TAKE BACK THE COURT

The Supreme Court May Greenlight a Fringe Scheme that Threatens the Core of Democracy

On January 6, 2021, insurrectionists infiltrated the U.S. Capitol Building in a lethal attempt to stop the final certification of legitimate election results, murder the vice president, and attack Democratic members of Congress. Along with baseball bats, stun guns, and pipe bombs, they were part of a movement wielding a fringe legal scheme that right-wing leaders planted throughout the 2020 election cycle: the Independent State Legislature Theory (ISLT). ISLT aims to nearly abolish checks and balances for state laws pertaining to federal elections. Now, the right-wing justices on the Supreme Court have created an opportunity to legitimize ISLT before the 2024 presidential election in *Moore v. Harper.*

Moore v. Harper is a Gerrymandering Case That Poses a Direct Threat to Democracy

ISLT is at the core of *Moore v. Harper* — a North Carolina gerrymandering case. After the 2020 census, the North Carolina legislature drafted a congressional map that the state supreme court rejected as an illegal partisan gerrymander.[1] After the state legislature failed to correct the gerrymandering issue with a new map, a court-ordered special master was brought in to reapportion North Carolina's districts.[2] Members in the state legislature, led by conservative North Carolina House Speaker Timothy Moore, are now suing for the right to gerrymander congressional districts without oversight by state supreme courts — using ISLT as the basis of their suit.The Supreme Court now has the opportunity to lend a veneer of legitimacy to a maximalist version of ISLT — in which state legislatures have near-exclusive control over laws and procedures for federal elections within their states for both congressional and presidential elections. The very theory that emboldened meritless lawsuits and Capitol insurrectionists alike in 2020 could become binding nationwide law.

ISLT Could Remove Crucial Checks and Balances

ISLT concentrates virtually all power over a state's federal election procedures into state legislatures and the U.S. Supreme Court itself — at a time when both institutions are dominated by right-wing idealogues. Removing these checks and balances could mean that for procedures relating to federal elections:

- The governor, regardless of political party, would be unable to veto changes to voting laws;[3]
- State constitutional provisions, such as those requiring popular elections for the appointment of presidential electors or those requiring congressional districts to be compact and contiguous, would have no binding authority on the legislature;[4]

[1] "Supreme Court of North Carolina Strikes Down Congressional and Legislative Maps," *Democracy Docket* (Feb. 4, 2022).
[2] "North Carolina Court Adopts New Redistricting Maps," *Democracy Docket* (Feb. 23, 2022).
[3] Thomas Wolf and Ethan Herenstein, "The Case that Could Blow Up American Election Law," *The Atlantic* (July 11, 2022).
[4] *Id.*

- State courts would have no role in reviewing voter suppression rules, radical changes to election procedures, or gerrymandered congressional maps, and they could not strike down these changes for being inconsistent with the state constitution or other state laws;[5]
- Independent redistricting commissions, which participate in the redistricting process in more than 20 states, could be dissolved;[6] and
- Direct democracy practices (voter-initiated legislation, voter-initiated amendments, and voter referendums), that exist in more than half of all states, could be nullified for matters related to federal elections.[7]

While federal law would still offer *some* constraints, ISLT could concentrate nearly unfettered control over federal election procedures into state legislatures. The Supreme Court could clear the way for state legislatures to enact radical changes with virtually no oversight and limit the recourse available to the voters. Adopting this scheme would be unprecedented in modern elections**.** And depending on how extreme of a ruling the Court issues, it could give right-wing controlled state legislatures dangerous new leeway to interfere with the 2024 election.[8] Free and fair elections are too important to risk; even the narrowest form of ISLT is fundamentally incompatible with democracy.

The Supreme Court Has An Extreme, Anti-Democratic Record

Time and time again, the Supreme Court has shown that it is no friend to democracy. Its rulings this century have demonstrated a clear pattern of steadily and systematically dismantling democratic institutions. The Court has made clear that one-party rule is its ultimate design, and that it can and should determine who votes and who rules. Here are some examples of the Court's unrelenting, anti-democratic jackhammer:

- 2000: The Court stopped the vote count in Florida as the presidential Democratic candidate gained ground. In a 5-4 partisan decision in *Bush v. Gore*, it functionally handed the election to George W. Bush.[9] It was such an openly horrific decision that the Court itself acknowledged the case should not be used as precedent moving forward. Justices Rehnquist, Scalia, and Thomas wrote a concurrence that laid the groundwork for the Independent State Legislature Theory.[10]
- 2010: In *Citizens United v. Federal Elections Commission,* the Court allowed nearly unfettered corporate money in political campaigns and struck down key parts of a bipartisan campaign finance reform bill.[11]

[5] *Id.*
[6] Jason Marisam, "The Dangerous Independent State Legislature Theory," Mich. St. Law Rev. (2022), 5.
[7] *Id.*
[8] Rhiannon Hamam, Michael Liroff, and Peter Shamshiri (hosts), "Independent State Legislature Theory," *5-4 Pod,* Prologue Projects (Oct. 25, 2022).
[9] *Bush v. Gore*, 531 U.S. 98 (2000).
[10] Mark S. Brodin, "*Bush v. Gore*: The Worst (or at least second-to-the-worst) Supreme Court Decision Ever," 12 Nev. L.J. 563 (2012).
[11] *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

- 2013: In the partisan 5-4 decision in *Shelby County v. Holder*, the Court attacked Section 4(b) of the Voting Rights Act (VRA) and removed the coverage formula to determine which jurisdictions — those with histories of racist voting laws — needed to meet Section 5 preclearance requirements. In his opinion, Chief Justice Roberts stated that "the conditions that originally justified [the coverage formula] no longer characterize voting in the covered jurisdictions" — ignoring continued blatant voting discrimination in Shelby County, Alabama and in other jurisdictions.[12] The decision sparked a wave of new laws that aimed to make it harder for people of color to vote. The impact of the decision was immediate and profound, with some states implementing regressive voting laws starting mere hours after the decision. The federal Commission on Civil Rights found that 23 states enacted newly restrictive statewide voter laws in the five years after the *Shelby* decision.
- 2018: In the partisan 5-4 decision in *Abbott v. Perez,* the Court reversed the lower courts' findings that Texas had intentionally discriminated against Black and Latinx voters in its congressional maps, allowing the state to blatantly violate the VRA.[13] The ruling raised the burden of proof for plaintiffs challenging racist voting laws in VRA claims — making it far easier for lawmakers to violate the VRA and prevail in legal challenges.
- 2021: In the partisan 6-3 decision in *Brnovich v. Democratic National Committee*, the Court took a direct swing at Section 2 of the VRA, which bans racial discrimination in voting practices. By classifying racist voting practices in Arizona as "[m]ere inconvenience,"[14] the Court made it easier for states to strip Black and Brown people of their right to vote. That same year, 19 states enacted voting restrictions, including voter purge laws, stricter ID laws, and omnibus election restriction bills.
- 2022: In two separate partisan 6-3 shadow docket decisions, the Court put racist maps back in place in Alabama and Louisiana for the 2022 midterm elections, even after lower courts struck them down for violating Section 2 of the VRA. Suspending Section 2 of the VRA had profound partisan consequences for the 2022 midterm elections and may have effectively shifted control of the House of Representatives. By conservative estimates, the Court cost Democrats seven House seats in the 2022 midterms, but the number is likely closer to 8-10 seats; Republicans now control the House by a five-seat razor-thin majority. In addition to the devastating impacts on communities of color, the Court has demonstrated it can shift power in other branches of government to its preferred party through anti-democratic decisions. The Alabama case is now being heard on the merits this term as *Allen v. Milligan* and could have profound consequences for voting rights throughout the country.

The Supreme Court May No Longer Have Jurisdiction in *Moore v. Harper*

In 2022, the North Carolina state supreme court struck down congressional redistricting maps proposed by the state legislature for illegal gerrymandering in violation of the state constitution, and ultimately appointed a special master to redraw the state's map.[15] The partisan control of

[12] *Shelby Cty. v. Holder,* 570 U.S. 529, 557 (2013).
[13] *Abbott v. Perez,* 585 U.S. __ (2018).
[14] *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021).
[15] "North Carolina Court Adopts New Redistricting Maps," *Democracy Docket* (Feb. 23, 2022).

the state supreme court has since shifted, and the new court decided to re-hear the case in February 2023 at the behest of right-wing state legislators. In April of 2023, the North Carolina state supreme court overturned its own past ruling and the congressional maps drawn by the special master. The new ruling greenlights the legislature to enact gerrymandered maps and harkens to the same bogus ideas at the heart of ISLT. The court stated that there is "no judicially manageable standard by which to adjudicate partisan gerrymandering claims" and that the courts have no role in "policy matters" like gerrymandered congressional maps. Allowing the legislature to gerrymander without being checked by the state constitution or judiciary, according to the state supreme court, is "returning the judiciary to its designated lane." The decision dilutes the voting power of millions of North Carolinians and their rights to self-determination and self-governance, and is expected to net conservatives up to four seats in the House of Representatives.

The Supreme Court requested additional briefing from all parties in *Moore v. Harper* after the state supreme court decided to rehear the case and again after the state supreme court issued its new ruling. The parties have been asked to answer whether the Supreme Court has jurisdiction to hear the case in light of the state court's ruling. Because the state supreme court has overturned its own ruling, the Court may ultimately decide that *Moore v. Harper* is moot and that it does not have jurisdiction to issue a decision. Whether or not the Court issues a ruling in *Moore v. Harper* or punts the Independent State Legislature Theory to a later case, ISLT remains an imminent threat to our democracy.

Any Ruling Legitimizing ISLT Will Have Devastating Consequences for Democracy

If the Supreme Court does issue a ruling in *Moore v. Harper*, it is crucial to remember that *any* recognition of ISLT sets the country on a path for tyranny — even if the outcome in this particular case seems relatively benign. In the immediate aftermath, states legislatures will likely rush to consolidate power in themselves and remove court oversight for election laws, and may limit or eliminate independent redistricting commissions and direct democracy provisions. Even more terrifying: legitimizing ISLT now or in the future opens the door for the Supreme Court to insert itself in the 2024 presidential election and could embolden state legislatures to directly interfere with results. Whether or not the Supreme Court rules in *Moore v. Harper*, ISLT remains a growing threat to voting rights, democracy, and rule of law. Taking up this case shows that the Court is willing to flirt with extremist, fringe, and dangerous legal schemes. The right-wing supermajority cannot be trusted to preserve checks and balances in elections while the Court imposes its radical agenda wholly unchecked. Only rebalancing and expanding the Court can shield our democracy from the Court's quest to inflict dogmatic one-party rule from the bench.