

RESPONSE TO COMMITTEE ON HOUSE ADMINISTRATION

**RE: JULY 28, 2022 HEARING: “THE INDEPENDENT STATE LEGISLATURE THEORY
AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY”**

MAJORITY QUESTIONS FOR THE RECORD

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For Richard Pildes

- 1) Please discuss the practical impact of adopting the independent state legislature theory on (1) voters, (2) state elections officials, (3) administrative state election rules put forth by chief elections officials of the state; or (4) state courts. For states where some manner of authority over elections has been delegated by the state constitution to a chief elections officer (e.g.: Secretary of State), what impact would the independent state legislature theory have?
 - a. Do these impacts vary under various versions of the independent state legislature theory? If so, how?

ANSWER: Yes, the impact depends greatly on which of several potential versions of such a theory the Supreme Court might endorse. At one end of the spectrum, if the Court holds that such a doctrine makes unconstitutional the application of state substantive constitutional provisions to state election laws regulating national elections and voter-initiated enactments regarding federal elections, the ramifications would be greatly destabilizing. In my written testimony at pages 4-6, I list some of the many such provisions that currently apply to federal elections that would no longer apply, unless the state legislature or Congress (under the Elections Clause) enacted such provisions into law.

Under a version of the theory in which state election administration and judicial interpretation could not stray “too far” from the text of the election code, we should expect a great deal of litigation testing the boundaries of how far is “too far.” Litigants disappointed by state administration and interpretation of election law would have strong incentives, if the election outcome might be affected, to turn to federal courts in an effort to overturn those decisions. Because the question how far is “too far” would be hard to specify, courts applying such a doctrine would run the risk of being accused of showing partisan favoritism to the candidate who benefits from rulings on this question.

A more restrained version of an ISLT would apply only to the remedial stage of litigation. Under this version, state courts could still enforce all of state law against state legislatures regulating federal elections, but if a state constitutional violation is found, the courts would have to give the legislature the first chance to remedying that violation, absent exigent circumstances.

- b. States vary in the manner of the appointment of their chief elections officer and whether that role is served by an individual, a commission or board, or some combination of both. How would variations in how states elect or appoint a chief elections officer or other authority affect the impact of independent state legislature theory on their authority to oversee their states’ elections?

ANSWER: I do not believe these variations are likely to have any implications under any version of the ISLT that I discuss in my written testimony.

- c. Representative Bryan Steil asked one witness at the hearing, Eliza Sweren-Becker, whether her position on the independent state legislature theory would “be the same for Democratically controlled states, often with veto-proof legislatures, like Illinois or Maryland.” If the Supreme Court upheld the independent state legislature theory in some form, would legislatures in all states be able to avail themselves of newfound powers under that theory, without the checks provided by their state courts?

ANSWER: Any version of the doctrine the Supreme Court endorsed would apply equally to all states and all state legislatures.

- d. Do the impacts of adopting a version of independent state legislature theory look different in “red” and “blue” states, or will there likely be disruptions to election processes in all 50 states?

ANSWER: There is no reason to think the disruptive effects would be limited to a few states, or states controlled by one party rather than the other. The disruption would likely be experienced across most or all states. The extent of the disruption would depend on which version of the doctrine the Court might adopt. But if new legal avenues are opened up for challenging federal elections, it is certain that campaigns, voters, and organized groups will attempt to exploit those openings whenever they believe it will be to their advantage to do so, regardless of which party controls state government or if state government is under divided partisan control.

- 2) The Supreme Court has historically been reluctant to make decisions that would “open the floodgates” to additional litigation. You testified that if the independent state legislature theory is upheld, “there is no question that disappointed candidates and voters will run to federal court to try to overturn state court interpretations.” Please expand on how upholding a version of the theory would affect future related litigation in federal courts.

ANSWER: The precise answer depends on which particular version of such a theory the Court might adopt. If the Court were to hold that state election administration and state judicial interpretation could not depart “too far” from the text of a state election law, the question of how far is “too far” would immediately and continually arise. Campaigns have every incentive to litigate such questions, if they think the answer might potentially affect the outcome. This version of the doctrine would turn the question of how far is “too far” into a matter of federal constitutional law. That means the federal courts would now become available to challenge the application or interpretation of state election law by state officials. A candidate who lost in state court on such matters would now be able to petition the Supreme Court for certiorari, based on the argument that state officials had violated the Constitution. In addition, voters or groups supportive of that candidate who were not a party to the initial state court litigation would not be bound by res judicata, and could initiate a new action in federal court claiming the state court’s interpretation of state election law violated the federal Constitution.

- 3) Professor Carolyn Shapiro testified that opening the door to litigation in this manner would be “incredibly time-consuming, incredibly resource-intensive” because “any time somebody doesn’t agree with a particular discretionary decision or even sees it as strategically beneficial to challenge the particular decision, which will deter officials from making those kinds of decisions.” In addition to subjecting elections officials to additional litigation, would adopting a form of independent state legislature theory impact how elections officials administer elections and make decisions on policy questions?

ANSWER: Depending on the scope of any independent-state legislature theory the Court might adopt, such a doctrine could well impact state election administration. State election laws, like most laws, often have gaps or ambiguities – some of which state election officials, such as Secretaries of State, routinely address through interpretive guidance or adoption of regulations. Legislators cannot always anticipate the range of situations in which issues about the application of state election law might arise; circumstances can change from the time a statute is first enacted, raising questions about how to remain faithful to the text and legislative intent in new circumstances. Statutes can be drafted poorly, causing confusion that leads election officials to provide helpful clarity. Legislatures can also delegate authority to election administrators to apply a statute’s provisions properly to circumstances the legislature recognizes it cannot anticipate fully in advance.

In all these contexts, of course, election administrators must act in ways consistent with the requirements of state election law. But these statutes often leave room for administrative discretion, partly for the reasons noted above. Election administrators might become risk-averse about issuing guidance or regulations, even in areas where the laws give them discretion to do so, out of fear that their actions will later be overturned as a violation of the ISLT. That would be unfortunate, because we need clear rules in advance of the election, and given the nature of legislation as described above, sometimes that clarity can only come from election administrators in areas where the statutory text is not crystal clear.

- 4) The Supreme Court has long held that state courts are best positioned to address questions of state constitutional law. Do you agree? Why or why not?

ANSWER: Yes, it is a fundamental tenet of federal court doctrine that state courts are generally the final arbiters regarding the meaning of state law, including state constitutional law. The Supreme Court, for example, refrains from reviewing decisions from state courts that rest wholly on independent and adequate state-law grounds (rather than federal ones); as the Court has said, “[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar...”. *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983). I agree with this long-established principle. That principle reflects respect for the distinct role of states in our federal system, in which state constitutions, state legislatures, and state courts play a central role. State courts are permitted to adopt different methods of interpreting their own constitutions than apply to the federal Constitution. State constitutions are quite different from the federal Constitution; they are typically much longer, deal directly with a much wider range of issues, and are amended frequently. State court judges develop unique familiarity with their state constitutions, including the historical context for particular provisions, the ways they might interact in complex ways with other provisions, and the caselaw that has developed concerning those provisions.

- 5) The supremacy of state courts in deciding issues of state constitutional law is a principle that extends beyond the voting rights/democracy space. If the Supreme Court were to reverse this principle in the elections context, what are the implications in other areas of jurisprudence?

ANSWER: As an initial matter, I see any ISLT as affecting only the interpretation of the term “legislature” in the Constitution. The word “legislature” is mentioned seventeen times in the Constitution, and for those provisions that empower state “legislatures” to take certain actions, such a decision could mean that the state legislature is free of state constitutional substantive constraints in these provisions. Not all mentions of “legislature” empower state legislatures to act; for example, Art. I, §2, cl. 1 simply declares: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the

Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”

- 6) In some states, the legislature has expressly delegated powers to amend the state constitution to the voters. In 2012, North Carolina voters used this power to establish a state constitutional requirement for voter ID. Under the independent state legislature theory, would voter-driven constitutional amendments on election policy be permitted? If not, could the independent state legislature theory be described as taking power away from voters?

ANSWER: In some states, such as North Carolina, the legislature must first vote to permit voters to vote directly on legislation or constitutional amendments. If the Court concludes that such voter-approved measures violate the Constitution when applied to federal elections, even when the legislature expressly decides to permit voters to vote on a specific proposal, that would certainly deny both the legislature and the voters the power to adopt such measures for federal elections.

In addition, most state constitutions that give voters the power to initiate legislation were adopted by a state constitutional convention, rather than by the legislature. If the ISLT denies voters in these states the power to use the initiative to regulate federal elections, that would take away powers from the voters that the state constitutional expressly grants.

Finally, even when voters amend the state constitution, if the Court endorses a version of the ISLT that rejects the power of state constitutions to impose substantive constraints on laws regulating federal elections, the doctrine would also take power away in this form from voters.

- 7) The Supreme Court’s upcoming case involves the North Carolina Constitution’s “Free Elections” Clause.¹ Was this clause written into the state constitution recently? Do other state constitutions have similar clauses? If so, were those other clauses enacted recently? Does North Carolina’s Free Elections Clause, and other clauses like it in other state constitutions, have substantive case law attached to it with respect to federal elections? If so, what would happen to that precedent and those voter protection standards if the Supreme Court issues an adverse decision in Moore v. Harper?

- a. Relatedly, some of the ISL debate focuses on the alleged “vagueness” of certain provisions of state constitutions – are there any analogies we can draw from the United States Constitution, such as for example from the Bill of Rights, when thinking about judicial interpretation of what appear to be “vague” constitutional provisions?

ANSWER: As I understand the history from the state judicial opinions in the *Moore v. Harper* litigation, North Carolina’s “free elections” clause was first adopted by the State’s Constitutional Convention in the Declaration of Rights in 1776. The day after the Convention adopted the Declaration of Rights, it approved the State’s Constitution, which incorporated the Declaration of Rights in Article 1 of the North Carolina Constitution. North Carolina’s provision was enacted after the enactment of similar clauses in the Pennsylvania and Virginia constitutions.

Twenty-six state constitutions have provisions that provide that elections should be “free,” or “free and equal,” or “free and open.” See Jessica Bulman-Pozen and Miriam Seifter, *The Democracy Principle in State Constitutions* 119 Mich. L. Rev. 859, 871 n.59 (2021). Nearly all state constitutions also expressly guarantee the right to vote in one set of terms or another. See

¹ N.C. Const. art. I, § 10 (“All elections shall be free.”).

Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2019). For descriptions of how state courts have applied these provisions, including to federal elections, these articles provide useful starting points, as do compilations of state constitutional doctrine for individual states that various authors have put together for a number of states.

If the Court adopts a version of the ISL theory, the effect on state constitutional provisions and interpretation would depend on which version the Court might adopt.

In some states, for example, the constitution first had to be approved by the legislature before being submitted for popular approval. Indeed, North Carolina provides such an example: the North Carolina General Assembly in 1969 first voted to approve the draft of the state's current constitution before it was then submitted for a popular vote, in which voters in 1971 then approved its adoption. Even if the Court adopts some version of the ISLT, the Court might conclude that state constitutions, or specific constitutional provisions, that came with legislative approval satisfy whatever version of the ISLT the Court might adopt.

The text of many provisions in the U.S. Constitution and state constitutions are frequently cast in highly general terms. This is particularly true of provisions that protect constitutional rights. In the U.S. Constitution, for example, the First Amendment provides that Congress shall make no law "abridging the freedom of speech." The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." These general provisions, like many others, have taken on more determinate meaning through hundreds of Supreme Court and lower court decisions. The text of these and similar provisions might seem highly general when taken abstractly but have been given more specific content through the processes of constitutional interpretation and decision. That is the normal process of constitutional interpretation and development. Provisions that might appear "vague" or highly general in the abstract take on much more specific meaning through judicial decisions over time.

If the Court were to adopt a version of the ISLT that permitted state judicial enforcement of "specific" state constitutional provisions but not "general" ones, one issue that courts would then confront is whether to take into account the development of state judicial precedent concerning these provisions. If a provision is "highly general" in the abstract, but has been given more specific content through caselaw, is that provision then "specific enough" to be enforced under this version of the ISLT? How developed must that body of precedent be? In addition, a provision might be "general" before it is interpreted for the first time; would such a doctrine ban the first decision interpreting the state constitution with respect to state laws regulating federal elections? That would seem to freeze the development of state constitutional doctrine concerning provisions that regulate federal elections.

- 8) Is there any version of the independent state legislature theory that is supported by the balance of historical evidence?

ANSWER: I believe the answer is no. I will focus on two general, potential versions of the ISLT that the Court might consider with respect to the Elections and Electors Clauses. The Court could also consider or adopt both of these versions.

First, the Court might consider a version that applies to non-constitutional matters of election administration and statutory interpretation. Before the Court in 2000 raised the possibility of such a position in *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 77 (2000) (per curiam), and before Chief Justice Rehnquist's concurrence in *Bush v. Gore* actually embraced this position, I am not aware of any historical support for this version. See *Bush v. Gore*, 531 U.S. 98,

112 (2000) (Rehnquist, C.J., concurring in the judgment). I am not aware of any scholar who advocated for such a position before 2000. I am not aware of any court addressing this argument, and I am not aware of any lawyer or commentator advocating this position before 2000.

Second, the Court might consider a version that bars enforcement of some or all state constitutional provisions against state laws that regulate federal elections. I believe the balance of historical evidence does not support this version of the ISLT, particularly if we focus on the original public meaning of the relevant constitutional clauses.

From the Constitution's adoption until the post-Civil War period, scholars have unearthed only a single instance in which any figure or any court suggested that state constitutions could not constrain state legislative laws regulating national elections. That single instance involved the 1820 Massachusetts Constitutional Convention, at which Justice Story argued against adopting a provision that, in his view, would unconstitutionally interfere with the state legislature's power over national elections. Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020). Throughout this period, a number of state constitutions did impose substantive constraints on state legislative regulation of national elections, and there does not appear to have been any objection to those provisions based on the ISLT. Historical practice before the Civil War does not support the ISLT.

Even so, the most comprehensive historical study of this issue – from an author who nonetheless strongly concludes that the balance of historical evidence does not support the doctrine – notes that, for a brief period of time after the Civil War, the ISLT “does have a history in Congress and state courts.” Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 504 (2022) (hereinafter *Revisiting History*). In this post-Civil War period, a few state court cases and a congressional resolution of a contested House election arguably suggest some support for the ISLT, as does one more recent decision, during WWII, from the Kentucky Court of Appeals. *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944) (legislative permitting soldiers to vote absentee constitutional despite state constitutional provision banning such voting).

The Supreme Court debated the relevance of Congress's resolution of the contested election in the 1866 case of *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866). Scholars have pointed out that, whatever the correct interpretation of *Baldwin*, Congress was at best erratic during the 19th century over whether state constitutions could constrain state statutes regulating national elections. See Derek Muller, *Legislative Delegations and the Elections Clause*, 43 Fla. State L. Rev. 717, 725–28 (2017). Scholars also dispute whether the handful of state court cases from the 19th century do or do not endorse the ISLT. In my answer to Question 11, I discuss the proper interpretation of *McPherson v. Blacker*, 146 U. S. 1 (1892), which proponents of the ISLT also offer in support.

On balance, after examining the evidence, I conclude that the weight of historical practice stands against the view that state constitutions cannot constrain state legislatures in the exercise of their powers under the Elections Clause. That is the same conclusion reached in the most comprehensive survey of the historical evidence, the *Revisiting History* article by Hayward Smith. Bits of historical evidence exist that might support the ISLT, though scholars dispute many of these examples. But the overall weight of historical practice supports the position that state constitutions can constrain state legislatures in the exercise of their ordinary lawmaking powers under the Elections and Electors Clauses.

- 9) Some have voiced a concern that the upcoming case could empower state legislatures to unilaterally appoint presidential electors against the will of the people. Do you view that as a threat? What other constitutional and statutory provisions would constrain a state legislature in that context?

ANSWER: No matter what the Supreme Court might decide about the ISLT, state legislatures do not have the power to appoint electors after Election Day in defiance of the popular vote in their state. As I said in my written testimony, Art. II of the Constitution 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. Congress mandates that electors must be appointed on the Tuesday after the first Monday in November. Electors cannot be appointed after that day; doing so would violate federal law. 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 the constitutional power of Congress to set the time for appointing the state’s electors, the state legislature is powerless to give itself the power to appoint electors after Election Day.

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 legally incorrect – no matter what version of the ISLT the Court might recognize, if it recognizes any such doctrine at all. Congress has locked in the date on which electors must be appointed, and no state law can give legislatures the power to appoint electors after Election Day.

There is a different path through which state legislatures might try to inject themselves into the presidential election process. Instead of appointing electors after Election Day in defiance of the state’s popular vote, state legislatures might try to insert themselves into some stage of the vote-counting process; here the legislature would claim that is helping to determine which candidate did in fact win the popular vote. The legislature might still not have the power to appoint electors itself; state law determines who has the legal authority to certify the outcome of the election, and I am not aware of any state that currently gives the legislature the power to certify the outcome.

But if the legislature did involve itself in the vote-counting process, it would be subject to the same constraints of federal law and the U.S. Constitution that apply to any institution of state government involved in the vote-tabulation process, whether a county canvassing board or a state board of elections or any other state entity. This includes the Equal Protection principle that all votes in a statewide election must be treated equally, a principle reflected in the substantive holding of *Bush v. Gore*, 531 U.S. 98 (2000). In addition, the Due Process clause protects voters who have cast valid votes under the laws that exist at the time of the election from having those laws changed after the fact – including in the guise of decisions that purport to “interpret” state election law but that in effect create “new law” and thus change state election law after the election. See Richard Pildes, *Judging ‘New Law’ in Election Disputes*, 29 Florida State University L. Rev. 691 (2001). 42 U.S.C. Sec. 1983 provides a mechanism for enforcing these constitutional requirements against state officials. The state legislature would also be bound by state laws; no matter what version of the ISLT the Supreme Court might adopt, it would not free state legislatures from being bound by existing state laws, unless the legislature enacted legislation to override those laws. If the Court

adopts a version of the ISLT under which state courts could continue to enforce specific provisions in state constitutions but not “highly general” ones, legislatures would still be bound by those specific provisions; in my written testimony, I explain the problems that would be opened up should the Court endorse that version of the ISLT.

In addition, Congress is considering legislation to update and reform the Electoral Count Act. The Senate is currently considering a bipartisan Electoral Count Act reform bill, and I understand this Committee is also working on legislation to reform the Electoral Count Act. The Senate bill that has been made public would confirm that presidential elections must be resolved through state laws enacted in advance of the election. These current and potential constraints on state legislatures would all still apply.

Finally, under current law, there is also a provision that empowers state legislatures to appoint electors if the election has “failed” in that state. This provision, enacted originally in 1845, was primarily designed to deal with risks like natural disasters that prevent holding the election on Election Day. There is a danger a state legislature might try to abuse this provision by claiming that the election had “failed” in that state due to the legislature’s claims about problems in the voting process. It is my view that Congress should repeal this provision and replace it with one that gives *voters* an opportunity to cast a vote after Election Day if the election must be postponed due to extraordinary circumstances, such as a natural disaster that prevents a state from holding the election on Election Day.

- 10) What actions could Congress take in response to a ruling endorsing the independent state legislature theory in Moore v. Harper?

ANSWER: Under the Elections Clause, Art. I, Sec. 4, Congress has the power to regulate the time, place, and manner of elections to the House and Senate. Congress can directly regulate the manner of those elections, as it has, for example, in requiring that members of the House be elected from single-member districts. In a recent opinion for the Court, *Arizona v. Inter Tribal Council*, 133 S.Ct. 2247 (2013), Justice Scalia quoted earlier Supreme Court decisions on the breadth of this congressional power: The power of Congress over the “Times, Places and Manner” of congressional elections “is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.” *Ex parte Siebold*, 100 U.S. 371, 392 (1880).

Under this power, Congress could, for example, provide that state laws regulating House and Senate elections must comply with all state constitutional requirements. State legislatures are not independent of the Congress’ power under the Elections Clause to regulate House and Senate elections.

- 11) Ms. Sweren-Becker testified that, “There is no support historically; there is no support legally,” for the independent state legislature theory, and that, “The Supreme Court has repeatedly rejected this idea in precedent after precedent after precedent.” Has the Supreme Court ever considered the independent state legislature theory directly? If so, what was the result(s)? When opinions of the Court have discussed the theory, have they cited legal authority that supports the theory?

ANSWER: With respect to the Elections Clause or the Electors Clause, the Supreme Court has directly addressed versions of the ISLT in three major cases. It has rejected the doctrine in all three cases.

The first two cases tested whether the ordinary processes of state lawmaking under state constitutions were in any way affected by these federal constitutional provisions. In both cases, the Court rejected the ISLT argument. In *Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565 (1916), the Ohio constitution gave voters the power through a popular referendum to approve or disapprove any law the legislature enacted. When voters used this power to reject a legislatively-approved redistricting map, that action was challenged as violating the “legislature’s” power under the Elections Clause. The Court rejected this claim, holding that state constitutions could give voters the power to reject laws for congressional redistricting and, by implication, for other exercises of the state legislative power under the Elections Clause. See 241 U.S. at 569 (holding that the Elections Clause does not bar “treating the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws”).

The second case, *Smiley v. Holm*, 285 U. S. 355 (1932), tested whether governors could veto state legislation regulating national elections, such as redistricting legislation, when state constitutions gave governors that general power over state legislation. Again, the Court held that, because state legislatures under the Elections Clause are engaged in the ordinary task of legislating, the ordinary processes for lawmaking a state constitution establishes are not overridden by the Elections Clause. The Elections Clause does not create an independent state legislature that is free from a governor’s power to veto legislation. The Court in *Smiley* distinguished the different types of functions the Constitution assigns in various provisions to state legislatures, and held that legislation enacted under the Elections Clause “involves lawmaking in its essential features” and, for that reason, lawmaking under this Clause “must be in accordance with the method which the State has prescribed for legislative enactments.” *Id.*, at 367. The issue of whether governors retain their veto power for legislation enacted pursuant to the Elections Clause is long-settled, and I am not aware of any defender of the ISLT who argues that it denies governors their ordinary veto powers.

The third and most recent case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) (*AIRC*), rejected the ISLT in the context of upholding the ability of a voter-initiated constitutional amendment to create an independent redistricting commission for congressional districts, and to provide the standards for the commission under which redistricting was to take place. The Court has never held that state constitutions cannot impose substantive constraints on state regulation under the Elections Clause. The *AIRC* case is the closest the Court has come to holding affirmatively that state constitutions can impose substantive constraints on the power of legislatures under the Elections Clause. The logic of that decision suggests state constitutions can indeed do so. If voters can take redistricting out of the hands of the legislature altogether, it would seem directly to follow they can take the lesser step of leaving redistricting in the hands of the legislature but impose substantive constraints on the use of that power.

When the Constitution assigns state legislatures specific functions *other* than ordinary lawmaking, the Supreme Court has endorsed a version of the ISLT. Thus, when the legislature acts in its constitutionally assigned role of ratifying proposed constitutional amendments, state constitutions cannot subject the legislature’s ratification to a popular referendum for approval. *Hawke v. Smith (No. 1)*, 253 U. S. 221 (1920). Similarly, the Court has held that Congress does not need to submit proposed constitutional amendments to the President for a potential veto, even though Congress must do so for ordinary legislation. *Hollingsworth et al. v. Virginia*, 3 Dall. 378, 1 L. Ed. 644. Congress is “independent” in its role of proposing constitutional amendments, even though it is not independent in its ordinary role of lawmaking.

The concurrence of Chief Justice Rehnquist in *Bush v. Gore* did not cite any historical precedent or evidence regarding the ISLT in support of its version of that theory. In some of the statements of individual Justices that endorse a version of the ISLT or in Chief Justice Roberts' dissenting opinion in *AIRC*, the Justices cite the *Hawke* case or rely on the bits of historical evidence discussed in my answer to Question 8. In addition, Chief Justice Roberts and some scholars argue that the Court's decision in *McPherson v. Blacker*, 146 U. S. 1 (1892), supports the ISLT. *McPherson* held that the Constitution permits state legislatures, when they exercise their power to determine the "manner" of selecting presidential electors, to choose whether to have them elected statewide or by district (as Maine and Nebraska do, in part, today). The case did not directly involve the ISLT. Contradictory dicta exists in *McPherson*, some of which is quoted in support of the ISLT (the legislature's power under the Electors Clause "can neither be taken away nor abdicated"), while other passages state clearly that legislatures must comply with state constitutions when exercising this power ("The legislative power is the supreme authority except as limited by the constitution of the State. . . ."). The Court in *AIRC* rejected the argument that *McPherson* recognized an ISLT.