Concluding Thoughts on the Invocation of the Independent-State-Legislature (ISL) Theory in the North Carolina Emergency Relief Application at the Supreme Court: Part Six in a Series

14 MAR 2022 | VIKRAM DAVID AMAR

POSTED IN: CONSTITUTIONAL LAW

Each of my last five columns has analyzed aspects or features of the so-called Independent-State-Legislature (ISL) theory concerning Articles I and II of the federal Constitution. The theory holds that because Article I (as to congressional elections) and Article II (as to presidential-elector selection) both make reference to state "legislatures," these elected legislatures are free, when it comes to congressional elections and presidential selection, to disregard generally applicable state constitutional constraints, and that federal courts are free to second-guess state courts on the meaning of state law in this domain. Republicans in North Carolina and Pennsylvania drew heavily on this theory in asking the U.S. Supreme Court to undo actions by

the state supreme courts in these two states concerning congressional redistricting. As I explained in the earlier Parts and in more depth in a co-authored article (with Akhil Amar) viewable on SSRN here, ISL theory is deeply flawed and unconvincing as a matter of original understandings (see Part One), the actions and intentions of state legislatures themselves, and recent Supreme Court case law (see Part Two).

In today's installment I want to look back a bit more at the Court's decisions last week not to grant relief to the North Carolina and Pennsylvania applicants, and look forward to other settings in which laying ISL notions to rest will be important.

Textualism Contradictions Within ISL

Justices Alito, Thomas and Gorsuch put on the record that they would have granted relief in the North Carolina case, *Moore v. Harper*. Here is some key language from their dissent from the denial of the application for a stay:

> This case presents an exceptionally important and recurring question of constitutional law, namely, the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections. There can be no doubt that this question is of great national importance. But we have not yet found an opportune occasion to address the issue. See, e.g., Democratic National Committee v. Wisconsin State Legislature, 592 U. S. ____ (2020); Scarnati v. Boockvar, 592 U. S. ____ (2020); Moore v. Circosta, 592 U. S. ____ (2020); Wise v. Circosta, 592 U. S. ____ (2020); Bush v. Gore, 531 U. S. 98, 112 (2000) (Rehnquist, C. J., concurring); see also Republican Party of Pennsylvania v. Degraffenreid, 592 U. S. ____ (2021) (THOMAS, J., dissenting from denial of certiorari); id., at ____ (ALITO, J., dissenting from denial of certiorari); Wisconsin State Legislature, 592 U. S., at ____ (GORSUCH, J., concurring). . . . This case presented a good

> opportunity to consider the issue. . . .
>
> [I]t is . . . likely that [the applicants] would prevail on the merits if review were granted. The Elections Clause [of Article I] provides that rules governing the "Times, Places and *Manner* of holding Elections for Senators and Representatives" must be "prescribed in each State *by the Legislature thereof*." Art. I, §4, cl. 1 (emphasis added). This Clause could have said that these rules are to be prescribed "by each State," which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power, as States are generally free to allocate state power as they choose. But that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously. . . .

For my purposes today, there are two points I want to highlight from this passage:

First, these three Justices take the position that the Article I (congressional election) and Article II (presidential selection) settings present the same basic ISL question, and that the answer should be the same in both realms. I say this because of the way they frame the question in terms of state judicial power to reject "rules adopted by a state legislature for use in conducting *federal elections*" generally (my emphasis), and because they cite, as evidence that the Court has been looking for a chance to address "*the issue*" (again, my emphasis), cases from 2000 and 2020 involving presidential elections, even though the North Carolina dispute before them involved congressional districting.

Second, these Justices' textual reading of Article I is driven, according to their own statement, by the fact that Article I says that times, places and manners of congressional elections "shall be prescribed in each State by the

Legislature thereof," instead of saying (as these three Justices observe the clause "could" have said) that times, places and manners are to be prescribed "by each State." The latter words ("by each state") would (according to the three Justices) have left it up to each State to decide which state organs get to do the regulating.

Here's the problem these three Justices run into, but perhaps do not see: Article II (whose meaning they say tracks Article I's) *does* confer responsibility onto "each state." With respect to presidential electors, Article II provides that "[e]ach state shall appoint, in a manner the legislature thereof may direct, [a set of electors]." Note that the subject of the sentence is *each state*, not the legislature thereof. It is each state—not each state legislature—that is empowered and obligated (because of the use of the word "shall") to do the appointing of electors. To be sure, as to the manner of such appointment, Article II does mention "legislatures," but says only that state legislatures "*may*" direct such manner, not that state legislatures "shall" or "must" or "will" direct the manner. Article II thus does not require that the state legislature be the body that adopts presidential selection regulations; instead, Article II's language makes clear that, as far as the federal Constitution is concerned, it is perfectly permissible in a given state for a body other than the legislature to be the one that directs the manner of presidential-elector selection. This is in considerable tension with the position the three Justices dissenting in *Moore* laid out with respect to Article I. In *Moore*, they said Article I creates indefeasible power and non-delegable duties for state legislatures insofar as the Constitution does not leave open to dispute "which branch, component, or officer of the state government should exercise th[e] power" of prescribing congressional election times, places and manner. Just as the Court "must take . . . seriously" the language that times, places and manners "shall be prescribed by" the state "legislature[s]" in Article I, so too must the Court take seriously the linguistic primacy of "each state," and the absence of any language requiring the active involvement of state legislatures, in Article II.

To put the point another way, if the three *Moore* dissenters find it important that Article I does *not* say "the Times, Places and Manner of [Congressional Elections] are to be prescribed by each state," so too they should find it important that Article II does not say "the Manner of appointing presidential Electors in each state shall be directed by the legislature thereof."

The bottom line here is that if ISL is supposed to apply the same broad way to both Articles I and II (as ISL proponents assert) the language of Article II, under the textual reading adopted by these three ISL-inclined Justices, weakens the case for ISL application in Article I. And yet in 2020 (in cases they cited to last week) these three wholeheartedly embraced ISL for Article II. Such a stance in part explains the impression some observers hold that these Justices are not taking constitutional language seriously so much as they are taking the ISL agenda seriously.

To be clear, I'm not suggesting that ISL theory works for Article I but not for Article II. It doesn't work for either. I'm simply pointing out that sweeping ISL notions certainly don't work for Article II under the textual approach employed by these three Justices, and yet these Justices have yoked the meaning of the two Articles together and already indicated embrace of ISL in both. A corollary of this point is, as Akhil and I have argued, that the Court's repudiation of ISL in the Article I setting in the *Arizona Elected Legislature v. Arizona Independent Redistricting Commission* and *Rucho v. Common Cause* cases is *a fortiori* a repudiation of ISL in Article II.

Widening the lens reveals that ISL works for neither Article I nor Article II primarily because there is nothing to indicate that enactment of these Articles reflects any intent by the Founders to interfere with the pre-existing and well-accepted supremacy that state constitutions enjoy over state legislative enactments (just as the U.S. Constitution is supreme over congressional enactments). And, very revealingly, none of these three

Justices who dissented last week nor ISL proponents more generally have identified any meaningful and specific history at the Founding articulating or explaining any federal constitutional preference for any particular intra-state separation-of-powers regime or any particular interpretative methodology for construing state statutes and state constitutional provisions bearing on federal elections. At most, ISL proponents draw on platitudes about how legislatures are the state institutions closest and most accountable to the people. In important respects that proposition may not even be true given the potential for legislative gerrymandering to which statewide gubernatorial or judicial elections may not be susceptible. And in any event such platitudes do not and cannot explain how legislative enactments have stronger democratic pedigrees than do state constitutions themselves, which come from the people and which create, empower, and cabin the legislatures.

At the end of the day, ISL backers tend to fall back on their repeated invocation of the word "legislatures." But, as I have noted many times, use of this word does not by itself tell us anything about the $64,000 question, that is, whether we are talking about "independent" legislatures, or legislatures subject to ordinary state constitutional constraints and state judicial review.

In fact, the mention of "legislatures" in Articles I and II (and Article V, as I have shown elsewhere) reflects no desire on the part of the federal Constitution to liberate these bodies from state constitutional constraints and state judicial review, but instead likely reflects concerns about clarity, efficiency, and ease of getting the new federal government under the Constitution off the ground. As Akhil and I have explained as to Article II (and Article I):

> The Framers knew that each of the thirteen then-existing states had an ordinary standing legislature, and Article II [and Article I as

> well] created a simple, inexpensive, and self-executing default that, unless a future state constitution specified otherwise by creating a special ad hoc legislative body or process, the state's ordinary pre-existing state legislature would be the body to adopt federal election regulations. And, to repeat, nothing in the Federal Constitution suggests that the ordinary state legislature would have federal carte blanche to act in extraordinary ways contrary to the general rules limiting the legislature in the very state constitution that created and bounded that legislature. . . . [The structure of state governments varied in 1787.] In the absence of [the Constitution's] mention of "legislature" [in Articles I and II], it thus might have been unclear in some states who was to play the default role in directing the manner of . . . the Federal Constitution's newly created [selection processes]. Going forward, however, [the Constitution's] text rather plainly gave each state, via any future state constitution or state constitutional amendment it might adopt, broad authority. A future state constitution could thus directly regulate the [federal election] process itself in whole or in part; create a special legislative body or legislative process to do the regulation; and/or continue to allow the ordinary legislature to direct electoral appointment, even [in the context of presidential electors] allowing the legislature to make appointments itself—all subject to whatever general rules that future state constitution might provide.

Why ISL Matters Not Just in Congressional Elections But Also (Perhaps Even More) in Presidential Elections

So much for looking back to last week's writings in the congressional districting case. Let us look forward to what a number of states are

considering doing with respect to presidential elections. Federal statutes set the date for state selection of presidential electors. Article II directly confers such power to set "Election (or Selection) Day" upon Congress. That does not mean that the identity of the electors must be known by 11:59 PM on Election Night, but it does mean that the antecedent facts—who voted for whom—have to be locked into place on or before Election Day. But prior to the holding of an election, a state has broad federally approved power to tinker with its election administration regime without running afoul of Congress's designation of an Election Day.

Note, however, once ISL is rejected in the Article II context, that a state constitution, as definitively construed by the state supreme court, might well constrain the choices of the state legislature long *before* Election Day. In some states, for example, the state constitution might well prevent the legislature from itself choosing electors, even though that is a choice the that federal Constitution permits. In other words, a state's constitution, best read, might require that ordinary voters choose the electors. (The Colorado Constitution, in this vein, provides that "after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.)" So, too, a state constitution might well be best read to prevent a state legislature from trying to make itself the "judge" of a contested presidential vote within the state. Such an attempt by the legislature might violate state constitutional separation-of-powers provisions vesting general adjudicatory power in such cases in the regular state courts and not the state legislature. (The Pennsylvania constitution, for instance, says that the "trial and determination of contested elections of electors of President and Vice-President, [along with various state offices,] shall be by the courts of law . . . .")

The scenarios herein envisioned—attempted power-grabs by state legislatures in the upcoming presidential-election derby—are not outlandish hypotheticals. There are movements now afoot in various circles to

empower red-tilting state legislatures in states that have bluish-purple

presidential electorates—Arizona, Georgia, Wisconsin, Virginia, Pennsylvania, and Michigan, to name some of the most obvious jurisdictions.

Of course, in each state the text of the state constitution—and authoritative good-faith interpretation of that constitution by state courts—will be crucial, but these state constitutions and state courts can perform their legitimate and beneficial roles only when the underbrush of ISL is cleared away once and for all.

POSTED IN: CONSTITUTIONAL LAW, ELECTION LAW

VIKRAM DAVID AMAR

Vikram David Amar is the Dean and Iwan Foundation Professor of Law at the University of Illinois College of Law on the Urbana-Champaign campus. Immediately prior to taking the position at Illinois in 2015, Amar served as the Senior Associate Dean for Academic Affairs and a Professor of Law at the UC Davis School of Law. He has also had teaching stints at three other law schools affiliated with the University of California: the UC Berkeley School of Law; the UCLA School of Law; and UC Hastings College of the Law.

Comments are closed.