

Moore v. Harper and the Fire Next Time

By Jonathan M. Winer

THE SUPREME COURT'S 6-3 DECISION IN [Moore v. Harper](#) may well be one of the most consequential Constitutional cases affecting the future of American democracy. But its political meaning is as significant as its legal implications. Its wider context is the current court's crisis of legitimacy, Donald Trump's attempted coup to overthrow the result of the 2020 election and the determination of Justice Clarence Thomas to sustain the right-wing's legal options to nullify a federal election in the future.

The ruling rejected the so-called "Independent State Legislature Theory," (see [Constitutional Coup](#) in the October 2021 Washington Spectator) which contends that the Constitution renders decisions of state legislatures unreviewable by state courts, and that they are therefore outside the boundaries and requirements of the state constitutions when it comes to gerrymandering and redistricting in one clause, and the selection of Presidential electors in another.

The majority opinion, written by Chief Justice John Roberts, should be understood as his desperate effort to undertake a rescue of the Court's legitimacy, and maybe the country in the process. Roberts recruited the court's newest Republican members, Brett Kavanaugh and Amy Coney Barrett, to save their tattered robes, too, and join him in making it harder for anyone to disrupt a future Presidential contest with competing versions of who in fact won the election.

The Independent State Legislature Theory relies for its authority on supposed textualism claiming both

the literal meaning of short phrases plucked from the Constitution, as well as outrageously bogus history. Its advocates have unashamedly claimed the authority of a downright fraudulent document from 1818, the "[Pinckney Plan](#)," conceived by Charles Pinckney, a South Carolina signer of the Constitution. This argument stated the framers' original intent in the Elections Clause was that elections would be decided only in state legislatures, rather than through the entire apparatus of checks and balances in each state. The only problem with this bit of originalist history is that the "Pinckney Plan" [was a forgery](#).

As further support for the petitioners' absolutist interpretation of the Elections Clause, they also cite the Founders' view that state legislatures were held in higher regard than state judiciaries. This originalist history is also bunk, dismantled by historians. (Professor Rosemarie Zagurri, of George Mason University, demolishes the originalist tower of falsehoods in the [Boston College Law Review](#).)

The theory posits that the Constitution says "state legislatures" alone will decide on the time, place and manner for federal elections, and on how the state chooses electoral votes for President (by congressional district, for example, by state, or even by county). The doctrine gives whoever happens to be in the state legislature at that moment the sole right to make these decisions. Regardless of a Governor's veto. Regardless of state law. Regardless of the state's constitution. Regardless of the decisions of the state courts. Regardless of the voters.

If adopted in its most extreme form, the theory would have allowed state legislatures to decide whenever they wanted to select the winner in a Presidential race by certifying the slate of electors they want in the Electoral College. Its endorsement by the Court would have opened the 2024 Presidential elections to the filing of competing electoral slates in states controlled by Republican legislatures — especially those with Democratic governors, which is Trump's dream scenario.

Endorsement of the theory by the Court would also have retroactively legitimated the efforts by Trump lawyers John Eastman, Sidney Powell, Rudy Giuliani, and a slew of their confederates to delay the certification of Joe Biden as President in order to give the state legislators time to declare that they had



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- 3 Dave Troy on the 70% Resurgence
- 4 Steven Pressman on Killing the Debt Ceiling
- 5 Will Novosediik reviews The Nexus

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Table of Contents May June 209709

1. Understanding the eBook May June 209709
 - The Rise of Digital Reading May June 209709
 - Advantages of eBooks Over Traditional Books
2. Identifying May June 209709
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an May June 209709
 - User-Friendly Interface
4. Exploring eBook Recommendations from May June 209709
 - Personalized Recommendations
 - May June 209709 User Reviews and Ratings
 - May June 209709 and Bestseller Lists
5. Accessing May June 209709 Free and Paid eBooks
 - May June 209709 Public Domain eBooks
 - May June 209709 eBook Subscription Services

- May June 209709 Budget-Friendly Options
- 6. Navigating May June 209709 eBook Formats
 - ePub, PDF, MOBI, and More
 - May June 209709 Compatibility with Devices
 - May June 209709 Enhanced eBook Features
- 7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of May June 209709
 - Highlighting and Note-Taking May June 209709
 - Interactive Elements May June 209709
- 8. Staying Engaged with May June 209709
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers May June 209709
- 9. Balancing eBooks and Physical Books May June 209709
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection May June 209709
- 10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
- 11. Cultivating a Reading Routine May June 209709
 - Setting Reading Goals May June 209709
 - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of May June 209709
 - Fact-Checking eBook Content of May June 209709
 - Distinguishing Credible Sources
- 13. Promoting Lifelong Learning
 - Utilizing eBooks for Skill Development
 - Exploring Educational eBooks
- 14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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