Is There Anything Left in the Fight Against Partisan Gerrymandering? Congressional Redistricting Commissions and the “Independent State Legislature Theory”

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NOTE

IS THERE ANYTHING LEFT IN THE FIGHT AGAINST PARTISAN GERRYMANDERING? CONGRESSIONAL REDISTRICTING COMMISSIONS AND THE “INDEPENDENT STATE LEGISLATURE THEORY”

Derek A. Zeigler* & Jose Urteaga**

Partisan gerrymandering is a scourge on our democracy. Instead of voters choosing their representatives, representatives choose their voters. Historically, individuals and states could pursue multiple paths to challenge partisan gerrymandering. One way was to bring claims in federal court. The Supreme Court shut this door in Rucho v. Common Cause. States can also resist partisan gerrymandering by establishing congressional redistricting commissions. However, the power of these commissions to draw congressional districts is at risk. In Moore v. Harper, a case decided in the Supreme Court’s 2022-2023 Term, the petitioners asked the Court to embrace the “Independent State Legislature Theory.” The ISLT, at a minimum, would allow federal review of state interpretations of state law governing congressional elections, including redistricting. Part I distills the Supreme Court’s opinions on redistricting commissions into two potential doctrinal routes: a more restrained version (ISLT-Lite) and a maximalist version (ISLT-Max). Part II proposes a framework to analyze existing congressional redistricting commissions for their constitutionality under each theory. Part III makes recommendations for building constitutionally sound congressional redistricting commissions under each theory, both for states with existing commissions and for those looking to reduce partisan gerrymandering in the future. While the future of ISLT, and congressional redistricting commis-

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sions more broadly, remains uncertain, this Note offers an analytical frame-
work so states may continue to constitutionally alleviate partisan gerryman-
dering through the congressional redistricting commission framework.

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This Note was originally meant to address the Court’s recent opinion in *Moore v. Harper* before it rendered its final decision.¹ On June 27, 2023, the Court ruled 6-3 against the North Carolina House of Representatives, which had argued that the U.S. Constitution’s Elections Clause insulates from state judicial review the state legislature’s decisions regarding rules for federal elections. Legal scholars hold differing opinions on what exactly the opinion means for the idea commonly referred to as the “Independent State Legislature Theory” (ISLT). Some argue that *Moore* is a complete repudiation of the fringe theory that would have left state legislatures completely unaccountable to state courts and citizen initiatives.² Others argue that even if *Moore* rejected the most extreme version of the theory, the Court has left the door open for it to intervene should the justices determine that state court review violates the Elections Clause in a particular instance.³ Indeed, even after *Moore*, state legislators continue to push the ISLT to challenge commonsense election laws in

2. See, e.g., [Supreme Court Rejects Independent State Legislature Theory](https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-rejects-independent-state-legislature-theory) (“The independent state legislature theory is now dead.”); [Derek Muller, Moore v. Harper Vindicates Rehnquist’s Opinion in Bush v. Gore](https://electionlawblog.org/?p=137104) (“The top line takeaway of *Moore v. Harper* is this: the Supreme Court has slammed the door shut on the argument that the state constitution or state judiciary cannot constrain the state legislature exercising power under the Elections Clause.”).
states like Michigan before the 2024 elections. If the door to invoking the theory truly remains open, as it seems to be, it is crucial to foresee the possible versions of ISLT and the catastrophic impact its adoption could have on the country. This piece provides insight into 1) what a “lighter” version of the theory would look like should the Court ever articulate what the “ordinary bounds of judicial review” are, and 2) the impact such a minimalist theory, as well as the temporarily rejected maximalist theory, would have on the landscape of congressional redistricting commissions. Discourse around ISLT and its potential ramifications should only deepen in light of Moore. We hope that this piece helps contribute to that burgeoning scholarship.

INTRODUCTION

On June 27, 2023, the Supreme Court of the United States issued its ruling in Moore v. Harper, a case that could have untethered state legislatures from checks by any other state authorities when setting their voting procedures for federal elections. The Court refused to go that far, but also noted that state courts did not have “free rein” to check their legislatures on matters of state law. This Note explores the uncertain landscape of congressional redistricting commissions after Moore. Historically, in all states with two or more congressional districts, state legislatures drew districts for both state and federal elections. This partisan redistricting practice created perverse incentives for

5. Moore, 600 U.S. at 36.
6. Id.
7. Id. at 34.
8. Some states have redistricting commissions with only the authority to draw state legislative district lines. See, e.g., Doug Spencer, Illinois: State Summary, LOY. L. SCH., https://redistricting.lls.edu/state/illinois?cycle=2020&level=Congress&startdate=2021-11-23 [perma.cc/7NMPV9] (Illinois). Some states have redistricting commissions with only the authority to draw congressional district lines. See, e.g., Doug Spencer, New Jersey: State Summary, LOY. L. SCH., https://redistricting.lls.edu/state/new-jersey?cycle=2020&level=Congress&startdate=2021-12-22 [perma.cc/T6GW-EKKH] (New Jersey). Some states have redistricting commissions with the authority to draw both congressional and state legislative district lines. See, e.g., Citizens Redistricting Commission, COMMON CAUSE, https://www.commoncause.org/california/our-work/ensure-fair-districts-reflective-democracy/california-redistricting-commission [perma.cc/H8Y-DNJN] (California). We use the term “congressional redistricting commission” to refer to all redistricting commissions that have some authority to draw congressional district lines (i.e. those in the second and third categories). There are four specific subcategories of redistricting commissions within the more general term “redistricting commission,” regardless of whether those commissions draw the lines for only congressional districts, state districts, or both. Those four types include: independent, advisory, backup, and politician commissions. See generally Bruce E. Cain, Redistricting Commissions: A Better Political Buffer?, 121 YALE L.J. 1808 (2012). To the extent that we use these more specific terms, rather than the all-encompassing “congressional redistricting commission,” we use them as terms of art based on Cain’s description.
politicians—dominant-party legislators focused not on elevating the voice of the people but instead on entrenching their own power. However, in a trend reaching back to the 1960s that has been picking up steam in the last decade, legislatures, constitutional delegations, and individuals across the nation have been fighting back against “partisan gerrymandering” by adopting alternative approaches to redistricting.

Partisan gerrymandering occurs when the majority party in a state legislature draws electoral districts to disproportionately benefit itself at the expense of minority parties, regardless of the partisan breakdown of voters statewide. Scholars and courts alike view partisan gerrymandering as dangerous to democracy, particularly due to its interference with the ability of the people to fully exercise their will over their elected representatives. For dec-


13. Ariz. State Legislature, 576 U.S. at 791 (“Partisan gerrymanders are incompatible with democratic principles.” (cleaned up) (quoting Vieth v. Jubelirer, 541 U.S. 267, 292 (2004) (plurality opinion))); see Vieth, 541 U.S. at 316 (Kennedy, J., concurring in judgment) (noting that the “ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government,” which was “abandoned” by an extreme partisan gerrymander in Pennsylvania); Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) (“The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people.”); Harper v. Hall, 868 S.E.2d 499, 542 (N.C. 2022) (holding partisan gerrymandering can violate the North Carolina Constitution because it “prevent[s] elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation” and “prevents election outcomes from reflecting the will of the people”); Catanese, supra note 10, at 350–51 (noting partisan gerrymandering causes gridlock problems, negatively impacts voter turnout, and increases voter apathy); Kevin Wender, Note, The “Whip Hand”: Congress’s Elections Clause Power as the Last Hope for Redistricting Reform After Rucho, 88 FORDHAM L. REV. 2085, 2088 (2020) (“[P]artisan gerrymanders have had a corrosive effect on American
ades, there were three primary avenues to resist partisan gerrymandering: individuals could sue in federal or state court or states (either through their citizens or legislatures) could create alternative redistricting options—typically in the form of commissions—so that legislatures would no longer wield the sole power to draw the maps.

In *Rucho v. Common Cause*, the Supreme Court held that partisan gerrymandering is a nonjusticiable political question, closing federal court doors to all plaintiffs hoping to pursue a partisan gerrymandering claim. This left two primary options to alleviate the problem: bring state-level cases or advocate for redistricting commissions. While the Court did not remove the state court option completely in *Moore*, the opinion instills further uncertainty over the constitutionality of congressional redistricting by commissions.

In *Moore v. Harper*, the Court heard a challenge to the North Carolina Supreme Court’s ruling that struck down the state legislature’s redistricting maps as an unconstitutional partisan gerrymander under the state constitution. The Supreme Court decided that the U.S. Constitution does not completely prohibit state courts from interpreting state law regulating federal democracy by decreasing competitive elections, entrenching partisan power in a way that is unrepresentative of the electorate, and diluting the franchise of a large number of voters solely because of their party affiliation.”; Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1272 (2016) (“Partisan gerrymandering can also chill a voter’s freedom to choose between political parties. In gerrymandered districts, the noncompetitive nature of the general election leaves the primary election as the only avenue for voters to affect their representation. Such a situation creates a powerful incentive to compel voters to join the dominant political party . . . .”).

15. See, e.g., Harper, 868 S.E.2d 499.
16. See supra note 8 and accompanying text.
17. Rucho, 139 S. Ct. at 2485.
18. See id. at 2507 (“States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions.”); id. at 2508 (“We express no view on any of these pending proposals [to form redistricting commissions].”). While Congress also retains power to reform the congressional redistricting process under Article I, Section 4 of the Constitution, it has taken a “historically limited role” in doing so and has not passed legislation in this area in recent memory. SARAH J. ECKMAN, CONG. RSCH. SERV., R45951, APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES 1, 17 (2021). Congress has attempted to require states to establish “independent redistricting commission[s]” to develop and enact “any congressional redistricting” plan for the state. For the People Act of 2021, H.R. 1, 117th Cong. § 2401(a) (2021) (reintroduced after failing to pass in 2019). After passing along party lines (all Democrats voting for; all Republicans against) in the House, a Republican-led filibuster in the Senate killed the bill. Barbara Sprunt, *Senate Republicans Block Democrats’ Sweeping Voting Rights Legislation*, NPR (June 22, 2021, 8:22 PM), https://www.npr.org/2021/06/22/1008737806/democrats-sweeping-voting-rights-legislation-is-headed-for-failure-in-the-senate [perma.cc/JRB8-3PV4].

19. Moore v. Harper, 600 U.S. 1 (2023); Harper, 868 S.E.2d at 542, 555 (holding that 1 partisan gerrymandering claims are justiciable under the North Carolina Constitution’s “fundamental right to vote on equal terms” clause, and that 2) at least one of the state legislature’s maps fails strict scrutiny).
thereby declining to adopt what has become known as the “Independent State Legislature Theory.” The ISLT posits that the U.S. Constitution—in explicitly delegating authority to set voting procedures for federal elections within Article 1, Section 4 (the Elections Clause) and Article 2, Section 1 (the Electors Clause)21 to each state via the “Legislature thereof” language22—refers exclusively to the state legislature and excludes other state actors, including state courts conducting judicial review.23 At a minimum, adopting ISLT would insulate state laws governing federal elections from challenges based on state laws and constitutions. Without federal courts as an alternative, removing these claims from the grasp of state courts would have left individuals with no judicial recourse for partisan gerrymandering. This would have, in turn, left redistricting commissions as virtually the only weapon left against state legislatures egregiously gerrymandering their maps for partisan gain. The Court’s decision in Moore leaves the power of commissions to draw maps for federal congressional elections intact, for now. The Court, however, left open a door for future challenges to these institutions.24 If the Court decides later to walk through that door, it seems inevitable that the Court would “condemn complaints about districting to echo into a void.”25

So, where does the decision in Moore leave us? Will commissions remain a viable means to fight partisan gerrymandering in federal elections, or must we all accept partisan gerrymandering as an inevitable scourge on democracy? Must we live with shouting into the void?

There is plenty of scholarship on ISLT’s history and merits (or lack thereof).26 We will not fully rehash it here.27 Instead, this Note examines two

21. Moore does not directly implicate the “Electors Clause”; however, the Court read the term “Legislature” identically for both clauses. Moore, 600 U.S. at 25–28.
22. U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .”); Id. art. II, § 1, cl. 3 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .”).
24. Moore, 600 U.S. at 34 (“[T]he Elections Clause expressly vests power to carry out its provisions in ‘the Legislature’ of each State, a deliberate choice that this Court must respect.”). No version of ISLT would affect these commissions’ ability to redistrict state district lines. See, e.g., Leah M. Litman & Katherine Shaw, Textualism, Judicial Supremacy, and the Independent State Legislature Theory, 2022 Wis. L. Rev. 1235.
27. For a discussion of the doctrine, see infra Part I.
potential versions of ISLT that the Supreme Court could still adopt after Moore and analyzes the possible impacts of each on the viability of redistricting commissions. Part I lays out two possible versions of ISLT that the Court could adopt: “ISLT-Max” and “ISLT-Lite.” Part II applies both theories to every existing congressional redistricting commission and attempts to predict how each will fare constitutionally under both theories. Finally, Part III provides recommendations to states on how to best prepare for a potential ISLT world.

I. ISLT-MAX OR ISLT-LITE?

The first time an ISL-like theory appeared in modern Supreme Court opinions was in Bush v. Palm Beach County Canvassing Board, the prequel to Bush v. Gore. In Palm Beach County, the Court hinted at a theory that would untether state legislatures from state oversight when they pass laws governing presidential elections, but it ultimately punked this question and sent the case back down to the lower courts. That same Term, the Court settled the 2000 Presidential Election issues in Gore, where the ISLT entered center stage of the legal debate for the first time.

28. We predict that the likely effect of ISLT will not vary from state to state for state supreme courts as it might for redistricting commissions.
33. Palm Beach Cnty., 531 U.S. at 76 (“As a general rule, this Court defers to a state court’s interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.”). The Court references an older case it deemed relevant to this theory: McPherson v. Blacker, 146 U.S. 1 (1892). In dicta, McPherson seems to reference a maximalist form of ISLT. See id. at 25. However, that case concerned whether a state law violated the federal Constitution directly, which would not implicate the modern ISLT, as the Court admitted in Palm Beach County, 531 U.S. at 76 (“[W]e did not address the same question petitioner raises here [in McPherson] . . .”). Likewise, the Court in Moore dismissed the relevance of McPherson in this context. Moore, 600 U.S. at 27–28.
34. Palm Beach Cnty., 531 U.S. at 78 (“The judgment of the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion.”).
35. Gore, 531 U.S. at 110.
36. Id. at 98, 112 (Rehnquist, C.J., concurring).
In his *Gore* concurrence, Chief Justice Rehnquist posited that “a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government” may exist and that Article II, Section 1, Clause 2 is one of them. That provision states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” electors for President and Vice President. Thus, the legislature’s election laws gain “independent significance” subject to review by federal courts, notwithstanding preexisting state court interpretation. This theory—that federal courts can intervene to interpret state election laws concerning federal elections despite state court decisions regarding the same, and thereby protect state legislature independence, became known as the Independent State Legislature Theory.

Even at these early stages, the theory faced stark criticism. There were four separate dissents in *Gore*, each condemning ISLT. For years, ISLT rarely reared its head. But recently it has made judicial appearances with increasing frequency. Each time ISLT does so, it seems to take on a slightly different iteration. This makes it difficult to predict exactly how far the Court may stretch the theory (should it choose to expand upon it at all) with the wiggle room it left itself in *Moore*. Ultimately, though, the Court has hinted at and coalesced around two main forms of ISLT in its jurisprudence, including in *Moore*: a more restrained theory and a maximalist theory.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, Chief Justice Roberts’s dissent put forth the more restrained approach. He accepted the basic ISLT premise that the term “Legislature” in the federal Constitution means the “representative [state] body.” The chief justice clarified that “the state legislature need not be exclusive in congressional districting, but neither may it be excluded.” He went on to note that “reading the Elections Clause to require the involvement of the legislature will not affect most other redistricting commissions . . . . [M]any States have commissions

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37. Id. at 112.
38. U.S. CONST. art. II, § 1, cl. 2.
40. Id. at 123 (Stevens, J., dissenting) (“[Article II] does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions.”); id. at 131 (Souter, J., dissenting) (“But the [Florida Supreme Court] majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II.”); id. at 141 (Ginsburg, J., dissenting) (“By holding that Article II requires our revision of a state court’s construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit.”); id. at 148 (Breyer, J., dissenting) (“But neither the text of Article II itself nor the only case the concurrence cites that interprets Article II . . . grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors.”).
42. *Id.* at 841–42.
that play an ‘auxiliary role’ in congressional redistricting. But in these States, unlike in Arizona, the legislature retains primary authority over congressional redistricting.” By putting forth this version of ISLT—what we term “ISLT-Lite”—the chief justice suggested he may be willing to let some redistricting alternatives survive constitutional scrutiny, so long as they do not “displace” the legislature and act only in an “auxiliary role.” Justices Alito, Scalia, and Thomas signed on to the chief justice’s opinion. The majority did not adopt Chief Justice Roberts’s view and instead rejected the theory outright.

Justice Ginsburg’s majority opinion in Arizona State Legislature rejected the narrow interpretation of the word “legislature” that proponents of ISLT support and instead opted for a more capacious understanding—one that depends on the kind of function the legislature looks to exercise (consistent with Justice Stevens’s dissent in Gore). The Court held congressional redistricting was a lawmaking function, then defined “legislature” not strictly as the representatives, but instead as any entity exercising the lawmaking power. To support its position, the Court relied on founding-era dictionary definitions, the purpose of the Elections Clause, principles of sovereignty,

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43. Id. at 847–48 (citation omitted).
44. Id. Note that this is consistent with Chief Justice Rehnquist’s concurrence in Gore, 531 U.S. at 113–14 (Rehnquist, C.J., concurring) (approving the legislature’s ability to “delegate[] the authority to run the elections and to oversee election disputes to the Secretary of State . . . and to state circuit courts” (citation omitted)).
45. Justice Thomas wrote a separate dissent but did not discuss ISLT. Ariz. State Legislature, 576 U.S. at 859 (Thomas, J., dissenting).
46. Id. at 808 (majority opinion) (“Constantly resisted by THE CHIEF JUSTICE, but well understood in opinions that speak for the Court: ‘[T]he meaning of the word “legislature,” used several times in the Federal Constitution, differs according to the connection in which it is employed, depending upon the character of the function which that body in each instance is called upon to exercise.’” (alterations in original) (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932))).
47. Gore, 531 U.S. at 123 n.1 (Stevens, J., dissenting) (“Wherever the term ‘legislature’ is used in the Constitution it is necessary to consider the nature of the particular action in view.” (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932))).
48. Ariz. State Legislature, 576 U.S. at 808 (“In sum, our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking . . . .”)
49. Id. at 813–14.
50. Id. (collecting dictionaries).
51. Id. at 816 (“The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people’s hands.”).
52. Id. at 817 (“Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.” (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991))).
and the truism that governmental power is ultimately derived from the people.\textsuperscript{53} The Court emphasized that this reading of “legislature” is especially necessary in the context of redistricting.\textsuperscript{54} The Arizona Constitution equally vests lawmaking power in both the people and the state legislature: the people via ballot initiative, and the legislature via statute.\textsuperscript{55} So, the Court held that “the people may delegate [by ballot initiative] their legislative authority over redistricting to an independent commission just as the representative body may choose to do.”\textsuperscript{56} This ruling was groundbreaking for the redistricting cause, affirming that voters across the United States could constitutionally exclude their state representatives from drawing electoral maps and instead vest that power in independent congressional redistricting commissions.

The Supreme Court looks much different today than it did in 2015,\textsuperscript{57} and while the majority in\textit{Moore} did cite to\textit{Arizona State Legislature} favorably at

\begin{itemize}
\item \textsuperscript{53} \textit{Id.} at 819 (“The genius of republican liberty seems to demand . . . that all power should be derived from the people . . . .” (quoting\textit{THE FEDERALIST} No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961))).
\item \textsuperscript{54} \textit{Id.} at 820 (“In this light, it would be perverse to interpret the term ‘Legislature’ in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators’ ability to choose the district lines they run in . . . .”).
\item \textsuperscript{55} \textit{Id.} at 814 (“As to the ‘power that makes laws’ in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do.” (citing\textit{ARIZ. CONST. art. IV, pt. 1, § 1} (“The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution or to enact or reject such laws and amendments at the polls, independently of the constitution . . . .”));\textit{Cave Creek Unified Sch. Dist. v. Ducey}, 308 P.3d 1152, 1155 (Ariz. 2013) (“The legislature and electorate share lawmaking power under Arizona’s system of government.”) (quoting\textit{Ariz. Early Childhood Dev. & Health Bd. v. Brewer}, 212 P.3d 805, 807 (Ariz. 2009))).
\item \textsuperscript{56} \textit{Ariz. State Legislature}, 576 U.S. at 814. Based on her questioning during oral argument in\textit{Moore}, Justice Jackson seems to share Justice Ginsburg’s view. See, e.g.,\textit{Transcript of Oral Argument} at 13,\textit{Moore v. Harper}, 600 U.S. 1 (2023) (No. 21-1271) [hereinafter\textit{Moore Transcript}] (“In other words, if the state constitution tells us what the state legislature is and what it can do and who gets on it and what the scope of legislative authority is, then, when the state supreme court is reviewing the actions of an entity that calls itself the legislature, why isn’t it just looking to the state constitution and doing exactly the kind of thing you say . . . when you admitted that this is really about what authority the legislature has? In other words, the authority comes from the state constitution, doesn’t it?”).
\item \textsuperscript{57} Three of the justices who joined the\textit{Arizona State Legislature} majority opinion to reject ISLT have since retired or died, namely Justices Ginsburg, Kennedy, and Breyer. Justices Barrett, Kavanaugh, and Jackson, respectively, replaced those justices. Only one of the dissenting justices in the case—Justice Scalia—is no longer on the Court. Justice Gorsuch—the prime proponent of what we term the “ISLT-Max”\textit{ infra}—took Justice Scalia’s seat on the bench. See\textit{ Justices 1789 to Present, SUP. CT. OF THE U.S.}, https://www.supremecourt.gov/about/members_text.aspx [perma.cc/77AZ-CFFY].
\end{itemize}
times, it remains unclear what those views mean for ISLT in the congressional redistricting process. Just four years after Arizona State Legislature, Chief Justice Roberts seemed to double down on the ISLT-Lite he espoused in his Arizona dissent. In Ruo v. Common Cause, without deciding on the merits of ISLT, he pointed to the existence of independent commissions and a “state demographer” as possible ways for states to tackle partisan gerrymandering. Further, in his concurrence in Democratic National Committee v. Wisconsin State Legislature, Chief Justice Roberts affirmed “the authority of state courts to apply their own constitutions to election regulations.” Likewise, in his majority opinion in Moore, he noted that the term “Legislature” in the Elections Clause does not necessarily “preclude a State from vesting congressional redistricting authority in a body other than the elected group of officials who ordinarily exercise lawmaking power.” In all three instances, the chief justice likely viewed the role of these nonlegislative actors as consistent with ISLT-Lite because the commission still only retains an “auxiliary role” in congressional redistricting. Other justices began departing from the chief in significant respects at this point in his writing—most prominent among them being Justice Gorsuch.

Justice Gorsuch wrote a separate concurrence in Democratic National Committee, joined by Justice Kavanaugh, making clear he disagreed with the extent to which the chief justice limited ISLT. Justice Gorsuch posited that the “Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.” Based on how Justice Gorsuch uses the word “primary,” we take it to mean “of first rank, importance, or value.” Justice Gorsuch thus presented the more expansive version of the theory: “ISLT-Max.” To survive ISLT-Max, the state legislature must play a “primary” role,

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59. While the Court in Moore did rely on the Court’s majority opinion in Arizona State Legislature, the Court in Moore was careful to not directly uphold the contention that such independent redistricting commissions are constitutional. Instead, the Court in Moore bypassed such a chance to do so and instead merely commented (after a brief analysis) that the “significant point for present purposes is that the Court in Arizona State Legislature recognized that whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution.” Id. at 25 (referencing Ariz. State Legislature, 576 U.S. at 816–17).
60. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) (“Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions.”).
63. See supra note 43 and accompanying text.
64. Democratic Nat’l Comm., 141 S. Ct. at 29 (Gorsuch, J., concurring in the denial of application to vacate stay).
or one “of first rank, importance, or value,” in each step of the redistricting process. While both Chief Justice Roberts and Justice Gorsuch use the word “primary” to describe the legislature’s necessary role to survive their theories, the chief justice’s ISLT-Lite rests more on functional concerns about commissions displacing legislative power, whereas Justice Gorsuch’s ISLT-Max depends on formalist concerns about other nonlegislative state officials, rather than the legislature (as a body of legislators), wielding primary power over congressional redistricting. Therefore, for example, the chief justice’s theory readily incorporates a governor’s veto in the plan enactment process as standard-issue legislating might, but such a gubernatorial role under Justice Gorsuch’s theory would render the scheme unconstitutional. It remains uncertain if Moore marks a meaningful departure from the chief justice’s ISLT-Lite views in these prior opinions as the majority opinion does not expound the theory and since it left the door open for future challenges.66

While Justices Thomas and Alito embrace some form of ISLT, it is unclear how far they would agree to take it. Neither wrote separately nor joined either Chief Justice Roberts’s or Justice Gorsuch’s opinions in Democratic National Committee.67 Justices Thomas and Gorsuch did, however, join Justice Alito’s statement in Republican Party of Pennsylvania v. Boockvar, which refused to go as far as ISLT-Max.68 Justice Thomas wrote a dissent in another case where he made it clear that his problem is with “nonlegislative officials” making election law decisions.69 He did not elaborate on what he meant by “nonlegislative officials.” However, he seemed to abandon this potentially middle-ground approach in his Moore dissent. While dissenting on the merits, Justice Thomas formally differentiated between power wielded by the state, which “in the ordinary sense of the Constitution, is a political community of free citizens . . .

67. See Democratic Nat’l Comm., 141 S. Ct. 28.
68. See Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1–2 (2020) (Alito, J., denying motion for expedited review) (“The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.”).
organized under a government sanctioned and limited by a written constitution,” compared to that of the power wielded by the legislature, which “generally means ‘the representative body which makes the laws of the people.’”

He went on to state that the Elections Clause’s function is a lawmaking one, and that courts look to “a State’s written constitution to determine the constitutional actors in whom lawmaking power is vested.” To Justice Thomas, the term “Legislature thereof” in Article I means “‘the lawmaking body or power of the state, as established by the state Constitution,’ or . . . ‘that body of persons within a state clothed with authority to make the laws.’” By taking this approach in Moore, it seems as though Justice Thomas may more firmly subscribe to the ISLT-Max camp along with Justice Gorsuch.

Justice Gorsuch joined Justice Thomas’s dissent in full, whereas Justice Alito did not join the merits portion of the dissent. As such, Justice Alito seems torn on the theory. He dissented from a denial of emergency relief to the defendants in Moore v. Harper, noting “there must be some limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections,” implying the federal Constitution is not a complete limitation. However, he also said,

This Clause could have said that these rules are to be prescribed “by each State,” which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power. . . .[But] its language specifies a particular organ of a state government, and we must take that language seriously.

Given that he implies there is not a complete limit on state court authority, Justice Alito may support ISLT-Lite rather than ISLT-Max.

70. Moore, 600 U.S. at 57 (Thomas, J., dissenting) (quoting Texas v. White, 74 U.S. (7 Wall.) 700, 721 (1869)).

71. Id. (quoting Smiley v. Holm, 285 U.S. 355, 365 (1932) (internal alterations and quotation marks omitted)).

72. Id.

73. Id. at 58 (quoting State ex rel. Schrader v. Polley, 127 N.W. 848, 850–51 (S.D. 1910)).

74. Id. at 40.


76. Id. at 1090.

77. See also Moore Transcript, supra note 56, at 39 (where Justice Alito asks Petitioner’s counsel: “[E]ven under your primary theory, however, isn’t it inevitable that the state courts are going to have to interpret [election] provisions and isn’t it inevitable that state election officials in the Executive Branch are going to have to make decisions about all sorts of little things that come up concerning the conduct of elections?”); Mac Bowers, Four Takeaways: Moore v. Harper Oral Argument, DEMOCRACY DOCKET (Dec. 8, 2022), https://www.democracydocket.com/analysis/four-takeaways-moore-v-harper-oral-argument [perma.cc/AWH6-ETXM] (“Alito and Kavanaugh, two of the most conservative justices when it comes to voting, were not buying the Moore position.”). But see Michael Sozan, Supreme Court Oral Arguments in Moore v. Harper Discredit Election Theory That Could Undermine Democracy, CTR. FOR AM. PROGRESS (Dec. 7, 2022), https://www.americanprogress.org/article/supreme-court-oral-arguments-in-moore-v-harper-discredit-election-theory-that-could-undermine-democracy [perma.cc/9P67-KTCM]
Ultimately, Chief Justice Roberts and the three more liberal justices refused to endorse ISLT-Max in Moore, in line with their prior views on the matter.78 Surprising some, these four found unlikely bedfellows in Justices Barrett and Kavanaugh. Justice Barrett had not previously opined on the theory before Moore’s decision, but her questioning at oral argument suggested she would vote against a full-throated ISLT-Max.79 Justice Kavanaugh seemed to support ISLT-Max before his time on the bench.80 These two signing onto the majority opinion inspires hope that any future ISLT case that could threaten congressional redistricting commissions would at least not result in the most dangerous, ISLT-Max, approach. However, Justice Kavanaugh invited others to make persuasive arguments on this point in his sole concurring in Moore, leaving a question mark in his voting column for potential future cases.81

We know Justice Gorsuch supports ISLT-Max. Justice Alito seems to fall to the ideological right of the chief justice in saying state courts lack a role in congressional redistricting. However, he has not signed onto Justice Gorsuch’s ISLT-Max articulation. He seems more aligned with Justice Thomas’s middle-ground, nonlegislative-officials view, but that view seems abandoned now even by Justice Thomas in his Moore dissent where he endorsed the more radical ISLT-Max theory.82

(“Justices Thomas, Alito, and Gorsuch seemed the most open to accepting an aggressive form of the ISL theory.”). Notably, Justice Alito was the only justice to not join any ISLT merits portion of the majority, concurring, or dissenting opinions in Moore, opting to instead only sign on to Justice Thomas’s discussion of how the case should have been rendered moot. Moore, 600 U.S. at 40.


79. See Moore Transcript, supra note 56, at 20, 63–64 (showing Justice Barrett questioning ISLT’s underlying logic: “If [the Elections Clause] did not appear in the Constitution, would the baseline assumption have been that the states possess the power to regulate elections for federal office anyway? Because, if so, I don’t see how it’s a delegation as opposed to a clause that clips state authority perhaps by saying it must be exercised by the legislature and by giving Congress the power of override”; and “we know from [Ohio ex rel. Davis v.] Hildebran[t, 241 U.S. 565 (1916)] that if a districting is done by referendum, that’s okay, you know, that doesn’t violate the Elections Clause. . . . When [a state constitution] can be changed by a simple majority, why is that more entrenched [than a state statute] and why would we say that having it appear in the Constitution is problematic when, if it appeared through the referendum process and the legislative process, it’s not?”).


82. Id. at 57–58 (Thomas, J., dissenting).
Regardless of which iteration of ISLT may take hold in a future case post-
Moore, historical legislative practice shows that there is a spectrum of legisla-
tive involvement when it comes to congressional redistricting.83 How far re-
moved from the actual legislature or legislators is too much in each context? The next Part applies our proposed analytical framework to all existing con-
gressional redistricting commissions to determine the likelihood of their con-
stitutionality under either version of ISLT.

II. LEGISLATIVE CONTROL OVER CONGRESSIONAL REDISTRICTING
COMMISSIONS AND POTENTIAL IMPLICATIONS UNDER ISLT

No two congressional redistricting commissions are exactly alike. However,
they do all share three key criteria that will likely determine their constitu-
tionality under ISLT. The first criterion is commission creation, or how the
commission came to be. The second is commission membership and selection: who sits on the commission and how did they come to occupy one of those
coveted seats? The third criterion, plan enactment, is also critical: what part
does the commission play in creating and enacting the congressional district
plan for the state?

When considering ISLT and its impact on congressional redistricting
commissions’ constitutionality, these procedural criteria matter far more than
the substantive elements of how commissions draw their maps.84 In other
words, the constitutionality of a commission under ISLT would not turn on
the substantive redistricting criteria states use to draw their maps, such as
compactness, contiguity, or respect for municipal boundaries. Instead, constitu-
tionality would depend on the procedural criteria named above.85 The Court
left room for various versions of ISLT to become law in the future, with mul-
tiple forms of the theory suggesting that it might be unconstitutional for any
entity that is not the legislature to draw those maps. Ultimately, the fate of a
congressional redistricting commission depends on one key question: does
the state legislature—in the face of an operative congressional redistricting
commission—maintain a sufficient level of legislative control over the congres-
sional redistricting process for each of our three criteria?

83. See infra Part II.
84. Petitioners in Moore employed a “procedural” versus “substantive” distinction in their
arguments for ISLT. They posited that, if the Supreme Court rejected the principle that ISLT
demands absolute insulation from state courts when legislating on federal election laws, the
Court should still have limited state courts’ involvement to adjudicating questions of procedural,
rather than substantive, election laws passed by the state legislature. See, e.g., Brief for Petitioners
Brief]; Moore Transcript, supra note 56, at 38, 61–62. We do not use the distinction in this way.
Instead, we merely use the distinction to demonstrate the different types of power elements at
play when assessing the constitutionality of congressional redistricting commissions under ISLT.
85. Of course, the federal Constitution still places general substantive requirements on
redistricting, like avoiding the predominance of race over other districting criteria. See, e.g., Shaw
Two questions derive from this primary one: 1) does a state legislature exercise enough control to meet ISLT-Max’s higher threshold (in other words, does it retain “primary responsibility” over congressional redistricting as Justice Gorsuch requires); or, if not, 2) does the legislature retain enough control to at least meet the lower threshold of ISLT-Lite (i.e. does the commission possess only an “auxiliary role” in congressional redistricting compared to the legislature’s “primary” one, as Chief Justice Roberts requires)?

If a state legislature does not wield sufficient control to meet the respective ISLT-Max or ISLT-Lite threshold for any given criterion, then we predict that the state’s commission would automatically fail under the respective ISL theory.

After determining these thresholds, this Part tries to answer these key questions about legislative control by using a totality of the circumstances test to assess each congressional redistricting commission’s potential to survive under either ISLT. This test requires analyzing each commission’s creation, membership and selection, and plan enactment processes to determine how much congressional redistricting authority the commission possesses compared to the state legislature. We also comparatively analyze these commissions to better understand their differences and how these differences impact their constitutionality under ISLT. After these assessments, we predict each commission’s likelihood for constitutionality under both ISLT-Max and -Lite based on how the three criteria map onto each commission.

We employ a spectrum model charting each existing congressional redistricting commission’s position based on these three criteria to project the commission’s likely validity under ISLT-Max and ISLT-Lite. The spectrum model is a linear diagram that depicts a range from least (left) to most (right) legislative control for each criterion. We break down each of the three key procedural criteria into subparts, categorized by the level of legislative involvement, then assign each commission to the appropriate subpart. The less control the state legislature exercises over a procedural element, the more likely a court would hold that particular commission unconstitutional under a given ISLT, and vice versa. We then create an overall spectrum model based on the assessments of how well the individual commissions fare on these three criteria. The final model plots the likelihood of a federal court upholding each commission’s congressional districting power as constitutional under ISLT-Max or ISLT-Lite.

On each of our models, we use a dashed line to demarcate the minimum thresholds required to satisfy each criterion under each theory. Think of these...
dashed lines as delineating how “tall” (in terms of legislative control) each commission must be to “ride the ride” (be constitutional). If the commission does not reach the minimum threshold for any criterion, it must fail under that theory. It cannot “ride the ride.” However, achieving one threshold does not necessarily mean a commission is constitutionally safe. For a commission to guarantee its survival under both ISLTs, the commission must meet both threshold requirements across all three criteria. The final model in Section II.D shows the commissions that are likely to survive ISLT-Max, ISLT-Lite, or neither based on these thresholds and assessments of the totality of the circumstances.

A. Criterion 1: Commission Creation

We break down the “commission creation” criterion into six subcategories, ordered from least to most legislative control: whether the commission was created by 1) executive order, 2) voter-led ballot initiative, 3) constitutional convention, 4) voter-initiated state statute, 5) legislatively referred constitutional amendment, or 6) legislative statute.

<table>
<thead>
<tr>
<th>EXECUTIVE ORDER</th>
<th>Maryland</th>
</tr>
</thead>
<tbody>
<tr>
<td>VOTER-LED BALLOT INITIATIVE</td>
<td>Arizona, California, Michigan</td>
</tr>
<tr>
<td>CONSTITUTIONAL CONVENTION</td>
<td>Connecticut, Hawai‘i, Montana</td>
</tr>
<tr>
<td>VOTER-INITIATED STATE STATUTE</td>
<td>Utah</td>
</tr>
<tr>
<td>LEGISLATIVE STATUTE</td>
<td>Indiana, Iowa, New Mexico</td>
</tr>
</tbody>
</table>

To meet the ISLT-Lite threshold, a congressional redistricting commission must have at least been created by a state constitutional convention. This includes only those commissions created by such a convention, or a voter-initiated state statute, legislatively referred constitutional amendment, or legislative statute. Only with these creation procedures does the commission arguably not render the state legislature “auxiliary” in the congressional redistricting process. For a commission created by executive order, the legislature has zero involvement in making the commission and the legislature cannot amend an executive order once it is issued. Therefore, the legislature exerts the least amount of control over a commission created by executive order. Voter-led ballot initiatives, where voters can directly amend their state constitutions by vote, are a close second compared to executive orders. Legislators are capable of amending the voter-led changes to their state constitutions but have no control over the initiation and enactment of a ballot measure. However, gar-


90. The Maryland Constitution provides that the governor “shall prepare a plan setting forth the boundaries of the [state] legislative districts” to then propose to the legislature for consideration. MD. CONST. art. III, § 5; see also MD. CITIZENS REDISTRICTING COMM’N, FINAL REPORT OF THE MARYLAND CITIZENS REDISTRICTING COMMISSION 3 (2022); Exec. Order No. 01.01.2021.02, 48–4 Md. Reg. 153 (Feb. 12, 2021).

91. See Amending State Constitutions, BALLOTPEDIA, https://ballotpedia.org/Amending_state_constitutions [perma.cc/24HL-VD6J]; see also Initiative and Referendum Processes,
nering sufficient state legislative support to amend a constitution is quite difficult, rendering the legislature’s ability to change the language enshrined in the constitution by a voter-led ballot initiative largely out of its control.\textsuperscript{92} With no, or practically zero, legislative control over this creation process for these types of commissions, the commission almost certainly renders the legislature “auxiliary,” causing these commissions to fail even under ISLT-Lite.

Commisions created by constitutional convention allow state legislatures to exert more control. Although rules for constitutional conventions vary by state, the three commissions created by constitutional convention all share the same key characteristic: the legislature initiates the commission-creation process by requesting a constitutional convention.\textsuperscript{93} Then, the legislature can refer amendments to the constitution. So, while the legislature itself does not operate as the voting body at a constitutional convention, the constitutional convention avenue does provide the state legislature with multiple opportunities to influence the commission’s creation. Commissions created by voter-initiated state statutes allow for still more legislative control because voters propose and enact them with zero input from legislators. The legislature can amend the language of these statutes, however, by simply enacting a new statute.\textsuperscript{94} The state legislature can typically pass a new statute much more easily than it can amend the state constitution via constitutional convention or otherwise.\textsuperscript{95} These types of commissions likely meet the threshold to survive under ISLT-Lite because these state legislatures were intimately involved in the creation process (constitutional convention route) or could easily alter the makeup of the commission later by majority-voted statute (voter-initiated state statute route).\textsuperscript{96} Therefore, the state legislatures have more than an “auxiliary” role; however, the legislatures still likely do not have “primary responsibility” in the redistricting process under this criterion to meet ISLT-Max’s

\textsuperscript{92}. See Amending State Constitutions, supra note 91(describing many states as requiring at least two thirds of the legislature to agree to an amendment before it is placed on a ballot for voter approval).


\textsuperscript{94}. See, e.g., Laws Governing the Initiative Process in Utah, BALLOTpedia, https://ballotpedia.org/Laws_governing_the_initiative_process_in_Utah [perma.cc/USR9-PPB4].

\textsuperscript{95}. See Moore Transcript, supra note 56, at 15–20, 59 (Statement by David H. Thompson) (“Statutes are always less problematic under the Elections Clause because they can be repealed. They can be rewritten by the state legislature.”).

survival threshold because nonlegislators have the ability to initially draft and create the commissions without legislative input.

To survive under ISLT-Max, a congressional redistricting commission must have at least been created by a legislatively referred constitutional amendment. This means that only those commissions created by such an amendment, or those created by legislative statute, meet ISLT-Max’s threshold for this criterion and would likely survive a constitutional challenge. Only with these creation procedures does the legislature arguably retain “primary authority” over redistricting.

Commissions created by legislatively referred constitutional amendments give even greater control to the state legislature. The legislative referral process sees the legislature freely delegate its redistricting authority to the commission on its own initiative if voters approve a state constitutional amendment. The legislature can later amend the commission’s structure through a similar process should it decide to change course. While the state constitution is almost certainly harder to amend than a state statute, the legislature at least has the potential for influence and control over the commission’s creation at both ends of this amendment process. The legislature’s responsibility for initiating the change (while knowing how difficult it is to reverse course) underlines the strength of legislative control in this category.

Finally, the legislature’s control is at its apex when it creates a redistricting commission via a regular state statute. Using that process, the legislature, acting of its own accord, chooses to give away its redistricting power. It retains power to alter the extent of the commission’s control over the redistricting process, or vitiate it completely, through the normal legislative process. Both of these creation procedures rest almost entirely in the control of the legislature, not voters or any other state entity. Therefore, the legislature maintains “primary” control over the redistricting process, rendering the commissions in these states consistent with ISLT-Max at least on this criterion.

97. See supra note 95 and accompanying text.
B. **Criterion 2: Commission Membership & Selection**

We break down the “Commission Membership & Selection” criterion into seven subcategories, ordered from least to most legislative control: 1) legislators are *not* involved, 2) legislators strike some applicants from the commissioner pool, 3) legislators propose a commissioner pool for 50% of commissioners, 4) legislators choose less than 50% of commissioners, 5) legislators choose at least 50% of commissioners, 6) legislators are 50% of commissioners, and 7) all commissioners are legislators. ²⁸

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²⁸ We believe that, for Justice Gorsuch, there is a material difference between a legislator serving on the commission and their appointee, even if the appointee is a reliable proxy (e.g., friend, donor, political party delegate, employee, or family member). Justice Gorsuch emphasizes these formal roles and labels in his ISLT writings. See *supra* Part I.
TABLE 2: LEGISLATIVE POWER OVER COMMISSIONERS

<table>
<thead>
<tr>
<th>LEGISLATORS ARE NOT INVOLVED</th>
<th>Maryland</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEGISLATORS STRIKE SOME APPLICANTS FROM THE COMMISSIONER POOL</td>
<td>California, Michigan</td>
</tr>
<tr>
<td>LEGISLATORS PROPOSE COMMISSIONER POOL FOR 50% OF COMMISSIONERS</td>
<td>Colorado</td>
</tr>
<tr>
<td>LEGISLATORS CHOOSE FEWER THAN 50% OF COMMISSIONERS</td>
<td>Alaska (2/5 Commissioners)</td>
</tr>
<tr>
<td>LEGISLATORS CHOOSE AT LEAST 50% OF COMMISSIONERS</td>
<td>New Mexico (4/7 Commissioners), Ohio (4/7), New Jersey (8/13), Idaho (4/6), Maine (10/15), Arizona (4/5), Iowa (4/5), Montana (4/5), New York (8/10), Washington (4/5), Utah (6/7), Hawai‘i (8/9)</td>
</tr>
<tr>
<td>LEGISLATORS ARE 50% OF COMMISSIONERS</td>
<td>Virginia</td>
</tr>
<tr>
<td>ALL COMMISSIONERS ARE LEGISLATORS</td>
<td>Connecticut, Indiana</td>
</tr>
</tbody>
</table>

To meet the ISLT-Lite threshold, state legislatures must have the power to choose, by appointment, at least some commissioners to serve on the commission. The appointment power, regardless of if state law allows legislators to appoint themselves or proxies, will help ensure the legislature is not rendered “auxiliary” in the process. The legislature has the least legislative control over commissions where legislators cannot sit as commissioners themselves, influence the pool from which commissioners are selected, or appoint anyone to serve as a commissioner. In this scenario, the legislature is completely excluded from deciding who sits as a commissioner, and hence, who draws and

99. MD. CONST. art. III, § 5 (Maryland); Exec. Order No. 01.01.2021.02, 48–4 Md. Reg. 153 (Feb. 12, 2021) (same); CAL. GOV. CODE § 8252 (West 2021) (California); State of California, Application and Selection Process, WE DRAW THE LINES CA, https://wedrawthelines.ca.gov/transitional/selection [perma.cc/9Z6K-9BPC] (same); MICH. CONST. art. IV, § 6, cl. 1–2 (Michigan); COLO. CONST. art. V, § 44.1, cl. 5–10 (Colorado); ALASKA CONST. art. VI, § 8 (Alaska); N.M. STAT. ANN. § 1-3A-3 (2021); OHIO CONST. art. XI, § 1 (Ohio); N.J. CONST. art. II, § 2, cl. 1 (New Jersey); ME. CONST. art. IV, pt. III, § 1-A (Maine); IDAHO CONST. art. III, § 2, cl. 2 (Idaho); ARIZ. CONST. art. IV, pt. II, § 1, cl. 3–6 (Arizona); MONT. CONST. art. V, § 14, cl. 2 (Montana); N.Y. CONST. art. III, § 5-b (New York); WASH. CONST. art. II, § 43, cl. 2 (Washington); UTAH CODE ANN. § 20A-20-201 (2023) (Utah); HAW. CONST. art. IV, § 2 (Hawai‘i); VA. CONST. art. II, § 6-A (Virginia); CONN. CONST. art. III, § 6 (Connecticut); KRISTIN SULLIVAN & KRISTEN MILLER, CONN. OFF. OF LEGIS. RSCH., CONNECTICUT’S REDISTRICTING PROCEDURES AND DEADLINES, 2016-R-0268 (2016) (same); State of Connecticut, Frequently Asked Questions, CONN. GEN. ASSEMBLY, https://www.cga.ct.gov/rr/tfs/20210401_2021%20Redistricting%20Project/faq.asp [perma.cc/NPP9-MUR9] (same); IND. CODE § 3-3-2-2 (2023) (Indiana).
proposes the commission’s maps. Commissions where a nonlegislative entity such as the state’s secretary of state or supreme court chooses the commissioners, but the legislators can at least partially influence the pool of potential commissioners by striking applicants, allow for more legislative control over commissioner selection. Legislators exert even greater control when they can directly choose the pool of potential commissioners for at least 50% of the commissioner slots from which a nonlegislative state authority then appoints the commissioners. These two categories—where the legislature has influence over the commissioner pool—differ primarily in the number of potential commissioners the legislature has control over and which entity initially chooses who enters that pool. In the first subcategory, a nonlegislative entity determines the pool, from which the legislature strikes only a handful of options, leaving the nonlegislative entity with dozens of potential commissioners from which to choose. By contrast, for the second subcategory, the legislature wields greater control by proposing a large percentage of the commissioners in the pool, but a nonlegislative entity still wields significant control over choosing who becomes a commissioner from that pool. In all three of the above categories, the legislature is either entirely cut out of, or maintains merely a minor role in, influencing who becomes a commissioner with the power to draw the maps. As such, these commissions likely fail to meet the requirements of ISLT-Lite.

State legislatures have much greater control over commissions where they can directly appoint individuals to serve as commissioners, instead of just influencing the pool of potential commissioners, because it remains within the power of the legislature—not another state entity—to choose the people that become commissioners. The power to directly appoint at least some commissioners to the commission is likely the smallest amount of legislative control that survives ISLT-Lite under this criterion. If the state legislature possesses any less control than a direct appointment power, then the commission arguably plays more than just an “auxiliary role” in redistricting compared to the legislature. Of the two categories meeting this description, the legislature, naturally, has less power over commissions where it chooses less than 50% of commissioners. For the commissions where the legislature maintains the

100. See, e.g., MICH. CONST. art. IV, § 6.

101. For Colorado’s congressional redistricting commission, individuals must apply for a commissioner position. A “nonpartisan staff” screens applicants to ensure they comply with prerequisite character requirements. COLO. CONST. art. V, § 44.1. Then, the chief justice of the Supreme Court of Colorado creates a panel, consisting of three retired justices of the Colorado Supreme Court or judges of the Colorado Court of Appeals, to select commissioners from this pool. Id. The panel then cuts the pool down to 150 before randomly selecting six of the qualified candidates as commissioners. Id. The state legislature only has some control over the selection of four commissioners. The majority and minority leaders from the state House and Senate each create a pool of ten candidates chosen from eligible applicants vetted by the nonpartisan staff. After the leaders choose their pools, the panel itself decides who to select as a commissioner from each of these pools. Finally, the justice panel chooses two unaffiliated commissioners. Strictly following this process produces a commission with four democrat, four republican, and four unaffiliated commissioners. Id.
power to appoint at least 50%, but not 100%, of commissioners, it has greater influence over the redistricting process by controlling more seats on the commission. Most commissions fall within this latter appointment category. The appointment procedures vary greatly between these different states, but most states disallow their state legislatures from appointing current local, state, or federal officeholders to the commission. Some do, however.

Regardless of these more specific scenarios, commissions in the “at least 50%” category all likely pass muster under ISLT-Lite because the legislature maintains a greater than “auxiliary” role in the process by choosing how to compose a majority of the commission’s membership. Arguably, these commissions could have met the ISLT-Max threshold of “primary responsibility” as well; however, the common fact that the appointees within the legislatures’ control either cannot or may not (depending on the state) be legislators themselves sufficiently breaks legislative control over the commissions such that those processes do not meet the “primary” requirement under ISLT-Max. Instead, these appointees are more analogous to “other state officials,” whom Justice Gorsuch specifically prohibits under ISLT-Max. So, while insufficient to satisfy the demands of ISLT-Max, these appointee-commission structures still likely survive constitutional scrutiny under ISLT-Lite.

The lowest level of legislative control a state legislature can exercise over a commission’s membership selection process to survive ISLT-Max is likely where at least 50% of the commissioners are guaranteed to be legislators themselves. At this level of control and more, the legislature arguably retains “primary authority” over redistricting because it ensures that legislators, as representatives of the legislature itself, constitute the “primary” voting bloc on the commission. Without support from the legislators on the commission, the commission cannot pass any plan, rendering the legislators’ votes ones of “first

102. In New Mexico, for example, the commission consists of seven commissioners. N.M. STAT. ANN. § 1-3A-3 (2023). The majority and minority leaders in both the state house and senate appoint one commissioner each. Id. This ensures two commissioners are appointed by democrats and two by republicans. See Party Control of New Mexico State Government, BALLOT PEDIA, https://ballotpedia.org/Party_control_of_New_Mexico_state_government [perma.cc/PU86-AWQC]. The independent State Ethics Commission appoints the fifth and sixth commissioners, “who shall not be members of the largest or second largest political parties in the state.” N.M. STAT. ANN. § 1-3A-3 (2023). The State Ethics Commission also appoints the seventh commissioner, “who shall be a retired justice of the New Mexico Supreme Court or a retired judge of the New Mexico Court of Appeals, and who shall chair the committee.” Id. Among other restrictions, state law prohibits public officials, candidates for public office, lobbyists, and officeholders in political parties at the state or federal level currently or within the last two years from serving on the commission. Id. §§ 1-3A-3 to -4. Washington’s process excludes similarly conflicted citizens from its commission. WASH. REV. CODE § 44-05-050 (West 2023); WASH. CONST. art. II, § 43. But see infra note 104 and accompanying text (detailing Hawaii’s appointment procedures, which differ significantly from New Mexico’s and Washington’s).
103. See, e.g., supra note 102 (New Mexico; Washington).
104. See, e.g., HAW. CONST. art. IV, § 2 (Hawaii).
rank, importance, or value.”106 Through these commissions, legislators directly represent the state legislature’s own interests, rather than wielding only indirect power through appointments. Finally, legislative control over the commissions is at its apex when state legislators hold every seat on the commission. In this last scenario, there is no question that the legislature maintains “primary responsibility” over the commission’s membership, as no other entity plays a role and no other nonlegislative individual is likely to sit on the commission. This almost guarantees that these commissions would survive ISLT-Max.

**MODEL 2: COMMISSION MEMBERSHIP & SELECTION SPECTRUM MODEL**

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### Criterion 3: Plan Enactment

We break down the “Plan Enactment” criterion into six subcategories, ordered from least to most legislative control: 1) commissions draw, pass, and enact maps, 2) commissions choose maps drawn by legislative staff, subject to approval by the state supreme court, 3) commissions draw maps, requiring approval by the legislature and subject to gubernatorial veto, 4) commissions draw maps requiring only approval by the legislature, 5) commissions draw and pass maps only if the legislature fails to pass maps, and 6) commissions draw and pass maps only if the legislature fails to pass maps, subject to change or voidance by legislative statute.

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106. *Primary, supra* note 65.
### Table 3: Legislative Power Over Plan Enactment

| Commission Draws, Passes, and Enacts Maps | Alaska, Arizona, California, Hawai‘i, Idaho, Michigan, Montana, New Jersey |
| Commission Chooses Maps Drawn by Legislative Staff, Subject to Approval by the State Supreme Court | Colorado |
| Commission Draws Maps, Requiring Approval by the Legislature and Subject to Gubernatorial Veto | Iowa, Maine, Maryland, New Mexico, New York, Utah |
| Commission Draws Maps Requiring Only Approval by the Legislature | Virginia, Washington |
| Commission Draws and Passes Maps Only If the Legislature Fails to Pass Maps | Connecticut, Ohio |
| Commission Draws and Passes Maps Only If the Legislature Fails to Pass Maps. Additionally, These Maps Are Subject to Change or Voidance by Legislative Statute | Indiana |

To meet the ISLT-Lite threshold, commissions must leave the legislature with a role in the drawing and enactment process. If the legislature does not

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107. ALASKA CONST. art. VI, §§ 10–11 (Alaska); ARIZ. CONST. art. IV, pt. II, § 1 (Arizona); CAL. CONST. art. XXI, § 2 (California); HAW. CONST. art. IV, § 2 (Hawai‘i); IDAHO CONST. art. III, § 2 (Idaho); MICH. CONST. art. IV, § 6 (Michigan); MONT. CONST. art. V, pt. V, § 14 (Montana); N.J. CONST. art. II, § 2 (New Jersey); COLO. CONST. art. V, §§ 44.3 to .5 (Colorado); IOWA CODE §§ 42.3 to .6 (Iowa); ME. STAT. tit. 21-A, ch. 15, § 1206-1 (amd. 2013) (Maine); ME. CONST. art. IV, pt. III, § 2 (same); Maryland Citizens Redistricting Commission, supra note 89 (Maryland); Redistricting in Maryland, BALLOTBLOG, [https://ballotpedia.org/Redistricting_in_Maryland](https://ballotpedia.org/Redistricting_in_Maryland) [perma.cc/4HCX-4VG9] (same); Doug Spencer, Maryland: State Summary, LOY. L. SCH., [https://redistricting.lls.edu/state/maryland/?cycle=2020&level=Congress&startdate=2022-04-04](https://redistricting.lls.edu/state/maryland/?cycle=2020&level=Congress&startdate=2022-04-04) [perma.cc/K9M9-YFYW] (same); N.M. STAT. ANN. §§ 1-3A-5, 1-3A-9 (2023) (New Mexico); Doug Spencer, New Mexico: State Summary, LOY. L. SCH., [https://redistricting.lls.edu/state/new-mexico/?cycle=2020&level=Congress&startdate=2021-12-17](https://redistricting.lls.edu/state/new-mexico/?cycle=2020&level=Congress&startdate=2021-12-17) [perma.cc/XSTR-737Z] (same); Redistricting in New Mexico, BALLOTBLOG, [https://ballotpedia.org/Redistricting_in_New_Mexico](https://ballotpedia.org/Redistricting_in_New_Mexico) [perma.cc/6V96-49EX] (same); N.Y. CONST. art. III, §§ 4-b, 5-b (New York); Laws & Regulations: Relevant State and Federal Statutory Provisions, supra note 89 (same); UTAH CODE ANN. §§ 20A-20-301 to -303 (2023) (Utah); Doug Spencer, Utah: State Summary, LOY. L. SCH., [https://redistricting.lls.edu/state/utah/?cycle=2020&level=Congress&startdate=2021-11-12](https://redistricting.lls.edu/state/utah/?cycle=2020&level=Congress&startdate=2021-11-12) [perma.cc/5JRL-XSH3] (same); VA. CONST. art. II, § 6-A (Virginia); WASH. CONST. art. II, § 43 (Washington); id. art. III, § 12 (same); CONNECT. CONST. art. III, § 6 (Connecticut); id. art. XII (same); OHIO CONST. art. II, § 16 (Ohio); id. art. XI, § 1 (same); id. art. XIX, § 3 (same); IND. CODE §§ 3-3-2-1 to -2 (2023) (Indiana); Doug Spencer, Indiana: State Summary, LOY. L. SCH., [https://redistricting.lls.edu/state/indiana/?cycle=2020&level=Congress&startdate=2021-10-04](https://redistricting.lls.edu/state/indiana/?cycle=2020&level=Congress&startdate=2021-10-04) [perma.cc/CC93-DWKT] (same).
have the ability to at least provide its disapproval or approval over a proposed redistricting plan, it is hard to see how one could consider the commission to have only “auxiliary” responsibility over the process. State legislatures possess the least amount of legislative control over commissions that can draw, pass, and enact maps without any legislative check. These commissions completely exclude the state legislature from any authority over the map-drawing process, a critical juncture in congressional redistricting.\textsuperscript{108} Legislatures possess slightly more control over commissions where legislative staffers, who are at least ostensibly overseen by the legislature, draw the initial maps. Here, legislative staffers submit the maps they draw to the commission, which then enacts the maps subject to approval by the state supreme court. While the legislature cannot directly influence the enacted plans through its own review process, it does have indirect control over the initial maps because the legislative staff itself is housed within the legislative branch. Neither commission type in these categories is likely to survive ISLT-Lite because the legislature maintains practically no role in drawing the finalized, codified map. As such, the commission retains primary control over the map-drawing process and renders the legislature’s influence merely “auxiliary” in nature.

Commissions that draw maps, but cannot freely enact those maps without outside checks, provide legislatures with greater control that is likely sufficient to survive ISLT-Lite. These commissions’ maps are subject to the usual legislative process, including legislative adoption and presentment to the governor for veto.\textsuperscript{109} The only difference in this normal process is that a commission, rather than the legislature, has the opportunity to first draw the maps. However, those maps cannot become law without legislative and gubernatorial approval. As such, the legislature maintains a critical role—typically final approval—in the map-drawing process. This critical role granted to the legislature, and the veto power retained by the governor, is the threshold level of legislative control we believe is necessary for commissions to survive ISLT-

\textsuperscript{108} For example, in California, the state legislature has no authority to supplant, amend, or reject the maps drawn and enacted by the state’s congressional redistricting commission. Voters explicitly wrote the redistricting power out of the legislature’s purview with the purpose of producing a “commission that is independent from legislative influence . . . .” CAL. CONST. art. XXI, § 2; \textit{California Proposition 20, Congressional Redistricting Initiative (2010)}, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_20__Congressional_Redis-\textit{tricting_Initiative__(2010)} [perma.cc/H85N-CPZA].

\textsuperscript{109} We do not assess whether the governor’s veto power counts as executive or legislative authority; we include it because presentment is one more step that the legislature must take to enact a map that it need not take in the next subcategory. Petitioners in \textit{Moore} described the veto as a procedural step, or simply a “hoop that needs to be jumped through,” to enact a map. \textit{Moore} Transcript, \textit{supra} note 56, at 10. In this way, they avoided the potential precedential problem of considering the governor’s veto authority over congressional districting maps as distinct from legislative authority for the purposes of their theory. \textit{See id.} at 8–10 (responding to a skeptical line of questioning by Chief Justice Roberts); \textit{Moore Petitioner Brief, supra} note 84, at 24, 39–40; \textit{Smiley v. Holm}, 285 U.S. 355, 372–74 (1932). \textit{But see Democratic Nat’l Comm., 141 S. Ct. at 29 (Gorsuch, J., concurring in the denial of application to vacate stay)} (“The Constitution provides that state legislatures . . . not state governors . . . bear primary responsibility for setting election rules.”).
Lite. Any less control than this and the commission is arguably playing more
than an “auxiliary role” in redistricting. The ability for the governor to veto
these commissions’ maps, however, ensures that they do not survive ISLT-
Max. Chief Justice Roberts suggested that this gubernatorial power would suf-
ficiently render the commission merely “auxiliary” in nature.110 As such, the
governor’s veto ability as part of the normal legislative process would likely
not kill a commission under ISLT-Lite.

Legislatures have greater control over commissions that draw maps that
only require approval by the legislature for enactment, without presentment
to the governor. In adopting these maps, the legislature acts independently
from any other check aside from judicial review of the substantive, but not
procedural, criteria used for the maps; however, the legislature still does not
have autonomy to draw the maps itself.111 This is the smallest amount of leg-
islative control possible under this criterion for commissions to likely survive
ISLT-Max because the legislature retains ultimate authority to decide upon
the enacted map. No map can become law without the legislature’s approval
and no other state entity can override that approval. State legislatures possess
even greater control in the next category, which includes the more traditional
“backup” commissions. These commissions draw the maps only if the legisla-
ture fails to do so first.112 Only then does the commission become operative
and draw and enact a plan in the legislature’s place. The legislatures maintain
significant, or even total, control on the front end, rendering the commissions
inoperative in many redistricting cycles. However, once the commission does
activate, the legislature loses its control.113 Finally, the legislature exercises the
most control over commissions that draw maps subject to change or nullifica-
tion during the ordinary legislative process; namely, when the legislature has
the ability to amend or adopt the final maps by statute, or simply reject a
commission’s maps in favor of its own. The final map is always the legislature’s in
this scenario, and these commissions hold no power on their own to enact a
map into law. As such, these legislatures likely retain “primary responsibility”
sufficient to survive ISLT-Max.

(2015) (Roberts, C.J., dissenting) (“The majority initially describes Hildebrant and Smiley as
holding that ‘redistricting is a legislative function, to be performed in accordance with the State’s
prescriptions for lawmaking, which may include the referendum and the Governor’s veto.’ That
description is true, so far as it goes.” (citations omitted)); see also Moore Transcript, supra note
56, at 7–10 (demonstrating Chief Justice Roberts’s skepticism of petitioner’s argument for a max-
imalist ISLT when he notes that petitioner’s admission that the governor’s veto functions as part of
the legislative power is “a pretty significant exception” in their theory).

111. See supra note 85 and accompanying discussion.

112. Cain, supra note 8, at 1815; Backup Redistricting Commissions, BALLotpedia,
https://ballotpedia.org/Backup_redistricting_commissions [perma.cc/S2SK-YMJH].

113. See supra note 88 and accompanying discussion.
**D. Putting It All Together**

Here, we put it all together. This final model divides the commissions into three sections: 1) those that federal courts would likely find constitutional under either theory, 2) those that federal courts would likely find constitutional under ISLT-Lite but unconstitutional under ISLT-Max, and 3) those that federal courts would likely find unconstitutional under either theory.

This final model illustrates where the minimum legislative control thresholds are for both theories ("primary responsibility" for ISLT-Max and "auxiliary role" for ISLT-Lite). We again denote these thresholds with dashed lines. We use a totality of the circumstances approach rather than a formalistic one to determine if a commission is constitutional under a given ISL theory and where a commission falls for its likelihood of survival in comparison to others along the spectrum. Ultimately, we predict eighteen commissions are vulnerable to constitutional challenge under ISLT-Max, with ten of those commissions vulnerable under ISLT-Max and ISLT-Lite.
1. Commissions Most Likely to Be Constitutional Under Either Theory

Commissions will likely survive ISLT-Max in only two states: Indiana and Virginia. These are the only two commissions that reach ISLT-Max’s thresholds across all three criteria.

a. Indiana

Even though Indiana has a congressional redistricting commission, its state legislature effectively controls every step of the congressional redistricting process. Indiana’s state legislature ranks first in legislative control over all three criteria. In essence, Indiana’s commission is a facade: a commission in name only.

The legislature created the congressional redistricting commission via legislative statute.114 Likewise, the legislature can eliminate the commission at any time by simply passing another statute. This fact bolsters the commission’s chances of surviving ISLT-Max, particularly compared to congressional redistricting commissions created by legislatively referred constitutional amendments.115 The legislature undoubtedly exercises “primary responsibility”116 over the commission’s creation and continued existence.

For the second criterion, commission membership and selection, all of the commissioners on Indiana’s commission are legislators,117 a membership structure that effectively renders the commission a legislative committee on

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114. IND. CODE § 3-3-2-2 (2023).

115. Moore Transcript, supra note 56, at 58–59 (Statement by David H. Thompson) (“Statutes are always less problematic [than constitutions] under the Elections Clause because they can be repealed. . . . [and] rewritten by the state legislature.”).


117. § 3-3-2-2.
redistricting. This is the greatest possible control legislators can possess over a commission and is by far the most authority any legislature wields over the examined commissions. The legislature not only exercises “primary authority” in this area; it exercises exclusive authority.

The legislature also maintains practically total control over the commission under the plan enactment criterion as well. Indiana’s legislature has the power to pass a congressional map as a statute without the commission even becoming operative. When operative, the commission sends the maps to the legislature’s redistricting committee for approval. The governor “shall” adopt the maps passed in this manner. Further, the maps are still subject to legislative amendment or nullification through the normal legislative process after enactment, meaning the legislature can always pass a different map if it disagrees with the commission’s chosen plan. Therefore, the legislature retains “primary” control over the finalized, codified congressional map.

b. Virginia

Virginia’s commission also meets the ISLT-Max threshold for all three of the evaluated criteria even though the commission wields slightly more control over the congressional redistricting process than Indiana’s.

First, the Virginia state legislature initiated the creation of the commission by passing a legislatively referred constitutional amendment, which voters adopted. As part of this structure, the legislature codified a requirement that state legislators would automatically comprise 50% of the commissioner seats. Further, the legislature selects the pool of other potential candidates from which another state body chooses the remaining 50% of commissioners who are not guaranteed legislators. So, the legislature heavily influences commissioner selection even for the seats not held by legislators themselves. While the commission has the power to draw the maps in the first instance, the legislature must approve any map the commission adopts before

118. See supra Section II.B.
119. §§ 3-3-2-1 to -2.
120. Id. § 3-3-2-2.
121. Id.
122. Id.
124. VA. CONST. art. II, § 6-A.
125. This body is called the “Redistricting Commission Selection Committee,” which consists of five retired Virginia circuit court judges chosen after consultation between the state legislature and supreme court. Id.; VA. CODE ANN. § 30-394 (West 2023).
126. VA. CONST. art. II, § 6-A.
it becomes law. This gives the legislature not only “primary” but sole authority over the enactment of the maps.

A federal judge is likely to uphold Virginia’s commission even if the Supreme Court adopts ISLT-Max. The governor plays no role in redistricting. The Supreme Court of Virginia plays a limited role insofar as it acts as a “Plan B” if the commission and legislature fail multiple times to pass a map. This puts Virginia’s commission on slightly shakier ground than Indiana’s, as Justice Gorsuch’s ISLT-Max posits that not even state judges can “bear primary responsibility for setting election rules.” When considering all other factors, however, it seems highly unlikely a judge would interpret this backstop measure as “primary” intervention by a nonlegislative state entity. Further, it seems unlikely Virginia’s commission would be in danger for this reason because the state court would almost never play a role in the process. Therefore, Virginia’s commission likely survives under ISLT-Max, even if the case is not as open-and-shut as Indiana’s.

2. Commissions Most Likely to Survive ISLT-Lite but Fail Under ISLT-Max

There are eight commissions likely to fail under ISLT-Max but survive scrutiny under ISLT-Lite: Ohio, Connecticut, Washington, Iowa, New Mexico, Maine, New York, and Utah. Thus, the route the Court may choose on ISLT is most critical in these states. While these commissions all meet the ISLT-Lite thresholds for all three criteria, they also each have characteristics that remove “primary responsibility” over congressional redistricting from the state legislature under one or more of our criteria and place that control in the hands of “other state officials” who are nonlegislative. This ensures they fail to survive ISLT-Max. However, under Chief Justice Roberts’s test for ISLT-Lite, the legislature likely does wield sufficient oversight over these commissions so as not to “displace” its authority too much. Therefore, a federal court would likely find the commissions only play an “auxiliary role.”

127. Id.
128. Id.
129. Id.
131. For instance, in 2020—the first cycle Virginia used its commission to redistrict congressional lines—the Virginia Supreme Court did not play a role in the process because the legislature agreed on the first set of plans adopted by the commission. Spencer, supra note 123.
132. Democratic Nat’l Comm., 141 S. Ct. at 29 (Gorsuch, J., concurring in the denial of application to vacate stay).
Ohio meets the ISLT-Max threshold for two criteria (commission creation and plan enactment) but it falls below the ISLT-Max threshold for criterion two (commission membership and selection). Therefore, even though Ohio’s legislature does maintain a high degree of control over the congressional redistricting commission, and hence the redistricting process, it is unlikely that its commission will survive ISLT-Max. However, since the commission does meet the ISLT-Lite threshold for all three criteria, it likely survives under that theory.

The Ohio legislature initiated the creation of the commission by passing a legislatively referred constitutional amendment.134 As part of that new constitutional text, the legislature retained the power to appoint a majority—four out of seven—of the commissioners.135 Ohio law does not prohibit the legislature from selecting legislators for these seats, meaning that there is a real possibility that legislators themselves will hold over 50% of the voting power on the commission. In the last redistricting cycle, Ohio legislators held all of those seats.136 Further, the commission could be inactive in any given redistricting cycle, since it only becomes operative if the legislature first fails to enact its own maps by a supermajority vote.137 In creating the commission by legislatively referred constitutional amendment, the legislature delegated a portion (but not all) of its authority to the commission to act as a majority-legislator backup that could create new maps. The legislature also ensured the process of passing these new maps would be easier by lowering the threshold to adopt them to a simple majority vote.138 In these ways, the legislature gave itself greater control over the commission and its redistricting process than almost any other commission in our sample. Nonetheless, while it is clearly possible that legislators could hold a majority of the commission’s seats, the fact that this may not occur if legislators choose otherwise calls into question whether the legislature’s role in the membership selection process is truly primary. Without more of a guarantee of legislator presence on the commission, the commission likely does not survive ISLT-Max.

At this high level of legislative control, Ohio’s commission will likely survive ISLT-Lite, but not ISLT-Max. Like Virginia’s legislature, Ohio’s remains intimately involved in the congressional redistricting process. It wields primary authority to enact its own maps and the process does not allow for a governor’s veto.139 But nonlegislative state actors are more involved in Ohio’s commission structure than in either Indiana or Virginia. The legislature only

134. OHIO CONST. art. XI, § 1.
135. Id.
137. OHIO CONST. art. XIX, § 1.
138. See id. art. XIX, § 1(C)(3).
139. See id. art. XI, § 1.
wields appointment power over four of seven commissioner seats and has no power to select the remaining three commissioners. Instead, Ohio’s constitution requires the governor, auditor, and secretary of state to automatically hold those three seats.\footnote{140} This runs afoul of Justice Gorsuch’s position that “no[] other state officials” can bear “primary responsibility” in the congressional redistricting process.\footnote{141} On the other hand, the legislature, as opposed to voters, wielded initial control over creating the commission and chose to delegate this power away.\footnote{142} Without more guaranteed legislative representation on the commission, it seems unlikely Ohio’s commission would survive ISLT-Max. However, this appointment scheme, combined with the other factors, seems highly likely to meet the “auxiliary” requirement of ISLT-Lite.

b. Connecticut

Connecticut’s commission would likely fail scrutiny under ISLT-Max because its score for the first criterion, commission creation, does not reach the necessary minimum threshold for ISLT-Max, even though it ranks highest for membership selection and plan enactment. However, its commission does meet the requisite ISLT-Lite thresholds for all three criteria, including commission creation. Therefore, Connecticut’s commission likely survives ISLT-Lite.

The commission was created by constitutional convention, not by the legislature. This process saw nonlegislators redirecting power usually belonging to the state legislature to another state authority.\footnote{143} This fact alone renders the commission unlikely to survive ISLT-Max.

However, if the U.S. Supreme Court were to adopt ISLT-Lite, it would most likely find Connecticut’s commission constitutional. First, the commission only activates if the legislature fails to enact its own maps.\footnote{144} Thus, the commission does not displace the legislature’s enactment power. It simply operates as a backup should the legislature fail to complete its redistricting duty. Second, if the commission does act, the commissioners are almost certainly all legislators. No law prohibits legislators from sitting as commissioners and historically the commissioners have all been legislators.\footnote{145} Further, legislators have the power to select every single commissioner, rather than only a subset,
ensuring they maintain complete control. At this level of legislative oversight, Connecticut’s commission seems almost guaranteed to pass ISLT-Lite.

c. Washington

Washington’s commission meets the ISLT-Max thresholds for commission creation and plan enactment but fails to meet the corresponding threshold for commission membership and selection. In this way, the commission likely fails ISLT-Max because the legislature cedes “primary responsibility” to the commission via its membership. The commission does, however, likely survive ISLT-Lite as it meets the thresholds for all three criteria.

The legislature chooses the majority of commissioners, but legislators may not serve on the commission at all. Therefore, the legislature does not have “primary responsibility” over drawing the maps, failing ISLT-Max.

However, Washington’s commission likely does survive ISLT-Lite. Like in Virginia and Ohio, Washington’s legislature initially acted to establish the commission and willingly chose to delegate its authority over congressional redistricting to the commission by passing a legislatively referred constitutional amendment. The legislature retained power to appoint four of the five commissioners, maintaining its “primary authority” over who draws the maps—likely satisfying ISLT-Lite. The legislature also retained the power to reject the commission’s proposed congressional plans. The legislature must adopt any plan passed by the commission before it becomes law. The governor cannot veto these legislative enactments, meaning the legislature has the final say on the governing plan. That gives the legislature sole authority in passing maps drawn by the commission. Consequently, the commission acts in an auxiliary capacity throughout the process.

146. CONN. CONST. art. III, § 6(b).
148. WASH. CONST. art. II, §§ 43(2)–(3).
149. Id.
152. WASH. CONST. art. II, § 43(7).
153. See id.
The Iowa and New Mexico commissions rank identically in each of the three criteria. Two structural factors remove the legislatures from having “primary responsibility” over each part of the redistricting process, putting them below the minimum control thresholds and rendering the commissions unconstitutional under ISLT-Max.\textsuperscript{154} First, as in Washington, state legislators cannot sit on Iowa or New Mexico’s commissions.\textsuperscript{155} Legislators thus have a degree of separation between themselves and the drawing of the maps. Second, the map-enactment process allows for a gubernatorial veto, permitting the governor to reject even those maps the legislature agrees to enact by the non-legislative commission.\textsuperscript{156} This gubernatorial intervention puts another state official in the position to rebuff the legislature, removing primary responsibility from the legislature over both map enactment and drawing. Since the commissions fail to reach the minimum threshold of legislative control for membership selection and plan enactment, a federal court would likely find these commissions unconstitutional under ISLT-Max.

However, there is likely sufficient legislative oversight to allow these commissions to survive a constitutional challenge under ISLT-Lite. Both commissions meet all three ISLT-Lite thresholds for our criteria. Statutes created both commissions,\textsuperscript{157} which is the highest level of legislative control possible for the first criterion, commission creation. Those statutes gave each legislature “primary responsibility” in this part of the process sufficient to satisfy ISLT-Max,\textsuperscript{158} far exceeding the “auxiliary” responsibility requirement of ISLT-Lite.\textsuperscript{159} The commissions draw the maps, but the legislature retains authority to appoint most of the commissioners (80% in Iowa; 57% in New Mexico).\textsuperscript{160} The commissions then submit those maps for approval through the usual legislative process: approval by the legislature with presentment to the governor.\textsuperscript{161} Chief Justice Roberts is not so much concerned about whether there are other actors in the process (unlike Justice Gorsuch). Instead, he seems more concerned about displacement of the legislature by the commission. So, the possibility of a gubernatorial veto likely does not put these commissions at

\textsuperscript{154} See Democratic Nat’l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (mem.) (Gorsuch, J., concurring in the denial of application to vacate stay).

\textsuperscript{155} IOWA CODE § 42.5(2)(b) (2023); N.M. STAT. ANN. § 1-3A-4(A)(2)(a) (2023).

\textsuperscript{156} IOWA CODE § 42.3; see N.M. STAT. ANN. § 1-3A-9(B) (treating commission plans like proposed legislation); N.M. CONST. art IV, § 22 (providing gubernatorial veto for all legislative bills).

\textsuperscript{157} IOWA CODE § 42; N.M. STAT. ANN. § 1-3A-3.

\textsuperscript{158} Democratic Nat’l Comm., 141 S. Ct. at 29 (Gorsuch, J., concurring in the denial of application to vacate stay).


\textsuperscript{160} IOWA CODE § 42.5; N.M. STAT. ANN. § 1-3A-3(B).

\textsuperscript{161} IOWA CODE § 42.3(1); N.M. STAT. ANN. § 1-3A-9.
risk under ISLT-Lite, especially in light of the chief justice’s beliefs on the legislative role of the governor’s veto.\textsuperscript{162}

e. **Maine**

Maine’s commission is also likely to fail under ISLT-Max. Maine’s commission does not reach the ISLT-Max threshold for the third criterion: its map-enactment process allows for gubernatorial veto.\textsuperscript{163} Although Maine performs well under the other criteria, the opportunity for a state official to step in and rebuke legislature-approved maps is likely dispositive for Justice Gorsuch’s theory, which says that state legislators, “not federal judges, not state judges, \textit{not state governors}, not other state officials” can participate.\textsuperscript{164}

Maine’s commission still has a significant amount of legislative oversight, and we predict it would easily survive ISLT-Lite. Maine’s legislature meets the ISLT-Lite thresholds for all three of our criteria. As in Washington, the Maine legislature chose to amend its state constitution and create a commission via a legislatively referred constitutional amendment.\textsuperscript{165} Although the amendment ceded some legislative power to the commission, the legislature retained “primary authority” for drawing and passing congressional maps. The legislators appoint two thirds of the commission, and in the most recent commission, all ten legislator-appointed members were themselves legislators.\textsuperscript{166} The members not appointed by legislators still have a vote, giving the commission a nonlegislator voice.\textsuperscript{167} As in Iowa and New Mexico, maps passed by Maine’s commission are subject to a gubernatorial veto.\textsuperscript{168} These elements demonstrate the commission still only plays an “auxiliary” role without “displacing” the legislature.\textsuperscript{169} Thus, it would likely fail ISLT-Max, but survive ISLT-Lite.

f. **New York**

New York’s commission likely fails under ISLT-Max because it fails to reach ISLT-Max’s thresholds for commission membership and map enactment. First, as in Washington, legislators are not allowed to sit as commissioners, even though they can appoint a majority of those commissioners.\textsuperscript{170} That removes the legislature from having “primary responsibility” over the map-

\begin{footnotesize}
\begin{itemize}
\item[162.] $\text{See supra}$ note 110 and accompanying discussion.
\item[163.] ME. CONST. art. IV, pt. Third, §§ 1-A, 2.
\item[164.] Democratic Nat’l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (mem.) (Gorsuch, J., concurring in the denial of application to vacate stay) (emphasis added).
\item[165.] Amendments to the Maine Constitution, 1820 - Present, supra note 89.
\item[166.] Commission Members, ME. STATE LEGISLATURE, https://legislature.maine.gov/appportionment-commission/commission-members [perma.cc/3Y55-NRF2].
\item[167.] ME. CONST. art. IV, pt. Third, § 1-A.
\item[168.] Id. §§ 1-A, 2.
\item[170.] NY. CONST. art. III, §§ 5-b(a)–(b).
\end{itemize}
\end{footnotesize}
drawing process, which alone likely renders the commission unconstitutional under ISLT-Max. Second, as in New Mexico, Iowa, and Maine, New York’s governor has the power to veto any maps drawn by the commission and passed by the legislature.\textsuperscript{171} This strong role for a nonlegislative entity is likely dispositive in determining the unconstitutionality of the commission under ISLT-Max.

However, New York’s commission would likely survive ISLT-Lite as the legislature attains the threshold of control for all three criteria under ISLT-Lite. The legislature created the commission via a legislatively referred constitutional amendment.\textsuperscript{172} Further, the commission’s maps are subject to the legislative process before they become law.\textsuperscript{173} Legislators also appoint an overwhelming majority of commissioners (eight out of ten).\textsuperscript{174}

g. Utah

Utah’s commission fails ISLT-Max because the legislature’s control over plan enactment does not rise to the minimum legislative control threshold under ISLT-Max. As in New York, the governor can veto the maps drawn by Utah’s commission and passed by the legislature.\textsuperscript{175} This role by a nonlegisla-
tive “state actor” seems dispositive in rendering the commission unconstitu-
tional under ISLT-Max.\textsuperscript{176}

The commission would likely survive ISLT-Lite, however, because the legis-
lature meets ISLT-Lite’s control thresholds for all criteria. Most importantly, the legislature can ignore the commission. A voter-initiated state statute cre-
ated Utah’s commission, meaning the legislature can amend how it oper-
ates.\textsuperscript{177} Indeed, after its creation, the legislature amended the commission to make it solely advisory.\textsuperscript{178} The commission draws maps that the legislature can adopt, but in practice the legislature ignores the commission and draws its own maps, subject to gubernatorial veto.\textsuperscript{179} It seems unlikely that a federal

\begin{itemize}
\item \textsuperscript{171} Id. § 4(b).
\item \textsuperscript{172} Laws & Regulations: Relevant State and Federal Statutory Provisions, supra note 89.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} See UTAH CODE ANN. § 20A-20-201(8)(b) (2023).
\item \textsuperscript{176} Democratic Nat’l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (mem.) (Gorsuch, J., concurring in the denial of application to vacate stay).
\item \textsuperscript{177} Utah Proposition 4, Independent Advisory Commission on Redistricting Initiative (2018), supra note 89.
\item \textsuperscript{178} Spencer, Utah: State Summary, supra note 107. Advisory commissions typically only advise and assist the entity, typically the state legislature, which actually draws and enacts into law the final congressional maps. Creation of Redistricting Commissions, NAT’L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), https://www.ncsl.org/redistricting-and-census/creation-of-redistricting-commissions [perma.cc/4ZG3-GTF6]; Cain, supra note 8, at 1813–15.
\end{itemize}
court would deem this kind of advisory commission anything other than “auxiliary.” Further, the state legislature can appoint a majority of the commissioners, even though legislators cannot themselves serve on the commission. Thus, the commission would likely survive ISLT-Lite.

3. Commissions Likely to Be Unconstitutional Under Either Theory

That leaves ten commissions a federal court would likely hold unconstitutional even under ISLT-Lite: Idaho, New Jersey, Alaska, Colorado, Hawai‘i, Montana, Arizona, Maryland, California, and Michigan. None of these commissions meet the ISLT-Lite thresholds for all three criteria and are unlikely to survive under either theory.

a. Idaho & New Jersey

The Idaho and New Jersey commissions share identical characteristics under our three criteria. In both states, the legislatures meet the ISLT-Lite control threshold for commission membership and the ISLT-Max control threshold for commission creation. However, neither legislature has enough legislative control to meet the minimum threshold under ISLT-Lite for plan enactment: once the commissions pass their maps, the maps become law without any legislative involvement.

The state legislatures created these commissions via legislatively referred constitutional amendments, suggesting a high level of legislative control. However, by delegating all power to draw and enact the plans to the commissions, the legislatures ceded “primary responsibility” in that process. Commissions are not limited to an “auxiliary role” in redistricting if they can enact congressional plans without any legislative input. That seems to directly contravene exactly what Chief Justice Roberts looks to avoid in his understanding of ISLT.

Therefore, during plan enactment (criterion three), the commissions displace the state legislatures in the redistricting process. While the legislatures’ ability to appoint a majority of the commissioners provides the legislatures with slightly more control, this is unlikely to save these commissions under ISLT-Lite because the commissions themselves retain all authority to draw, draw, and enact.
pass, and enact maps without sending those maps to the legislatures for approval.\textsuperscript{187} Lastly, even though the legislatures chose to cede this plan enactment authority to the commissions via legislatively referred constitutional amendments, Chief Justice Roberts is clearly concerned about not just legislative displacement in creation, but also about the legislatures maintaining more than “auxiliary” control in the enactment stage.\textsuperscript{188} If the legislatures do not meet the control mark for plan enactment, a high degree of control over commission creation is unlikely to save the commissions under ISLT-Lite. Therefore, in the absence of greater legislative control over plan enactment, a federal court is unlikely to find these commissions constitutional under ISLT-Lite.

b. \textit{Alaska}

Alaska’s commission likely fails under ISLT-Lite for the same reason as Idaho’s and New Jersey’s: they all allow their commissions to pass the maps unilaterally, without legislative oversight.\textsuperscript{189} Therefore, Alaska’s commission similarly does not meet the ISLT-Lite legislative control threshold over plan enactment. While Alaska’s commission does meet the ISLT-Lite control threshold for commission membership selection, it barely fairs better on this criterion than does New Jersey’s or Idaho’s commission. While legislators in New Jersey and Idaho can appoint a majority of the commission, giving legislators some authority to pass the maps by proxy, legislators in Alaska can only appoint two out of five commissioners.\textsuperscript{190} This makes the Alaska commission the only one where legislators have appointment power but appoint only a minority of commissioners.\textsuperscript{191} While the Alaska legislature did create the commission by legislatively referred constitutional amendment,\textsuperscript{192} and therefore meets the ISLT-Max control threshold for commission creation, that fact alone is unlikely to overcome the low legislative control on the other criteria. In turn, it is unlikely that a judge would find the commission plays only an “auxiliary role” in the redistricting process.\textsuperscript{193} Therefore, with this low overall level of legislative control, the commission would likely fail under ISLT-Lite.

c. \textit{Colorado}

Colorado’s commission structure is different in at least two ways from any other commission examined thus far. These differences make it even less likely to survive under ISLT-Lite than the previously discussed commissions.

\textsuperscript{187} See supra Table 3.
\textsuperscript{188} \textit{Ariz. State Legislature}, 576 U.S. at 847–48 (Roberts, C.J., dissenting).
\textsuperscript{189} \textit{ALASKA CONST. art. VI, § 10}.
\textsuperscript{190} Id. § 8.
\textsuperscript{191} See supra Section II.B.
\textsuperscript{192} HARRISON, supra note 89, at 113–15.
\textsuperscript{193} \textit{Ariz. State Legislature}, 576 U.S. at 848 (Roberts, C.J., dissenting).
Unlike in Alaska, where the legislature can appoint some commissioners, Colorado legislators cannot directly appoint any commissioners, making its constitutionality under ISLT-Lite highly suspect as it falls below the ISLT-Lite control threshold for the membership selection criterion. A nonpartisan legislative staff draws the initial congressional district plans, which ostensibly provides the legislature with some control over the map drafting and enactment processes possessed by the commission. A federal court would presumably consider legislative staff as legislative officials but may not consider them equivalent to the legislature itself. This additional level of separation suggests that the legislature would not have “primary authority” over the commission in a formalistic sense; instead, the legislature would have authority over the legislative staff that then submits its maps to the commissioners to consider for adoption and enactment. Therefore, even though the legislative staff resides within the state legislature, its authority seems too far removed from the legislators to survive under ISLT-Lite. Since Colorado’s legislature also does not reach the ISLT-Lite control threshold for plan enactment, this provides further evidence that it is likely to fail under ISLT-Lite.

The final nail in the coffin for Colorado’s commission is the fact that the maps it adopts are subject to approval by the Colorado Supreme Court. This requirement, coupled with the lack of legislative involvement in the membership selection process and the drawing of proposed plans, seems to ensure the commission fails under ISLT-Lite because the state supreme court—not the state legislature—exercises “primary authority” over the maps’ enactment. While the state legislature created the commission itself via a legislatively referred constitutional amendment, this high level of legislative control over criterion one (commission creation) is unlikely to outweigh the significant lack of legislative control on the other two criteria. Further, the legislature’s attenuated oversight ability over the “nonpartisan” staff that aids the commission is likewise unlikely to overcome the significant lack of legislative control in these other areas. Consequently, a federal court would likely find Colorado’s commission unconstitutional under ISLT-Lite.

194. COLO. CONST. art. V, § 44.1.
195. The nonpartisan staff is part of the “general assembly’s legislative council and office of legislative legal services” and assists in selecting commissioners and with the congressional redistricting commission’s map-drawing process. Id. §§ 44, 44.1(3)(a), 44.2. The Legislative Council’s Staff serves as the “nonpartisan research arm of the Colorado General Assembly” and performs functions including “provid[ing] support to legislative committees, respond[ing] to requests for research . . . and perform[ing] other centralized legislative support services.” About the Legislative Council Staff, COLO. GEN. ASSEMBLY, https://leg.colorado.gov/agencies/legislative-council-staff [perma.cc/V33E-JDCH].
196. COLO. CONST. art. V, § 44.4.
198. COLO. CONST. art. V, § 44.4.
199. Id. § 44.5.
d. Hawai‘i & Montana

The Hawai‘i and Montana commissions fare equally across all three criteria. While the commissions meet the ISLT-Lite control thresholds for commission creation and membership selection, they fail to meet the threshold for plan enactment. Therefore, both likely fail to survive ISLT-Lite.

These commissions were created at constitutional conventions. While legislatures had no direct voting role in creating the commissions at the conventions, the fact that the legislatures called for the conventions initially would likely ensure the legislatures maintained enough control over this criterion for the commissions to survive ISLT-Lite. Further, the state legislatures can appoint a majority of commissioners to the commissions, even if legislators cannot serve as commissioners. This further increases legislative control over the commissions. However, unfortunately for these commissions’ chances of surviving ISLT-Lite, they unilaterally draw and pass the congressional maps without providing the state legislatures a role in the process. This complete displacement of the legislatures in plan enactment, which also occurs in Idaho and New Jersey, is likely dispositive in determining the commissions’ unconstitutionality under ISLT-Lite. Such power gives the commissions far more than “auxiliary” control over plan enactment. After considering all these factors, it is likely that such a low level of legislative authority over the redistricting process would result in both commissions failing under ISLT-Lite.

e. Arizona

Arizona’s commission will likely fail constitutional scrutiny under ISLT-Lite based on our three criteria. Compared to other legislatures, Arizona’s legislature has close to the lowest amount of legislative control over its commission under two criteria: commission creation and plan enactment. For both, the commission fails to meet the ISLT-Lite control threshold. Voters themselves created the commission by ballot initiative. This process embedded

201. Hawaii Provisions for Future Reapportionment, Amendment 2 (1968), supra note 89 (Hawai‘i); Lansom, supra note 89 (Montana); MONT. CONST. art. V, § 14, cl. 2 (same).


203. HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14.

204. HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14.


the commission into the state constitution, insulating it from legislative alteration.\textsuperscript{207} Additionally, the commission draws and passes maps unilaterally. It does not need the approval of the legislature or any other institution.\textsuperscript{208} While the legislature can appoint most of the commissioners, which ensures the commission meets the ISLT-Lite threshold for the membership selection criterion, legislators cannot sit on the commission themselves.\textsuperscript{209} Combined, this minimal-to-nonexistent level of participation by the legislature in each part of the redistricting process puts Arizona’s commission in one of the most precarious constitutional positions.

Arizona’s commission is perhaps the easiest to assess under these theories as it was directly at issue in Arizona State Legislature.\textsuperscript{210} Chief Justice Roberts wrote his dissenting opinion establishing the modern ISLT-Lite in direct response to a challenge to the Arizona commission’s constitutionality. Chief Justice Roberts’s dissent made clear that Arizona’s legislature does not “retain[] primary authority over congressional redistricting”;\textsuperscript{211} instead, the commission does. Therefore, its structure has effectively already been deemed to violate ISLT-Lite.\textsuperscript{212} Given that the chief justice finds Arizona’s commission unconstitutional, commissions with even less legislative control are similarly easy targets for unconstitutionality under ISLT. Three such commissions exist: Maryland’s, California’s, and Michigan’s.

\textit{f. Maryland}

Maryland’s commission differs significantly from all other commissions. Maryland’s governor created the commission by executive order without the legislature’s involvement.\textsuperscript{213} The executive order prohibits legislators from serving as commissioners and gives them no role in choosing commissioners.\textsuperscript{214} This displaces the legislature’s authority in map drawing and commission creation, dooming the commission under ISLT-Lite. The commission

\begin{itemize}
  \item \textsuperscript{207} \textsc{Mathis et al.}, supra note 89, at 3.
  \item \textsuperscript{208} Ariz. Const. art. IV, pt. II, § 1 (authorizing the legislature to submit its recommended changes to the commission’s maps but permitting the commission to ignore those recommendations and choose its own desired map).
  \item \textsuperscript{209} Id.
  \item \textsuperscript{210} Ariz. State Legislature, 576 U.S. at 787.
  \item \textsuperscript{211} Id. at 848 (Roberts, C.J., dissenting).
  \item \textsuperscript{212} The Court in Moore did not seem to disturb this understanding of what Arizona State Legislature stands for. \textit{See supra} note 59.
  \item \textsuperscript{213} Spencer, Maryland: State Summary, supra note 107. The governor claimed his authority to create such a commission rested in the Maryland Constitution, which states that the governor “shall prepare a [congressional redistricting] plan setting forth the boundaries of the [state] legislative districts” to then propose to the legislature for consideration. Md. Const. art. III, § 5; Exec. Order No. 01.01.2021.02, 48–4 Md. Reg. 153 (Feb. 12, 2021). Therefore, he used this power to delegate initial map-drawing authority to the commission.
  \item \textsuperscript{214} 48–4 Md. Reg. 153.
\end{itemize}
not only fails to reach the ISLT-Lite control threshold for commission creation and membership selection, but also ranks at the lowest reported level for legislative control in these areas across all the commissions we considered. These factors practically guarantee that the commission would not survive under either theory.

The Maryland legislature does retain sufficient legislative control for the commission to meet the ISLT-Lite threshold over plan enactment, but this element alone is unlikely to render the commission constitutional under ISLT-Lite. The governor’s commission draws plans that it proposes to the state legislature,\textsuperscript{215} which the legislature can eschew in favor of its own map.\textsuperscript{216} If it does ignore the commission’s plans, the legislature must pass its own plans, subject to gubernatorial veto.\textsuperscript{217} This amount of control over plan enactment is surely not insignificant; indeed, we predict that all other commissions with equivalent control over plan enactment would survive ISLT-Lite.\textsuperscript{218} However, unlike these other commissions, this higher degree of legislative control over plan enactment is unlikely to overcome the fact that the legislature played no part in the creation of the commission and holds no control over who sits on the commission. These other states also saw their commissions meet the ISLT-Lite thresholds for the other two criteria, which Maryland’s commission clearly does not pass.

The governor still “displaced” the legislature’s authority without its consent by unilaterally creating a commission and conferring it with some legitimacy and redistricting power. Chief Justice Roberts took strong issue with a voter-led ballot initiative displacing Arizona’s legislature,\textsuperscript{219} and he likely would not approve of a different nonlegislative actor creating a commission with the same effect—removing the legislature from the creation process. Even more, the fact that the governor explicitly prohibited legislators from serving on the commission, and therefore excluded them from having an influence on the commission’s drafted plans,\textsuperscript{220} further removes the legislature’s control from this part of the process. Lastly, while the legislature does not have to adopt the commission’s plan, it likely must at least consider the plan before outright rejecting it, lest the governor’s constitutional power to prepare and send maps to the legislature be rendered superfluous.\textsuperscript{221} This ensures the commission does at least have agenda-setting power in the plan enactment arena. Such a power is at most “auxiliary” compared to the legislature’s power for the plan enactment criterion, but the commission retains far more than “auxiliary”

\textsuperscript{215} State of Maryland, supra note 107.
\textsuperscript{216} Redistricting in Maryland, supra note 107.
\textsuperscript{217} Spencer, Maryland: State Summary, supra note 107.
\textsuperscript{218} See supra Section II.D.2.d–g.
\textsuperscript{221} See MD. CONST. art. III, § 5.
redistricting power when considering all three factors together. Therefore, it is unlikely Maryland’s commission survives ISLT-Lite.

g. California & Michigan

California’s and Michigan’s commissions are almost identical in their procedures and have the same ranking for each of our three criteria: near last in legislative control. Their legislatures wield the least amount of control over these commissions compared to any other state legislature. Further, their legislatures are the only ones that do not meet the ISLT-Lite legislative control thresholds for any considered criterion. For these reasons, we predict that California’s and Michigan’s commissions are the most likely to be struck down by a federal court as unconstitutional under ISLT-Lite.

Like voters in Arizona, voters in California and Michigan usurped congressional redistricting power from their states’ legislatures by creating these commissions through voter-led ballot initiatives. The states’ constitutions prohibit any legislators from sitting as commissioners on these bodies and even prohibit legislators from directly appointing commissioners, leaving legislators with only a minor power to strike some applicants from consideration as commissioners. Once formed each cycle, the commissions act entirely independently from the state legislatures in drawing, adopting, and enacting a congressional redistricting map. At no point in these processes do the California or Michigan legislatures possess the power to amend, oversee, or change these maps, and no presentment to the governor is necessary for the maps to become law.

Due to this significant exclusion of legislative control over the commissions in their redistricting processes, these commissions would almost certainly fail under ISLT-Lite. In structuring these commissions in this way, voters severed the power of congressional redistricting from their legislatures. Therefore, the commissions do not play a simply “auxiliary role”; they directly “cut [the legislature] out of that process” and almost entirely “displace” any of its control, in contravention of ISLT-Lite.


223. California legislators can cut a total of twenty-four candidates—eight democrats, eight republicans, and eight unaffiliated individuals—from a pool of sixty applicants selected by an independent panel. CAL. GOV’T CODE § 8252 (West 2021); State of California, supra note 99. Michigan’s legislative leaders may strike twenty such candidates. MICH. CONST. art. IV, § 6(2)(e).

224. CAL. CONST. art. XXI, § 2; MICH. CONST. art. IV, § 6.

225. CAL. CONST. art. XXI, § 2; MICH. CONST. art. IV, § 6.

226. See CAL. CONST. art. XXI, § 2 (California); We Ended Gerrymandering in Michigan, supra note 89 (Michigan).

voters did exactly what ISLT-Lite warns is forbidden under the Elections Clause: they “address [redistricting] concerns by displacing their legislature.” It is unlikely any federal court would uphold these commissions under ISLT-Lite.

III. RECOMMENDATIONS

Our predictions leave eighteen states’ commissions vulnerable to constitutional challenge under ISLT-Max, with ten of those commissions vulnerable under ISLT-Max and ISLT-Lite. Presumably, the states with these vulnerable commissions will want to (and should) continue pursuing the goal of eliminating or minimizing partisan gerrymandering. Further, other states currently without a congressional redistricting commission may want to create one.

While Indiana’s commission—where the state legislature retains almost absolute control over redistricting—may seem like the best model for states looking to create congressional redistricting commissions that would survive constitutional muster under either ISLT, commissions with this structure would almost certainly not achieve the reduction in partisan gerrymandering states are looking for. Therefore, in this Part, we offer two commission templates that are as aggressive as possible on eliminating partisan gerrymandering, while staying constitutional under each theory. We hope these proposals serve as guides to states looking to root out partisan gerrymandering to the greatest extent possible in a world where the ISLT could still become the law of the land.

A. ISLT-Lite Template Commission

If the Supreme Court were to adopt ISLT-Lite in the future, states can give their commissions certain features to help insulate them from constitutional

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228. Id. at 849.
230. Those states are Idaho, New Jersey, Alaska, Colorado, Hawai‘i, Montana, Arizona, Maryland, California, and Michigan. See supra Section II.D.3.
231. For the purposes of our analysis, we equate the extent to which a commission is independent from legislative control with the effectiveness of combatting partisan gerrymandering.
challenged while still providing the commissions with enough independence to combat partisan gerrymandering. This template uses features of the three criteria considered in Part II that, when combined, would create a commission likely to withstand a constitutional challenge under ISLT-Lite.

First, states should adopt their commissions through either constitutional conventions or legislatively referred constitutional amendments like Colorado, Hawai‘i, Idaho, and Virginia did.\textsuperscript{234} We predict both routes are likely to survive ISLT-Lite, but the convention route is slightly riskier due to lower legislative control over the creation process. Ultimately, the choice here may depend on the available and feasible method in a given state, as all states may not have constitutional referral or convention abilities. Regardless of the chosen path between these two, constitutionalizing the commission better protects its longevity by insulating it from the shifting political whims of future legislators that may want to engage in partisan gerrymandering. The petitioners in \textit{Moore} argued that “[s]tatutes are always less problematic under the Elections Clause because they can be repealed. . . . [and] rewritten by the state legislature.”\textsuperscript{235} However, Justice Barrett questioned the strength of this view, noting that “a lot of state constitutions can be amended by simple majorities.”\textsuperscript{236} Further, Chief Justice Roberts’s concern in \textit{Arizona State Legislature} was that “[a]n Arizona [voter-led] ballot initiative transferred [congressional redistricting] authority from ‘the Legislature’ to an ‘Independent Redistricting Commission.’”\textsuperscript{237} Under these ISLT-Lite views, a redistricting commission created by the \textit{legislature itself} might dodge justices’ concerns about legislative control in the redistricting process. A commission created in this way would also allow a state to argue that its redistricting commission is still accountable to the state legislature since the legislature blessed the commission to act in this area.

To balance concerns about ISLT and partisan gerrymandering, states should also give their legislatures the power to appoint the \textit{thinnest possible majority} of the commissioners, like commissions in Iowa, Montana, and New Mexico.\textsuperscript{238} We do not predict a meaningful doctrinal difference in outcomes under ISLT-Lite depending on whether the legislature can appoint its own members or proxies \textit{so long as} the legislature retains at least the ability to appoint a majority of these seats.\textsuperscript{239} The legislature would likely maintain sufficient control over the commission for membership selection if it can appoint

\begin{itemize}
  \item \textsuperscript{234} See supra Table 1.
  \item \textsuperscript{235} \textit{Moore} Transcript, supra note 56, at 59.
  \item \textsuperscript{236} Justice Barrett further questioned, “When [the constitution] can be changed by a simple majority, why is that more entrenchment and why would we say that having it appear in the Constitution is problematic when, if it appeared through the referendum process and the legislative process, it’s not.” \textit{Id.} at 63–64.
  \item \textsuperscript{238} See supra Table 2.
  \item \textsuperscript{239} See supra Section II.B.
\end{itemize}
its own members or “proxies.” So long as the legislature can appoint a majority, the commission itself arguably acts as a proxy for the legislature’s wishes (assuming proxies would vote the same as legislators themselves) and therefore would still hold only “auxiliary” control over the redistricting process compared to the legislature.240 Ultimately, since we predict no difference in outcomes, we recommend a majority proxy-only appointment scheme, but more risk-averse states may justifiably wish to give their legislatures the option to appoint their own members.241

It seems at least slightly more likely that having proxies, rather than legislators themselves, as commissioners may better help achieve the goal of reducing partisan gerrymandering—if anything by simply improving the optics and public perception of the commission. While legislators must appoint some seats for the commission to remain constitutional under ISLT-Lite, states should refrain from having legislators appoint all members (or all voting members) to the commission because voting members not appointed by legislators can mitigate the worst impulses toward partisan gerrymandering and can engender potential compromise among commissioners.242 Creating a commission where legislators appoint a small majority of commissioners will hopefully strike a permissible balance in the eyes of federal judges.

Finally, states should give commissions the power to draw and pass maps subject to approval via the regular legislative process, which includes the potential for a gubernatorial veto. We predict any further removal of the legislature from final plan enactment (such as allowing commissions to act unilaterally or giving the state supreme court final approval authority) would be detrimental to the constitutionality of a commission under ISLT-Lite. This safer, more litigation-averse approach may help convince stakeholders in other states to pursue a commission because legislators would retain greater power in the process. A commission with this map-enactment process would remain protected to some degree from partisan gerrymandering in two important ways: the commission would draw the maps the legislature can choose from, and the governor would have a veto. Those checks help insulate the commission from partisan gerrymandering in creating the plan, while simultaneously ensuring the legislature maintains “primary authority” over enacting the final plan.243


241. As a reminder, most commissions that share this 50%-plus appointment characteristic do not allow their state legislatures to appoint current local, state, or federal officeholders. See supra notes 102–104 and accompanying discussion.


B. ISLT-Max Template Commission

If the Supreme Court were to adopt ISLT-Max in the future, an à-la-carte commission that can do the most under our criteria to eliminate partisan gerrymandering—while maximizing its chances of staying constitutional—will be less aggressive and inherently more under the control of the legislature than the commission proposed for use under ISLT-Lite. However, that does not mean a redistricting commission is no longer worthwhile. This ISLT-Max model likewise relies on the criteria considered in Part II to propose a sustainable congressional redistricting commission if the Supreme Court were to adopt ISLT-Max.

Under the commission creation criterion, states can likely adopt one of the same approaches as proposed for the ISLT-Lite template commission in the previous Section. A commission created by a legislatively referred amendment ensures the legislature has significant control under this criterion, while insulating the commission from the partisan instability more inherent to statutorily created commissions. This recommendation is consistent with our prediction that Virginia’s commission, created by a legislatively referred constitutional amendment, would likely survive even under ISLT-Max. This would likely satisfy the requirement that the legislature, not any other state entity, maintains “primary responsibility” over the creation of the commission. 244 However, the constitutional convention option disappears under the ISLT-Max approach. The legislature simply cedes too much control in the redistricting process to survive ISLT-Max if it creates a commission via convention. Therefore, we recommend states create their commissions through a legislatively referred constitutional amendment if, under ISLT-Max, they want to receive similar benefits as they would through a convention, but without the doctrinal downsides.

Under the commission membership criterion, it is likely that the most aggressive antigerrymandering position that could still survive scrutiny under ISLT-Max is guaranteeing legislators constitute 50% of the commissioners’ seats. In this way, the legislature retains “primary responsibility” over who draws the commission’s maps as the entity that controls the largest voting bloc on the commission. Guaranteed legislator representation, rather than a lesser appointment power, is likely necessary to survive ISLT-Max. Appointees, while potentially strong proxies for the legislators that appoint them, would likely not pass the formalist strictures of Justice Gorsuch’s ISLT-Max. 245 For the remaining seats, however, we recommend the commissioners be chosen from general applicants without any input from the legislature. This may help reduce partisanship, and it differs from a system like Virginia’s, which allows legislators to designate a pool of candidates for the remaining seats not chosen by the legislature. Virginia’s commission likely passes ISLT-

245. See id.
Max muster partially because legislators automatically comprise 50% of the commission’s seats. So long as legislators maintain 50% of commissioner seats, and therefore guarantee that no map can pass without legislative support, the legislature likely maintains “primary responsibility” over the redistricting process, regardless of the level of control it maintains over the selection of the remaining commissioners. Therefore, this option should allow states to experiment with bringing in less partisan nonlegislator commissioners to fill the remaining 50% of commissioner seats, without calling into question the commission’s survival under ISLT-Max.

Finally, for map enactment, the best procedure available for fighting partisan gerrymandering that is (probably) constitutional under ISLT-Max is giving the commission power to propose an initial congressional redistricting plan that requires legislative approval before enactment. This renders the commission as purely advisory and gives the legislature final approval authority for map enactment without granting the commission an opportunity to alter the legislature’s ultimate decision. The governor should have no veto power over the legislature’s decision. This structure of final approval ensures no map can become law without the legislature’s approval, which gives the legislature “primary responsibility” over the enactment of the maps. While the legislature can accept or reject any map, it cannot nullify or ignore the commission’s efforts completely because it would still receive and consider maps by the commission. The commissioners can do their jobs, and if the legislature dislikes the map, the commission can try again. But ultimately, the legislature gets the final say on which map becomes law. This might cause the commission to gravitate toward what the legislature prefers, but that compromise is better than making the commission superfluous.

**Conclusion**

The “blast radius” if the Supreme Court had adopted ISLT in *Moore v. Harper* would have “sow[n] elect[oral] chaos” and devastated congressional redistricting practices across the country.\(^{246}\) The country dodged this bullet the first time around, but the Court left room for ISLT to wreak havoc on our institutions in the future should a more targeted challenge present itself.\(^{247}\) This Note attempts to concretize that potential impact. Regardless of which theory the Court may adopt in the future, ISLT would undo the will of state legislatures, voters, and/or the framers of state constitutions across twenty different states, affecting hundreds of millions of voters.\(^{248}\) Both theories would severely limit the states’ ability to fight partisan gerrymandering and remove

\(^{246}\) See Moore Transcript, *supra* note 56, at 71 (Statement by Neal K. Katyal).

\(^{247}\) See Pildes, *supra* note 3.

\(^{248}\) As of the end of 2022, the total population of individuals living in a state with a congressional redistricting commission was approximately 150 million, based on population data from the 2020 Census. 2020 Population and Housing State Data, U.S. CENSUS BUREAU (2021), https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html [perma.cc/L7DW-K7N4].
the last effective bastion against combatting that pernicious practice. Unless they were to drastically change their commissions to conform to ISLT’s requirements, states would need to choose between fighting partisan gerrymandering by holding two different systems of elections for federal and state legislatures or giving up their redistricting commissions and accepting partisan gerrymandering as a required evil of modern American democracy. Either way, the impact of ISLT on our electoral systems and political future cannot be overstated. We hope that this Note takes the abstract impacts of ISLT and makes them real enough for ordinary voters and citizens to understand. Perhaps most of all, we hope that this contribution illuminates the dangers that this theory poses to the future of congressional redistricting throughout the United States and how state leaders can act to defend these systems to the greatest extent within their control.