Moore v. Harper

written by Elizabeth Rapaport | January 24, 2023

Moore v. Harper is about which organs of state government get to weigh in on congressional redistricting. In high school civics terms, it's about checks and balances. More precisely, the question posed to the Supreme Court in this case is whether the U.S. Constitution permits state courts to constrain the district map-drawing power of state legislatures to prevent extreme gerrymandering. Before readers roll their eyes about the tedium to follow or lick their chops in anticipation of some dry and technical paragraphs, let me assure you that this is a high stakes case. Alarmed by the propensities of the conservative majority on this Supreme Court, conservative Federalist Society luminaries have joined forces with progressives in opposition to the actions they fear this Court may take. A broad coalition spanning the ideological spectrum of the legal establishment has filed briefs in the case. All plead with the Supreme Court, "Please, NO!" In practical political terms, there is the potential in *Moore v. Harper* for this Court to do the job of entrenching minority Republican rule that was flubbed by assorted would-be insurrectionists in the wake of the election of President Joe Biden.

1. How *Moore v. Harper* found its way to the Supreme Court's 2022-23 Docket

Following upon the 2020 census, the Republican-controlled North Carolina state legislature passed a new congressional districting plan. The plan is a rather extreme example of gerrymandering. Although the voters of the state are fairly evenly split between the two parties, the new plan would all but guarantee 10 of 14 congressional seats to the Republican Party. Gerrymandering is of course a time-honored practice of both parties. North Carolina like some other states places some limits on gerrymandering in its state constitution. Voters groups asked the state courts to hold that the legislature's redistricting plan violated the state constitution. The NC Supreme Court did so. After an intransigent state legislature refused to revise its redistricting plan, the NC Supreme Court authorized a substitute plan, following statutory procedures for doing so. Stung, the Republican legislators took their case to the U.S. Supreme Court. (Moore is the speaker of the NC house of representatives, Harper denotes a collection of NC civic and voters' groups.)

In *Moore v. Harper* the NC legislature argues that the federal Constitution gives state legislatures plenary (unlimited) and exclusive power to draw congressional district lines. Accordingly, they asked the Court to adopt a reading of the federal Constitution that would deliver that result. On this reading state courts cannot review a redistricting plan to determine whether it respects the limits that the state constitution places on gerrymandering. The U.S. Supreme Court declined to intervene before the pending 2022 election. The plan authorized by the NC Supreme Court was left in place for the 2022 election. But four members of the U.S. Supreme Court (Justices Alito, Thomas, Gorsuch, and Kavanaugh) expressed interest in the theory of constitutional interpretation on which the NC legislature relied. They found it intriguing and deserving of a serious hearing. Four members of the Court is what it takes to grant *certiorari*, *i.e.*, to secure a place on the Court's discretionary docket. The NC legislature was handed a gilt-edged invitation to take the so-called Independent State

Legislature Theory to the high court. And they did.

Alarm bells went off in the legal world. Readers may recall a flurry of media coverage of the Independent State Legislature Theory (ISLT) during the insurrectionary aftermath of the 2020 presidential election. Wild-eyed Trump lawyers dragged the ISLT in from what was routinely described by establishment commentary as the far fringe of constitutional discourse. ISLT put a thin veneer of legitimacy on their efforts to supplant lawful slates of presidential electors with slates pledged to Donald Trump. The theory has far-reaching implications beyond the issue of whether state courts may play a role in congressional district line-drawing that is squarely before the Court in this case. These include allowing presidential electors pledged to mirror the popular vote in their state to be supplanted by slates of electors chosen by state legislatures exercising their plenary power. If the Court buys into ISLT, it could in time apply the principle to other areas of election law, including presidential elections. There is concern that even a partial victory for ISLT in *Moore v. Harper* could be a camel's-nose-under the-tent prelude to more or worse in redistricting or other areas of election law. There is concern that the conservative majority on the Supreme Court is a pretty wild- eyed bunch themselves.

In *Moore v. Harper* the NC legislature asks only that the Court free the legislature from any check by the state courts and the state constitution in redistricting. The best outcome for American democracy would have been for the Court to decline to take the case. This would have been a clear signal that the Court is not going to indulge ideas of insurrection by legal proxy. However, the Independent State Legislature Theory is catnip to the conservatives on this Court—and there are six of them.

II. Originalism and the Independent State Legislature Theory

As is well known, some of the conservatives on the current Court are doctrinaire originalists and all are influenced by originalism. The currently favored version of originalism is textualism. A textualist interpretation looks to the public or common meaning of a key term or phrase at the time of the drafting and ratification of the Constitution. For evidence of meaning a textualist will also look to traditional practices these usages reflect or to which they give rise. Paraphrasing Justice Kagan at her confirmation hearing, virtually all judges are originalists to this extent. Where originalists depart from other judges is in freezing the meaning of the Constitution at the time of the founding. An originalist will be unmoved by any argument or evidence marshalled to show that the Constitution should be read to take account of changing conditions. Change, they believe, requires amendment of the Constitution where legislative branch action is insufficient to effect the desired reform. In this way the judiciary respects the boundary between its role, which is to interpret and apply the law, and that of the legislature. Sceptics and opponents argue that this is not an accurate portrayal of how judges, including originalist justices, do or could do their jobs.

Twenty-first century cases involving the Second Amendment "right to bear and keep arms" provide good examples of originalism at work. In *District of Columbia v. Heller* (2008) the conservative majority abandoned the idea that the Second Amendment tied gun rights to the need to raise or maintain a "well ordered militia" to the military prerequisites of the state. *Heller* held that there is an *individual* right to keep arms in the home. Last Term in *NY Rifle and Pistol Ass'n. v. Bruen*, the Court held that the right to "bear" arms included the right *to carry arms in public*. The *Bruen* case was the site of warring histories of gun rights in distant times. The liberal justices did not concede the nature of colonial and early republic understandings and practices to the conservatives. They also warned that minimizing the ability of the government to regulate gun ownership and use in contemporary America was a terrible idea. The conservatives were unmoved by the practical consequences of this profound shift in constitutional interpretation of the Second Amendment. They preferred the personal and permissive reading of gun rights to the social and restrictive reading of

constitutional history.

III. *Moore v. Harper*

In *Moore v. Harper* ISLT gets its chance to go mainstream. The Elections Clause of the U.S. Constitution gives to state legislatures the power to regulate federal congressional elections subject to being overridden by Congress if Congress chooses to act. The text unambiguously states that "the legislature" has this power:

> 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 choosing Senators. (Art. 1, section 4, clause 1)

The text of The Elections Clause says nothing about state constitutions or state courts having a role in drawing the lines of congressional districts. Nevertheless, state court review of gerrymandering under state constitutions is part of our election landscape; it is the way the game has been played. In *Moore v. Harper* the NC state legislature wields ISLT in hopes of sweeping state courts out of the game.

The implications of ISLT exceed the gerrymandering of congressional districts at issue in *Moore v. Harper*. Most dramatically there is the question of appointments to the Electoral College. Their votes ultimately decide presidential elections. The Electors Clause of the U.S. Constitution (Art. II, sec. 1, clause 2) states in the pertinent part that "Each State shall appoint, in such Manner as the Legislature thereof may direct" its slate of electors. The text of the Electors Clause does not include the familiar method followed by the states of certifying electors bound by state law to vote for the winner of the popular vote in their state. The text refers only to the "Legislature." Applied to the Electors Clause, ISLT means state legislatures could conceivably choose a slate pledged to a candidate who lost the popular vote in that state. This was the gambit of the coup plotters unwilling to accept the defeat of Donald Trump in 2020. Any constitutional provision or state law to the contrary would be void. The Electors Clause is not before the Court in *Moore v. Harper*. A victory for ISLT in this case could encourage proponents to hope for further useful vindication of the theory at the Supreme Court in the future.

With six conservatives on the Court, each side in *Moore v. Harper* understands the strategic importance of persuading conservative justices of its rendition of the place of ISLT in constitutional history. This case was briefed and argued to persuade committed originalists. Lawyers arguing against ISLT must overcome the plain language of the text of the Elections Clause. Lawyers arguing for adoption of ISLT as the correct constitutional reading must overcome its apparent novelty. It has sparse provenance in constitutional history and none in Supreme Court precedents. The briefs and oral arguments of opposing sides were exercises in constitutional history.

Constitutional history *should* give the victory to the opponents of ISLT. In summary the argument goes as follows: "Legislature" in the Elections Clause means "a law-making body constrained by the state constitution that created it and subject to judicial review." The Elections Clause should not be read in pristine isolation but in light of the way "legislature" is treated throughout the document as subject to the check of judicial review. Similarly, references in the Constitution to Congress and its powers are informed by constitutional provisions that constrain its lawmaking powers, such as the president's veto power. There is overwhelming historical evidence that the founding generation and subsequent generations understood "legislature" in this fashion. State court judicial review of legislation was practiced from the earliest days of the Republic.

However, as I listened to the oral arguments on December 7, I heard two of the most conservative justices, Alito and Gorsuch, clinging to the few shreds of evidence that could be adduced to support ISLT against the weight of the record. The three less doctrinaire conservatives, Chief Justice Roberts and Justices Kavanaugh and Barrett did not appear to be so blind to the obstacles to concluding that history and tradition support ISLT. Some of their remarks suggested an interest in finding a middle course between shutting the courthouse door on ISLT and endorsing it completely.

Oral argument was pervaded by an eerie air of willed unreality as the lawyers and judges debated the eighteenth, nineteenth, and twentieth century provenance of ISLT. Less than two years ago some state and federal office holders tried to install Donald Trump for a second term in defiance of the popular vote using ISLT as a legal fig leaf. These worthies are still at it, some openly in league with white supremacists and neo-fascists. Never heard at oral argument was this reality-based description of the proceedings: the NC legislature is asking the Supreme Court to facilitate Republican state legislators' pursuit of Republican control of Congress through aggressive gerrymandering. We have two major parties in the United States neither of which has been a fastidious practitioner of electoral democracy. At this moment one of them threatens to overturn the whole electoral applecart.

Three Justices made some reference to contemporary politics, all careful to avoid challenging the tacit agreement that the plain meaning of the text in constitutional history was the order of the day. Gorsuch remarked very briefly that the "political salience"[1] of their decision would depend upon whose ox was gored. Thomas picked up the metaphor, asking a lawyer for Harper whether he would be in court making the same argument "[if] the state legislature had been very, very generous to minority voters in their redistricting."[2] Justices Gorsuch and Thomas want us to know that they are onto the partisan game of the Harper litigants. Justice Kagan gets closer to the reality outside the marble halls of the Supreme Court. While Gorsuch and Thomas acknowledge the existence of partisan politics, she alludes to the political moment we are in now. She asks a Moore lawyer whether he has something to say about the "big consequences" of adopting ISLT "at exactly the time" when checks on partisan activity "are needed most."

> It would say that legislatures could enact all manner of restrictions on voting, get rid of all kinds of voter protections that the state constitution, in fact, prohibits. It might allow the legislatures to insert themselves, to give themselves a role, in the certification of elections and … the way election results are calculated. So …in all these ways, I think what might strike a person is that this is a proposal that gets rid of the normal checks and balances on the way big governmental decisions are made in this country. And …you might think that it gets rid of all those checks and balances at exactly the time when they are needed most, because legislators, we all know, have their own self interests.[3]

But she does not press for a responsive answer.

IV. How Will the Justices Rule in *Moore v. Harper*?

The short answer is that we don't know. I would observe that the stakes are high for the Court's conservatives as well as for electoral democracy. In overturning *Roe v. Wade* or foisting a decision on the country that makes adequate gun regulation impossible, the conservatives were fulfilling ideological ambitions of decades long standing. ISLT has no such standing. It does not have deep roots in conventional conservative jurisprudence. It is a creature of the radical right of this moment. If the Court were to decide to hobble the ability of state courts to restrain gerrymandering it will be seen as a frank alignment of the Court with the radical Republican project of locking in minority rule. When the conservatives overturned *Roe*, they did what the conservative movement had been promising to do since 1973. Chief Justice Roberts was the lone conservative on the Court unwilling

to vote his heart in *Roe*. The Chief, an institutionalist, did not want the Court to take the hit to its prestige entailed by the unpopular move of abolishing at one go reproductive rights enjoyed for 50 years. *Moore v. Harper* is a nakedly political case that tests the Court's willingness to tip the scales in favor of an increasingly radical Republican Party. How many, if any, conservative justices are ready to depart from establishment legal conservatism to align with and provide a constitutional gloss for subversion? We are in a new political environment in the United States after the failed coup in January 2021. Only a scattering of Republicans in elected office has broken with the coup plotters, hardly enough to call a rump. *Moore v. Harper* asks the conservative justices which side are you on? They can declare for one or the other or find some way to try to equivocate.

The decision likely will be handed down in the spring or early summer of 2023.

notes

1. Oral Argument Transcript at 54, the Supreme Court of the United States.

2. *Ibid*. at 94.

3. *Ibid*. at 49-51.