



Written by [Elad Hakim](#) on June 27, 2022

## The Supreme Court Has a Chance to Address the Independent State Legislature Doctrine

Should state courts have the power to interfere with the state legislatures' constitutional right to set election rules? While the Supreme Court has yet to formally address this question, four of the justices have expressed an interest in doing just that. While unlikely to play a role in the upcoming midterm elections, a decision by the Supreme Court could play a major role in future elections.

The Independent State Legislature Doctrine (ISLD) stems from several provisions of the Constitution. One provision, known as the [Elections Clause](#), provides, "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 provision, known as the [Presidential Electors Clause](#), states, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."

While the Supreme Court has not yet implemented the ISLD, the tide could be changing due to several recent cases involving gerrymandering and/or the re-drawing of congressional districts. One such case involves an appeal filed by North Carolina Republicans. As reported by [Just the News](#), in that case, a state court "threw out congressional district maps drawn by that state's General Assembly." The [article](#) further notes, "The North Carolina Supreme Court ruled that the map violated state constitution provisions protecting free elections and free association by establishing lines that would likely yield GOP victories." Another similar, yet not identical, case awaiting word from the Supreme Court arises out of Pennsylvania and can be reviewed [here](#).

It is unclear if the Supreme Court will agree to take either case. However, the ISLD has garnered the attention of some of the Court's Justices. As reported by the [Associated Press](#):

Already, four conservative Supreme Court justices have noted their interest in deciding whether state courts, finding violations of their state constitutions, can order changes to federal elections and the once-a-decade redrawing of congressional districts. The Supreme Court has never invoked what is known as the independent state legislature doctrine, although three justices advanced it in the *Bush v. Gore* case that settled the 2000 presidential election.



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“The issue is almost certain to keep arising until the Court definitively resolves it,” Justice Brett Kavanaugh wrote in March.

At the heart of the debate, generally, is how much power, if any, state courts should have to serve as a “check” over state legislatures when it comes to election rules. In other words, does the Constitution provide state legislatures with the exclusive power to regulate federal elections in their respective states and prohibit state courts from interfering with these decisions? The answer seemingly revolves, in part, around the interpretation of the above-referenced provisions.

[Proponents](#) of the ISLD argue that courts should have no power over election rules/policy because the Constitution provides that such decisions are solely the responsibility of the state legislatures. Therefore, they argue, state court should not be involved in deciding issues of this nature. After all, they argue, the Constitution clearly gives such power to the state legislatures and courts have no business getting involved, even in cases involving a violation of a state’s constitution. Congress, on the hand, does have certain powers in accordance with the Elections Clause.

[Opponents](#) argue that this interpretation cannot possibly be in line with what the framers intended. For example, if the state legislatures are permitted to decide all election-related rules/policies without any state court intervention or oversight, this process could be abused for political purposes/gain and would do away with any notion of checks and balances. They also argue that a state legislature is created by (is a creature of) the state’s constitution. Since a state court has the authority to adjudicate state constitutional issues, it also has authority to adjudicate issues involving/revolving around an entity created by the state constitution. According to [Carolyn Shapiro](#), a professor at the Chicago-Kent College of Law, “The legislature is created by the state constitution, so it must be limited by it. The notion that [lawmakers] are freestanding entities to do anything they want in this context is inconsistent with constitutional democracy.”

The Supreme Court will likely address the ISLD at some point in the future. Whether it decides to do so now or later, proponents are likely to continue to raise it until the Court provides some definitive guidance regarding its application.

A narrow reading of the ISLD could present problems down the road, and those advocating for a narrow reading/interpretation of the ISLD could very well take a different tune if their respective political party does not control the state legislature. This is a potential problem whenever a person or group is given virtually carte blanche authority. For example, while a Republican-controlled state legislature could celebrate the power afforded by the ISLD, it could just as easily oppose its application with a Democrat-controlled state legislature. One need to look no further than the recent cases out of North Carolina and Pennsylvania to understand how the ISLD could be a blessing for the party in power and a curse for the minority party. Conversely, a broad interpretation could allow courts to be the arbiters of such issues, raising concerns that some potential partisan or activist judges could play a concerning role in deciding elections.

As such, if the Supreme Court ever decides to address this issue, it will likely take these and other potential concerns into consideration when deciding this interesting and important constitutional issue.



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