

BROTHERS IN LAW COMMENTARY

Justice Kavanaugh stands up for state constitutional law in the Missouri congressional case

By Akhil Amar & Vikram Amar

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(Celal Gunes/Anadolu via Getty Images)

A crucial case decided yesterday on the Supreme Court's emergency docket will likely mean that in the upcoming November election Republicans will win only 6 of 8 Missouri congressional seats in the new House of Representatives, rather than 7 of 8, as they were hoping for.

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request himself, without referring it to the whole court; he would not have acted unilaterally unless he knew a majority of the court wanted no part of this request.)

We applaud this outcome, and we offer a few quick points of elaboration.

1. Under both the U.S. Constitution's Article I, section 4, and a clear [congressional statute on the books](#), Missouri's single-member districting lines for Congressional districts are to be determined by state law – including, of course, state constitutional law, as definitively determined by the state supreme court. The Missouri Supreme Court had already [weighed in](#) on the relevant state-law issues in *Hoskins*. (For the details, see Amy's recent [explainer](#).) There was thus no proper role for the U.S. Supremes at this point. Such is the square command of the court's landmark ruling in the 2023 [Moore v. Harper](#) – a ruling involving congressional districting in North Carolina in which the court aligned with our [amicus brief](#) in that case (co-written with [Steve Calabresi](#)) and also built squarely on an earlier Roberts court precedent, [Arizona v. Independent Redistricting Commission](#), involving congressional districting in Arizona.
2. Some prominent commentators in 2023 opined that the *Moore* court had left the door open for U.S. Supreme Court intervention seeking to second-guess state supreme courts in a broad range of future congressional districting cases. We thought that these commentators misread *Moore*, and [we said so](#) back in 2023. Since then – consistent with our reading of the case, and contra the predications of these other commentators – the U.S. Supreme Court has yet to second-guess a single state supreme court state-law ruling involving congressional districting.
3. In *Hoskins*, the [state supreme court](#) was *unanimous*. It essentially ruled for Democrats even though a strong majority of that court had been appointed by Republican governors. This is what law looks like.
4. Here is another thing that law looks like: What's sauce for a Democratic goose in Virginia is sauce for a Republican gander in Missouri. When sore-loser Democrats tried to use the Supreme Court's emergency docket to second-guess the Virginia Supreme Court on a state-law issue in a recent congressional districting case, the Supreme Court [shot down](#) the Virginia Democrats unanimously and immediately. Yesterday, the court quite properly did the same thing on the same brisk timeline to Missouri Republicans.
5. The state of Missouri, via its constitution, has chosen to allow the people of the state, in certain specified situations, to weigh in directly on congressional districting before any ordinary state law changing the districting rules may go into effect. This is surely a choice Missouri is allowed to make under the 10th Amendment, [the Republican Government Clause](#), *Erie*,

and the *Moore v. Harper* line of cases. If the people of Missouri don't like this system, they are of course free to change their state constitution. The state constitutional provisions at issue in *Hoskins* have a long and distinguished pedigree. The [Missouri Constitution](#) could clearly have prevented the state legislature from implementing ANY optional districting change absent two legislative votes separated by an intervening general election. Given that, the Missouri Constitution can surely take the lesser step of pausing new legislative districting rules in some situations, where opposition among the electorate is particularly intense and seemingly widespread, while allowing new legislative districting rules to take immediate effect in other, calmer and less partisan situations.

6. Under the so-called [Purcell principle](#), the Supreme Court has admonished that federal courts should not upset state-law election rules and practices on the eve of an election, absent a very clear violation of federal law.

For a more detailed analysis, advocating for and correctly predicting yesterday's Supreme Court result, see Vik's September 7 Justia [column](#).

Hooray for Justice Kavanaugh! Hooray for the court!

P.S. Shortly after Kavanaugh's order last evening, a rogue federal district court judge, disregarding both the plain purport of Kavanaugh's ruling and the clear legal analysis of the underlying issues in Vik's Justia column, has [apparently](#) tried to reopen the door that Kavanaugh properly slammed shut. We urge and expect a quick and stern bench slap of the district court from the Eighth Circuit on its emergency docket and/or from Kavanaugh and the Supremes.

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