LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

How and Why Justice Breyer (and Other Justices) Should Weigh in on the Independent-State-Legislature Notion Before Breyer Retires

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As I noted last week and major news outlets have also reported, the United States Supreme Court is poised next week to consider taking up the North Carolina partisan-gerrymandering case involving the so-called Independent-State- Legislature (ISL) theory. As I have explained at length, the theory—which holds that elected state legislatures, when regulating federal elections under Articles I and II, are free from state-court enforcement of state constitutional limits on legislative power—is belied by the well-understood meaning of "state legislatures" in 1787, the grammar and syntax of Articles I and II themselves, the clear actions by states right before and right after the founding, the enactments of state legislatures themselves over the course of American electoral history, and unbroken

Court precedent from the early 1900s through the last decade. But so far, the bulk of the discussion of the theory's merits by any of the Justices has come from conservative members of the Court who in the past few years seem open to embracing it. Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch in particular have been adept at using the device of the dissental—a term melding "dissent" and "denial" to describe the practice of noting and explaining a dissent from a denial of emergency relief or a denial of certiorari—to lay out why they (wrongly) think that acceptance of ISL notions is required to make meaningful the language in the Constitution. (See, e.g., here and here.)

Many observers expect the Court to grant certiorari in the North Carolina case, and ISL notions have been surfacing often enough in recent years that the Justices should take some case to formally bury the misbegotten theory. If the Court does grant certiorari in the North Carolina dispute and set the matter for regular briefing and argument, all of the Justices who render a final decision (likely in 2023) will have a chance to weigh in on the validity *vel non* of ISL. But if the Court really takes constitutional law seriously, and is averse to accepting constitutional theories that have no support in sophisticated assessments of constitutional text, in founding expectations, in structural norms, or in Supreme Court precedent (all the benchmarks the *Dobbs* draft majority opinion said *Roe* failed), the Justices need not wait until 2023 to register their incredulity about ISL. One ideal option would be for the Court to grant and summarily (and unanimously) affirm the North Carolina Supreme Court's ruling enforcing the state constitution's prohibition on excessive partisanship in drawing voting-district lines.

While less common than granting and summarily reversing (or granting, vacating, and remanding), granting and summarily affirming is something the Court has from time to time done. As the leading treatise on Supreme Court practice explains, "the Court may grant a petition and summarily affirm the judgment below. . . in order to resolve a conflict among the lower

courts; this has happened where the judgment below is . . . so obviously correct and [any] conflicting decision[s] so clearly wrong that the Court feels further consideration is unnecessary." This justification applies fully to ISL; to the extent that the North Carolina Supreme Court's rejection of ISL is in tension with a small number of old cases from other courts, the judgment in the North Carolina Supreme Court case is obviously correct.

A second accepted reason for summary affirmance is that the "Supreme Court itself has just decided the point on which the conflict exists." That applies here as well; the Court definitively rejected ISL in the Article I setting twice in the last decade, in *Arizona Elected Legislature v. Arizona Independent Redistricting Commission* (2015) and *Rucho v. Common Cause* (2019).

Summary affirmance can also be justified when the Court "believes that the decision below is . . . [clearly] correct but that the issue is sufficiently important to need the added weight of Supreme Court approval." This third justification also applies to ISL; regardless of any (dated) split in lower court authority, ISL notions are being bandied about sufficiently frequently today by commentators, lower court judges, state officials, and some of the Justices themselves that the Court needs to add its "weight" by accepting review of the theory and definitively putting it to rest.

If for whatever reason there are not five votes to summarily affirm, and four Justices want to grant certiorari, individual Justices can and should register their emphatic rejection of ISL either by dissenting from or concurring in a decision to grant. The use of the dissental from and the "concurral" (a blend of "concurrence" and "denial") in certiorari *denials* is increasingly common, and "dissentants" (to coin a phrase that blends "dissent" and "grant") from and "concurrants" (blending "concurrence" and "grant") in certiorari *grants* are also within the power of the Justices to issue. If, as discussed above, the Court has the power and option to grant and summarily affirm, individual

Justices should at the cert. stage be able to put on the record that they would rather do that than grant and set a case for briefing and argument. (While I have not come across dissentants from or concurrants in decisions to grant certiorari and set cases for argument, and running word searches to find such things is no simple matter, I have seen plenty of examples of concurrants when the Court grants, vacates, and remands in one fell swoop.) All separate writings in these genres by Justices can provide helpful merits-related information to other Justices, lower courts, Congress and the President, state courts and other organs of state government, and interested members of the public. These framing and cueing functions explain the increased use of dissentals and concurrals at the Court (and in lower courts) with respect to denials of discretionary review, and the same benefits can accrue even when review is granted.

But, someone might object, when review is granted, any Justices who disagree with the grant will have ample opportunity down the road to register their views. I don't view the matter in either/or terms; all dissentals/dissentants and concurrals/concurrants are designed to convey information sooner rather than later, and to a variety of audiences for whom time may be of the essence. A related concern is that dissentants and concurrants could suggest that Justices already and needlessly have locked into their views on the merits. I don't share this concern, as long as any Justices who issue dissentants or concurrants are open to the changing their minds (based on subsequent briefing and argument) before casting their final votes. I also note that dissentals and concurrals (the legitimacy of which seems accepted) also involve Justices weighing in on the merits, especially in the context of applications for stays at the Court, a setting in which likelihood of success on the merits is explicitly a factor in the Court's decision whether to grant. In any event, whether or not one finds these concerns weighty (and I don't) they would not apply to one member of the Court who is fully allowed to participate in next week's decision whether to grant review in the North Carolina case, Justice Stephen Breyer. He will *not*

have a chance to voice his merits views in the October Term 2022, because he will be retired from the Court by then. The fact that the Court's operating rules permit (even encourage) him to participate in the certiorari-granting process for cases on which he will not vote after briefing and argument suggests that the Court (and the country) cares about his views, and so I close this column with a particular exhortation to Justice Breyer (whether he is joined by others or not) to use his considerable analytic acumen to engage and debunk ISL even at the certiorari stage. Justice Breyer, it might be noted, is one of only two Justices currently on the Court who were also on the Court at the time of *Bush v. Gore*, whose rushed shadow-docket consideration itself helped create the ISL monster. The other remaining Justice, Clarence Thomas, has in the past few years (in the context of dissentals) doubled down on the *Bush v. Gore* concurring opinion he joined (authored by Chief Justice William Rehnquist and also joined by Justice Antonin Scalia) that floated, without any sustained originalist or precedentialist analysis, ISL notions. Justice Breyer joined Justice John Paul Stevens, Justice Ruth Bader Ginsburg and Justice David Souter in expressly rejecting ISL in 2000, but has kept quiet about the idea since then. Now is the time, before Justice Breyer departs, for the rest of the Court, and the rest of the nation, to hear and benefit from his wisdom.

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