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Quo vadis American democracy after the Moore vs. Harper case?

¿Quo vadis de la democracia estadounidense después del caso Moore vs. Harper?

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Abstract

This work aims to highlight some positions of a personal and above all critical nature following a recent ruling dating back to 27 June 2023 by the supreme court. A fight between federal and state courts is certainly not obvious and the role of judges and the theory of independent state legislature are topics under discussion. What creates interpretation problems for us are the opinions of judges, especially their role in various cases after 2020 in the United States that creates concerns for the future of electoral elections in the United States as well as many doubts in the sector of democracy in the arena of elections for the near future.

Keywords

American democracy; Independent State Legislature Doctrine; gerrymandering; election law; elections clause; judicial review; American federalism; mootness; overruling, cherrypicking; comparative law; American civil procedural law.

Resumen

Este trabajo pretende poner de relieve algunas posiciones de carácter personal y sobre todo crítico tras una reciente sentencia del 27 de junio de 2023 del Tribunal Supremo. Una lucha entre los tribunales federales y estatales ciertamente no es obvia y el papel de los jueces y la teoría de una legislatura estatal independiente son temas en discusión. Lo que nos crea problemas de interpretación son las opiniones de los jueces, especialmente su papel en varios casos posteriores a 2020 en los Estados Unidos, lo que genera preocupaciones sobre el futuro de las elecciones electorales en los Estados Unidos, así como muchas dudas en el sector de la democracia en la arena de elecciones para el futuro próximo.

Palabras clave

Democracia estadounidense; Doctrina de la Legislatura Estatal Independiente; manipulación.

I. Introduction

Once again the American supreme court with its ruling in Moore v. Harper 600 U.S. 1 (2023) case of 27 June 2023[1] tried to answer, think, conclude and give new interpretations in the Independent State Legislature doctrine (ISL) as a position of the existence of the power that regulates federal elections within the individual federal states, to legislative bodies of those states that such power is subject to the control and limitation of the state courts or the governor (Morley, 2020, Morley, 2021; Smith, 2022; Weingartner, 2023). This is a theory that is based on the constitution of the United States, in particular Art. 1, section four, first paragraph (elections clause) which states: "(...) places and methods of elections for senators and representatives will be established in each state by the respective legislative bodies; Congress may, however, at any time establish or modify the relevant rules, except as regards the places in which senators are to be elected (...)". A second point of strengthening is found in Art. II, second paragraph which also states: "(…) each state will appoint, in the manner established by its legislative body, a number of Electors, equal to the total number of senators and representatives that the state has the right to send to Congress; but neither senators, nor representatives, nor others holding fiduciary or paid positions in the employ of the United States, may be appointed Electors (…)".

To date, the majority of judges of the supreme court have not validated this position, remaining faithful to an old case: McPherson v. Blacker, 146 U.S. 1 (1892)[2], related to a Michigan law and its validity affecting presidential electors. They approved a report of 1874 of a Senate committee advocating the absolute power of legislative bodies[3]. The subject of the dispute in the Blacker case was compliance with Michigan law in the federal constitution and not that of the state as binding precedent concerning the theory of ISL that was announced. As the years passed with the Bush v. Gore, 531 U.S. 98 (2000)[4] regarding Florida supreme court votes after a recount request, state judges stayed away from the letter of the state election code and in

[1] https://www.supremecourt.gov/opinions/22pdf/21-1271_3f14.pdf

[2] https://supreme.justia.com/cases/federal/us/146/1/

[3] Parr. 34-35.

[4] https://supreme.justia.com/cases/federal/us/531/98/

violation of the Elections Clause (Morley, 2015)[5]. The ISL theory was part of the Court's majority opinion focused on the Equal Protection Clause of the Fourteenth Amendment. There is a relative pushback against this ruling that was noted in the Smiley v. Holm, 285 U.S. 355 (1932)[6] case after the relative veto of the Governor of Minnesota which concerned the new electoral districts which was the product of the legislative body of the state where the supreme court rejected this position by stating that: "(…) as legislative body (…) the federal Constitution referred to the exercise of the states' general power to legislate rather than to the representative assembly in the strict sense; if the Governor is a party to the legislative process, his veto cannot be considered worthless (…)"(Schweigert, 2008).

In a different way in our case we read: "(…) in the Federal constitutional provision of an attempt to endow the legislature of the state with power to enact laws in any manner other than that in which the constitution of the state has provided that laws shall be enacted. Whether the Governor of the state, through the veto power, shall have a part in the making of state laws is a matter of state politics. Article I, section 4, of the Federal Constitution, neither requires nor excludes such participation (…) as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority (...)"[7]. With a small majority of 5-4 the conclusions were similar to those we have already read in the Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015)[8] case: "(...) the legislative assembly of the state of Arizona complained about the unconstitutionality of the amendment to the state constitution, obtained through a referendum (popular initiative), which had created an independent commission with the task of drawing new electoral districts after each census, stripping the legislature of that power. According to the opinion of the majority, also in this case the legislative body is not the only representative assembly, but also the electorate that makes use of the referendum instrument, provided that it complies with the provisions of the state constitution (...)"[9].

[5] Parr. 112-122.

[6] https://supreme.justia.com/cases/federal/us/285/355/

[7] 285 U.S., 367-368.

[8] https://supreme.justia.com/cases/federal/us/576/13-1314/

[9] Par. 819.

II. Analysis ofr the case and personal evaluations

In American constitutional history North Carolina has remained as a swing state that is based on a two major party electoral system. Redistricting redraws the electoral districts by typically following the ten-year census and the parties serve to maintain control of the state institutions, especially the legislative assembly. The state's electoral map has been redrawn three times to date. In particular, in 2019 it was discussed before the supreme court through the Rucho v. Common Cause, 588 U.S. (2019)[10] case, despite the fact that gerrymandering was not suitable and perhaps contrary to democratic principles and the federal courts could not thus advance issues that fall within political discretion while reserving to institutions the recognition of partisan gerrymandering as racial according to the voting rights act of 1965 (Bondurant, 2021). After the last census of 2020, the population of North Carolina was calculated to be around one million units to be allocated to the House of Representatives. The General Assembly as a legislative body thus produced new maps under discussion, i.e. the House of Representatives of the United States and for each of the chambers of the General Assembly that are approved to vote for the Republicans. The groups and associations have asked the judiciary to censor new maps, thus violating the constitution that was created by gerrymandering. In the Harper v. Hall, 380 N.C. 317 (2022) (Harper I)[11] case a Wake County court recognized: "(...) the partisanship of the design of the new electoral districts". It also stated that it could not grant satisfaction to the plaintiffs, since, with few and detailed exceptions, the cases of gerrymandering amounted to political questions that are nonjusticiable under the North Carolina Constitution[12].

The state supreme court followed a path that was different from the lower court despite the fact that the Rucho ruling was read from scratch, stating that: "(…) simply because the supreme court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina Courts (…)"[13]. In practice, the defendants' argument which was part

[10] https://supreme.justia.com/cases/federal/us/588/18-422/

[11] https://law.justia.com/cases/north-carolina/supreme-court/2023/413pa21-2.html

[12] Par. 348.

[13] Par. 361.

of the relevant reference to the theory of ISL was rejected. It ordered the lower court to monitor the General Assembly's drawing of districts and to take action if there are any violations. So the General Assembly adopted a new map where the court was appropriate and approved new maps drawn up according to the independent experts who are employed in the 2022 elections according to the Harper v. Hall, 383 N.C. 89, (2022) (Harper II)[14] case. In the Harper II case which dates back to February 2022 after an appeal to the supreme court of the US by the representatives of the General Assembly for a relative suspension of the decision concerning North Carolina, the judges: "(...) did not grant the emergency measure, but accepted to argue the case in the following judicial year (…) agreed with the lower court on the deficiencies of the new map presented by the General Assembly, which did not meet the criteria established in Harper I (…)" (McKinney, 2022)[15].

The North Carolina supreme court as an elective body in the 2022 elections included four justices who were affiliated with the Democratic Party and three who were part of the Republican Party. Thus the balance of the court was tipped with five justices who were conservative and liberal affiliated. Since 1st January 2023, representatives of the General Assembly have called for the overruling of Harper I, thus granting the annulment of the order that terminated the original electoral map. The new court ruled in favor of the representatives of the General Assembly, thus overturning the Harper I case and accepting the reasoning coming from the Rucho case (Harper v. Hall, N.C. (2023) (Harper III)[16]. In this case it is not excluded that the state courts could hear partisan gerrymandering cases and the state supreme court took the majority position on a political question by stating that: "(…) in Rucho the supreme court considered partisan gerrymandering claims under the Federal Constitution, but the arguments it addressed are similar to those raised here. While the current claims allege that partisan gerrymandering violates our state constitution, we find the reasoning of the supreme court in Rucho persuasive because the same arguments, concerns, and predictions have arisen here (…)" (MacGuidwin, 2023).

[14] https://casetext.com/case/harper-v-hall-12

[15] Harper II, par. 125.

[16] https://www.documentcloud.org/documents/23792065-harper-v-hall-2023-04-28-opinion-of-the-north-carolina-supreme-court

The federal judge found himself taking a position on the first question which was that of jurisdiction. The state judge's ruling posed the issue of the mootness of the case as a circumstance that made the decision "the most necessary" (Kates, Barker, 1974; Hall, 2008; MacGuidwin, 2023). Obviously for the supreme court the majority was not the crucial issue. Because the basis of resolving and taking a position was a reasoning that was based on Art. III, section 2 of the federal constitution thus providing for the jurisdiction of the supreme court over disputes and related cases. This requirement requires that the parties maintain a personal interest as we saw in the old Baker v. Carr, 369 U.S. 186 (1962), 204 (Lund, 2012)[17] and in Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66 (2013)[18]. The issue was the overruling of the state judge relating to the previous judgment which undermined the interest of the parties in resolving the dispute before the federal supreme court.

It is noted that the members of the General Assembly did not request the restoration of the relevant electoral map because in the case of a new hearing relating to Harper I they were already out of time. The interest was overruling as a principle that was established by the first ruling that came from the North Carolina supreme court and was relevant to the justiciability of partisan gerrymandering claims. The reversal of the Harper I case is only suitable for the federal supreme court as being uniquely capable of providing complete relief to the state legislature. The return to the previous and/or old original electoral maps is a sufficient element for the parties who have a personal interest in the dispute. Let us not forget that within this framework there is an ad hoc law in North Carolina which provides for the automatic revival of the maps when the decision of the federal supreme court is favorable to the General Assembly. This is also the Hunt v. Cromartie, 526 U.S. 541 (1999)[19] case maintaining and taking into account provisions that were sufficient for a possible mootness given that in North Carolina the case with gerrymandering was involved. A second point of analysis concerned the question of the theory of ISL. According to Art. 1258, title 28 of the United States Code the federal supreme code also has jurisdiction: "(…) judgments or decrees rendered by the highest court of a state in which a decision could be (…) further proceedings in lower courts does not affect the the fact that a state supreme

[17] https://supreme.justia.com/cases/federal/us/369/186/

[18] https://supreme.justia.com/cases/federal/us/569/66/

[19] https://supreme.justia.com/cases/federal/us/526/541/

court has issued a final judgment on a matter of federal concern, as seen in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)[20], in which at least four categories of similar cases are identified (…) the second category includes cases (…) in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings (…)"[21].

In the Harper I ruling, the North Carolina supreme court decided the "final decision" on the matter of federal interest of the meaning of the Elections Clause. According to the Washington judges, in its 2023 decision the state supreme court, in reality, merely reaffirms its jurisdiction to verify the compliance of redistricting plans with state law. The supreme court of the United States of America, therefore, has jurisdiction to decide the meaning and scope of the Elections Clause, and may address the merits of the question.

In particular, Chief Justice John Roberts began a very particular speech which highlights a return to the past and especially in the Marbury v. Madison, 5 U.S. 137 (1803)[22] case relating to the principle of judicial review of the United States of America. The judge showed and took a position even before the federal constitution was in force and the principle that was noted in the Marbury v. Madison case regarding the constitutional charters and the states mentioning: "(...) the Massachusetts delegate to the Convention Elbridge Gerry, eponym of the practice of gerrymandering, cited in a positive way the conduct of the judges who had declared the unconstitutionality of laws in conflict with state constitutions. It is striking that over three pages of the sentence are dedicated to a historical review that reiterates what, in a sentence of the supreme court of the United States of America, may even seem banal (...)".

Thus the jurisprudence of the court is included starting from Ohio and ex rel. Davies v. Hildebrant, 241 U.S. 565 (1916)[23] unanimously supporting the relative legitimacy of the elective assembly. In this context, the Smiley case was also noted, stating that: "(…) to the role of the Governor in the legislative process of many states, and the Arizona State Legislature. The fundamental principle that links the three rulings is

[20] https://supreme.justia.com/cases/federal/us/420/469/

[21] Par. 480.

[22] https://supreme.justia.com/cases/federal/us/5/137/

[23] https://supreme.justia.com/cases/federal/us/241/565/

that redistricting is essentially a legislative function and, therefore, to be carried out according to the procedures established for legislating in state constitutions, nothing in (the elections) Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of state's constitution (...)"[24]. As we understand, the court did not follow a new path but only the one that was noted by the Smiley case. The power to regulate elections and especially of members of Congress is given by the federal constitution, thus restricting the exercise and not just state law. This is a reconstruction that thus ignores the jurisprudence that we reported previously. In particular, the fact of the conception of the legislative bodies that existed since the time of the constituents was ignored by stating that: "(…) what are legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution. It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void (…)"[25].

It is taken into account that the state representative assembly is a body that is based on the state constitution and the US constitution, conferring relative competence. These are two papers that bind the assembly. Even cherrypicking of supreme court jurisprudence by representatives of the General Assembly did not persuade the court's majority. In the McPherson case he was defended by the right of the Michigan legislature to award presidential votes based on individual constituencies of the House of Representatives and was not faced with a conflict between the legislature and the state constitution but a violation of the Elections Clause by the legislative body taking away the power of the state of Michigan to give to individual districts. Within this context, Chief Justice Fuller stated that: "(...) the legislative power is the supreme authority except as limited by the constitution of the state (...) what is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist (…)"[26].

In the Leser v. Garnett, 258 U.S. 130 (1922)[27] case relating to the invalidity of the Nineteenth Amendment under state constitutional provisions made ratifications of

[24] 576 U. S., 817-818.

[25] Vanhornes Lessee v. Dorrance, 2 Dall. 304 (Pa. 1795) 308. https://supreme.justia.com/cases/federal/us/2/304/

[26] McPherson, 25.

[27] https://supreme.justia.com/cases/federal/us/258/130/

the amendment by state representative assemblies inoperative. The supreme court defended the validity of these ratifications by arguing that the assemblies performed a federal function that was free from the limitations imposed by state law and the appellants apply the same principles in the present case. Of course, from 1922 to 2023 there are many years but the court based itself on the distinction between the function of a simple ratification and the regulation of the electoral procedure as a complex operation for legislation and subject to the constraints of a legislative procedure that establishes the state constitutional charter. According to Roberts: "(…) the supreme court has historically rejected the concept according to which the act of legislating pursuant to the Elections Clause is purely federal in character (…) not being able to ignore tout court the cumbersome precedents of Smiley, Hildebrant and Arizona State Legislature, the appellants-and Justice Clarence Thomas, author of the dissenting opinion-recognize that there is some constraint that state law can apply to the legislative body, but they reread those rulings extolling the difference between procedural and substantive constraint. Their argument is that in all those cases the limitation pertained to the procedural aspect of the legislation (as in the case of the Governor's veto), but that there was no jurisprudence on the constraints imposed on the content of the legislation approved under the Elections Clause. Not even this line of argument convinces the majority of the Court, which, in the cited sentences, did not distinguish between substantive and procedural constraints (...) the distinction between the two appears far from easy: when a governor vetoes a bill because of a disagreement with its policy consequences, has the governor exercised a procedural or substantive restraint on lawmaking? (...) believing that it is not necessary to investigate the matter further (...) cites provisions of state constitutions of the late 18th and early 19th centuries regulating the conduct of the electoral procedure. According to the interpretation of the Elections Clause desired by the appellants, it would have been impossible enforce similar provisions before a judge; What sense would it have made for legislators of the same generation as the Constituents to include them? (…)".

As can be read from the previous paragraph, the court has taken precise positions. It first demonstrated the provisions of the federal constitution that do not shield state legislatures from the law in their own state and clarifies the even limited power vested in state judges who cannot give to a state law a direct reading relating to the

circumvention of federal law. Within this context Roberts stated, rectius conciliato that: "(...) the present ruling with that given in Bush v. Gore, in which it was decided that, in interpreting the laws governing elections in Florida, the supreme court of that state had impermissibly distorted them beyond what a fair reading required (...)[28]. The supreme court of North Carolina was, therefore, excessive in interpreting state law? This is irrelevant. This has never been the argument of the appellants, who have always conceded that the state supreme court had applied state law well. The Federal supreme court therefore has no reason to decide this last question, and does not do so. All that remains, therefore, is to confirm the ruling given by the supreme court of North Carolina in Harper I. The ISL theory is rejected in its entirety.

As regards the Moore v. Harper case, it is stated that the history of the jurisprudence of the court in question was taken up above all by the Arizona State Legislature even if the balance of power within the court was different at the time. It is interesting and appropriate to pay attention to the dissenting opinion of judge Clarence Thomas which in reality also resembles that of judge Gorsuch and is limited to the question of mootness also by a third judge: Alito. The problem of jurisdiction according to judge Thomas has no doubts about its non-existence but it is only a pure case of mootness. The change from Harper I to Harper III was not decided by the federal supreme court. It was not decided because the appellants got what they wanted and in relation to the issue of the elections clause where the supreme court could not influence the developments of the lower courts. It is understood that thus the relative rights of the parties were also not affected by the court's decision itself. According to judge Thomas: "(...) the fundamental error of the majority would have been to have wanted to judge what the General Assembly produced in 2021 as statutes, in the abstract, separately from the real controversy. However, in the US legal system, this would not be the role of judicial review (…). The power to declare which law is applicable in a dispute also entails the negative power to disregard an unconstitutional enactment (...) but this is not a power per se to review and annul acts of (legislation) on the ground that they are unconstitutional (…)"[29].

[28] 531 U.S., 115.

[29] Massachusetts v. Mellon, 262 U. S. 447 (1923), 488. https://supreme.justia.com/cases/federal/us/262/447/

It is understood that when a court has declared the unconstitutionality of an Act that does not mean that it deprives the person who owns it. The court limited itself to resolving a specific dispute in accordance with the constitution and left out that an act cannot in any way regulate the case given that it is ineffective from the beginning. There is no specific case where the judicial power must express itself. And we say this while remaining "faithful" to the inspirations and positions of judge Thomas despite the fact that he shows a conservative position regarding the role of judges on the legal level. With the expression: "(…) I would gladly stop there (…)", the discussion that the judge made in his dissenting opinion was opened. The basis of one's position was based on the supremacy of the federal constitution. This is a consequence of the supremacy where the limitations impose on state constitutional documents the performance of the relevant functions which are entrusted by the federal constitution as ineffective. Thus the people of a single state cannot have limits on their powers given that these people are part of the United States of America[30]. The substantive and procedural constraints on the power of the General Assembly for judge Thomas were very precise. The majority's question on the governor's veto is not difficult and he could not take a position since the sanction and veto of bills are part of a legislative process. The governor certainly has these powers as well as the effects of the legislative branch of the body. Substantial constraints on the legislative process which also includes the position of the governor regarding the performance of the function entrusted to the elections clause requires a precise justification for the majority of the court which it seems not to provide. On the other hand, the majority is attacked by giving the lower courts the right to function and exercise the judicial review also in future cases which have the elections clause as their object. Thus it asks the federal courts to have a function that it accepts: "(…) the bounds of ordinary judicial review (…)" although this is also a problematic path.

Therefore, in Rucho, the federal courts could not decide on issues involving gerrymandering despite the relevant exceptions. The problem was the overcoming of gerrymandering and how this could also be in harmony and balanced with the bounds of ordinary judicial review.

In this spirit judge Thomas took a position saying that: "(...) the federal courts

[30] McCulloch v. Maryland, 4 Wheat. 316 (1819). https://supreme.justia.com/cases/federal/us/17/316/

are overwhelmed by a large number of cases involving the constitutional law of individual states and in which the winners of a federal election are decided by hasty judgments of federal courts on the exceeding of these bounds of ordinary judicial review by state courts in the interpretation of their respective constitutions (…). I would hesitate long before committing the Federal Judiciary to this uncertain path. And I certainly would not do so in an advisory opinion, in a moot case, where the only function remaining to the court is that of announcing the fact and dismissing the cause (…) I respectfully dissent (…)".

The Moore v. Harper case after the Bush v. Gore has followed a path of extreme resolutions in such matters on the supreme court's side. Above all, to confirm this position of extreme "solutions" in the sector of ISL after the 2020 elections, we cite the Democratic National Committee v Wisconsin State Legislature, 141 S. Ct. 28 (2020)[31] case regarding the order of a district court concerning the extension of the one-time deadline for voting by mail and the complications associated with the COVID-19 pandemic. The theory of ISL was not called for by the appellants and justices Gorsuch and Kavanaugh made no reference to it in their opinions. In particular, Gorsuch stated: "(...) a justification of the theory on the basis of the political responsibility of representative assemblies, which does not exist for judges (...)". Judge Kavanaugh also noted that: "(…) the value of the theory only in relation to federal elections does not address the consequences of its application when laws and regulations apply without distinction to state and federal elections (…)".

In the same spirit and in the same period we remember the Moore v. Circosta, 592 U. S. (2020)[32] case where the North Carolina Board of Elections was asked for the relative extension of postal voting due to a change in electoral regulations which made it difficult to exercise the right to vote due to the logistical problems that in moment they faced the post office. The Board and the applicants found as a "solution" an agreement where the intervention of the state legislator stated: "(...) the need for one's consent for the validity of the agreement. A court found him wrong, recognizing that the law gave the Board the authority to exercise emergency powers to hold election rallies in cases of "natural disaster", without violating any law approved by the state

[31] https://casetext.com/case/democratic-natl-comm-v-wis-state-legislature

[32] https://www.supremecourt.gov/opinions/20pdf/20a72_5hek.pdf

legislature. The legislator's attempt to obtain a suspension failed both at the level of the state supreme court and at the level of the federal one (…)".

In the same case, justices Gorsuch and Alito in the minority took a dissenting opinion where the ISL theory was considered. Obviously, the difficult and calculable imaginary case of accident was ignored where the evaluation of the circumstances carried out by the lower courts according to judge Gorsuch gave an opinion based on a natural disaster. So they considered that the requirement did not exist!. Also in this case there is no reference or any consideration for the problem and its own logic for the conduct of state elections which are contextual with the federal ones. The political responsibility is certainly great and it was also taken into consideration that: "(...) constitutional overreach and (...) last-minute election-law-writing-by-lawsuit found in this case could have caused damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures (…)". Judge Gorsuch deferred to the people again and the decision at the Board was a unanimous decision of a bipartisan body that was appointed by a different governor and directly elected by the people of North Carolina themselves. In this case not even the judge asked if so if he sees if the supreme court's election law after it has been extrapolated and taken into account the opinions of state magistrates and judges.

In a last case and in particular at the same time of 2020 we remember the Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1 (2020)[33]case, where the Pennsylvania supreme court once again decided to extend the deadlines for postal voting. The federal supreme court split down the middle and the stay was ultimately denied. The judge Alito together with Thomas and Gorsuch were all in favor of granting the suspension thus expressing their opinion precisely by stating that: "(...) provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election (…)" (Brown, 2022).

[33] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-542.html

In practice they "allowed" a certain accusation towards state judges who incorrectly used the judicial review to replace the legislator's political choice with their own. The supreme court refused, and in Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732 (2021)[34] the denial of a judicial review and the dissenting opinions of judges was repeated: Alito, Thomas, Gorsuch are reinvigorated and the confusion on the rule has applied the electoral competition thus avoiding "denying" the certainty of the result.

The consequences and problems not so much of the judges with the dissenting opinions but also of the cases themselves have been very complicated in recent years regarding the application of the theory of ISL, discussing it exhaustively and also considering the path of American federalism. The interpretation we can give judges normally employ both state election laws that use techniques that are different from the rest of state law and how the federal courts conclude and the forum that is suitable for the resolution of the relevant solutions of this type of disputes. The state judge, according to the legal system of his own state, reduces his interpretative path to the specific type of laws and to the letter of the law that the theory of ISL actually requires a priori. The application of the theory leads to a federalization of the state election law that regulates federal elections in this state. The usual deference of state courts in the application of their own law is thus eliminated. Remembering from scratch the Bush v. Gore case, the theory perhaps risked falling in its image to the authority of state judges who could begin to decide cases that influence a fear and a "clash" with federal judges (Krent, 2001).

Ignoring the intent of the state legislature for a text of law as well as in the decision to conduct state and federal elections as well as state assemblies may seek to challenge with the legislation and also prohibit delegations by the assemblies to professionals in an administration of the electoral proceedings. A valid position that judge Gorsuch said was a reality in our times. The relative centrality of representative assemblies within this scenario is not seen. On the contrary, the federal courts have greater prominence in the most surprising way where the supreme court can decide on anything when the state refers to federal elections.

[34] https://casetext.com/case/republican-party-of-pa-v-degraffenreid

In the Moore v. Harper case are reflected the implications for US democracy. The 2020 election allowed for widespread talk of significant manipulation of the election outcome while also avoiding a large number of members of the Republican Party who refused to be portrayed as complicit. There is no guarantee that women and men of the same moral perception will also be in the right positions in their future. As stated in the Moore v Harper case: "(…) a broad view of the so-called independent state legislature theory, depriving state court enforcement of state constitutional provisions from serving as a check on legislative redistricting, would essentially hand the future of democratic representation in the states to those motivated to entrench political power in a single party (...)"[35].

The anxieties are many and even exaggerated given that the attempts to define the ISL theory as one that overturns the presidential elections as we saw in the Texas v. Pennsylvania, 592 U.S. (2020)[36] is inconceivable given that the electoral results reaching 2024 in the state representative assemblies will be under the control of the Republican Party and will try to lend a hand. As in the past, Jeffrey Clark in Donald Trump's group and an employee at the Department of Justice tried to convince his colleagues to sign a letter that was addressed to Georgia legislators to consider who should be the winner through the designation of electors presidential elections (Brown, 2021) seeking a vote from the people. In the same spirit, Virginia "Ginni" Thomas who was the wife of justice Clarence Thomas, wrote a letter on 9 November 2020 to twenty-nine Arizona legislators trying to convince them to select: "(…) a clean slate of electors (…)" (Brown, 2022).

Clean or not it is not difficult to understand how these types of openings towards theory can lead to certain incidents that move away from the pure theory of American democracy and the country's public order.

Of course it is not difficult to think logically about the consequences for the nine justices of the supreme court where the three: Thomas, Gorsuch and Alito were those who voted to declare the mootness of the case they had to decide and leaving the theory out thus allowing a precedent danger at the state level. In particular, judge Alito was consistent with the minority and did not limit himself to various

[35] https://www.brennancenter.org/sites/default/files/2022- 10/2022.10.26_Amicus_PA_officials.pdf, p. 30.
[36] https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf

opinions. Thomas along with fellow judge Gorsuch made it clear that they could not decide to accept the ISL theory. The opinion of judge Thomas shows us a certain inconsistency given that he is right in addressing his colleagues and accusing them of having decided on a moot case after they launched accusations against the parties and without an advisory opinion from the majority where the judge wrote a long advisory opinion being discussed through a lawsuit he didn't decide himself.

There are many doubts and above all of judge Thomas given that the state courts can monitor and control the representative assembly while we are talking about procedural aspects in the sector of the electoral process but not substantive ones. This reconstruction is not convincing. The representative assembly deals with the substance of the election and understands the result without interference from state judges and the details of the procedure. The objective of the electoral procedure is to determine the result. The reconstruction of the structure of the judicial power and its relationship with the legislature according to judge Thomas is the structure of power in one's country. The majority of the court in the extreme heterogeneity is part of a very banal statement given that there is nothing about a state representative assembly that can exercise its powers fully and permanently.

III. Concluding remarks

As regards the theory of ISL, it was not expressed by judge Roberts but he noted the need to open a discussion on the matter by referring to the Marbury v. Madison case as a reference to an audience of first-year law students. But he wasn't so naive! Because the recognition of the origins of the judicial review which is linked with the birth of the US per judge Roberts was connected with the work of the federal courts which can control the activity of the state courts in the review of state legislation and thus establishing a generic criterion. This federal position on Thomas's side opens the doors to a judicial chaos that is certainly not desired by anyone. Alternatives to this type of chaos are also found in the operation of electoral fraud which is part of the emptying of substance from an electoral process and armed insurrection in the case of a civil war.

The reasonable logic of the heterogeneous majority is based on the issue of mootness and makes the right decision on an issue that deserves attention for

American democracy. Judge Thomas' logic serves to abandon any type of negative position and a paraphilology of the moment in these cases.

The Moore v. Harper case is a very interesting case that is in line with previous and non-previous jurisprudence of the American supreme court, especially in terms of the democratic backsliding that has seen the light of day in the United States in recent years. In this spirit, we also remember the position of Gregory Jacob who was already an advisor to Vice President Pence, in relation to the events concluded on 6 January 2021[37]. John Eastman in his role as Donald Trump's lawyer a few days later tried to convince Pence by going through the street of Jacob of a constitutional theory that allowed the subversion of the electoral result through the complicity of the then Vice President. Jacob responded that this theory had ended up before the supreme court by a nine-to-zero majority. So Eastman took into consideration that at least two judgments had to be made in their own right from the start. In the Moore v. Harper case is clear the role of American judges as well as the path of American democracy in this area.

[37] https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.us courts.cacd.841840.164.11.pdf.

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