VERDICT

LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

More Developments in *Moore* (*v. Harper*), and the Central Role Justice Anthony Kennedy Has Played in Addressing the "Independent State Legislature" Theory (ISL) that *Moore* Raises

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This week has brought a few significant developments in *Moore v. Harper*, the pending Supreme Court case involving the so-called "Independent State Legislature" interpretation of Articles I and II of the Constitution (ISL). (For background on what the ISL issue is and why it matters, see here.)

First, the *Moore* parties filed a letter in the Supreme Court on Wednesday formally alerting the Justices to last Friday's ruling by the North Carolina Supreme Court (discussed in detail in my last column, co-authored with Jason

Mazzone, here), and offering to "file supplemental briefs regarding the effect of [that] decision on [the U.S. Supreme] Court's jurisdiction should the Court" so desire. And just yesterday late afternoon, the Court accepted that offer, and asked the parties (as well as the Solicitor General) to file supplemental briefing, due next Thursday, on what effect last week's action by the North Carolina Supreme Court has on the U.S. Supreme Court's jurisdiction.

The request for supplemental briefing is fine; it suggests a majority of the Court may not have clearly made up its mind on whether *Moore* is moot. But as Jason and I pointed out, supplemental briefing (and the Court's deliberation on that briefing) takes valuable time. And if the Court *does* end up concluding (wrongly, from our vantage point) that *Moore* is in fact moot, then that time spent on the briefing and deliberation may make it considerably harder for the Court to resolve the ISL issue—which the Justices need to—in advance of next year's presidential election cycle. That is why Jason and I urged the Court to immediately grant review in a case from Ohio—*Huffman v. Neiman* (whose cert. petition is currently pending)—that also raises the core ISL questions. That way, briefing in *Huffman* can proceed apace, and the Court could (if need be) use *Huffman* as the vehicle to resolve ISL before Thanksgiving. (There is no downside to this "keep your options open" approach from the Court's vantage point—that is, the Court will be no worse off by granting in *Huffman* now—since *Huffman* can always be dismissed or vacated and remanded without opinion, depending on what happens with *Moore* and depending on whether *Huffman* itself has justiciability flaws that take time to examine)

This week's request for briefing makes our proposed course of action all the more sensible.

Meanwhile, we also got some heretofore unknown information bearing on *Moore* this week that takes us back over twenty years, to the 2000 Bush v. Gore

(*B v. G*) case, in which a concurring opinion by Chief Justice William Rehnquist (joined by Justices Antonin Scalia and Clarence Thomas) hurriedly planted seeds that would become the weed that is modern ISL theory. Supreme Court reporter Joan Biskupic reported in CNN, also on Wednesday, on newly released papers on *B v. G* from the files of former (and now deceased) Justice John Paul Stevens, including a pre-oral-argument four-page memo Justice Sandra Day O'Connor had distributed to all her colleagues, laying out Justice O'Connor's preferred approach for resolving the dispute. Biskupic says this memo "provided the early framework that steered the outcome in the dispute" and that Justice O'Connor's views (along with Justice Anthony Kennedy's) "eventually forced [Chief Justice William] Rehnquist to abandon [Rehnquist's] effort to author the main opinion with a boundary-pushing [ISL] view of federal election principles." Justice O'Connor's memo is indeed very interesting, but not quite for the reasons Biskupic says. Indeed, Biskupic suggests that this memo formed the basis for the unsigned (or "*per curiam*") opinion (apparently drafted initially by Justice Kennedy) for the five Republican Justices who comprised the *B v. G* majority that relied on the Equal Protection Clause of the 14th Amendment—*rather than ISL*—in repudiating what the Florida Supreme Court had ordered by way of presidential election recounts. In fact, as others (like Derek Muller) have already pointed out yesterday, Justice O'Connor's memo was *all* ISL—it didn't even mention "Equal Protection" as a legal basis even as it criticized the standardlessness of the Florida Supreme Court's directives, something the *per curiam* opinion would characterize as an Equal Protection problem. (All of the criticisms Justice O'Connor's memo made about the Florida Supreme Court went, for her, only to show that the Florida courts were impermissibly disrespecting the Florida legislature, an ISL-centric, not an Equal Protection, idea.) Not only was O'Connor's memorandum seemingly *not* the basis of the *per curiam*, the memo was essentially a first draft of what would become Chief Justice Rehnquist's ISL concurrence; several paragraphs in O'Connor's memorandum were lifted

verbatim from the memo and plopped into Chief Justice Rehnquist's concurrence (perhaps in a bid to woo Justice O'Connor to join an opinion that featured her own words).

The real story, then, turns out not to be how Justice O'Connor's memorandum shaped the majority opinion (Biskupic's focus), but how and why Justice O'Connor came to abandon her ISL-focused memo and decline to join Chief Justice Rehnquist's concurrence that cannibalized it. (In this respect, Justice O'Connor in *B v. G* appears to be guilty of what the *Dobbs* Court criticized *Roe v. Wade* for—deciding something is unconstitutional but not caring very much about which provision(s) in the Constitution were doing the work.) And here is where Justice Kennedy's role would seem to take on huge significance. Although he originally praised Justice O'Connor's memo—and Justice Kennedy is an unflaggingly kind and respectful person who praises the work of fellow Justices (and fellow human beings) whenever he can—Justice Kennedy had at oral argument in *B v. G* expressed disagreement with the core of ISL—that elected state legislatures were freed of the state constitutions that created those very legislatures by virtue of something in the federal Constitution. That, Justice Kennedy rightly suggested, would not be consistent with the principles of Republican government to which the Constitution is textually committed.

What we don't yet know, and what would be fascinating to learn, is precisely how Justice Kennedy was apparently able to convince Justice O'Connor that ISL was not constitutionally correct, and to persuade her to be part of the *per curiam* but to withhold her vote from the concurrence.

Why does it matter that the real protagonist of this story is not Justice O'Connor but Justice Kennedy? For starters, getting history right—as an originalist Court itself would be the first to say—is something valuable for its own sake. But perhaps more importantly, Justice O'Connor's abandonment

(apparently with Justice Kennedy's encouragement) of ISL shows us there was never a majority of Justices at the time of *B v. G* who embraced ISL; in fact, Biskupic's document revelation is evidence that there was a conscious decision by six Justices *not* to accept ISL (notwithstanding Justice O'Connor's flirtations with the theory), and that the Bush v. Palm Beach Canvassing Board decision handed down a week before *B v. G* (and which contained some broad ISL language) should be taken at its word when the Court said it was "declin[ing] at this time to review [any] federal questions asserted to be present."

Not only does Justice O'Connor's apparent change of mind confirm that ISL theory has never commanded a majority of Justices in a case where ISL would affect the outcome, it also helps explain the only big ISL case that the Court has decided since *B v. G*—the 2015 ruling upholding, against ISL challenge, the creation of the Arizona Independent Redistricting Commission. The central role of Justice Kennedy in the *B v. G* story helps explain why Justice Kennedy would be the sole conservative Justice to join Justice Ruth Bader Ginsburg's clear and forceful repudiation (a repudiation that has since been supported by a flood of originalist scholarship, including this piece) of ISL in the seminal 2015 Arizona ruling, a ruling that itself was seemingly embraced by the whole Court four years later in Rucho v. Common Cause. Justice Kennedy had seen the wrongness of ISL the whole time. And as is true of many (though of course not all) of Justice Kennedy's core constitutional instincts, his instinct against ISL was dead right.

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