Independent State Legislature Doctrine

• What is it?
• Why are we talking about it?
• What’s all the fuss about?
• What happens from here?
Initially, the concept is straightforward.....the power to regulate federal elections is assigned to state legislatures via the US Constitution

• Just read the Constitution....
United States Constitution

Article I, Section 4, 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.

Article II, Section 1, 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.
Independent State Legislature Doctrine
- What is it? (cont.)

• Seem pretty clear, right? Not so fast….
  • Since this inherent authority of a state legislature comes from the US constitution, to what extent can state laws (including state constitutions) impair a state legislature’s authority to regulate federal elections?
  • What about any other state entity other than the legislature?
  • Would state constitutional limitations on partisan gerrymandering in congressional maps now be unenforceable?
  • Is this really just a power grab by federal courts to have greater control over reviewing state court opinions that involve federal elections?
This issue has been indirectly addressed by the US Supreme Court well before the 2000 Bush v. Gore cases.

**McPherson v. Blacker (1892)**

- Michigan’s statutorily prescribed method of appointing presidential electors on a district by district basis did not violate the presidential electors clause of the US Constitution (Art. II, Sec. 1, Cl. 2)

**Ohio ex. rel Davis v. Hildebrant (1915)**

- Ohio’s constitutionally prescribed referendum process for overturning the legislature’s congressional map did not violate the elections clause of the US Constitution (Art. I, Sec. 4, Cl. 1)

**Smiley v. Holm (1932)**

- Minnesota’s constitutionally prescribed process for allowing its governor to veto the legislature’s congressional map did not violate the elections clause of the US Constitution (Art. I, Sec. 4, Cl. 1)


- The Florida Supreme Court’s decisions to alter a statutorily prescribed process for counting votes in a presidential election violated the presidential electors clause of the US Constitution (Art. II, Sec. 1, Cl. 2)

**Independent State Legislature Doctrine**

- What is it (cont.)?
Independent State Legislature Doctrine

No, it’s not Ohio being Ohio again.

So who is it?

North Carolina!!
Moore v. Harper (No. 21-1271)

• Basic Facts
  • NC legislature adopts congressional map (Gov approval not required in that state)
  • Congressional map declared invalid by NC trial court and supreme court on state constitutional grounds
  • NC trial court (and ultimately NC Sup Ct) implements its own, separate map
  • NC files an emergency appeal with SCOTUS
  • SCOTUS rejects that appeal, but indicates that a normal appeal would likely be accepted
  • NC files that appeal

• Question Presented:
  Whether a State’s judicial branch may nullify the regulations governing the “Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,” U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a “fair” or “free” election.

• June 30, 2022 – SCOTUS agrees to hear the appeal next term
Independent State Legislature Doctrine

- Why are we talking about it? (cont.)

The Reaction....
"It’s Hard to Overstate the Danger of the Voting Case the Supreme Court Just Agreed to Hear.”
- Slate – 6/30/2022

“A new Supreme Court case is the biggest threat to US democracy since January 6”
- Vox – 6/30/2022

“Breaking and Analysis: Supreme Court Will Hear Moore v. Harper, the Independent State Legislature Theory Case from North Carolina; This Case Could Severely Curtail the Ability of State Courts to Protect Voting Rights and Stop Partisan gerrymandering”
- Electionlawblog.org – 6/30/2022
“Democracy advocates raise alarm after Supreme Court takes election case”
- Washington Post – 7/1/2022

“A new Supreme Court case threatens another body blow to our democracy”
- Washington Post (Opinion) – 7/2/2022

“The Supreme Court's next move could fundamentally change our democracy”
- Washington Post (Opinion) – 7/5/2022

“How Congress Can Preempt the Most Dangerous Possible Ruling of the Next Supreme Court Term”
- Slate – 7/7/2022

“Why the Trumpist threat in 2024 just got more dangerous”
- Washington Post – 7/6/2022

“The dangerous election theory the Supreme Court may be poised to endorse”
- CNN.com (Opinion) – 7/7/2022
“How The Supreme Court Could Turbocharge Gerrymandering — Just In Time for 2024”
- 538.com – 7/7/2022

“Republicans Are Trying to Repeal the 20th Century, Reagan Lawyer Warns”
- Newsweek.com – 7/8/2022

“Next Time Trump Tries to Steal an Election, He Won’t Need a Mob”
- New York Times (Opinion) – 7/8/2022

“How the Supreme Court could make it legal to steal the next presidential election”
- MSNBC (Opinion) – 7/11/2022

“The Case That Could Blow Up American Election Law”
- The Atlantic – 7/11/2022
“This phony ‘doctrine’ is an anti-democratic Republican power grab masquerading as legal theory. It was cooked up in a right-wing legal hothouse by political operatives looking to give state legislatures the power to overturn the will of American voters in future elections.”

Sen. Sheldon Whitehouse (D-R.I.), statement to The Washington Post, 7/1/2022
Independent State Legislature Doctrine

- What’s all this fuss about?

Is this just a “radical legal theory” that is a “fundamental threat to our democracy”?

Is this just another partisan fight between the 2 major political parties?

See Harkenrider v. Hochul

• NY Supreme Court, Steuben County

• Brief of the Speaker of the NY Assembly and the NY Assembly majority, filed March 21, 2022
Independent State Legislature Doctrine

- What’s all this fuss about? (cont.)

- It’s a bird…

- It’s a plane…

- No, it’s just old, boring language from the U.S. Constitution
Independent State Legislature Doctrine

- What happens from here?