

# Supreme Court Upholds State Courts' Power of Judicial Review Over Election Matters

Article By:

Lawrence T. García

Michael P. McGee

Wendolyn Wrosch Richards

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On June 27, 2023, the United States Supreme Court upheld a decision by North Carolina's highest court holding that the North Carolina legislature went too far in gerrymandering voting district maps. The Court affirmed the authority of state courts to review the decisions of state legislatures on election matters, rejecting the "independent state legislature theory." The theory, taken to its extreme, is that no branch of state government can question a state legislature's decision regarding any federal election. The ruling is an encouraging sign for states like Arizona, Illinois, and Michigan, where independent redistricting commissions have created, or are creating, new maps intended to represent non-partisan, or less partisan, boundary drawing and citizen-driven ballot initiatives to protect voters' rights.

The plaintiffs in *Moore v. Harper*, 600 U.S. \_\_\_\_ (2023), were groups and individuals challenging North Carolina's 2021 congressional districting map, which they viewed as unacceptable gerrymandering, created to favor Republican candidates. The legislative defendants asserted that in creating the new map, they had exercised the authority established by the "Elections Clause" in Article I, Section 4 of the United States Constitution that provides that state legislatures shall prescribe, "the Times, Places and Manner of" federal elections. Although North Carolina judges had found the new map to be "a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation," the legislative defendants argued the map was beyond the reach of judicial review. The Supreme Court had to decide whether "the Elections Clause insulates state legislatures from review by state courts for compliance with state law." *Moore*, slip opinion at p 11.

Writing for the majority, Chief Justice John Roberts began the analysis by citing our country's long-standing legal tradition of judicial review of the constitutionality of legislative acts. The majority opinion noted the 1787 decision in *Bayard v Singleton*, where the North Carolina Supreme Court found a law banning British loyalists from challenging property seizures was unconstitutional. The opinion goes on to review many decades of decisions where courts have considered the "interplay between state constitutional provisions and a state legislature's exercise of authority under the

Elections Clause.” *Moore*, slip opinion at p 15.

Looking at the other side of the case, the Court examined the legislative defendants’ arguments about the impact of the Election Clause. Rejecting Justice Clarence Thomas’s dissent, Roberts addressed the concept known as “independent state legislature theory” which contends that, “because the Federal Constitution gives state legislatures the power to regulate congressional elections, only [the Federal] Constitution can restrain the exercise of that power.” *Id* at 18. The historical references supporting this theory are debunked in the *Moore* decision, and many commentators have stated the decision in *Moore* slams the door on the extreme view that state legislative acts around federal elections are not subject to review by state courts.

The *Moore* decision, however, refers to a need to balance competing interests: “Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein.” *Moore*, slip opinion at p 26. The opinion goes on to note:

We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause... We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.

*Id.* p 28-29. It therefore remains to be seen how difficult it will be to challenge state legislatures in their future attempts at partisan district drawing in state courts. Paying homage to the Supreme Court decision in *Bush v Gore*, it also leaves open the question of when federal courts may find that a state court has transgressed the “ordinary bounds of judicial review.” And, *Moore* leaves the Court’s holding in *Rucho v Common Cause*, 139 S Ct 2484 (2019) that partisan gerrymandering claims brought in federal court are not justiciable because they present a political question beyond their reach.

Nevertheless, taken in the context of other decisions reached this term, such as the Alabama districting case implicating the Voting Rights Act (*Allen v Milligan*), the recent decision in *Moore* gives comfort to many traditionalists who have been increasingly fearful of sudden and/or extreme changes to norms in American jurisprudence.

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National Law Review, Volume XIII, Number 179

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