

Testimony of Richard H. Pildes

Hearing on “The Independent State Legislature Theory and its Potential to Disrupt our  
Democracy”

House Committee on Administration

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Thank you for giving me this opportunity to testify. I am the Sudler Family Professor of Constitutional Law at NYU School of Law. Most of my professional career has been devoted to the law of democracy. I am the co-author of the casebook, *The Law of Democracy: Legal Regulation of the Political Process*, first published in 1998 and now in its sixth edition. I edited and contributed to the volume, *The Future of the Voting Rights Act*, published in 2006. I have published around 90 or so articles and book chapters on nearly all aspects of the voting and elections process, including the constitutional framework for elections. I have argued or been counsel before the Supreme Court on voting and election issues, and a diverse group of Justices has cited my scholarship on these issues. I have testified before to the Senate and the House on these issues, and I recently served as a commissioner on President Biden’s Commission on the Supreme Court of the United States.

The focus of my testimony will be on potential ramifications of the independent state legislature theory (ISLT) and some assessment of the historical record for or against the existence of such a doctrine. A critical point is that the question is not the simple matter of whether the Constitution does or does not create an “independent state legislature” doctrine under the Elections Clause (for House and Senate elections) or the Electors Clause (for presidential elections). If the Supreme Court were to recognize an independent state legislature doctrine (ISLD), the question of the doctrine’s *scope* would be just as important. There are a number of potential versions of such a doctrine that have been raised. The ramifications of any such doctrine depends, then, on *which* particular version the Court might potentially adopt. The same is true about the historical record: in asking what that record demonstrates regarding the ISLT, the answer will depend on which potential version of the theory is being considered. That is an important point often neglected in the general public commentary on the issue.

At the outset, it is also important to stress what the ISLT would *not* enable, even if the Court were to accept the theory in its strongest form. That would still not mean state legislatures could choose to ignore the popular vote in their state and appoint presidential electors themselves. Because I have seen a good deal of confusion about this in some public commentary, it is import to clarify this point.

The Constitution in Art. II expressly gives Congress the power to determine the “time” at which electors must be chosen. Since the Presidential Election Day Act of 1845, codified at 3 U.S.C. Sec. 1, Congress has set a nationally uniform day for appointment of the presidential electors (Election Day, in states which use an election – which of course is all states in the modern era). Congress has mandated that electors must be appointed on the Tuesday after the first Monday

in November. If a state chooses to use an election for choosing the presidential electors, that election must be on the day Congress has proscribed. Electors cannot be appointed after that day. Of course, it might take time to determine who the voters have in fact chosen on Election Day, given the need to tabulate the votes, conduct any possible recounts, and resolve any litigation over the outcome that might arise. But from a legal perspective, the electors have been chosen on election day.

Given Congress' clear constitutional power to determine the timing of the election, state legislatures would still not have the power to ignore the popular vote and decide to appoint electors after election day. Given Congress' power of Congress to set the time for appointing the state's electors, the state legislature is powerless to change its statutory law after Election Day to insert itself in the certification process. The ISLT, if the Court decides to recognize it, would have no bearing on Congress' power to lock in the date on which electors must be chosen. There has been loose talk that the doctrine would give state legislatures "plenary powers" over the presidential election, from which it supposedly follows that they could "reclaim" their power to appoint electors after the election has been held. That is incorrect – even if the Court recognizes an independent state legislature doctrine. In addition, should a state legislature attempt to insert itself into the counting of the state's popular vote for president, the state legislature—like any institution of state government—would be bound by *Bush v. Gore*<sup>1</sup> and related Fourteenth Amendment precedents that require all ballots cast in an election to be treated consistently with "equal protection" and "due process" principles. The federal Constitution would still constrain state legislatures, which have no more power to manipulate the counting of ballots in a presidential election to achieve a dishonestly partisan outcome contrary to what an accurate count would show than does a state or local canvassing board.

A second important initial point: the Constitution assigns to state "legislatures" and to "Congress" a number of different types of roles or functions. The issue that I will address is limited to the role of states and Congress in the *lawmaking process* of regulating the "manner" of national elections. But the Constitution assigns these entities functions other than lawmaking. In these other roles, it is possible that state legislatures or Congress have a degree of constitutional independence they do not have in the ordinary context of lawmaking.

For example, Congress has a distinct role in proposing constitutional amendments. Early Supreme Court precedent recognized that, unlike when Congress legislated, Congress did not have to present proposed amendments for the President's approval or veto.<sup>2</sup> Indeed, Congress has not presented numerous constitutional amendments for presidential approval or veto, including the Bill of Rights. But the fact that Congress might be "independent" in the context of proposing constitutional amendments does not mean, of course, that it is "independent" in the context of lawmaking, in which presentment to the President is constitutionally required. Similarly, the original Constitution assigned state legislatures a power to elect Senators. It is possible that, in their role as electors, state legislatures had a degree of independence they do not have in the context of regulating national elections. If a state constitution before the Seventeenth Amendment had

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<sup>1</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>2</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 n.\* (1798) (statement at oral argument of Chase, J.).

purported to permit direct popular election of Senators, it is possible such a provision would have violated the role the Constitution assigned to state legislatures as electors. Indeed, in upholding the ability of a voter-initiated constitutional amendment to create an independent redistricting commission for House districts, the Supreme Court’s opinion in the *Arizona State Legislature v. Arizona Independent Redistricting Commission* case, 576 U.S. 787 (2015) (*AIRC*) recognized that state legislatures might have had unique independence, prior to the Seventeenth Amendment, in their distinct role as electors. Thus, it is possible the Constitution creates a more “independent” Congress or state legislature for certain functions, but not for others, such as when these entities are engaged in the function of lawmaking, such as the regulation of federal elections. These conclusions are not based on reading the word “legislature” in isolation, but on structural inferences based on the nature of the power that the Constitution confers on Congress or state legislatures in these specific provisions.

*Does the Constitution Deny the Ability of State Constitutions to Constrain State Laws Regulating National Elections?* With respect to whether state legislatures cannot be bound by the substantive provisions in state constitutions when they regulate national elections, the most comprehensive examination of that history can be found in Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY’S L.J. (2022) (hereinafter *Revisiting History*). A second important article on the history is Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020).<sup>3</sup>

As an initial matter, these works agree that there is simply no evidence that the Framers understood the Constitution to create an independent state legislature with respect to the power to regulate national elections. As even Professor Morley, the most committed academic defender of some version of the doctrine, acknowledges: “It appears that the Framers neither expressly considered the independent state legislature doctrine nor addressed the potential significance of their use of the term ‘legislature’ in the Elections Clause and Presidential Electors Clause.”<sup>4</sup> <sup>5</sup>Indeed, if we look to historical practice in the Founding era and for decades later, the evidence indicates that the general public understanding of the texts in these clauses was that no such doctrine existed. Smith points out that at least five state constitutions expressly imposed substantive constraints on state legislative regulation of national elections by requiring that all elections be conducted by ballot, rather than by voice vote – an issue that was one of the most important and contested ones of election administration in early constitutional history. State constitutional regulation of national elections expanded throughout American history.

Second, until the 2020 election, there does not appear to be any federal court precedent, including from the Supreme Court, which acknowledged any version of the ISLT at all with respect to state regulation of federal elections. The only time the Court spoke in the vicinity of the issue

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<sup>3</sup> For other works on the history, see Michael Weingartner, *Liquidating the Independent State Legislature Theory*, (forthcoming, Harv. J.L.Pub. Pol. (2023), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4044138](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138); Mark Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. \_\_ (forthcoming 2022), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3902163](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902163).

<sup>4</sup> Michael Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 503 (2021).

arguably came in the 1892 case of *McPherson v. Blacker*, 146 U.S. 1 (1892), in which the Court held that the Michigan legislature had not violated the Constitution in choosing to have presidential electors selected by district rather than statewide. While Professor Morley reads certain passages, admittedly dicta, as supporting the ISLT, other scholars conclude that reading is “not supported by any reasonable reading of the case,”<sup>6</sup> or that the case at best contains contradictory dicta that point in opposite directions on the issue.

I cannot survey here all the historical materials scholars have debated beyond these major points. Professor Morley suggests a few state court cases in the Civil War era dealing with absentee voting by soldiers in the battlefield, as well as the congressional resolution of a contested House election in 1866, *Baldwin v. Trowbridge*, evidence belief in the doctrine during that era. As an initial matter, for those who believe the Constitution’s text should be understood in terms of the original public meaning those provisions reflect, this mid-19<sup>th</sup> century evidence would appear to have little weight. The reading of these few state court cases is also disputed by scholars, and the majority and dissent in the *AIRC* case disputed the weight to be given legal arguments made in the inevitably partisan context of the House’s resolution of a disputed election.

Even accepting these few mid-19<sup>th</sup> century examples as evidence in support of the ISLT, the overwhelming weight of historical practice illustrates that state constitutions throughout American history have imposed substantive constraints on the terms under which state legislatures can regulate national elections. The fact that these constitutions have done so throughout American history makes the ISLT hard to square with historical practice. In dissenting in the *Arizona Independent Redistricting* case, Chief Justice Roberts left open the possibility that he might agree that state constitutions can limit the exercise of state legislative powers under the Elections Clause -- even though he concluded the Elections Clause prohibited a voter-initiated constitutional amendment that transferred redistricting to an independent commission. The flaw in the Arizona provision, in his dissenting view, was that it completely transferred the entire function of redistricting out of the hands of the legislature. As he put it: “Suffice it to say that none of [the other state constitutional constraints on state legislatures] purports to do what the Arizona Constitution does here: set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process.”<sup>7</sup>

#### *The Potential Ramifications: State Constitutions and Voter-Initiated Amendments and Legislation*

The most important issue concerning the scope of a potential ISLD is whether such a doctrine permits state legislatures to ignore substantive constraints that state constitutions otherwise impose on the regulation of elections. There are several different versions of the extent to which a potential ISLD might limit the role of state constitutions. The “maximalist” position would be that state constitutions cannot impose any substantive constraints on state regulation of federal elections. But there are also several more limited positions that would recognize only certain, more narrowly defined boundaries on the role of state constitutions. In addition to

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<sup>6</sup> Smith, *Revisiting History*, at 531 n. 400.

<sup>7</sup> *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting).

identifying these various potential versions of an ISLD, I will highlight some of the ramifications these various versions would have.

In forty-six states, the current state constitution was drafted by a constitutional “convention” without direct involvement by the state legislature.<sup>8</sup> These constitutions were arguably approved without state legislative or congressional endorsement. (In the other four, current constitutions were drafted by the state legislature and ratified by popular vote). The state constitutions in most of these forty-six convention states impose many regulations of congressional and presidential elections. If the Constitution is best read to permit only the institutional “legislature” to regulate federal elections, all the provisions in these constitutions that do so might be held unconstitutional. This is the maximalist version of the ISLT. Simply to state that conclusion is to indicate the breadth of such a position, as the concrete examples discussed below illustrate.

Closely related to the general role of state constitutions is the question of how popular lawmaking, in the twenty-four states in which such an option exists, would be affected by a potential ISLT. Popular lawmaking can take several forms. Approximately eighteen states allow voter-initiated constitutional amendments. An additional six states allow voter-initiated state statutes, which permit voters to enact new laws without legislative consent. While voter-initiated legislation is easier for legislatures to repeal, ten of these twenty-four states impose significantly higher hurdles than required for other legislation on legislative efforts to repeal voter-initiated legislation. Because popular lawmaking is not “the legislature” enacting laws, a maximalist version of the ISLT might render unconstitutional all the forms of regulating national elections that have been adopted through popular lawmaking initiatives. Note that the Framers could not have intentionally meant to exclude popular lawmaking as a valid means of state regulation of national elections when they used the word “legislature,” because the statewide voter initiative was not even conceived of as a form of lawmaking until the late 19<sup>th</sup> and early 20<sup>th</sup> Century.

This is a sampling of the vast array of provisions regulating federal elections that are found in state constitutions or voter-initiated legislation, all of which would be threatened by the maximalist version of the ISLT: provisions banning straight-ticket voting; voter identification requirements; the deadlines for voter registration; provisions establishing all-mail voting systems; provisions regulating the absentee-ballot process; provisions banning voters who failed to vote in the general election from voting in run-off elections; how to fill vacant Senate seats (by special election rather than gubernatorial appointment); provisions on the thresholds required to be elected to office (plurality-vote or majority-vote provisions); provisions for challenging the validity of votes; the criteria to be used in redistricting, such as whether districts must be compact, whether partisan considerations are banned or constrained, what weight to be given to competitiveness; whether districting is to be done by independent commissions. A number of these provisions date to early state constitutions.<sup>9</sup>

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<sup>8</sup> The information in this paragraph and the next one comes from *Nathaniel Persily et al., When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 *Ohio State Law Journal* 689 (2016).

<sup>9</sup> *Id.*

The regulation of primaries for federal elections is an area particularly worth singling out. As voters have become dissatisfied with the nature of politics in recent years, they have sought to reform the structure of primaries in several states. These reforms are motivated, in part, by the belief that factional candidates can win nomination in the traditional form of primaries, and in safe seats, those candidates will go on to win the general election. These reforms seek to modify the structure of primaries and voting rules to make it more likely candidates with broad majority support, rather than more factional candidates, will be rewarded (and will also, therefore, be more likely to run in the first place). In Washington and California, voters adopted the Top-2 structure for primaries, in which all candidates run in a single primary and the top two then go on to compete in the general election. In Maine, voters adopted ranked-choice voting (RCV) for federal and state primaries and the general election. Most recently, in 2020 voters in Alaska adopted the Top-4 primary structure, with RCV to be used in the general election. Whether or not these reforms turn out to have the beneficial effects their proponents believe they will have, they are examples of the ways in which voters over the years have sought to reform the democratic process to make it more responsive to their concerns.

This brief sampling suggests how destabilizing the maximalist version of the ISLT would be. The way in which federal elections have been conducted for many decades in states would be overturned. The ability of voters, through voter-initiated constitutional amendments or voter-initiated legislation, to change the structure of elections would be eliminated. In theory, Congress could legislate to approve all these provisions, or legislatures in individual states could choose to adopt through legislation all the provisions in their states currently found in state constitutions or popular enactments. For certain rules that have become widely accepted by now, state legislatures would, if required by the federal Constitution, affirmatively enact those rules. But that hardly seems likely for the full range of these substantive provisions, in part because legislators have a strong self-interest in structuring election rules in ways that benefit themselves and their partisan allies.

In addition, nearly all these provisions apply to both state and federal elections. If they are unconstitutional as applied to federal elections, another consequence is that states would face the prospect of running dual election-administrative systems, with different rules governing state and federal elections (unless the legislature adopted these provisions for federal elections). It would also mean state legislatures have more power to regulate federal elections than they do their own state elections.

In identifying the destabilizing range of consequences that would flow from the maximalist version of the ISLT, the point is not the text of the Constitution should be ignored. The point is that for generations, back to the Founding era, a vast array of actors have acted on the view that the Elections and Electors Clauses do not prevent the enactment of these provisions, whether through state constitutions or voter-initiated forms of lawmaking. Nor, for generations, has the enactment or enforcement of these provisions drawn any significant objection that they are unconstitutional due to these two clauses.

I will turn now to less extreme versions of an ISLT, though those versions too would have substantial ramifications.

*General v. specific state constitutional provisions.* A different variant of the ISLT would not condemn all substantive state constitutional constraints on state legislatures in the exercise of their powers under the Elections and Electors Clauses, but would limit the power of state courts in interpreting their own constitutions. This position would distinguish state constitutional rules that are fairly “specific” and can be judicially enforced – such as a provision requiring that the state use a Top-2 or Top-4 primary structure for federal election primaries, or a provision banning taking partisan considerations into account in drawing districts – from more “general” state constitutional provisions, such as provisions common to many state constitutions that guarantee the right to “free and equal” elections. On this view, if a state court applies these type of “general” provisions to hold unconstitutional state election laws regulating federal elections, the state court has violated the federal Constitution. But state courts would retain the power to enforce more specific, substantive state constitutional provisions that regulate federal elections.

This view is hinted at in the statements of Justices Alito and Thomas in the 2020 election cases involving the Pennsylvania Supreme Court’s decision, based on its interpretation of the state constitution, to require the absentee-ballot receipt deadline to be extended beyond the date the legislature had set in the state’s election laws.<sup>10</sup> Justice Thomas criticized the court’s reliance on what he called a “vague clause” in the state’s constitution.<sup>11</sup> Similarly, Justice Alito stated that the federal Constitution would be violated if state courts could override state laws for federal elections “by claiming” that a state constitutional provision required that result. These statements might suggest that if state courts are enforcing specific provisions – rather than “vague” ones – they are not “claiming,” in Justice Alito’s view, that a provision applies in a particular way but are instead “directly” enforcing a specific substantive provision. The idea here might seem to be that when state courts, enforcing state constitutions, act in a “judicial capacity,” there is no federal constitutional problem, but when they act, in effect, as rule-makers they are acting in a “legislative capacity” and the Elections and Electors Clauses prohibit that.

But this position would require federal courts to determine just how specific state constitutional provisions must be to “specific enough” rather than “too general” to constrain state election rules permissibly without violating the federal Constitution. It is not at all clear this distinction can be given principled, consistent content. Yet in the absence of such ability, there is a troubling risk that federal judicial judgments about this line would rest on highly subjective judgments. The New York courts, for example, recently struck down the Democratic gerrymander of the state’s congressional districts on the basis of a popularly-adopted constitutional amendment in 2014 that provided: “[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties” (NY Const, art III, § 4 [c] [5]). Is this provision specific enough or too general for purposes of the approach suggested in the statements of Justices Alito and Thomas?

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<sup>10</sup> *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2021) (Alito, J., statement).

<sup>11</sup> *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 732 (2021) (Thomas, J., dissenting from denial of certiorari).

Most state constitutions contain provisions guaranteeing the right to vote, or requiring equal protection of the laws, or securing the right to free and fair elections. Are these provisions unenforceable in federal elections because they are “too general”? Another issue this view would have to confront is how to address “general” constitutional provisions that state courts have given more specific content to over time, through the development of precedent. After all, many constitutional provisions are stated in highly general terms – consider all the Supreme Court precedents determining the meaning of the First Amendment or the federal Equal Protection Clause – but take on much more determinate meaning over time through judicial decisions. If a “general” state constitutional provision has been given “specific enough” content through precedent over time, can state courts now enforce that provision against state election laws regulating federal elections? Will federal courts review that series of state decisions to determine if the decision before them fairly follows from that earlier line of precedent or strays “too far” from it? If the same provision exists in two state constitutions – such as a provision guaranteeing the right to vote – would state enforcement of that provision not violate the federal Constitution in a state that has given the provision much more specific content over time but would violate the federal Constitution in a state with more sparse precedent on the provision?

An ISLT that would distinguish between “specific” and “general” state constitutional provisions would be less extreme than one which precluded application of all state constitutional constraints. But even leaving aside the intrusion on state court development of state constitutional law such a view would entail, any effort to apply that distinction would be fraught with uncertainty, difficult if not impossible to apply in a consistent, principled way, and would pose a serious risk of highly subjective federal court judgment about which constitutional provisions, in which states, could be applied to state laws regulating federal elections.

*Limits Only on State Court Remedial Relief.* A still more limited version of the ISLT is being argued for in the petition for certiorari filed in *Costello v. Carter* (No. 21-1509, June 1, 2022), a challenge to the Pennsylvania’s Supreme Court adoption of a redistricting plan in the face of a political impasse over redistricting. The argument in that petition does not challenge the power of state courts to apply state constitutional provisions and invalidate legislatively enacted congressional redistricting maps. The argument, instead, is that the Elections Clause should be understood to constrain the state judiciary’s remedial discretion when imposing congressional maps in response to a legislative impasse or a constitutional violation. The argument asserted is that, while a state court can impose a congressional map in response to constitutional violation or political impasse, its range of discretion should be understood to be constrained by virtue of the Elections Clause. Whether or not such a position is justified as a matter of constitutional interpretation, if this is as far as a Court-endorsed ISLT goes, it would be much less destabilizing than the more maximalist potential versions of an ISLT.

#### *The Potential Ramifications: Non-constitutional Administration and Interpretation of State Election Laws Regulating Federal Elections*

Some proponents of an ISLT believe it applies to the administration and interpretation of state election statutes. This position might be an alternative to the positions catalogued above – or it might be in addition to those positions. The view that there is an ISLT that applies to state court



interpretation of such state statutes arose, for the first time, in Justice Rehnquist's concurrence for three Justices in *Bush v. Gore*.<sup>12</sup> That concurrence concluded that the Florida courts had violated the Electors Clause because their interpretation of Florida election statutes departed from the "clearly expressed intent" of the Florida legislature – an intent that "must prevail" under the Electors Clause.

As an initial matter, state laws regulating federal elections, like all laws, often require some judgment about how to administer those laws and how to interpret them. Laws often contain gaps or ambiguities, because the drafters cannot have foreseen all the circumstances to which those laws must be applied or anticipated certain questions that might arise. Lawmakers might have clarity about how the law treats the core, paradigmatic instances that the law was designed to address but have given little thought to borderline cases that then arise – particularly when the laws are not recent enactments and circumstances have changed. Election statutes might expressly or by implication delegate some degree of discretion to election administrators, such as Secretaries of State, who must then exercise judgment about how to best apply the statute's text and purposes to fill in these gaps or address unforeseen issues.

For similar reasons, and despite the best drafting efforts of legislatures, laws will also often contain ambiguous provisions whose meaning courts must then determine. The majority of cases the Supreme Court decides involve the disputed interpretation of federal statutes, it is worth recalling, rather than matters of constitutional law.

Just as in the state constitutional context, there are two possible versions of the ISLT when it comes to state administration of election laws that regulate federal elections or state court interpretation of those laws. The narrower version is that these officials cannot apply or interpret these laws in a way that *directly contradicts* or conflicts with a provision in the state's election code. If the law requires some action on or before date X, for example, these actors cannot invoke various principles of interpretation that lead to an interpretation that changes that date. If an ISLD extended no further than this, much would depend on how federal courts understood the principle of "direct contradiction."

A more maximal position is that the federal constitutional clauses prohibit these state actors from applying or interpreting state election law for federal elections in a way that strays "too far" from the text of those laws. In effect, such a version of the ISLT would rest on the principle that the federal Constitution imposes a "plain meaning" rule of interpretation for state statutes regulating federal elections, regardless of how state courts normally interpret state statutes. Much would depend in this context on how to define when a state court decision strays "too far" from the text of those laws.

In either version, an ISLD that applied to administration and interpretation by state actors of state election laws regulating federal elections would be based on the principle that these actors cannot, in the guise of interpreting these laws, effectively re-write them. If applied in a consistent way, such a doctrine might be a check against attempted partisan manipulation of these election laws – particularly by state officials elected in partisan elections (such as Secretaries of State). But

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<sup>12</sup>*Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring in the judgment).

such a doctrine would also put federal courts in the position of policing the application and interpretation of state election law for federal elections, which in theory could prompt federal court litigation every time a candidate or voter disagrees with the application or interpretation of state election law regarding a federal election. Such a doctrine would also raise a whole host of troubling questions about what it would mean for federal courts to become the final arbiters of state laws regulating federal elections – questions canvassed in in a recent draft article entitled *Textualism, Judicial Supremacy, and the Independent State Legislative Theory*, by Professors Litman and Shaw.<sup>13</sup>

As to the historical record on the view that the ISLT constrains state court interpretation of state laws regulating federal elections: I am not aware of this argument ever having been made, let alone judicially endorsed, before the concurrence in *Bush v. Gore*. I do not believe any scholarship points to prior instances of this argument being made.

Moreover, Congress also has the power under the Elections Clause to regulate the times, places, and manner of elections to the House and Senate. Congress has exercised this power in several federal statutes.<sup>14</sup> Yet no federal court has ever suggested, as far as I am aware, that the Elections Clause creates an “independent Congress,” which constrains how the federal courts engage in the process of interpreting these federal statutes. Indeed, I am also not aware of this argument even ever having been made with respect to Congress, whether in litigation or in scholarship. Instead, federal courts have engaged in the same methodological approaches to interpreting federal election statutes that they apply to any other federal statute. Yet if the Elections Clause imposes unique interpretive constraints on how state courts interpret state statutes regulating federal elections, it would seem to follow logically that the federal courts must function under similar unique constraints when they interpret federal statutes enacted pursuant to the Elections Clause.

To be sure, serious due process issues of fundamental fairness arise if, after votes have been cast, state courts -- in the guise of “interpreting” election law -- in effect change the ground-rules under which the election has been conducted. In effect, such decisions create “new law” -- after votes have been cast – while purporting to interpret election statutes. But there is already a body of federal due process law that guards against such actions, though only in decisions of the federal courts of appeals. This body of law is more expansive than an ISLD would be regarding state judicial interpretation, because it applies to all elections, not just federal ones. I have written about this body of law in an article entitled *Judging “New Law” in Election Disputes*.<sup>15</sup> The federal courts have been clear, though, that such a doctrine should apply only in extreme cases, and that ordinary disputes over the meaning of state election laws do not implicate due process. In addition, the federal courts have not found due process violations based merely on disagreeing

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<sup>13</sup>Leah Litman and Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, Wisconsin Law Review 5 (June 2022): 1–31. available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4141535](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4141535).

<sup>14</sup> See, e.g., Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997 (2021); Robert G. Natelson, *The Original Scope of Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1 (2010).

<sup>15</sup> Richard Pildes, *Judging ‘New Law’ in Election Disputes*, 29 Florida State University L. Rev. 691 (2001).

with how to read the text of an election statute; instead, they have engaged in extensive fact-finding about prior state election practice before determining that state actors have in effect re-written election laws after the votes have been cast. Thus, even apart from any ISLT, there are constitutional protections already in place against such violations of fundamental fairness in the election context.

In sum, discussion in an all-or-nothing sense of whether the Constitution “does” or “does not” create an ISLD can be misleading. The Constitution might create a uniquely “independent” Congress or state legislature when those entities carry about certain specific functions, such as proposing constitutional amendments or, in the original Constitution, electing Senators. But that does not mean Congress or state legislatures are made constitutionally independent in their function of lawmaking with respect to national elections. In addition, discussions of a potential ISLD requires clarity about which particular version of such a doctrine is being considered. Different versions have different ramifications; the question of whether there is any historical support for such a doctrine, and what that support might be, also depend on which version of a potential ISLD is being considered. But there is little doubt that the maximalist version of such a doctrine – in which state constitutions and voter-initiated constitutional amendments or statutory initiatives are unconstitutional if they impose any substantive constraints on state legislatures’ regulation of federal elections – would be highly destabilizing to the federal election process. All the substantive rules in such sources regulating federal elections would no longer be in effect, until state legislatures decided which of these rules to enact. The ability of voters and state constitutions to constrain state legislatures from self-interested manipulation of the laws regulating federal elections would be ended. That is a troubling prospect.