# Post-Argument Analysis in the *Moore v. Harper* Case Raising the So-Called "Independent State Legislature" (ISL) Theory: What Might the Court Do?

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Last week's Supreme Court oral argument in *Moore v. Harper* rightly drew a lot of media attention. The case raises the so-called "Independent State Legislature" (ISL) theory that, if embraced, could have profound implications (as explained here). But unlike many oral arguments (such as the previous week's argument involving same-sex weddings in Colorado), this one didn't generate a clear consensus among analysts about how a

majority of the Court is likely to rule. Reading oral-argument tealeaves can often be challenging; one reason is that Justices sometimes ask questions or make comments counter to their own leanings simply to make sure they understand the strongest arguments on the other side. Oral arguments are even harder to read these days because the arguments very often run well beyond their allotted times (and thus Justices say so many things it's hard to know what each Justice cares most about).

But even though we'll all just have to wait until June or so to really know what will happen in *Moore*, many commentators are suggesting that there appears to be a majority (Justices Sonia Sotomayor, Elena Kagan and Ketanji Brown Jackson for sure, and quite possibly Chief Justice John Roberts and Justices Brett Kavanaugh and Amy Coney Barrett) who, because of powerful originalist and precedent-based arguments, reject the basic premise of ISL: the notion that when Article I, section 4 of the Constitution confers power on the "legislature" of each state to "prescribe" the times, places and manner of congressional elections, "legislature" means a particular body of ordinary, elected legislators who are free to flout procedural and substantive limitations in the state's constitution and to exercise power exclusive of other organs of state government. ISL's insistence that "legislature" refers to a particular governmental body—rather than a state's system of making laws—simply can't be squared with, among other things, the early (founding-era) involvement of governors in Massachusetts and New York (and judges as well in New York) in the formation of congressional-election regulations.

That a majority of the Court seems to reject ISL's basic textual premise is good news. The less good news is that some members of this potential

majority (who could be joined by Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch) might nonetheless be interested in retaining a somewhat vigorous role for the U.S. Supreme Court to police state-court interpretations of state constitutions when federal elections are involved. As a friend of mine put the point, much of the argument seemed to focus on what "adjectives and adverbs" might be used to craft an oversight standard the Supreme Court could use to rein in state courts whose rulings go too far beyond explicit state constitutional text in this domain.

If (and I repeat *if*, since we really don't know) this is where things are heading—with a middle group of Justices wanting to retain distinctive U.S. Supreme Court oversight over state courts in this realm—here are several points to keep in mind:

1. Such an outcome would have nothing to do with Article I, section 4's use of the word "legislature." If (as the middle-group position sketched out above would seem to concede in light of founding history and past cases): (1) state governors can in the congressional-election-regulation setting continue to exercise veto power (for any reason they like, whether explicit policy preferences or concerns about compatibility with state constitutions), and if; (2) independent, unelected redistricting commissions can be created and can draw congressional district lines based on commissioners' views of the best election-regulation policies, and if; (3) the people of each state can enact explicit language into their constitutions (that state courts can then enforce) that reflects detailed and comprehensive policy judgments about the substance and procedure of congressional-election regulation, then the ordinary, elected set of legislators—the

body ISL says is specially empowered and insulated by Article I—isn't being protected in its prerogative to "prescribe" anything at all. Indeed, if all these other organs of state government (governors, independent commissions and the people themselves—none of whom is the "legislature" according to ISL) are allowed to regulate as part of a state's lawmaking system, then the only state government actors who *aren't* allowed to play in this policymaking game are state court judges. ISL has morphed from special federal protections for ordinary, elected state legislatures to special federal limitations on state courts. The operative theory should thus be renamed from ISL to SJD ("State Judge Distrust").

2. And where SJD could legitimately come from, constitutionally speaking, is anyone's guess. ISL purported to be based on the "deliberate" use in Article I, section 4 of the word "legislature" instead of the word "state." But nowhere does Article I, section 4 mention state courts or state judges, much less single out these actors for any special (negative) treatment. And it's hard to understand why SJD—if it is valid—wouldn't apply even had Article I, section 4 used the word "state" rather than "legislature." In *Dobbs* (and elsewhere) the Court majority has said that constitutional doctrines need to have grounding in the text, structure, history and tradition of the constitutional document itself. Yet SJD doesn't appear to enjoy any of these pedigrees.
3. To be sure, Article I, section 4 governs *federal* elections, such that some Justices may believe that there is an inherently federal interest here to be protected. And there is. But remember that Article I's drafters and ratifiers explicitly, consciously and publicly chose to confer power on state governments to administer congressional

elections (opting for a presumptively decentralized, rather than an inherently federalized, election system), and specifically identified Congress (along with the President)—*not the Supreme Court*—as the federal entity empowered to regulate congressional elections, or refuse to seat ostensibly elected members of Congress, when states are doing bad things. What originalist evidence is there for the notion that the Supreme Court is the key federal player here? No one has pointed to any as far as I can tell.

4. A large role for the U.S. Supreme Court in making sure state courts rightly interpret state constitutions (just pause for a minute to think about how weird from a federalism standpoint that very concept sounds) is not just "made up" and thus anti-originalist, it also flouts more than a century of clear teachings by the Court that state courts are the master interpreters of state law (*Green v. Neal's Lessee*), that whether state law comes from statutes or judicial rulings is no concern of the federal government (*Erie*), and that states have broad power under the Tenth Amendment (subject, of course, to republican government principles) to blend legislative and judicial roles (*Calder v. Bull*). And it ignores the structural ways in which state supreme court judges (who are often elected by statewide, ungerrrymandered electorates and thus accountable to them) are very different from appointed and life-tenured federal judges, who are rightly much more confined in their lawmaking powers.
5. Perhaps the desire by some Justices today to retain oversight of federal-election administration goes back to the instinct members of the Court may have had two decades ago in *Bush v. Gore*. Relatedly, some members of today's Court who have great respect for Chief Justice William Rehnquist (the author of a very relevant concurrence

in *Bush v. Gore*), don't want to lightly reject the intuition he expressed there about a role for the Supreme Court. But Chief Justice Rehnquist's intuition (however well-intentioned) turns out to be wrong—after all, he grounded the intuition in Article I's use of the word "legislature," which, as shown above, can't really do any interpretive work in light of founding history and textual sophistication. (It bears noting that the Court in *Bush v. Gore* didn't have the benefit of all the recent scholarship and briefing debunking the idea that "legislature" means a particular body rather than a state's "lawmaking system," so Chief Justice Rehnquist's mistake was forgivable, especially given time pressures present in 2000.) The *Moore* Respondents, seemingly sensitive to the respect Chief Justice Rehnquist's concurrence may still enjoy, declined to call it out for the false start that is was, and in this regard failed to properly serve the Court by offering the Justices a clear if uncomfortable truth. And by not directly taking on the *Bush v. Gore* concurrence, the Respondents ended up presenting a convoluted and problematic theory themselves—that state courts can't be centrally involved in lawmaking in this realm, but what the North Carolina Supreme Court here did was permissible (according to some contested and ill-defined line between legitimate state-constitutional interpretation and illegitimate policymaking). This position may not be as dangerously flawed as ISL, but without more it could leave some Justices thinking they must choose between two readings of Article I neither of which makes sense; respondents would have been better off (and would have better served the Court) by presenting in addition a third (and coherent and historically well-grounded) reading—one that recognizes broad leeway by states to experiment in this realm, even

by conferring substantial policy-making power on state judges, subject to republican government principles. Because of their desire to control things, some Justices might balk here at coherence if it requires self-restraint, but I'm happy that at least some of the amicus briefing (including a brief on behalf of Professors Steven Calabresi, Akhil Amar, and myself) laid out this position forthrightly and forcefully so the Justices have it before them and need to reckon with it.

6. There is yet another way in which the retention of broad supervisory powers by the U.S. Supreme Court in this arena makes no structural sense. Since everyone concedes that state courts can in *state* elections interpret state constitutions expansively (beyond explicit text in the state constitutions) to protect voting rights enshrined in state constitutions—or, for that matter, rein in statutes that extend voting privileges in ways that violate permissible limitations on voting contained in state constitutions—there might now exist a situation in which the voting rules for state and federal elections will be meaningfully different. For example, if a state supreme court well in advance of an election rules that the state constitution is (even though there is no super-explicit state-constitutional language on this point) best read to require that votes be *received* by Election Day in order to be counted, even if the election statute on point says ballots should be counted as long as they are *postmarked* by Election Day, does that mean the U.S. Supreme Court could/should intervene to hold that ballots postmarked but not yet received by Election Day must count for U.S. House of Representative contests even though they clearly cannot be counted for state legislative and gubernatorial offices? Of course, if a state supreme court ruling really does come up

with truly new election rules fashioned out of whole cloth right before (or worse yet after) an election is held, that may well raise a federal constitutional problem under due process and rule-of-law principles. But it should be a problem for both state and federal elections, and the power of the U.S. Supreme Court to step in should be the same in both settings.

In this regard, we should remember that what might seem at first blush to the Supreme Court as state-court overreaching might in fact be proper under that state's legal and interpretive traditions. There is no general federal common law of state constitutional interpretation (or state statutory interpretation or state common-law interpretation).

A proper test here cannot be whether a state supreme court is suitably "textualist," as some members of the U.S. Supreme Court might seek to define textualism. A given state legislature, the state people who elect that state legislature, and the spirit of that state's overarching state constitution might well prefer a state-law jurisprudence that is more purposive, or structural/holistic, or precedent-based, or representation-reinforcing, or democracy-promoting, or canon-driven, than relentlessly textual.

7. Finally, how meaningful any reservation of U.S. Supreme Court oversight power in this realm will be in practice may depend on how it is applied in *Moore*. If the Court affirms what the North Carolina Supreme Court did in this case (on the ground that the lower court's interpretation of the NC constitution wasn't impermissibly

adventurous), then even if the U.S. Supreme Court Justices add language indicating they plan to keep a watchful eye on state courts and that state court judges should mind their Ps and Qs going forward, such an outcome might not do too much damage. A result like that, depending on the precise words the Court uses, may not be terribly different from a full-throated (and correct) statement that state courts are the master interpreters of state (constitutional) law, and that state courts violate the federal Constitution only when they act so capriciously as to run afoul of due process and rule-of-law limitations, which would apply in state as well as federal elections. After all, if the U.S. Supremes want to formally reserve power to themselves but also make clear in their actions that federal courts should not use it except in truly outlandish cases, then state courts might be able to move forward in a more or less business-as-usual way. (The problem could still persist to the extent that overly zealous lower federal courts might try—and be able—to review questions of state-court misinterpretation of state law in federal-election settings, so I don't want to suggest an affirmance by the U.S. Supreme Court solves everything.) But if the Supreme Court reverses the North Carolina Supreme Court under some amorphous "the lower court strayed too far beyond the text of the state constitution" reasoning (as if the U.S. Supreme Court doesn't often forge doctrines—like "state sovereign immunity"—that go well beyond the words of the U.S. Constitution), then the problems are much worse still, in terms of the uncertainty and contentiousness that would be interjected into the 2024 election cycle. Such a development would be as unwelcome as it is unwarranted.

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