



## Supreme Court May Adopt Extreme MAGA Election Theory That Threatens Democracy

Michael Sozan

September 26, 2022

The U.S. Supreme Court, which is dominated by a radical right-wing majority, is again on the precipice of deciding a case that would be a major setback for free and fair elections and democracy. In its new term, the high court will hear arguments in *Moore v. Harper*, a case from North Carolina involving the authority of the state legislature to gerrymander congressional maps for unfair partisan advantage. There is a strong possibility that the court's conservative majority will adopt the anti-democratic independent state legislature (ISL) theory, which has been promoted by MAGA extremists claiming that there are virtually no checks and balances on state legislatures in key election matters, even by voters or their state's own courts. This theory has long been considered to be on the fringes of conservative legal arguments and discredited by the Supreme Court for more than a century.

The potential fallout of this case is enormous. If adopted, the radical ISL theory could allow state legislatures—and only state legislatures—to regulate federal elections and congressional map drawing, without regard to a state's constitution and without input from state courts, governors, secretaries of state, election administrators, or voters. Even more disturbing, rogue state legislatures could even try to push their new powers further to determine the results of presidential elections. It is little wonder that even conservative judges and scholars reject the dangerous ISL theory.

Without any meaningful checks on overreach by state legislatures, many of which have recently enacted laws rooted in the “big lie” aimed at suppressing voters and sabotaging free and fair elections, the ISL theory could undermine the very foundations of democracy. A Supreme Court ruling embracing the radical notion that state legislatures have absolute and sole authority to regulate federal elections could be a giant step backward for our multiracial democracy and protections of our cherished freedoms. At a time when democracy is under assault on multiple fronts, adoption of the ISL theory would be a perilous power grab with potentially calamitous effects.

## **The case under review: Moore v. Harper**

On June 30, 2022, the Supreme Court agreed to hear *Moore v. Harper*, which involves a challenge to gerrymandered congressional maps in North Carolina.<sup>1</sup> In that case, the North Carolina Supreme Court determined that the maps drawn by the Republican-controlled legislature were crafted for unfair partisan advantage, which violated multiple provisions of the state constitution, including the “free and fair elections clause.”<sup>2</sup> The state Supreme Court ruled that the maps should be redrawn to more fairly represent all North Carolinians. In its decision, the state court followed the legal road map laid out by the U.S. Supreme Court just a few years earlier in *Rucho v. Common Cause*, where the high court explicitly ruled that in gerrymandering litigation, “state statutes and state constitutions can provide standards and guidance for state courts to apply.”<sup>3</sup>

In rendering its pro-voter decision, the North Carolina Supreme Court rejected the radical argument that the state legislature had the sole authority to draw congressional maps without consideration of the state constitution and without review by state courts. The court correctly concluded that the ISL theory would upend long-settled precedent and is “repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences.”<sup>4</sup>

Nonetheless, continuing its radical quest, the North Carolina legislature asked the U.S. Supreme Court to hear the case and reinstate its maps. The Supreme Court granted certiorari and will hear oral arguments sometime in its upcoming term starting on October 3, with a ruling likely by June 2023.<sup>5</sup>

## **The illogical reasoning underpinning the independent state legislature theory**

The ISL theory, which is unmoored to existing legal precedent, relies on a nonsensical interpretation of the U.S. Constitution claiming that state legislatures have unfettered authority to set rules for federal elections and cannot be countermanded by any other state-based entities, thus eliminating any checks and balances. These other state-based entities include state courts—even when the courts are applying right-to-vote provisions in the state’s constitution—as well as the state executive branch, state and local election officials, state ballot initiatives, or other non-legislative state entities such as independent redistricting commissions. For example, the ISL theory could prevent a governor from vetoing an anti-voter bill. And in situations where the legislature may not have addressed a specific policy—such as voting by mail during a pandemic—or expressly delegated its authority to executive branch officials, election officials or courts could be prohibited from filling in the gaps. It is not a stretch to say that the radical ISL theory weakens the very foundations of federalism and judicial review and upends democratic norms.

The theory’s proponents root their argument in the elections clause of the U.S. Constitution (Article I, Section 4), which gives each state legislature the authority to set the time, place, and manner for conducting congressional elections, subject to any superseding rules set by Congress.<sup>6</sup> Proponents also cite the Constitution’s electors clause (Article II, Section 1, Clause

2), which vests each state legislature with the authority to determine the manner of how a state chooses its presidential electors.<sup>7</sup>

ISL theory proponents unconvincingly cite several cases for support, including a 2020 Supreme Court election-related case, which states, “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.”<sup>8</sup> In addition, they point to a 1920 Supreme Court case holding that the term “legislature” means a “representative body which made the laws of the people.”<sup>9</sup> For reasons discussed below, these arguments fail to justify adoption of the ISL theory because they are belied by the vast counterweight of the Supreme Court’s precedent, the U.S. Constitution, and historical fact.

### **The extreme conservatives pushing the independent state legislature theory**

In the past few years, extreme conservatives have made a concerted effort to persuade courts, including the Supreme Court, to change course and adopt the radical ISL theory.

Donald Trump, aided by now-discredited attorney John Eastman and other allies, made the ISL theory a key building block in his conspiracy to pressure several battleground states in the 2020 election to appoint alternate electors and steal the election from President Joe Biden.<sup>10</sup> Trump told former Vice President Mike Pence, who oversaw the counting of Electoral College votes, to use the ISL theory as a basis to disregard the Electoral College results, but Pence properly refused after determining that he had no constitutional basis to do so.<sup>11</sup> Angry with Pence’s decision, Trump allegedly encouraged a violent mob to wage an insurrection at the U.S. Capitol on January 6, during the counting of the electoral votes. Although this effort was unsuccessful in 2020, the Supreme Court’s upcoming decision in *Moore v. Harper* could give fresh ammunition to Trump and his team in 2024 if they again try to illegally seize the presidency.

Deep-pocketed conservative special interests are funding the well-coordinated effort to make the ISL theory the law of the land.<sup>12</sup> The ironically named Honest Elections Project, a group pushing for restrictive voting laws, has filed multiple friend-of-the-court briefs, including in *Moore v. Harper*, in an attempt to influence the Supreme Court.<sup>13</sup> That group is reportedly tied to CRC Advisors and the Marble Freedom Trust, organizations that control at least \$1.6 billion in donations and hard-to-trace political spending via Leonard Leo, co-chairman of the conservative Federalist Society.<sup>14</sup> In recent years, Leo has helped to orchestrate the Supreme Court’s current extreme composition by recommending conservative nominees and managing massive spending campaigns to confirm them.<sup>15</sup>

Describing how the puzzle pieces fit together in this extremist scheme, Sen. Sheldon Whitehouse (D-RI) stated, “This phony ‘doctrine’ is an anti-democratic ... power grab masquerading as legal theory. It was cooked up in a right-wing legal hothouse by political operatives looking to give state legislatures the power to overturn the will of American voters in future elections.”<sup>16</sup> Whitehouse concluded, “The fact that the Court is even considering a case involving such an extreme idea shows how beholden it is to the right-wing donors who got so many of the justices their jobs.”<sup>17</sup>

## **Arguments against the independent state legislature theory**

The ISL theory is an extreme, unserious concept that would allow partisan legislators to impede a truly representative and multiracial democracy. The theory is inconsistent with the U.S. Constitution, Supreme Court precedent, and American history, and it upends our federalist system.<sup>18</sup>

The most important factor is whether the term “legislature” means “solely the legislature.” It does not, according to a plethora of scholars across the ideological spectrum.<sup>19</sup> Rather, the standard interpretation of “legislature” is broader,<sup>20</sup> meaning the state’s general lawmaking process, including all the normal procedures and limits (for example, a governor’s signature or veto), citizen-led ballot measures, and rulings of state courts, which often are based on state constitutions. Among the vast array of entities supporting this well-settled view is the bipartisan Conference of Chief Justices, an esteemed group representing the top judges in all 50 states.<sup>21</sup>

Proponents of the extreme ISL theory can point to no convincing modern precedent that would allow state legislatures to regulate elections and map drawing completely unchecked, a result that the nation’s founders would not have endorsed.<sup>22</sup> As longtime voting rights litigator Marc Elias observed, with legal theories to deny the right to vote and to sabotage valid elections becoming more mainstream, it is critically important that judges remain able to protect people’s constitutional rights, interpret laws, put limits on hyperpartisan politicians who too often change the rules to favor their political party, and strengthen democracy.<sup>23</sup>

A fundamental point remains that even lawyers who are respected within conservative circles have criticized the ISL theory and warned of the potential anti-democratic fallout. For example, former federal circuit court judge and conservative stalwart Michael Luttig summed up the stakes starkly, writing that extremists “can only be stopped from stealing the 2024 election at this point if the Supreme Court rejects the independent state legislature doctrine.”<sup>24</sup> The Cato Institute, a right-leaning think tank co-founded and funded by the Koch Brothers, published analyses that concluded that the ISL theory relies on a “long-rejected” interpretation of the Constitution and would disrupt “settled law.”<sup>25</sup> Moreover, in a July 2022 hearing about the ISL theory in the U.S. House of Representatives’ Committee on House Administration, no Republican member voiced explicit support for the ISL theory, and one member—Rep. Barry Loudermilk (R-GA)—specifically said that “state constitutions are a proper check on state legislatures.”<sup>26</sup>

Thus far, although the Supreme Court has not ruled squarely on the boundaries of the ISL theory, it has strongly and repeatedly rejected a sweeping interpretation that would assign a literal reading to the word “legislature.”<sup>27</sup> In the high court’s prior decisions, the operative constitutional provisions have been understood as allowing state legislatures to set the basic rules for conducting federal elections, which are then subject to normal state processes and which include other government components, such as election administrators that prescribe the finer details for administering the vote or state courts that interpret the meaning of state election rules in the context of state constitutions.<sup>28</sup> This broader interpretation makes eminent sense in a functioning democracy with checks and balances.

In fact, as recently as 2015, a 5-4 majority of the Supreme Court struck a blow to the ISL theory in a case involving Arizona's redistricting commission.<sup>29</sup> In that case, the high court concluded that the word "legislature" should be read broadly "in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."<sup>30</sup> Four years later, in a radical decision, the court's conservative majority decided in *Rucho v. Common Cause* that partisan gerrymandering is beyond the reach of the federal courts.<sup>31</sup> But even in that anti-democratic case, Chief Justice John Roberts, writing for the majority, concluded that even if the federal courts cannot intervene, state courts can apply state constitutions and statutes to constrain partisan gerrymandering and wrote approvingly of ballot measures creating independent redistricting commissions in Colorado and Michigan.<sup>32</sup>

It is clear that if the Supreme Court adopts the ISL theory, it will be a major reversal of precedent. But in the past few years, the Supreme Court's composition has markedly changed, and activist conservatives now enjoy a 6-3 majority. CAP has written extensively about the Supreme Court's recent judicial overreach under this new majority, noting how its decisions have "undermined long-standing precedents, laws, and constitutional rights"<sup>33</sup> and have "claw[ed] back the rights of Americans in a way unseen in modern times."<sup>34</sup> In the highest-profile and most flagrant example, the extreme faction of the Supreme Court threw out long-standing precedent in its decision to overrule *Roe v. Wade*, denying the constitutional right to abortion.<sup>35</sup>

Where do the current justices stand when it comes to ISL theory? Four justices—Samuel Alito, Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh—have expressed varying levels of support for the ISL theory in recent opinions.<sup>36</sup> Their support echoes an argument that former Chief Justice William Rehnquist, joined by Justice Thomas and former Justice Antonin Scalia, made in the 2000 *Bush v. Gore* case.<sup>37</sup> Current Chief Justice Roberts, while not agreeing it was appropriate to apply the ISL theory in pre-election cases during the 2020 election cycle,<sup>38</sup> was the lead dissenter in the 2015 Arizona case—where Roberts advanced a slightly narrower version of the ISL theory. Roberts concluded that state legislatures cannot be cut out of setting state election-related rules for federal candidates. He was joined in his dissent by Justices Thomas and Alito. It would not be surprising if the newest conservative justice, Amy Coney Barrett, sides with the court's conservative wing, providing a sixth potential vote for the ISL theory. Thus, in the words of Rick Hasen, professor at the UCLA School of Law and director of the Safeguarding Democracy Project, the ISL theory "hangs out there, as a ticking time bomb, waiting to go off."<sup>39</sup>

### **The harmful effects of the independent state legislature theory**

If the Supreme Court abandons precedent and adopts the radical ISL theory, state legislatures would have sweeping new powers to be the sole arbiters of laws governing elections and gerrymandering and could thwart the right of Americans to elect the leaders of their choice. With at least 17 states recently passing new laws along partisan lines to suppress voters of color and sabotage elections,<sup>40</sup> the effects could be profoundly unfair and anti-democratic. Election deniers and partisan lawmakers could have an unobstructed route to rigging election results and weakening the future of American democracy.

A vast array of harmful consequences could flow from the ISL theory. These include:

- **Stopping state courts from protecting voters:** Extremist legislatures could subvert elections because state courts would be constrained in limiting them from unconstitutional voter suppression, unfair vote counting, and other forms of election sabotage. Courts could have little authority to act in emergency circumstances to protect free and fair elections, such as during natural disasters or pandemics.
- **Ending protections against gerrymandering:** Partisan legislators could have free reign to draw congressional districts to dilute voters in the opposing party. State constitutional bans on gerrymandering in states such as Florida, Ohio, and North Carolina could be ignored, and independent redistricting commissions in states such as Arizona, California, and Michigan could be nullified.
- **Undoing pro-voter election rules enshrined in state constitutions, achieved via ballot measures, or implemented through administrative rules:** These could include provisions such as the right to vote in free and fair elections, early voting, or same-day voter registration.
- **Curtailing the discretionary authority of state and local election officials, including secretaries of state, particularly in cases where state voting laws do not address granular policy details:** For example, if a secretary of state determines that state law allows them discretion to order the counting of certain mail ballots, a partisan legislature could stop them if the legislature had not directly granted discretion over that specific matter.
- **Stripping governors of their long-held ability to veto anti-democratic laws or new maps passed by partisan legislatures, even where such laws violate the state's constitution:** In states where the legislature's majority and governor are from opposite political parties, this could tip the scales and ignore voters' preferences.
- **Making election administration extremely chaotic:** That is because the ISL theory would not have any effect on the rules governing state elections. With a dual system of election laws, administrators and voters would need to navigate potentially conflicting sets of rules for federal and state elections on the same election day.<sup>41</sup>
- **Vastly diminishing the right of everyday people, including marginalized communities, to challenge unfair election-related laws in state court:** As a consequence, some people may even lose further faith in the political system and might stop voting.
- **Placing Congress in the untenable position of being the last constitutional bulwark against rogue or extreme state legislatures uncommitted to fundamental democratic principles:** Although Congress could theoretically pass baseline standards governing federal elections and binding state legislatures, the repeated failure of such federal legislation to pass suggests that Congress may not be counted on to act.

Many pro-democracy advocates are concerned that if pushed to its extreme, the ISL theory could convince a rogue state legislature to decide that it has ultimate control to refuse to certify the accurate results of a presidential election.<sup>42</sup> In this scenario, the legislature would disregard the will of the people and instead appoint its own slate of electors. In fact, as noted earlier, Trump and his extremist allies essentially tried this route in the aftermath of the 2020 election, pursuant to John Eastman’s unconstitutional scheme.<sup>43</sup>

Yet even the most extreme version of the ISL theory should not allow this. That is because the plain text of the Constitution and clear, long-standing precedent say that legislatures cannot simply ignore the popular vote and choose new presidential electors *after* electors are chosen on election day.<sup>44</sup> Moreover, “the state legislature—like any institution of state government—would be bound by *Bush v. Gore* and related Fourteenth Amendment precedents that require all ballots cast in an election to be treated consistently with ‘equal protection’ and ‘due process’ principles.”<sup>45</sup>

However, partisan legislatures have the constitutional authority to change the “manner” of presidential elections *before* election day by giving themselves, instead of the voters, the ability to select electors so that they can be the ultimate decision-makers over the election results.<sup>46</sup> If legislatures exercised this option and decided that they, instead of the people, would select presidential electors, it would shatter democratic norms.

## **Conclusion**

If the Supreme Court aims to promote a healthy democracy and restore Americans’ trust in the high court, it must not rule favorably on the radical ISL theory when it decides *Moore v. Harper*. Free and fair elections—and the most basic principle that partisan actors cannot overrule: the will of the voters—could suffer an enormous blow if the Supreme Court gives state legislatures unfettered authority to set election rules for federal candidates. Intended and unintended consequences would ensue for decades, further destabilizing America’s already weakened democracy. The justices must instead respect clear precedent and reject the blatant power grab that underlies the radical independent state legislature theory.