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Analysis

## How Elections Clause Case Threatens To Disrupt Democracy

By Marco Poggio | September 9, 2022, 8:02 PM EDT

When the U.S. Supreme Court rules in *Moore v. Harper*, a case focusing on the elections clause, it will decide whether state courts can override state legislatures in setting congressional election rules and drawing electoral maps.

North Carolina Republican legislators petitioned the high court in March arguing the clause empowers only state legislators, under a strict reading known as independent state legislature theory.

Some civil rights organizations, attorneys and legal scholars worry a ruling embracing the theory could undermine democracy — by cutting off judicial review on issues, such as redistricting, that can be vulnerable to partisanship.

Eliza Sweren-Becker, an attorney at the Brennan Center for Justice, said adopting the doctrine would give free rein to state legislatures to adopt partisan gerrymandered maps and enact voter suppression legislation that state courts could no longer review and governors could no longer veto. It would be difficult, if not impossible, to have fair representation in Congress, she said.

"Removing those checks and balances on the state legislature would completely upend the way that we run elections in this country and hurt voters across the United States," she said. "It is an extraordinarily dangerous, radical notion that would have profound, destabilizing consequences."

Federal laws and the Constitution would still act as limitations on what states can or cannot do in terms of regulating federal elections. Right after placing each state's authority to regulate federal elections on "the legislature thereof," the election clause gives Congress the authority to overrule it. That has happened in the past. Congress enacted the Civil Rights Act of 1960 and the Voting Rights Act of 1965 to prohibit discrimination in voting.

In addition, the 14th Amendment guarantees one person-one vote equality; the 15th Amendment prohibits racial discrimination in drawing state districts; and the 19th Amendment removed voting restrictions based on gender.

But voting rights experts warn *Moore v. Harper* is barreling down the road at a time when federal laws have already been weakened by a series of close-vote Supreme Court decisions coming down in the last 15 years.

Punctuating that concern, another Supreme Court case slated for this term, *Merrill v. Milligan*, will look into whether a congressional map in Alabama that critics said would suppress the Black vote has violated Section 2 of the Voting Rights Act, which bans racial discrimination in voting. The ruling in that case could weaken those protections.

"In the years since the Supreme Court has undermined federal protections, state constitutional protections and state courts have become all the more important in protecting the right to vote and to fair representation," Sweren-Becker said. "This independent state legislature theory targets and puts those protections in its crosshairs."

### Dissecting the Elections Clause

The Constitution gives state legislatures the power to set rules for how congressional elections are conducted. It also gives Congress the power to overrule them. The U.S. Supreme Court decided in 2015 that independent redistricting commissions count as a "legislature" in this context. That precedent is now imperiled in *Moore v. Harper*.

### Article I, Section 4, Clause 1

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.

### State Judicial Review Imperiled

Lee E. Goodman, a Wiley Rein LLP partner who served as chairman and commissioner of the Federal Election Commission and has advised political campaigns, said that while the ruling in *Moore v. Harper* could severely limit state courts' review of congressional election rules and maps, it would not remove them entirely from the equation.

"It's not as if this case is going to give carte blanche to state legislatures," he said. "State courts regularly enforce federal constitutional and statutory standards. So there will still be a role for state courts in checking abuses by a state legislature."

But some legal scholars believe the ruling could open the door to more destabilizing actions by state legislatures, such as changing vote counting procedures that would make them more prone to manipulation.

Michael J. Gerhardt, a professor at the University of North Carolina School of Law, said the independent legislature theory makes it easier for legislators in states with supermajorities to overturn election results.

"The danger is that the more state control there is, the greater likelihood that there'll be an oppressive sort of the tyranny of the majority in the states," he said. "If states have effectively the last word here, they may also be able to frustrate popular majorities."

Goodman thinks those concerns are overblown.

State legislatures set rules for election, but it is up to state boards of elections to count the votes and certify results. Challenges to election results can be brought on several grounds, including fraud, in state court. The House of Representatives has additional power to scrutinize the legitimacy of the election of one of its members.

"At no point in that process does the state legislature exercise authority over determining winners and losers of elections. It only sets the rules of election pre-election," Goodman said.

The Harper v. Moore ruling will not limit federal courts' intervention. But while possible, challenges to gerrymandering in federal courts are increasingly difficult, experts say. The Constitution and federal statutes forbid redistricting on a racial basis, but they say nothing about political gerrymandering.

In 2019, the Supreme Court said in its 5-4 decision in *Rucho v. Common Cause* that political gerrymandering is not an issue for federal courts to decide. The majority opinion in that case, penned by Chief Justice John G. Roberts Jr., acknowledged that state laws and constitutions in many states have provided frameworks to address partisan redistricting. Some states have passed constitutional amendments that created independent commissions that took over the task of drawing congressional maps from state legislatures.

#### How the Case Reached the High Court

The justices will rule whether the North Carolina Supreme Court usurped authority from the North Carolina legislature when it rejected congressional maps drawn by state legislators saying they violated the state constitution, including a clause stating that "all elections shall be free."

Nov. 18, 2021

Together with a group of North Carolina voters, plaintiff Rebecca Harper, a registered Democrat living in a congressional district that was changed during partisan redistricting following the 2020 census, sued the Republican-controlled state legislature in state court.  
Feb. 14, 2022

The state high court struck down the maps, calling them "egregious and intentional partisan gerrymanders, designed to enhance Republican performance," and remanding the issue to the trial court. A North Carolina Superior Court eventually appointed a special master to create a new congressional map.

State legislators filed an emergency application with the U.S. Supreme Court to stay the state court's ruling.

March 7

The Supreme Court decided with a 6-3 vote to deny the application.

In dissenting to the denial, Justice Samuel Alito said the elections clause could have left to the states the task to allocate the power of regulating federal elections. "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," he said in his opinion. Justice Brett M. Kavanaugh concurred with the denial, but wrote in a separate opinion that both sides presented "serious arguments on the merits" and that he would vote to hear the case in the fall term if the legislators presented a petition for certiorari. The votes of four justices are necessary to take up a case at the court.

March 17

The legislators filed a petition for certiorari.

June 30

The justices agreed to hear the case.

The erosion of federal power and judicial review on partisan gerrymandering has moved challenges to state courts. Many states, through ballot measures, adopted constitutional provisions explicitly listing the right to fair elections or other voting rights protections. State courts have shut down partisan electoral maps both in Republican- and Democratic-controlled states.

But now much of that is on the chopping block with *Moore v. Harper*. Hundreds of constitutional provisions and administrative rules ensuring elections are conducted fairly or expanding access to voting — such as the right to vote by mail or the guarantee to cast a secret ballot — could become toothless if the Supreme Court rules in the legislators' favor, experts say.

Stuart C. Naifeh, an attorney who runs the Redistricting Project at the NAACP Legal Defense & Educational Fund, said the independent legislature theory undermines a lawmaking process that has been in place since the birth of the nation.

"Historically, when state legislatures pass legislation, whether it's related to voting or any other topic, it's subject to judicial review," he said. "This would make voting an exception to that historical and traditional process."

Naifeh pointed out that both Democratic and Republican legislators engage in gerrymandering. The *Moore v. Harper* ruling could shield that practice from review.

"Legislators can then gerrymander themselves into power, even with a minority of voters in the state," he said. "It will just aggravate the partisan divisions that we've already seen rising and continuing to rise."

Challenges to gerrymandering in federal courts would still be viable even if the high court adopts the independent state legislature theory, but some legal experts warn it wouldn't be long until its proponents would seek to use it to limit federal courts' power.

"The next step in their argument that attempts to restrict review of what the legislature is doing would be to try to ban federal courts' as well," **Jerry H. Goldfeder**, the director of the Voting Rights and Democracy Project at Fordham Law School and a special counsel at Stroock & Stroock & Lavan LLP focusing on election and campaign finance law, told Law360.

#### How State Constitutions Protect Voting Rights

Constitutions in 30 states have some requirement that elections be "free," according to the National Conference of State Legislatures. Twenty of those states also require that elections be either "equal" or "open." Fifteen states have language that explicitly protects citizens' right to vote from improper influence or interference by "civil or military" powers.

#### A Debate Over the Elections Clause

Article I creates the House of Representatives and the Senate, and prescribes how the congressional seats and rules of election are going to be set. Section 4, Clause 1, also known as the elections clause, assigns that authority to state legislatures.

"The elections clause is quite explicit in granting the authority to state legislatures to set the time-place-manner rules, including district lines of federal congressional elections," Goodman said. "That's not even in question."

The last time the Supreme Court has looked closely at the passage was in 2015 when it decided *Arizona State Legislature v. Arizona Independent Redistricting Commission*. In that case, all nine justices agreed the Constitution empowers state legislatures in drawing congressional districts, but they disagreed on who could be considered legislators. Writing for the 5-4 majority, Justice Ruth Bader Ginsburg said the citizens of Arizona were acting as legislators in the meaning of the clause when they gave, through a ballot measure, power to an independent commission to draw congressional maps.

Three of the dissenters in that case — Justices Roberts, Clarence Thomas and Samuel A. Alito Jr. — will now get a say in deciding *Moore v. Harper* in a court that has since tilted toward the right. Justice Roberts wrote in the dissenting opinion that when the Founders wrote the elections clause, they intended the word "legislatures" to mean the assembled representatives of the people in a state capitol.

James A. Gardner, a scholar at State University of New York at Buffalo Law School, said of *Moore v. Harper* that what on its face looks like an abstract debate over a sliver of text in the Constitution is first and foremost a case centering on political power. Only states with Republican supermajorities have so far filed amicus curiae briefs in support of adopting the independent legislature theory.

A majority of Supreme Court justices who increasingly favor literal interpretations of the Constitution's text could now inject judicial approval into a theory that could help political majorities in states, particularly those controlled by Republicans, retain power, Gardner said.

"You can describe it as an abstract question of constitutional law," he said. "The political importance, though, is much more significant here."

--Graphics by Jonathan Hayter, Ben Jay and Jason Mallory. Editing by Robert Rudinger.