

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

---

Online Publications

Faculty

---

12-8-2022

## Oral Argument in *Moore v. Harper* and the Perils of Finding “Compromise” on the Independent State Legislature Theory

Katherine A. Shaw

Benjamin N. Cardozo School of Law, kshaw2@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-online-pubs>



Part of the [Constitutional Law Commons](#), [Election Law Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Shaw, Katherine A., "Oral Argument in *Moore v. Harper* and the Perils of Finding “Compromise” on the Independent State Legislature Theory" (2022). *Online Publications*. 60.

Available At <https://larc.cardozo.yu.edu/faculty-online-pubs/60>

This News Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Online Publications by an authorized administrator of LARC @ Cardozo Law. For more information, please contact [larc@yu.edu](mailto:larc@yu.edu).

# Oral Argument in *Moore v. Harper* and the Perils of Finding “Compromise” on the Independent State Legislature Theory

by [Kate Shaw](#)

December 8, 2022

The Supreme Court’s cert grant last June in *Moore v. Harper* was an [ominous note](#) on which to end an explosive term. The grant seemed to broadcast an openness to embracing what’s known as the “independent state legislature theory,” or ISLT. It is a once-fringe idea that the U.S. Constitution, and in particular Article I’s “elections clause,” grants to state legislatures alone, and withholds from other state entities (think: courts and constitutions), the power to regulate elections for federal office.

According to proponents of the theory, the elections clause creates a special set of rules around federal elections, divesting entities like state courts of their ordinary powers, including the power to enforce state constitutional provisions. In the case of *Moore*, proponents of the ISLT argued that the North Carolina Supreme Court acted beyond its authority when it found that an extreme partisan gerrymander drawn by the North Carolina legislature violated the North Carolina state constitution. Because the Supreme Court agreed to hear *Moore v. Harper* in the absence of any circuit split, and because various members of the Supreme Court indicated their sympathy for the ISLT in cases involving the 2020 election, the cert grant set off alarm bells in both legal and political circles – both because untethering state legislatures from state courts and state constitutions could wreak havoc on federal congressional elections, and because the theory at issue in *Moore* is a close cousin to the idea pushed in 2020 by Trump allies like John Eastman – that another clause of the Constitution, Article II’s “presidential electors” clause, gives state legislatures plenary authority not just over the “times, places, and manner” of federal elections, which is the language of the elections clause, but also over the method of choosing presidential electors. The “Eastman theory” contends that state legislatures even have the authority to discard the popular vote and instead select presidential electors outright, even after an election has been held.

Whether because the political winds have changed dramatically in the months since the Supreme Court ended its fiery last term, or because an expansive version of the ISLT falls apart so thoroughly upon close inspection (as the cascade of scholarship, statements by [current](#) and [former](#) judges, and other experts that has been unleashed in recent months in opposition to the ISLT makes clear), Wednesday’s [oral argument](#) did *not* indicate that a majority of the Court is eager to embrace a sweeping ISLT.

That said, a majority *may* be willing to sign onto some version of the theory, even if a more circumscribed one. Depending on what that looks like, the theory could have important implications for future elections—both congressional and presidential. The “blast radius,” as Neal Katyal repeatedly called the potential effects of the *Moore* decision during Wednesday’s argument, appears unlikely to be as wide as many initially feared—and as the North Carolina legislators are still seeking—and the decision might not immediately “wreak havoc in the administration of elections across the nation,” in the words of Solicitor General Elizabeth Prelogar. But, in the effort to find a “middle ground” or the like, the Court may nevertheless embrace some version of the ISLT. That is both alarming in its own right, and could invite future challenges that allow the Court to go still further.

## **Background**

Before turning to Wednesday’s arguments, a bit of background is in order. In its modern form, the idea of the ISLT was first floated in a concurring opinion by Chief Justice Rehnquist in the 2000 opinion in *Bush v. Gore*. Rehnquist, joined by Justices Scalia and Thomas, agreed with the Court’s majority that what the Court termed “standardless manual recounts” violated the equal protection clause. But in his [concurring opinion](#), Rehnquist went on to note that the Florida Supreme Court had also run afoul of Article II in establishing new recount standards; the opinion pointed to Article II’s provision that “‘each State shall appoint, in such Manner as the Legislature thereof may direct,’ electors for President and Vice President” and concluded that a “significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.”

Fast-forward to 2020 and another high-stakes presidential election. In a series of cases that reached the Court on its “shadow docket,” all involving challenges to decisions by

state courts and state executive-branch officials to facilitate voting in the early days of the COVID-19 pandemic, a number of writings by various justices reflected some version of the view that the Constitution confers special authority on state legislatures when it comes to regulating federal elections. In an October case out of Wisconsin, Justice Gorsuch [concurred](#) to raise questions about the Wisconsin Elections Commission's decision to accommodate voters in light of the pandemic, and Justice Kavanaugh [wrote](#) separately to explicitly invoke the ISLT, approvingly citing Chief Justice Rehnquist and asserting federal-court authority to review state courts' interpretations of state election law: "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws." In a case out of North Carolina, Justice Gorsuch again [invoked](#) the ISLT, this time joined by Justice Alito; and in a case from Pennsylvania, Justice Alito, joined by Justices Thomas and Gorsuch, [wrote](#) "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."

These signals from the justices were not lost on some state actors, who picked up and ran with the idea that the federal constitution might give federal courts the ability to second-guess the decisions of state courts and state executive-branch officials when it came to federal elections. In the *Moore* case, the North Carolina legislature produced a badly gerrymandered set of legislative maps following the 2020 Census. A group of voters and organizations sued, alleging that the maps violated various provisions of the state constitution, including its "free elections" clause. The North Carolina Supreme Court [agreed](#) with the plaintiffs in a lengthy opinion, which included a brief discussion of the late-added argument made by the legislature that the U.S. Constitution's elections clause barred any state judicial review of the federal map. (The North Carolina court called the argument "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts.") After finding the maps unconstitutional, the state Supreme Court gave the legislature a chance to produce new maps; a three-judge court approved the new state legislative maps, but found the new congressional maps still unlawful. So the three-judge court, pursuant to state statute, convened a group of

special masters to produce a map for the 2022 congressional election. A fairly ordinary process—until the state legislators successfully petitioned the Supreme Court for review.

## Argument analysis

Going into Wednesday’s arguments, it seemed clear that the most important justices to watch were Chief Justice Roberts and Justice Barrett, who did *not* join their conservative fellow travelers in the 2020 presidential-election cases discussed above (which predated Justice Barrett on the Court), and Justice Kavanaugh, whose record on the ISLT is mixed. Throughout the argument, the tenor of Barrett’s questions suggested that she was unlikely to vote for an expansive view of the ISLT that totally disabled state courts from participating in the regulation of federal elections. Roberts, and at times Kavanaugh, seemed to be in a similar place.

That may in part be attributable to several important strategic choices made by the petitioners—choices that in this case laid bare the incoherence of the ISLT, but that also leave open the possibility of a future challenge faring differently. The most important choice may have been not to mount a challenge to the Court’s precedents in this area, including *Smiley v. Holm*, a 1932 case in which the Court held that a requirement of a gubernatorial veto did not impermissibly intrude upon legislative authority under the elections clause. Very early on in the argument by David Thompson, who represented the North Carolina legislators and advocated for the ISLT, Chief Justice Roberts pressed him on the question of the gubernatorial veto: “that’s a pretty significant exception. You have otherwise a very categorical case, and it’s sort of of, well, with this one exception. But vesting the power to veto the actions of the legislature significantly undermines the argument that it can do whatever it wants.”

Thompson offered two arguments in response: first, he maintained that a requirement of a gubernatorial veto was a “procedural limitation” that was consistent with the elections clause, but that any effort by non-legislative state actors to *substantively* regulate federal elections was impermissible. Roberts seemed dubious about the workability of this distinction, as, importantly, did Barrett, who noted that “you do have a problem with explaining why these procedural limitations are okay but substantive limitations are not.” (She also harkened back to her days as a law professor, noting about the procedure /substance distinction, that “as a former civil procedure teacher, I can tell you is a hard

line to draw and a hard line to teach students.”) The petitioners also seemed to argue, citing sources like Samuel Johnson and (Alito-favorite) Sir Matthew Hale, that the legislative process was once understood (at least in the majority of states) as involving “three branches of the legislature,” with the governor as the third, so that a veto was permissible as a part of the ordinary legislative process. Either way, not only Roberts and Barrett, but also Kavanaugh and even at one point Alito, seemed to struggle with this.

In addition to the argument that state courts have no role in interpreting and enforcing state constitutions in the context of federal elections, the petitioners offered a backup argument: that at a minimum states cannot enforce general or vague state constitutional provisions, and that provisions like the one at issue here – guaranteeing free and fair elections – are simply not clear enough to produce judicially manageable and administrable standards. There was a great deal of discussion of this idea across the three hours of argument, at times shading into the distinct question of whether there is a role for federal judicial review of some subset of state-court rulings that involve federal elections.

With the exception of Justice Alito, it wasn’t clear how much support there was for the idea that some state constitutional provisions are too vague or general or insusceptible to judicial standards to be enforced by courts at all. But there *did* seem to be support for the idea that there are occasions on which federal-court intervention in this area might be appropriate. As to the latter formulation, *all* of the advocates arguing against the ISLT seemed on board with the Court announcing some such set of standards for review of state court interpretation and enforcement of state constitutional provisions (perhaps leaving for another day the question of the interpretation of statutes). Former Solicitor General Don Verrilli, arguing for the state respondents, framed the proper test as “whether the state decision is such a sharp departure from the state’s ordinary modes of constitutional interpretation that it lacks any fair and substantial basis in state law.” Neal Katyal for the non-state respondents offered a similar test, describing a “sky high” standard for federal court intervention. Solicitor General Elizabeth Prelogar emphasized that in the mine run of cases, “if a state court is conducting judicial review and is interpreting its state constitution, that — that presents no fundamental conflict with the Elections Clause itself.” But she allowed that a very narrow and limited constitutional claim might be available where a “state court isn’t actually engaged in the process of

judicial review.” The idea here seems to be that if a state court is engaging in pure policymaking, or is doing something unrecognizable as judging, that court might be understood to have usurped the legislative role in regulating elections in a way that runs afoul of the elections clause. But of course, as Justice Kagan underscored in a revealing colloquy with Verrilli, whether a state court decision reflects “pure policymaking” is largely in the eye of the beholder; as she noted, “every single one of us on this bench has written opinions at times, you know, saying that other judges, whether it’s other judges on this Court or — or lower court judges, you know, have engaged in policymaking rather than in law.”

Whatever the standard, if we are debating the *scope* of federal judicial review of state court enforcement of state constitutional provisions as a matter of the elections clause, in some ways the ISLT has already won. A muted public response to that possibility may be reflective of a shifted Overton window.

Any decision that allowed federal courts to insert themselves into state courts’ superintending of state constitutional provisions when it comes to voting would be enormously problematic, even if not cataclysmic in this formulation and application. I detail many of the reasons in a recent [law review article](#) with Leah Litman—but for present purposes, one problem that became clear in Wednesday’s discussion was that any Supreme Court test that allowed inquiry into whether state court decisions are sufficiently “judicial” to satisfy the Supreme Court would inevitably entail the imposition of federal ideas about judging onto state courts, in a way that is fundamentally incompatible with state sovereignty and constitutional principles. Down the line, such a decision could also open the door to challenges that are more aggressive—including, potentially, challenges that take on precedents like *Smiley* and *Hildebrant* head-on, as John Eastman’s [amicus brief](#) did—with Justices Alito, Gorsuch, and Thomas waiting for the magic two more votes to entrench the more radical version.

There’s no guarantee, of course, that this will be the eventual holding in *Moore*. There was sufficient skepticism at the oral argument that it is possible to envision this case ending like the 2020 “rogue elector” case *Chiafalo v. Washington*, in which a unanimous Court rebuffed a request to adopt a novel theory whose consequences for American elections would be enormously destabilizing. But if the Court *does* adopt some

“compromise” position, the magnitude of that decision shouldn’t get lost in relief about what the Court *didn’t* do. A partial victory for the ISLT is still far more than the theory warrants.

*Photo credit: People wait in line outside the U.S. Supreme Court to hear oral arguments in the Moore v. Harper case on December 7, 2022 in Washington, DC. (Photo by Drew Angerer/Getty Images)*

## About the Author(s)

Kate Shaw

Professor of Law at the Benjamin N. Cardozo School of Law. She served in the Obama White House Counsel’s Office and is a member of the National Task Force on Election Crises. Follow her on Twitter (@kateashaw1).