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Crossing the (District Line): An Examination Into Moore v. Harper and Independent State Legislature Theory

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HONORS THESIS

Crossing the (District Line): An Examination into Moore v. Harper and Independent State Legislature Theory

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ABSTRACT

The purpose of this research is to explore Independent State Legislature Theory (ISL), an uncommon election theory that emerged in 2000 and has had a resurgence in the past several years. This research will be split into two different stages: a background analysis tracing development of this legal theory through several court cases and a more careful examination of the case of *Moore v. Harper*, a case heard in 2023 where the theory was eventually ruled against by the United States Supreme Court. The background stage is comprised of a literature review and analysis on the doctrines that guide election theories like ISL. The second stage analyzes the *amicus curiae* briefs filed to the Court prior to the hearing on *Moore v. Harper*, as well as the actual language found in the oral arguments made by both advocates and Justices, as well as the Court's opinions issued in the case. The results of the two stages together will serve as crucial background in future discussions and research into the case, and as a reference if ISL is brought before the court in a future case.

INTRODUCTION

The Elections Clause of the United States Constitution proscribes the duties of choosing "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State (to) the Legislature" of that state (U.S. Constitution, art. 1, sec. 4). The debate on the interpretation of the clause stems from what the framers meant by using the word "Legislature." According to the Brennan Center for Justice, the common definition is that legislature "refers to each state's general lawmaking processes, including all the normal procedures and limitations" (Wolf, Herenstien 2022). The limitations that Wolf and Herenstien note are those of checks and balances from the other two branches of state government: the Judicial and the Executive. For example, common practice is that if the state legislature (the Legislative branch) passes a piece of legislation, the Judicial Branch is allowed to bar it from passing if they deem it unconstitutional. The Executive Branch has the ability through either the President or Governor of a state to sign the legislation into law, or to veto it. This is foundational to the internal processes of our government, in which no one branch of government is given too much power over the other branches.However, proponents of the Independent State Legislature Theory (ISL) argue that the reading of this specific clause lends itself towards having state legislatures having unfettered authority over federal elections. This means that state legislatures would be independent of any system of checks and balances from the other branches of government within the state. A common reason why they argue this is due to textualist interpretation, which is an extremely narrow reading of the clause to have the word "legislature" mean just that: the state legislature or assembly. Further, proponents of the theory argue that state courts are increasingly overstepping their authority regarding elections in their decisions, as we saw with the Election of 2020 and Donald Trump's claim of a stolen election.

However, many who argue against the implementation of the ISL theory say that the benefits that many proponents claim are detrimental to American democracy. Those arguing against the theory believe that adoption of ISL would "establish that state legislatures cannot be constrained by state constitutions, voter-enacted initiatives, and state judicial precedent in the context of federal elections" (Thorning et al., 2022). Opponents argue that the wholesale adoption of ISL would effectively supersede any notion of both federalism as well as checks

and balances, as it would give absolute control to the state legislature in turn isolating them from any checks and balancing process for hearing issues on elections. The research questions that this paper aims to look at the background of the theory: how it emerged and what specific areas of election law it has been seen to pop up in, who is proposing the theory's implementation, and what have been reasons for opposition to its acceptance into law prior to the landmark decision of *Moore v. Harper*. This will lead to the analysis of the *amicus* briefs filed prior to the case and the language of the decision and if there is any chance that this theory could be re-litigated in the future and potentially be implemented by states.

Much of the literature that has been reviewed has been focused on analysis of legal precedent and attitudes, with the vast majority stemming from law review articles and opinion pieces. This literature ranges from analysis of that critical *Bush v. Gore* (2000) case which is where ISL theory finds its origins, to analysis of a Supreme Court case that sought to apply ISL theory to North Carolina following the 2020 Census called *Moore v. Harper* (2023). The wide range of perspectives in favor or against ISL's implementation, and the change in political partisanship over the past 20 years will give great insight into how the issue has evolved and why the Supreme Court has continually ruled against its application.

Research Methodology

The main methodology of this thesis proposal is two-fold. First, it will involve a literature review of various law review articles or articles examining both the proponents for and those against the theory. This will be used to give a historical background to the issue of ISL and the ever-changing opinions on the topic. Specifically, this will be done through comparing articles across the past 2 decades as that is primarily the period where ISL theory, or ISL, has come into the fray as a political and legal fringe theory when it comes to American elections.

As to the first stage of the methodology, analysis of various legal arguments, decisions, and canon is widely used in the field. Many law review articles, which encompasses a vast majority of the literature reviewed thus far, employ this analysis format. This is through using case law as a basis for conclusions on other issues. In the case of this thesis, this will be used to see how the historical application of ISL has shifted and changed leading to the case of *Moore v. Harper* where the theory was finally a primary argument of a case before the

Supreme Court. The second stage of the methodology will be a deeper analysis into the landmark case of *Moore v. Harper* (2023), in which for the first time, the ISL theory's viability was the main question before the court. Analysis of this decision will give insight into how, because of the background established in the first section of this paper, the ISL theory gained legitimacy and how it was applied to the issue before the court. This also will lead to a discussion on if the theory is still viable following the *Moore* decision, or if it has been finally eliminated as a potential legal avenue for state legislatures to use regarding federal elections.

Ethical Considerations

As previously stated, the purpose of this paper is not to offer opinions on whether the Supreme Court was correct in their determination to strike the theory, but to examine its history and if this is truly the last time that this issue will be before the Court. The ethical implications of this research have been considered, specifically regarding bias and keeping bias in check to not mislead or misrepresent the research that will be gathered or accumulated.

LITERATURE REVIEW AND HISTORICAL BACKGROUND

The first stage of research involved looking at how the ISL theory was first proposed and how the issue has gained traction in recent years leading to the case of *Moore v. Harper* in 2023, where it was the main question before the U.S. Supreme Court. The literature reviewed overall did not connect how the theory developed and how it has grown into prominence at the forefront of many recent election law cases.

Initial Proposal in *Bush v. Gore*

The initial introduction of ISL Theory was in the case of *Bush v. Gore* argued before the U.S. Supreme Court in 2000. The issue before the Court was over the National Election of 2000 between Democrat Al Gore and incumbent Republican President George W. Bush. Specifically, the case was heard due to Bush winning "the 25 electoral votes in Florida (and thus the presidential election) by a narrow margin against respondent, Al Gore" (Cornell). Florida's "25 electoral votes gave him one more than the majority he needed in the Electoral College" (Calmes, Foldessy, 2001), giving him 271 votes and the presidency in turn.

The question before the Court was over the Florida Supreme Court's decision to impose a manual recount due to the closeness of the elections results, stemming from a contention of results from Al Gore. Bush's campaign sought to enjoin the recount from happening and filed for a stay on the state court's order with the U.S Supreme Court. In a 7-2 majority, the Court found in favor of Bush winning him the Presidency.

The notion of ISL theory emerged from a concurring opinion of the *Bush* case. A concurring opinion is one that agrees with the Court's majority in its decision, however, perceives a different legal reason why a case should be decided in the same way. As such, it is not binding as it is not in line with the majority in its reasoning. In this case, three of the seven justice majority filed a concurrence that agreed with the outcome of the case, a Bush victory in Florida, however, it argued it was due to what would become the origins of the ISL theory.

Within the concurring opinion, authored by Chief Justice Rehnquist and joined by Justices Thomas and Scalia, the "three Justices argued that Article II legislatures must remain free from obviously incorrect state court statutory interpretation" (Smith, 2001). They were referring to the Florida Supreme Court's decision to order manual recounts, and how it was effectively creating election law, something apportioned to the state legislature. Writing in concurrence, Chief Justice Rehnquist notes that:

> "General coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies" (Rehnquist, 531 U.S. 98)

This point made argues a less invasive version of ISL theory, arguing that changing the constitutional responsibility noted in Article I to be conducted by other branches rather than the state legislature is impermissible.

In a dissenting opinion in the same case of *Bush v. Gore*, Justice Stevens hinted at the potential for danger if the notion put forward by that concurring opinion was accepted. He notes how:

> "Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." It does not create state legislatures out of whole cloth, but rather takes them as they come-as creatures born of, and constrained by, their state constitutions." (*Bush v. Gore,* 2000)

Simply put, the states' ability to appoint electors stems from Article II, however that same Article II binds the legislatures to their state constitutions. As such the state legislature must be limited by the constitution, which allows for judicial review from state and federal courts of the decisions made by the legislature. This stands in stark contrast to the concurrence and warns of the potential for abuse should the legislatures be empowered to ignore said constitutions. While referencing a different clause than the Elections Clause, the Federal Electors Clause, proponents of the theory have attached the same logic to the Elections Clause found in Article I of the U.S. Constitution.

Amar and Amar (2022) further examine the impact of what they call "*Bush*-league" notions of the ISL theory. They argued that the holding of *Bush* had disastrous consequences for democracy, and any attempt to revitalize the legitimacy of some of those arguments would effectively have the same effect. Outside of some legal sources, the concurrence filed in *Bush* was not really examined at length and received little criticism. The case was very unusual in many other cases due to the timeframe that it was decided. The case from start to finish was only four days, with the Florida Supreme Court ordering recounts on December 8, 2000, the U.S. Supreme Court hearing arguments on the case on December 11, 2000, and issuing it's ruling on December 12, 2000. This is in stark contrast to normal cases before the Court, where months often pass between arguments and decisions being issued by the Court. As Amar and Amar note "without the usual deliberative timetable enabling scholarly expertise to guide the Court pre-decision, via amicus briefs and the like" (Amar, Amar, 2022), the decision implicated many issues without care, and at the time was thought to lead to future litigation in regard to ISL theory, a correct prediction which this thesis will discuss further.

ISL and Ballot Propositions

Arizona State Legislature v. Arizona Independent Redistricting Commission, decided in 2015 was the next time that the theory was tested by proponents after *Bush*. The case (herein *Arizona Redistricting Comm'n*) was argued over how "in 2000, Arizona voters adopted an initiative, Proposition 106, aimed at "'ending the practice of gerrymandering and improving voter and candidate participation in elections.'" (576 U.S. 787, 2015). Ballot propositions are typically used by voters to amend their state's constitution or to create laws, making it a part of the lawmaking process just like any act passed in the legislature.

Following the Commission creating a redistricting plan in 2012, the state legislature sued them, arguing that the commission circumvented the state legislature's authority under the Electors Clause of the U.S Constitution to redistrict. The typical track of an appeal is an initial decision in trial court, then to a lower court (State Supreme Court, U.S. District Court, or U.S. Court of Appeals), and if the appeal still fails, it is appealed to the U.S Supreme Court. In this case, following a district court's ruling that the Commission could stand and remain in control of re-districting, the case was appealed to the United States Supreme Court

In a 5-4 decision, the Court found that "lawmaking power in Arizona includes the initiative process…permit(ing) use of the AIRC in congressional districting in the same way the Commission is used in districting for Arizona's own Legislature" (576 U.S. 787, 2015). This ruling rejected the ISL theory offered by the state legislature of Arizona.

An interesting point that should be noted about this case was that Chief Justice John Roberts dissented and agreed with the State Legislature's argument. He specifically argued that the "legislature" mentioned in the clause was solely the state legislature, not the lawmaking practice as had been previously defined by the Court and standard interpretation in the past. As such, he argued that since ballot propositions were not enacted by the legislature itself, such an action was unconstitutional.

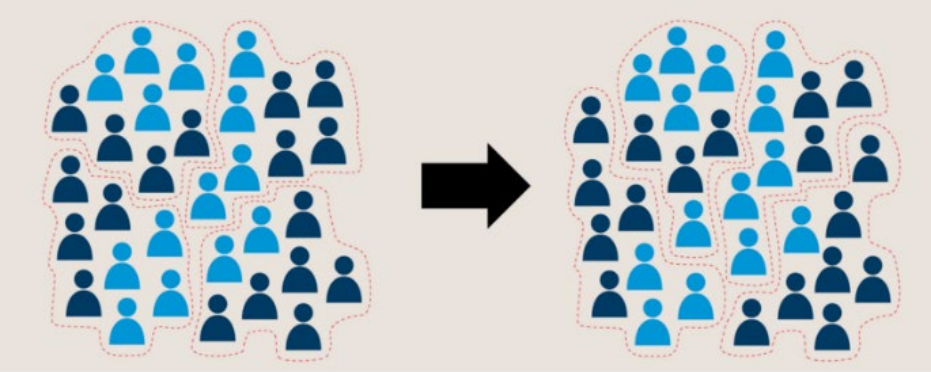
ISL and Gerrymandering

One of the main reasons why many argue that the validation of the ISL theory is dangerous to our democracy is due to it giving unprecedented power to the legislatures, which in turn can create inequities and constitutional issues when redistricting occurs. Districts within states are redistricted every 10 years in line with the decennial national Census, which gives new information to state legislatures on both population and demographics within the states. The purpose is to make sure that there is representative governance being conducted by the state legislature and the federal government.

However, the decennial redistricting of state electoral maps has become wildly partisan in the past 20 years, using redistricting power apportioned to legislatures to skew elections in favor of one party over the other in that redistricting. This practice is widely known as gerrymandering.

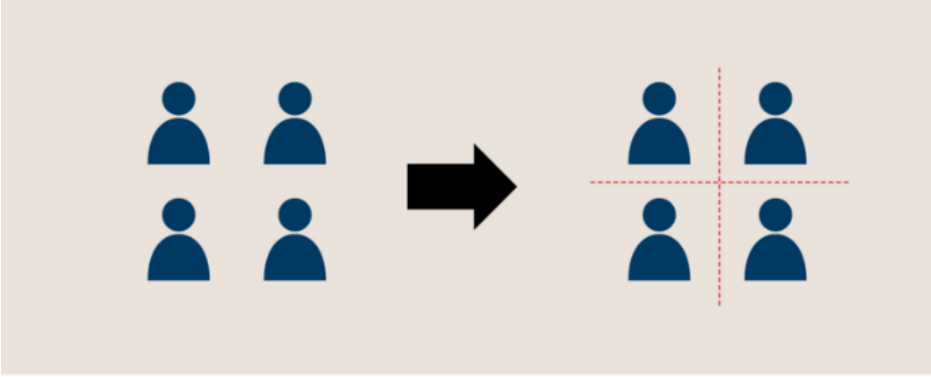
There are two common methods that are used by state legislatures during redistricting that lead to gerrymandered districts called packing and cracking.

Figure 1: Packing example diagram



Packing is the grouping of individuals with common characteristics into certain districts to diminish their voting power, as they will win some districts but not all districts (Li, Kirschenbaum, 2023).

Figure 2: Cracking example diagram



Cracking on the other hand, divides groupings of individuals to dilute the voting power they have, the direct opposite of packing. (Li, Kirschenbaum, 2023)

Protections against partisan gerrymandering have been denigrated by recent Supreme Court decisions such as in *Rucho v. Common Cause* (2019). In *Rucho* the Court found that "partisan gerrymandering claims present political questions beyond the reach of the federal courts," (588 U.S. 684) While issues like racial gerrymandering, where the practice is conducted based on racial and ethnic identity, are still reviewable by the Supreme Court, the same protections are not applicable to partisan gerrymandering.

With growing use of ISL in election litigation in conjunction with the *Rucho* decision, opponents to the ISL theory argue that acceptance could create a vacuum where state courts and governorships that would normally serve as a check to this unbridled ability to redistrict in a partisan manner would be powerless to do so. Often due to the ability of the state legislature to redistrict along party lines, candidates from parties in the minority often are elected, creating what Seifter (2021) refers to as "minority rule". What Seifter means is that while the party in power may be the "majority" in the legislature, it is in effect only so due to gerrymandering skewing elections so that the real majority's voting base is diluted.

Gerrymandering is extremely ill perceived in the eyes of many potential voters. A 2019 study conducted by the Brennan Center at New York University found that of likely voters in the 2020 elections, 70 percent of voters from all parties agree the Supreme Court should place

limits on gerrymandering. The push to stop gerrymandering, especially along party lines (also known as partisan gerrymandering) has been a hard-fought battle, with some progress being made in states that have enacted reforms. However there still is no federal ban on it, even at the time of writing this thesis. Tofighbakhsh (2021) finds that this should be cause for concern, as partisan gerrymandering is often considered tied to racial gerrymandering, which has been prohibited since the landmark Supreme Court case of *Miller v. Johnson* (1995). Tofighbakhsh (2021) finds that:

> *"*Voters in gerrymandered districts who seek to vindicate their constitutional right against racial sorting will face legislatures that have learned from the mistakes of past officials. These lawmakers can be expected to take full advantage of Rucho's normative signal that redistricting for partisan advantage is not a matter for judicial concern."

Opponents to ISL argue that the theory in practice can make partisan gerrymandering much easier. Without checks or balances from the Executive or the Judicial branches of the state government, this can create outcomes to elections that do not represent the true intentions or desires of the voters that are not reviewable as the State Legislature would have complete autonomy over elections. Amar (2021) agrees with Tofighbakhsh, in that the Supreme Court's handling of cases like *Rucho* and Constitutional theories has not reflected the majoritarian viewpoints and systems that the Constitution ought to allow and protect. As such, a post-*Rucho* country is much more apt for division, and the Court should make representative democracy more democratic (Amar, 2021).

ISL and Election Results

The National Election of 2020 was perhaps the most controversial election since the Election of 2000 between Bush and Gore. The 2020 election was riddled with claims by Republican incumbent President Trump that Democratic challenger Joe Biden had "stolen" the election.

Carolyn Shapiro in an article for the *University of Chicago Law Review* examines at length the ISL theory and argues how it was used unsuccessfully in the 2020 election by Donald Trump and Republicans to grab power. Due to the claims of a stolen election, the Trump

campaign attempted to overturn results in key states through litigation. As Shapiro examines, one state this could be seen in was Pennsylvania, a key battleground state that Joe Biden would eventually win in 2020. The Trump campaign attempted to appeal a decision of the Pennsylvania Supreme Court in regard to absentee ballots to the U.S. Supreme Court, claiming that they overstepped their authority in setting elections rules. This is the same argument that proponents of ISL theory use, that the Federal Constitution prescribes that duty exclusively to the state legislature and no other branches of government. The U.S. Supreme Court "denied the stay by a 4–4 vote and declined to expedite the petition for certiorari" (Shapiro, 2023). However, within the four Justice dissent, there was evidence of support for the ISL theory. Shapiro references Justice Alito's dissent in the case, which mirrors former Chief Justice Rehnquist's dissent in *Bush v. Gore*. Regarding the Electors Clause and other Constitutional responsibilities afforded to the state legislature, Alito argued that they:

> "Would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election" (Shapiro, 2023).

This almost mimics the language used by Justice Rehnquist 20 years prior, that state legislatures should be empowered to ignore obviously incorrect interpretation, in this case what Justice Alito refers to "whatever rules (the Pennsylvania Supreme Court) thought appropriate".

Shapiro also finds that ISL should be seen as a highly unconstitutional theory that should be rejected or there would be risk of unconstitutional breaches to our democracy. One quote that particularly discusses the difference between what she calls readings of the Elections and Electors Clauses and "maximalist ISLT":

> "Any reading of the Elections and Electors Clauses that deprives state courts and state constitutions of their ordinary authority over state law is questionable at best. But the maximalist version of the ISLT…goes beyond any reasonable understanding of those Clauses. It must be rejected." (Shapiro 2023)

As Shapiro notes, scholars have argued that litigation surrounding the 2020 election has revealed a more "maximalist" version of ISL theory. She notes that some justices have argued that "the Clauses require the Supreme Court to undertake its own textualist interpretation of state election law…without deference to state courts' interpretations" (Shapiro, 2023). This would be a major issue, Shapiro argues, due to the risk of creating inconsistency between federal and state interpretations of the same laws and limiting the ability for state courts to review issues of elections claims effectively (Shapiro, 2023).

***MOORE V. HARPER* AND ISL**

Amicus Curiae Brief Analysis

Prior to any case being brought before the Supreme Court, the parties give briefs on their reasoning of the based in law and fact to make the Court aware of the issues that they should be considering. However, *amicus curiae* briefs are also filed with the Court, "com(ing) from individuals or organizations that are not parties in the case but have interests in the outcome" (Democracy Docket, 2023). The purpose of these briefs is often to give the perspective of businesses, think tanks, legal scholars, the Executive Branch, and the Legislative Branch on the issues before the court. As mentioned previously, the main objective of this paper is to examine how fringe legal theory can have impact on American democracy. These *amicus curiae* briefs are useful tools to compare legal issues they raise with the Supreme Court's reasoning, with this comparative analysis being the core methodology of this paper.

There were sixty-nine different *amicus curiae* briefs filed by outside parties regarding the case of *Moore v. Harper*. According to the Brennan Center for Justice, forty-eight were in support of the voters and non-profits suing the state of North Carolina (Harper), sixteen were in support of the state legislature of North Carolina (Moore), and five were in support of neither party to the lawsuit (Wolf et al., 2022). This paper looked at the arguments for and against the implementation of ISL mentioned in the *amicus curiae* briefs as well as briefs that did not explicitly side with either the respondents or petitioners.

Results

The *amicus curiae* briefs against the implementation of the ISL theory proposed by North Carolina had several common threads throughout their briefs. The comparative analysis

conducted specifically looked at how they compare to the Supreme Court's reasoning in *Moore v. Harper.* While not every brief that was filed in this case is mentioned below, the common threads of Constitutional provisions, precedent, and the potential ramifications of allowing such a theory to be proposed are key in understanding why the Court agreed and found in favor of the Respondents.

One common thread is the lack of ability of state legislatures to insulate themselves from state court review by means of ISL. A brief from the Conference of Chief Justices, represented by numerous current and former State Supreme Court Chief Justices agreed that while the states have the right to pass laws regarding election rules based on the Elections Clause, there is no unfettered right to "block state legislatures from inviting state judicial review of those laws" (Wolf et. al, 2022). This agrees with the Court's finding that the Election Clause does not allow for the circumvention of other measures within a state's constitution that dictate and inform the legislature.

The United States in its brief, authored by Solicitor General Elizabeth Prelogar, argued almost verbatim the Court's reasoning in their opinion in the case. Citing from the same *Smiley* case as the Court, the brief argues that "the exercise of (lawmaking) authority must be in accordance with the method which the State has prescribed for legislative enactments" (Prelogar, E. et al, 2022). ISL must be rejected, as it would "authorize legislatures to ignore the state constitutions that created them" (Prelogar, E. et al, 2022). The United States' brief demands respect to historical precedent that has been decided by the Court in the interest of democracy.

The ACLU in their brief in support of the Respondents address the Court's prior ruling in *Rucho* and how the initial decision by the North Carolina Supreme Court exemplifies how the Court deferred to the states in cases of partisan gerrymandering. In their brief, the ACLU argues that "Rucho thus looked to our federalist system's promise to protect and promote democracy" (ACLU et al., 2022) regarding election law, and therefore ISL must not be validated any further by the Court.

However, some briefs argued for ramifications that the Supreme Court did not mention or seem to consider within their written decision, arguing that acceptance of theories like ISL could have an impact on how Americans see our democracy. In a brief written by Richard Hansen, a legal scholar on election law, Hansen describes how "opening up a new line of election cases will only exacerbate partisan splits in public opinion about the legitimacy of the actions of the judiciary" (Hansen, 2022) something that the Petitioners argument would most certainly. The increased levels of litigation over elections will undermine voter confidence in both the system and results, creating more partisanship in line with what this paper observed in the section on rhetoric and its effect on democracy.

There were also many briefs that argued for the implementation of the legal theory to elections. A common thread that could be found between these was the historical perspective of what the Framers had in mind when prescribing the Elections Clause and whether state courts have jurisdiction to hear cases as a result in regard to election disputes.

APA watch in their brief in support of the Petitioners argued that the Elections Clause by virtue of being in the Federal Constitution, supersedes and preempts any state law or measure that the North Carolina Supreme Court may have utilized in their decision. Regarding both the Election Clause and the Tenth Amendment, the amici argue that "delegating state courts the power to review state laws governing federal elections or delegating other, 'non-legislative' actors the power to make rules for federal elections" is prohibited (Wolf et al., 2022). As such, the State Supreme Court should not have been able to hear the case as they are not a legislative body. It is a textualist interpretation of the Clause that, while correct under the interpretation, the Court flatly denies in their decision. A separate brief from Citizens United agrees with the argument that is put forward by APA. Similarly, this brief argues that since state courts are not considered part of the legislature, they do not have the jurisdiction to make rules or impact rules created by state legislatures in regard to federal elections. The brief cites Chief Justice Roberts dissent in *Arizona Independent Commission* to support their claim. The dissent discusses in part the meaning of legislature in the language of the Constitution arguing "that 'legislature' means just that, the body in the state that exercises legislative power" (Citizens United et al., 2022). This definition they argue, is exactly what the Framers had in

mind when writing the Federal Constitution, and as such, should indicate to the Court that ISL must be accepted.

Background of *Moore*

The case stemmed from the 2021 redistricting conducted by the Republican majority within the North Carolina legislature following the 2020 decennial Census. The figures below represent the changes that the legislature sought to implement, what areas were the most affected, and the remedial map that was created through court order following the injunction of the proposed plan.

Figure 3: Overturned Map Proposed by North Carolina Legislature

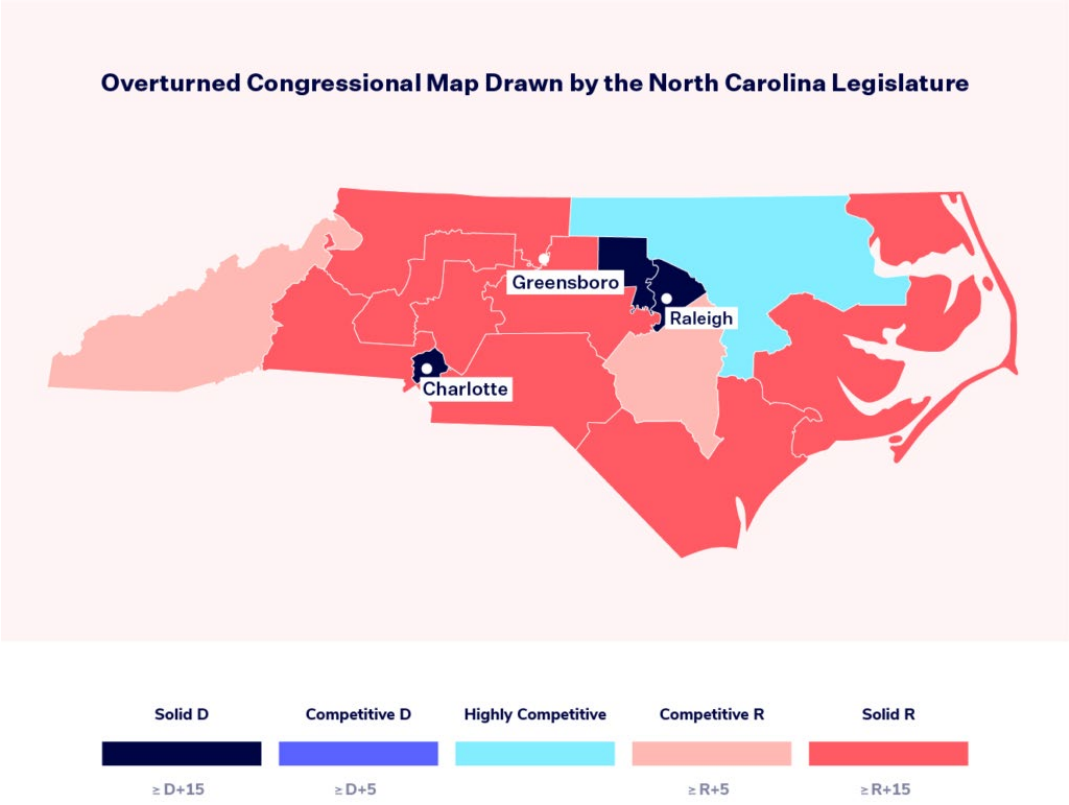


Figure 4: Court-ordered remedial map by Special Masters

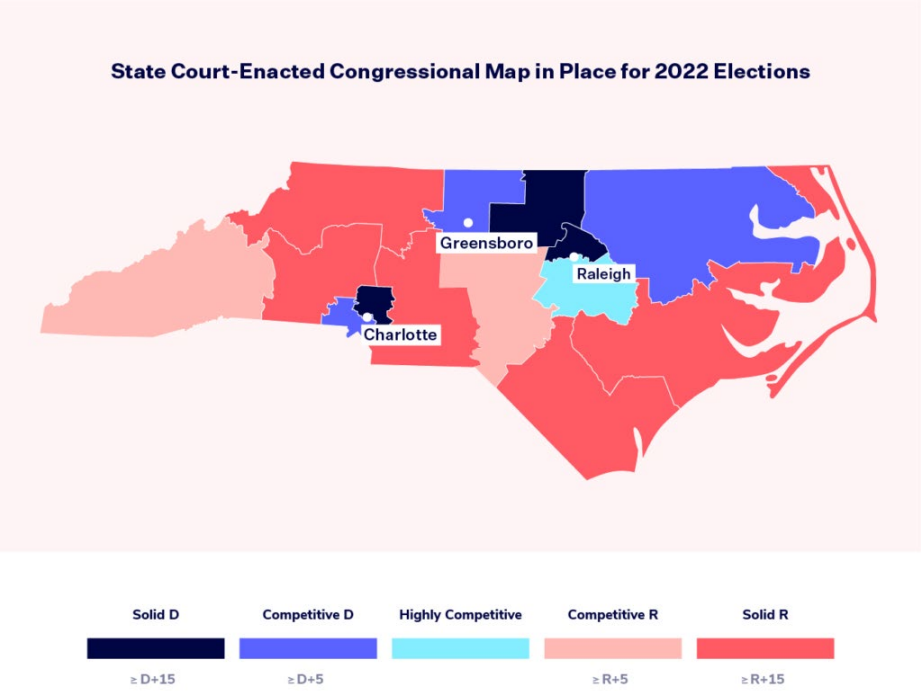
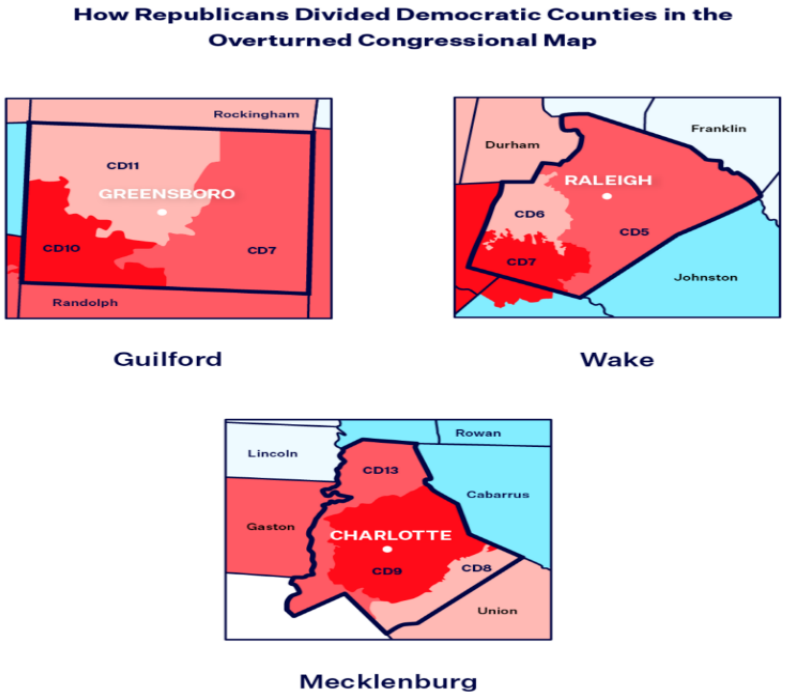


Figure 5: Affected Districts within N.C Due to Gerrymandering



As seen in the above figures, compared to the special master's plan, the Republican-majority legislature proposed to redistrict in a way that decreased "solid D" districts or areas, increasing "competitive" or "solid R" districts, and "highly competitive" district. They did so by "trisecting each of the three most heavily Democratic counties in the state: Guilford, Wake and Mecklenburg" (Democracy Docket, 2023) as outlined in Figure 5.

This is a clear example of how legislatures use the cracking method while redistricting in such a way to increase their own party's power over the other's. Upon seeing the proposed redistricting, the legislature was sued for partisan gerrymandering by Common Cause, a voting rights organization, and other voting rights groups. The North Carolina Court found that regarding ability to review claims of partisan gerrymandering, "simply because the (U.S.) Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts…it does not follow that they are nonjusticiable in North Carolina courts." (600 U.S. ___, 2023) As mentioned previously the Supreme Court did hold in *Rucho* that that partisan gerrymandering claims presents questions that are not justiciable by the U.S. Supreme Court but remained reviewable by state courts. The North Carolina Supreme Court agreed and believed that they had authority under that ruling to rule on the state level. The North Carolina Supreme Court agreed that there was evidence of partisan gerrymandering in the proposed plan and enjoined its use. The Court also appointed special masters to redraw the district map (see fig. 4).

However, in 2023, the North Carolina Supreme Court now had a Republican majority on the bench and was petitioned by the legislature of North Carolina to once again rehear the case that enjoined the proposed district mapping and created the remedial map by the court-appointed special masters. Upon rehearing the case, in April of 2023, "the state Supreme Court reversed its prior decisions, ruling that partisan gerrymandering claims are not justiciable under the state constitution" (Democracy Docket, 2023). As such, the case was then appealed to the US Supreme Court with Timothy Moore the Speaker of the North Carolina Legislature, as Petitioner, and Rebecca Harper of Common Cause as Respondent. Harper volunteered to be a named party as she lived in North Carolina at the time of litigation.

Issues Before the Court

The question before the Court was twofold: (1) if the Supreme Court have jurisdiction to hear this case and (2) whether the Elections Clause insulates state legislatures from review by state courts for compliance with state law (600 U.S. ___, 2023). The issue of jurisdiction was due to the case already being appealed and decided twice in lower courts of competent jurisdiction, in this case from the North Carolina Supreme court.

Oral Arguments

There was almost three hours of oral arguments heard before the Court in the case of *Moore v. Harper* from both the Petitioners and Respondents, as well as the Solicitor General of the United States as amicus curiae.

The Petitioners in the case, Moore et. al., were the proponents of the ISL theory in the case of *Moore v. Harper* as mentioned earlier in this thesis. What is interesting in the initial questioning of the advocate for the Petitioners, the Justices asked many questions which revealed how the Petitioners had crafted a version of ISL to better argue before the court. In the case of *Moore*, one of the primary issues was what the Petitioners are arguing for the definition of "legislature" in the Elections Clause. David Thompson, in arguing for the petitioners, said that their theory argues that "the dissent in (*Arizona Independent Redistricting Commission v. Arizona State Legislature*) was correct and that the legislature meant the legislature plus the gubernatorial veto" (600 U.S. ___, 2023). The gubernatorial veto power, as both the Petitioner and the Court agreed, stemmed from a case *Smiley v. Holm* 285 U.S 355 which held that redistricting plans were subject to veto power from the Governor, similar to any other piece of legislation as product of lawmaking or legislative power.

Questions regarding issues of checks and balances that often are discussed when arguing for or against the implementation of ISL were also asked within the oral arguments. Justice Kagan asked about how issues like partisan gerrymandering, as discussed earlier in this thesis, could be non-enforceable with the *Rucho* holding of those types of issues being non-justiciable by federal courts and the ISL contention of lack of ability to limit legislative power regarding elections by other branches of government. Thompson argued that "checks and

balances do apply, but they come from the federal Constitution and the panoply of federal laws like the Voting Rights Act and other statutes that are highly protective of voters" (600 U.S. ___, 2023). This echoed the longstanding ISL argument that it is by virtue of the Elections Clause being federal law within the U.S Constitution that there is no ability to create substantive limitations, or checks, on legislative action by state courts. As such, they argue, there is enough of an existing framework to grant protections against such issues.

The Respondents, Hall et. al., in response, naturally argued against the points made by Thompson for the Petitioners. Donald Verrilli Jr., arguing for the Respondents, Hall et. al., notes how "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" (600 U.S. ___). He is of course referring to the *Smiley* case that was cited by both Thompson and the Court in their responses and questions respectively. This is a common retort to the ISL theory: that existing precedent before the court and ISL theory in general is contradictory to the arguments made by the Petitioners in *Moore.* That there are alterations made every time the issue comes before the Court to the ISL theory to attempt to make it more palatable for acceptance into law.

Supreme Court Holding

The Supreme Court in a 6-3 decision found in favor of the Respondent, Harper. Chief Justice Roberts wrote for the majority, joined by Justices Kagan, Sotomayor, and Jackson, in delivering the opinion of the Court. First, the majority held that the Supreme Court did have jurisdiction to hear the case. Due to the ongoing or live dispute between the parties following the reversing of the 2021 decision of the North Carolina Supreme Court in 2023, the Supreme Court held that since "the defendants did not ask the North Carolina Supreme Court to vacate that judgment" (600 U.S ___, 2023), there remained a live dispute justiciable by the US Supreme Court. The opinion of the Court reasons that since the landmark case of *Marbury v. Madison* (1803), the U.S Supreme Court has held that "it is emphatically the province and duty of the judicial department to say what the law is." (600 U.S. ___, 2023). As such it was their responsibility to review the case before them.

However, in the dissenting opinion authored by Justice Thomas and joined by Justices Gorsuch and Alito addressed the issue of jurisdiction and in fact argued that the case never should have been reviewed by the Supreme Court in the first place. The opinion states that the case is effectively moot, as there was an interlocutory appeal that was decided by the North Carolina Supreme Court. Citing the 2023 North Carolina Supreme Court decision, ". The three-judge panel's 23 February 2022 order addressing the Remedial Plans is vacated…Plaintiffs' claims are dismissed with prejudice." (600 U.S. ___, 2023). With the dismissal of prejudice, the dissenting opinion argued that there could be no more relief that the Petitioners could receive through law and fact as a result. As Justice Thomas wrote to sum it up plainly: "In short, this case is over, and petitioners won." (600 U.S ___, 2023)

In response to the question on if the Elections Clause of the US Constitution allow for state legislatures to insulate themselves as noted above, the majority found that "Elections Clause does not vest exclusive, independent authority in state legislatures to set rules regarding federal elections" (600 U.S ___, 2023). This was in line with past precedent established by the Court in other cases regarding the Elections Clause and ISL theory.

The majority, citing *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, recognized that whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. Constraints included things such as veto power from the Governor, as well as judicial review from lower courts (600 U.S ___). This holding effectively dismissed any viability of the ISL theory. The Court further found that precedent set in the case of *Smiley v. Holm* 285 U.S 355 must be upheld: that "a state legislature may not 'create congressional districts independently of' requirements imposed 'by the state constitution with respect to the enactment of laws'" (600 U.S ___).

Justice Kavanaugh wrote a concurring opinion, arguing the same conclusion as the majority related to both the question on jurisdiction and ISL. However, unlike the majority he offered several standards that can be used to determine how state courts evaluate Election Clause claims. Regardless of that departure, he agreed with Majority in stating that "federal court

review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication" (600 U.S. ___, 2023).

Conclusion

The case of *Moore v. Harper* is surely considered a blow to the ISL theory, being struck down once again. However, the importance of understanding its history and the case at large, is that the legal argument continues to re-emerge. From *Bush* to *Arizona Districting Comm'n* to *Moore*, the argument has gone from an idea in a concurrence to the main argument in landmark cases before the Supreme Court.

The value of this research, as stated previously, is to give a basis and background for future research into the theory. While the issue seems to be resolved, it is possible for proponents of the theory to reintroduce it through another case in the future. Key to the success of the judiciary in our country is the principle of *stare decisis*. This principle dictates that the Court in its ruling must honor precedent that it establishes in deciding similar cases before it. However, parties that want a legal theory or argument use what is called a test balloon case to try and get the Court to depart from its established precedent. This is where there is a case similar to a case that has already been decided on by the Court, however, something is different enough to warrant a re-hearing of the issue. Whether it be slightly different facts with the same argument, the same facts with a slightly different argument, or even just with a new Court, the issue is relitigated to try and break that precedential chain. In reviewing the oral arguments before the Court in *Moore*, Neal Katyal, advocate for the Respondents Hall et. al., shows how issues and definitions core to legal theories are malleable when being argued before the Court to be accepted. Katyal stated that:

> "(The Petitioners brief) said legislature means legislature. But then you get caveat after caveat. It includes the governor (referencing *Smiley*). It includes referenda. It includes independent commissions in the reply brief they say (referencing *Arizona*). Then they say, well, but state courts can't do it, but maybe they can for federal review, maybe they can if it's procedural or non-abstract." (600 U.S. ___).

It would not be impossible for an issue like ISL theory to be relitigated in the future and be accepted into the legal canon at that point with yet another tweaked definition of legislature, or who is allowed to limit the legislative actions apportioned by the Elections Clause. The law is meant to be interpreted; however, it creates wiggle-room for relitigating on these types of caveats that Katyal notes in his oral argument before the Court.

Justice opinions on the issue are clearly malleable to change as well with these different interpretations. Consider how Chief Justice Roberts dissented and agreed with the theory in part in *Arizona Comm'n* yet wrote the majority opinion in *Moore* that rebuked the theory. The same justice with different facts and arguments on how the theory is applied changed his decision on how it could be used. As the ISL theory continues to be proposed in election law, in five, ten, fifteen years, we may see another case just like *Moore v. Harper*. As such, the research and background that this paper provides will be an invaluable resource for future research as we see how this issue may continue to prompt us to ask questions about the future of our democratic processes.

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