Policy Brief: Supreme Court Reaffirms Federal Power over State Legislatures

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Insights for What’s Ahead:

The US Supreme Court decided the case of Moore v. Harper, a test of the “independent state legislature” (ISL) theory that only the state legislatures—not courts—could determine the manner of both state and Federal elections under the Elections Clause of the Constitution. The Court ruled 6-3 that Federal courts do retain authority over state elections, thus rejecting the ISL theory. Had the case gone the other way, state legislatures could presumably have overridden decisions of state courts regarding the conduct of elections and possibly even have appointed different electors for President than those actually chosen by the state’s voters.

- For the 2024 election, state courts will continue to be able to hear cases regarding the conduct of state elections and possibly invalidate rules made by the legislature, and Federal courts will continue to hear appeals from state court decisions that raise issues under the US Constitution.
- The decision was bipartisan, with three Justices appointed by each party joining the majority opinion.
- The decision smooths the path to resolving litigation expected to arise out of next year’s election (both before and after the election) and removes one possible danger—that state legislatures might seek to overturn the popular vote in their state.

History and the Court’s Opinion

The Elections Clause of the Constitution (Article I, Section 4) states that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” In December 2022, the US Supreme Court heard oral arguments in the case arose out of a redistricting plan enacted by the North Carolina legislature which the state supreme court overturned as excessive partisan gerrymandering. In oral argument, a majority of the Court seemed to lean towards reaffirming the powers of state courts, with Chief Justice John Roberts and Associate Justices Brett Kavanaugh and Amy Comey Barrett appearing to find ways to uphold state courts’ power without “acting more as a legislature,” in Justice Barrett’s words. Chief Justice Roberts noted that previous Court decision permitting state governors “power to veto the actions of the legislature” significantly undermines the argument that [the legislature] can do whatever it wants [.]” In contrast, Justices Thomas, Alito, and Gorsuch appeared willing to consider the ISL theory.

After a newly-elected North Carolina State Supreme Court overturned the decision which was on appeal to the US Supreme Court, in March 2023, the Supreme Court issued a brief order asking for additional briefs to discuss the effect of the North Carolina court’s decision. In the end, the Supreme Court decided the case on the basis of the original appeal from North Carolina without considering the new state decision, on the ground that the plaintiffs had actually sought to change the plans the Republican legislature had made.

Chief Justice John Roberts wrote the opinion, joined by the Court’s three liberal Justices (Sotomayor, Kagan, and Jackson) and Justices Kavanaugh and Barrett. The Chief Justice’s opinion was clear in
rejecting the ISL theory: “The Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections,” citing the case of *Marbury v. Madison* that gave the Supreme Court power to “invalidate laws that violate the Federal Constitution” and stating that the language of the Elections Clause “does not carve out an exception” to judicial review. Therefore, by extension, “[w]hen state legislatures prescribe the rules concerning federal elections, they remain subject to the ordinary exercise of state judicial review.” The Court then cited other cases reaffirming the point with regard to the Elections Clause in particular, including the 1932 case of *Smiley v. Holm* and *Chiafalo v. Washington*, a case concerning three electors in the 2016 election who had violated their pledges to support Hillary Clinton, who had won Washington’s electoral votes.

Thus, a state legislature “may not ‘create congressional districts [including their boundaries] independently of requirements imposed ‘by the state constitution with respect to the enactment of laws”—a process that definitely includes judicial review. In addition, Roberts wrote that “[t]his Court has an obligation to ensure that state court interpretations of state law do not evade federal law,” drawing an analogy and citing to a *case* in which the Court ruled that states “may not sidestep the Takings Clause by disavowing traditional property interests.”

However, Roberts’ majority opinion continued to state that while “the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein” given the important role of state courts in interpreting state constitutions. Instead, “[a]s in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law.” This standard is not precisely defined, a point discussed further in Justice Kavanaugh’s concurring opinion.

Nothing in the decision in *Moore v. Harper* changes the Supreme Court’s earlier decision that partisan gerrymandering is permissible, while gerrymandering based on race is not (reaffirmed in its recent decision in *Allen v. Milligan*)—another reason why the Court may not have chosen to address the North Carolina Supreme Court’s reversal of its earlier decision. Presumably the three liberal Justices, who oppose the Court’s decision on partisan gerrymandering, chose not to dissent on this point so as to ensure a broader majority on the key point of rejecting the ISL theory.

**Justice Kavanaugh’s concurring opinion**

Justice Brett Kavanaugh wrote a concurring opinion in which he stated his full agreement with the majority opinion while wanting to explore further the question of the standard Federal courts should use to review state court decisions under the Elections Clause. His opinion reviews three proposed standards for these reviews—Chief Justice Rehnquist’s reasoning in the 2000 case of *Bush v. Gore* (whether a state court “impermissibly distorted” state law “beyond what a fair reading required”), Justice Souter’s reasoning from the same case (“the limits of reasonable interpretation” of state law), and the Solicitor General’s broader proposal in *Moore v. Harper* (deference to a court should apply unless a court reaches a “truly aberrant” interpretation of state law).

Kavanaugh suggests that “all three standards convey essentially the same point: Federal court review of a state court’s interpretation of state law in a federal election case should be deferential, but deference is not abdication.” However, he then states he would pick Chief Justice Rehnquist’s standard as more “straightforward” and “should apply not only to state court interpretations of state statutes, but also to state court interpretations of state constitutions. And in reviewing state court interpretations of state law, “we necessarily must examine the law of the State as it existed prior to the action of the [state] court” (quoting Chief Justice Rehnquist). Presumably either Justice Kavanaugh could not obtain majority support for that view among the Court or he is simply seeking to put forward a separate view which could inform future litigation on the issue.
Dissenting opinion

Justice Clarence Thomas, joined by Justices Alito and Gorsuch, drafted an opinion which focused on the question of whether the Court should have decided the case at all given the North Carolina court’s reversal of its earlier opinion, calling it a “straightforward case of mootness”; the majority opinion “‘affirms’ an interlocutory state-court judgment that has since been overruled and supplanted by a final judgment resolving all claims in petitioners’ favor. . . . As such, the question is indisputably moot, and today’s majority opinion is plainly advisory.” While questions of mootness sometimes arise in the Court’s jurisprudence, the language here is somewhat strong, although Thomas added that “I respectfully dissent” (instead of a simple “I dissent” which sometimes indicates very strong disagreement among the Justices).

Conclusion: Settled—for Now

In the end, the Court’s opinion reflected the pattern at oral argument, with three Justices strongly opposed to the ISL theory, three open to arguments for it, and three in the middle, led by the Chief Justice, seeking to preserve some authority for Federal courts in these cases. The Court’s opinion dismissed the ISL theory squarely. It also settled the specific case in North Carolina at issue, even though the State Supreme Court had already reversed its own opinion, setting new boundaries for the districts at issue. By shifting the focus to the question of mootness—and wrongly terming the majority opinion “clearly advisory,” the dissenters hope to preserve the broader issue of the extent of courts’ powers over state legislatures for another day. That day, however, is unlikely to occur before the 2024 Presidential election.
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