



**TESTIMONY OF  
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**HEARING ON THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS  
POTENTIAL TO DISRUPT OUR DEMOCRACY**

**BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION**

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<sup>1</sup> The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice so they work for all. My testimony does not purport to convey the views, if any, of the New York University School of Law.

Chairperson Lofgren, Ranking Member Davis, and Members of the Committee:

Thank you for the opportunity to testify about the dangers of the “independent state legislature” theory. This is a fringe interpretation of the Constitution that—if adopted—could have devastating consequences for fair representation, voting rights, and election administration. It would deprive voters of free and fair elections and give nearly unrestrained power to state legislators, without the checks and balances that come from state courts, state constitutions, and other state institutions. To call it a “theory” confers far too much legitimacy – it is a meritless notion that would undermine our democracy. This testimony will spell out the specific, harmful consequences that would flow from a misguided Supreme Court opinion embracing it.

We face a perilous moment for our democracy. On January 6, 2021, a violent mob—bent on insurrection and fueled by President Trump’s lies about a stolen election—attempted to overturn the will of American voters. A decade’s worth of efforts to restrict voting rights have escalated sharply over the last two years, with 18 states passing 34 laws to make it harder for Americans to vote.<sup>2</sup> This year, six states also enacted laws that allow partisan interference in elections and threaten the people and processes that make elections work. Legislative majorities in at least nine states have also sought to adopt partisan gerrymanders during the most recent redistricting cycle, aiming to lock in an outsized share of seats for the next decade and insulate representatives from political accountability and the voters’ will.<sup>3</sup> The U.S. Supreme Court has refused to police partisan gerrymandering and has not struck down a restrictive state voting law in over a decade, while repeatedly weakening the Voting Rights Act’s protections against racial discrimination.<sup>4</sup>

Against this backdrop, the Supreme Court agreed to hear *Moore v. Harper*, a North Carolina partisan gerrymandering case that rests on the so-called “independent state legislature” theory.<sup>5</sup>

That notion, as argued in *Moore*, is a radical and erroneous misreading of the word “legislature” in the Elections Clause of the U.S. Constitution. That provision recognizes states’ power to regulate federal elections, while giving Congress overriding authority to make or alter such laws.<sup>6</sup> As the Supreme Court held only seven years ago, the well-established understanding

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<sup>2</sup> Brennan Center for Justice, *Voting Laws Roundup: May 2022*, 2022, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022>.

<sup>3</sup> According to a forthcoming Brennan Center analysis, nine states initially passed congressional maps that would be significant partisan gerrymanders under commonly accepted standards (including those articulated in the Freedom to Vote: John R. Lewis Act (H.R. 5746)), and maps in 13 other states bear strong indicia of gerrymandering. These include maps drawn by Democrats as well as Republicans. Pursuant to state constitutions, state courts have ordered that maps in three of the states be redrawn.

<sup>4</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims are nonjusticiable); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (striking down Voting Rights Act’s coverage formula for preclearance); and *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (making it more difficult for plaintiffs to bring claims under Section 2 of the Voting Rights Act).

<sup>5</sup> *Moore v. Harper*, 868 S.E.2d 499, *cert. granted* (No. 21-1271, OT 2022 Term).

<sup>6</sup> See U.S. Const. Art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Election 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.”).

is that the clause addresses each state’s lawmaking process, including, for example, gubernatorial approval or veto, the state constitution, and state court interpretation of state law.

If the Supreme Court converts the independent state legislature theory from a fringe notion into the law of the land, the catastrophic consequences would stretch beyond North Carolina and redistricting to wreak havoc on elections nationwide. At bottom, this radical concept would strip away checks and balances that have existed for centuries, empowering the most partisan actors in many states to manipulate election processes and outcomes. That is because proponents of the theory insist the Elections Clause gives legislators virtually unencumbered power, prohibiting other branches of state government—including state courts or governors—from constraining them under state law.

The stakes are high. State courts could lose the power to check extreme partisan gerrymandering. So could redistricting commissions, depending on how the theory is applied. Hyper-partisan legislative majorities could again draw lines to entrench representatives in office with impunity. Governors could lose their power to veto vote suppressive legislation, just as courts could lose their traditional authority to review that legislation for consistency with state constitutional protections. Secretaries of state, election boards, governors, and the people—because they are not the “legislature”—could lose the authority they regularly exercise to set policy for federal elections.

Because the theory holds that *only* legislatures may make rules for federal elections, it would negate myriad state constitutional provisions, such as the right to a secret ballot guaranteed in 44 state constitutions. It would likewise negate countless rules and regulations created by state and local election officials—but for federal elections *only*. As a result, officials would be forced to administer bifurcated election processes—with one scheme applicable to state and local elections, and another to federal elections—making an already complex and difficult job nearly impossible. This confusion would increase the risk of election sabotage and interference by muddying the public’s understanding of how elections work, deterring voters from participating. All of this would undermine the public’s already-wavering faith in our democracy.<sup>7</sup>

This chaos should be enough to discredit the theory. But the notion is not just wrong as a policy matter: It is legally meritless. A wealth of historical evidence and over a century of Supreme Court precedent, summarized below, rejects it. As do over two centuries of elections practice.<sup>8</sup> The very purpose of the Elections Clause is to constrain state legislatures, not to

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<sup>7</sup> Jennifer Agiesta, “CNN Poll: Americans’ Confidence In Elections Has Faded Since January 6,” *CNN*, July 21, 2022, <https://www.cnn.com/2022/07/21/politics/cnn-poll-elections/index.html>.

<sup>8</sup> Proponents of the independent state legislature theory also argue that their interpretation applies to the Electors Clause, which governs presidential elections and has been understood to convey the same scope of authority over such elections. See U.S. Const. Art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.”). “[C]ourts have construed the Electors Clause coextensively with the Elections Clause, holding that the former endows Congress with the same authority over presidential elections that the latter grants it over congressional races.” Nicholas O. Stephanopoulos, “The Sweep of the Electoral Power,” *Constitutional Commentary* 36 (2021): 54; see also *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *Voting Rgts. Coal. V. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) (“The broad power given to Congress over congressional elections has been extended to presidential elections . . . .”); *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) (“[Article II section 1] has been interpreted to grant Congress power over

liberate them to gerrymander, suppress the vote, or otherwise engage in the “abuse” James Madison warned of. This theory is not just dangerous, it is fundamentally misguided as a matter of law.

**I. The independent state legislature theory would wreak havoc on American elections.**

**A. The independent state legislature theory would undermine fair representation and voting access and increase the risk of election interference.**

The independent state legislature theory would sweep away many traditional checks and balances on state lawmakers, stripping away the constraints of gubernatorial vetoes, state constitutional limits, and state judicial review. In addition, it could fuel legal challenges in which litigants ask federal courts to throw out ballots cast in accordance with the state constitution, laws enacted via ballot initiative, or policies promulgated through rulemaking. As a result, the notion would remove critical protections against (1) partisan gerrymandering, (2) vote suppression, and (3) partisan manipulation of elections. Here are several examples.

- (1) The theory would open the door to more partisan gerrymandering. For example, it would lay the groundwork for the following scenario: By ballot initiative, voters adopt a state constitutional amendment banning partisan gerrymandering. When the state legislature adopts an extreme partisan gerrymander of the state’s congressional districts, voters turn to their state court to enforce that amendment and ensure a fair map for future elections. But state legislators obtain a federal court order holding that the state court and the state constitution have no power to limit their redistricting authority.

Of course, this is not a hypothetical exercise. In *Moore v. Harper*, we have seen state lawmakers pursue this very approach to nullify North Carolina’s constitutional limits on partisan gerrymandering with respect to the state’s congressional maps.

A ruling in favor of the state legislators in *Moore* would sweep away the decision of the state’s highest court, thereby depriving North Carolina voters of their right to equal representation under the state constitution. It could also deprive *all* voters across the country of their last remaining judicial remedies against partisan gerrymandering. That is because, in 2019’s *Rucho v. Common Cause*, the Supreme Court closed federal courthouse doors to partisan gerrymandering claims under the U.S. Constitution.<sup>9</sup> Notably, all nine justices pointed to state courts as an alternative and appropriate forum for voters to challenge partisan gerrymanders under state constitutions.<sup>10</sup> Just three years later, the Supreme Court now threatens to renege on

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Presidential elections coextensive with that which Article I section 4 grants it over congressional elections.”); and Eugene Gressman, “Uniform Timing of Presidential Primaries,” *North Carolina Law Review* 65 (1987): 355 (“[T]he Court employs the same constitutional analysis—the same broad treatment of vested congressional power—in dealing with article II, section 1.”).

<sup>9</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2484–08 (2019).

<sup>10</sup> *Rucho*, 139 S. Ct. at 2507.

this assurance, and, in so doing, negate state constitutional protections against partisan gerrymandering.<sup>11</sup>

Likewise, independent redistricting commissions—because they are not the “legislature”—could be abnegated.<sup>12</sup> What is more, *all* ballot measures passed by voters to strengthen democratic electoral institutions in states could be affected or invalidated.

- (2) States could adopt more restrictive voting laws. The theory would, for example, enable the following scenario: A state legislature enacts a law that makes it harder for voters, and particularly for voters of color, to cast their ballots. Federal courts, relying on the weakened interpretation of the Voting Rights Act proffered by the Supreme Court, let the law stand. The state supreme court strikes it down because the law violates the right to vote and the guarantee of free and fair elections enshrined in the more protective state constitution. But, if the independent state legislature theory were in force, that discriminatory voting law would remain in effect, because state courts would be powerless to apply their own state’s constitution to protect their citizens’ rights when it came to federal elections. This too is not a mere hypothetical exercise—it is playing out right now with respect to North Carolina’s voter ID law.<sup>13</sup>

Over the last two decades, the Supreme Court has substantially undermined the Voting Rights Act’s protections against racial discrimination in voting—striking critical blows in *Shelby County* and in *Brnovich*—all while undercutting other federal voting rights protections.<sup>14</sup> As a result, federal courts now play an ever smaller role in protecting voting rights.<sup>15</sup> As the Supreme Court has retreated from the field, governors (through their veto power), state courts, and state constitutions have emerged as the most potent protectors of voting rights. The theory could render them powerless.<sup>16</sup> Vote suppressors will likely step into that vacuum.

- (3) Many critical constraints on election interference and sabotage would disappear. The theory could, for example, set in motion the following scenario. A highly infectious virus upends daily life during an election year. The overtaxed postal service warns that it cannot ensure that ballots mailed before election day will arrive on time

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<sup>11</sup> At least seven state constitutions expressly ban partisan gerrymandering. See Cal. Const. art. XXI, § 2(e); Colo. Const. art. V, § 44.3; Fla. Const. art. III, § 20; Mich. Const. art. IV, § 6.13(d); Ohio Const. art. XIX, § 1(3)(a); N.Y. Const. art. III, § 4(c)(5); and Wash. Const. art. II, § 43(5).

<sup>12</sup> At least four state constitutions curb partisan gerrymandering by vesting redistricting power in independent redistricting commissions. See Ariz. Const. art. IV, Pt. 2 § 1(3); Cal. Const. art. XXI, § 2; Colo. Const. art. V, §§ 44(2), 46(2); and Mich. Const. art. IV, § 6.

<sup>13</sup> Compare N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020) (federal court allowing the voter ID law to take effect), with Holmes v. Moore, 840 S.E.2d 244 (N.C. Ct. App. 2020) (state court preliminarily enjoining the voter ID law).

<sup>14</sup> See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (holding that Indiana’s photo ID law imposed only a limited burden on the right to vote and was justified by state interests); and Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (holding that Ohio’s “use it or lose it” voter list maintenance law did not violate the National Voter Registration Act).

<sup>15</sup> See, e.g., Franita Tolson, “Parchment Rights,” *Harvard Law Review Forum* 135 (2022): 533–34; and Cristina M. Rodríguez, “Foreword: Regime Change,” *Harvard Law Review* 135 (2021): 146.

<sup>16</sup> Joshua A. Douglas, “The Right to Vote in State Constitutions,” *Vanderbilt Law Review* 67 (2014): 91–92.

because more voters than ever are seeking to vote by mail. The state supreme court extends the ballot receipt deadline by three days to ensure that validly cast ballots arrive in time to be counted, invoking the state constitution’s free and fair elections provision and the court’s own statutory authority to carry out the intent of the election code during emergencies. But the U.S. Supreme Court says the state court’s ruling is impermissible and any ballots arriving after the initial statutory deadline are too late. Those ballots could go uncounted, potentially swinging the results of an election. This scenario likewise is not hypothetical, as litigation arising from the Pennsylvania courts teed up this possibility in 2020.

The notion would also undermine protections against other efforts to manipulate election outcomes, like restrictive and arbitrary vote-counting rules, sham audits, the empowerment of poll watchers to disrupt voting and vote-counting processes, and threats against election officials. State lawmakers are already testing the guardrails. For example, proposed Arizona legislation purports to give the legislature the power to “accept or reject” election results.<sup>17</sup>

To be clear, the independent state legislature theory would not permit federal courts to retroactively change the rules under which ballots were cast or allow state legislatures to reject the results of an election.<sup>18</sup> And it would not let state legislatures select an alternate slate of presidential electors if state law requires that electors be selected by popular vote. Such conduct would violate federal law, both constitutional and statutory. Nor would it implicate or weaken Congress’s expansive power to make laws for federal elections. Still, interference and sabotage efforts—even when they fail—contribute to a general sense of lawlessness and distrust that erodes faith and participation in our democracy. We saw just that in the aftermath of the 2020 elections, as President Trump and his lawyers repeatedly invoked the theory as rhetorical justification for their plot to overturn the will of American voters, falsely suggesting that any election-related decisions not made by state legislatures were invalid.

## **B. The independent state legislature theory would create chaos in election administration.**

In its full form, the independent state legislature theory contends that existing laws—enshrined in state constitutions, set forth in state court decisions, promulgated in state- and local-agency-level regulations, or adopted by citizens through ballot initiative—do not apply to federal elections. In practice, this notion would create a cascade of chaos.

### **First, the theory would negate hundreds of laws and policies for federal elections.**

Take Michigan, for example, where voters amended the state constitution in 2018 to adopt same day registration, automatic voter registration, and absentee voting.<sup>19</sup> The independent state

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<sup>17</sup> H.B. 2596, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).

<sup>18</sup> Helen White, “The Independent State Legislature Theory Should Horrify Supreme Court’s Originalists,” Just Security, June 30, 2022, <https://www.justsecurity.org/81990/the-independent-state-legislature-theory-should-horrify-supreme-courts-originalists/>.

<sup>19</sup> Bureau of Elections, “Official Full Text Proposal 18-3,” Mich. Dep’t of State, accessed July 26, 2022, [https://www.michigan.gov/-/media/Project/Websites/sos/01vanderroest/Full\\_Text\\_PTV.pdf?rev=8fb03b06c2e043d4b149ef5c6a02e392](https://www.michigan.gov/-/media/Project/Websites/sos/01vanderroest/Full_Text_PTV.pdf?rev=8fb03b06c2e043d4b149ef5c6a02e392); see Mich. Const. art. II, § 4.

legislature theory would wipe those policies off the books for purposes of federal elections. That would disenfranchise Michigan voters who registered through automatic or same-day registration in federal elections or force them to re-register by other means for those elections alone. Michigan voters could be required to vote in person for federal elections, even after they had voted by mail for state races held on the same day.

Michigan's Prop 3 is just one example of laws that would be wiped off the books for federal elections. Voters across the country have enacted major election policies through direct democracy. For example, through ballot initiatives, Arkansas and Mississippi adopted voter ID laws; Nevada voters adopted automatic voter registration; California and Florida restored voting rights to people with prior convictions; and Alaska and Maine secured rank-choice voting.<sup>20</sup> Even the most fundamental features of our elections are at risk. In 44 states, for example, the right to cast a secret ballot is enshrined in the state constitution.<sup>21</sup> If those guarantees did not apply to federal elections, state legislatures could adopt policies to force voice voting for federal offices, creating bedlam at the polls and surely exacerbating intimidation of voters and election officials.

**Second, the theory would result in bifurcated bodies of policy—one for federal elections and another for state and local elections.** Nullifying hundreds of laws, but only for purposes of federal elections, would force state and local election officials to administer chaotic parallel systems, in which the applicable policy would differ depending on whether a race is for state and federal office. A two-track system for voter registration, voter list maintenance, early voting, and mail voting (among other policies) would strain already overburdened election administrators.<sup>22</sup> Moreover, the radical notion would make it difficult for election officials to know what the law is for federal elections, because they would not be able to rely on longstanding regulations, court decisions, or even gubernatorial vetoes.

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<sup>20</sup> Ark. Const. art. III, § 1; Ark. Const. Amend. XCIX, § 1 (proposed by Ark. H.J. Res. 1016, § 1 (2017), <https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2017R%2FPublic%2FHJR1016.pdf>); Miss. Const. art. XII, § 249A; Miss. Sec'y of State, "Voter Identification," accessed July 26, 2022, <http://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IID=27>; Cal. Const. art. II, § 2; Cal. Assemb. Const. Amendment no. 6, Chap. 24, (June 25, 2020), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200ACA6](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200ACA6); Fla. Const. art. VI, § 4; Constitutional Amendment Petition Form for Voting Restoration Amendment, Fla. Dep't of State, Div. of Elections (Oct. 31, 2014), <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf>; Nev. Rev. Stat. § 293.5732; State of Nevada 2018 Initiative Petition, Ballot Question No. 5, § 2, <https://www.nvsos.gov/sos/home/showpublisheddocument/4381/637208298378230000>; Alaska Stat. § 15.15.350; Alaska Ballot Measure No. 2, § 44 (2020); Alaska Division of Elections, "Alaska's Better Elections Initiative," Office of the Lt.-Gov. <https://www.elections.alaska.gov/petitions/19AKBE/19AKBE-TheBill.pdf>; Me. Rev. Stat. tit. 21-A §§ 1(27-C), 1(35-A), 601(2)(J), 695, 722(1), 723; Maine Citizen's Guide to the Referendum Election (Nov. 8, 2016), <https://www1.maine.gov/sos/cec/elec/upcoming/citizensguide2016.pdf> (see Question 5).

<sup>21</sup> Caitriona Fitzgerald, Pamela Smith, and Susannah Goodman, *The Secret Ballot at Risk: Recommendations for Protecting Democracy*, Electronic Privacy Information Center, Verified Voting Foundation, and Common Cause Education Fund, 2016, 6, <https://secretballotatrisk.org/Secret-Ballot-At-Risk.pdf>.

<sup>22</sup> Ruby Edlin and Turquoise Baker, "Poll of Local Election Officials Finds Safety Fears for Colleagues - and Themselves," *Brennan Center for Justice*, March 10, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/poll-local-election-officials-finds-safety-fears-colleagues-and>; see also *Hearing on the Changing Election Security Landscape: Threats to Election Officials and Infrastructure*, Before the H. Comm. on Homeland Security, 117th Cong. (2022) (testimony of Elizabeth Howard, Senior Counsel, Democracy Program, Brennan Center for Justice), <https://www.brennancenter.org/our-work/research-reports/testimony-threats-against-election-officials-committee-homeland-security>.

**Third, the theory would revoke the discretionary and emergency powers of state officials that are necessary for smooth and safe elections.** For example, governors, secretaries of state, or election boards are expressly or impliedly empowered in states like Florida, Michigan, North Carolina, Pennsylvania, and Texas to exercise discretionary authority in the event of emergencies.<sup>23</sup> In 2018, Florida Governor Rick Scott used his emergency power to permit eight counties particularly affected by Hurricane Michael to extend early voting days and designate more early voting locations.<sup>24</sup> In 2020, the Harris County elections administrator implemented drive-through voting, enabling Texans in the county to cast their ballots at a safe distance during the Covid-19 pandemic; state and federal rejected legal challenges to this policy.<sup>25</sup> If state officials were unable to modify election procedures in the face of a natural disaster, terrorist attack, or another pandemic, voters and local election officials could be forced to vote and work in dangerous circumstances.

## **II. The independent state legislature theory is meritless.**

The independent state legislature theory has been debunked by scholars from every conceivable angle and under every accepted jurisprudential approach, including by conservative scholars and former judges. The undisputed history of the founding era, the plain meaning of the Constitution’s text, more than a century of unbroken practice and Supreme Court precedent, and common sense all refute this radical notion.

Having conducted extensive research of the founding-era understanding of the Elections Clause and the way it has been interpreted since 1787, I can assure the Committee that the lessons of history are unambiguous: the theory is meritless as a constitutional matter.

The historical record makes clear that the founders did not give power to state legislatures absent the checks and balances of ordinary lawmaking processes (like state constitutions, governors, and courts).<sup>26</sup> The founders had two primary motivations as they drafted the Elections Clause: ensuring fair representation and guarding against their profound distrust of state legislators.<sup>27</sup> At the Constitutional Convention, James Madison gave a lengthy defense of the Elections Clause. He argued that it was essential to give Congress the power to override state laws for federal elections because state lawmakers would unquestionably misuse their authority over elections, warning, “It was impossible to foresee all the abuses that might be made of the

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<sup>23</sup> Fla. Stat. § 101.733(3) (department of state’s division of elections duty to create statewide election emergency contingency plan); Fla. Stat. § 101.74 (supervisors of elections’ emergency election management powers); Fla. Stat. § 252.36(5)(a) (governor’s emergency powers); Mich. Comp. Laws § 30.405(1)(a) (governor’s emergency powers); N.C. Gen. Stat. § 166A-19.30(a)(2) (governor’s emergency powers); 25 Pa. Stat. § 2726 (county boards of elections may change polling locations in emergencies); 35 Pa. Stat. and Cons. Stat. §§ 7301(b), (f) (governor’s emergency powers); and Tex. Gov’t Code § 418.016 (governor’s emergency powers).

<sup>24</sup> Florida Office of the Governor, Exec. Order No. 18-283 (October 22, 2018), [https://www.flgov.com/wp-content/uploads/orders/2018/EO\\_18-283.pdf](https://www.flgov.com/wp-content/uploads/orders/2018/EO_18-283.pdf).

<sup>25</sup> Jolie McCullough, “Nearly 127,000 Harris County Drive-Thru Votes Appear Safe after Federal Judge Rejects GOP-Led Texas Lawsuit,” *Texas Tribune*, November 2, 2020, <https://www.texastribune.org/2020/11/02/texas-drive-thru-votes-harris-county/>.

<sup>26</sup> See generally Eliza Sweren-Becker and Michael Waldman, “The Meaning, History, and Importance of the Elections Clause,” *Washington Law Review* 96 (2021).

<sup>27</sup> Sweren-Becker and Waldman, “Elections Clause,” 1007–08.



discretionary power.”<sup>28</sup> He explicitly cautioned that state legislators would draw unrepresentative districts and worried that state politicians would manipulate the rules to affect election outcomes, “mould[ing] their regulations as to favor the candidates they wished to succeed.”<sup>29</sup>

Madison was not alone. The debates leading up to the ratification of the new Constitution are replete with vocal distrust of state legislators.<sup>30</sup> At the ratification debates and in public writing, defenders of the Elections Clause warned against relying, even “for a moment, on the will of state legislatures,” and expressed concern about state lawmakers trying to exercise “undue influence in elections” and making “improper regulations” arising from “sinister views.”<sup>31</sup> It is simply not credible that the founders, aiming to curb abuses by state legislators, intended for or understood the Constitution to give those very same actors uniquely unchecked power to regulate federal elections.

Practice—before, during, and after the founding era—further elucidates the public meaning of the Constitution and likewise refutes the independent state legislature theory. For example, most state constitutions adopted between independence and the adoption of the United States Constitution regulated the selection of delegates to Congress, and several state constitutions adopted from 1789 to 1803 contained substantive restrictions on election law that were understood by the founding generation to apply to all elections held in the state, including federal elections.<sup>32</sup> Moreover, most state legislatures shared their elections power with other state actors during the founding era.<sup>33</sup> These practices, which are inconsistent with the independent state legislature theory, were uncontroversial at the time.

This original public meaning of the Constitution is consistent with its text. Indeed, the text of the Constitution reveals the absurdity of the independent state legislature theory. For example, when the Elections Clause gives power not only to state legislatures but also to “Congress” to make laws for federal elections, no one contends that it gives Congress the power to regulate federal elections in violation of the U.S. Constitution or to enact election laws without sending a bill to the President for his signature or veto. Similarly, the First Amendment prohibits only “Congress” from discriminating on the basis of speech and religion. But we understand the amendment, in context, to apply to the federal government in its entirety, including the judicial

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<sup>28</sup> *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1911), vol. 2: 240–41.

<sup>29</sup> *Records of Federal Convention*, 240–41.

<sup>30</sup> Sweren-Becker and Waldman, “Elections Clause,” 1009–10.

<sup>31</sup> “Convention Debates, 25 June 1788,” in *The Documentary History of the Ratification of the Constitution Digital Edition*, eds. John P. Kaminski et al. (Charlottesville: University of Virginia Press, 2009), vol. XXII: New York, no. 4: 1906; “Plain Truth: Reply to an Officer of the Late Continental Army, Independent Gazetteer 10 November,” in *The Documentary History of the Ratification of the Constitution Digital Edition*, eds. Kaminski et al. (Charlottesville: University of Virginia Press, 2009), vol. II: Pennsylvania: 222; and “Text of a Federalist Speech Not Delivered in the Maryland Convention,” in *The Documentary History of the Ratification of the Constitution Digital Edition*, eds. Kaminski et al. (Charlottesville: University of Virginia Press, 2009), vol. XII: Maryland, no. 2: 884.

<sup>32</sup> Hayward H. Smith, “Revisiting the History of the Independent State Legislature Doctrine,” *St. Mary’s Law Journal* 53 (2022): 479, 488.

<sup>33</sup> Mark Krass, “Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections,” *Virginia Law Review* 108 (2022): 122–39.

and executive branches. That is why, to take one example, a judge cannot close off her courtroom to atheists.

It is no surprise, then, that the Supreme Court has affirmatively and repeatedly rejected the independent state legislature theory. The Court has long interpreted the term “legislature” in the Elections Clause to encompass the complete lawmaking apparatus in each state. For example, the Court has held that if the state constitution provides that legislation is subject to a gubernatorial veto or citizen referendum, those processes apply to election regulations.<sup>34</sup> If the state constitution permits citizens to legislate via ballot initiatives, then citizens may regulate federal elections.<sup>35</sup> And, of course, state courts are entitled—indeed, obligated—to ensure that their election laws comply with other state laws, both statutory and constitutional.<sup>36</sup> A state legislature, after all, is a creature of its state constitution.<sup>37</sup>

These are just a few of the reasons why the independent state legislature theory is wrong as a matter of constitutional law. The great weight of scholarship has identified the notion for what it is – a partisan and dangerous misreading of the Constitution that will distort our democracy.

### **III. Conclusion**

Thank you for calling attention to the independent state legislature theory and its extraordinarily dangerous consequences. This radical notion is not yet the law, and in this critical moment for our democracy, it is important that Congress and the public speak out about the risks it poses. Fortunately, the facts and the law all point in the same direction: the independent state legislature theory is not a plausible reading of the Constitution, and the Supreme Court should not adopt it.

Even if the Court does embrace this radical theory, Congress has the power to thwart many of its worst consequences. The very same constitutional provision that activists are seeking to weaponize against democracy gives Congress the authority to enhance and protect voting rights and ensure fair representation. Indeed, that is the principal purpose of the Elections Clause.

We are encouraged by the introduction of the bipartisan legislation to reform the Electoral Count Act, which addresses the vulnerabilities in that law, and we urge Congress to pass those bills swiftly. However, that legislation does not remedy the risks posed by the independent state legislature theory. More is needed.

Last year, Congress came very close to enacting legislation that would not only enhance our democracy but would neutralize state legislative efforts to gerrymander, suppress votes, and sabotage elections. The Freedom to Vote: John R. Lewis Act would supersede state law, and

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<sup>34</sup> *Smiley v. Holm*, 285 U.S. 355 (1932) (redistricting power subject to gubernatorial veto); *Davis v. Hildebrandt*, 241 U.S. 565 (1916) (redistricting power subject to referendum).

<sup>35</sup> *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808–09 (2015) (redistricting power subject to ballot initiative).

<sup>36</sup> See *Rucho*, 139 S. Ct. at 2507 (election power subject to state law).

<sup>37</sup> See *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795) (“What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void.”).

would ensure national standards for voting access, prohibit partisan gerrymandering, and add federal protections against election interference. For the reasons the Brennan Center has repeatedly articulated,<sup>38</sup> we strongly urge Congress to pass the Freedom to Vote: John R. Lewis Act, regardless of how the Supreme Court rules in *Moore v. Harper*.

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<sup>38</sup> See, e.g., *Addressing the Election “Audit” in Arizona and Threats to American Democracy*, Hearing Before the H. Comm. on Oversight and Reform, 117th Cong. (2021) (testimony of Gowri Ramachandran, Senior Counsel, Democracy Program, Brennan Center for Justice), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Ramachandran%20Testimony.pdf>; *Election Subversion: A Growing Threat to Electoral Integrity*, Hearing Before the H. Comm. on Administration, 117th Cong. (2021) (testimony of Gowri Ramachandran, Senior Counsel, Democracy Program, Brennan Center for Justice), <https://docs.house.gov/meetings/HA/HA00/20210728/113971/HHRG-117-HA00-Wstate-RamachandranG-20210728.pdf>; *S.1, the For the People Act*, Hearing Before the S. Comm. on Rules and Administration, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), <https://www.brennancenter.org/our-work/research-reports/testimony-s-1-people-act-senate-committee-rules-administration>; *Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act*, Hearing Before the S. Comm. on the Judiciary, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://www.brennancenter.org/our-work/research-reports/testimony-protecting-precious-almost-sacred-right-john-r-lewis-voting>; *Oversight of the Voting Rights Act: Potential Legislative Reforms*, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-WeiserW-20210816.pdf>; *The Implication of *Brnovich v. Democratic National Committee* and Potential Legislative Responses*, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210716/113905/HHRG-117-JU10-Wstate-Morales-DoyleS-20210716.pdf>; *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections of the H. Comm. on Administration, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf>; *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*, Hearing Before the Subcomm. on Elections of the H. Comm. on Administration, 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf>; and *Oversight of the Voting Rights Act: A Continuing Record of Discrimination*, Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on Judiciary, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>.