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IDEAS

There Is Absolutely Nothing to Support the 'Independent State Legislature' Theory

Such a doctrine would be antithetical to the Framers' intent, and to the text, fundamental design, and architecture of the Constitution.

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The Supreme Court will decide before next summer the most important case for American democracy in the almost two and a half centuries since America's founding.

In *Moore v. Harper*, the Court will finally resolve whether there is a doctrine of constitutional interpretation known as the "independent state legislature." If the Court concludes that there is such a doctrine, it would confer on state legislatures plenary, exclusive, and judicially unreviewable power both to redraw congressional districts for federal elections and to appoint state electors who quadrennially cast the votes for president and vice president on behalf of the voters of the states. It would mean that the partisan gerrymandering of congressional districts by state legislatures would not be reviewable by the state courts—including the states' highest court—under their state constitutions.

Such a doctrine would be antithetical to the Framers' intent, and to the text, fundamental design, and architecture of the Constitution.

The independent-state-legislature theory gained traction as the centerpiece of President Donald Trump's effort to overturn the 2020 presidential election. In the Supreme Court, allies of the former president argued that the theory, as applied to the electors clause, enabled the state legislatures to appoint electors who would cast their votes for the former president, even though the lawfully certified electors were bound by state law to cast their votes for Joe Biden because he won the popular vote in those states. The Supreme Court declined to decide the question in December 2020. The former president and his allies continued thereafter to urge the state legislatures, and even self-appointed Trump supporters, to transmit to Congress alternative, uncertified electoral slates to be counted by Congress on January 6.

That as many as six justices on the Supreme Court have flirted with the independent-state-legislature theory over the past 20 years is baffling. There is literally no support in the Constitution, the pre-ratification debates, or the history from the time of our nation's founding or the Constitution's framing for a theory of an independent state legislature that would foreclose state judicial review of state legislatures' redistricting

decisions. Indeed, there is overwhelming evidence that the Constitution contemplates and provides for such judicial review.

To the extent that advocates of the independent-state-legislature theory have any evidence at all to support the theory, it is exceedingly thin. Their textual argument is that the total disempowerment of state courts necessarily follows from the fact that the elections clause empowers the state legislatures to prescribe the "manner" of holding congressional elections.

But there is neither more nor less significance to the fact that the Constitution assigns this quintessential legislative power to the state legislatures than that the Constitution assigns federal lawmaking to Congress, rather than to the executive or the judiciary. And yet, the Constitution provides for judicial review of the actions of both.

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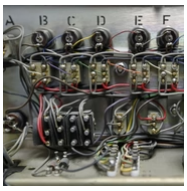

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Proponents of the independent-state-legislature theory argue that, because the elections clause does not assign this legislative role to the state governors and courts, the burden is on those who argue against the theory to come forward with compelling evidence that the Framers intended state courts to review state-legislative election laws. But that's to reverse the burden of proof. Because there is no evident support at all for the theory, the burden instead is on those who argue for the theory to come forward with compelling evidence from the text, structure, or design of the Constitution, or from the history at the time of the framing or founding, that confirms that the Constitution conferred on the state legislatures judicially unreviewable authority to redraw congressional districts. The proponents of the theory have not carried this heavy burden to date, and they cannot possibly carry this burden in *Moore v. Harper*.

Not only does the Framers' assignment of the power to prescribe the manner for holding congressional elections to the state legislatures not prove the theory and end the inquiry, as its proponents contend, that assignment is actually the beginning of the proof that the Constitution does not foreclose state judicial review of those decisions. For, where the proponents identify literally no evidence at all that the Framers intended to foreclose state judicial review, there is actually overwhelming evidence in the text and structure of the Constitution, and in the pre- and post-ratification history, that the Framers understood and assumed that there would be judicial review of the legislatures' redistricting decisions. This is as would be expected, given the Framers' obvious acceptance and accommodation of the sacred judicial role in the states' governments—which not incidentally enjoyed the same sanctity in the new national government—as well as their deep suspicions of the natural partisan tendencies of the state legislatures.

The Constitution is a grand compact born of a compromise between the states and the new national government. It created and empowered that new national government out of the whole of the power of the United States, which before ratification was possessed entirely by the American colonies and the states. That new national government comprised three separated governmental authorities—the legislature, executive, and judiciary—each checked by the others

according to its respective constitutionally assigned role, just as the states had and would establish for themselves post-ratification. The Constitution preserves and accommodates the previously existing power of the states that they did not surrender to the national government in order to create the union, as well as their governments and governance by separated powers. This accommodation and preservation was made explicit in the Tenth Amendment—that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"—and also in the Constitution's "guarantee to every State in this Union a Republican Form of Government" in Article IV, Section 4.

Because the Constitution preserved the states' reserved powers and accommodated their state governments of separated powers through which those reserved powers are exercised, it would have been a constitutionally radical idea for the Framers to have considered foreclosing state judicial review of the state legislatures' redistricting decisions. There is every reason to believe that the states would not have agreed to a constitution that denied their highest courts that judicial review. But in all events, such an idea would not have been blithely and, at very best, silently implied in the Constitution's text and nowhere else even mentioned. Had the Framers intended to foreclose state judicial review and done so, there would be substantial historical evidence from the time of the framing that they intended such, and unmistakable language in the Constitution that they did so. There is neither.

Much to the contrary, abundant evidence confirms that there is no such doctrine as the "independent state legislature" in the Constitution's animating understanding of the allocated powers between the new national government and the states; in the history and practice of state judicial review of all legislative enactments and actions—including state and federal election-related enactments—before and after the time of the nation's founding and the Constitution's framing; and in the guarantee and supremacy clauses. In the complete absence of evidence that there is such a theory, this unmistakable evidence that there is not such a theory confirms the intuitive constitutional sense of the matter that such a doctrine is antithetical to the Framers' intent and the fundamental design and architecture of the Constitution.

Specific to the historical record of state judicial review, the Framers wrote the elections clause against the backdrop that most state constitutions at the time constrained their respective legislatures when they regulated both state and federal elections. And immediately following the federal Constitution's ratification, state constitutions continued to constrain the power of state legislatures in their prescription of the manner for holding elections. From 1789 to 1810, 13 state constitutions were enacted or amended, and all but two of these regulated congressional elections. And from 1789 to 1821, 23 state constitutions were enacted, amended, or both, and 17 of these regulated congressional elections. Many of the Founders of the country and the Framers of the Constitution were authors of these state constitutions.

Thomas Wolf and Ethan Herenstein: The case that could blow up American election law

Because of the indisputable absence of any evidence that the Constitution forecloses state judicial review of the state legislatures' redistricting decisions under the state constitutions, the best, if not compelled, understanding of the elections clause is that, where Congress has not chosen under Article I, Section 4, to "make or alter" the particular "manner" for holding the federal election at issue, the Constitution does not in any way limit the state supreme courts' review of redistricting decisions. The Constitution's empowerment of Congress to prescribe the manner for holding congressional elections when it chooses does not confirm that there is no state judicial review of the state legislatures' decisions because there is a congressional check on the legislatures, as proponents of the independent-state-legislature theory contend. Rather, this empowerment of Congress confirms that there is state judicial review and that the federal check on the power of the states over congressional elections is not Congress's power, but instead the federal judiciary's power to review the decisions of the state supreme courts under the United States Constitution. That is, the federal interest in the holding of these elections is protected not by usurping the states' judicial power to review their legislatures' enactments under their own state

constitutions, but by federal judicial review of the state supreme courts' decisions under the U.S. Constitution.

In an attempt to establish that the state courts have no authority to review the legislatures' decisions under the elections clause, proponents of the independent-state-legislature theory go to extraordinary lengths to argue that the state legislatures have not delegated their legislative power to the state courts and are constitutionally prohibited by the elections clause from doing so. This, and their textual argument for judicially unreviewable legislative redistricting, are the fatal flaws in their argument. When the state courts review the decisions of their state legislatures under their state constitutions, they are not exercising federal power delegated to them by the state legislatures; they are exercising the judicial power of the states, which was reserved to the states by the federal Constitution and accorded the state supreme courts by their state constitutions. The state courts do not exercise delegated federal power from the state legislatures even when they review state legislative enactments for consistency with the federal Constitution. In the former instance, they exercise judicial power conferred on them directly by the state constitutions, and in the latter instance, they exercise judicial power under the supremacy clause to enforce the federal Constitution. It is simply constitutional non sequitur to conclude from the fact that the legislatures exercise federal power when they redistrict that the elections clause forbids state judicial review.

This is why, as in *Moore v. Harper*, where the state legislature itself has legislated a comprehensive scheme for state judicial statutory and constitutional review of the legislature's redistricting decisions, and the state courts have reviewed the legislature's decisions pursuant to that scheme, there is neither authority, justification, nor warrant for commandeering the state's constitution and judicial processes. The state supreme court's decision under the North Carolina constitution is conclusive under that constitution, and it is only reviewable by the federal courts and the Supreme Court of the United States thereafter for a determination of whether that decision violates the federal Constitution.

If there were authority in the Constitution to limit the state supreme courts in their exercise of the states' judicial power, that authority would be found in the elections clause, because when the state legislatures prescribe the manner for holding federal elections, they do exercise federal constitutional power granted to them in that clause. But if the Supreme Court were to interpret the elections clause to permit some circumscription of the state supreme courts' review of their legislatures' redistricting decisions, that circumscription would necessarily be exceedingly limited, restricted first by the Tenth Amendment and restricted even further by the palpable lack of any discernible constitutional guidance for even a minimal incursion on the states courts' constitutionally mandated judicial review.

That circumscription could be no greater than that necessary to protect the federal interest in the state legislatures' prescription of the manner of holding congressional elections where Congress has chosen not to dictate the manner of holding those elections. In that circumstance, the federal interest is protected not by commandeering the states' constitutions and judicial processes, but rather by the U.S. Supreme Court's review of the state supreme courts' decisions under the federal Constitution. For the Supreme Court of the United States to commandeer and command the state courts to any greater extent—by, for example, attempting to restrain and confine the state supreme courts to some preconception of their proper roles under the state constitutions, as if they were federal courts interpreting the federal Constitution—would represent a manifestly unconstitutional federal co-opting of the most sacred power reserved to the states: judicial review of their legislatures' laws under their state constitutions.

With all the means and judicial resources available to it, the Supreme Court itself is all but powerless to prevent judicial "legislating" by the federal courts. Given that commandeering the state constitutions and judicial processes would be required but is impermissible under the Tenth Amendment, there would be exponentially fewer means, if any, available for the Supreme Court to prevent the state supreme courts from "legislating" from the bench.

The only federal interest to be protected by constraining the state supreme courts in their interpretations of their state constitutions is in ensuring that the legislatures, as the states' lawmakers, prescribe the laws governing congressional elections. There is no federal interest in having the legislatures prescribe the rules without state judicial review. The only way for the Supreme Court to protect this federal interest is to attempt to prevent the state supreme courts from "legislating," as opposed to interpreting and applying, their constitution. But for all purposes under the federal Constitution (and under the state constitutions as well), when a court—federal or state—renders a decision, it is always interpreting the law. It is never legislating the law. The Supreme Court might reverse a lower or higher federal court or a state supreme court court, and a federal court might reverse a state supreme court from time to time. But those reversals are never for legislating from the bench. By definition of the judicial function, such reversals are necessarily for misinterpreting the law, not for legislating the law.

As the law has become more politicized, critics of judicial opinions, including courts and judges themselves, have accused courts of legislating, rather than interpreting, the laws, as proponents of the independent state legislature accuse the North Carolina Supreme Court of doing in *Moore v. Harper*. This accusation has taken on meaning and has been a powerful rhetorical sword in the effort to limit courts to their proper role as interpreters, not makers, of the law. But this accusation of judicial legislating is only a figure of speech that has been used to powerful rhetorical effect. It is not a statement of fact as to what courts do, because it is literally not possible for courts to legislate. If courts misinterpret the law, they are simply misinterpreting the law; they are not legislating. It is for this reason that the North Carolina Supreme Court did not usurp the role of the legislatures by legislating the state's congressional districts, contrary to what the theory's advocates maintain.

James Piltch: North Carolina is a warning

Because one judge's—or, for that matter, one justice's—legislating is another's interpretation, were the Supreme Court to attempt to constrain the state supreme courts in their interpretation of their constitutions, it would be required to identify a different ground than judicial "legislating." But the fact is that there is no constitutionally legitimate ground upon which the Court could say that the state supreme courts exceed their authority in interpreting their own state constitutions. There is, therefore, no limitation the Court could legitimately impose on the state supreme courts to constrain their interpretation of those constitutions. Indeed, the attempt to do so would be an exercise in federal judicial "legislating" no different from the state judicial "legislating" that the Court would be attempting to prevent.

It would be impossible for the Court even to identify and articulate a standard that would distinguish state supreme court interpretation from legislation under the guise of interpretation. Even if it could articulate such a standard in the abstract, it would be folly for the Court to attempt to fashion standards that would confine the state courts to their interpretive roles, if for no other reason than that those roles, and the interpretive methodologies and sources that the supreme courts use in interpreting their constitutions, vary from state to state depending on the state constitution and its respective interpretive histories. The 50 state constitutions, and therefore the constitutional provisions that might apply to the state legislatures' redistricting decisions, vary widely in substance and language across the states as well. And finally, the state constitutional provisions that could apply to the state legislatures' congressional-redistricting decisions are in many cases no less capacious and indeterminate than the provisions of the U.S. Constitution that would apply were Congress to prescribe the rules for holding congressional elections and the Supreme Court to review those laws under the U.S. Constitution.

The Supreme Court does not agree on the nature, scope, and standards governing its own review of Congress's enactments under the U.S. Constitution. Every day the Court sits, its members employ different and shifting outcome-determinative interpretive methodologies and consult different sources when interpreting and applying the U.S. Constitution. There is no reason to believe that there would or should be any agreement among the justices as to how to fashion federal

constitutional constraints on the state supreme courts’ review of their legislatures’ laws under their own respective state constitution. But there is every reason that they should never try.

All of which goes to confirm that the Constitution neither contemplates nor permits federal constitutional commandeering of the states’ constitutions and their judicial processes. Rather, it contemplates and provides only for federal judicial review of the state supreme courts’ state constitutional decisions by the U.S. Supreme Court for consistency with the United States Constitution.