

MOORE V. HARPER: THE INDEPENDENT STATE LEGISLATURE THEORY AND THE COURT AT THE BRINK

BRADEN FAIN*

INTRODUCTION

The Supreme Court will decide a case this term that could be “one of the most momentous and disastrous cases in American history.”¹ The case—*Moore v. Harper*²—has been brought to the Court by North Carolina state legislators who wish to draw voting districts that are nothing more than “egregious and intentional partisan gerrymanders, designed to enhance Republican performance.”³ The North Carolina Supreme Court struck down the map drawn by North Carolina legislators and replaced it with a map drawn by non-partisan experts.⁴ The legislators now challenge the North Carolina Supreme Court’s decision based on the “Independent State Legislature Theory” (ISLT).⁵

The logic underlying the ISLT is simple. The Elections Clause of the U.S. Constitution provides that the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof.”⁶ Proponents of the theory

*Copyright 2023 @ Braden Fain

J.D. Candidate, Duke University School of Law, 2024. B.S., Kansas State University, 2020. Special thanks to the highly dedicated editors of the *Duke Journal of Constitutional Law & Public Policy*. With gratitude for my parents.

1. Akhil Reed Amar, *Mr. Amar Goes to Washington – the Moore v. Harper Oral Argument*, AMERICA’S CONSTITUTION, at 17:15 (Dec. 13, 2022), <https://open.spotify.com/episode/47np0ip15bVGx4xJRYJJXt?si=5DQqpZMTSyKMbA8G35Ktbg&nd=1>.

2. No. 21-1271 (U.S. argued Dec. 7, 2022).

3. *Harper v. Hall*, 868 S.E.2d 499, 510 (N.C. 2022).

4. See Brief for Non-State Respondents at 12, *Moore v. Harper*, No. 21-1271 (U.S. argued Dec. 7, 2022) (summarizing the procedural history of this case).

5. See generally Brief for Petitioners, *Moore v. Harper*, No. 21-1271 (U.S. argued Dec. 7, 2022) (arguing the validity of the ISLT).

6. U.S. CONST. art. I, § 4, cl. 2 (emphasis added).

contend that, because the clause explicitly provides authority to state legislatures, those legislatures have *exclusive* authority within the state⁷ to regulate federal elections.⁸ This means state courts would be precluded from reviewing state legislatures' regulation of federal elections for compliance with state constitutions.⁹ It could also mean that state legislatures cannot delegate their authority to regulate federal elections.¹⁰ The theory would thus severely impact federal elections.

First, the theory would nullify voter protections enshrined in many state constitutions, such as the right to accessible voting places¹¹ and constitutional bans on gerrymandering federal congressional districts.¹² Acceptance of the theory would prevent state courts from protecting voters against suppressive voting laws passed by state legislatures.¹³ The theory would also allow state legislatures to flout the will of their people by ignoring popular ballot initiatives creating pro-democracy measures such as independent redistricting commissions.¹⁴ Without state courts, constitutions, and redistricting commissions, voters would be left with no tool to combat partisan gerrymandering.¹⁵ Because the theory would also prevent delegation of regulatory authority, it would curb states' authority to respond to emergencies—such as a global

7. The Elections Clause provides Congress with significant authority to regulate federal elections as well. The Elections Clause continues: “but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” *Id.*

8. See generally Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021) (setting forth the academic argument in favor of the ISLT).

9. *Id.*

10. Ethan Herenstein & Thomas Wolf, *The ‘Independent State Legislature Theory,’ Explained*, BRENNAN CTR. FOR JUST. (June 30, 2022), <https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained> (discussing the ISLT and its potential repercussions).

11. Michael Sozan & Genna Cifelli, *9 Ways the Supreme Court’s Decision in Moore v. Harper Could Harm Democracy*, CTR. FOR AM. PROGRESS (Dec. 1, 2022), <https://www.americanprogress.org/article/9-ways-the-supreme-courts-decision-in-moore-v-harper-could-harm-democracy/> (discussing potential consequences of the ISLT).

12. See Herenstein & Wolf, *supra* note 10.

13. See Sozan & Cifelli, *supra* note 11.

14. *Id.*

15. *Id.* Other potential remedies for partisan gerrymandering—federal court review, congressional action, or voting out gerrymandering legislators—are also foreclosed or extremely unlikely. Federal court review is no longer possible following *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). See *infra* Part I. Congress could act by passing a law preventing gerrymandering, but that appears unlikely given Congress’s consistent failure to pass voter protections. Finally, the very problem with gerrymandering is that the practice makes it extremely difficult to vote out the legislators who are drawing gerrymandered maps—thus the ordinary political process offers no realistic remedy.

pandemic.¹⁶ Further, because the theory would apply only to federal elections, it could wreak havoc on states' ability to administer elections by forcing states to administer separate federal and state elections subject to different rules.¹⁷

Many proponents offer weaker, alternative versions of the ISLT that would allow action by other state actors, such as governor veto,¹⁸ state court review subject to federal court review,¹⁹ or delegation of regulatory authority to other state officials.²⁰ These weaker theories still come with at least some of the consequences described above and would disrupt elections in the United States.

I. LEGAL BACKGROUND

The modern ISLT comes from former Chief Justice Rehnquist's concurrence in *Bush v. Gore* (*Bush II*).²¹ The Chief Justice failed to gain a majority for the ISLT in *Bush II* but planted the seeds for both Donald Trump's challenges to the 2020 election and the litigation at issue in *Moore v. Harper*.²² Since Chief Justice Rehnquist suggested the ISLT as a credible theory in 2000, and especially since Donald Trump's failed attempts to overturn the 2020 election based on the theory, an immense amount of scholarship has emerged regarding the ISLT's

16. *Id.*

17. *Id.* Article I, Section II, Clause I of the U.S. Constitution and the 17th Amendment provide that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Thus, anyone who is allowed to vote in state elections must be allowed to vote in elections for House and Senate. These provisions would prevent states from imposing different qualifications for voting in state versus federal elections, but it would require an extremely broad reading of these provisions to suggest that they prevent differing rules about, for example, the time or place where voting can take place.

18. See Brief for Petitioners, *supra* note 5, at 24 (conceding that a gubernatorial veto is permissible under the ISLT).

19. See Morley, *supra* note 8, at 515–32 (discussing state court review in the ISLT context and the possibility of state court review subject to federal court review of state court judgments). See also William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, THE ATLANTIC, (October 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/> (laying out the Court's potential middle ground approach to the ISLT).

20. See Morley, *supra* note 8, at 554 (concluding that under the ISLT state legislatures can delegate authority to regulate federal elections, and that any argument to the contrary is "without merit").

21. 531 U.S. 98 (2000) (*Bush II*) (per curiam). Chief Justice Rehnquist's concurrence has never been favorably cited by the Court. Akhil Reed Amar, *More on Moore – The Oral Argument, Continued*, at 1:37:42 (Dec. 21, 2022), AMERICA'S CONSTITUTION, <https://open.spotify.com/episode/2euGavOh0Roy1l3H77IEvx?si=0d44cf03300943a9>.

22. See Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. CT. REV. 1, 1–2 (discussing recent developments related to the ISLT and its origins).

validity. That scholarship has reached an overwhelming consensus: the ISLT has no basis in Constitutional text, founding-era history, or Supreme Court precedent.²³ This immense scholarly record has led even prominent conservatives to conclude that “there is absolutely nothing” to support the theory.²⁴

The crux of the ISLT’s problem is that its interpretation of “legislature” in the Elections Clause is totally inconsistent with historical practice and precedent. History and founding-era usage of “legislature” reveal that the term does not strictly refer to the legislative body within a state, but instead to the regular lawmaking process as prescribed by each state’s constitution.²⁵ State legislatures, when acting in their regular lawmaking capacity, are subject to state constitutional limits such as gubernatorial veto and state judicial review.²⁶ Thus, a state legislature is not “independent” from state constitutional constraints when creating federal election regulations any more than when it passes other laws.²⁷

23. See Amar & Amar, *supra* note 22; Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory*, 57 GA. L. REV. (forthcoming spring 2023); Mark Bohnhorst, Michael Fitzgerald & Aviam Soifer, *Gaping Gaps in the History of the Independent State Legislature Doctrine: McPherson v. Blacker, Usurpation, and the Rights of the People to Choose Their President*, MITCHELL HAMLIN L. REV. (forthcoming 2023); Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 101 (2022); Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052 (2021); Leah Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235 (2022); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. (forthcoming 2022); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021); Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. (2023); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY’S L.J. 445 (2022); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997 (2021); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J. L. & PUB. POL’Y (forthcoming 2023); Rosemarie Zagari, *The Historian’s Case Against the Independent State Legislature Theory*, B.C. L. REV. (forthcoming 2023) (all arguing on various grounds against the validity of the ISLT).

24. J. Michael Luttig, *There is Absolutely Nothing to Support the ‘Independent State Legislature’ Theory*, THE ATLANTIC (Oct. 3, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/moore-v-harper-independent-legislature-theory-supreme-court/671625/>.

25. See Brief for Akhil Reed Amar, Vikram David Amar & Steven Gow Calabresi as Amici Curiae Supporting Respondents at 17–22, *Moore v. Harper* No. 21-1271 (U.S. argued Dec. 7, 2022) (discussing the meaning of “legislature”).

26. *E.g.*, N.C. CONST. art. II, § 22, cl. 1; see also Brief for Petitioners, *supra* note 5 (“judicial review is a background assumption of the American constitutional system”).

27. See sources cited *id.*

These principles follow because state legislatures are created by state constitutions.²⁸ State legislatures are forbidden from violating the constitutions that created them; just as Congress is created and constrained by the U.S. Constitution, a state legislature is created and constrained by its respective state constitution.²⁹ To say otherwise creates an untenable scenario in which a constitution creates something it then cannot control. Consistent also with the Framers' deep distrust for state legislatures, the Framers likely would not have given state legislatures such broad authority over federal elections.³⁰ Further, eight of the eleven states that ratified the U.S. Constitution in 1787–88 had constitutions that constrained state legislatures' ability to regulate federal elections, contradicting ISLT's core logic.³¹ While Chief Justice Rehnquist was working with limited time and a limited scholarly analysis in his *Bush II* concurrence, today the Justices have an immense historical and scholarly record refuting the ISLT.³² The Court's recent precedent is consistent with this updated historical record.

The Court most recently addressed the ISLT in *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*.³³ In that case, the Court found it permissible for Arizona to grant redistricting authority to an independent commission.³⁴ The Court rejected the ISLT outright: “[n]othing in [the Elections Clause] instructs, nor has this Court ever held, that a state legislature may [regulate] the . . . manner of holding federal elections in defiance of provisions of the State’s constitution.”³⁵ If state legislatures must comply with their state constitutions in regulating federal elections, then the crux of the ISLT — that state legislatures are *not* bound by state constitutions — is incorrect.

28. See Amar & Amar, *supra* note 22, at 19 (“[a] state’s ‘legislature’ was not just an entity created to represent the people; it was an entity *created and constrained by the state constitution*”).

29. See *id.*

30. See James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. L. REV. 625, 641 (2002) (noting the “long American history of popular distrust of state legislatures and of corresponding efforts to use state constitutions to curb undesirable legislative behavior”).

31. Amar & Amar, *supra* note 22, at 22–24. These state constitutional limitations on federal elections included limitations on the election of Senators, which, before the 17th Amendment’s ratification, were elected by state legislatures instead of by popular vote. Gardner, *supra* note 30, at 647–48.

32. See sources cited *supra* note 23.

33. 576 U.S. 787 (2015) (*AIRC*).

34. *Id.* at 824.

35. *Id.* at 817–18.

AIRC was a 5-4 decision in which the conservative wing of the Court dissented.³⁶ Four years later, however, in *Rucho v. Common Cause*, the conservative wing gave its full-throated approval of *AIRC*.³⁷ In *Rucho*, the Court found that partisan gerrymandering is a non-justiciable political question, thus preventing federal courts from hearing challenges to even the worst partisan gerrymandering.³⁸ With federal courts unable to address partisan gerrymandering, the Court assured concerned voters that its “conclusion does not condone excessive partisan gerrymandering.”³⁹ The Court continued that complaints about partisan gerrymandering were not condemned to “echo into a void,” because the Court accepted and approved of state courts’ ability to hear those challenges.⁴⁰ The Court expressly approved of state constitutional amendments in Colorado and Michigan creating redistricting commissions.⁴¹ And the majority even approved of a Florida Supreme Court decision striking down the state’s districting plan because it violated the Florida Constitution.⁴² The Court thus approved of states’ ability to create redistricting commissions, state constitutions’ ability to constrain state legislatures in regulating federal elections, and state supreme courts’ ability to interpret and enforce state constitutions in the federal election context. *Rucho* thus confirmed *AIRC*’s total repudiation of the ISLT. And, critically, Justices Alito, Thomas, Gorsuch, and Kavanaugh all joined the decision in full.⁴³

This recent repudiation of the ISLT builds on a century-old line of cases rejecting the theory—in both *Ohio ex rel Davis v. Hildebrandt*⁴⁴ and *Smiley v. Holm*,⁴⁵ the Court unanimously rejected the ISLT. Thus, over the course of a century, the Court has rejected the ISLT every time it has been raised. Further, every member of the Court other than Justices Barrett and Jackson have authored or joined a majority opinion rejecting the ISLT.⁴⁶

36. *See id.* at 824 (Chief Justice Roberts wrote the dissent, joined by Justices Scalia, Thomas, and Alito).

37. 139 S. Ct. 2484 (2019).

38. *Id.* at 2508.

39. *Id.* at 2507.

40. *Id.*

41. *See id.* (“The States . . . are actively addressing the issue on a number of fronts.”)

42. *See id.*

43. *Id.* at 2491.

44. 241 U.S. 565 (1916).

45. 285 U.S. 355 (1932).

46. Justices Kagan and Sotomayor joined the majority in *AIRC*, and Chief Justice Roberts, Justices Alito, Thomas, Gorsuch, and Kavanaugh all joined the majority in *Rucho*. The Court has not decided a case considering the ISLT since Justices Jackson and Barrett joined the bench.

II. FACTS AND PROCEDURAL BACKGROUND

Following the 2020 census, the North Carolina General Assembly enacted new maps for congressional elections.⁴⁷ Respondents challenged those maps in North Carolina Superior Court pursuant to a statutory scheme⁴⁸ enacted by the state legislature.⁴⁹ As prescribed by that scheme, the Chief Justice of the North Carolina Supreme Court appointed a three-judge panel to preside over the case.⁵⁰ That panel initially denied relief, but the North Carolina Supreme Court granted a stay and remanded to the panel for an expedited trial.⁵¹ The panel reported its findings after a week-long trial, concluding the maps were “intentional, pro-Republican partisan redistricting” that amounted to “extreme partisan outliers.”⁵² The panel found that the maps were more advantageous to Republicans than 99.9999 percent of maps and essentially guaranteed Republicans ten of North Carolina’s fourteen congressional seats even if Republicans were to lose the statewide vote.⁵³ The panel nonetheless found the State Constitution could provide no remedy for the gerrymander.⁵⁴ Respondents appealed, and the North Carolina Supreme Court reversed and enjoined the use of the maps.⁵⁵

Pursuant to the same legislative scheme above, the North Carolina Supreme Court gave the State’s General Assembly a chance to remedy its defective maps subject to Superior Court approval.⁵⁶ To aid its review, the Superior Court panel appointed a bipartisan group of retired judges to serve as Special Masters.⁵⁷ Those Special Masters further hired four expert assistants, including a leading redistricting expert.⁵⁸ The General Assembly submitted new maps, but the Superior Court struck those down again as an unconstitutional partisan gerrymander under the State Constitution.⁵⁹ Pursuant to the legislature’s prescribed framework, the Superior Court adopted a map

47. Brief for Petitioners, *supra* note 5, at 6.

48. N.C. Gen. Stat. §267.1(a).

49. Brief for State Respondents at 5, *Moore v. Harper*, No. 21-1271 (U.S. argued Dec. 7, 2022).

50. *Id.*

51. *Id.* at 6.

52. *Harper v. Hall*, 868 S.E.2d, at 510, 515.

53. *Id.* at 520.

54. Brief for Non-State Respondents, *supra* note 4, at 8.

55. *Id.* at 8–9.

56. *Id.* at 11.

57. *Id.*

58. *Id.*

59. *Id.* at 12.

drawn by the Special Masters for the 2022 election.⁶⁰ That map was to be used only in 2022, with the General Assembly tasked with drawing new maps for 2024.⁶¹

Petitioners sought a stay from the North Carolina Supreme Court, which was denied.⁶² Petitioners next sought a stay from the United States Supreme Court, which was also denied.⁶³ Justices Alito, Thomas, and Gorsuch dissented from the denial of stay, and Justice Kavanaugh concurred, noting his concern about the Elections Clause arguments raised by Petitioners.⁶⁴ On June 30, 2022, the Supreme Court granted certiorari.⁶⁵

III. SUMMARY OF PETITIONERS' ARGUMENT

Petitioners advocate for the ISLT with arguments based on constitutional text and structure,⁶⁶ founding-era history,⁶⁷ and Supreme Court precedent.⁶⁸ Petitioners conclude that the North Carolina Courts usurped the state legislature's role in regulating federal elections in violation of the Elections Clause.⁶⁹

A. *Constitutional Text*

The pro-ISLT Petitioners' main argument relies on a strict textual reading of the Elections Clause.⁷⁰ Very simply, Petitioners argue that because the Elections Clause names state legislatures specifically, those legislatures "bear primary responsibility for setting election rules."⁷¹

Petitioners also rely on a supposed change in the constitutional text during its drafting.⁷² Petitioners claim that the earliest draft of the Elections Clause, as included in what is known as the "Pinckney Plan," gave "states" the authority to regulate federal elections instead of the

60. *Id.*

61. *Id.*

62. Brief for Petitioners, *supra* note 5, at 10–11.

63. Moore v. Harper, 142 S. Ct. 1089, 1089 (2022).

64. *Id.*

65. Moore v. Harper, 142 S. Ct. 2901 (2022).

66. Brief for Petitioners, *supra* note 5, at 17.

67. *Id.* at 25.

68. *Id.* at 39.

69. *Id.* at 49.

70. *Id.* at 13.

71. *Id.* at 13–14 (quoting Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 29 (2020) (quoting Gorsuch, J. concurring in denial of application to vacate stay). This flat-footed reading of the Elections Clause has been roundly repudiated by an immense scholarly record. See *supra* note 23 and accompanying text.

72. *Id.* at 2.

“legislature[s] thereof.”⁷³ Petitioners conclude that the Framers made this change from states as a whole to only state legislatures because they intended to preclude all state actors other than the legislature from regulating federal elections.⁷⁴ Unfortunately for Petitioners, the Pinckney Plan is a fraudulent document, and “has been so utterly discredited that no instructed person [would] use it . . . as a basis for constitutional or historical reasoning.”⁷⁵

Petitioners’ final textual-historical argument comes from a markup of a draft Constitution submitted by the Convention’s “Committee of Detail.”⁷⁶ Petitioners assert that this markup, by Edmond Randolph, added “the legislature” to that draft’s delegation of authority for setting the time and manner of selecting senators.⁷⁷ As discussed *infra*, however, the Articles of Confederation used the same language as the Elections Clause and allowed state constitutional constraints on legislatures; it would thus require significant evidence to demonstrate the Framers intended to make such a radical change as Petitioners assert.⁷⁸

B. Constitutional Structure

Petitioners move next to a structural argument.⁷⁹ They posit that the power granted to state legislatures in the Elections Clause is a federal power, and thus limited only by the Federal Constitution.⁸⁰ Petitioners

73. *Id.* at 15–16.

74. *Id.*

75. See Ethan Herenstein & Brian Palmer, *Fraudulent Document Cited in Supreme Court Bid to Torch Election Law*, POLITICO, (Sep. 15, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/09/15/fraudulent-document-supreme-court-bid-election-law-00056810> (“James Madison, one of the main authors of the Constitution, was ‘perplexed’ when he saw Pinckney’s document. He was ‘perfectly confident’ that it was ‘not the draft originally presented to the convention by Mr. Pinckney.’” Further, “John Franklin Jameson, an early president of the American Historical Association, observed back in 1903, ‘The so-called draft has been so utterly discredited that no instructed person will use it as it stands as a basis for constitutional or historical reasoning.’ Since then, the document has become, in the words of a modern-day researcher, ‘probably the most intractable constitutional con in history.’”). Further, the document Petitioners rely on to recount the Pinckney Plan’s supposed proposal at the Philadelphia Convention *itself* summarizes the backstory of the fraudulent Pinckney Plan as distinct from the true Pinckney Plan. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. D, at 595, 601–04. Apparently, Petitioners did not read to the end.

76. Brief for Petitioners, *supra* note 5, at 16.

77. *Id.*

78. See *infra* Part IV.C.

79. Brief for Petitioners, *supra* note 5, at 17.

80. *Id.* at 19. Petitioners rely on *Leser v. Garnett* to make this claim; that case concerned ratification of the Nineteenth Amendment. 258 U.S. 130, 135–36 (1922). In that case, voters in Maryland challenged the state’s ratification of the Nineteenth Amendment on grounds that the

assert that a contrary conclusion would lead to “absurd results” where a state court might strike down a state election regulation as unconstitutional under the state constitution, followed by an enactment of that same regulation by Congress.⁸¹ Petitioners concede, however, “that each State’s constitution may properly govern [] *procedural* questions.”⁸² Thus, Petitioners would allow state gubernatorial veto and even delegation by the legislature to some other lawmaking entity, as in *AIRC*.⁸³

C. Founding-Era History

Petitioners next look to founding-era history.⁸⁴ Petitioners argue that the state courts’ reliance on the North Carolina Constitution’s “vague”⁸⁵ Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses would have been “unprecedented at the founding.”⁸⁶ They argue that many similar provisions could be found in state constitutions at the time, but none were used to strike down

state constitution prevented the legislature from ratifying. *Id.* at 136–37. The Court held that ratification of federal constitutional amendments is a federal function not subject to state constitutional constraints. *Id.* at 137. The Court in *Leser* relied on *Hawke v. Smith*, where the Court held that state legislatures are specifically designated with ratifying constitutional amendments. 253 U.S. 221, 228 (1920). Crucially, however, the Court in *Hawke* held that the Elections Clause is different from amendment ratification and “plainly gives authority to the State to legislate *within the limitations therein named.*” *Id.* at 231 (emphasis added). The Court went on, “[s]uch *legislative* action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.” *Id.* (emphasis added). Further, the Court in *Smiley v. Holm* squarely rejected Petitioners’ argument, holding that the Elections Clause does not “render[] inapplicable the conditions which attach to the making of state laws.” 285 U.S. 355, 365 (1932).

81. Brief for Petitioners, *supra* note 5, at 24. Of course, such an “anomaly” is totally consistent with the Supremacy Clause, where federal statutory law is supreme to even state constitutional law. *See infra* note 136 and accompanying text.

82. *Id.* at 24 (emphasis added). Drawing sharp lines between a “procedural” versus “substantive” limitation is nearly impossible in practice. *See Amar & Amar, supra* note 22, at 18 n.47 (“These two aspects—the first of which might be seen as broadly ‘procedural’ and the second broadly ‘substantive,’ blur at the margins. Definitionally, we might say that a ‘legislature’ under a given state constitution is a body that includes a veto-pen-wielding governor. But of course we might also say that, definitionally, a ‘legislature’ under that very same state constitution is a body that must allow absentee voting (even for congressional and presidential elections) or an entity that may not pick presidential electors itself or try to reserve a power to judge contested presidential elections.”).

83. Brief for Petitioners, *supra* note 5, at 24.

84. *Id.* at 25.

85. *Id.*

86. *Id.* Equally unprecedented at the founding was partisan gerrymandering aided by advanced data analytics and computing technology—“[t]hese are not your grandfather’s—let alone the Framers’—gerrymanderers.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2514 (2019).

congressional maps.⁸⁷ Petitioners conclude that “no state adopted any state-constitutional provision that purported to control congressional redistricting,” and thus historical practice does not support state constitutional limits on redistricting.⁸⁸

D. Supreme Court Precedent

Petitioners last address the Court’s relevant precedent.⁸⁹ Petitioners begin by concluding that the Court’s precedent teaches that “the power to regulate federal elections lies with State legislatures alone, and the [Elections] Clause does not allow the state courts, or any other organ of state government, to second-guess the legislature’s determinations.”⁹⁰ Petitioners first address *Smiley v. Holm*, which allowed a gubernatorial veto in this context.⁹¹ They argue that a governor’s veto was allowed only because “the veto power, ‘as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority.’”⁹² Petitioners then attempt to turn *AIRC* in their favor, contending the case stands for the proposition that although state legislatures may delegate their redistricting duties as in *AIRC*, state courts still may not adjudicate these cases.⁹³ Petitioners do

87. Brief for Petitioners, *supra* note 5, at 25. Similarly, the Equal Protection Clause was added to the Constitution in 1868, but it was not used to prohibit things like school desegregation until *Brown v. Board of Education*. 347 U.S. 483 (1954).

88. *Id.* at 25–26. Even if it is true that no state specifically limited a legislature’s districting power in its constitution, that is not to say that no state constitution curtailed the legislature’s ability to regulate federal elections in other important ways that defy the logic of the ISLT. For a forceful rebuttal of the Petitioners’ historical arguments, see Amar, Amar, & Calabresi, *supra* note 25, at 7–16.

89. Brief for Petitioners, *supra* note 5, at 39.

90. *Id.* This conclusion is a brazen misrepresentation of the Court’s precedent. See *supra* notes 33–46 and accompanying text. .

91. 285 U.S. 355 (1932).

92. Brief for Petitioners, *supra* note 5, at 40 (quoting *Smiley v. Holm*, 285 U.S. 355, 400 (1932)). It is unclear why judicial review, especially when legislatively prescribed as here, would not also be a valid check on the legislative process. Further, Petitioners’ conclusion here is directly at odds with its preceding paragraph, which states the Elections Clause does not permit state courts, “or any other organ of state government, to second-guess the legislature’s determinations.” *Id.* at 39 (emphasis added). Allowing another organ of state government to second-guess the legislature is *exactly* what *Smiley* did by allowing the governor’s veto.

93. See *id.* at 40 (“all Justices have agreed at a minimum that ‘redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking’ and ‘one thing that is clear is that a ‘State’s prescriptions for lawmaking’ . . . do not include the adjudication of cases or controversies in state courts” (quoting *AIRC* 576 U.S. at 841, 808)). Here, Petitioners concede that “legislature” in the Elections Clause refers to a state’s lawmaking function and strain to argue that somehow state courts’ power of judicial review is not part of that ordinary function.

not address the fact that, in *Rucho*, the entire Court unequivocally rebutted this proposition.⁹⁴

Petitioners then move to the Presidential Elections Clause⁹⁵ to aid their argument.⁹⁶ Petitioners raise *McPherson v. Blacker*,⁹⁷ where prospective electors in Michigan challenged the legislature’s decision regarding the method of appointing electors.⁹⁸ They assert that *McPherson* held that legislative appointment authority “cannot be taken from [state legislatures] or modified by their constitutions any more than can their power to select senators of the United States.”⁹⁹ But not only is the language Petitioners rely on from *McPherson* mere dicta,¹⁰⁰ *McPherson* also “did not implicate ordinary judicial review for compliance with a state constitution—which [] happened without any apparent objection in *McPherson*.”¹⁰¹

Petitioners move next to the Supreme Court cases arising out of the 2000 Presidential Election—*Bush v. Palm Beach County Canvassing Board (Bush I)*¹⁰² and *Bush II*. Petitioners argue that in *Bush I*, the Court “cited *McPherson* for the proposition that the Constitution’s specific reference to state legislatures ‘operates as a limitation upon the State in respect of any attempt to circumscribe the legislative power.’”¹⁰³ Petitioners then move to *Bush II*. As the majority rooted its decision in the Equal Protection clause in that case,¹⁰⁴ Petitioners rely solely on Chief Justice Rehnquist’s concurrence.¹⁰⁵ Petitioners assert

94. See *supra* notes 36–43 and accompanying text.

95. U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . .”).

96. Brief for Petitioners, *supra* note 5, at 40.

97. 146 U.S. 1, 24 (1892).

98. Brief for Petitioners, *supra* note 5, at 41.

99. *Id.* at 41 (quoting *McPherson*, 146 U.S. at 35).

100. See Amar, Amar & Calabresi, *supra* note 25, at 28; Morley, *supra* note 8, at 546 (both noting *McPherson*’s status as dicta).

101. Brief for Non-State Respondents, *supra* note 4, at 47. Further, in his *AIRC* dissent, Chief Justice Roberts “describe[d] pre-*AIRC* precedents including *McPherson* as establishing that a state constitution may ‘constrain’ the legislature but not ‘depose it entirely.’” *Id.* (quoting *AIRC*, 576 U.S. 787, 840–41 (2015)).

102. 531 U.S. 70 (2000) (*Bush I*) (per curiam).

103. Brief for Petitioners, *supra* note 5, at 41–42 (quoting *McPherson*, 146 U.S. at 25). However, the Court in *Bush I* “decided precisely nothing on the merits.” Amar, Amar & Calabresi *supra* note 25, at 29. The Court further reaffirmed that “[i]t is fundamental that state courts be left free and unfettered . . . in interpreting their state constitutions.” Brief for Non-State Respondents, *supra* note 4, at 47 (quoting *Bush I*, 531 U.S. at 78).

104. *Bush II*, 531 U.S. 98, 103 (2000).

105. Brief for Petitioners, *supra* note 5, at 42.

that under *Bush II*, “[a] significant departure from [a state election regulation] presents a federal constitutional question.”¹⁰⁶

E. Delegation and Conclusion

Petitioners conclude that only the North Carolina General Assembly may draw Congressional districts; thus the North Carolina General Assembly improperly conferred North Carolina State Courts with legislative power by allowing state courts to draw maps in certain circumstances.¹⁰⁷ Petitioners then complain that the North Carolina Courts’ “policymaking . . . plainly exceeds the limits of permissible delegation on any understanding.”¹⁰⁸ Petitioners once again take aim at the North Carolina Supreme Court’s application of the State Constitution’s “open-ended guarantee of ‘free’ or ‘fair’ elections,” along with that Court’s protection of state constitutional provisions for “equal protection” and “free speech and assembly.”¹⁰⁹ Petitioners

106. *Id.* (quoting *Bush II*, 531 U.S. at 112–13). Petitioners’ reasoning is as follows: the Electors/Elections Clause gives a particular branch of state government (state legislatures) a power, and because an election law passed by a state legislature is made pursuant to that power, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.” Thus, if a state departs from the legislative scheme, it raises a federal question. *Id.* There are numerous issues with this logic. First, as an immense scholarly record shows, the Elections/Electors Clauses do *not* confer power only on state legislatures, but instead the lawmaking process of a state. Next, *Hawke v. Smith* and *Smiley v. Holm* teach that action pursuant to the Elections Clause is a state and not a federal function. See *supra* note 80 and accompanying text. Further, the clause at issue in *Bush II* comes from Article II, not Article I, and finally, Chief Justice Rehnquist’s concurrence was rejected by six members of the Court and carries no precedential weight.

107. Brief for Petitioners, *supra* note 5, at 44–45. Petitioners make this argument based on federal non-delegation principles, which, as non-state respondents point out, do not apply in the state context. See Brief for Non-State Respondents, *supra* note 4, at 63 (“federal nondelegation principles protect the federal separation of powers. But the ‘separation of powers embodied in the United States Constitution is not mandatory in state governments’ (quoting *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 255 (1957)). Further, the power the General Assembly delegated here was quintessentially judicial; as Justice Scalia wrote in *Grove v. Emison* for a unanimous Court: the “power of the judiciary of a State to . . . formulate a valid redistricting plan has not only been recognized . . . but appropriate action by the States in such cases has been specifically encouraged” by the Court. 507 U.S. 25, 33 (1993).

108. Brief for Petitioners, *supra* note 5, at 46.

109. *Id.* Petitioners criticize the North Carolina Supreme Court’s use of the North Carolina Constitution’s guarantees of “equal protection” and “free speech and assembly” because they “make no reference to elections at all.” *Id.* (quoting *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J. dissenting from the denial of application for stay)). Of course, the U.S. Constitution’s Equal Protection clause similarly makes no reference to the election context, yet the Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964) used the Equal Protection clause to establish the constitutional requirement of one person, one vote. That decision and principle were recently unanimously upheld in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). Further, the North Carolina Constitution’s guarantee of “free” and “fair” elections clearly *does* apply *exclusively* to the election context, and if the North Carolina Supreme Court did not have power to enforce those

conclude that because the General Assembly cannot delegate its authority to draw maps or the ability to interpret congressional maps' state constitutionality, the maps used in the 2022 election drawn by a North Carolina state court violated the Elections Clause.¹¹⁰

IV. SUMMARY OF RESPONDENTS' ARGUMENT

Respondents, similar to Petitioners, focus first on the Constitutional text and structure,¹¹¹ founding-era history,¹¹² and Supreme Court precedent.¹¹³ Respondents then argue alternatively that both state and federal law authorized judicial review in this case¹¹⁴ and that federal court intervention is unwarranted here.¹¹⁵ To conclude, Respondents survey the practical effects the Court's decision might have on elections in the United States.¹¹⁶

A. *Constitutional Text*

Like Petitioners, Respondents begin with the Elections Clause.¹¹⁷ Respondents first assert that state legislatures are bodies "empowered by the people to make laws . . . constrained by the constitution that created [them]."¹¹⁸ Respondents concede that state legislatures occasionally act in a non-legislative capacity, such as when ratifying federal constitutional amendments.¹¹⁹ Respondents show, however, that as the Supreme Court held in *Smiley*, state legislatures "exercise . . . the lawmaking power" when they regulate congressional elections, and are thus subject to ordinary state constitutional constraints.¹²⁰ Respondents

provisions, they would be rendered toothless.

110. See Brief for Petitioners, *supra* note 5, at 49 ("[T]he General Assembly is the only entity with the authority to draw North Carolina's congressional district.").

111. Brief for Non-State Respondents, *supra* note 4, at 19, 25. Note that a second Brief was filed by State Respondents; this commentary will focus primarily on the Non-State Respondents Brief as both briefs follow similar logic and structure.

112. *Id.* at 28.

113. *Id.* at 41.

114. *Id.* at 57.

115. *Id.* at 67.

116. *Id.* at 73.

117. *Id.* at 19.

118. *Id.* at 20.

119. See *id.* at 22 ("State legislatures occasionally act in a different capacity, such as an 'electoral' or 'ratifying' capacity." (citing *Smiley*, 285 U.S. 355, 365–66 (1932))).

120. *Id.* at 21 (quoting *Smiley*, 285 U.S. at 372–373). Respondents also note that Petitioners concede this point. See Brief for Petitioners, *supra* note 5, at 24–25 (describing state legislatures' power under the Elections Clause as "lawmaking"). See also *supra* note 80 (discussing *Hawke v. Smith* and its holding that state legislatures acting pursuant to their Elections Clause authority exercise their legislative function).

then argue that judicial review is a fundamental constraint imposed by written constitutions, and that the power of judicial review was understood by the Framers to extend to state courts as well.¹²¹

Next, Respondents address Petitioners' assertion that state courts exercise a legislative function when they enforce state constitutions.¹²² They contend that judicial review "does not 'by any means suppose a superiority of the judicial to the legislative power' but rather 'supposes that the power of the people is superior to both.'"¹²³ Respondents repeat that state legislatures are bound by their respective constitutions when they regulate federal elections, and that those regulations are thus subject to judicial review by state courts.¹²⁴ They conclude that when courts enforce state constitutional constraints, they do not exercise legislative authority.¹²⁵

B. Constitutional Structure

Respondents move next to an argument based on constitutional structure.¹²⁶ Respondents make a parallel argument to various provisions of the U.S. Constitution which provide Congress with sole power to regulate,¹²⁷ yet it is clearly established that Congress cannot exercise these powers unconstrained by the U.S. Constitution.¹²⁸ Respondents point out that Petitioners agree that judicial review is a "background assumption of the American constitutional system."¹²⁹ And "[w]hen the Framers intended to deviate from that background principle, they did so through 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'"¹³⁰

121. Brief for Non-State Respondents, *supra* note 4, at 22–23.

122. *Id.* at 24.

123. *Id.* at 24 (quoting THE FEDERALIST NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

124. *Id.* at 24–25.

125. *Id.* at 24.

126. *Id.* at 26.

127. For example, Article I, Section 8 of the U.S. Constitution provides that "[t]he Congress shall have power to . . . collect taxes" and "[t]o regulate commerce," among many more enumerated powers. While Article I, Section 8 provides these powers only to Congress, it is universally accepted that Congress's actions pursuant to those powers are subject to presidential veto and Supreme Court review. *See Nat'l Lab. Rels. Bd. v. Sebelius*, 567 U.S. 519 (2012) (assessing Congress's power to pass the Patient Protection and Affordable Care Act under either Congress's taxing or commerce power).

128. *See* Brief for Non-State Respondents, *supra* note 4, at 26 ("[T]he Constitution's enumeration of the areas in which 'congress shall have power' to regulate . . . does not suggest that congressional exercises those powers unconstrained by constitutional limits.").

129. *Id.* (quoting Brief for Petitioners, *supra* note 5, at 11).

130. *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993); citing, *e.g.*, U.S. CONST. art.

Respondents assert that Petitioners have failed to show that the Framers did so with the Elections Clause.¹³¹

Next, Respondents discuss the Tenth Amendment and the Supremacy Clause.¹³² First, they establish the Tenth Amendment’s federalism principle: powers that are not prohibited or delegated to the federal government are reserved to the states.¹³³ One such power is the ability to decide the structure of state governments.¹³⁴ Specifically, Respondents highlight that “the Framers ‘intended the states to keep for themselves . . . the power to regulate elections.’”¹³⁵ With this backdrop set, Respondents note that the Supremacy Clause provides only three sources of law supreme to state constitutions: (1) the Federal Constitution, (2) the laws of the United States, and (3) federal treaties.¹³⁶ Respondents conclude that “had the Framers intended to elevate a fourth category—state statutes regulating congressional elections—they would have so provided.”¹³⁷

C. *Founding-Era History*

Respondents next discuss founding-era history.¹³⁸ First, they establish that the Articles of Confederation granted appointment power for members of the Confederation Congress to state legislatures.¹³⁹ And even though this power was granted to the “legislatures,” just like the Elections Clause, “ten of the eleven states with constitutions in effect under the articles limited legislatures’ power to appoint delegates to Congress.”¹⁴⁰ Thus, the practice before the

1, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”)).

131. *See id.* at 27 (“petitioners do not come close to establishing that the Framers in the Elections Clause intended to depart from the background principle that state legislatures are constrained by state constitutions as interpreted by state courts”).

132. *Id.* at 27–28.

133. *Id.* at 27 (citing U.S. CONST. amend. X).

134. *Id.* at 27 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and then quoting *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022)).

135. *Id.* at 28 (quoting *Shelby County v. Holder*, 570 U.S. 529, 543 (2013)).

136. *Id.* *See* U.S. CONST. art. VI, cl. 2 (“[t]his 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”).

137. *Id.*

138. *Id.*

139. *Id.* at 29 (quoting ARTICLES OF CONFEDERATION of 1781, art. V).

140. *Id.* at 29 (citing VA. CONST. of 1776 (appointment by “joint ballot” in both houses); DEL. CONST. of 1776, art. 11 (same); MD. CONST. of 1776, art. XXVII (same); MASS. CONST. of 1780, pt. 2, ch. IV (same); PA. CONST. of 1776, § 11 (choice of delegates “by ballot”); N.C. CONST. of 1776, art. XXXVII (same); GA. CONST. of 1777, art. XVI (same); S.C. CONST.

Elections Clause was that state constitutions constrained state legislatures, even given the Articles' textual commitment to the "legislatures."¹⁴¹

Moving to the Constitutional Convention, Respondents highlight that the delegates at the Convention agreed that states would have the ability to regulate federal elections in the same way they had under the Articles of Confederation.¹⁴² Given the lack of debate surrounding states' regulation of federal elections, the nearly identical language to the Articles, and the Framers' distrust of state legislatures, Respondents conclude that it is "inconceivable that the Framers intended to depart from the Articles' settled meaning" that state legislatures were constrained by their constitutions.¹⁴³

Next, Respondents survey the historical practice following the Constitution's ratification.¹⁴⁴ They detail that "between 1789 and 1821, 20 States adopted or amended their constitutions, and 16 of those States—*more than three quarters*—regulated congressional elections."¹⁴⁵ Further, "[d]uring George Washington's presidency, seven out of eight state constitutions regulated congressional elections. And during the first 25 years after the founding, 10 out of 11 state constitutions regulated congressional elections."¹⁴⁶ Many of these state constitutions were drafted by the Framers of the Federal Constitution.¹⁴⁷

Respondents conclude that the consistent historical understanding that state constitutions constrain their respective legislatures in the

of 1778, art. XXII (appointment in both houses "jointly, by ballot"); N.Y. CONST. of 1777, art. XXX (nominations by each chamber then delegate appointment "by the joint ballot"); N.H. CONST. of 1784, pt. II, Delegates to Congress (separate votes by each house)).

141. *Id.*

142. *Id.* at 29–30 (quoting *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 816 (2015) Instead, the debate at the Convention focused on whether *Congress* should have a role. *Id.* at 30).

143. *Id.* (citing James Madison, *Thursday June 21 in Convention, in 1 RECORDS OF THE FEDERAL CONVENTION OF 1787* 358–60 (Max Farrand ed., 1937), and James Madison, *Wednesday September 12 1787 in Convention, in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787* 587 (Max Farrand ed., 1937)).

144. *Id.* at 31.

145. *Id.*

146. *Id.* at 31 n.4.

147. *Id.* at 34 (citing Hayward H. Smith, *supra* note 23, at 484 (John Dickinson led Delaware constitutional convention); Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-90*, 59 PA. HIST. 122, 129 (1992) (James Wilson served on primary drafting committee at Pennsylvania constitutional convention)).

federal election context should “‘settle the meaning’ of the Elections Clause.”¹⁴⁸

D. Supreme Court Precedent

After reviewing the Elections Clause’s historical meaning, Respondents address Supreme Court precedent.¹⁴⁹ First, they review *Smiley*, which held that the Elections Clause does invalidate normal restrictions on the making of state law.¹⁵⁰ Importantly, the Clause has no effect on the “‘restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power.’”¹⁵¹ Respondents highlight that the *Smiley* Court rejected Petitioners’ reading of “‘legislature” by allowing constitutional constraints on the legislature—in that case, a gubernatorial veto.¹⁵² In the same vein, the *Hildebrant* Court affirmed that Ohio’s Constitution could be used to reject a congressional map via popular referendum.¹⁵³ Respondents conclude that if gubernatorial veto and popular referendum are permissible under the Elections Clause, then state constitutional restrictions imposed by state courts are permissible as well.¹⁵⁴

Respondents move next to *Wesberry v. Sanders*¹⁵⁵ to show that judicial review is not precluded in this context.¹⁵⁶ *Wesberry* rejected the argument that Congress’s actions under the Elections Clause were not judicially reviewable;¹⁵⁷ the Court held that “‘nothing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen’s right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction.’”¹⁵⁸ Respondents argue that the Elections Clause gives the same authority to state legislatures as to Congress in regulating federal elections.¹⁵⁹

148. *Id.* (quoting *Chiafolo v. Washington*, 140 S. Ct. 2316, 2326 (2020)).

149. *Id.* at 41.

150. *Id.* at 42.

151. *Id.* at 42 (quoting *Smiley*, 285 U.S. 355, 369 (1932)).

152. *Id.*

153. *Id.* at 42–43.

154. *Id.* at 43.

155. 376 U.S. 1 (1964).

156. Brief for Non-State Respondents, *supra* note 4, at 44.

157. *Id.*

158. *Wesberry*, 376 U.S. at 6.

159. *Id.* (“[A]llocation of the same authority to state legislatures in the same clause cannot mean that the state legislature’s enactments are unreviewable by state courts under state constitutions”).

They conclude that if Congress’s actions are reviewable, state legislatures’ actions must also be reviewable.¹⁶⁰

Last, Respondents urge the Court that its modern precedent—*AIRC* and *Rucho*—squarely rejects the ISLT.¹⁶¹ Respondents emphasize that the entire *Rucho* Court agreed that state courts can apply state constitutions to congressional redistricting.¹⁶²

E. Petitioners’ Concessions

Respondents next argue that Petitioners “all but concede that their principal argument is indefensible—by abandoning it midway through their brief.”¹⁶³ First, Respondents attack Petitioners’ distinction between procedure and substance as “wholly atextual,”¹⁶⁴ as the Elections Clause makes no such distinction. Consequently, Respondents refute Petitioners’ assertion that the “text of the Constitution directly answers the question presented in this case.”¹⁶⁵

But beyond being “atextual,” Respondents argue that the Court’s precedent forecloses any distinction between procedure and substance.¹⁶⁶ For example, Respondents note that the Court in *Smiley* did not allow state constitutional limits on legislation because they were procedural, but because the Elections Clause does not confer state legislatures power to enact laws in violation of the state constitution.¹⁶⁷ Respondents then cite *Grove v. Emison*, where Justice Scalia, writing for a unanimous Court, held that a state court’s remedial redistricting plan, “far from being a federally enjoined ‘interference,’ was precisely the sort of state judicial supervision of redistricting [the Court has] encouraged.”¹⁶⁸ Further, Respondents cite *Rucho*, where the Court approved of state constitutional provisions that “outright prohibited partisan favoritism in redistricting:”¹⁶⁹ “provisions that are undeniably substantive.”¹⁷⁰

160. *Id.*

161. *Id.* at 45–46.

162. Brief for Non-State Respondents, *supra* note 4, at 46.

163. *Id.* at 50–51.

164. *Id.* at 51.

165. *Id.* at 51 (quoting Brief for Petitioners, *supra* note 5, at 1).

166. *Id.*

167. *Id.* (citing *Smiley*, 285 U.S. 355, 367–68 (1932)).

168. *Grove v. Emison*, 507 U.S. 25, 34 (1993).

169. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019).

170. Brief for Non-State Respondents, *supra* note 4, at 52.

Last, Respondents disagree with Petitioners' characterization of items as procedural or substantive. They highlight that "governors often veto legislation on the ground that the law violates *substantive* state constitutional restrictions" despite Petitioners' assertion that a gubernatorial veto is itself procedural.¹⁷¹ Similarly, Respondents disagree that conferring redistricting authority to the independent redistricting commission in *AIRC* was merely a procedural constraint.¹⁷² They argue that the *AIRC* commission was tasked with actually creating the maps, and the constitutional provisions creating the commission *substantively* limited the commission's map-making.¹⁷³

Respondents next address Petitioners' attempted distinction between "specific" and "open-ended" constitutional provisions.¹⁷⁴ At the outset, they note that such a distinction is nowhere to be found in the U.S. Constitution's text.¹⁷⁵ But even if the Court took to Petitioners' distinction, Respondents remark that for centuries the Supreme Court has interpreted "open-ended" constitutional provisions like the Equal Protection and Due Process Clauses.¹⁷⁶ And state courts are certainly capable and allowed to do the same.¹⁷⁷ Further, Respondents note that "the meaning and enforceability of state constitutional provisions is a matter of state law, to be determined by state courts."¹⁷⁸ Thus, Petitioners' idea to allow federal courts to strike down insufficiently detailed state constitutional provisions "would contravene the most basic principles of federalism and invite unprecedented intrusions by federal courts into the structure of state government."¹⁷⁹

F. Respondents' Alternative Argument

Respondents next argue in the alternative that, even if their reading of the Elections Clause is incorrect, both state and federal law

171. *Id.* Respondents also point out that "[i]n *Smiley*, Minnesota's Governor vetoed the legislature's congressional plan on *substantive* grounds—concluding that the districts were malapportioned." *Id.* (citing Transcript of Record at 6-7, *Smiley*, 285 U.S. 355 (No. 617)).

172. *Id.* at 53.

173. *Id.* (citing ARIZ. CONST. art. IV, pt. 2, § 1(14)(E) (requiring commission to start with equally populous districts arranged in a "grid-like pattern across the state," and then make changes "as necessary" to accommodate specified "goals"); *id.* § 1(14)(F) (favoring "competitive districts").

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 53–54.

178. *Id.* at 54 (citing *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).

179. *Id.*

authorized the North Carolina courts' decisions.¹⁸⁰ First, they highlight that the North Carolina General Assembly expressly authorized judicial review of congressional districting maps.¹⁸¹ Respondents note that delegation to other state actors is allowed under the Elections Clause (which Petitioners concede¹⁸²), and “[z]ero evidence” suggests that state courts are uniquely barred from exercising their judicial function in this manner.¹⁸³ Importantly, Respondents reject Petitioners' argument that the General Assembly delegated its legislative power, because “the power to review laws for constitutionality is quintessentially *judicial*.”¹⁸⁴ Respondents quote Justice Scalia in *Grove* to underscore their point: the “power of the judiciary of a State to . . . formulate a valid redistricting plan has not only been recognized . . . but appropriate action by the States in such cases has been specifically encouraged” by this Court.¹⁸⁵ Thus, Respondents conclude, the North Carolina state courts' decisions were authorized by state law without violating even Respondents' disfavored reading of the Elections Clause.

Respondents next conclude that even if the Elections Clause justified state legislatures acting beyond the powers enumerated to them by their state constitutions, federal law prevents them from doing so.¹⁸⁶ Respondents assert that 2 U.S.C. § 2a(c) requires states to “redistrict[] in the manner provided by the law thereof.”¹⁸⁷ They argue that this “law” includes substantive limits in the state's constitution.¹⁸⁸ Next, Respondents explain that Congress has authorized state courts to establish remedial congressional districting plans under 2 U.S.C. § 2c.¹⁸⁹ Thus, they conclude, federal law requires state legislatures to follow their respective constitutions and permits state courts to remedy a state legislature's failure to do so.

G. Federal Intervention

Respondents next argue that because North Carolina courts engaged in a principled review of the North Carolina Constitution, the

180. *Id.* at 57.

181. *Id.* at 58.

182. *Id.* at 61 (citing Brief for Petitioners, *supra* note 5, at 44–45).

183. *Id.* at 59.

184. *Id.* at 62.

185. *Id.* at 63 (quoting *Grove v. Emison*, 507 U.S. 25, 33 (1993)).

186. *Id.* at 65.

187. *Id.*

188. *Id.* at 65–66.

189. *Id.* at 66.

courts' actions "do not represent the sort of lawlessness that could justify federal-court intervention."¹⁹⁰ Respondents detail the North Carolina Supreme Court's decisions to show that the Court followed its own "long-settled rules of interpretation—evaluating text, structure, history, purpose, and precedent."¹⁹¹ Because "[t]he North Carolina Supreme Court simply applied longstanding principles of state constitutional interpretation, consistent with an explicit grant of authority from the state legislature, to reach the very conclusion *Rucho* presaged," Respondents urge that the Court's actions should not be displaced by federal intervention.¹⁹²

H. Practical Effects

Respondent's final argument focuses on the real-world effects the Court's decision may have on U.S. elections.¹⁹³ They first address Petitioners' broadest theory—that state constitutions cannot limit state legislatures in federal elections.¹⁹⁴ Respondents identify five untenable consequences of that theory: it would (1) nullify numerous state constitutional provisions, (2) wreak havoc by requiring many states to administer two different election systems, (3) create uncertainty as to what state courts can do in federal elections, (4) create uncertainty for executive officials, and (5) produce the result rejected in *Rucho* by providing no remedy for partisan gerrymandering.¹⁹⁵

Similarly, Respondents critique Petitioners' arguments in the alternative. If adopted by the Court, such rules would allow state courts to "enforce 'procedural' and 'specific' constitutional provisions, but not 'substantive' or 'open-ended' ones."¹⁹⁶ Respondents argue these alternatives would not address the problems with Petitioners' primary theory, and further would require federal courts to "invent[], from scratch, an entire jurisprudence" defining the meaning of 'procedural,' 'substantive,' 'specific,' and 'open-ended.'¹⁹⁷ Respondents point out that because those categories are incoherent, this would be a never-ending task for federal courts.¹⁹⁸ It would further require federal courts to

190. *Id.* at 67.

191. *Id.*

192. *Id.* at 73.

193. *Id.*

194. *Id.*

195. *Id.* at 73–78.

196. *Id.* at 78.

197. *Id.*

198. *Id.*

interpret state law, far from those courts' area of expertise, and would mark an "unprecedented affront" to the Constitution's judicial federalism.¹⁹⁹

I. Respondents' Conclusion

Respondents conclude that "[o]nly by rejecting Petitioners' position can this Court 'protect[] the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.'"²⁰⁰ And further, "only by rejecting Petitioners' positions can this Court avoid a flood of litigation turning every local political dustup into a federal constitutional case."²⁰¹

V. ORAL ARGUMENT

The Justices' questions at oral argument suggested that neither side commanded a clear majority. Justices Kagan, Sotomayor, and Jackson appeared hostile to the ISLT, while Justices Kavanaugh, Barrett, Chief Justice Roberts, and to some extent even Justices Thomas and Alito appeared skeptical of Petitioners' primary argument but interested in a middle ground approach that would permit state court review subject to some level of federal review.

A. Petitioners' Argument

David Thompson, arguing on behalf of Petitioners, began by asserting that the Elections Clause enlists state legislatures to perform a federal function subject only to federal law constraints.²⁰² From the beginning of their argument, Petitioners signaled their intent to rely heavily on *Leser*.²⁰³

Justice Thomas began the questioning, asking about the Court's jurisdiction to review a state supreme court decision concerning state law, which signaled surprising skepticism from him.²⁰⁴ Chief Justice Roberts and Justice Barrett followed, immediately displaying their

199. *Id.*

200. *Id.* at 78–79 (quoting *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of stay application)).

201. *Id.* at 79.

202. Transcript of Oral Argument at 4–6, *Moore v. Harper* (U.S. argued Dec. 7, 2022) (No. 21-1271) [hereinafter *Transcript of Oral Argument*].

203. Transcript of Oral Argument, 5, 14–15, 22. *See supra* note 80 (discussing Petitioners' misguided use of *Leser v. Garnett*, 258 U.S. 130 (1922)).

204. *Id.* at 6–7.

skepticism.²⁰⁵ The Chief Justice asked about Petitioners' concession that a gubernatorial veto is permissible in this context: "the governor is not part of the legislature . . . why do you concede that point?"²⁰⁶ Petitioners responded that a governor's veto is a procedural limitation and presented their "formalistic" approach to distinguishing procedural versus substantive limitations: whether a limitation is "a hoop that needs to be jumped through."²⁰⁷ Justice Barrett then asked whether Petitioners' approach is grounded in constitutional text or if Petitioners were merely trying to deal with the Court's precedent.²⁰⁸ Petitioners responded that their approach is consistent with precedent, and that everyone agrees the Elections Clause refers to a lawmaking function, which Petitioners said would be bound by its procedures and only federal substantive limitations.²⁰⁹

Next came Justices Jackson, Sotomayor, and Kagan. Justice Jackson focused on the fact that state legislatures are *created* by their state constitution, and repeatedly asked Petitioners why the legislatures are not thus bound by their constitutions in this context.²¹⁰ Petitioners dodged Justice Jackson's query, again relying on *Leser*.²¹¹ Justice Sotomayor discussed the long history of state constitutions placing substantive limits on election regulations.²¹² She questioned Petitioners about this history, invoking Justice Scalia's opinion in *Grove*, discussed *supra*.²¹³ When Petitioners attempted to reframe the relevant history, Justice Sotomayor quipped "if you rewrite history, it's very easy to do."²¹⁴ Justice Kagan joined, asking why a state legislature is not seen as "embedded in a system of constraints" that included the governor and the courts.²¹⁵ Petitioners again invoked *Leser*, and Justice Kagan responded with quotes from *Smiley*, *AIRC*, and *Rucho*, noting the weight of precedent against Petitioners by retorting: "if you're going to quote one at me, I'm going to quote three at you."²¹⁶ Justice Kagan also expressed concern with the consequences of Petitioners' theory—to

205. *Id.* at 8, 10.

206. *Id.* at 8.

207. *Id.* at 10.

208. *Id.*

209. *Id.* at 12.

210. *Id.* at 12–15.

211. *Id.* at 14–15.

212. *Id.* at 15–16.

213. *Id.* at 16–17. See *supra* note 107; Part IV.E (discussing *Grove v. Emison*, 507 U.S. 25 (1993)).

214. *Id.* at 18.

215. *Id.* at 23.

216. *Id.* at 27.

which Petitioners replied that Congress could remedy these concerns with legislation like the Voting Rights Act.²¹⁷

Throughout Petitioners' argument the Justices expressed concern about Petitioners' distinction between substance and procedure. Justice Barrett pointed out that Petitioners criticize the North Carolina Supreme Court's application of the state's 'free-and-fair-elections' provision for lacking a judicially manageable standard, but that Petitioners' distinction between substance and procedure is equally problematic.²¹⁸ Justice Sotomayor noted that in *Mistretta v. United States*,²¹⁹ the Court found that distinguishing between substance and procedure is a "logical morass that the Court is loathe to enter."²²⁰ Justice Kavanaugh also expressed concern about the distinction.²²¹

Justice Kavanaugh expressed interest in a 'middle ground' approach when he discussed Chief Justice Rehnquist's *Bush II* concurrence, reasoning that *Bush II* would justify some deferential federal court review of state courts.²²² Chief Justice Roberts expressed similar interest when he prompted Petitioners to discuss its "narrower alternative ground" for resolving the case, which would allow some substantive restrictions so long as they are judicially manageable.²²³

B. Respondents' Argument

Neal Katyal, Donald Verrilli, and Solicitor General Prelogar all argued on behalf of Respondents.²²⁴ Each began their argument with a strong attack on Petitioners' argument.²²⁵ Mr. Katyal began with an example from New York in 1792 where state judges struck down a state

217. Of course, the Court in recent years has done significant damage to the VRA in *Shelby County*, 570 U.S. 529 and appears poised to further reduce the VRA's effectiveness this term in *Allen v. Milligan*, 142 S. Ct. 879 (U.S. argued Oct. 4, 2022) (No. 21-1086). And any substantial voting rights legislation is unlikely to pass in a gridlocked Congress.

218. Transcript of Oral Argument, 60–63.

219. 488 U.S. 361 (1989).

220. Transcript of Oral Argument, at 32.

221. *Id.* at 43–44.

222. *Id.* at 41–42.

223. *Id.* at 44–46.

224. Mr. Katyal on behalf of Non-State Respondents, Mr. Verrilli on behalf of the State Respondents, and General Prologar on behalf of the United States.

225. See Transcript of Oral Argument, 70, 128, 166. ("For 233 years, states have not read the Elections Clause the way you just heard . . . when enacting legislation, there's no such thing as an independent state legislature"; "there's no basis in text or history for concluding that a governor's veto can act as a substantive check on the legislative prerogative, but judicial review cannot"; "[t]he Court should adhere to the consistent practice that has governed for more than two centuries and should reject Petitioners' atextual, ahistorical, and destabilizing interpretation of the Elections Clause.").

regulation of federal elections on grounds that it violated the State Constitution.²²⁶ Respondents conceded, however, that some level of federal judicial review is warranted in the Elections Clause context, and this issue took over most of Respondents' time.²²⁷ The striking thing about Respondents' argument is just how much weight Chief Justice Rehnquist's concurrence in *Bush II* held—all sides essentially agreed that Chief Justice Rehnquist correctly posited that some level of federal review is warranted in this context.²²⁸

The most important issue confronting the Justices was defining which level of federal review is warranted in this context. Respondents offered a handful of potential standards,²²⁹ with the common theme being the standard should be “incredibly high.”²³⁰ Justice Alito asked whether such a standard could be flunked and appeared interested in a lower standard that would allow greater potential for federal review.²³¹ The liberal justices appeared satisfied with an extremely high standard,²³² and were sure to point out that Petitioners had conceded that the North Carolina courts had not done anything improper, regardless of the standard the Court might adopt.²³³ They also pointed out that because Petitioners conceded the point, the Court need not adopt a standard to resolve this case.²³⁴

The Justices also asked about whether the standard of review should vary between state constitutions and state statutes.²³⁵ Mr. Katyal

226. *Id.* at 70, 73. This piece of history was not included in any of the parties' briefs as apparently it was uncovered only after briefs were filed, but it a crucial and on point example that totally invalidates Petitioners argument. AMARICA'S CONSTITUTION, *supra* note 1, at 48:11.

227. Transcript of Oral Argument, 96–97.

228. *See generally* Transcript of Oral Argument (repeatedly discussing Chief Justice Rehnquist's concurrence in *Bush II*; the former Chief Justice was mentioned twenty-three times during oral argument). It is interesting to note the personal ties members of the Court have both to C.J. Rehnquist and the litigation in *Bush v. Gore*: C.J. Roberts clerked for C.J. Rehnquist, Justice Thomas joined the C.J. Rehnquist's concurrence, and Justices Kavanaugh and Barrett both litigated the *Bush* side in *Bush v. Gore*. AMARICA'S CONSTITUTION, *supra* note 21, at 1:22:40.

229. Transcript of Oral Argument, at 130 (“whether the state decision is such a sharp departure from the state's ordinary modes of constitutional interpretation that it lacks any fair and substantial basis in state law”); *Id.* at 185 (“if the state court decision is so lacking in any basis and has no fair or substantial support and can only be understood as an effort to frustrate federal rights, then the Court can look past that decision”).

230. *Id.* at 98.

231. *Id.* at 152–53.

232. *See id.* at 158 (Justice Kagan expressing concern that a test adopted by the court might be passed too easily, thus allowing federal review of state court judgments too readily).

233. *Id.* at 187–88.

234. *Id.* at 157–58, 189.

235. *Id.* at 123.

argued that review of state constitutions should be more deferential than state statutes, but made clear that although statutes receive less deference, the standard is still very high.²³⁶ Mr. Verrilli and General Prelogar disagreed, concluding that state constitutions and state statutes should be subject to the same extraordinarily high level of review.²³⁷

C. Petitioners' Rebuttal

Petitioners made a brief rebuttal, with no questions by the Justices.²³⁸ Chiefly, they attempted to take back their admission that the North Carolina courts' actions would not violate any standard of federal review the Court might adopt.²³⁹ Petitioners also argued that federal court review of state constitutions should be less deferential than for review of state statutes.²⁴⁰ Petitioners also raised their concern about Respondents' "functionalist" acknowledgment that a state legislature must play a "central role" in regulating elections.²⁴¹

VI. ANALYSIS

A. How the Court Will Likely Rule

The Court is likely to adopt a 'middle ground' approach to the ISLT. This approach would permit state court review of state legislatures' regulation of federal elections, subject to some level of federal court review.²⁴² Such an approach might only allow state courts to *review* state legislatures' actions, curbing state courts' ability to provide remedies as the North Carolina courts did in this case.²⁴³ Thus, the Court will likely answer two questions with its decision: what standard of federal court review is warranted here, and how limited are state courts in providing remedies in this context?

For the first question, Justice Alito appeared eager to adopt a far less deferential level of review than Respondents suggested, and Justices Thomas and Gorsuch would likely sign on to such an

236. *Id.* at 124.

237. *Id.* at 142,186.

238. *Id.* at 189–92.

239. *Id.* at 190.

240. *Id.*

241. *Id.* at 191.

242. *See* Baude & McConnell, *supra* note 19.

243. *Id.*

approach.²⁴⁴ But Chief Justice Roberts and Justice Barrett seemed to prefer a more deferential standard closer to what Respondents suggested.²⁴⁵ Justice Kavanaugh seemed to be somewhere between these two groups.²⁴⁶ Thus, the ultimate question of the level of review to which state court decisions will be subject will likely come down to whether the ‘liberal’ bloc of Justices Sotomayor, Kagan, Jackson, and for this case Chief Justice Roberts, can secure Justice Barrett’s vote for a deferential standard, or whether the ‘conservative’ bloc of Justices Thomas, Alito, and Gorsuch can attract Justices Kavanaugh and Barrett to vote for a less deferential standard.

Were the standard held to be “sky-high” as Respondents propose, this decision would not necessarily be problematic.²⁴⁷ It would be proper for federal courts to step in where a state supreme court ran so far afield that it violated federal rights such as due process.²⁴⁸ Federal court review is warranted wherever federal rights are violated *regardless* of whether the election at issue is state or federal—it makes no difference that a federal election is at issue and the Elections Clause controls.²⁴⁹

To find that greater federal court review is warranted in the federal election context would require a finding that the Elections Clause protects some nebulous, heretofore unrecognized federal right.²⁵⁰ Such a decision, which Justice Alito seemed to prefer, would have no grounding in constitutional text, history, or precedent. Moreover, it would amount to an untenable affront to state sovereignty and an unacceptable aggrandizement of federal courts’ power.²⁵¹ It would prompt future challenges to election integrity under the ISLT and provide the Court an avenue to step in to intervene in elections if it so chooses.²⁵² Rather than staying out of the political thicket and leaving

244. *See supra* Part V.A; Justices Alito, Thomas, and Gorsuch all dissented from the Court’s denial of Petitioner’s application for stay and signaled their support for the ISLT in that dissent. *Moore v. Harper*, 142 S. Ct. 1089, 1089–92 (2022).

245. *See supra* notes 205–08 and accompanying text.

246. *See supra* note 222 and accompanying text.

247. Transcript of Oral Argument at 87.

248. Amar & Amar, *supra* note 22, at 48–49.

249. *Id.*

250. AMERICA’S CONSTITUTION, *supra* note 21, at 1:07:25–1:08:27.

251. *See supra* Part IV.

252. For example, during the 2020 election the Pennsylvania Supreme Court extended voting deadlines on account of the COVID-19 pandemic. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732 (2021). If the Supreme Court had the ISLT in its quiver at the time, it would have been much easier for the Court to justify stepping in to invalidate ballots received after the initial deadline. Such a decision would have been detrimental to Pennsylvania citizens’ ability to vote

the issue to state courts as the Court promised in *Rucho*, the Court would expose itself to countless eleventh-hour election challenges.

The second question the Court will likely address is whether state courts may provide remedies for state constitutional violations made by state legislatures in regulating federal elections. Respondents' concession that state legislatures must play a "central role" in regulating federal elections is highly concerning, especially if the Court finds that "legislature" refers exclusively to a state's institutional legislature and not the method for making laws prescribed by the state's constitution.²⁵³ If the Court agrees that the institution of the state legislature must play a central role, the Court could hold that while state courts are allowed to review state legislatures actions for state constitutionality (subject to some level of federal review), they cannot themselves create election regulations—such as writing maps, as the North Carolina courts did.²⁵⁴ Such a holding would also call into question whether state bodies outside the official state legislature may regulate federal elections.

Consequently, this approach would likely spur new challenges to independent redistricting commissions like Arizona's in *AIRC*. Petitioners advocated for overturning *AIRC* in their brief, and proponents of the approach the Court is likely to adopt have made clear they believe *AIRC* was wrongly decided.²⁵⁵ To this end, only two Justices remain on the Court from the *AIRC* majority, and the Court's recent treatment of *stare decisis*²⁵⁶ is cold comfort for those who think it might protect *AIRC* from future challenges.²⁵⁷ Without state courts or independent redistricting commissions, voters would be left with no suitable remedy to combat partisan gerrymandering.²⁵⁸ Thus, although

during a global health crisis and could have easily affected the outcome of the state's elections.

253. Brief for State Respondents, *supra* note 49, at 57.

254. See *supra* Part II (describing the procedural history of this case). Recall that the North Carolina General Assembly was given a chance to redraw its maps to comply with the State Constitution. *Id.* Only once the General Assembly failed to do so did North Carolina Courts hire experts to draw non-partisan maps. *Id.* Without the possibility of state courts stepping in and imposing their own maps, it seems at least plausible that a state legislature would use the time pressure of an upcoming election to strong-arm a state court into accepting an otherwise impermissible map.

255. See Baude & McConnell, *supra* note 19 ("[*AIRC*] was 5–4, distinguishable, and, most important, wrong").

256. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overturning nearly fifty years of precedent regarding the right to abortion in the U.S. Constitution).

257. Justice Jackson makes a sure third vote to uphold *AIRC*, but the Court's next most likely vote to uphold *AIRC* would likely be Chief Justice Roberts, who wrote the dissent in *AIRC*.

258. As noted *supra* note 15, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) prevents federal

the Court appears unlikely to embrace the full ISLT, its decision could still be extremely damaging if it missteps in answering these key questions.

B. How the Court Should Rule

The Court should slam the door shut on the ISLT by holding that “legislature” in the Elections Clause refers to the ordinary lawmaking process of a state. Such a holding would accord with the immense scholarly record and the Court’s own precedent.²⁵⁹ Practically, this would allow state courts to continue imposing limits on federal election regulations, thereby avoiding catastrophic damage to American democracy.²⁶⁰ It would further allow states to continue their efforts to ensure fair elections—specifically states’ efforts to curb partisan gerrymandering.²⁶¹

CONCLUSION

Moore v. Harper does not present the Court with a difficult case. Constitutional text, historical practice, and Supreme Court precedent make the question presented exceptionally easy to answer: there is not now and has never been an “independent state legislature.” Still, the Court appears poised to recognize the ISLT on at least some level. While the Court appears unlikely to fully embrace the ISLT in its strongest form, its failure to emphatically discredit the ISLT would swing the door open to further erosion of American democracy.

court review of partisan gerrymandering, and the problem cannot be fixed through the basic political process because gerrymandering prevents that process from properly functioning.

259. *Id.*

260. *See supra* INTRODUCTION (discussing the scholarly record and the Court’s precedent).

261. Partisan gerrymandering presents an enormous threat to democracy but is relatively easy to remedy. State courts, as in North Carolina, and especially independent redistricting commissions, as in Arizona, California, Colorado, and Michigan, are very effective at creating non-partisan districts. Chris Leaverton, *Who Controlled Redistricting in Every State*, BRENNAN CTR. FOR JUST. (Oct. 5, 2022), <https://www.brennancenter.org/our-work/research-reports/who-controlled-redistricting-every-state>. As of the 2022 election, about 40 percent of congressional districts were determined by one of these two methods. *Id.* While that still leaves the door open for further gerrymandering, rejecting the ISLT would at least give states a chance to use these effective methods for curbing gerrymandering. *Id.*