potentially avoiding complex litigation if a state legislature did not explicitly overturn anti-gerrymandering bills but passed opposing ones. State constitutional amendments are more likely to be resilient and effective in the face of an antagonistic state legislature.

The path to passing state constitutional amendments varies by state. In eighteen states sufficient citizen signatures can force a statewide vote on a proposed constitutional amendment,

¹⁵⁶ John Kruzell, "American Voters Largely United against Partisan Gerrymandering, Polling Shows," Text, *The Hill* (blog), August 4, 2021, <https://thehill.com/homenews/state-watch/566327-american-voters-largely-united-against-partisan-gerrymandering-polling/>.

¹⁵⁷ "Amending State Constitutions," Ballotpedia, accessed May 2, 2023, https://ballotpedia.org/Amending_state_constitutions.

like the ballot initiatives discussed above.¹⁵⁸ In most other states, however, the path to a constitutional amendment requires the legislature to act. In states which allow ballot initiatives but do not allow for voter-proposed constitutional amendments, it makes sense to advocate for legislation through ballot initiative rather than a constitutional amendment given the higher likelihood of success. However, in states which do not allow either voter ballot initiatives or proposed amendments, advocates should focus on lobbying representatives and public awareness campaigns.

i. PRECISE POLICY MAKING

It is possible that a decision endorsing the Independent State Legislature Theory will suggest that a decision taking away judicial authority to make substantive decisions will improve policy-making and place control in the hands of elected representatives. This argument has weaknesses, given that it may give too much credit to the expertise of state legislatures (particularly those that are elected from gerrymandered districts) and likely gives too little credit to state courts, who, absent federal intervention, have shown themselves to be quite adept at handling partisan-gerrymandering. But regardless of the merits, this type of argument is consistent with prior Supreme Court rulings, such as those in *Rucho* and *Whitford*, both of which cast doubt on the judicial branch's ability to create and use manageable standards to address partisan gerrymandering. As discussed in Chapter I, this falls into a broader trend from the current Supreme Court requiring greater specificity from legislatures and reducing legislatures' authority to delegate power. This mirrors the approach of the "Major Questions Doctrine" discussed in Chapter I.

To be resilient in the face of this jurisprudential shift, policy-making will need to be more precise. This is true regardless of the merits of the Major Questions Doctrine and other court

¹⁵⁸ "Amending State Constitutions."

jurisprudence. Policymaking will need to address and account for a Supreme Court more hesitant of governmental action.

One way that laws or amendments could remain effective is by specifying precise standards with which courts can adjudicate partisan-gerrymandering disputes. One example would be to mandate the efficiency gap falls within a certain predetermined range. This would be a direct response to cases such as *Rucho* which cast doubt on the court's ability to find appropriate metrics to quantify partisan gerrymandering. Legislation could require that the districts fall under a specific threshold. The developers of the efficiency gap, Nicholas Stephanopoulos and Eric McGhee, have argued that an efficiency gap above 7% represents a gerrymander.¹⁵⁹ Particularly in states with only two congressional districts, this may not be feasible while also maintaining contiguous and compact districts. For instance, Montana, which uses a commission to redistrict, nonetheless has a high efficiency gap.¹⁶⁰ It may simply be difficult to connect the liberal voters in urban areas into a district. Those voters are likely still a minority overall, so if Montana managed to create a Democratic district, Montana would have a large efficiency gap favoring Democrats. Considering this, the appropriate metrics for each state need to be determined on a state-by-state basis, although the 7% proposed by Stephanopoulos and McGhee serves as an acceptable starting point.

There are drawbacks to this approach. For one, it is possible that legislators will not create appropriate standards. In this world, there would be legislation that provides biased districts the veneer of legitimacy. This legislation would be difficult to eliminate and would potentially stymie

¹⁵⁹ Nate Cohn and Quoc Trung Bui, "How the New Math of Gerrymandering Works," *The New York Times*, October 3, 2017, sec. The Upshot, <https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html>, <https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html>.

¹⁶⁰ Nathaniel Rakich, "The House Map's Republican Bias Will Plummet In 2022 — Because Of Gerrymandering," *FiveThirtyEight* (blog), March 31, 2022, <https://fivethirtyeight.com/features/the-house-maps-republican-bias-will-plummet-in-2022-because-of-gerrymandering/>.

any litigation against district maps, so long as they met the mandated standards. This is true of all anti-partisan gerrymandering legislation.

This is not to say that all standards are insufficient or impractical, but Florida's failure has two ramifications for legislation. First, legislation should focus specifically on partisan gerrymandering rather than simply trying to contain symptoms of gerrymandering, such as the compact nature of districts. Second, legislation should not just specify what tests are used but what the acceptable levels are. For instance, legislation could mandate that the efficiency gap should not exceed 5%. Gerrymandering is a spectrum ranging from complete fairness to highly partisan, which makes it difficult to pinpoint a specific threshold at which gerrymandering becomes inappropriate. This determination can be handled on a state-by-state basis as required by the specifics of geography and political breakdown of each state. The litigants in *Gil v. Whitford*, a case hinging upon the efficiency gap in Wisconsin redistricting, called for any redistricting plans with an efficiency gap above 7% to be overruled.¹⁶¹ As scholars have noted, this is likely large enough to allow for a moderate gerrymander, so the efficiency gap allowed could even be smaller.

Another potential drawback to this approach is that a complete reliance on the efficiency gap may not accurately reflect various voting blocs. While this paper is almost exclusively focused on partisan gerrymandering, much of the research surrounding redistricting policy has been focused on racial gerrymandering, or the drawing of districts to affect the voting power of minorities.¹⁶² While it is true that racial identity can correlate with voting habits,¹⁶³ racial voting groups are not monolithic. For instance, in Florida, more than two-thirds of Latino voters in Miami-

¹⁶¹ Benjamin Plener Cover, "Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal," *Stanford Law Review* 70, no. 4 (2018): 1161–62.

¹⁶² Jason Barabas and Jennifer Jerit, "Redistricting Principles and Racial Representation," *State Politics & Policy Quarterly* 4, no. 4 (2004): 415, <https://doi.org/10.1177/153244000400400404>.

¹⁶³ Michael Barber and John B. Holbein, "400 Million Voting Records Show Profound Racial and Geographic Disparities in Voter Turnout in the United States," *PLOS ONE* 17, no. 6 (June 8, 2022): 6, <https://doi.org/10.1371/journal.pone.0268134>.

Dade County voted for Donald Trump during the 2020 presidential election while most Latino voters in Florida voted against Donald Trump. Preserving minority districts and minimizing the efficiency gap may be at cross purposes. To the extent that racial districts are politically diverse voting blocs, focusing on reducing the efficiency gap may compromise legislators' ability to create minority districts.¹⁶⁴ However, in a world in which a minority population in a specific state has a highly polarized voting pattern, it is likely preferable to focus on the efficiency gap, ensuring that the political views of the minority population are converted to political representation through elections.

ii. GUIDING JUDICIAL STANDARDS

Another strategy for countering partisan gerrymandering under the Independent State Legislature Theory is by providing courts with specific directions about which standards to apply in certain situations. This strategy borrows from Congress' approach taken toward religion during the Clinton administration. In 1993 Congress passed the Religious Freedom Restoration Act, or RFRA. This act required that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest"¹⁶⁵ Put plainly, RFRA required that courts use strict scrutiny, a very exacting legal standard when reviewing policies which might infringe upon free exercise of religion. RFRA was passed in response to *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), which developed an Incidental Impact Test to allow valid, neutral government policies to infringe upon religious exercise.¹⁶⁶ *Smith* was relatively permissive of

¹⁶⁴ Cover, "Quantifying Partisan Gerrymandering," 1161–62.

¹⁶⁵ Schumer, Charles, "Religious Freedom Restoration Act of 1993," H.R.1308 § (1993).

¹⁶⁶ *Employment Division, Department of Human Resources of Oregon v. Smith*, No. 88-1213 (Supreme Court 1990).

government action. RFRA meant that the courts had to handle religious freedom cases with less deference to governmental interests than earlier, attempting to counteract *Smith*.

Mirroring this approach, state legislation or state constitutional amendments could specify how courts should handle partisan gerrymandering. For instance, a legislature could mandate that courts review redistricting and reject maps with partisan bias, unless there is no way to make a less biased map. Or a legislature could mandate that courts review the redistricting process for evidence of partisanship, and if found, return the districts to the redistricting body to draw maps that do not unreasonably favor a political party. The key to this approach is that the state legislature grants authority to state courts and creates a legislative guide for state courts' actions. This clear legislative grant differs from a general constitutional mandate of districting fairness because such a mandate does not specify the courts' obligations or role. It is a grant of jurisdiction rather than forcing the courts to read standards of fairness into a constitution to reject partisan gerrymandering.

This approach is less reliable than a precise policymaking approach because it is always possible that the Supreme Court could overrule lower courts' interpretation of gerrymandering standards. In theory, RFRA-esque legislation would serve as a grant of authority to the courts and avoid an Independent State Legislature Theory. Even a standard that eliminates the courts' ability to rule on substantive issues should allow the courts to directly use a statute instructing them to behave in a certain way on the issue. It would no longer require the initiative of the courts, even if the courts would still adjudicate partisan gerrymanders. However, even if this legislation should represent a valid delegation of authority from state legislatures to state courts, there is always the risk that the Supreme Court would see it differently.

Despite the potential legal risk, this approach might also be better policy. As discussed earlier, there are pitfalls to using a rigid standard such as an efficiency gap, even if such a policy

is an improvement on the status quo. This approach, which dictates how courts must handle partisan gerrymandering but does not specify thresholds or metrics which need to be used, may allow courts to better recognize partisan gerrymandering. Over-reliance on a specific metric may leave room for loopholes. For instance, the efficiency gap measurement can change depending on how you determine how many votes are wasted. Some scholarship notes that voter suppression can mask partisan gerrymandering by reducing the number of “wasted votes.”¹⁶⁷ This would entrust courts with ultimate judgment about the partisanship of maps, allowing them to use judicial subpoenas as a mechanism for fact-finding and their layers of review to ensure a fair result. This approach would unlock the courts again despite an ISLT.

V. POTENTIAL FEDERAL ACTION

At a federal level, there are fewer concerns about the durability of legislation. Even though congressional representatives rely on gerrymandered maps to be elected, they do not also draw those congressional maps. And even if a representative had a political incentive to alter legislation barring partisan gerrymandering, it is unlikely that Congress would legislate to create political advantages for specific representatives. Even though the House of Representatives relies on gerrymandered maps for election, senatorial elections are not subject to the same redistricting process and therefore lack that political incentive. Combined with the difficulty of policy-making in Congress and structural barriers like the presidential veto, repealing legislation can be difficult.

Federal action would eliminate the free-rider problem discussed earlier, wherein certain states take advantage of other states’ willingness to create non-partisan maps to gain a political advantage.

¹⁶⁷ Cover, “Quantifying Partisan Gerrymandering,” 1132.

Federal legislation addressing partisan gerrymandering has been proposed in the last few years. The best example is the never-passed Freedom to Vote Act, which would have addressed voter suppression, access to voting, and election security, in addition to partisan gerrymandering. This proposed bill hoped to create uniform standards which states must follow when redistricting. The bill reads “A State may not use a redistricting plan to conduct an election that, when considered on a statewide basis, has been drawn with the intent or has the effect of materially favoring or disfavoring any political party.”¹⁶⁸ The bill also outlines how courts should determine whether districts are partisan. These include the use of computer models to see how statistically partisan the proposed maps are. The bill also mandates comparison with other maps which are compliant with compactness standards and the preservation of voting groups. To justify the expansion of federal power over state legislatures, the bill cites Article I Section 4 elections clause as well as the 14th Amendment. This bill provides an excellent blueprint of potential federal action and should be advocated for going forwards. The specific guiding principles will help mitigate *Rucho* and the use of federal legislation will create a uniform standard.

VI. SEPARATION OF POWERS CONCERNS

a. CONCERNS OF FEDERALISM

There are potential federalism concerns if the federal government assumes an outsized role in state elections. While the Elections Clause gives the federal government the ability to regulate congressional elections, it otherwise grants authority to state legislatures to determine time, place, and manner of congressional elections. While federal action is allowed under the Constitution, state control is the norm. Federal action would radically alter the relationship between state legislatures and federal courts, giving significantly more authority to federal courts and the federal

¹⁶⁸ Amy Klobuchar, “S.2747 - 117th Congress (2021-2022): Freedom to Vote Act” (2021), <http://www.congress.gov/>.

legislature. This would represent a clear shift in power, with power moving from state legislatures and being given to the courts. Depending on the nature of the federal legislation, it is possible that federal courts would have significant leeway in determining which maps are permissible. This conception of federal control of elections is potentially beyond what the framers would have envisioned, but that does not mean it is beyond what the framers enabled. In fact, the Framers were highly concerned with the potential dangers of giving too much authority to state legislators.¹⁶⁹ In many ways, partisan gerrymandering represents a good example of why the Framers allowed Congress the ability to regulate elections.

As always, with concerns of federalism, there are concerns about abuse of power. Some may argue that the ability of the states to check the federal government is one of the guiding principles of American democracy. From this perspective, the use of federal legislation to control how state legislatures must elect representatives is a subversion of democracy. When making policy, the federal government should be careful to not intervene with state authority to dictate time, place, and manner of elections unless when strictly necessary. For instance, it would not make sense for Congress to determine where polling stations should be, or whether a state should use a caucus or a vote when determining the winners of a primary election.

But the federal government was granted the authority to regulate elections, as discussed in Chapter I. This specific intervention in state control is justified and necessary.

b. CONCERNS ABOUT THE ROLE OF THE JUDICIARY

Relying on statutes or state constitutional amendments will require judicial intervention to enforce anti-gerrymandering clauses. This paper advocates for reforms that would allow the courts to (re)enter a crusade against partisan gerrymandering. However, many people challenge the use

¹⁶⁹ *Moore v. Harper*. Brief amicus curiae of Scholars of the Founding Era.

of jurists to address elections. One of the most frequent counter-arguments against involving the Courts in fighting partisan gerrymandering is to suggest that the Courts are an inappropriate actor for settling gerrymandering. This argument typically has two components. First, questions of representative democracy should not be handled by unelected officials comprised entirely of elites who hold law degrees—potentially ignoring the degree to which elite lawyers dominate legislatures such as Congress.¹⁷⁰ This is a philosophical argument against the courts. Second, the use of courts draws them into a political thicket, transforming jurists from neutral arbiters into politicians. This, in turn, reduces the credibility of the judicial system and given the importance of an independent judiciary to a healthy democracy, undermines democracy itself. Furthermore, critics argue that the politicization of the judicial process will lead to jurists being selected for political views, not their judicial qualifications, reducing the competence of the courts. This argument ignores the extent to which judicial nominations are already deeply political but must be addressed regardless. This second argument is a more pragmatic argument than the first; however, both concerns are unpersuasive, and courts should play a role in countering partisan gerrymandering. This section will address each argument in turn.

First, the philosophical argument against the use of courts to adjudicate gerrymandering is fundamentally incomplete. There are two counterarguments, each likely sufficient to allow the courts to address these issues. First, an image of the unelected jurist meting out justice is disingenuous. Legal cases are not created in a vacuum. Judges are constrained both by the statutes and amendments they interpret as well as a rich history of precedent. While in many states judges

¹⁷⁰ Thomas Lewis, “INSIGHT: Law School Popular for Congress, With Harvard, Georgetown Topping List,” accessed May 2, 2023, <https://news.bloomberglaw.com/us-law-week/insight-law-school-popular-for-congress-with-harvard-georgetown-topping-list>.

are not elected positions, although many state supreme court justices are in fact elected officials,¹⁷¹ judges operate within a legislative framework. Judicial decisions are largely not the political musings of a legal scholar, but the settlement of a specific dispute brought by plaintiffs in accordance with either laws passed by elected representatives or an amendment in a state's founding and guiding document. While there are occasionally accusations of judicial activism, generally judicial decisions are grounded in precedent and law. Judges are bound by *stare decisis*, or a general commitment to prior decisions. This is one of the conventions which protects the legitimacy of the courts and prevents courts from making political decisions. And judges' decisions are often not final. There are layers of review, from courts of appeal to state supreme courts, to the Supreme Court. And, as a final layer of review, if the state legislature determines that the judicial system has gone beyond its authority, state legislatures can clarify, amend, or repeal the relevant statutes.

The second counter-argument to a philosophical opposition is that the nature of elections makes a more isolated actor like a judge better for handling gerrymandering than a legislator who may be reliant on gerrymandering for their job. Representative democracy is of course one of the founding principles of America, but gerrymandering subverts that principle. As argued in Chapter II, the courts have empirically produced less partisan maps than elected officials. We must weigh the nebulous accusations of unelected jurists adjudicating elections (somehow producing non-partisan results) against the concrete evidence that congressional districts will be demonstrably less reflective of the electorate if left to state legislatures. While some may lambast the unelected judge, that independence makes judges less political actors.

¹⁷¹ Ballotpedia, "State-by-State Redistricting Procedures." https://ballotpedia.org/State-by-state_redistricting_procedures

The second argument against the use of the courts in handling gerrymandering emphasizes the potential for politicization. This differs from the philosophical argument in that the first argument contests whether a good democracy would rely on the courts for questions of democracy and this argument questions the very ability of the courts to settle such questions without losing legitimacy. Concerns about the legitimacy of the courts can be traced throughout American history, even visible foundational cases such as *Madison v. Marbury*, but particularly relevant is the argumentation surrounding judicial intervention regarding racial gerrymandering. Contemporary critics of the Voting Rights Act and landmark decisions such as *Baker v. Carr* and *Katzenbach v. South Carolina* argued that ruling on racial gerrymandering cases would undermine the legitimacy of the courts. *Baker v. Carr* addressed a state law requiring Tennessee to redistrict. Tennessee was out of compliance and the Supreme Court held that it was a justiciable issue—i.e., it was not a political question—and that Tennessee needed to redraw its state districts. In Justice Frankfurter’s famous dissent, he argued that such a ruling was a political decision and would reduce the Court’s ability to handle other issues. He wrote that *Baker* “presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been, and now is, determined. It may well impair the Court’s position as the ultimate organ of “the supreme Law of the Land” in that vast range of legal problems.”¹⁷² And yet, six decades later, the Courts have developed significant precedent surrounding racial gerrymandering.¹⁷³ Argumentation surrounding judicial intervention today mirrors the arguments of the 1960s. And, just like then, judicial intervention is necessary and non-political. Just as the Tennessee legislature was attempting to gain a political advantage by not

¹⁷² *Baker v. Carr*.

¹⁷³ Benjamin Hayes, “Racial Gerrymandering: Past Cases and the Supreme Court’s Upcoming Decision in *Bethune-Hill II*” (Congressional Research Service, March 14, 2019).

redistricting, state legislatures are partisan today. When there are statutes or amendments prohibiting such action, it is not political to enforce those statutes or amendments. Courts have been an invaluable tool in countering racial discrimination in redistricting.

There is a potential argument that judges will be less suited to addressing partisan gerrymandering than racial gerrymandering, given that most judges have polarized views that align with one of the two major political parties. Judges almost always have political beliefs which align with the views of the party that nominated and confirmed them.¹⁷⁴ The argument that judges will create biased maps is unfounded. Chapter II shows that judges have already been highly successful at redrawing maps. The courts are aware of the concerns around legitimacy and go to great efforts to be non-partisan in their approach.

The essential counter-argument to the potential politicization of the courts is that the courts have already been performing in this capacity for decades without compromising themselves. In fact, it is possible that the courts have increased faith in the redistricting process, especially in states where court intervention led to fairer maps. While it is true that a greater emphasis on the courts could raise their profile further, there is no clear reason to believe that state courts would abandon *stare decisis* or act as a legislative body. And the policies advocated for in this paper may help preserve judicial legitimacy. By advocating for clear, even potentially mathematical, standards for courts to interpret, it reduces the extent to which it appears courts are being activist. Judicial intervention in partisan gerrymandering is an established and non-problematic exercise of judicial authority.

¹⁷⁴ William Marshall, "The Judicial Nominations Wars," *University of Richmond Law Review* 39, no. 3 (March 1, 2005): 821–22.

VII. DISCUSSION OF STANDARD III

While most of this chapter is dedicated to addressing standards I and II, it is necessary to briefly discuss the possibility of standard III. Standard III would eliminate large swathes of the above advocacy. For a more complete look at the impact of Standard III, refer to Chapter II. However, giving state legislatures complete authority, at the expense of state courts and state constitutions, would eliminate the impact of voter initiatives, state constitutional amendments, and independent redistricting commissions. This would invalidate much of the advocacy in this chapter. Standard III would implicate nearly every facet of elections, and there would be no governor or state court with the authority to limit state legislatures.

Anti-gerrymandering advocates would have to rely on either federal action or a state legislature willingly giving up its own authority. In this case, federal action is likely the only practical solution. In addition to solving the free-rider problem discussed above, it would also create a more resilient check and balance compared to state legislation. Because state legislatures would be operating in a federal capacity when redistricting, it is even possible that legislation passed by a state legislature would be insufficient to overturn redistricting maps, especially if they could not be enforced. Because of this, it would be important to counter partisan gerrymandering at a federal level.

It is true that the Supreme Court ruled in *Rucho* that partisan gerrymandering was not a justiciable issue. While this makes it near impossible to establish federal anti-gerrymandering rules solely through litigation, it does not rule out the possibility of federal legislation under the Article 1 Section 4 Elections clause, as discussed above. The *Rucho* rule presumes a lack of federal legislative action.

It is possible that a ruling enforcing the potential standard III is one of the few possible events significantly radical enough to encourage Congress to pass significant legislation. If this did occur, it would have a potentially counter-intuitive impact on federalism trends. *Rucho* was intended to constrain federal authority, particularly that of the courts, on state redistricting trends. Federal anti-gerrymandering standards would represent one of the largest expansions of federal authority over elections since the civil rights era. If *Rucho* and its subsequent precedents encourage Congress to regulate gerrymandering, the political legacy of *Rucho* will be that of a precedent leading to the reduction in state authority, not of one expanding it.

Discussion of standard III is, of course, deeply speculative. And there are difficulties in passing federal legislation, particularly when that legislation may affect the reelection odds for many Congressional members. Nonetheless, this paper contests that federal legislation would be the only tenable solution to a standard III. There is a chance that reform will be unsuccessful and American elections will always be characterized by partisan redistricting.

Likely a more durable solution would be to pass a federal constitutional amendment banning gerrymandering. However, given that a constitutional amendment requires the approval of 3/4s of the states, largely as determined by state legislatures who are unlikely to support such an amendment,¹⁷⁵ it is not pragmatic to fight for a constitutional amendment.

As a final note on federal action against gerrymandering, federal legislation will only be as effective if it is effectively enforced by judges. As such, the Senate should prioritize nominating and confirming judges who are willing to enforce anti-gerrymandering legislation. While this does not inherently mean nominating and confirming liberal judges, it does mean confirming judges

¹⁷⁵ U.S. Const Article 5

who believe in the efficacy of federal law shaping state-level election policy. It will be helpful to have jurists who are willing to take a more flexible and expansive view of the law.

CONCLUSION

On the surface, *Moore v. Harper* is a technical debate over the interpretation of the phrase “state legislature.” And yet, this case has the capacity to alter congressional elections forever. State courts represent one of the few checks and balances on congressional redistricting processes. If state legislatures go unchecked when creating congressional districts, it would permanently make our elections less democratic. It would give state representatives far greater ability to pick our federal representatives, rather than letting voters decide. Partisan gerrymandering is not an abstract threat—it is demonstrable, deep-rooted, and has a polarizing impact on our national politics. Gerrymandering is also likely to become more extreme. In the last few years, technology and algorithms have radically enhanced legislatures’ ability to draw precise partisan boundaries, creating fewer and fewer opportunities to win an unexpected victory. In its most extreme form, gerrymandering threatens to eliminate the power of the electorate to change the political party in power.

Moore v. Harper represents a key piece of the gerrymandering puzzle. State court involvement in redistricting is often technical—the use of a special master conforming to prior precedent to produce fairer districts does not make punchy headlines. Nor does court action seem like a durable strategy. It is not coordinated and is reliant on expensive litigation. And yet, even in the last redistricting cycle, court involvement in over ten state redistricting cycles produced fairer, more representative maps. In the wake of *Rucho v. Common Cause*, which prevents federal courts

from handling partisan gerrymandering, *Moore* could eliminate the last judicial check on redistricting.

A potential ruling does not just limit judicial authority to handle redistricting. If state courts lose their ability to review state legislature decisions on elections, it might change every facet of our election process, from voter registration to ballot drop locations. Fighting these practices will become more difficult as well, without judicial enforcement. State legislatures will be able to regulate the manner of congressional elections, without a state-level check. While *Moore v. Harper* likely will not give state legislatures this authority, this decision could be the basis point for completely independent state legislatures. Further research should analyze other potential areas of litigation which could increase state legislature autonomy. The policies advocated for in this paper focus entirely on redistricting and likely will not mitigate other aspects of the Independent State Legislature Theory. As such, further policies will have to be developed in accordance with specific state legislature actions.

It can be difficult to grapple with the full ramifications of *Moore v. Harper*, partially due to how new the theory is. Only a couple of decades ago, the Independent State Legislature Theory was an aside in a concurrence. Over the last twenty years, this novel theory has taken the guise of originalism and now stands ready to limit the courts' ability to mitigate partisan gerrymandering. Of course, this is not yet final. The Supreme Court has not made a decision. The Supreme Court may even decide to dismiss *Moore v. Harper* as improvidently granted, essentially choosing not to decide at this time. This is particularly true given the North Carolina State Supreme Court's

reversal of opinion.¹⁷⁶ And if the Supreme Court does decide to hear *Moore v. Harper*, it is unclear how extreme of a standard they will adopt. It is still possible that the Supreme Court will reject the Independent State Legislature Theory entirely.

There is a real risk, however, that the Supreme Court does choose to endorse the Independent State Legislature Theory in some form. And even if the Court does not uphold some version of the Independent State Legislature Theory this year, that this niche theory could even be implemented demonstrates the power of seemingly neutral procedure over our institutions. While the right to vote will not be eliminated, the power of that vote will be diminished. Furthermore, the use of this power will come at the expense of state courts' ability to use state laws and state constitutions to mitigate partisan gerrymandering.

In other words, implementing an Independent State Legislature Theory will make an established problem far worse. And any solution will almost certainly not emerge from the status quo. There is no example of a state legislature willingly giving up its power to redistrict. When a political party controls a redistricting process, that process will almost invariably provide an undue advantage. This trend is potentially counter-intuitive. State legislatures are directly elected by citizens and therefore should be directly accountable to the electorate. In contrast, redistricting commissions and special masters are technocratic and are far removed from voters. There would be no way for an individual voter to influence a special master or change the districts drawn by a commission. But while these technocratic solutions might feel anti-democratic, the results they

¹⁷⁶ Wines, "North Carolina Gerrymander Ruling Reflects Politicization of Judiciary Nationally."

produce are far more democratic. In practice, giving state legislatures authority does not result in fair districts, but in districts drawn by political parties for political gain. Allowing political parties to determine redistricting results in maps designed by political strategists like Thomas Hofeller. By reducing the power of our elected representatives, it actually increases the ability of the average voter to determine who becomes an elected official and is capable of enacting policy.

The consistent partisan actions of state legislatures mean that the push for reform will have to originate in one of three places: the judicial system, ballot initiatives, and federal action. The Independent State Legislature Theory would eliminate any hope of reform from the judicial system. This essay argues for the use of ballot initiatives, which in many states allow voters to vote directly on state laws or state constitutional amendments. These reforms can take on many forms. They can force power to be shared among parties by mandating equal ratios on any commissions. They can mandate strict limits of partisanship in the outcome. But regardless of the form they take, the goal of these reforms is to prevent one party from using redistricting for political advantage.

Every attempt should be made to protect our institutions. This paper argues for the use of independent redistricting commissions and greater precision in anti-gerrymandering legislation and constitutional amendments. This strategy places particular importance on the role of individuals through ballot initiatives but the broader goal is to remove the power from state legislators and their strategists, such as Thomas Hofeller, and place it into the hands of competent, accountable, transparent institutions. There is no silver bullet solution to mitigate a potential

Independent State Legislature Theory, but these proposed reforms are still worthwhile. The stability of our institutions is simply too valuable to concede.

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