THE BROOKINGS INSTITUTION

THE CURRENT: Moore v. Harper: Who has the power to set state election rules?

Thursday, December 8, 2022

Host: Adrianna Pita, Office of Communications, Brookings
Guest: Russell Wheeler, Nonresident Senior Fellow, Governance Studies, Brookings; President, The Governance Institute

---

PITA: You're listening to The Current, part of the Brookings Podcast Network. I'm your host, Adrianna Pita.

On December 7th, the Supreme Court heard oral arguments in the case of Moore versus Harper, which challenges the role that state courts and state constitutions play in establishing and modifying state election laws. Here to tell us what's behind the Supreme Court case and why it's important is Russell Wheeler, a nonresident senior fellow in Governance Studies here at Brookings and president of the Governance Institute. Russ, thanks so much for talking to us today.

WHEELER: Good to be with you.

PITA: So this case, Moore v. Harper, comes from a North Carolina redistricting dispute in which the Republican-led legislature drew a new congressional district map. The North Carolina state Supreme Court rejected it as, quote, "an egregious and intentional partisan gerrymander" and said that it violated the state constitution's free elections clause. The state legislators have now appealed this up to the U.S. Supreme Court, asking for a reversal of the state court based on the "independent state legislature doctrine." Russ, what can you tell us about this independent state legislature theory that's at the center of this case?

WHEELER: You know, it's interesting. You call it doctrine and then theory and you find that terminology floating around. Some people regard it as a, what's the word they use, a fringe theory and others regarded as a doctrine that grows out of the so-called "times, places and manner" clause of the Constitution, which says, let me just read it here. It said, "The times, places and manner of holding elections for senators and representatives shall be prescribed by, in each state, by the legislature thereof." It goes on to say that Congress may by law overrule those regulations. And there's a similar provision allocating the legislature authority to effect the manner of choosing presidential electors, which has given rise to perhaps even more concern than the case we're talking about now.

Basically, proponents say that the Constitution means what it says, and thus decisions about federal elections are vested in state legislatures, subject to no review by the state courts, countenancing, for example, no ballot initiatives that would establish citizen redistricting commissions. Basically, it's up for the state legislatures to determine here what the districts should be. And if the state legislature wants to effect political partisan gerrymandering, well, that's its prerogative. That's the basis of it.

Now, it has various permutations of various versions. I mean, there's a very strict version, the one I just enunciated. There are more modest versions. Proponents say the state courts can interpret procedural aspects of a legislature's election regimen, but they can't, for example, review substantive aspects of that regimen. And there's all sorts of variations, but it basically comes down to whether or not the state legislature is restricted or unrestricted in how it goes about setting up federal elections, in particular, how it goes about drawing districts for members of the House of Representatives.

PITA: How does this square with the notion of checks and balances, that sort of foundational principle that the three branches are supposed to be co-equal to each other?

WHEELER: Well, yeah, that's the $64 question. Opponents of the theory or the doctrine say that when the state legislatures enact a redistricting plan, they're just basically going through a legislative process and the legislative process has always been subject to review by state courts. Legislatures, in other words, are creatures of state constitutions, and legislatures, for that reason, cannot ignore state constitutional provisions as interpreted by the courts. The opponents argue, well, that's usually the case, but here, basically, the legislatures aren't exercising a normal legislative function. They're basically exercising a federal function delegated to them by the Constitution. But that's what a lot of the argument comes down to, is you just can't have unrestricted, uncontrolled decisions by state legislatures constrained only by Congress's overruling regular state regulations, especially now, because Congress is basically incapable of doing much of anything.

There's an historical argument, too. The opponents of the doctrine or the theory note that the framers, as you say, were suspicious of concentrating authority in any single entity. That's the checks and balances notion, separation of powers notion. They were especially suspicious of state legislatures. They thought state legislatures could be threats to property owners and could go off on all sorts of wild tangents. And the opponents argue, that being the case, if the Constitution's framers really had meant to vest in state legislatures this unchecked authority to control federal regulations, authority unchecked by any review by state courts, for example, they would have said so much more explicitly than they do. But we heard just in the oral argument today, Neal Katyal, who was arguing against the proposition, arguing on behalf of the North Carolina voters, said, nowhere in the Federalist Papers, for example -- there were three Federalist Papers on the election provision -- nowhere do they say anything about that could be construed as defending the so-called independent state election theory. So there you have it. The Constitution says what it says. Oponents know it says what it says, but really there's an awful lot more to it than that.

PITA: It's been particularly notable in this case that there's been very wide bipartisan pushback. Even the very conservative Federalist Society and many Republican legal experts have written in opposition; they filed amicus briefs rejecting this theory. Why did the Supreme Court even decide to take this up at this time?

WHEELER: You're right. Most of -- there's about, I think, over 60, maybe almost 70 amicus briefs -- and most of them attack the theory rather than defend it. Who knows? It takes four justices to agree to hear a case. So for them, at least four of them thought it was worth hearing.

In an earlier iteration of this case, when the court refused to take up the case at an earlier stage, several justices dissented from that refusal. One of them was Justice Alito, who seems fairly supportive of the theory. But Alito said, we're going to have to take this up sooner or later, so we might as well take it up now. And I think in that he's probably right. Although the briefs may be largely in opposition, it's floating around in a lot of circles. A lot of people are talking about it, and the court probably thought it's just time to do something about it.

The court says its guidelines for taking cases are, take a case when the courts of appeals have a conflicting interpretation of a statute that needs to be resolved. But the court's so-called Rule 10 also says the court will consider taking the case simply if it presents an important question that needs resolution on a national level. And I suspect that motivated at least four of the justices, some of whom probably think that's probably a good idea, also from oral argument, and perhaps other justices who said, we might as well take this up now because it's not going away.

PITA: So what could this ultimately mean for future elections?

WHEELER: Well, that's an awful lot of the discussion. Also, you heard references in the oral argument today to the blast area. In other words, the explosion goes off if you accept this theory, but it's going to have detrimental effects spread out in a wide area. If adopted in its extreme form, in its absolute form, which I think is unlikely, it would just throw into chaos all sorts of state election schemes in which state constitutions vest various authorities not only in the legislature but in other groups, the secretary of state's offices, for example.

Also, the opponents note that administering elections involves an awful lot of very detailed, spur of the moment decisions. For example, what does a local election official do if the law says the polls have to close at, say, 8:00, but there's a hurricane pending the next day, and so the election officials said, let's keep the polls open a little longer because we're not going to be able to open them tomorrow because of extreme weather. Well, is that a violation of the legislature's authority to prescribe the rules for conducting elections? And what that could lead to is an awful lot of court challenges in state and federal courts to these very detailed and spur of the moment decisions that are necessary to run elections in complex cases.

Now, as I say, I think that's unlikely the court would adopt it, get a majority of the court to go along with that extreme version. But the opponents argue any deference to this independent state legislature theory, even a qualified one, would lead to a mass confusion. And also, let's be frank, it would allow the state legislatures who are inclined to do so to malapportion the districting for House seats, as the North Carolina legislature did, and the North Carolina Supreme Court called them on it. And this is important because the Supreme Court of the United States has said, as recently as 2019, that there is no federal standard for evaluating partisan gerrymandering. Basically the court said that it may be a problem, but there's no justiciable standard in the federal constitution by which we can evaluate it. But it went on to say, but we have faith in the state courts and state legislatures to take action to ensure that rampant partisan gerrymandering doesn't occur, which would seem to be an endorsement of the anti-independent state legislature view, because the court said explicitly state courts have a role in making sure that partisan gerrymandering doesn't get out of hand.

PITA: All right. Well, I'm not going to ask you to try and predict which way the court will rule, but you have obviously been following the oral arguments. For the benefit of those who have not, what did you hear today that you think is particularly important? Was there anything surprising? What should watch listeners really know of the arguments today?

WHEELER: Well, this is an area that has an awful lot of moving parts, and I don't pretend to master all the moving parts. So I'm a little reluctant to say what was surprising and what wasn't. But I will say this: it seemed that three of the justices, Alito, Thomas and Gorsuch, seem inclined to give the state legislatures a pretty wide berth. Whether they go whole hog or not, I don't know. The three liberal justices, Sotomayor, Kagan and Jackson were much more skeptical. Chief Justice Roberts said that one does not have to buy the independent state legislature theory to say that the North Carolina Supreme Court, in throwing out the state's redistricting plan, based on the North Carolina Supreme Court's provision that elections should be fair and free, in doing that, the North Carolina Supreme Court may have gone too far and stepped away from a judicial function into a legislative or policymaking function. And so, without adopting the independent state legislature theory at all, the court could send the case back to the North Carolina courts and ask them to reconsider it in light of a more, stricter standard. And Kavanaugh and Barrett seem to pick up on that. As you say, I'd be nuts to try to predict this, but one could say perhaps a 6 to 3 decision, at least on fairly narrow grounds that the North Carolina Supreme Court went too far, but without at all endorsing the independent state legislature theory.

Or the court might even say, look, the case is still active in the North Carolina courts. There's an appeal pending from the redistricting map that the three-judge North Carolina trial court adopted, and that was used in the election last month almost on an emergency basis. The appeal of that redistricting plan is still pending, so let's wait and see how that comes out. I mean, the court could wash his hands of it. I don't think that's likely either. But at this stage, it's I think the safest thing to say is it's unlikely that you're going to have a Supreme Court embrace wholeheartedly the most aggressive version of the independent state legislature theory.

PITA: All right. Well, Russ, thank you very much for talking to us today and explaining this.

WHEELER: Well, I hope I've explained it a little bit. It's not the easiest thing to get your hands on.

PITA: Definitely not. But that's why we invite you on. Thank you, Russ.