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THE MAD HATTER'S QUIP: LOOKING FOR LOGIC IN THE INDEPENDENT STATE LEGISLATURE THEORY

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ABSTRACT

The Supreme Court is set to hear a case that threatens the bedrock of America's democracy, and it is not clear how it will shake out. The cumbersomely named "Independent State Legislature Theory" is at the heart of the case *Moore v. Harper*, which is before the Supreme Court this term. The theory holds that state legislatures should be free from the ordinary bounds of state judicial review when engaged in matters that concern federal elections. Despite being defeated a myriad of times at the Supreme Court, the latest challenge stems from a legal battle over North Carolina's redistricting maps. If the Court rules in favor of the theory—as some recent scholars urge them to do—then historically undemocratic state legislatures would be free to engage in all manner of devious disenfranchisement tactics, with little to no redress in state courts.[†]

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[†] The present article was submitted for publication in December of 2022 before the Supreme Court decided the *Moore v. Harper* case.

FOREWORD

Originalism is not a method of interpreting our Constitution based upon understanding the "original intent" of our "Founding Fathers." Far from it, originalism is much like "psychodrama"—a therapeutic technique that is equally suited to clinical, family, and workplace environments.

Psychodrama can simply be defined as a psychotherapeutic modality in which a patient/client acts out events from his or her past.[1] It is a form of role-playing in which the patient/client can assume the role of any person who was actually involved in a particular event from the patient's/client's past.[2]

A psychodrama can involve multiple patients/clients as actors. You can even have multiple patient/client actors playing the same role at the same time. The United States Supreme Court is an ideal setting for engaging in psychodrama. When employing originalism to interpret the Founding Fathers' intent, the justices are not looking to either "understand" or "divine" intent; they are looking to replicate behavior.[3]

Our Founding Fathers were nothing if not world-class hypocrites or people suffering from multiple personality disorders. How else could they devise and endorse a governing document for a democracy in which slavery was legal?[4] A document in which women were

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[1] Jeremy Sutton, *What Is Psychodrama Therapy? 10 Techniques for Your Sessions,* POSITIVE PSYCHOLOGY.COM, https://positivepsychology.com/psychodrama-therapy/ (Apr. 19, 2023).

[2] *Id.*

[3] Stephen E. Sachs, *Originalism: Standard and Procedure,* 135 HARV. L. REV. 777, 779 (2022) ("To call originalism an 'interpretive methodology' is something of a misnomer, as there's no particular method to follow: the theory picks out a destination, not a route.").

[4] Andrew Cohen, *Constitution's Biggest Flaw? Protecting Slavery,* BERKELEY NEWS (September 17, 2019) https://news.berkeley.edu/2019/09/17/constitutions-biggest-flaw-protecting-slavery/ ("The Constitution's biggest flaw was in protecting the institution of slavery. Many constitutional provisions did this. Article 1, Section 9, prohibits Congress from banning the importation of slaves until 1808, and Article 5 prohibited this from being amended. Article 1, Section 2, provides that, for purposes of representation in Congress, enslaved black people in a state would be counted as three-fifths of the number of white inhabitants of that state. Article 4, Section 2, contains the 'fugitive slave clause,' which required that an escaped slave be returned to his or her owner.").

not allowed to vote?[5] A document in which freedom and democracy were only available to white, male property owners?[6] The Preamble to the United States Constitution reads as follows:

> ***We the People*** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[7]

This opening paragraph of the United States Constitution does not introduce a governing document that represents "the people." It represents a very limited group of people, "oligarchs"[8] who wanted to protect their property interests and maintain their power at the expense of all others, those who were both living at the time of its implementation and in future times as well.

This is why the "Founding Fathers" created the Senate. This is why they created an electoral college. They wanted to ensure their "rights" as "people owners"; they certainly did not see themselves as mere people or fellow citizens. They were creating a social hierarchy with themselves at the top—an aristocracy without a king.

Today, we might call our Founding Fathers "libertarians,"[9] people who put their personal rights above those of all others and who have neither respect nor tolerance for majority rule/democracy.

An originalist interpretation is not an interpretation in any sense of the word. It is a method of role-playing in which the

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[5] *Id.* ("Women, of course, were not accorded the right to vote until the adoption of the 19th Amendment in 1920.").

[6] *Id.* ("There is one key value not mentioned in the preamble: equality. This omission should not be surprising for a Constitution that protected and institutionalized slavery and that protected only the rights of white men.").

[7] U.S. CONST. pmbl.

[8] *Oligarch*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/oligarch (last visited June 29, 2023). ("[O]ne of a class of individuals who through private acquisition of state assets amassed great wealth that is stored especially in foreign accounts and properties and who typically maintain close links to the highest government circles.").

[9] *Libertarian*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/libertarianism (last visited June 29, 2023) ("[A]n advocate of the doctrine of free will.").

participants assume the identity of oligarchs and act as oligarchs—not as lawmakers. They use words in a manner that is convenient to them. Originalists use "alternative definitions" for words, much like we have seen politicians use "alternative facts" to support their narratives.[10]

Originalism is anti-democratic. The "O" in originalism stands for "oligarchy."

I. INTRODUCTION

Perhaps the most incredible dream of legal scholars—particularly those who endeavor to write legal scholarship—is to have their work recognized. To have your academic peers compliment your work is rewarding. However, having your work cited by another author, especially a sitting Supreme Court Justice, is a significant achievement.

Legal scholarship can be a vehicle for incredible progress in shaping and developing a collective understanding of various areas of the law. However, that vehicle has not always steered towards an objective point. Instead, monied interests have often co-opted legal scholarship with a narrow focus on achieving a particular result within the law.[11]

While the law can be the arena for exploring new theories, some scholarship has littered the space with pieces concocted solely to justify a particular political outcome. This is done without regard for these positions' historical, logical, or moral underpinning.[12] Instead, it is done simply at the behest of particular political interests. For instance, in 2008, the Supreme Court ruled—*inter alia*—that the Second Amendment to the United States Constitution protected an individual right to own a firearm, overturning decades of good precedents to the contrary.[13] The late Justice Scalia utilized the doctrines of originalism

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[10] Sachs, *supra* note 3, at 785 ("'[A]t least as measured by use of originalist sources,' Cross concluded, originalism 'has failed to constrain the justices' --not because they 'ignore it,' but because the 'sources can be employed for either a liberal or a conservative result.'"). *See generally* Glenn Kessler, Salvador Rizzo, Meg Kelly, *Trump's False or Misleading Claims Total 30,573 Over 4 Years*, WASH. POST (Jan. 24, 2021, 03:00 AM), https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/.

[11] MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 97 (2014).

[12] *See infra* note 211.

[13] District of Columbia v. Heller, 554 U.S. 570, 577 (2008) (stating that the Second Amendment "protects an individual right to possess a firearm unconnected with

and textualism to justify the ruling in the majority opinion.[14] The opinion disregarded the historical context of the Second Amendment and the established precedent of its text. However, Justice Scalia also used a breadth of law review notes—historically born out of writing competitions with cash prizes or written by people either employed by or working on behalf of the NRA—to justify that position.[15]

In 2022, the Supreme Court ruled in *Dobbs v. Jackson Women's Health Organization* [16] that the United States Constitution does not confer a right to an abortion, overturning *Roe v. Wade*.[17] However, the Court's decision overturned more than fifty years of precedent, disregarding the principle of stare decisis.[18] It took particular aim at *Roe* even though the case's constitutionality was not a certified question, and overturning it was not introduced until the petitioners' second reply brief.[19] The Court relied on several citations to various law review notes in reaching its opinion.[20]

Now, once again, the Court finds itself in a similar situation. The Court granted certiorari in *Moore v. Harper*,[21] a case that asked the Court to determine whether a state's legislature is the sole authority for administering, overseeing, and delivering the results of federal elections.[22] And, as in the previous two cases, there is a resurgence of

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service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home").

[14] See *id.* at 590, wherein Justice Scalia reasons through an interpretation of James Madison's initial writings on the Second Amendment and cites to law review articles concerning the original meaning of the Second Amendment.

[15] See *id.* at 587, 597, 602, wherein Justice Scalia cites to several law review articles referencing the original meaning of the Second Amendment. *Cf.* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 224-25 n.164 (2009).

[16] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (holding that the Constitution does not confer a right to abortion).

[17] *Id.* at 2317 (Breyer, J., dissenting). ("For half a century, *Roe v. Wade*, . . . , and *Planned Parenthood of Southeastern Pa. v. Casey*, . . . , have protected the liberty and equality of women.").

[18] *Id.* at 2348.

[19] Brief for Dobbs Petitioners in Support, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (U.S. argued Oct. 18, 2021) [hereinafter Brief for Dobbs Petitioners in Support].

[20] *Dobbs*, 142 S. Ct. at 2241 nn.3, 4, 23, 38.

[21] Moore v. Harper, 600 U.S. 1, 143 S. Ct. 2065 (2023) (The Court decided this case on June 27, 2023).

[22] *Id.*

legal scholarship on this particular issue—much of it ahistorical, illogical, and amoral.[23] It is important to note that the surge of legal scholarship around the fringe independent state legislature theory (hereinafter "ISLT") is not the product of spontaneity.

Instead, this current moment in legal scholarship reflects a decades-long effort by special interest groups to cultivate certain legal theories, gather academics who will support them, and seek jurists to endorse them, all for the sake of achieving particular political outcomes.

Part II of this Article will outline the ISLT, drawing on the pertinent constitutional provisions, relevant case law, and current legal scholarship on the issue. Part III will highlight contradictions within the independent state legislature theory by explaining the historical, legal, and political context within which this theory seeks to operate while offering a view consistent with the same considerations. Part IV of this Article will explore the connection between the proliferation of conservative academic institutions, the scholastic product, and the reliance on that contrived product in the Supreme Court when deciding on political issues like abortion and gun rights. This Article will summarize with brief remarks on the foreboding nature that awaits the legal community should the observed trend of money-backed legal scholarship continue to influence the nation's highest court. Lastly, there will be a post-dated analysis of the decision in *Moore*.

II. THE INDEPENDENT STATE LEGISLATURE THEORY

Within the Constitution, there are two clauses at the center of the independent state legislature theory: (1) the Time, Place, and Manner Clause[24] and (2) the Presidential Electors Clause.[25] In full, the Time, Place, and Manner Clause states the following:

> 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,

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[23] *See A Guide to Recent Scholarship on the 'Independent State Legislature Theory'*, BRENNAN CTR. FOR JUST. (Oct. 14, 2022), https://www.brennancenter.org/our-work/research-reports/guide-recent-scholarship-independent-state-legislature-theory.

[24] *Infra* note 26.

[25] *Infra* note 27.

> except as to the Places of chusing [choosing] Senators.[26]

Its companion clause, the Presidential Electors Clause, reads as follows:

> 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.[27]

Supporters of the independent state legislature theory argue that these two clauses grant "authority to regulate the 'Manner' of conducting congressional elections and appointing presidential electors specifically to the 'Legislature' of each state rather than to the state as a whole."[28] Since these clauses are in the federal constitution, neither a state constitution nor a state branch of government can infringe on the state legislature's constitutionally derived authority.[29]

However, this argument rests on a purely semantic point. The theory holds that because the Constitution says explicitly "legislature," it is exclusively the legislature that can weigh in on matters of the time, place, and manner of elections or the electors to be chosen therein.[30] Therefore, no state court, secretary of state, or governor could exercise his or her authority when it comes to those matters.

Twenty-twenty-two ("2022") is not the first time litigants put this theory before the Court. In *Davis v. Hildebrant*,[31] the Court upheld

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[26] U.S. CONST. art. I, § 4, cl. 1.
[27] *Id.* art. II, § 1, cl. 2 (amended 1804).
[28] Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 508 (2021).
[29] U.S. CONST. art. VI, cl. 2 ("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.").
[30] *Infra* note 69 at 2.
[31] 241 U.S. 565 (1916).

a voter referendum that disapproved of a congressional redistricting map drawn by the Ohio state legislature.[32] In that ruling, the Court explained that since the referendum and the process by which it came about were outlined in the state constitution, it was a part of the "Legislature."[33] By extension, it was legislating within the meaning of the Time, Manner, and Place Clause in the United States Constitution.[34] Thus, the Court defeated an early iteration of the independent state legislature theory.

In 1932, the Court heard the case of *Smiley v. Holm*,[35] in which it upheld the Minnesota governor's veto of a redistricting plan drawn by the state legislature.[36] The Court explained that the Elections Clause permits that election laws be promulgated and devised by the method each state sees fit.[37] Once more, the Court found that institutions outside of the state legislature can occupy constitutional roles in election lawmaking processes.

The last time this theory surfaced was in 2000, in *Bush v. Gore*.[38] The Court took on the question of whether the Florida Supreme Court violated the Equal Protection Clause of the Constitution when it ruled that local counties were to count some ballots by hand.[39] Briefly, after the Court's ruling in *Bush v. Palm County Canvassing Board*[40] and Al Gore contesting the certification of Florida's presidential election results, the Florida Supreme Court ordered a manual recount of certain counties' ballots.[41] The manual recount differed from how other counties in the state tabulated their ballots.[42] The Bush campaign then petitioned the Court to enjoin this newly authorized practice.[43] The Court enjoined the counting and heard arguments on the case just two days later.[44]

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[32] *Id.* at 568.
[33] *Id.*
[34] *Id.* at 569.
[35] 285 U.S. 355 (1932).
[36] *Id.* at 372-73.
[37] *Id.*
[38] 531 U.S. 98, 103 (2000) [hereinafter *Gore*].
[39] *Id.*
[40] 531 U.S. 70 (2000).
[41] *Gore*, 531 U.S. at 100.
[42] *Id.*
[43] *Id.*
[44] *Id.*

However, the focus of this Article is not the majority holding in that case, but a nonbinding concurring opinion from noted segregationist Chief Justice William Rehnquist.[45] At its core, *Bush v. Gore* assessed whether different vote tallying practices within Florida violated the Equal Protection Clause of the Fourteenth Amendment.[46] However, in a concurring opinion, Chief Justice Rehnquist asserted that since the Constitution's text specifically delineates a legislature as the arbiter of the manner of elections, then that entity's decisions deserve proper deference.[47] The Court's role—so his analysis goes—is to "ensure" protection so that the legislature's powers are not frustrated.[48] As a result, the Florida Supreme Court cannot deem statutes that deal with the happenings of elections violative of the state constitution because the Florida Legislature is carrying out its "Article II powers."[49] Thus, the independent state legislature theory was born.

It would not be until 2012 that the Supreme Court again dealt squarely with the issue of a legislature's power in regard to Article II. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[50] the Court was asked to determine whether a state proposition that empowered an independent commission to draw district maps violated the Elections Clause of the Constitution by removing that power from the state legislature.[51] Until 2000, the Arizona state constitution empowered the state legislature to draw district lines for elections.[52] However, that same year, voters passed Proposition 106, which modified that state constitution and instead created an independent redistricting commission.[53] That commission was then solely

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[45] *Id.* at 111 (Rehnquist, C.J., concurring).
[46] *Id.* at 108 (majority opinion).
[47] *Id.* at 113 (Rehnquist, C.J., concurring).
[48] *Id. Contra* Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 488, 498 (1976) (Stewart, J., dissenting) (acknowledging that the Court is "bound to accept the interpretation of [state] law by the highest court of the State").
[49] *Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring).
[50] 576 U.S. 787 (2015).
[51] *See generally* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015) (holding that the local proposition did not violate the Elections Clause of the Constitution by removing the congressional districting power from the state legislature because state constitutions have placed lawmaking powers in the hands of the electorate).
[52] *Id.* at 792.
[53] *Id.*

responsible for redrawing district lines.[54] The Arizona State Legislature sued the commission, arguing that the commission violated the Constitution by taking away from the legislature its power to draw district lines.[55]

In a 5-4 decision penned by Justice Ginsburg, the majority held that the independent commission did not violate the Elections Clause of the Constitution as the Arizona State Legislature contended.[56] To support its decision, the Court examined what the term "Legislature" meant back when the Constitution was ratified.[57] Citing dictionaries and debates from the time, the Court noted that a legislature could be generally defined as "'the Authority of making Laws, or Power which makes them.'"[58] The Court explained that its precedent stood for the proposition that the "[p]ower which makes" laws included more than only a Senate and an Assembly.[59] For instance, the Court pointed out that *Smiley v. Holm* held that the State's "legislative authority" includes more than only the two houses of the legislature but includes the governorship as well.[60] In essence, the Court went to lengths to note that "[n]othing in the Elections Clause . . . 'attempt[ed] to endow the legislature of the State with [the] power to enact laws in any manner [*other*] than that . . . which the constitution'" of that state had outlined.[61] In other words, the state legislature is bound by the state constitution.

Curiously, Chief Justice John Roberts made great efforts to support a liberal and expansive reading of the Elections Clause. The Chief Justice teased through the history of political practices prior to the passing of the Seventeenth Amendment.[62] Specifically, Chief Justice Roberts reasoned that since legislatures were responsible for nominating senators prior to the passage of the Seventeenth Amendment, they clearly had an exclusive role in federal elections that the states could not infringe.[63] Further, the Chief Justice maintained that the state

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[54] *Id.*
[55] *Id.*
[56] *Id.* at 788, 790.
[57] *Id.* at 814.
[58] *Id.*
[59] *Id.* at 814.
[60] *Id.* at 808.
[61] *Id.* at 807.
[62] *Id.* at 840 (Roberts, C.J., dissenting).
[63] *Id.*

legislature could trump any provision regulating federal elections under the Elections Clause.[64] However, the majority noted that the case the Chief Justice cited to support that position held that "state legislation in direct conflict with [a] [s]tate's [c]onstitution is void."[65]

In short, the Court clearly declared that "[n]othing in [the Elections Clause] instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."[66]

A. Moore v. Harper

This brings us to the case recently before the Court—and at the center of this note—*Moore v. Harper*.[67] Before this year, the North Carolina legislature passed a law that prescribed how litigants could challenge redistricting cases.[68] In 2021, the North Carolina legislature began drawing new congressional districts in response to the 2020 census.[69] Stakeholders submitted map proposals, and the legislature undertook a series of routine hearings to pick a congressional map.[70] On November 4, 2021, the legislature enacted a map for congressional districts.[71]

Twenty-five individual voters residing in North Carolina's fourteen congressional districts under the 2021 map (the respondents) sued.[72] The respondents argued that the 2022 map reflected partisan gerrymandering, violating the state constitution's Free Elections Clause.[73] After a four-day trial, the North Carolina trial court found that the proposed map represented unconstitutional partisan gerrymandering but concluded the claims were nonjusticiable. [74]

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[64] *Id.*
[65] *Id.* at 818.
[66] *Id.* at 817-18.
[67] 600 U.S. 1, 143 S. Ct. 2065 (2023).
[68] N.C. GEN. STAT. § 1-267.1 (2018).
[69] Brief for Harper Respondents in Opposition at 3, Moore v. Harper, No. 21-1271 (U.S. argued Dec. 7, 2022) [hereinafter Brief for the Respondents].
[70] *Id.*
[71] *Id.*
[72] *Id.* at 4.
[73] *Id.*
[74] *Id.* at 4-5.

Upon review, the North Carolina Supreme Court adopted the trial court's factual findings but reversed the holding, finding that the claims were justiciable.[75] At this point, the North Carolina Supreme Court remanded the matter back to the trial court for a remedial phase, asking the General Assembly to redraw the maps.[76]

Within two weeks, a new map existed before the trial court and its newly appointed special masters.[77] However, the court found that the new map violated the law and featured many unconstitutional components of the previous map.[78] As such, the court adopted a new map proposed by the special masters that was crafted from the General Assembly's map.[79] At this time, the petitioners—known as Moore in this action—exhausted state-level appellate remedies.[80] They then petitioned the United States Supreme Court for review.[81]

Three justices voted in favor of reviewing the case. While Justice Kavanaugh concurred with the denial of the application, he also agreed with Justice Alito's reasoning for wanting to hear the case.[82] Notably, in dissenting from the denial of a stay application filed early on in the case, Justice Alito remarked, "[t]his case presents an exceptionally important and recurring question of constitutional law . . . ."[83]

The petitioners' central argument is that the North Carolina Supreme Court violated the Elections Clause of the United States Constitution when it struck down the General Assembly's congressional maps.[84] The petitioners posit that the general assembly was exercising powers given to it under Article II of the Constitution.[85] Namely, the general assembly prescribed the "manner, time and place" of federal elections while engaging in partisan gerrymandering.

To rebut the respondents' arguments, the petitioners claimed that the Court did not strike down the maps under specific and definite

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[75] *Id.* at 4.
[76] *Id.* at 5.
[77] *Id.* at 9.
[78] *Id.* at 10.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Application for Stay, Moore v. Harper, 142 S. Ct. 1089, 1089 (2022) (No. 21A455) [hereinafter *Application for Stay*].
[83] *Id.*
[84] Brief for the Respondents, *supra* note 69, at 8.
[85] *Id.*

state constitutional limits but vague and ambiguous ones.[86] The petitioners argue that the Court's precedent is distinguishable because the Court has never held that judicial review is part of a state's "'check in the legislative process.'"[87] Therefore, the petitioners argue that the Court should rule for them and allow them to enact their congressional maps without review from the state supreme court or constraint from the state constitution.

In their brief, the respondents rely on traditional arguments demonstrating that there is no support for the petitioners' theory of the Elections Clause.[88] For instance, the respondents point out that the petitioners do not cite any authority that stands for the proposition that the Elections Clause "supplants [the] ordinary state constitutional constraint[s]."[89] The respondents explain that there are provisions in the Constitution that delineate an unreviewable power but that the language is not in the provisions in question.[90] Finally, the respondents underscore that the Court's own precedent supports the position that a state court—applying a state constitution—can weigh in on matters of redistricting within the state.[91]

III. ARGUMENT

A. The Theory and its Contradictions

If one were to turn to the independent state legislature theory for some internal consistency or logic, one would be looking in all the wrong places. Even if one accepts the independent state legislature theory, the petitioners should still lose for several reasons.

From a foundational level, the theory is inconsistent with basic notions of federalism—the system upon which our political and judicial systems are premised.[92] The petitioners argue that a state actor cannot check a state legislature in matters of election law.[93] Adopting

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[86] *Id.* at 20.
[87] *Id.* at 21.
[88] *Id.*
[89] *Id.* at 18.
[90] *Id.* at 19.
[91] *Id.*
[92] Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022, No. 5 WIS. L. REV. 1235, 1235 (2022).
[93] *Application for Stay*, *supra* note 82.

this argument would create a branch of state government that cannot be checked and balanced against a state court or executive.[94] In practice, it would forcibly mandate that state courts adopt a specific mode of statutory and constitutional interpretation.[95] The federal government would be the sole entity that could check the state government—effectively turning federalism on its head. This is quite unlike any balance of power currently in our political and legislative system.

Further, the petitioners are asking—in essence—the Court to elevate state legislatures to a position of supremacy over the very documents that created them. State legislatures were not divined from some otherworldly authority but forged by people through state constitutions. To turn around and implement a mode of constitutional interpretation that subjugates a state constitution to one of its constituent parts would be to upset the delicate balance of power and hold hostage both the other branches and the residents of any given community.

On another note, the petitioners claim that a textualist reading of the Constitution would secure them a win.[96] They argue that since the Constitution says "Legislature," then it must exclusively mean a state's legislature.[97] However, the meaning of the operative word at the time of the document's writing was not quite that simple. Indeed, many dictionaries from the era define a "legislature" as "the power that makes laws."[98]

Moreover, the historical practice of legislatures, state courts, and federal courts shows that the petitioner's arguments are inapposite. Legislatures routinely delegated power—or were not even trusted enough to wield it.[99] In sum, there is a lack of:

> [A] sound basis for concluding that the Framers' use of the term "the Legislature," without more, would have signaled to readers of the Constitution in 1787 and 1788 an unstated plan incompatible with basic postulates of popular sovereignty to provide state legislators with a newfangled immunity from the governing principle

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[94] Litman & Shaw, *supra* note 92.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 813 (2015).
[99] Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory*, 57 GA. L. REV. 539, 551 (2023).

> pursuant to which state courts assess the constitutionality of state legislation under state constitutions.[100]

Simply put, it is unreasonable to argue for "broadly empowering federal courts to constrict state-court judicial review of federal-election-related laws under state constitutions, [and] far less for precluding such judicial review altogether."[101] That is to say, when one looks to the plain understanding of the words of the Constitution at the time they were written, then one cannot help but reach the conclusion that legislatures were subject to checks from their coordinate branches of government, not immune from them. Properly understood, a strict textualist reading of the Constitution—understanding what the word meant at the time of the founding—cuts against the Petitioners' argument, not for it.

Finally, from a basic statutory analysis perspective, the petitioners should lose because the independent state legislature theory tells them they should lose. The petitioners are arguing that only the state legislature can detail the time, manner, and place of conducting elections.[102] As previously mentioned, the North Carolina General Assembly passed a law detailing how litigators can challenge redistricting laws.[103] The law also identifies the panel of judges that will hear such a case and the sort of fact-finding in which the court will engage.[104] It allows the General Assembly to propose new maps per the court's findings.[105] If this sounds familiar, it is because these are all the procedures that the court in North Carolina followed. In other words, the petitioners contradict their theory by challenging the law that empowered the North Carolina court to hear this case.

B. The Role of State Legislatures

It is important to note that the forebears of our Constitution did not wholly trust state legislatures. Back in 1787, when the founders and framers of the Constitution were etching out the trappings of the document, one founder took particular caution with state legislatures.

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[100] *Id.*
[101] *Id.* at 539.
[102] Brief for the Respondents, *supra* note 69.
[103] *Id.* at 18-19.
[104] N.C. GEN. STAT. § 1-267.1 (2018).
[105] *Id.*

Recovering from the torment of massively decentralized power under the Articles of Confederation, James Madison found it "impossible to foresee all the abuses that might be made of the discretionary power" other founders wanted to entrust in state legislatures.[106] Madison went on to warn that "whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed."[107] Given the case before the Court today, Madison's fear seems prescient and foreboding.

Madison did not stop there. He went on to explain that "[t]he right of suffrage is certainly one of the fundamental articles of republican government, and ought not to be left to be regulated by the Legislature."[108] Madison feared the atrocities that would befall a nation that left the machinations of voting and elections to the unchecked state legislature. He was not without good reason.

His view ended up prevailing in more ways than one. In September of 1787, the Constitutional Convention revealed the product of its efforts—a Constitution for the United States of America. However, the document would not become operative until several states agreed to it. Interestingly, the convention delegates did not want the matter left to state legislatures. Instead, they elected to have state conventions ratify the document.[109]

Despite Madison's best efforts, state legislatures found a way to bring forth many of his greatest fears. For instance, in 1796, many states used the popular vote to determine their elections.[110] However, after one party had a particularly strong showing in the local elections of 1800, the opposing party—which dominated in the state legislature—repealed the popular vote and put the selection of Electoral College delegates in their own power.[111] Several more states would follow.[112] There was an intense backlash; by "1828 all states but two had given voters—not state legislatures—the power to choose presidential electors."[113]

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[106] MICHAEL WALDMAN, THE FIGHT TO VOTE ix (2016).
[107] *Id.*
[108] *Id.* at 23.
[109] *Id.* at 27.
[110] Jill Lepore, *Party Time: Smear Tactics, Skulduggery and the Début of American Democracy*, THE NEW YORKER, Sept. 10, 2007, at 94.
[111] *Id.*
[112] *Id.*
[113] WALDMAN, *supra* note 106, at 45.

The history of state legislatures further demonstrates that they were the constant subject of inefficacy and corruption, frequently resulting in their circumscription.[114] For example, when the Constitution was ratified, delegates—principally Madison—compromised in giving the power to choose senators to the state legislature and not the people.[115] This quickly proved unworkable. "In the 1890s alone, legislatures left fourteen Senate seats vacant."[116] At one point, the Colorado governor enlisted the militia to monitor the statehouse while it picked a senator.[117] On another occasion, one party found itself relying on the state police to exercise their police powers in instituting its choice, while the other political party found an ally in the state sheriff to implant its chosen candidate.[118] But this was not the worst problem facing state legislatures.

Despite their seeming inefficacy at electing senators, state legislatures were notoriously proficient at one thing—being corrupt. In 1906, one study observed that "in seven states in the previous fifteen years, 'charges of corruption [had] been put forward with enough presumptive evidence to make them a national scandal.'"[119] Indeed, state legislatures were cheaper—and by extension easier—to buy than an entire electorate. Legislators often appointed senators that doubled as industry representatives. In that same year, "two Senators were convicted of taking fees to represent corporate interests."[120]

Ultimately, the nation found it sufficiently necessary to take the power to appoint senators away from the state legislatures. Thus, the Seventeenth Amendment to the Constitution was born in large part from the demonstrated inefficacy of those local governmental

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[114] *See* Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108, No. 5 VA. L. REV. 1091, 1, 112-29 (2022) (arguing that, throughout history, local officials made decisions about the time, manner, and place of elections, effectively cutting against ISLT proponents' argument that it is historically a function reserved for state legislatures); *see also* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1787 (2021) (explaining how the independent state legislature theory weakens democratic principles by overpowering state legislatures).

[115] WALDMAN, *supra* note 106, at 105.

[116] *Id.* at 106.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 108.

bodies.[121] It leaves one to wonder why any Supreme Court justice would look to the history of state legislatures for some justification upon which to conclude that they are deserving of more power.

Concerningly, this monied influence in state legislatures is alive and well today, albeit a bit more sophisticated. In Kimberly Reed's 2018 documentary *Dark Money*,[122] the narrator examines the influence of untraceable money in Montana's state elections.[123] In one instance, incumbent politicians found themselves up against ad campaigns funded by nascent and unknown groups that sent thousands of flyers out only days before Election Day.[124] These campaigns supported the candidates that were in favor of siphoning off Montana's natural resources for the benefit of large corporations operating within the state.[125] Often, incumbent politicians throw up their hands or lose their elections.[126] The historical issues with state legislatures are as real and present now as they were at the founding.

The bottom line is that the history and tradition of state legislatures is one rife with corruption and incompetence. The prevailing trend is not much better, thanks to Supreme Court cases like *Citizens United*.[127] Any court that would rely on history to justify entrusting more power to state legislatures cannot be trusted itself.

C. Cause for Concern

With clear and controlling case law on this matter and a substantial historical record demonstrating an aversion to powerful state legislatures, one cannot help but ask why the Court even decided to hear this case.

In *Rucho v. Common Cause*,[128] the Court considered the question of whether claims regarding partisan gerrymandering are

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[121] *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U.L. REV. 500 (1997) (exploring the myriad factors that played into the states' decision to cede the power to elect senators to the citizenry).
[122] DARK MONEY (Kimberly Reed dir., 2018).
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[128] *See generally* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

justiciable.[129] In that case, a North Carolina court struck down the state legislature's 2016 congressional map, holding that it was the product of partisan gerrymandering.[130] The lower court went on to enjoin the legislature from using that map.[131] The aggrieved party appealed to the Supreme Court, arguing that the lower court exceeded its powers in ruling that the map reflected partisan gerrymandering.[132] With Chief Justice Roberts writing for the majority, the Court held that questions of partisan gerrymandering are nonjusticiable.[133] To support its reasoning, the Court explained how there is a lack of a "limited and precise standard that is judicially discernible and manageable."[134] Indeed, the Court noted that its case law does not resolve the issue of whether partisan gerrymandering claims arise out of a "*legal* right, resolvable according to *legal* principles . . . ."[135]

Harper shares many of the same qualities as *Rucho,* making the case non-justiciable. The case before the Court arises from a controversy dealing with a partisan gerrymander. This should be the end of the case under *Rucho*. One might argue that the case before the Court raises a fundamentally different question than the one before the Court in *Rucho*—i.e., *Harper* deals with the Elections Clause, while *Rucho* deals exclusively with partisan gerrymandering. However, the Court dealt with the Elections Clause in *Rucho*. The Court found that only in two areas—"one-person, one-vote and racial gerrymandering" does the Court have a place to intervene under the Elections Clause.[136] But even though the current case before the Court deals with neither of these principles, the Court did not find that *Harper* presented some non-justiciable political questions.

Given their willingness to overturn precedent and deliver results for which neither party asked, one could not help but fear that the Court was positioned to deliver a catastrophic result. Remember, in *Dobbs v. Jackson Women's Health Organization*, the petitioners asked the Court to consider whether Mississippi's law banning all abortions

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.* at 2502.
[135] *Id.* at 2494.
[136] *Id.* at 2495-96.

after weeks was constitutional.[137] Properly understood, the petitioners were plainly asking for the Court to find that the state ban was constitutional under current law.[138] Instead, Justice Alito—writing for the majority—found no constitutional right to an abortion and overruled both *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[139] All of this is to say that the conservative majority on the Court is not against delivering monumental results for which no one asked. It should surprise no one if the same is done in *Harper.*

Concerningly, the Court is showing time and again that it is willing to flout bedrock principles of constitutional law to reach controversial cases. For instance, in another case recently before the Court—*303 Creative LLC v. Elenis*,[140] the Petitioner asked whether the application of a Colorado anti-discrimination law infringes on her First Amendment rights.[141] The Petitioner, in this case, is a web designer who opposes same-sex marriages on religious grounds.[142] She does not want to design websites for same-sex weddings.

However, a Colorado law prohibits businesses from discriminating against same-sex couples on the basis of sexual orientation.[143] Curiously, the Petitioner in the case has not designed a website for a same-sex couple, has not been solicited to do so, and—by extension—has not been the subject of an enforcement action by Colorado under its anti-discrimination law for such.[144] By all measures, there is no ripe issue for the Court to decide as the Petitioner has not suffered any injury. However, the Court granted *certiorari* in the case. This term shaped up to be the most extreme in history. *Harper* was no exception.

D. Forecasting

The two glimpses the Court has given into how it might rule on an Independent State Legislature Theory case suggest, at minimum, three votes favor endorsing a maximalist version of the theory. In

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[137] *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
[138] Brief for Dobbs Petitioners in Support, *supra* note 19.
[139] *Id.* at 2279.
[140] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1170 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).
[141] *Id.*
[142] *Id.*
[143] COLO. REV. STAT. § 24-34-306(1)(a) (2022).
[144] Brief for Respondent at 5, *303 Creative LLC*, 142 S. Ct. 1106 (2022) (No. 21-476).

2020, the Court refused to hear a case captioned *Republican Party of Pennsylvania v. Boockvar*.[145] In that case, the Pennsylvania Supreme Court ruled that mail-in ballots could be received up to three days after Election Day instead of 8:00 p.m. on Election Day as defined in a Pennsylvania statute.[146] Ultimately, the Court did not hear the case as it did not receive the requisite four votes to grant certiorari.[147]

However, Justice Alito's statement to not grant certiorari in *Boockvar II*—joined by Justices Thomas and Gorsuch—asked the Court to endorse the Independent State Legislature Theory by reasoning that the "provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rule governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave" them the power to do so.[148]

Again in 2020, the Court handed down an order in *Democratic National Committee v. Wisconsin State Legislature*.[149] In that case, a lower federal court in Wisconsin determined that an extension to voting deadlines was necessary for voters to cast ballots in light of the COVID-19 pandemic.[150] However, in a 5-3 ruling, the Court found that the lower federal court erroneously granted the extension.[151] In its reasoning, the Court cited the long-standing principle that the Court has the final say on matters of federal law but that a state's highest court has the final say in matters of state law.[152]

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[145] Republican Party of Pa. v. Boockvar (*Boockvar II*), 141 S. Ct. 1, 1 (2020); *See also* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732-33 (2021) (Thomas, J., dissenting).

[146] *Boockvar II*, 141 S. Ct. at 1.

[147] Justice Barrett did not participate in the vote at the time. *Id.* While Justice Kavanaugh was able to participate, he did not vote to hear the case. *Id.*

[148] *Boockvar II*, 141 S. Ct. at 2 (Alito, J., concurring).

[149] Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28, 28 (2020).

[150] *Id.* (Roberts, C.J., concurring); *see also id.* at 28-30 (Gorsuch, J., concurring).

[151] *Id.* at 28-30 (Gorsuch, J., concurring); *see also id.* at 30 (Kavanaugh, J., concurring).

[152] *See* Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976); Republican Nat'l Comm. v. Burton, 455 U.S. 1301-02 (1982) (stating "this Court has no jurisdiction to review decisions based on adequate, nonfederal grounds"); Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring) (comparing Boockvar II with DNC v. Wis. State Leg. and stating that "this case involves federal intrusion on state lawmaking processes"); *see also* Transcript of Oral Argument at 42, Moore v. Harper, (No. 21-1271),

Most notably from that order are the concurring opinions from Justice Gorsuch and Justice Kavanaugh, in which Justice Gorsuch wrote that "[t]he Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."[153] Justice Gorsuch borrowed heavily from Justice Rehnquist's concurring opinion in *Bush v. Gore*,[154] suggesting the Justices' openness to a narrow definition of the word legislature. It intimates his idea that a federal court should insert itself into a state's interpretation of its law in elections. Justice Kavanaugh's opinion might signal that he would be the fourth vote in a more moderate application of the Independent State Legislature Theory. Chief Justice Roberts's dissenting opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[155] —where he furiously insisted that the word "legislature" be defined as exclusive to a state's assembly and senate—suggested that there is a potential fifth vote for some version of the theory.[156]

Concerns undoubtedly remain about what the exact import of the ISLT will be, as there are several different iterations of the theory. Even amongst experts in the field, there is much disagreement on what is precisely possible. However, there seems to be little disagreement over the concern that any adoption of the ISLT will spell doom for voting rights, the balance of power, and democracy in America. In other words, it is not a question of if but how much.

In one version of the theory, scholars contend that there is a middle ground that the Court can take, which both respects the Constitution while not adopting the most maximalist version of the theory. In their joint article, the Honorable Michael McConnell—a former federal judge—and Professor William Baude argue that the Court can adopt what they call the "constitutional state legislature theory."[157] Under their proposal, the Court would rule that while state courts can

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https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1271_21o2.pdf.

[153] *Democratic Nat'l Comm.*, 141 S. Ct. at 29.

[154] *Id.* at 34 n.1.

[155] 576 U.S. 787 (2015).

[156] *Id.* at 840.

[157] William Baude & Michael McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, THE ATLANTIC (Oct. 11, 2022), https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/.

review and ultimately strike down congressional maps under the state constitution, the state court would not be able to redraw the map.[158] Remember, in *Harper*, the state court appointed a special master to redraw the congressional maps.[159]

There are some appealing facets of this proposition. Firstly, adopting this theory carries within it the perceived air of compromise and fairness. Further, it would allow states to pursue other already constitutionally recognized means of redrawing district lines—such as adopting an independent commission.

However, upon slight scrutiny, it is not hard to see that even employing this tame version of the ISLT would be a sort of pandora's box. To start, the legislature or the voters must institute an independent commission. A legislature keen on retaining its enhanced powers likely would not be so inclined to cede them to an independent commission. And relying on a majority of voters to do something politically disadvantageous for their party is equally implausible. Further, it is important to focus on what is being compromised: federalism, checks and balances, and democracy. That compromise would be made in the name of an undertheorized, ahistorical, and self-contradictory theory.

Perhaps the most salient point is the concern with what states will do with those facets of voting other than congressional maps. The time, manner, and place of conducting elections consist of myriad policies, procedures, and practices that expand inclusion in our democracy. Early voting, absentee ballots, same-day registrations, and voter identification laws are all examples that fall within the Elections Clause.[160]

For their part, states have not necessarily shown themselves as vanguards of voting rights when endowed with some new power. Take, for example, what happened in the wake of the Supreme Court's decision in *Shelby County v. Holder*.[161] In that case, the Court struck down the Voting Rights Act's preclearance provision,[162] which

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[158] *Id.*
[159] *Id.*
[160] Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571, 607-09 (forthcoming 2022) (stating that the "independent state legislature theory would create a major crack in [the] bedrock principles" of voting rights).
[161] *See generally* Shelby County v. Holder, 570 U.S. 529 (2013).
[162] *Id.* at 556-57.

required some states with demonstrated histories of abusing voting rights to submit any proposed changes to voting laws to Congress for approval.[163] Just two hours after the Court invalidated this provision of the law, Texas instituted new voting identification laws, which made hundreds of thousands of voters—many of whom had voted for decades—ineligible to vote.[164]

However, some scholars go much further and fear that this theory would allow states to meddle in elections post-certification of a popular vote. For instance, it is well-reported now that former President Trump sought to send slates of fake electors to support his presidential candidacy after the vote in those states had been certified for President Biden.[165] In the Republican National Committee's brief in *Harper*, the author deceivingly writes that the theory would not allow states to engage in post-election mischief to change "valid election results."[166] However, 2020 saw unprecedented legal—and physical—battles by GOP politicians and lawyers questioning and litigating the validity of election results.[167] The word "valid" is drenched in irony.

Therefore, to endorse even the mildest form of this theory would open the floodgates of untold election horrors. And while the Court should not be engaging in policy analysis in its decision-making on the legality of any issue, there is a sufficient dearth of precedent—as well as an abundance of case law and history—for any honest jurist to dismiss this theory whole cloth.

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[163] *Id.* at 534-35.

[164] WALDMAN, *supra* note 106.

[165] Alan Feuer & Katie Benner, *The Fake Electors Scheme, Explained*, N.Y. TIMES (July 27, 2022), https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html; *See also* Carson v. Simon, 978 F.3d 1051, 1060 (8th Cir. 2020) (stating that "only the Minnesota Legislature, and not the Secretary," can "establish the manner of conducting the presidential election in Minnesota," which was endorsed by a divided panel of the Eighth Circuit).

[166] Brief for the Republican Nat'l Comm., et. al. as Amici Curiae Supporting Petitioners at 22, Moore v. Harper, (2022) (No. 21-1271), https://www.supremecourt.gov/DocketPDF/21/21-1271/237169/20220906163915853_21-1271%20Amici%20RNC%20et%20al.%20Supp.%20Pet..pdf.

[167] Ian MacDougall, *ProPublica's Guide to 2020 Election Laws and Lawsuits*, PROPUBLICA (Nov. 3, 2020, 06:22AM), *https://www.propublica.org/article/propublicas-guide-to-2020-election-laws-and-lawsuits.*

E. Oral Arguments

On December 7, 2022, the Supreme Court heard oral arguments on this case. While the petitioners and respondents mainly confined their arguments to their briefs, the most telling part of the argument was the justices' questions.

Chief Justice Roberts queried the petitioner's attorneys about several apparent contradictions in their theory. Namely, the Chief Justice pointed out that if the petitioners concede *Smiley* is good law, how can they still contend that they even have a case?[168] The petitioners dance around this argument by saying that *Smiley* and *Arizona State Legislature* stand for the proposition that there can be *procedural* limitations on a "legislature."[169] However—so the argument goes—the case before the Court in *Harper* deals with a *substantive* limitation on a "legislature."[170]

Justice Barrett seized on this procedure versus substance dichotomy and questioned where precisely the petitioners rooted that claim.[171] Under questioning from the Court, the petitioners first retreated to history and interpreted a passage of James Madison's writing.[172] But then the petitioners pointed to the Court's precedent in *Smiley* and *Bush v. Palm Beach County*, a precedent to support their position.[173]

However, two critical conservative justices seemed skeptical about this distinction. Justice Barrett—a former professor of Civil Procedure—engaged in a line of questioning that demonstrated the difficulties in discerning between procedure and substance.[174] The Justice questioned why this would be a workable distinction when the Court also has to consider adopting rules in this field with manageable and clear standards.[175] Later on, Justice Kavanaugh teased out through a series of questions that nowhere in those cases did the Court specify "substantive" or "procedural."[176] Some interpret these questions to

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[168] Transcript of Oral Argument, *supra* note 152, at 7-8.
[169] *Id.* at 8.
[170] *Id.* at 8-9.
[171] *Id.* at 10-11.
[172] *Id.* at 11.
[173] *Id.* at 11-12.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 44.

signal that the justices will not endorse a maximalist version of the ISLT.[177] However, Justice Barrett's comments during her Senate confirmation hearing around abortion law precedent—and subsequent action thereon—tell a different story about what one can divine from her words.[178]

The more liberal justices on the Court made no bones about their issues with the proposed theory. Justice Jackson made a sharp and pointed inquiry into the inherent contradiction in the Petitioner's claims. Namely, Justice Jackson questioned how using the state constitution to assess whether a legislature violated the powers given to it by the state constitution could be a procedural—rather than a substantive—issue.[179]

Justice Kagan then pointed out that the Court's precedent—both in *Smiley* and *Arizona State Legislature*—stood for the propositions that "just as Congress is subject to limitations in the federal Constitution . . . 'there is no intimation of a purpose to exclude a similar restriction imposed by state constitutions upon state legislatures'" and "nothing in the elections clause instructs, and this Court has never held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the state's constitution."[180]

Justice Kavanaugh also showed some skepticism in his colloquy with the Petitioner's counsel. Like those before him, Justice Kavanaugh seized on the procedure versus substance distinction and asked which authority the petitioner thought best stood for that proposition.[181] After the Petitioner cited to *Palm Beach County*, Justice Kavanaugh made it a point to query whether it actually stood for that proposition, at one time pointing out that the exact quote the Petitioner

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[177] Ian Millhiser, *Amy Coney Barrett Appears Likely to Block the GOP's Latest Attack on Democracy*, VOX (Dec. 7, 2022), https://www.vox.com/policy-and-politics/2022/12/7/23498507/supreme-court-moore-harper-amy-coney-barrett-democracy-voting-rights-north-carolina.

[178] Becky Sullivan, *What Conservative Justices Said—and Didn't Say—about Roe at Their Confirmations*, NPR (June 24, 2022), https://www.npr.org/2022/05/03/1096108319/roe-v-wade-alito-conservative-justices-confirmation-hearings.

[179] Transcript of Oral Argument, *supra* note 152, at 13.

[180] *Id.* at 25.

[181] *Id.* at 43.

relied on upon their argument did not contain the words "substance" or "procedure."[182]

But Justice Kagan teased out the potential consequences of adopting this theory with stinging clarity. She pointed out that things like gerrymandering, voting restrictions, and voting protections would all be subject to the whim of state legislatures without the possible redress of state constitutional violations.[183] The Petitioner's counsel tacitly ceded this point by arguing that the check on these violations could come from federal law or the political consequences for legislators of doing unpopular things with voters.[184]

Justices Alito and Gorsuch became much more active—and hostile—once the Respondent began their argument. For instance, Justice Alito engaged in a rapid-fire series of leading questions seizing on times when a court may be engaging in legislative functions versus judicial review.[185] Justice Alito often cut off the Respondent's attorney and ended his queries with argumentative and combative phrases.[186] Justice Gorsuch intimated that the Respondent's attorney was defending a state's application of the Three-Fifths compromise and cut him off before he could explain.[187] It seemed that—at this point—those Justice were less interested in understanding an argument than they were humiliating someone.

That said, it is clear that there are strong disagreements on the Court about the role of state courts in federal elections, as well as the powers of the legislature. And while some experts place stock in Justice Barrett's and Justice Kavanaugh's skeptical questions about the validity of the theory, there is just as much evidence to show that these Justices are apt to do things not based on precedent, history, or their signals.[188]

Instead, it is much more likely that the Court will endorse some minimalist version of the theory—granting either itself or other federal courts—more power in the state administration of national elections,

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[182] *Id.* at 43-44.
[183] *Id.* at 49.
[184] *Id.* at 50.
[185] *Id.* at 86.
[186] *See, e.g., id.* at 81-85 ("I'm not sure I understand your argument" and "is that also a lollapalooza?").
[187] *Id.* at 109.
[188] Sullivan, *supra* note 178.

all the while hamstringing state institutions from applying their laws to the legislature.

F. Demagoguery

The ISLT is undertheorized, ahistorical, and inapposite with the Court's precedent. However, this is not the first such theory found before the nation's highest Court. And the culprit for the proliferation of these theoretical viruses is something all too familiar to readers—and authors—of law review notes like this: law schools.

The 1970s were home to the first observable burst of right-wing political ideologies and their hosts seeking to infiltrate law schools. James McGill Buchanan Jr.—a renowned American economist of the time whose work focused on things such as political economy, public choice, and libertarianism—became increasingly concerned with what he described to his financial supporters as "'genuine subversion in our law schools.'"[189] And he set out to reform legal thought to better suit the needs of both himself and his corporate suitors.[190]

To that end, Buchanan enlisted the help of Professor Henry G. Manne, a scholar in law and economics—"a field dedicated to shaping the understanding and practice of law in a manner that CEOs and CFOs could . . . appreciate."[191] As an example of his work, consider that "Manne's own work of the 1960s argued . . . that insider trading was good for the economy . . . ."[192] In essence, Manne sought "to transform the legal profession 'wholesale' rather than 'retail.'"[193]

To implement this vision, Manne and Buchanan set out to influence how students, faculty, and graduates thought about and discussed the law. For his part, Manne hosted two-week-long seminars to which he invited scholars from schools such as Yale, Harvard, and Columbia.[194] The Manne's Law and Economics Center financially sponsored academics to write papers supporting the center's principles about legal libertarianism, public choice, and corporate-oriented cost-benefit analysis.[195]

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[189] NANCY MACLEAN, DEMOCRACY IN CHAINS 122 (ed. 2018).
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.* at 123.
[194] *Id.*
[195] *Id.* at 122.

But running these operations required cash flow. Manne would solicit contributions from numerous corporations, often pitching their long-term interest in developing a pro-business legal landscape.[196] Among the early donors was "a long-standing libertarian funder . . . ," Charles Koch.[197]

The effects of these early efforts can be felt covertly and overtly in the legal field—from scholarship minimizing the consequences of white-collar crime to practitioners thwarting antitrust regulation enforcement. However, at the center of this Note lies one example of how legal scholarship redefined a right with massive implications for America.

Until 2008, the Supreme Court had squarely considered the issue of whether the Second Amendment conferred an individual right to own a firearm four times.[198] The Court found that it did not each time—until the 2008 case of *District of Columbia. v. Heller*.[199] To find out what happened, one political scientist reviewed "a century's worth of law review articles on the Second Amendment . . . from 1888 to 1960."[200] Each one "concluded that the Second Amendment did not guarantee an individual right" to own a firearm.[201] The first one that did argue such a position appeared in 1960.[202] It was written by a student who began by citing an article from *American Rifleman*.[203]

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[196] *Id.* at 126.
[197] *Id.*
[198] MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 222 (2014). *See generally* United States v. Cruikshank, 92 U.S. 542 (1875) (holding that the Second Amendment did not apply to the states); Presser v. Illinois, 116 U.S. 252, 265 (1886) (holding that a state could not pass laws that "prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government"); Miller v. Texas 153 U.S. 535, 538 (1894) (ruling that the Court had "examined the record in vain, however, to find where the defendant was denied the benefit of any of [the Second Amendment's] provisions . . . ."); United States v. Miller, 307 U.S. 174, 178 (1939) (finding that "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less that eighteen inches at length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument").
[199] *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008).
[200] WALDMAN, *supra* note 198, at 224.
[201] *Id.*
[202] *Id.* at 156.
[203] *Id.*

And the counter-scholarship only started there. From 1970 to 1989, historian Carl Bogus wrote that "twenty-five articles adhering to the collective rights view were published, but so were twenty-seven articles endorsing the individual model."[204] The most telling part is that about 60% of those twenty-seven articles were "written by lawyers who had been directly employed by or represented the" National Rifle Association [hereinafter "NRA"] or "other gun rights organizations."[205]

There was big money to be made in this endeavor, too. In one instance, several authors received a million dollars to fund their work on the individual rights theory of the Second Amendment.[206] The NRA provided "$1 million to endow the Patrick Henry professorship in constitutional law and the Second Amendment at George Mason University Law School."[207] The NRA hosted essay contests offering $25,000 for the essay it thought best argued the individual rights theory.[208] In one particular instance of note, it paid one lawyer $15,000 to write a negative review of a book that argued the collective rights theory.[209]

All of this provided the legal justification upon which the majority on the Supreme Court relied when it drafted the majority opinion in *Heller*—ruling that the Second Amendment protected an individual right to own a firearm,[210] despite its precedent and established historical record to the contrary. Justice Scalia relied on six law review notes in his decision, all arguing for an individual rights interpretation of the Second Amendment, and all of them are dated post-1980.[211]

Much like in 2008, the legal landscape is similarly positioned. For instance, Michael Morley—a George Bush appointee and honored member of the Republican National Lawyers Association—[212] has

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[204] *Id.*
[205] *Id.*
[206] *Id.* at 225.
[207] *Id.*
[208] *Id.* at 226.
[209] *Id.*
[210] District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").
[211] See *id.* at 587, 597, 602, wherein Justice Scalia cites to several law review articles referencing the original meaning of the Second Amendment.
[212] *Member Profile - Michael Morley*, REPUBLICAN NAT'L LAWS. ASS'N, https://www.rnla.org/michaelmorley (last visited Feb. 2, 2023).

taken to writing several articles arguing for the "New Elections Clause" and a revisionist understanding of the ISLT in line with the Republican state legislature's position in *Harper*.[213] The Republican National Committee cites his work in their brief for *Harper* twice.[214] Now—just as in 2008—it is easy to see the politically motivated interests in achieving specific legal outcomes not because they are in accord with the law or history but because they align with a particular party's political interests.

IV. Conclusion

Much has been said and written about what laws are and what they ought to be. From Socrates and Plato, to the Justices upon the Supreme Court today, people have wrestled over canons of interpretation, philosophical underpinnings of lawmaking, and many more high-minded ideas about the rules with which we govern ourselves. Maybe the fact that things are ever-changing means there is no universal or foundational truth upon which we might build our laws.

But there are consequences. There are consequences that come with empowering state legislatures to disenfranchise millions of people, as they have already done. There are consequences to revising history to suit narratives aimed at specific political outcomes. There are consequences to concocting and enshrining in law legal theories that preserve and bolster systems of oppression. If the law is not a tool to serve the people of a nation—all of the people—then what is it?

Like many a tool in our society, the law can be used. It can be used to build, or it can be used to destroy. The law can also be abused. The independent state legislature theory is the latest way folks seek to abuse legal tools to destroy those systems that protect people and allow them to participate in our democracy. And any court that would rule or lawyer that would argue in the interests of folks wielding the tool in such a manner does not deserve the powers privileged to them.

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[213] *See also Michael T. Morley*, FLA. STATE UNIV. COLL. L., https://law.fsu.edu/faculty-staff/michael-morley (last visited Feb. 14, 2023) (providing a list of Michael Morley's publication arguing for the ISLT, against injunctions, election emergencies, and rule manipulations in presidential nominations).

[214] Brief of Amici Curiae the Republican National Committee, The NRCC & The North Carolina Republican Party in Support of Petitioners at 20, Moore v. Harper, 600 U.S. 1, 143 S. Ct. 2065 (2023) (No. 21-1271) 2022 WL 4117422.

V. Post-*Moore*

On June 27, 2023, the Court handed down its decision in *Moore v. Harper* and averted what could have been a catastrophic result for American democracy.[215] In a surprising 6-3 decision, Chief Justice Roberts delivered the opinion of the Court, joined by Justices Barrett, Kavanaugh, and the three liberal justices.[216] Justice Thomas wrote a dissenting opinion, in which Justice Gorsuch joined, and Justice Alito joined in part.[217] In sum, the Court summarily rejected the ISLT, holding that the Elections Clause does not vest exclusive and independent authority in the state legislatures to set the rules regarding federal elections.[218]

The path to this ruling was not straightforward. After the case was argued and submitted to the Court, but before the Court issued its ruling, the North Carolina Supreme Court reconstituted itself.[219] There was an election in North Carolina that switched the jurists on the court from a liberal to a conservative majority.[220] In one of their first actions as the majority, the North Carolina court overruled and withdrew its decisions in the line of *Moore* cases.[221] This presented serious questions about whether the Supreme Court still had jurisdiction to rule on the case.

Concerningly, the Court found that it did have jurisdiction to decide on the case. In doing so, the Court forced itself through a narrow line of reasoning to find that "the [North Carolina] court did not purport to alter or amend the judgment in *Harper I*" enjoining the use of the 2021 maps.[222] Were this Court to reverse *Harper I*, the 2021 plans would again take effect.[223] Therefore, since "complete relief runs through this Court," the parties continued to have a personal stake

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[215] Moore v. Harper, 600 U.S. 1, 143 S. Ct. 2065 (2023).
[216] *Id.*
[217] *Id.*
[218] *Id.* at 2083.
[219] *Id.* at 2075.
[220] Ian Millhiser, *The Supreme Court Signals that a Terrifying Attack on Voting Rights Will Vanish—For Now*, VOX (Mar. 2, 2023) https://www.vox.com/politics/2023/3/2/23622717/supreme-court-moore-harper-anti-democracy-case-elections.
[221] *Moore*, 143 S. Ct. at 2077.
[222] *Id.* at 2078.
[223] *Id.* at 2079.

in the outcome of the election.[224] The Court will do what it must to reach the merits of a case when it wants to.

In reaching the substantive holding in the case, the Court relied on a series of cases which stood for the principle that state legislatures remain subject to the ordinary exercise of state judicial review.[225] Namely, the Court drew from *Hildebrant*, *Smiley*, and *Arizona Independent Redistricting Commission*, in rejecting the ISLT, as this Note suggested.[226] The Court also looked back at the history of state legislatures to ultimately find that "state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause."[227] As this Note pointed out, the historical record around state legislatures was clear that they were institutions typically circumscribed, not expanded.[228]

However, there is one passage from the Chief Justice's opinion that might be some source of concern. Specifically, the Chief Justice noted that while "we [the Court] conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein. . . . [The Supreme Court has] an obligation to ensure that state court interpretations of that law do not evade federal law."[229] Chief Justice Roberts explained that the Court did not adopt a "test by which we can measure state court interpretations of state law in cases implicating the Elections Clause," rather the Court held "that state courts may not transgress the ordinary bounds of judicial review . . . ."[230] It is not entirely clear what this means, especially considering that the author of the opinion refused to spell out a test or illustrate his point by providing examples. However, it should be emphasized that the ISLT was born out of a seemingly throw-away line in a concurring opinion of a Supreme Court case.

Of note, the Chief Justice is not beyond teeing up a seemingly restrained ruling with an eye towards a much more extreme decision down the road. What has been observed by some as the "Roberts Two-Step," experts in the field have noted instances in which the Chief Justice issues a seemingly tame ruling on a noteworthy case in order to

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[224] *Id.* at 2077.
[225] *See id.* at 2079-88.
[226] *Id.*
[227] *Id.* at 2086. *Compare id.*, *with* Part III of this note.
[228] *Id. Compare id.*, *with* Part III Section B of this note.
[229] *Moore*, 600 U.S. at 46-47.
[230] *Id.* at 36.

draw in support from justices that might not sign on to a more extreme opinion.[231] For instance, experts observed this phenomenon in the line of cases that lead to the *Citizens United* ruling.[232] Others have described this phenomenon in discussing the line of cases that lead to the decision in *Shelby County*.[233] As such, do not be surprised if the Chief Justice's decision in *Moore* is simply the latest instance of the Court teeing up a jurisprudential rule it can expand at a later date to deliver on a more extreme outcome, specifically in 2024.

Keep in mind, 2020 saw a flurry of litigation in state courts around the 2020 federal elections.[234] What would federal courts do—ones remade during the Trump presidency[235]—in evaluating whether "state courts [transgressed] the ordinary bounds of judicial review[?]"[236] What would the Supreme Court do, comprised of a conservative majority, where two of the dissenting Justices signed on to a milder version of the ISLT? It is not clear, but the Court's past behavior does not portend well for the future of America's democracy.

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[231] Richard L. Hasen, *Die Another Day,* SLATE (Apr. 2, 2014) https://slate.com/news-and-politics/2014/04/the-subtle-awfulness-of-the-mccutcheon-v-fec-campaign-finance-decision-the-john-roberts-two-step.html.
[232] *Id.*
[233] Rhiannon Hamam, Michael Liroff, Peter Shamshiri, 04, Shelby County v. Holder, 5-4 (2020) https://www.fivefourpod.com/episodes/shelby-county-v-holder/.
[234] MacDougall, *supra* note 167.
[235] Tamara Keith, Carrie Johnson, Ron Elving, *Trump Remakes Federal Judiciary in His Image,* NPR (Jul. 1, 2020) https://www.npr.org/2020/07/01/886302162/trump-remakes-federal-judiciary-in-his-image.
[236] Moore v. Harper, 600 U.S. 1, 143 S. Ct. 2065, 2089 (2023).