The Independent State Legislature Theory

Moore v. Harper
&
Costello v. Carter
Partisan Gerrymandering


- Voters in North Carolina and Maryland challenged congressional maps as unconstitutional partisan gerrymanders.

- Chief Justice Robert’s 5-4 majority opinion
  - Federal courts cannot address partisan gerrymandering, but remedy can be sought through state courts under state constitutions and state statutes.
  - “Our conclusion does not condone excessive partisan gerrymandering…Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply…Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions.”

So, after North Carolina adopted new maps based on 2020 Census results, voters filed suits in state court alleging the new maps were partisan gerrymanders in violation of North Carolina’s constitution…
Moore v. Harper
North Carolina’s 2020 Redistricting Cycle

- November 2021 - North Carolina General Assembly adopted new legislative and congressional maps

- *Harper v. Lewis* and *North Carolina League of Conservation Voters v. Hall*
  - Voters and voting groups brought challenges in North Carolina state courts arguing that the new state legislative and congressional maps were partisan gerrymanders in violation of North Carolina’s constitution.

- February 2022 - NC Supreme Court ruled 4-3 that the state's congressional and legislative maps were partisan gerrymanders inconsistent with NC’s constitutional protections for free elections, free speech, freedom of association, and equal protection.
  - And ordered the legislature to re-draw the maps

- Late February 2022 - Superior court held newly-redrawn state legislative maps were ok to proceed but rejected the new congressional map and appointed special masters to redraw the congressional lines to be used on an interim basis for the 2022 congressional elections.
Moore v. Harper

- Late February 2022 - NC legislators appealed to SCOTUS for an emergency stay application to block the congressional map drawn by the special masters pending full petition for writ of certiorari
  - Argument centers around the Independent State Legislature Theory
  - "The federal constitution expressly provides that the manner of federal elections shall “be prescribed in each State by the Legislature thereof.” U.S. CONST. art. I, § 4. Yet barring this Court’s immediate intervention, elections during the 2022 election cycle for the U.S. House of Representatives in North Carolina will be conducted in a manner prescribed not by the State’s General Assembly but rather by its courts."

- Early March - SCOTUS declined to block the congressional map
  - Justice Kavanaugh Concurrence – full cert petition should be granted on ISL issue
    - "I agree with Justice ALITO that the underlying Elections Clause question raised in the emergency application is important…the issue is almost certain to keep arising until the Court definitively resolves it…if the Court receives petitions for certiorari raising the issue, I believe that the Court should grant certiorari in an appropriate case—either in this case from North Carolina or in a similar case from another State. If the Court does so, the Court can carefully consider and decide the issue next Term after full briefing and oral argument."

- Late March – NC Legislators filed full petition for a writ of certiorari
- June 30, 2022 – Petition Granted by SCOTUS
What is the Independent State Legislature Theory?

ISL was, until recently, a fringe legal theory supported by Chief Justice Rehnquist and Justices Scalia and Thomas in their concurrence in *Bush v. Gore* (2000).

The theory is derived from Articles I and II which specifically mention state “legislatures” when it comes to regulating federal elections:

**Elections Clause – Article I, Section IV, Clause 1**

“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, except as to the Places of chusing Senators.”

**Elector's Clause – Article II, Section I, Clause 2**

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”

Justice Gorsuch expressed his concurrence in 2020:

- “The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.” *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay)

For the regulation of federal elections, state legislatures cannot be checked by any other branch of state government even if their decisions regarding federal elections violate their state constitution.
Implications of ISL

Redistricting:
- State legislatures would have exclusive power over congressional plans
- Could also threaten Independent Redistricting Commissions

ISL theory could also give state legislatures unrestrained power over all aspects of federal elections, including presidential elections (Electors Clause)
- Choosing electors for electoral college in presidential elections
- Issues relating to early voting; same day registration; and decisions around post-election disputes
- Because ISL does not apply to state elections, state and federal contests in a single state could have differing rules

➢ Note that state legislatures would still be subject to federal statutes and the U.S. Constitution.
Smiley v. Holm (1932)

• Minnesota State Legislature passed redistricting plan, but governor vetoed

• Legislature argued that under Elections Clause, approval from governor was not required

• Supreme Court disagreed:

  “Exercise of the authority [to regulate congressional elections under the Elections Clause] must be in accordance with the method which the state has prescribed for legislative enactments. We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted.”
(Justice Ginsburg)

- Arizona state legislature brought action against state’s IRC and Arizona Secretary of State arguing that ballot initiative creating the commission violated the Elections Clause.

- “Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution.”

- “the Elections Clause permits the people of Arizona to provide for redistricting by independent commission.”
(Chief Justice Roberts)

• Roberts specifically mentions that while federal courts cannot address partisan gerrymandering, state constitutions can provide protections and remedy can be sought through state courts.

• He also specifically mentions independent redistricting commissions as a method states utilize to avoid partisan gerrymandering.

• “Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions.”
• The common understanding during the founding-era was that “legislature” meant an entity created and constrained by the state constitution (state constitution being a creation of the people)

• Many founding-era state legislatures around the time of the drafting of the Constitution were constrained in different ways such as instruction, recall, referendum, initiative, and judicial review

• 4/6 state constitutions during George Washington’s first term regulated the manner of federal elections:
  • Delaware Constitution of 1792
    • required that voters elect congressional reps “at the same places” and “in the same manner” as state representative.
  • Georgia, Pennsylvania, and Kentucky
    • Required “all elections” to be “by ballot”
Arguments Against ISL: Founding History (cont.)

- Massachusetts and New York had veto provisions for enacting federal election rules:
  - Massachusetts – bills concerning federal elections were presented to governor for approval
  - New York – bills concerning federal elections could be vetoed by review council made up of governor, and members of state judiciary

- Framers understood the landscape of the states when they drafted Articles I and II

- State legislatures were understood to be delegates of the people, limited by state constitutions created by the people.
• When the Constitution refers to “Congress,” another body of government, it is implied and universally understood that Congress is bound by checks and balances. (Presidential veto, Constitution, federal courts)

• It follows then that when the framers refer to state “legislatures” it is implied that they are restricted by checks and balances from state branches of government.
Arguments Against ISL: State Legislatures have delegated this power to state courts

- Some state legislatures have specifically delegated power to state courts to review issues related to federal elections

- Two decades ago, NC General Assembly passed a statute expressly giving state courts authority to review legislative redistricting work. N.C. Gen. Stat. § 1-267.1

- Additionally, NC General Assembly authorized state courts to “impose an interim districting plan” in certain situations like the one in this case.
  - “In the event the General Assembly does not act to remedy any identified defects to its plan within that period of time, the court may impose an interim districting plan for use in the next general election only, but that interim districting plan may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court.” N.C. Gen. Stat. Ann. § 120-2.4
Costello v. Carter
Pennsylvania

- *Costello v. Carter* introduces a slightly different issue related to ISL theory:
  - Whose responsibility is it to draw the maps when a state legislature and governor come to an impasse in the redistricting process?
  - Do the Elections Clause and 2 U.S.C. § 2a(c) constrain state courts when they impose congressional maps after an impasse in the state legislature?

- The Republican-controlled Pennsylvania state legislature passed a congressional map (9 D-leanifting districts / 8 R-leaniting districts), but the Governor vetoed the map.
- Due to the impasse, the Pennsylvania Supreme Court voted 4-3 to impose a new map that would result in 10 Democratic-leaniting congressional districts.
- The Plaintiffs assert in their petition for cert that their arguments are “more modest” than *Moore v. Harper*:
  - “Rather than disapproving a map enacted by the state legislature, the Supreme Court of Pennsylvania acted to fill a vacuum caused by the dead-lock between the legislature and the governor...But the Moore petitioners appear to be suggesting that the Elections Clause categorically prohibits the state judiciary from imposing a congressional map—even in response to a legislative impasse or constitutional violation. Our position is more nuanced: The state judiciary may impose a congressional map in response to a legislative impasse or constitutional violation, but its remedial discretion is constrained by the Elections Clause and 2 U.S.C. § 2a(c). Both petitions should be granted, and the cases should be heard together on the same day.”

- Note – 2 U.S.C. § 2a(c) – federal statute that provides scheme to follow for elections when state legislature fails to pass a redistricting plan.
What’s next?

- Oral arguments in *Moore* likely in late 2022
- Decision likely in late spring 2023