

**The Independent State Legislature Theory and
Its Potential to Disrupt Our Democracy**

**Hearing Before the House of Representatives
Committee on House Administration**

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Chairperson Lofgren, Ranking Member Davis, and distinguished members of the Committee:

Thank you for the invitation to testify before this committee. I am a Professor of Law and an Associate Dean at Chicago-Kent College of Law, Illinois Institute of Technology, where I teach constitutional law, legislation, and public interest law. My scholarship focuses on our constitutional democracy, including research on the constitutional and statutory structures underlying our democracy and on the Supreme Court and its relationship with other courts and institutions. My CV contains a complete list of my scholarly publications, but of note, in 2020, I published an article entitled *Democracy, Federalism, and the Guarantee Clause*, arguing that Congress has the power and the obligation to act to protect representative democracy in the states.¹ And my testimony here today draws heavily from my forthcoming article, *The Independent State Legislature Theory, Textualism, and State Law*, which is forthcoming in the University of Chicago Law Review.²

My testimony today has several goals. After a short introduction, I will first provide some background on what the historical record related to the Independent State Legislature Theory (ISLT) shows, with a special focus on the points of broad agreement among scholars. Second I will explain in more detail what forms the ISLT takes, including what versions are at issue in the pending Supreme Court case, *Moore v. Harper*.³ Third, I will discuss the potential effects of an embrace of the ISLT, including in its more extreme forms. To preview, these effects include (a) massive uncertainty and chaos in the administration and regulation of elections and concomitant unpredictability about what the rules are and who makes them, (b) undermining the longstanding expectations and understandings of voters, state legislators, and other state officials about how state law governing elections would be interpreted and applied, and (c) a shift of authority over state election law from state courts, executive branch officials, and elections administrators, to the federal courts, in particular the Supreme Court. Finally, I will note some actions that Congress could consider to forestall at least some of these effects, regardless of how the Supreme Court rules in *Moore*.

¹ 62 Ariz. L. Rev. 183 (2020).

² 90 U. Chi. L. Rev. __ (forthcoming 2023), current draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322.

³ Docket No. 21-1271.

Introduction

The ISLT arises from the Constitution’s assignment of the obligation and authority to regulate federal elections. Article I, Section 4, known as the Elections Clause governs congressional elections. It provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article II, Section 1, governs the election of presidential electors and is often called the Electors Clause. It provides, in relevant part:

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...

Proponents of the ISLT rely on the fact that both of these clauses assign the regulation of federal elections specifically to the legislatures of the states, not to each state as a whole. As a result, ISLT proponents argue that legislatures’ substantive regulation of federal elections cannot be constrained by state constitutions. Critics of the ISLT respond that legislatures are creatures of state constitutions and thus cannot exercise powers beyond what those constitutions provide. As my testimony will indicate, however, there are many nuances to and variations among those positions.

The Historical Record

The ISLT emerged as a serious argument in litigation over the 2000 and 2020 presidential elections, as well as in *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*, a 2015 case challenging Arizona’s popularly-enacted constitutional amendment establishing an independent redistricting commission.⁴ As a result, but especially since the 2020 election, a massive and increasing amount of scholarship has emerged addressing whether the ISLT. In this section, I will not attempt a comprehensive summary—I am omitting, for example, discussion of the drafting history of the Elections and Electors

⁴ 576 U.S. 787 (2015). I will discuss *AIRC*’s holding in the next section.

Clauses—but I will highlight some of the points on which there appears to be general agreement and will indicate some of the areas of contention.⁵

- Beginning immediately after the Founding, many states either adopted or amended their constitutions to regulate federal elections.
 - a. Sometimes, those constitutional provisions explicitly referenced congressional or presidential elections. For example:
 - i. The Delaware Constitution of 1792, for example, provided that congressional representatives “shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner.”⁶
 - ii. In 1810, Maryland amended its 1776 constitution to guarantee all free white men the right to vote for presidential electors.⁷
 - iii. The Florida Constitution of 1838 required that “[r]eturns for elections of members of Congress ... shall be made to the secretary of state...”⁸

⁵ Much of this section of my testimony summarizes Part I.A of my forthcoming article, *The Independent State Legislature Theory, Textualism, and State Law*, which in turn relies heavily on the work of other scholars, including Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol’y __ (forthcoming 2023), draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138; Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. __ (forthcoming 2022), draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902163; Vikram David Amar and 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; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. U.L. Rev. 731, 759–61 (2001) (hereinafter *History*); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary’s L.J. 445 (2022) (hereinafter *Revisiting History*); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1 (2020) (hereinafter Morley, *ISLD, Elections, and Constitutions*); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501 (2021) (hereinafter Morley, *ISLD*).

⁶ Del. Const. of 1792, art. VIII, § 2.

⁷ Md. Const. of 1776, art. XIV (adopted 1810). The amendment also expressly applied to elections for state offices and for congressional representatives, but the ISLT is not relevant to voter qualifications for congressional offices because the federal Constitution regulates voter qualifications for congressional elections, providing that “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. Const., art I, § 2. See Morley, *ISLD, Elections, and Constitutions*, *supra*, at 38-39 n.168. The Maryland amendment does, however, provide evidence against the ISLT for purposes of presidential elections, for which the federal Constitution does not regulate voter qualifications.

⁸ Fla. Const. of 1838, art IV, § 16.

- iv. State constitutions in the nineteenth century sometimes expressly regulated congressional districting by, for example, “instituting districting criteria including compactness, population equality, and respect for county boundaries.”⁹
 - v. State constitutions in the nineteenth century often regulated other aspects of federal elections, including the election of presidential electors.¹⁰
 - b. From the beginning, many state constitutions contained provisions that regulated elections generally, but were understood to apply to elections for federal offices.¹¹ For example, some required that elections be by ballot or, alternatively, by voice vote,¹² and these provisions were understood to apply to both state and federal elections.¹³
- State constitutional requirements for legislating apply to regulation of federal elections.
 - a. The Supreme Court has long held that when state legislatures regulate federal elections, they do so using their ordinary lawmaking power. As a result, they must act consistent with their constitutions’ procedural requirements for such lawmaking. Specifically, the Supreme Court has upheld the use of both a gubernatorial veto of and a popular referendum rejecting enactments governing federal elections.¹⁴

⁹ Weingartner, *supra*, at 37, citing Va. Const. of 1850, art. IV, § 13-14; Va. Const. of 1830, art. III, § 6; Iowa Const. of 1846, art. 3, Legislative Department, § 32; Cal. Const. of 1849, art. IV, § 30. *See also* Smith, *Revisiting History*, *supra* at 525-28.

¹⁰ *See* Smith, *Revisiting History*, *supra* at 525-27, citing, e.g., S.C. Const. of 1869, art VIII, § 9; Pa. Const. of 1873, art. VIII, § 7; Colo. Const. of 187, art. XIX, Schedule, §§ 19-20.

¹¹ *See* Smith, *Revisiting History*, 53 St. Mary’s L.J. at 488-91.

¹² *See, e.g.*, Pa. Const. of 1790, art. III, § 2; Ga. Const. of 1789, art. IV, § 2; Ky. Const. of 1792, art. III, § 2; Tenn. Const. of 1796, art. III, § 3; Ohio Const. of 1803, art IV, § 2. *See also* Weingartner, *supra*, at 36-37; Smith, *Revisiting History*, *supra*, at 489.

¹³ Weingartner, *supra* at 36; Smith, *Revisiting History*, *supra*, at 488-91.

¹⁴ *Smiley v. Holm*, 285 U.S. 355 (1932) (gubernatorial veto); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (referendum). The Supreme Court has treated state legislatures’ authority under the Electors and Elections Clauses differently from their authority to ratify constitutional amendments and (before the Seventeenth Amendment) to appoint Senators. Regulating federal elections is a form of lawmaking; ratification and appointment of Senators are not. *Compare Hawke v. Smith*, 253 U.S. 221 (1920) (holding that a state constitution cannot require a referendum to ratify a federal constitutional amendment); *id.* at 228 (explaining that the same is true for selection of Senators before the 17th Amendment); *id.* at 229 (distinguishing between those acts and regular legislation); *Leser v. Garnett*, 258 U.S. 130 (1922) (rejecting state constitutional challenges to ratification of the 19th Amendment where state constitutions prohibited such ratification).

- b. Additionally, as the leading academic proponent of the ISLT has acknowledged, when acting as the judge of its own elections, Congress has “typically enforced state constitutions’ procedural requirements concerning the legislative process.”¹⁵
- The Supreme Court has never held that substantive state constitutional limitations cannot apply to state laws governing federal elections, and before 2000, had discussed the issue only once, in the 1892 case of *McPherson v. Blacker*, and there only in dicta.¹⁶
 - a. *McPherson* was about whether the Electors Clause requires a state to select all of its presidential electors at large or whether the state legislature could divide the state into districts for that purpose. In that context, the Court said that the Clause “convey[s] the broadest possible power of determination’ [and] ‘leaves it to the legislature exclusively to define the method of appointment.’”¹⁷
 - b. This language could be read to support the ISLT, but it is an incomplete reading of the opinion. *McPherson* also said that “[w]hat is forbidden or required to be done by a State” when it comes to appointing presidential electors “is forbidden or required under the legislative power under the state constitutions as they exist” and the state’s “legislative power is the supreme authority except as limited by the constitution of the State.”¹⁸ *McPherson*’s more explicit dicta thus actually undermines the ISLT.
- Historically, state courts have almost uniformly applied state constitutional provisions to laws governing federal elections, as scholars have documented in detail.¹⁹ There are, however, a small number of cases, mostly dating from the late nineteenth century, in which state courts refused to apply particular state constitutional provisions to such laws.
 - a. In at least two cases, the state courts concluded that the relevant constitutional provisions did not or likely did not address federal elections at all.²⁰

¹⁵ Morley, *ISLD, Elections, and Constitutions*, 55 Ga. L. Rev. at 46.

¹⁶ 146 U.S. 1 (1892).

¹⁷ *Id.* at 27.

¹⁸ *Id.* at 25.

¹⁹ Weingartner, *supra*, at 41-43.

²⁰ *See, e.g., Opinion of the Judges*, 37 Vt. 665, 677 (1864); *In re Plurality Elections*, 8 A.2d 881, 881-82 (R.I. 1887).

- b. In *every* case, there was no ambiguity that the state legislature wanted to treat federal elections differently from state elections. Either state legislatures sought advisory opinions from state supreme courts about the scope of their authority with respect to federal elections or they passed laws that applied specifically to federal elections only.²¹
- The House of Representatives, when acting as judge of its own elections, has been inconsistent about whether to honor state constitutional provisions governing those elections.
 - a. The most famous example, *Baldwin v. Trowbridge*, involves a Civil War-era congressional election.²² The Michigan constitution required voters to vote in person, but the Michigan legislature passed a law allowing soldiers in the Union Army to vote absentee. The votes of those soldiers proved decisive in one congressional race, and the House ultimately decided to accept those votes. Although the some House Members relied on the ISLT, others who agreed with the result argued that there was in fact no conflict between the statute and the state constitution, and at least one of those Members expressly rejected the ISLT.²³
 - b. In other contested elections, both predating and postdating *Baldwin*, the most intensive historical research demonstrates

²¹ *In re Opinion of the Justices*, 45 N.H. 595, 599 (1864) (advisory opinion) (permitting legislature to allow soldiers out-of-state to vote absentee in federal elections regardless of state constitutional restrictions); *State v. Williams*, 49 Miss. 640, 666 (Miss. 1873) (allowing state legislature to set congressional elections for dates that would be impermissible for state elections); *In re Plurality Elections*, 8 A.2d 881 (advisory opinion) (permitting legislature to allow federal elections to be decided by a plurality both despite majority-vote requirement in state constitution); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936) (upholding state laws specific to choosing presidential electors); *Dummit v. O'Connell*, 181 S.W.2d 691, 694-96 (Ky. 1944) (upholding statute allowing absent soldiers to vote in federal elections only); *Beeson v. March*, 34 N.W.2d 279, 285-87 (Neb. 1948) (upholding state law specific to presidential electors); *Opinion of the Judges*, 37 Vt. 665 (holding that Vermont constitution required in person voting in state elections but did not speak to federal elections).

²² *Baldwin* is discussed at length by numerous scholars. See, e.g., Smith, *Revisiting History*, *supra*, at 448, 458, 522-25, 541; Weingartner, *supra*, at 60-61; Morley, *ISLD, Elections, and Constitutions*, *supra*, at 48-51. See also Smith, *Revisiting History*, *supra*, at 546-70 (arguing that *Baldwin v. Trowbridge* cannot be treated as precedential in the way judicial opinions are).

²³ See Weingartner, *supra* at 61, citing 39 Cong. Globe at 822, 840,

that the House “either rejected the ISL theory or assumed state constitutions controlled.”²⁴

- c. The appropriate reading of the historical record about these cases is somewhat contested. In his 2020 article, Professor Michael Morley reads some of them as supporting the ISLT,²⁵ although he notes at least one twentieth-century case in which the House “enforced state constitutional restrictions.”²⁶ The majority and dissent in *AIRC* also discussed *Baldwin* and disagreed about its import.²⁷ The more intensive historical research, however, has emerged since *AIRC* and Professor Morley’s article, and expressly challenges both the *AIRC* dissent and Professor Morley’s analysis. As far as I know, Professor Morley has not publicly responded.
- The historical evidence is overwhelming that delegation of discretion to executive officials who ran elections was common at the Founding.²⁸

The ISLT in Practice

Issues related to the ISLT can arise in a variety of different circumstances. In this portion of my testimony, I set forth the major questions I am aware of, and I explain how the ISLT has arisen in contemporary election litigation.

Can state constitutions place substantive limits on state legislative power to regulate federal elections?

- As already noted, state constitutional requirements for lawmaking procedures undisputedly apply to state legislative enactments governing

²⁴ Weingartner, *supra* at 60. See also *id.* at 56-62; Smith, *Revisiting History, supra*, at 522-25, 532-38.

²⁵ Morley, *ISLD, Elections, and Constitutions, supra*, at 48-61. See also *id.* at 61-65 (discussing Senate treatment of state constitutional regulation of the appointment of Senators and a Senate Committee report evaluating electoral college reform).

²⁶ *Id.* at 48, citing *Contested Election Case of Paul v. Harrison*, H.R. Rep. No. 67-1101 (1922).

²⁷ *AIRC*, 576 U.S. at 818-19 (discussing *Baldwin*’s tension with another contested election and suggesting that *Baldwin* was resolved on partisanship, not constitutional analysis); *id.* at 819 (concluding that “*Baldwin* is not a disposition that should attract this Court’s reliance”); *id.* at 838-39 & n.3 (Roberts, C.J., dissenting) (relying on *Baldwin* for invocation of the ISLT).

²⁸ Krass, *supra*.

federal elections. ISLT proponents argue, however, that the Supreme Court cases that so hold speak only to *procedural* lawmaking requirements in state constitutions and that the content of laws governing federal elections cannot be constrained by *substantive* state constitutional provisions.²⁹ The Supreme Court has addressed (and rejected) this argument, at least in part, in recent cases (discussed in the next bullet points), and may address it further in *Moore v. Harper*.

- Some ISLT proponents have argued that popular initiatives amending state constitutions to require independent commissions for congressional redistricting violate the federal constitution because they remove control of congressional redistricting from the legislature. The Supreme Court rejected this version of the ISLT in 2015 in *AIRC*, by a 5-4 vote.³⁰ The majority reasoned that the people of the state of Arizona were exercising legislative power when they passed the initiative.³¹ The dissent insisted that the Elections Clause’s assignment of authority to the “legislature” is an assignment to the institutional legislature, not to the state’s general legislative power.³² The *AIRC* majority included Justices Kennedy, Ginsburg, and Breyer, none of whom are still on the Court.
- Although Chief Justice Roberts wrote the dissent in *AIRC*, four years later in *Rucho v. Common Cause, Inc.*, he—along with all eight of his colleagues—agreed that state constitutions can legitimately restrict partisan gerrymandering in congressional redistricting, specifically noting Florida’s popularly-enacted constitutional amendment.³³ Those statements, however, were either dicta in the majority opinion or were in dissent.
- As noted above, the Supreme Court may revisit these issues in *Moore v. Harper*. *Moore* is an appeal from a North Carolina Supreme Court case striking down the state’s congressional redistricting (along with its state legislative redistricting) as an unconstitutional partisan gerrymander. (The map at issue drew ten Republican districts and three Democratic districts, even though North Carolina is about evenly split in terms of votes for Republicans and Democrats in general elections.) In holding both that partisan gerrymandering is justiciable under the North Carolina constitution

²⁹ See, e.g., Morley, *ISLD, Elections, and Constitutions*, *supra*, at 93.

³⁰ 576 U.S. 787.

³¹ *Id.* at 806-09, 814-20.

³² *Id.* at 828-42 (Roberts, C.J., dissenting).

³³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507-08 (2019); *id.* at 2524 (Kagan, J., dissenting).

and that these particular maps are unconstitutional, the North Carolina Supreme Court relied on the history and structure of the state constitution, including the unique history of its constitution and Declaration of Rights, and rested on several specific provisions of the Declaration of Rights, which I will discuss in more detail below.³⁴ Depending on the reasoning, if the Supreme Court holds that the North Carolina constitution cannot so limit the legislature in drawing the congressional map, the case could be a step backwards from *AIRC* and *Rucho*.

Assuming that some state constitutional provisions can apply to state laws governing federal elections, are there limits to which kinds of provisions can be given effect by state courts?

- Some ISLT proponents argue that state constitutions can limit state legislatures' regulation of federal elections, but only insofar as the constitutions include explicit and direct constitutional provisions like the creation of independent redistricting commissions. They argue that where the constitution contains broader guarantees, such as the guarantee, versions of which appeared in some of the earliest state constitutions and are common to this day, that elections be "free," or "free and fair," or "free and open,"³⁵ state courts cannot rely on those provisions to strike down laws governing federal elections. The basis for this version of the ISLT is that these more "open-ended" provisions shift too much power away from the state legislatures and to state courts, in violation of the Electors and Elections Clauses.³⁶ At least one of the unstated assumptions underlying this argument appears to be that state courts cannot be trusted to apply general constitutional provisions in an evenhanded and judicious manner.
- A version of this argument arose during the 2020 election, in the litigation surrounding the Pennsylvania Supreme Court's order extending the received-

³⁴ *Harper v. Hall*, 868 S.E.2d 499, 535-47 (N.C. 2022).

³⁵ Smith, *Revisiting History*, *supra*, at 491 & n.208 (discussing early state constitutions); Weingartner, *supra*, at 36 & n.278 (same); *id.* at 54 & n.420 (discussing constitutions approved by Congress upon admission to statehood); *Free and Equal Election Clauses in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 4, 2019) (listing contemporary clauses in 30 state constitutions), available at <https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx>

³⁶ See Derek Muller, *Rucho v. Common Cause and a weak version of the claims in the North Carolina partisan gerrymandering dispute*, Election Law Blog (March 8, 2022), available at <https://electionlawblog.org/?p=128045>.

by deadline for mail-in ballots,³⁷ and at least three justices indicated their support for it. The Pennsylvania Supreme Court concluded unanimously that, under the unique circumstances of that election, the statute as written could not operate consistent with the state constitution’s guarantee of free and equal elections, although it split 4-3 on the appropriate remedy.³⁸ As we all know, in the end, the ballots that arrived after the original statutory deadline could not have made a difference in the result of any federal election in Pennsylvania, and the Supreme Court, after initially narrowly denying a stay, ultimately denied certiorari.³⁹ But dissenting from that denial, Justice Thomas criticized the Pennsylvania court for relying on a “vague clause” of the state constitution “to rewrite the rules.”⁴⁰ Justice Alito, joined by Justice Gorsuch, described the state court’s holding as “claim[ing] that a state constitutional provision guaranteeing ‘free and equal’ elections gives the Pennsylvania courts the authority to override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections.”⁴¹ And because the statute at issue governed both state and federal elections without distinction, the ISLT here would have resulted in different rules for state and federal elections.⁴²

- This version of the ISLT is expressly implicated in *Moore v. Harper*, in which, as noted above, the North Carolina Supreme Court struck down an extreme partisan gerrymander of the state’s congressional districts. North Carolina’s constitution does not have a provision that speaks directly to partisan gerrymandering or that creates an independent commission. In striking down the gerrymander, the state high court relied on the history and structure of the state constitution and Declaration of Rights, which predated the constitution itself. The court explained:

³⁷ *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 37-72 (Pa. 2020) (*Boockvar I*).

³⁸ *Id.* at 370-72; *id.* at 392 (Saylor, J., concurring and dissenting); *id.* at 394-98 (Donohue, J., concurring and dissenting). The three dissenting justices agreed that the law as written could not operate constitutionally, but they would have kept the election day receipt deadline and instead altered the deadline to apply for a mail-in ballot, lengthening the period between the application and receipt deadlines. *Id.* at 392 (Saylor, J., concurring and dissenting); *id.* at 394-98 (Donohue, J., concurring and dissenting).

³⁹ *Republican Party of Pennsylvania v. Boockvar (Boockvar II)*, 141 S. Ct. 1 (2020) (denying stay by 4-4 vote); *Republican Part of Pennsylvania v. Degraffenreid*, 114 S. Ct. 732 (2021) (denying certiorari).

⁴⁰ *Id.* at 734 (Thomas, J., dissenting from denial of certiorari).

⁴¹ *Id.* at 732 (Alito, J., dissenting from denial of certiorari).

⁴² In 2020, it was possible for Pennsylvania to segregate late-arriving ballots so that it could count late-arriving votes in state elections but not federal ones. In many contexts, however, it will be impossible to apply the different rules to the different types of elections. I will discuss this issue further later in my testimony.

[p]artisan gerrymandering ... violates the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, and the principle of democratic and political equality that reflects the spirit[] and intent of our Declaration of Rights.⁴³

The petition for certiorari directly challenges the North Carolina court's reliance on these provisions of the state constitution. The Question Presented asks:

Whether a State's judicial branch may nullify the regulations governing [congressional elections] ... and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.⁴⁴

As one scholar has pointed out, this version of the ILST is consistent with the majority opinions in both *AIRC* and *Rucho*, both of which approved of constitutional provisions explicitly creating redistricting commissions.⁴⁵

Even if state courts and state constitutions can substantively regulate state laws governing federal elections, are state courts limited in the remedies they can order?

- Another version of the ISLT suggests that even if state courts have the power to declare a legislature's actions governing federal elections unconstitutional under state constitutions, they are limited in the remedies they can impose. More specifically, petitioners in *Moore v. Harper* argue that the state trial court exceeded its authority by imposing its own map after finding that the legislature's remedial map did not meet the standards the state high court had set.⁴⁶ This argument is, at the very least, in tension with prior Supreme Court precedent requiring deference to state courts as well as state legislatures when it comes to redistricting. In *Grove v. Emison*, for example, both the state and federal courts were hearing challenges to Minnesota's

⁴³ *Harper*, 868 S.E.2d at 546.

⁴⁴ Petition for Certiorari, *Moore v. Harper*, No. 21-1271, at i.

⁴⁵ *Id.*

⁴⁶ *Id.* at 34-38. A similar question is presented by a pending petition for certiorari from Pennsylvania. *Costello v. Carter*, Docket No. 21-1509. There, the legislature and the governor were unable to agree on congressional redistricting maps, and the state courts imposed their own. The petition for certiorari contends that ISLT imposes substantive constraints on the maps the state courts can order. *Carter v. Chapman*, 270 A.3d 444 (Pa. 2022).

congressional maps.⁴⁷ Although the legislature passed new redistricting plans, they were vetoed by the governor, and shortly thereafter, the federal district court enjoined the state court from imposing its own maps, including a congressional map.⁴⁸ The Supreme Court unanimously held that the federal court should have deferred to the state court process. More specifically, the Court emphasized that “reapportionment is primarily the duty and responsibility of the State through its legislature *or other body...*,”⁴⁹ and it expressly demanded deference to the state court in congressional redistricting.⁵⁰ But *Grove* does not directly consider the ISLT.

- This version of the ISLT, restricting state courts’ remedial power, has implications beyond redistricting. In the 2020 Pennsylvania litigation, for example, although all seven state supreme court justices agreed that the mail-in ballot regime could not function constitutionally, this version of the ISLT might prevent them from imposing a remedy as to federal elections, even though the same statute governed both state and federal elections and even though the statute was unconstitutional with respect to federal elections. (I will discuss the problem of applying the ISLT to statutes governing both state and federal elections in more detail later in my testimony.)

Are state courts limited in their ability to construe state laws governing federal elections?

- One version of the ISLT builds on the argument that state constitutions cannot limit state legislative action with respect to federal elections to reach questions of statutory interpretation. If that is true, the argument goes, then invocations of state constitutional law in the process of statutory construction are also inappropriate. This version of the ISLT was at issue in the first case that went to the Supreme Court in the 2000 election, *Bush v. Palm Beach County Canvassing Board*.⁵¹ There, Bush’s legal team argued that the Florida Supreme Court improperly relied on the Florida constitution’s “free elections” clause to require the Secretary of State to accept vote totals obtained by recount. The Supreme Court did not decide whether the state court’s reliance on a state constitutional provision for purposes of statutory interpretation (or its use of a constitutional avoidance canon) violated the Electors Clause’s

⁴⁷ 507 U.S. 25, 27 (1992).

⁴⁸ *Id.* at 30-31.

⁴⁹ *Id.* at 34, quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

⁵⁰ *Id.* at 36-37.

⁵¹ 531 U.S. 70 (2000).

assignment of authority to the state legislature. Instead, it remanded the case to the Florida Supreme Court to clarify its holding.⁵²

- In *Bush v. Gore*, although the majority opinion did not implicate the ISLT, Chief Justice Rehnquist relied on a version of it in his concurring opinion (joined by Justices Scalia and Thomas). Rehnquist argued that the Florida Supreme Court’s interpretation of the state statute governing recounts and allocating potentially overlapping authority to the state courts and the Secretary of State violated the Electors Clause. The specifics are less important than his argument that under the Electors Clause, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”⁵³ He offered no citation or other support for this statement. Because he disagreed with the Florida Supreme Court’s interpretation of the statute, he argued that its holding violated the federal constitution.
- In 2020, several Supreme Court justices embraced this view to varying degrees. The first time the justices discussed the ISLT was in a case involving federal court “interven[tion] in the thick of election season to enjoin enforcement of a State’s laws.”⁵⁴ In that case, the court declined to vacate a stay of a district court opinion enjoining enforcement of state laws.⁵⁵ Because the case involved federal judicial intrusion on state election law, as opposed to the relationship between state courts and the state legislature, the ISLT was not implicated, as Chief Justice Roberts explained.⁵⁶ Nonetheless, in his separate opinion concurring in the denial of the vacatur of a stay, Justice Kavanaugh both quoted from Rehnquist’s *Bush v. Gore* concurrence and cited *Palm Beach County*, and he concluded by explaining that “the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.”⁵⁷
- Also in 2020, Justice Gorsuch (joined by Justice Alito) dissented from the Supreme Court’s refusal to disrupt a settlement reached in North Carolina

⁵² *Id.* at 78. On remand, the Florida Supreme Court reached the same holding, making clear that it was relying on ordinary principles of statutory interpretation and not on the state constitution. *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273, 1282 (Fla. 2000) (per curiam).

⁵³ 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

⁵⁴ *Democratic Nat’l Comm. v. Wisconsin State Leg.*, 141 S. Ct. 28, 28 (2020) (*DNC*) (Roberts, C.J., concurring in denial of application to vacate stay).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 34 n. 1 (Kavanaugh, J., concurring in denial of application to vacate stay).

state court litigation.⁵⁸ One of settlement provisions extended the received-by deadline for mail-in ballots. In his opinion, Justice Gorsuch argued that the relevant statutes did not allow the Board of Elections the authority to issue the regulations required by the settlement. His argument rested on a *de novo* reading of statutory language allowing for the Board to modify state election law in the face of a “natural disaster” that “disrupted” the “normal schedule” for the election.⁵⁹ He failed to discuss other state laws using comparable language, longstanding practice in North Carolina that allowed the Board to extend deadlines, or the fact that the settlement applied to federal and state elections alike. And his argument included an insinuation that the trial court had engaged in “egregious” and collusive action,⁶⁰ although he did not discuss that court’s express rejection of the allegations of collusion,⁶¹ its analysis of the relevant statutory language,⁶² or the fact that the North Carolina Supreme Court had reviewed the settlement and declined to intervene.⁶³

Are executive officials and elections administrators limited in their ability to interpret and apply state laws governing federal elections? Are state legislatures themselves limited in how much discretion they can delegate to such officials and administrators?

- Just as state courts’ normal interpretation and application of state law might be disrupted by the ISLT, the same might be true for state executive officials and election administrators. No case directly presented that issue during the 2020 election, but Justice Gorsuch hinted at it when he said in one opinion 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.”⁶⁴
- In a subsequent opinion, Justice Gorsuch also hinted at the possibility that the ISLT might actually *constrain* state legislatures as to how much they can delegate to state courts or to other state officials. Although he did not

⁵⁸ *Moore v. Circosta*, 141 S. Ct. 46 (2020). Justice Thomas indicated, without an opinion, that he would have granted a stay in both *Moore* and in a companion case, *Berger v. North Carolina Bd. of Elections*, 141 S. Ct. 658 (2020).

⁵⁹ N.C. G.S. § 163-27.1.

⁶⁰ *Moore*, 141 S. Ct. at 47.

⁶¹ *North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections*, 2020 WL 10758664, *3 (N.C. Super. Ct. 2020).

⁶² *Id.* at *4.

⁶³ See *North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections*, 848 S.E.2d 496 (N.C. 2020); *North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections*, 848 S.E.2d 497 (N.C. 2020).

⁶⁴ *DNC*, 141 S. Ct. at 28-29 (Gorsuch, J., concurring in denial of application to vacate stay).

conclude that improper delegation occurred, he raised the issue: “even assuming the North Carolina General Assembly could delegate its Elections Clause authority to other officials...”⁶⁵ This language is an unmistakable invitation for candidates and parties to challenge state judicial and administrative decisions they do not like as reflecting unconstitutional delegations.

Potential Effects

- The ISLT often arises in the context of redistricting. The serious problem of extreme partisan gerrymandering is beyond the scope of this hearing, but it is worth noting that the ubiquity of the problem gives lie to one of the chief normative justifications for the ISLT. Proponents argue that regulation of elections, including redistricting, is an inherently political activity and that it thus makes sense to vest the authority to do so in what they claim is the most politically accountable branch.⁶⁶ But in large part because of extreme partisan gerrymandering, state legislatures are often highly countermajoritarian and non-accountable.⁶⁷ Precluding state constitutions, state courts, and executive officials from ensuring more political accountability thus undermines this justification for the ISLT.
- Most state election laws govern both state and federal elections without distinction. States generally have one voter registration system; one set of rules for absentee and mail-in ballots; one set of rules for how ballots are counted, etc. ISLT proponents, including the justices, do not generally address the implications of the ubiquity of unified election statutes. Instead, where there is a single statutory scheme that governs both state and federal elections, the extreme versions of the ISLT appear to presume that state legislatures have done or more of the following things:

⁶⁵ *Moore*, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief).

⁶⁶ *See, e.g., DNC*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay); Morley, *ISLD, Elections, and Constitutions*, *supra*, at 33-35

⁶⁷ *See* Miriam Seifter, *Countermajoritarian Legislatures*, __ Colum. L. Rev. __ (forthcoming), draft available at <http://ssrn.com/abstract=3782224> (arguing that in 2020, the states in which the ISLC arose were states with highly gerrymandered countermajoritarian legislatures); *id.* at *60 (discussing the 2020 litigation in North Carolina and arguing that “[i]t is hard to see how honoring the wishes of the two leaders of the unconstitutionally gerrymandered legislature [who filed suit in federal court] would have been a better approximation of the will of the people than adhering to the decision of the [bipartisan] officials appointed by the popularly elected governor”).

- a. Decided, without saying so out loud, that they are willing to regulate federal elections in ways that would be unconstitutional when it comes to state elections.
 - b. Decided, despite enacting a single unified statute, that they are creating the possibility of two systems of election regulation, either because the statute is struck down as to state elections but can't be struck down as to federal elections, or because the statute is interpreted differently with respect to state and federal elections.
 - c. Decided, without saying so out loud, that any delegations of discretion or authority to state and local officials is controlled, at least as to federal elections, by an undefined (and unheard-of before 2020) ISLT nondelegation doctrine.
- These presumptions are problematic for a number of reasons.
 - a. Those who promote this view of the ISLT are themselves entirely failing to engage in meaningful statutory interpretation. In any ISLT challenge involving a statute, the first question a court should ask is whether the laws in question incorporate the state constitution and all ordinary aspects of state law, from judicial review to relevant precedent to methods of statutory interpretation. The political accountability justification for the ISLT counsels is undermined by the assumption that the legislature is rejecting state constitutional limitations or set forth special rules for the interpretation of election law statutes as they apply to federal elections.

This principle applies not only to constitutional provisions. Where states have a statute or case law dictating that courts should take a purposivist approach when interpreting statutes and/or should look to legislative history, that law should govern. Where a statute uses language that has been previously construed or otherwise passed on by the state high court, those holdings should be understood to have been incorporated into the statute. Where a state allows delegation to executive officials an elections administrators, that delegation should be understood to be identical for state and federal elections.

- b. There is absolutely no historical support for treating unified election laws differently for purposes of federal elections that for state elections.. Even in the tiny number of cases where state courts have allowed state legislatures to regulate federal elections free from the constitutional constraints that apply to state elections, the laws in question applied expressly to federal elections. In other words, there is no historical

precedent for treating the same law differently with respect to different elections, as either a matter of constitutionality under the state constitution, of statutory interpretation, or of delegation to other state officials. But the extreme view of the ILST opens the door to a federal court requiring a state with a single unified law to have one system of regulation for federal elections and another for state elections, and to those systems being incompatible.

- The ISLT undermines not only political accountability, but also the other major justification offered for it: predictability. ISLT proponents are certainly correct in their argument that voters, elections officials, and candidates alike are best served by knowing ahead of time what the rules are and who sets them.
 - a. The ISLT can undermine legislators' expectations about how statutory language will be interpreted. One of the issues that arose in Pennsylvania in 2020 involved an inseverability clause in the major election law enacted in 2019. The Pennsylvania Supreme Court unanimously refused to apply the clause, which was identical to statutory language it had declared ineffective in 2006. But under the textualist approach to statutory interpretation promoted by some ISLT proponents, the clause would have to apply, at least as to federal elections.
 - b. The ISLT can undermine everyone's expectations and lead to chaos, which is what would have happened had the inseverability clause been given effect. The statute in question not only governed the received-by deadline for mail-in ballots, but it also eliminated straight ticket voting, allowed for no-excuse mail-in voting, and provided for new voting machines. It would have been impossible for the statute to apply differently to the different types of elections.
 - c. The ISLT can similarly undermine expectations and revive long-settled disputes. In 2021, for example, the New Hampshire Supreme Court struck down new and onerous voter registration requirements as inconsistent with a constitutional guarantee that "[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any

election.”⁶⁸ No party filed a petition for certiorari. But under the ISLT, perhaps a candidate or political party could collaterally attack this decision in the future, claiming that the registration law must apply to federal elections, even if it is unconstitutional as to state elections.

- d. Similarly, if the ISLT restricts administrative and executive discretion and statutory interpretation, candidates and campaigns will have every incentive to comb through existing regulations, guidances, and practices, to seek any possible argument that the officials have exceeded their authority as a matter of federal constitutional law. And because states have unified elections systems, such a result could disrupt longstanding professional election administration and state administrative law.
- For all of these reasons, the ISLT, particularly in its most extreme forms, will undermine state courts and destabilize state law. It is also likely to undermine institutional and democratic legitimacy. State courts may be reluctant to apply their own constitutions or doctrines of statutory interpretation out of fear of the chaos that may ensue if federal courts disagree with their holdings. Citizens may question the integrity of their own courts if they understand that federal courts can and do routinely second-guess state judges’ interpretation and application of state law. In fact, if the ISLT requires state courts to use different approaches to judging when evaluating statutes insofar as they apply to federal elections, it essentially converts all questions of statutory interpretation that affect federal elections into federal questions, not matters of state law.
 - Despite its name and the rhetoric around it, the ISLT, particularly in its most extreme forms, does not empower state legislatures. Instead, it empowers federal courts, and particularly the Supreme Court. As we all know, election litigation is often rushed and hotly contested. The ISLT, however, will function as a perpetual litigation machine. Virtually any question involving a state law that applies to federal elections could find its way to federal court, most likely the Supreme Court. And the Supreme Court’s recent aggressive use of its emergency docket to intervene in all manner of disputes itself will invite that kind of litigation.

⁶⁸ *Id.*, WL 2763651, *2. The plaintiffs also alleged a violation of the state constitution’s equal protection guarantees. *Id.* at *1. Although the trial court granted an injunction on both bases, the Supreme Court did not reach the equal protection issue. *Id.*

Options for Congressional Action

There are a variety of actions Congress can consider to eliminate or ameliorate the risks to democracy presented by the ISLT.⁶⁹ I offer here only a few, largely undeveloped ideas. I would be happy to discuss these or any other ideas with you or your staff.

- (1) Legislation providing that state laws governing federal elections are subject to the same constitutional limitations, judicial review, statutory construction, and delegation doctrines as all other state laws. Alternatively, Congress could require that state laws must expressly disavow those aspects of state law if the legislature wants to avoid them.
- (2) Legislation requiring state courts to pass on the statutory construction and constitutionality of state election laws before federal courts can do so, and requiring that federal courts defer to those determinations, including a requirement that litigants raise the ISLT issue in state court.
- (3) Legislation imposing a presumption, to be applied by federal courts, of legislative acquiescence to state court rulings and administrative practices that apply to federal elections.
- (4) Legislation limiting the timing under which federal courts, including the Supreme Court, can reverse or stay state administrative decisions or state court rulings.

Thank you again for inviting me to speak with you.

⁶⁹ I do not distinguish here between the Electors and Elections Clauses. Different legislation, or different forms of legislation, might be appropriate under the different clauses.