Supreme Court Rejects Independent State Legislature Theory

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Today, the Supreme Court issued its decision in *Moore v. Harper,* the long-anticipated case involving the so-called Independent State Legislature Theory (ISLT) advanced by the North Carolina legislature. The Court rejected the ISLT and held that the Federal Elections Clause "does not insulate state legislatures from the ordinary exercise of state judicial review." Though the foregoing statement sounds ordinary, the ramifications for local governments had the ISLT been adopted would have been anything but.

Following the 2020 census the North Carolina legislature redistricted. A group of voters and non-profits challenged the map, claiming they reflected an unconstitutional partisan gerrymander under the North Carolina constitution, which provides that "[a]ll elections shall be free." Art. I, §10. In *Harper I,* the North Carolina Supreme Court agreed that the legislature had engaged in unconstitutional partisan gerrymandering under the North Carolina constitution and struck down the maps, remanding the case to the lower courts to oversee the redrawing of new maps. The North Carolina Supreme Court in *Harper I* also rejected the argument that "the Elections Clause in the Federal Constitution vests exclusive and independent authority in state legislatures to draw congressional maps." This argument is the basis for the ISLT theory.

Thereafter, the North Carolina legislature sought review by the U.S. Supreme Court, advancing the ISLT theory. The Elections Clause provides: "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."

While the case was pending before the U.S. Supreme Court, the makeup of the North Carolina Supreme Court changed after an election and the defendants in *Harper I* sought rehearing with the North Carolina Supreme Court. The North Carolina Supreme Court reheard the case and reversed course, concluding that partisan gerrymandering claims are nonjusticiable political questions under the North Carolina constitution. But the North Carolina Supreme Court did not revisit the decision in *Harper I* that "the Federal Elections Clause does not shield state legislatures from review by state courts for compliance with state constitutional provisions." Because of the subsequent North Carolina Supreme Court decision, the U.S. Supreme Court asked the parties to brief whether it still had jurisdiction over the case.

In a 6-3 decision authored by the Chief Justice, the U.S. Supreme Court concluded that it continued to have jurisdiction over the case / it was not moot because the question of whether the Federal Elections Clause prevents state courts from reviewing state legislative redistricting undertaken pursuant to the Federal Elections Clause was not disturbed by the second North Carolina ruling. In fact, as the Court pointed out, by overruling *Harper I,* the North Carolina Supreme Court "reaffirmed that it retains the authority to review congressional districting plans for compliance with state law."

Turning to the question on the merits, the majority held that going back to *Marbury v. Madison,* "courts have recognized their duty to evaluate the constitutionality of legislative acts." And in this case, state court authority to review state legislative acts undertaken pursuant to the Federal Elections Clause are

no different. The Court reasoned that history, state court decisions at the time of founding, and writings from around the time of the founding supported its conclusion that courts may review legislative action and that the Federal Elections Clause does not create an exception to that fundamental principle.

In so holding, the Court also relied on its own precedents, which have already considered the "interplay between state constitutional provisions and a state legislature's exercise of authority under the Elections Clause." The Court indicated three key decisions supported its decision: *Ohio ex rel. Davis v. Hildebrant, Smiley v. Holm*, *Arizona State Legislature v. Arizona Independent Redistricting Comm'n.* In *Hildebrant,* the Court held that the Elections Clause did not prevent a state popular referendum from overriding a redistricting law. Similarly, in *Smiley*, in considering the effect of a Governor veto over a state redistricting plan, the Supreme Court held that a "state legislature's exercise of authority under the Elections Clause…must be in accordance with the method which the State has prescribed for legislative enactments." And finally, more recently in *Arizona State Legislature*, the Supreme Court upheld the state's creation of an independent redistricting commission, which the legislature challenged under the Federal Elections Clause. Pertinent to this case, the Court in *Arizona State Legislature* concluded "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."

Thus, the Court concluded based on the Nation's history and its own precedent that "[a] state legislature may not 'create congressional districts independently of 'requirements imposed 'by the state constitution with respect to the enactment of laws.'" The Court rejected the legislature's arguments that it is only constrained by the Federal Constitution. On this point, the Court noted that the Framers recognized that Legislatures "are the mere creatures of the State Constitutions, and cannot be greater than their creators." The state legislatures are therefore bound by both the Federal Constitution (as they concede) and their own state constitutions, which created them.

Finally, the Court noted that although "the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein." State courts should not "read state law in such a manner as to circumvent federal constitutional provisions." This word of caution may be related to the remedies the North Carolina Supreme Court originally ordered, but the U.S. Supreme Court did not decide whether in this case, the North Carolina Supreme Court had "strayed beyond the limits derived from the Elections Clause."

IMLA, NACo, and NLC, USCM, and ICMA filed an amicus brief in this case authored by John Korzen with the Wake Forest University School of Law, arguing that the Supreme Court should reject the ISLT theory given the significant problems that the theory, if adopted, would create. Specifically, the Amici were concerned that the adoption of the ISLT could create a two-tiered election system, one for federal elections where state legislatures could operate unchecked by state constitutions and state judicial review, and one for state elections where those normal checks are in place. Such a two-tiered system could have impacted everything from mail-in ballots and recounts, polling locations, voter ID requirements, and emergency responses. And while the Court did not specifically address these pragmatic concerns, it is notable that the Court's pragmatists (the Chief Justice and Justice Kavanaugh) joined in the majority in this opinion. The Court's opinion today keeps the status quo, which is a good thing for those administering elections.

To read the full decision, **click here**.

To read the amicus brief, **click here**.