Revival of the Independent State Legislature Doctrine

Faiz Surani

Brett Kavanaugh has something he would like to share. The Justice recently set off a great deal of alarm in liberal circles around his concurrence to the Supreme Court's rejection of a Democratic request to extend a Wisconsin mail-in ballot deadline.[1] The Court's ruling, though important for Wisconsin voters, was by no means a departure from its recent skepticism of court-ordered voting accommodations.[2] In fact, the source of alarm had nothing at all to do with any question before the Court in the case. Instead, in a staggering footnote, Justice Kavanaugh articulated a long-dormant, fringe legal theory asserting a constitutional mandate for the Supreme Court to second-guess state courts on matters of state election law. Known as the "independent state legislature doctrine", this theory carries potentially profound implications for both the immediate election and long-term issues of federalism.

To best understand the potential impact of the independent legislature doctrine, we must begin by examining its origins. The doctrine is based in the U.S. Constitution's Article II Elector Appointment Clause, which states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [to elect the President and Vice President]".[3] As the argument goes, Article II specifically grants regulatory authority not

[1] *D.N.C. v. Wisconsin State Legislature*, No. 20A66 (Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

[2] *See, e.g.*, *Andino v. Middleton*, No. 20A55 (Oct. 5, 2020) (staying district court injunction blocking South Carolina's witness requirement for absentee ballots); *Merrill v. People First of Alabama*, No. 20A67 (Oct. 21, 2020) (staying district court injunction easing various voting restrictions in Alabama).

[3] Elector Appointment Clause, U.S. CONST. ART. II, § 1, CL. 2.

to states as a whole but specifically to *state legislatures*. Thus, "a state legislature directing the manner of appointing electors pursuant to Article II operates with independence from its own state constitution."[4] Ironically, the upshot of this theory has less to do with the legislature itself and more to do with the Supreme Court: because Article II specifically grants this power to legislatures, the doctrine dictates that a "significant departure [by state courts] from the legislative scheme for appointing Presidential electors presents a federal constitutional question," providing the Court a pretext to intervene in matters of state law.[5]

Though the doctrine is often couched in originalist terms, its grounding in American legal history is tenuous at best. First, independent legislature doctrine runs directly contrary to the Supreme Court's precedents interpreting Article I, Section 4 of the Constitution, the Elector Appointment Clause's direct counterpart respecting congressional elections.[6] For example, in the 1932 case *Smiley v. Holm*, the Court explicitly *rejected* the idea that state legislatures alone could possess the authority to regulate elections, interpreting the Congressional Elections Clause in that case to allow for a gubernatorial veto of redistricting plans put forward by the legislature.[7]

Further, as attorney Hayward H. Smith writes, examining the history of the theory, "there is no indication in the historical record that the Elector Appointment Clause was originally understood to grant independence to state legislatures," significantly undercutting any originalist justification.[8] The real origination of the doctrine, Smith argues, came decades later, in the form of "desperate and transparently manipulative judicial and political attempts to prevent state constitutions from accidentally disfranchising

[4] Smith, Hayward H., *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 734 (2001).

[5] *Bush v. Gore*, 531 U.S. 98, 116 (Rehnquist, C.J., concurring) (2000).

[6] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators." Congressional Elections Clause, U.S. CONST. ART. I, § 4, CL. 1.

[7] *Smiley v. Holm*, 285 U.S. 355 (1932).

[8] History of the Independent Legislature Doctrine, *supra* note 4, at 743.

Civil War soldiers who had risked their lives to preserve the Union and end slavery."[9] After the Civil War, however, the theory largely fell out of favor, having never been firmly established in the first place. The question, then, is this: how did the independent legislature doctrine journey from arcane legal trivia to modern relevance? The story begins with perhaps the most (in)famous election case in American history: *Bush v. Gore*.

Deeply controversial nearly 20 years on, *Bush v. Gore* put an end to the most bitterly contested election in recent memory, with the 5-4 conservative majority ending all recounts in the state of Florida.[10] By a margin of 537 votes, George W. Bush was declared the winner of the 2000 presidential election. The *per curiam* majority opinion is well-remembered for its single-use legal reasoning, limiting its Equal Protection analysis "to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[11] Less remembered but now greatly significant is Chief Justice Rehnquist's concurrence. Rehnquist wrote separately to advocate a different grounds for the decision: that the Florida Supreme Court had "infringed upon the legislature's authority" by, in his view, dramatically misinterpreting state election law. The Chief Justice asserted, with what can only be described as serious chutzpah, that overruling state courts on state law "[did] not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislature."[12] In doing so, Rehnquist clearly articulated the far-reaching independent legislature doctrine that Justice Kavanaugh would come to reference in *Wisconsin State Legislature*. Rehnquist's radical theory of the case ultimately garnered only two other votes (Justices Scalia and Thomas), but his ideas continued to gain traction among originalist scholars.[13]

The potential implications of the doctrine as stated by Chief Justice Rehn-

[9] *Id.* at 742.
[10] *Bush v. Gore*, 531 U.S. 98.
[11] *Id.* at 109.
[12] *Id.* at 115 (Rehnquist, C.J., concurring).
[13] Morley, Michael, *Partisan Gerrymandering and State Constitutions*, FSU College of Law, Public Law Research Paper No. 917 , 18 n.92 (Aug. 28, 2020).

quist's *Bush v. Gore* concurrence are immense. We turn first to the immediate concern: the 2020 presidential election.[14] The challenges presented by the coronavirus pandemic have led to an unprecedented rash of election litigation. For the most part, these lawsuits have fallen along the lines of Democrats seeking to extend voting accommodations and mail-in ballot deadlines, with Republicans tending to challenge such measures. With so many cases navigating their way through both state and federal courts, the Supreme Court has had occasion to weigh in on several emergency requests for injunctive relief. It is in this context that Justice Kavanaugh brought to the fore the independent legislature doctrine in *D.N.C. v. Wisconsin State Legislature*, despite the case in question being a federal challenge not implicating the doctrine whatsoever.

Of course, a single justice's concurrence does not a majority make. As it would happen, Justices Gorsuch, Alito, and Thomas have all either written or joined opinions in recent days propounding some version of the doctrine, with newly minted Justice Amy Coney Barrett yet to preside over such a case. Most concerningly, Justice Alito, joined by Gorsuch and Thomas, suggested the Court could apply the doctrine to *retroactively* discount Pennsylvania mail-in ballots arriving after Election Day where the Pennsylvania Supreme Court had previously ordered them to be counted as a matter of state law.[15] Justice Alito's indication that the Court could be willing to invalidate ballots even after the election's conclusion raises the possibility that the Court could consider entirely new challenges to ballots already cast in compliance with election laws, like the long-shot Texas GOP attempt to throw out hundreds of thousands of votes cast at drive-thru voting centers.[16]

[14] Several of the cases mentioned subsequently are the subject of ongoing litigation at time of writing, and facts surrounding the election are rapidly changing. All information is current as of October 29, 2020, but new developments may render some parts out-of-date.

[15] *Republican Party of Pennsylvania v. Boockvar*, No. 20542 (Oct. 28, 2020) (Alito, J., statement respecting denial of motion to expedite consideration of the petition for a writ of certiorari).

[16] Medley, Alison, *Last-minute challenge threatens to reject thousands of drive-thru votes in Harris County*, The Houston Chronicle (Oct. 29, 2020).

Adopting the doctrine could have more permanent effects on election-related jurisprudence as well. Nowhere is that more apparent than in the fight over partisan gerrymandering. In the 2019 case *Rucho v. Common Cause*, the Supreme Court declared that disputes over partisan gerrymandering fall under the "political question" doctrine, and are thus outside the scope of federal judicial review.[17] Independent legislature doctrine under the Congressional Elections Clause would allow the Court to go one step further though, and actively stifle state-level attempts to end gerrymandering in two main ways.

First, it could threaten the nonpartisan redistricting commissions established in many states by referendum. In 2015, the Supreme Court narrowly upheld Arizona's nonpartisan redistricting commission by a 5-4 vote citing long-established precedents like *Smiley*, while the main dissent outlined a limited (and to some degree, more textually defensible) version of the doctrine.[18] However, two members of that majority (Kennedy and Ginsburg) have since been replaced by staunch conservatives on the Court, calling into question the long-term survival prospects of these commissions.

Second, the Court could apply the theory to block state courts from limiting partisan gerrymandering under state constitutional provisions. Invoking an expansive version of the doctrine like the kind described in *Bush v. Gore*, originalist scholar Michael Morley contends that state constitutions "cannot limit a legislature's power to regulate most aspects of federal elections, including its authority to draw congressional district boundaries."[19] Amusingly enough, this standard would bring partisan gerrymandering cases back into the purview of the federal judiciary, but only insofar as to protect a state legislature's right to engage in the practice.

Justice Kavanaugh's objectively unnecessary proclamation in *Wisconsin State Legislature* as well as his insinuation that late-arriving absentee ballots

[17] *Rucho v. Common Cause*, 588 U.S. — (2019).

[18] *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015).

[19] Partisan Gerrymandering and State Constitutions, *supra* note 13, at 5.

could "flip the results of an election"[20] were a clear signal to interested parties: the Supreme Court can and will prevent the tabulation of legitimate ballots.[21] While it remains to be seen how Justice Barrett will rule on these issues, available evidence suggests it is unlikely that she will depart from the jurisprudence of her late mentor Antonin Scalia and Federalist Society peers on the Court.[22] Her support could complete a five-justice majority seemingly unconstrained by basic principles of federalism or even an intellectually honest application of their stated originalist philosophy. To be clear, the chances of a truly contested election are slim, and the likelihood that the Court be in a position to determine the outcome slimmer. Even so, the fact that a sizable bloc of the Court has expressed willingness to thwart the free and fair tabulation of votes based on junk doctrine augurs deep trouble for the Court's legitimacy as a democratic institution.

[20] There is, of course, no such thing. Elections do not have results to be "flipped" until all ballots properly cast have been counted.

[21] *D.N.C. v. Wisconsin State Legislature*, No. 20A66 , slip op. at 7 (Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

[22] *See generally* Cope, Kevin L. and Fischman, Joshua B., *An Empirical Analysis of Judge Amy Coney Barrett's Record on the Seventh Circuit*, SSRN (Oct. 14, 2020) (finding that then-Judge Barrett was "within a group of the circuit's six most conservative judges, and possibly more conservative than every other judge considered") *and* Newburger, Emma, *Amy Coney Barrett pays homage to conservative mentor Antonin Scalia – 'His judicial philosophy is mine too'*, CNBC (Sep. 26, 2020).