

Yeshiva University, Cardozo School of Law

**LARC @ Cardozo Law**

---

Online Publications

Faculty

---

7-2-2022

## **A New Supreme Court Case Threatens Another Body Blow to Our Democracy**

Katherine A. Shaw

Leah Litman

Carolyn Shapiro

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



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

---

# Opinion A new Supreme Court case threatens another body blow to our democracy

By Leah Litman, Kate Shaw and Carolyn Shapiro

July 2, 2022 at 7:00 a.m. EDT

*Leah Litman is an assistant professor at the Michigan Law School and co-host of the podcast “Strict Scrutiny.”*

*Kate Shaw is a professor at Cardozo Law School and co-host of “Strict Scrutiny.” Carolyn Shapiro is a professor at the Chicago-Kent College of Law and co-director of Chicago-Kent’s Institute on the Supreme Court of the United States.*

When the Supreme Court overruled *Roe v. Wade*, the justices in the majority insisted they were merely returning the issue of abortion to the democratic process. But a case the court has announced it will hear in its October term could make that democratic process a lot less democratic.

With that case, *Moore v. Harper*, the justices will review a North Carolina Supreme Court decision holding that the state constitution prohibits extreme partisan gerrymanders. The Supreme Court’s choice to take the case could presage yet another decision that will undermine democracy, by prohibiting *other* government institutions — here, state courts — from protecting voting rights and democracy.

Just three years ago, a 5-to-4 Supreme Court prohibited federal courts from addressing whether extreme partisan gerrymandering violates the Constitution. But don’t worry, the court said, state courts can curb the practice if they conclude it violates *state* constitutions.

*Harper* invites the Supreme Court to go back on that promise. This invitation is based on an unsupportable legal claim known as the independent state legislature theory (ISLT). The theory would disable state courts from protecting voting rights in federal elections by eliminating state constitutional protections in those elections. And it would do so at a time when voting rights are under attack, including at the Supreme Court itself.

Less than a decade ago, the court eliminated the Voting Rights Act requirement that jurisdictions with histories of racial discrimination in voting preclear changes to voting rules with the Justice Department or federal courts. And in July of last year, the court weakened what remained of the VRA, making it harder for plaintiffs to challenge voting regulations that impose disproportionate burdens on minority voters.

While those cases involved federal protections for voting rights, *Harper* could undermine state voting protections.

The issue in *Harper* is whether the federal Constitution prevents a state court from determining whether the state legislature violated the state constitution in setting rules for federal elections. The petitioners — Republican legislative leaders — are asking the court to hold that it is *unconstitutional* for state courts and state constitutions to protect federal voting rights.

This argument rests on a blinkered reading of two clauses in the Constitution that assign to the legislature of each state the job of identifying the “Manner” of appointing presidential electors and the “Times, Places and Manner” of congressional elections. Neither clause suggests that state legislatures can violate their own constitutions.

Chief Justice William H. Rehnquist suggested this far-fetched theory in a concurrence in *Bush v. Gore*. But the theory failed to command a majority, and it was largely ignored for almost two decades.

But in the 2020 election litigation, Justices Neil M. Gorsuch and Brett M. Kavanaugh, in addition to Justices Samuel A. Alito Jr. and Clarence Thomas, expressed sympathy for the theory.

Since 2020, a mountain of scholarship has emerged thoroughly debunking the ISLT. Its historical bases are nonexistent. The Founders understood well that states could choose to have constitutions that constrain state legislatures, and that view has held sway in practice and law ever since. And state executive officials have also enjoyed considerable discretion to operate federal elections since the founding.

The ISLT is also wildly inconsistent with federalism. In our federal system, state courts have the final say over the meaning of state law; states also have considerable latitude in structuring their governments. The ISLT could transform cases about interpreting or applying state election laws into federal constitutional cases to be decided by the federal courts.

The theory would lead to a chaotic system in which states could not reliably hold unified elections for state and federal offices. Common state constitutional provisions guaranteeing that elections be “free,” “free and equal,” or “free and open” would not apply to laws governing federal elections, but would still apply to laws governing state elections.

So, for example, if a state court relied on a state constitutional provision to strike down burdensome registration or voter ID requirements, those requirements would nonetheless remain in place for federal elections. The state would end up with two systems — one for federal elections and one for state elections.

The ISLT would also empower heavily gerrymandered legislatures to make the rules regarding federal elections.

Fortunately, even if the court embraces the revanchist ISLT, that would not permit state legislatures to throw out votes already cast to appoint presidential electors of their choosing. The federal Constitution prohibits states from disregarding votes already cast, no matter what the court might say in *Harper*.

But the court’s endorsement of the ISLT would still create disarray and would enable anti-democratic power grabs. Given that the court, in overturning *Roe*, has just handed over what used to be a fundamental right to the political process, there could not be a worse time for making our democratic process less democratic.