



Supreme Court Will Reject the Independent State Legislature Doctrine

George R. Tyler

March 30, 2023

Republican dominance of the Supreme Court is a doubled-edged sword. By design, numerous rulings by the Republican majority have enhanced their party's election prospects. But those conservative justices can't stop themselves from scratching their pet peeve itches like abortion that harm those same election prospects. A ruling this June to implement the Independent State Legislature doctrine (ISL) holds special peril for them.

A Partisan Court Using Gerrymandering to Elevate the Republican Party

This Supreme Court is the first partisan one in American history; three of the six sitting Republican justices were rushed to Florida by party officials in 2000 to aid George W. Bush in becoming president. These partisan justices know Republicans have lost the presidential popular vote in 7 of the last 8 elections. And they have responded with rulings to help their Party by limiting ballot access by Democrats include eviscerating the Voting Rights Act. Republican judges, legislators and governors have rushed to exploit these rulings, with 24 of the 25 states with the most restrictive voting rules now governed by Republicans.

But the majority's most consequential ruling expanding Republican political power is *Rucho*. It affirmed gerrymandering - state legislatures customizing the partisan geographic contours of state and federal legislative districts - that has resulted in a net

shift of some 16 to 19 seats in the House of Representatives from Democrats to Republicans (enabling them to flip the House in 2022). That huge advantage remained in the aftermath of the 2020 census.

The Supreme Court's Looming "Own Goal" - The ISL Doctrine

The tension between the Court majority's implementation of pet peeves versus elevating Republican electoral prospects is on vivid display with Moore v Harper, the pending ISL case. If adopted by the Court, ISL would free state legislators of oversight by state courts and governors regarding election administration, ballot access and vote-tabulation.

This case also bears on the Court majority's partisan interest in sustaining the Republican 19-seat gerrymandering edge. As state supreme courts in North Carolina and Pennsylvania demonstrated in 2022, that edge can easily be eroded by principled state courts citing state constitutions. And the Supreme Court has been reluctant to overrule those state judicial decisions. Instead, the Court majority can forestall such state court interventions by embracing the ISL doctrine.

Another threat to their 19-seat edge is independent redistricting commissions established by voters and reformers specifically to eradicate gerrymandering. More than 20 states have them, mostly Democratic or swing states, but they pose a risk of voters spreading them to Republican states. The Court majority can eliminate that risk by barring such commissions (reversing a 5-4 ruling over conservative dissent by the more moderate Court in 2015). That would aid Republicans modestly in states like Arizona. But on balance, their 19-seat edge would be notably reduced because eliminating such commissions would renew gerrymandering in Democratic states like California and New York.

The issue of independent commissions highlights the danger posed by the ISL case for the Congressional Republican's 19-seat gerrymandering edge. Adoption of the ISL doctrine in virtually any form will expand gerrymandering, enabling Democrats to reduce that edge, perhaps significantly.

ISL Will Tarnish Republicans

A second risk exists should the Republican justices embrace the ISL doctrine in any form because that ruling will darken public perception of their commitment to democracy.

If oversight by state courts and governors is barred by an ISL Court ruling, partisan Republican legislators would be free to manipulate election rules and even certify state presidential electors to Congress despite their candidate losing the statewide vote (as Trump intended in 2020). Farfetched? Well, Republican legislatures in swing states, including Georgia and Arizona, have already replaced nonpartisan election officials and election boards with Party partisans responsible for counting and certifying election results. In contrast, Democratic grassroots and officials have rejected such shenanigans.

Republican state officials exploiting an ISL ruling to rejigger election outcomes will have a calamitous impact on the Republican brand. A tell is the recent firestorm of condemnation by Republican legal experts deeply alarmed by the danger ISL poses to democracy. Those critics are a who's who of Republican legal expertise, including an outspoken Steven Calabresi (co-founder of the Federalist Society), former Appeals Court judge J. Michael Luttig and even the libertarian Cato Institute.

Democracy Anarchists

The ISL case confronts the Republican majority with a Sophie's Choice.

They can rule in favor of ISL and thus empower Republican state legislatures rejiggering election outcomes. Yet, that will certainly significantly erode their party's gerrymandering edge. But most importantly, a full-throated embrace of ISL will also endanger the majority's pet peeve agenda. After all, the Republican justices have a slew of pet peeves poised for enactment – dirtier air and water, weaker unions, neutering the establishment clause, kneecapping the administrative state and the like – lots of heavy lifting. Yet, embracing ISL will assuredly invoke a severe reaction in the coming years that will include public and legislative pressure for Supreme Court reforms including adding more justices and jurisdiction stripping.

Such reforms pose an existential danger to the Republican Court's fulsome ideological pet peeve agenda – and will temper the Republican Supreme Court's enthusiasm for the ISL.