Electoral Democracy and the Roberts Court

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In the major election law case *Moore v. Harper*, the Supreme Court rebuffed the Independent State Legislature Theory (ISLT). ISLT aims at one party rule. It is designed to take advantage of the current political environment of aggressive Republican-dominated state legislatures. Chief Justice John Roberts authored the 6-3 decision rejecting ISLT. ISLT was deployed in *Moore v. Harper* to contend that state legislatures are given unlimited power to construct congressional districts by the U.S. Constitution, and that therefore state courts could not restrain extreme gerrymandering by imposing state constitutional limits. I discussed ISLT and *Moore v. Harper* in some detail in *New Politics* Winter 2023 after oral argument in November 2022 but before the case was decided in June 2023. As explained in that article, ISLT would, if adopted by the Supreme Court, also bless the kind of manipulation in presidential elections that the insurrectionists failed to pull off following the 2020 election. Trump's congressional allies sought to replace legitimate Biden slates of presidential electors with Trump slates selected by state legislatures. Three conservative Justices joined the three liberal justices to say "no dice" to ISLT. If the Court holds to its decision in *Moore v. Harper*, a similar move by congressional Republicans in 2024 could not look to the Supreme Court for legitimation.

This 6-3 decision was good news. Two of the three Trump appointees, Brett Kavanaugh and Amy Coney Barrett, voted with Chief Justice Roberts and the liberals to reject ISLT. It is more evidence that Republican-appointed federal judges, including Trump appointees, in many instances behave as "normal" conservatives, observing the familiar norms and incentives that characterize the elite legal profession. When Trump contested his 2020 loss in the courts to the tune of some sixty lawsuits, we saw dozens of instances of judges appointed by Republican presidents, Trump included, refusing to carry the insurrectionists' water. The federal judiciary to date has out-performed Congress in defending electoral democracy against the insurrectionists. The Senate failed to convict the impeached president, the Republican Party has embraced him, the Biden Justice Department was slow, likely too slow, to indict Trump, and the Democratic Party thus far proved feeble in countering his re-election bid. Should Trump secure a second term in 2024, we can expect a combination of more careful judicial selection and opportunism to produce a more compliant federal judiciary.

As welcome as the result in *Moore v Harper* is, a brief survey of recent election law cases reminds us that "normal" legal conservatism has degraded electoral democracy during the tenure of the Roberts Court. This Court has closed the federal courts to challenges to partisan gerrymandering and

sharply curtailed federal protection of the rights of minority voters. While the Roberts Court has not done Trump's bidding, the "normal" conservative course has softened the ground for the putschist pursuit of one-party rule.

In 2019 Roberts authored *Rucho v Common Cause*, a decision concluding that partisan gerrymandering posed inextricably "political questions." Political questions are outside the competence and legitimate jurisdiction of the federal courts. Justice Kagan wrote a bitter dissent for the then four liberal justices. She criticized her colleagues for leaving violations of constitutional voting rights without remedy in the federal courts. However, racial gerrymandering—depriving minorities of an equal opportunity to vote—violates the Equal Protection Clause of the 14th Amendment and the Voting Rights Act. The Court took the legal world by surprise in June 2023 by ruling in *Allen v. Milligan* against the Alabama state legislature's determined effort to confine Black electoral power to one out of the state's seven congressional districts. This despite Black Alabamians comprising a quarter of the state's population and being geographically concentrated. Roberts wrote the majority opinion joined by Kavanaugh and the three liberal justices.

But one swallow does not a summer make. Just a few months later, in October 2023, the Court heard oral argument in another racial gerrymandering case, *Alexander v. South Carolina Conference of the NAACP*. All six conservatives expressed great skepticism that they would be able disentangle a racial from a partisan basis for this gerrymander. South Carolina is poised to prevail. If so, South Carolina Black voters will have to settle for one of seven congressional districts although their numbers and geographical concentration are very similar to the pattern in Alabama. The decision will come down by summer 2024. The message to be conveyed by this case, if the tenor of oral argument is a guide, is that with modest efforts at subterfuge racial gerrymander will pass muster with this Supreme court. There are a number of racial gerrymandering cases making their way through the courts as we approach the 2024 election. We won't have to wait too long to see whether the Alabama redistricting case signifies greater commitment to minority voting rights. Or, was the Court perhaps tacking to fend off the perception, troubling to Roberts and Kavanaugh, that the Court is partisan and extreme on the sensitive issue of race and political power?

The Roberts Court has issued two important decisions hostile to the Voting Rights Act. *Shelby County v. Holder* delivered a severe body blow to the VRA in 2013. The VRA requires districts with histories of discrimination against minority voters to submit changes in voting procedures to "pre-clearance" by the Department of Justice. Chief Justice Roberts writing for the majority held that the VRA formula for determining whether a district must get pre-clearance was obsolete and therefore unconstitutional; federal supervision of voting regulations could not be justified by reference to conditions fifty years earlier. Unless and until Congress passes a bill with a contemporary formula, regulations governing voting are free from federal oversight.

Pre-clearance was the heart of the VRA's strategy to protect minority voters. The VRA provided some back-up to pre-clearance by allowing voters to sue when their right to an equal opportunity to vote is forfeited on account of racial discrimination. In the 2021 case *Brnovich v. Democratic National Committee* (Brnovich was Attorney General of Arizona), the Court applied the VRA to regulations governing how ballots are collected and counted. Justice Alito authored a majority opinion disparaging interests protected by the VRA. All five of Alito's fellow conservatives signed on to the opinion. It makes very discouraging reading. Alito does not propose a test for determining when a state's methods of regulating the "time, place and manner" governing voting deprive racial minorities of an equal opportunity to vote. Instead, he weighs the state's interest in preventing fraud heavily against the "convenience" of Native American, Black, and Hispanic voters with respect to two regulations challenged as racially discriminatory by minority voters. An Arizona regulation treats out-of-precinct votes as invalid. Twice as many minority voters cast their ballots out-of-precinct as do white voters. Arizona criminalizes ballot collections services *aka* "ballot harvesting" in

the language of its critics. Native American voters living on transportation-poor reservations depend more than white voters on ballot collections services. Both regulations were upheld in *Brnovich v. DNC*. Advocates for minority voters are left to ponder when obstacles to voting might rise to a level sufficient to outweigh the state's interests when conducting an election. To sum up the status of the Voting Rights Act in the Roberts Court: Department of Justice pre-clearance is a dead letter and the chances of prevailing in an individual lawsuit weakened and uncertain.

If the future is like the recent past, the 2024 election may well be close in both the Electoral College and Congress. Close presidential elections in the battleground states under our antiquated Electoral College system and the narrow majorities in recent congresses magnify the influence of the Supreme Court decisions in voting rights and redistricting cases. The import of these decisions is not as easily grasped as a case like *Dobbs* that wiped out half a century of bodily self-determination for women. But they are in fact quite consequential and quite dangerous. The more voters understand the Roberts Court's anti-democratic record on voting rights, the more likely democratic opposition becomes.