Independent State Legislatures: More Challenges for America's Elections

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Every American will agree that representative government, guaranteed by the individual's entitlement to cast a ballot, is the hallmark of our democracy. No fewer than seven amendments to our Constitution expand voting rights[1] and Congress has enacted numerous measures to protect and promote the franchise.

But various factors can blunt the popular vote, some inherent in our system and others arising in an increasingly politicized environment. For example, it is possible under the Constitution that a numerical majority of individual votes may not succeed in electing the leader of our nation. At the state level, redistricting is employed to undermine the influence of one group of voters while amplifying the power of another. And voters' ease of access to the ballot box, whether local or presidential, is increasingly hostage to the vagaries of battling ideologies.

All of these elements converged in the last presidential race, and an issue soon to be considered by the Supreme Court may add further complexity to popular participation in 2024. This article discusses those elements, with particular emphasis on the last-referenced issue—the independent state legislature (ISL) theory.

The Importance of Battleground Votes. Decades from now, raw statistics may depict the 2020 Presidential election as a decisive outcome, in which the winning candidate captured 74 more electoral ballots and seven million more popular votes than the runner-up.

But we recognize the result was much closer, given the dichotomy in our system between popular ballot totals and electoral votes. In Arizona, Georgia, and Wisconsin, a total of only 45,000 popular votes separated the two candidates, out of more than eleven million votes cast in those states. Pennsylvania's difference was 80,000 votes out of nearly seven million cast. Together, this narrow margin of 125,000 ballots out of eighteen million across four battleground states--less than seven-tenths of one percent--would yield 57 critical electoral votes to the winner, more than 22 percent of the required 270 total. Influence over voter turnout—not only via campaign tactics but also via control over the times, manners, and places where constituents could cast a vote—was critical.

The Constitution's Limited Franchise.
These statistics reflect the framers' original construction. The subordination of a direct popular vote for President was immediately evident in Article II of the Constitution. Forming an executive branch of government and vesting executive power in the presidency, Article II defines in Clause 1 the mechanism for electing the President. That process is not via popular consensus, but through the vote of electors, allocated in the same numbers as the states' representation in Congress:

1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows.
2. **Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress**: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.[2]

The Constitution's requirement that electors not hold certain federal offices is augmented by one other prohibition: the Fourteenth Amendment disqualifies state officials who have engaged in insurrection or rebellion against the United States or given aid and comfort to its enemies.[3]

Beyond that, the states have significant latitude in appointing electors, and more significantly for the individual voter, in determining how those electors are to cast their ballots. Today, with two exceptions,[4] every state appoints all their electors to vote for the slate receiving the greatest number of that state's popular votes for president.

States have the authority to require fidelity by their electors. Fifteen states provide that so-called "faithless electors" may be subject to fines, have their votes cancelled, or disqualified replaced by a substitute.[5] While instances of "faithless electors" have been exceedingly rare, they occurred in both the 2016 and 2020 presidential elections. In *Chiafalo v. Washington*, 591 U.S. ___, 140 S.Ct. 2316 (2020) the Washington Supreme Court affirmed the state's imposition of a $1,000 fine on three electors who, asserting independence under the Twelfth

Amendment, voted for Colin Powell rather than the Clinton/Kaine ticket in 2016. In Colorado, a similar argument ensued. There, elector Michael Baca voted for John Kasich in 2016 despite the state's requirement that he support the winning Democratic ticket. Colorado law provided that a faithless elector would be replaced, and Baca sued. On appeal, the Tenth Circuit found that Colorado electors are free under the Twelfth Amendment to vote their conscience, a result requiring invalidation of faithless voter prohibitions in states across the Circuit.

The Supreme Court decided both cases on July 6, 2020, resolving the circuit split. In *Colorado Department of State v. Baca*,[6] it reversed the Tenth Circuit after unanimously affirming that Washington could impose a fine on faithless electors who ignore their presidential pledges. Authoring for the Court in *Chiafalo,* Justice Kagan wrote "The Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee — and the state voters' choice — for President."[7]

The Court thus further confirmed the states' authority over their electors, an authority which dictates a winner take all electoral structure and essentially nullifies votes cast by those in significant minority positions. That disparity is seen in the "battleground" phenomenon: voters in states having significant majority/minority party splits receive scant presidential campaign attention while those in swing states, where minute fractions of the popular vote can yield decisive electoral college results, are overwhelmed. In those jurisdictions, voter access, mail-in ballots, timeframes for accepting and counting votes, recount processes, and many other elements traditionally subject to local control can play a significant role In determining the presidency.

The Independent State Legislature

While the Elector's Clause in Article II allocates to state legislatures significant influence over the presidential vote, an even more consequential provision was placed in Article I, and gives rise to the Independent State Legislature (ISL) theory. The Elections Clause provides that:

> **The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof**; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.[8]

The Elections Clause has been aggressively wielded by legislatures in the process of gerrymandering, enabling the political party occupying the most seats in the statehouse to secure and extends its dominance. The techniques used are colloquially referred to as "cracking" and "packing"—in the former, strongholds of the opposite party are fragmented, sending those voters to other districts where they will be in the minority. "Packing" involves the opposite, concentrating pockets of the disfavored favored party into a given district where they will be a majority but will cede control of the transferor districts. The result: one party's voters, sometimes constituting a numerical majority, are underrepresented in the legislature, while the other party, sometimes a numerical minority, exerts artificially augmented power.

The gerrymandering process is subject to Voting Rights Act[9] scrutiny when the reallocation of votes is blatantly along racial lines and obviously designed to disenfranchise minority voters. But where the intent and effect is predominantly partisan, the Elections Clause provides legislatures, of both political stripes, with significant cover. It is in this context—the degree to which legislatures can subordinate the individual voter without interference from the courts—that the ISL debate arises.

Two such controversies have been formative. *Gill v. Whitford,* 585 U.S. ___ (2018), involved twelve Democratic voters who had challenged Wisconsin's redistricting plan known as Act 43, passed by the Republican legislature after the 2010 census. Their claim, that the Act was an unconstitutional gerrymander which violated their rights under the First and Fourteenth Amendments, was upheld by a federal panel in 2016—the first invalidation of a redistricting plan on partisan grounds in more than 30 years. But on appeal, the case was dismissed by a unanimous Supreme Court for lack of Article III standing. *Gill* would influence a subsequent redistricting case for which the Supreme Court granted cert in 2018 after protracted battling in the court below. *Rucho v. Common Cause,* No. 18-422, 588 U.S. ___, 139 S.Ct. 2484 (2019) involved a challenge to political gerrymandering practices in North Carolina, where the state's 2016 redistricted map had been drawn by the state's General Assembly. Challenged in federal court, the redrawn map was held to be a violation of the plaintiffs' Equal Protection and First Amendment rights, as well as overstepping the legislature's "times, places, and manner" prerogatives under Article I.

The Court's review in *Rucho* necessarily began with an analysis of its authority to hear such a case. In a 5-4 decision, with the dissent urging that action was necessary to prevent a further erosion of democratic ideals, the majority declined to consider the case. Chief Justice Roberts wrote that, although partisan gerrymandering might be "incompatible with democratic principles," the federal courts had no jurisdiction to hear those disputes, because they presented nonjusticiable political questions beyond reach of the federal judiciary. *Rucho* thus further insulated state legislatures' redistricting activities from federal scrutiny: if a political majority in the statehouse, even one held by only a small margin, was stifling the minority's voice through creative cartography, the solution to that problem ostensibly lay within the state courts.

The ISL Front and Center: *Moore v. Harper.*

The controversy over North Carolina's redistricting would not end with *Rucho*. The state's congressional maps were again drawn following the 2020 census, again aggressively gerrymandered. When those maps were challenged in the North Carolina Supreme Court as violating the state constitution, the General Assembly responded with the assertion that it had the autonomy to define legislative districts, free of such interference. The North Carolina high court disagreed, holding that the maps could not be used in the primary elections and must be withdrawn. Writing for the 4-3 majority, Justice Robin Hudson wrote:

> Today, we answer this question: does our state constitution recognize that the people of this state have the power to choose those who govern us, by giving each of us an equally powerful voice through our vote? Or does our constitution give to members of the General Assembly, as they argue here, unlimited power to draw electoral maps that keep themselves and our members of Congress in office as long as they want, regardless of the will of the people, by making some votes more powerful than others? . . . **We hold that our constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter**.[10]

Writing in dissent, Chief Justice Newby argued that the court was straying into the exclusive province of the state's legislative branch:

> **I dissent from the decision of this Court which violates separation of powers by effectively placing responsibility for redistricting with the judicial branch, not the legislative branch as expressly provided in our**

> **constitution.** As predicted by the Supreme Court of the United States, this Court's decision results in "an unprecedented expansion of judicial power."[11]

Chief Justice Newby framed a completely different perspective on the posture of the General Assembly and "the people." Instead of usurping individual rights, the legislature was in fact expressing them:

> Since the General Assembly serves as the "agent of the people" for enacting laws, a restriction on the General Assembly is in fact a restriction on the people themselves. Therefore, this court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly *must be express and proven beyond a reasonable doubt*.[12]

When proponents of the original gerrymandered maps appealed to the United States Supreme Court seeking an emergency stay of the state's order, their request failed, and the redrawn map was used in North Carolina's May 2022 primaries. But an imposing triumvirate—Justice Alito, joined by Justices Thomas and Gorsuch--dissented from the denial, asserting that the independent state legislature (ISL) doctrine required analysis by the Court. Justice Alito wrote:

> In my view, the applicants have shown that the question presented by this case easily satisfies our usual criteria for certiorari, see this Court's Rule 10, and it is also likely that they would prevail on the merits if review were granted. The Elections Clause 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.**[13]

No doubt buoyed by this development, Timothy Moore, the Speaker of the state's House of Representatives, filed for certiorari. That review was granted by the

Court on June 30, 2022, teeing up *Moore v. Harper* for argument in the upcoming October session.

Central to the *Moore* discussion is the meaning of "legislature." The term has been argued to encompass the totality of a state's lawmaking process, including the checks and balances embodied in the state's constitution as interpreted by its courts. As the Brennan Center puts it, "So if a state constitution subjects legislation to being blocked by a governor's veto or citizen referendum, election laws can be blocked via the same means. And state courts must ensure that laws for federal elections, like all laws, comply with their state constitutions."[14]

But as noted above, three Supreme Court Justices disagree, arguing that the word "legislature" as cited in Articles I and II refers only to that body, and not to any peripheral element of legislating. Therefore, ISL proponents say, state legislatures have virtual autonomy when it comes to regulating federal elections, free and clear of state courts and state constitutions.

Many see a clear threat in *Moore* that the Court will immobilize a primary mechanism remaining after *Rucho* to challenge legislative redistricting which could then co-opt federal elections—the state constitution as applied by the state courts. If adopted, the ISL theory "would disable state courts from protecting voting rights in federal elections by eliminating state constitutional protections in those elections," legal experts Leah Litman, Kate Shaw and Carolyn Shapiro wrote of the case in an opinion piece for *The Washington Post*.[15] Among the federal election decisions that ISL lawmakers may want to undertake without interference from other quarters include changes to voter registration, to early voting, to the number and location of polling places, to vote by mail rules, and more. The Brennan Center sees starker possibilities: "Extreme versions of the theory would block legislatures from delegating their authority to officials like governors, secretaries of state, or election commissioners, who currently play important roles in administering elections."[16]

The potential upshot of a victory by the North Carolina legislature in *Moore* is at least threefold. On one hand, a decision for the state will seemingly encourage ever-more undemocratic gerrymandering, further devaluing the individual's vote and perpetuating unrepresentative legislatures, both at the statehouse and in Congress. Second, the unfettered authority to override and replace responsible and locally-appropriate voting policies and procedures may inhibit voter

participation. Finally, and perhaps of greatest immediate concern to local governments, the prohibition against involving the state courts or state constitutions in federal time, manner, and place issues may create two tiers of election rules and processes—one for state and local elections and an entirely different one for federal contests. Most elections are administered at the county level, and potential questions of the following nature may arise:

- when a county can accept and/or count a ballot (i.e. must ballots be delivered by the time polls close on election day or can they be accepted if postmarked by election day but delivered late?)
- where polling places can be located (for example, is proximity to public transportation required)
- what types of voter ID are acceptable
- what can be printed on ballots, envelopes, and election mail
- what types of information (voter registration, polling location, etc.) and supports (language, disability) will voters receive
- what procedures will be used to test and certify voting machines and systems

The potential complexity, cost, and confusion have compelled IMLA to file an amicus brief in *Moore*, not on partisan grounds but simply to advocate for election administrability at the local government level.

Conclusion.

Moore v. Harper thus represents a very consequential Supreme Court case, likely to be decided well in advance of the 2024 Presidential Election. If two Justices join the three who already evidence acceptance of ISL, a historic inflection point would result. The potential that in federal elections, state legislatures could operate free of oversight by a state court and in defiance of state constitutions to modify mechanisms that have historically worked to ensure fairness in the popular vote is an ironic twist on Justice Kagan's admonition in *Chiafalo* that states are the vehicle to ensure that "the People" reign supreme:

> Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge

> laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.[17]

The question presented in *Moore* is no longer whether electors must remain faithful to the "vote of millions" but whether state legislatures will be equally bound to ensure that outcome.

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[1] The Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and the Twenty-Sixth Amendments expand the vote, to male citizens regardless of race, to senatorial contests, to women, to residents of the District of Columbia, by invalidating poll taxes, and finally to those 18 years of age and older.

[2] US Const. Art II, Cl. 1

[3] US Const Fourteenth Amend.

[4] The outliers, Nebraska and Maine, each award two of their electors to the candidate who wins a plurality of the statewide vote, and allocate their remaining electors to the winners of the vote in each of the states' congressional districts; in practice, this methodology has only rarely resulted in either state splitting its vote.

[5] These include Arizona, California, Colorado, Indiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, Utah, and Washington.

[6] *Baca,* 140 S.Ct. 2316 (2020).

[7] *Chiafalo*, 120 S. Ct. at 2325.

[8] US Const. Art. I, Sec. 4, Cl. 1.

[9] Section 2 of the Voting Rights Act prohibits voting practices that deny equal access to the voting process on account of race, color, or membership in a language minority group. 52 U.S.C. §10101 et seq.

[10] Harper v. Hall, No. 413PA21 (N.C. Feb. 4, 2022).

[11] *Id.* at (citing Rucho v. Common Cause, 139 S.Ct. 2484, 2507).

[12] *Id.*

[13] Moore v. Harper, 142 S.Ct. 1089 (Mar. 7, 2022)

[14] Ethan Herenstein and Thomas Wolf, "The 'Independent State Legislature' Theory, Explained," BRENNAN CENTER, June 30, 2022, www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained

[15] Leah Litman, Kate Shaw, and Carolyn Shapiro, "A new Supreme Court case threatens another body blow to our democracy," WASHINGTON POST, July 2, 2022.

[16] Herenstein and Wolf, supra note 14.

[17] *Chiafalo*, 120 S. Ct. at 2328.