How High Court May See Independent Redistricting After 2020

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Every 10 years, the people's fundamental right to vote takes center stage when states are required to redraw their federal and state electoral districts in light of the new census tallies.

Redistricting is a complicated task, and one vigorously debated factor is how much politics should play a role in drawing new districts. To limit political influence, policymakers and commentators have looked to independent redistricting commissions, which are generally assumed to be constitutional.

The U.S. Supreme Court upheld such a commission in 2015 in Arizona State Legislature v. Arizona Independent Redistricting Commission. But a lot has changed since that 5-4 decision five years ago, including the replacement of Justices Antonin Scalia and Anthony Kennedy with Neil Gorsuch and Brett Kavanaugh.

As a result, it is important to consider the textual issue that divided the court in Arizona State Legislature — whether the phrase "the Legislature" in Article I, Section 4 of the federal Constitution requires redistricting to be performed by the state's elected representatives — and whether today's court would reach the same result if presented with the issue anew.[1]

The Majority's Interpretive Approach in Arizona State Legislature

In Arizona State Legislature, the court addressed whether, consistent with the elections clause of the federal Constitution, Arizona could "remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission."[2] Under Article I, Section 4, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations ..." (emphasis added).

The majority relied on precedent, along with the purpose and history of the clause, to conclude that the Legislature was not limited to the representative body alone.[3] The majority noted that "precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."[4]

Moreover, the majority reasoned that "[t]he history and purpose of the [Elections] Clause" "permits the people of Arizona to provide for redistricting by independent commission."[5]

Notably, the majority placed almost no weight on the textual meaning of the phrase "the Legislature."

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Other than briefly noting that dictionaries “capaciously define the word ‘legislature,’”[6] the majority engaged in no meaningful textual analysis, relying instead on what it saw as “[t]he dominant purpose[s] of the Elections Clause”: “to empower Congress to override state elections rules, not to restrict the way States enact legislation” and “to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate.”[7]

Given the history and purpose of the clause, the majority concluded that “it would be perverse to interpret the term ‘Legislature’ ... so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators’ ability to choose the district lines they run in.”[8]

The Dissenters’ Interpretive Approach in Arizona State Legislature

Dissenting, the chief justice, joined by Justices Clarence Thomas, Samuel Alito and Scalia, focused on the textual meaning of the phrase “the Legislature,” contending that the majority’s “position has no basis in the text, structure, or history of the Constitution.”[9] Relying principally on contemporary dictionaries and founding era sources, the dissenters concluded that when the Constitution uses the phrase “the Legislature,” it “refer[s] to an institutional body of representatives, not the people at large.”[10]

The dissenters acknowledged the majority’s preferred broad dictionary definition of “the Legislature” — the power that makes laws — but the dissenters reasoned that the phrase could not be understood as applying to the people because, as the majority admitted, “[d]irect lawmaking by the people was virtually unknown when the Constitution of 1787 was drafted.”[11]

The dissenters noted that the majority’s definition of “the Legislature” conflicted with 17 other constitutional provisions.[12] The dissenters interpreted “the Legislature” to mean “a representative body that, when it prescribes electoral regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process.”[13]

The dissenters chided that “[t]he majority ... show[ed] greater concern about redistricting practices than about the meaning of the Constitution.”[14] Although the dissenters acknowledged the majority’s concern about partisanship in redistricting,[15] they concluded that “[t]he inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area.”[16]

Takeaways

The interpretive dispute between the majority and the dissenters raises questions about whether today’s court would decide Arizona State Legislature the same way or would adhere to the decision if a case were brought challenging new federal electoral districts drawn by an independent redistricting commission after the 2020 census.

Justice Gorsuch’s writings show his commitment to textualism.[17] Justice Kavanaugh expressed similar views on the U.S. Court of Appeals for the District of Columbia Circuit and has since confirmed that position in more recent commentary:

> One factor matters above all in constitutional interpretation and in understanding the grand sweep of constitutional jurisprudence — and that one factor is the precise wording of the constitutional text.[18]

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If the current court were writing on a clean slate, one could reasonably predict that both Justices Gorsuch and Kavanaugh would side with the dissenters in Arizona State Legislature. Of course, no one knows that for sure. And if the court took up the issue again, it would have to decide whether to abide by stare decisis, a doctrine that itself has faced stress in recent years.[19]

But as state policymakers continue to debate whether to adopt independent redistricting commissions, it is worthwhile to consider the potential vulnerability of Arizona State Legislature and whether alternative approaches could avoid a renewed constitutional challenge that might invalidate a state's districting plan. Having a districting plan struck down on constitutional grounds is quite costly, both in terms of time and money.[20]

Notes

1. Arizona State Legislature also involved an interpretation of 2 U.S.C. § 2a(c), which also split the Court 5-4. Compare Arizona State Legislature, 135 S. Ct. at 2668-71 (majority), with id. at 2687-89 (dissent). This article does not analyze whether the Court would adhere to its statutory decision if it reconsidered the constitutional question.

2. Arizona State Legislature, 135 S. Ct. at 2658.

3. Id. at 2666-68, 2671.

4. Id. at 2668.

5. Id. at 2671.

6. Id.

7. Id. at 2672.

8. Id. at 2675.

9. Id. at 2678 ("Nowhere does the majority explain how a constitutional provision that vests redistricting authority in 'the Legislature' permits a State to wholly exclude 'the Legislature' from redistricting.").

10. Id. at 2679-80; accord id. at 2684-85 (discussing convention and ratification debates about the Clause).

11. Id. at 2679.

12. Id. at 2680-83.

13. Id. at 2688.

14. Id. at 2690.

15. Id. at 2678.

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16. Id. at 2690.

17. E.g., Currier v. Virginia, 138 S. Ct. 2144, 2152-53 (2018) (Gorsuch, J., joined by the Chief Justice, and Thomas and Alito, JJ.) (evaluating a double jeopardy argument by first looking to the text of the clause and then "the original public understanding"); see also Neil Gorsuch, Why Originalism is the Best Approach to the Constitution, https://bit.ly/2vtEcXo ("Originalism teaches only that the Constitution's original meaning is fixed; meanwhile, of course, new applications of that meaning will arise with new developments and new technologies.").

18. Brett M. Kavanaugh, Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution, 89 Notre Dame L. Rev. 1907, 1908 (2014) ("[O]ne factor matters above all in constitutional interpretation and in understanding the grand sweep of constitutional jurisprudence—and that one factor is the precise wording of the constitutional text."); accord Free Enterprise Fund v. PCAOB, 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("As the Supreme Court has indicated, it is always important in a case of this sort to begin with the constitutional text and the original understanding, which are essential to proper interpretation of our enduring Constitution.").

19. See Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ.) ("Today's decision can only cause one to wonder which cases the Court will overrule next."); Knick v. Twp. of Scott, Pennsylvania, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting) (referencing Justice Breyer's dissent in Franchise Tax Board and commenting, "Well, that didn't take long. Now one may wonder yet again.").

20. See, e.g., North Carolina's redistricting cases cost taxpayers $5.6 million and counting (Jan. 6, 2018), https://bit.ly/39g9eQZ.

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