

EXPLAINER

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The 'Independent State Legislature Theory,' Explained

This dubious legal theory could have dramatic consequences for elections.

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Defend Our Elections

▪ Election Integrity

There's a thread that links the partisan gerrymandering of congressional maps in North Carolina, attempts to dissolve the Wisconsin Election Commission, and efforts to overthrow the 2020 presidential election in Pennsylvania and elsewhere. In each case, the participants have invoked a dubious interpretation of the Constitution called the "independent state legislature theory."

Long relegated to the fringe of election law, the theory will soon be front and center before the Supreme Court, which has **agreed** to hear a case concerning the North Carolina congressional maps in the fall. If the Supreme Court were to adopt the theory, it would radically change our elections.

What is the independent state legislature theory?

The independent state legislature theory is a reading of the Constitution, pushed in recent years by a small group of advocates, that would give state legislatures wide authority to gerrymander electoral maps and pass voter suppression laws. It has even been used as political cover to try to overturn elections.

The Constitution delegates power to administer federal elections to the states, subject to Congressional override. There is, however, a disagreement about how much power is delegated and to which state actors exactly.

There are two relevant clauses. One is the Elections Clause, which reads, "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."

The other is the Presidential Electors Clause, which reads, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."

The dispute hinges on how to understand the word "legislature." The long-running understanding is that it refers to each state's general lawmaking processes, including all the normal procedures and limitations. So if a state constitution subjects legislation to being blocked by a governor's veto or citizen referendum, election

laws can be blocked via the same means. And state courts must ensure that laws for federal elections, like all laws, comply with their state constitutions.

Proponents of the independent state legislature theory reject this traditional reading, insisting that these clauses give state legislatures exclusive and near-absolute power to regulate federal elections. The result? When it comes to federal elections, legislators would be free to violate the state constitution and state courts couldn't stop them.

Extreme versions of the theory would block legislatures from delegating their authority to officials like governors, secretaries of state, or election commissioners, who currently play important roles in administering elections.

Where did the independent state legislature theory come from?

Following the disputed 2000 election, Chief Justice William Rehnquist wrote a **concurring opinion** in *Bush v. Gore* proposing an embryonic version of the independent state legislature theory. He argued that the Constitution's assignment of elections authority to state legislatures diminishes state judges' power to alter "the general coherence of the legislative scheme." This approach garnered little scrutiny outside academia at the time.

Fifteen years later, the idea was exhumed as part of an effort to dismantle Arizona's independent redistricting commission. Again, the Supreme Court rejected the theory and let the commission continue its work.

Then, after the 2020 election, President Trump and his allies used the independent state legislature theory as part of their effort to overturn the results. For a third time, the Supreme Court declined to adopt the theory. But three sitting justices — Clarence Thomas, Samuel Alito, and Neil Gorsuch — endorsed it.

Most recently, gerrymanderers in North Carolina, Kansas, and beyond, have invoked the independent state legislature theory to try to block state courts from reviewing their maps. So far, the Supreme Court has not embraced it.

What are some of the arguments for and against the

independent state legislature theory?

Proponents of the independent state legislature theory emphasize a narrow reading of the word “legislature” in the Elections and Electors Clauses. They also **point** to a couple of Supreme Court **cases** from the early 20th century ruling that state constitutions could not take away state legislatures’ power to ratify federal constitutional amendments under Article V of the U.S. Constitution. Adherents argue that the same logic must apply to the Elections and Presidential Electors Clauses, even though the Supreme Court **has made clear** that the ratification of constitutional amendments under Article V is distinct from the ordinary lawmaking process used in election administration.

Critics **point out** several flaws in the independent state legislature theory and its justifications. First, the framers **did not trust** state legislatures to run fair elections. They empowered state legislatures to administer federal elections only with great hesitancy.

“What led to the appointment of this Convention?” John F. Mercer of Maryland rhetorically asked his fellow delegates to the 1787 Constitutional Convention. “The corruption & mutability of the Legislative Councils of the States.” James Madison, similarly suspicious of the legislatures, prepared for the convention by compiling a list of ways state legislators had failed to act in the national interest.

This mistrust comes through in the Elections Clause, which reserves to Congress the power to override the abuses of power that Madison and his colleagues expected. Given the low regard in which the framers held state legislatures, it’s difficult to imagine they would want to free those lawmaking bodies from the existing constraints of the gubernatorial veto, the state constitution, and judicial review.

There is further historical evidence against the independent state legislature theory. During the founding era, most state constitutions **regulated** federal elections and most state legislatures **shared** their elections power with other state actors. These practices, which are inconsistent with the independent state legislature theory, were uncontroversial at the time.

Critics also reject the theory’s narrow approach to the Constitution’s text. They point out that the term “legislature” doesn’t necessarily mean “exclusively the legislature.” The First Amendment, to draw a parallel, literally prohibits only “Congress” from discriminating on the basis of speech and religion. But we understand the amendment to apply to the federal government in its entirety, including the judicial and executive branches. That’s why, to take one example, a judge can’t close off her courtroom to atheists.

What would happen if the Supreme Court accepted the independent state legislature theory?

The independent state legislature theory would cause significant disruption by potentially nullifying state constitutional provisions regarding federal elections. State constitutional bans on gerrymandering in **Florida**, **Ohio**, **North Carolina**, and other states could die, as could independent redistricting commissions in Arizona, California, Michigan and other states. Other state constitutional provisions — like the right to a secret ballot in many states — could also be wiped out.

Delegations of authority would also be questionable, robbing elections commissions and secretaries of state of the power to make decisions, including in emergencies. And only federal courts would have the power to review gerrymandering or voter suppression claims relating to federal elections.

The nightmare scenario is that a legislature, displeased with how an election official on the ground has interpreted her state's election laws, would invoke the theory as a pretext to **refuse to certify** the results of a presidential election and instead select its own slate of electors. Indeed, this isn't far from **the plan** attempted by Trump allies following his loss in the 2020 election. And, according to former federal judge **J. Michael Luttig** — a distinguished conservative jurist — the theory is a part of the “Republican blueprint to steal the 2024 election.”

These high stakes underscore the significance of the challenge the independent state legislature theory presents to the courts.

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