„Krytyka Prawa", tom 15, nr 2/2023, s. 294–309, ISSN 2080-1084, e-ISSN 2450-7938, © 2023 Author.

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The Independent State Legislature Theory – the Underlying Ideas and the Threats[2]

Submitted: 20.02.2023. Accepted: 25.04.2023

Abstract

This article discusses the independent state legislature theory, which has been the subject of interest of an ever-growing group of American constitutionalists in recent years. This theory deals primarily with state legislatures' power – derived directly from the US Constitution – to regulate federal elections. According to its underlying premises, this fact results in the absence of any tools to control the law enacted in this area as to its compliance with a given state's constitution. Neither the electoral administration nor the state courts can interfere with these laws. They would therefore be subject to federal courts' review only. However, the Supreme Court, in applying the political questions doctrine, has excluded many election law matters – other than those concerning funding – from its jurisdiction. As a result, such an important part of state law – one concerning fundamental political rights – would remain without any supervision inherent in modern democracies.

Keywords: Supreme Court of the United States, constitutionality review, gerrymandering, independent state legislature theory, federalism.

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[2] The research used in the article has not been supported financially by any institution.

The subject matter of this study is one fundamental issue of American election law, one unnoticed for many years. This law and its discussion in the relevant American literature has been examined to the greatest extent and most often by representatives of political science, who have been focusing recently on empirical studies of voting behaviour, changes in the organisation and financing of electoral campaigns, and the problem of electoral democracies. Constitutionalists approach this matter with less commitment, returning to it on the occasion of particularly important political events, electoral disputes, or as when the Supreme Court becomes increasingly interested with one of the provisions of the election law. The latter situation is the reason for the growing interest in the independent state legislature theory (ISLT) in the area of constitutional law doctrine. The last two years in the judicial decisions of the Supreme Court of the United States provide plenty of input for glossary activity. Among the issues considered to the greatest extent is the overturn of nearly half a century of precedent recognising constitutional guarantees of the right to abort a pregnancy, or the limitation of the regulatory powers of federal agencies. Polish readers have had ample opportunity to familiarise themselves with the controversies stemming from the above, while the *independent state legislature theory* has remained so far in the background, so to speak. However, this fact is not the reason why the said theory deserves to be discussed at more length here. The reason is the long-anticipated decision issued in case *Moore v. Harper*, which has to do with the issue in question. This decision could have extremely far-reaching consequences for American democracy and politics.

The purpose of this paper is to analyse the institution of the independent state legislature theory and its impact on the democratic nature of elections in the United States. The specific issues that form the elements of the description of this institution are the analysis of the powers of state electoral administration bodies and the confrontation of the powers of local legislatures and the rank of the legislation they pass with the principle of constitutional supremacy in light of the constitutionally allowed jurisdiction of state courts. Another element of the argument offered here is the competence of the federal judiciary in the context of reviewing the compliance of federal election laws adopted by state legislatures and, above all, the judiciary's ability to interfere with the manipulation of electoral district boundaries (typical of American politics) in light of the political questions doctrine, a circumstance that adversely affects the jurisdiction of federal courts. The practical aspect of the independent state legislature theory in the context of the coronavirus

 DOI: 10.7206/kp.2080-1084.608

pandemic, especially when it comes to the judicial review of changes in election procedures resulting from epidemic threats during the 2020 general election, is another important issue addressed in this paper. The paper makes use of formal-legal methodology, comparative methodology, and historical analysis. It also offers a review of the relevant literature and judicial decisions.

The *independent state legislature theory* (hereinafter referred to as ISLT) originates from a broad interpretation of Articles I and II of the US Constitution, which delegate the entire authority to regulate federal elections directly to state legislatures. In the judicial practice of state and federal courts as well as in the views expressed in the views of legal academics, scholars, and commentators, these provisions, as a general rule, used to be interpreted to mean that state legislatures enacting legislation on federal elections are subject to the same restrictions as other legislation at that level. Thus, if the constitution of a state provides for the possibility of a governor's veto, a means to express disapproval of the adopted legislation by popular vote, these instruments can also be applied to the electoral laws passed by state legislatures.[3] Not long ago, in 2015, when adjudicating in the case *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[4] the Supreme Court confirmed the legitimacy of the said interpretation. At the time, it ruled that it was consistent with the constitutional powers of state legislatures to establish, by popular initiative, an independent commission tasked with outlining new electoral district boundaries in Arizona. The ISLT, on the other hand, infers from the indication that it is only state legislatures that adopt regulations for federal elections that these legislatures are completely independent in this sphere. This means that no restrictions under state constitutions apply to them – and that they are not subject to judicial review by the state judiciary. It is precisely the exclusion of "state" *judicial review* that is the most dangerous consequence of the theory under discussion.[5] If the Supreme Court, in the aforementioned ruling, had confirmed the legitimacy of this concept, election laws enacted by state legislatures would have been found outside of any form of scrutiny known to modern democracies.

The ISLT first appeared in constitutional discourse as early as 1820, when the Massachusetts state constitution started to take shape. One of the proposals made in the drafting of the constitution was to give the state legislature a deadline by which it should amend the federal electoral districts and limit the number of seats in each district (to two). Joseph Story, a Supreme Court judge and author of Commentary on the US Constitution, published in 1833, who participated in the sessions,

[3] C. Shapiro, *The Independent State Legislature Theory, Federal Courts, State Law*, "University of Chicago Law Review" 2023, 90, pp. 12–20 and the literature cited therein (4.04.2023 cited text awaiting publication).

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

[5] M.T. Morley, *The Independent State Legislature Doctrine*, "Fordham Law Review" 2021, 90(2), pp. 502–503.

argued that "the proposed amendment is plainly a violation of the US Constitution. (…) [The Convention] does not have a right to insert in our [state] constitution a provision which controls or destroys a discretion (…) which must be exercised by the [state] Legislature [with respect to federal elections]." M.T. Morley argues that similar discussions have also taken place in other states, e.g.: New Hampshire, Rhode Island, and Mississippi.[6] For many years, however, the ISLT did not attract much interest among legal academics, scholars, and commentators. Only in recent decades has this concept come to the foreground of the constitutional debate, especially in the context of deepening socio-political conflicts.[7]

In addition to preventing state courts from ruling on the lawfulness of election laws passed by state legislatures, the ISLT essentially limits the powers of state election administration bodies by entrusting them only with the role of executive bodies. It should be recalled that all states establish their respective electoral bodies, which often include popularly elected officials[8] who head the election administration and are in charge of overseeing the organisation of the election, the proper course of the election campaign, and determining the outcome of the election. Many of them draw from their democratic origins to derive the authority to make decisions of a universally binding nature, thus going beyond the limits set established by the ISLT. After all, it makes the effectiveness of the decisions taken by these bodies dependent either on their being preceded by an appropriate statutory authorisation or on their tacit approval in the form of a decision to refrain from taking action to invalidate them. This applies to technical issues as well. There seems to be a risk that this approval will depend on political calculation as to whether it benefits the party with the majority in the state legislature.[9]

The competence of election administration bodies is the subject of most federal court rulings related to the ISLT in the 21st century. In many cases, they agreed with state legislatures, which support it in principle.[10] The first such ruling to be cited here concerned a situation where a state secretary of extended the deadline for submitting lists of candidates for the presidential election until 8 September

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6 Idem, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, "Georgia Law Review" 2020, 55(1), pp. 41–45.

7 Cf. R.R. Ludwikowski, *No Straight Shots. Is America Still a Bastion of Democracy and a Shield Against Terrorism?*, "Państwo i Prawo" 2022, 6, pp. 47–65.

8 The most popular solution in the circumstances in question is the election of a state secretary of state in a general election – usually the same election during which the governor is elected, and the establishment of state and local (county, city or parish-based) Election Commissions.-

9 S. Issacharoff, *Weaponizing the Electoral System*, "Stanford Law Review Online" 2022, 74, p. 30; R.L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, "Harvard Law Review Forum" 2022, 135, pp. 287–290.

10 M.T. Morley, *The Independent State Legislature Doctrine*, "Fordham Law Review" 2021, 90(2), pp. 509–515.

 DOI: 10.7206/kp.2080-1084.608

2008, while the state law provided for the expiration of this deadline on 5 September. The Libertarian Party failed to submit the necessary documents before the extended deadline, which resulted in a refusal to accept these documents and register its candidates as presidential electors. As a result of the dispute arising from this situation, a Louisiana district court determined that the secretary violated Article II Section 1 Clause 2 of the US Constitution by arbitrarily setting a new deadline without any grounds for such a decision being provided in state law. The court stated that "only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office. (…) [Thus] only the legislature – and not the [state] secretary of state – is vested with the power to create new deadlines for federal elections."[11] A case surrounding this presidential election in Ohio concerned similar issues. The Ohio General Assembly failed to fulfil its duty to pass legislation allowing the registration of candidates from outside the two major parties – after the earlier relevant legislation in force was repealed as being contradictory to the state constitution. Faced with a legislative gap, so to speak, the local secretary of state decided to act – as in the case of Louisiana. Among the solutions he introduced was e.g. to specify the number of signatures required to register a candidate. The court examining the legality of the measures adopted agreed with the state legislature. It found that this kind of interference by an election administration body was impermissible because it imposed a completely new requirement upon which the ability to exercise the passive right to vote depended – and which was not approved by the legislature.[12] The key to overturning the secretary of state's decision was not the objections regarding the substantive aspect of the requirements imposed, but the omission of the state legislature in the legislative procedure. *A contrario*, it can be deduced from this ruling that if the regulations issued by the secretary of state had been executive regulations or if they had been issued within the framework of the statutory authorisation granted to him by the legislature, they would have been acceptable.

However, as already pointed out, one of the core ideas of the ISLT is that it limits the jurisdiction of state courts in a way that makes them unable to decide on the compliance of federal election laws with the provisions of state constitutions. Adopting this radical view, it should be considered especially impermissible for state judges to decide in electoral disputes in a way that would oblige state authorities to take measures that would not directly follow from the state law.[13] Such a situation was one of the constitutional problems that arose around the presidential

[11] *Libertarian Party et al. v. Dardenne*, 294 F. App'x 142 (5th Cir. 2008).

[12] *Libertarian Party of Ohio et al. v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Ohio 2008).

[13] V.D. Amar, A.R. Amar, *Eradicating Bush-League Arguments Root, and Branch: The Article II Independent--State-Legislature Notion and Related Rubbish*, "The Supreme Court Review" 2021, 1, p. 14.

election[14] in Florida in 2000. In *Bush v. Gore*,[15] the Supreme Court did not, admittedly, directly refer to the ISLT, but Chief Justice W. Rehnquist did so in a concurring opinion. Supported by Justices A. Scalia and C. Thomas, he noted that if state judges make a decision that contradicts in any way the election laws enacted by a state's legislature, the US Constitution offers a direct basis for interference by the federal judiciary, whose duty it is to overturn a ruling that may be flawed due to its contradiction of Article II of the US Constitution. Rehnquist explicitly stated that local legislators are not limited by either state constitutions or their interpretation by local courts in determining the rules and terms of federal elections – including presidential elections, as was the case in question. The author of the concurring opinion referred to the 1892 Supreme Court ruling in *McPherson v. Blacker*[16]. However, legal academics, scholars, and commentators[17] argued that the reference to this 19th-century precedent was an abuse, especially since a few decades later, in the case *Smiley v. Holm*[18], the Supreme Court explicitly stated that the language of Article II of the Constitution did not grant any special authority – one independent of the state constitution – to regulate electoral affairs at the local level. The Supreme Court stated argued that it found "no suggestion in the [examined] 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."[19]

In recent years, the ISLT has been present in the public debate most often in the context of the coronavirus pandemic.[20] It should be recalled that the presidential election was held in November 2020, a period when no vaccine against SARS-CoV-2 was approved for use in the United States (the FDA did not issue the relevant

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14 This election was, of course, not the only one in US history to stir up controversy. The best example of an election that led to a serious constitutional crisis was the presidential election of 1876, which turned out to have to be decided by a specially appointed commission. The results of its efforts are still being questioned to this day. Cf. in particular W.H. Rehnquist, *Centennial Crisis: The Disputed Election of 1876*, New York 2004, p. 257.

15 *Bush v. Gore*, 531 U.S. 98 (2000), pp. 112–113.

16 *McPherson v. Blacker*, 146 U.S. 1 (1892).

17 Cf. M. Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, "Georgetown Law Journal" 2001, 90(1), p. 121 (footnote 53); L.H. Tribe, *Bush v. Gore and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors*, "Harvard Law Review" 2001, 115(1), pp. 189–190; N. Lund, *The Unbearable Rightness of Bush v. Gore*, "Cardozo Law Review" 2002, 23(4), pp. 1265–1267; L.M. Litman, K. Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, "Wisconsin Law Review" 2022, 5, pp. 1239–1240.

18 *Smiley v. Holm*, 285 U.S. 355 (1932).

19 R.A. Shapiro, *Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie*, "Loyola University Chicago Law Journal" 2002, 34(1), p. 98.

20 Cf. J.A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, "Lewis&Clark Law Review" 2022, 26(2), pp. 423–427.

 DOI: 10.7206/kp.2080-1084.608

decision until 23 August 2021), and the death toll resulting from the infection was extremely high. This is why many states decided to make mail-in ballot procedures more flexible[21] or increase the number of polling stations where votes were cast. One of the options considered for a while was to postpone the election, but given the need for Congress to pass a relevant resolution[22] and amend the Constitution,[23] the idea was abandoned. Several governors decided to postpone the primaries, but this did not have a significant impact on the November voting. The most controversial issue was the extension of the deadline by which mail-in ballots were to be collected. The interest in this issue and related disputes stemmed primarily from the widespread belief among experts that Donald Trump was likely to receive far fewer votes under this system than Joe Biden.[24] The theory of an independent state legislature provided a convenient argument for opponents of these changes in election law since these special provisions were usually introduced by election administration bodies or governors rather than by the legislator.

The case of North Carolina seems to be particularly interesting. In June 2020, despite these objective difficulties, the legislature managed to pass legislation to facilitate the upcoming elections. The solutions adopted at that time included provisions that allowed for liberalisation of the formal requirements for an application to allow voting by mail, reducing the number of witnesses certifying the circumstances justifying the granting of this privilege from 2 to 1, an increase in the amount of funds invested to securely organise voting in both permissible forms, and an instrument that let voters track their ballots.[25] For the above reasons, the legislature did not change the regulation governing the time limit which determined the validity of votes cast by mail. Meanwhile, the federal postal service announced it would not be able to guarantee that all votes cast by mail would be delivered to the election offices in time for the 6 November deadline. Unable to accept this state

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21 It seems reasonable to address the difference between *absentee ballot* and *mail-in ball* at this point. Both involve voting by standard mail, most often with the use of postal infrastructure. *Absentee ballot*, however, is a solution available only to those who, for reasons beyond their control, cannot appear at the polling station where they cast their ballot in the traditional form (e.g. due to illness affecting the voter's mobility or due to military service outside the country or state). Such a voter must submit an official request each time to be able to take advantage of this privilege. *Mail-in ballot*, on the other hand, is a state-wide system of registered voters who receive a ballot from the state by mail and are then able to decide on the form in which they want to return it to the election administration.

22 Article II Section 1 Clause 4 of the US Constitution: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

23 The 20th Amendment to the Constitution states clearly and explicitly that "[t]he terms of the President and the Vice President shall end at noon on the 20th day of January (…)."

24 Cf. C. Plescia, S. Sevi, A. Blais, *Who Likes to Vote By Mail?*, "American Politics Research" 2021, 49(4), p. 383 and the accompanying analysis of findings.

25 Cf. C. Shapiro, op. cit., pp. 33–34.

of affairs, one NGO sued the state Board of Elections. The parties reached an agreement that resulted in the Board extending the deadline to 12 November. The situation became a backdrop for a jurisdictional dispute between the Board of Elections and the state legislature, which was eventually brought before the federal Supreme Court. However, the court did not issue a final or substantive ruling resolving the dispute – and refused to issue an interim order suspending the application of regulations adopted by the Board. Justice N. Gorsuch opposed the Supreme Court's refusal to take any action. Referring to the independent state legislature theory, he argued that bodies such as the Board of Elections and local courts did not have the authority to interfere with election procedure to the extent to which it was regulated by state law. He justified his standpoint not only with the wording of the Elections Clause in Articles I and II of the US Constitution, but also with the need to give citizens a sense of control over the laws made, claiming that it was not possible in light of the activities of the Board because its members were nominated by the governor from among candidates nominated by the chairmen of the two largest parties.[26] His opinion was also upheld by Justices C. Thomas and S. Alito.

Since the understanding of Articles I and II of the US Constitution analysed in this paper prevents state courts from reviewing legislation passed by state legislatures with regard to federal elections, the only instance exercising control (at least in theory) over such legislation – an instance other than Congress – would be the federal judiciary. The problem, however, is that in the context of gerrymandering, which can be the source of the most serious threats to democracy, the Supreme Court clearly limits its scope of jurisdiction. It goes without saying that *gerrymandering*[27] is a very common phenomenon in the United States, and is therefore a fundamental source of contention between the two major American parties, which shape constituencies in states governed by their representatives in a way most favourable to them.

For many decades, the matter of determining electoral district boundaries has been part of the so-called *political questions doctrine*, which the Supreme Court has excluded from its jurisdiction. In 1962, in the *Baker v. Carr* ruling,[28] the Supreme Court determined that political questions would include cases in which one of the

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[26] *Moore et al. v. Cricosta et al.*, 592 U.S. __ (2020) No. 20A72 (in the study cited above, C. Shapiro cites quotations from this decision with comments and references to the precedents used by the judge as the basis for their opinion).

[27] T. Wieciech, *Stany Zjednoczone*, [in:] J. Szymanek (ed.), *Niedemokratyczne wymiary demokratycznych wyborów*, Warszawa 2016, pp. 506–517; K. Kozłowski, *Instytucja* gerrymanderingu *w prawie amerykańskim*, [in:] P. Laidler, J. Szymanek (eds.), *Idee, instytucje i praktyka ustrojowa Stanów Zjednoczonych Ameryki*, Kraków 2014, pp. 275–294; J. Jaskiernia, *Równość praw wyborczych a ochrona mniejszości w USA*, "Państwo i Prawo" 1993, 10, pp. 80–89.

[28] *Baker v. Carr*, 369 U.S. 186 (1962).

 DOI: 10.7206/kp.2080-1084.608

following circumstances occurred: 1) a clear constitutional expression of the authority of one of the political powers on a given issue; 2) the impossibility to construct a judicial standard to determine the constitutionality of the issue considered; 3) the impossibility of resolving the dispute without determining the relevant policies of the state; 4) the need to take a stand that disregards one of the political powers; 5) the extraordinarily urgent need to refer to a decision of a political power in the adjudication process; 6) the risk of occurrence of conflict between the political and judicial powers if they proposed different solutions.[29] This means that by considering gerrymandering as a political issue, the Supreme Court equated it with issues such as foreign policy, internal regulation of both houses of Congress, or *impeachment*, where judiciary interference is indeed something unusual. However, the doctrine of *political questions* has been subject to some modifications from case to case, mainly in the area of state election law, which in itself stressed the specific nature of the issue. In 1964, only two years later, in the ruling issued in the case *Wesberry v. Sanders*,[30] the Supreme Court argued that it was against the federal constitution to create electoral districts that were significantly smaller or larger than usual if the outcome of an election could be affected. The main argument in this case was the principle of substantive equality of elections. By dramatically increasing the number of residents eligible to vote in one constituency and not increasing the number of seats to be filled there, the legislature affected the actual significance of their votes. However, it was not until the mid-1980s that the Supreme Court clarified the criteria for assessing whether a *gerrymandering* case referred to it could be examined. In the *Thornburg v. Gingles* ruling,[31] the Supreme Court limited the ability of federal judiciary to interfere in the sphere of authority of state legislatures in electoral matters to cases where changes made by the law under examination could adversely affect the electoral rights of racial or language minority groups. In order to examine the case thoroughly, the Supreme Court ruled it necessary for the interested party (the initiator of the proceedings) to demonstrate that the aggrieved minority is sufficiently numerous in the district to constitute a majority in a separate district, and that its representatives were likely to vote for the same candidates. The Supreme Court also deemed it necessary to prove that in the past, the groups that constituted the majority in the disputed district – after the contested changes – also voted in a uniform manner, preventing the minority from choosing their preferred candidate. The situation became the backdrop for the division of *gerrymandering* into exclusively politically motivated *gerrymandering* (*political gerry-*

[29] Ibidem, p. 217.

[30] *Wesberry v. Sanders*, 376 U.S. 1 (1964).

[31] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

mandering) and racially motivated gerrymandering (*racial gerrymandering*), which has survived to this day,[32] and only the latter has been brought under judicial scrutiny by the Supreme Court. The conditions for determining the impact of such solutions are well illustrated by the 2017 Supreme Court ruling in *Cooper v. Harris*.[33] The case concerned two congressional districts in North Carolina, which changed dramatically after the 2010 census. Voters from these districts had for many years chosen candidates popular among the black minority. The Republican-dominated state legislature modified the boundaries of these districts in a way to make black Americans become a dominant majority there, reducing their presence in other districts, thus increasing the chances of Republican Party candidates in the latter. A suspicion that the racial factor was decisive in the construction of legislation on electoral district boundaries does not automatically trigger so-called *strict scrutiny*, the most stringent standard for assessing the constitutionality of a law, although in other cases a mere suspicion of racial discrimination automatically triggers its application. This standard presupposes the unconstitutionality of a provision, and the burden of proof rests with the legislator to show that the contested regulations have been introduced to achieve a particularly important and justifiable public interest – and that their nature is subsidiary.[34]

In light of the above, it was reasonable to expect the further moderation of the Supreme Court's position could, so that "political gerrymandering" would also be subject to judicial review. After all, in a case from 1986, the Supreme Court argued that political gerrymandering could be judged by the judiciary in particularly blatant cases. Referring to the criteria established in *Baker v. Carr*, it stated at the time that *political gerrymandering* met none of them. The Supreme Court clearly refused to consider a priori all disputes between political communities over equal opportunities in the electoral process as excluded from its jurisdiction. The Supreme Court stressed that the fact that objections to election laws were raised by a political entity – such as one of the state parties – did not mean that these objections could not be addressed by the Supreme Court.[35] However, the ruling issued in *Rucho v. Common Cause*,[36] a case that concerned further modifications to electoral district boundaries in North Carolina, made the Supreme Court's standpoint very

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32 Cf. *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. __ (2016); *Gill v. Whitford*, 585 U.S. __ (2018).

33 *Cooper v. Harris*, 581 U.S. __ (2017).

34 T. Crum, *Reconstructing Racially Polarized Voting*, "Duke Law Journal" 2020, 70(2), pp. 288–290.

35 *Davis v. Bandemer*, 478 U.S. 109 (1986), pp. 123–124 after: M.J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, "Georgetown Law Journal" 1997, 85, pp. 533–534.

36 *Rucho v. Common Cause*, 588 U. S. __ (2019), No. 18-422.

 DOI: 10.7206/kp.2080-1084.608

clear. The said boundary modifications were to make sure that the Republicans won with a secure lead in 10 of the 13 districts. At the same time, the Supreme Court also received a case from Maryland, where the local Democratic Party governor requested changes that took away from the Republicans one of the two districts where they had an advantage.[37] The case brought by Robert Rucho is special not only because the Supreme Court ultimately ruled that it did not have jurisdiction over such cases,[38] but also because it clearly divided the Supreme Court into two groups of judges: judges nominated by Democrats and those nominated by Republicans. Given the current composition of the Supreme Court – since the ruling in question, the liberal R. Bader Ginsburg has been replaced by A. Coney Barrett, cementing the predominance of conservative-oriented judges – and the age of all judges, it can be argued that the view expressed in that ruling will dominate the line of judicial decisions issued in similar matters for well over ten years to come. The Supreme Court, acting through Chief Justice J. Roberts, contrary to the position expressed by previous panels of judges, stated that no form of *partisan gerrymandering* – even the most obvious one – could be subject to federal judiciary review. It claimed that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust." It argued, however, that "the fact that such gerrymandering is 'incompatible with democratic principles' does not mean that the solution [to this injustice] lies with the federal judiciary."[39] It further found that *gerrymandering* favouring one party over another is a long-standing practice, known in American constitutionalism since colonial times. Since it existed at the time of the drafting of the Constitution and was never directly prohibited in any official manner, the Founding Fathers must have supported – or at least tolerated – it. The Supreme Court, in the opinion of the majority of the panel deciding this case, could not interfere in such situations and act against the will and intent of the Founding Fathers. As rightly pointed out by E. Rubin, following this line of reasoning, the Supreme Court should have overruled the decision issued in the case of *Brown v. Board of Education of Topeka*. The Constitution, even considering the amendments made as a result of the Civil War, does not provide for a direct prohibition of racial segregation.[40] The judges constituting the majority in the Rucho case, who voted in favour of the ruling, argued that bringing similar cases under the jurisdiction of federal courts was also inappropriate because there was a lack of objective criteria for evaluating the regulations that determined district boundaries. This argument

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37 *Lamone v. Benisek*, 585 U.S. __ (2018).

38 M.T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, "Georgia Law Journal" 2020, 55(1), p. 5.

39 *Rucho v. Common Cause*, s. 30

40 E.L. Rubin, *Gerrymandering and Judicial Capacity*, "Wisconsin Law Review" 2020, 2, p. 260.

appears to be flawed as well. E. Kagan, in her concurring opinion to the ruling, recalled that experts mentioned many possible solutions. One of them is the so-called *efficiency gap* analysis. It involves examining the difference between the ratio of valid and invalid votes before and after the change of electoral district boundaries. The greater the proportional increase in invalid votes cast by registered voters of one party, the greater the likelihood of occurrence of disqualifying legislative interference. Nowadays, it is also possible to use software that analyses many possible variants and is able to indicate the optimal ones and match the applicable regulations with them.[41]

These were the circumstances under which the Supreme Court received the case of *Moore v. Harper*, referred to at the outset of the paper. It concerns yet another dispute over electoral district boundaries in North Carolina. After the 2020 census, the Republican-dominated legislature made changes, which the state Supreme Court overturned on the grounds that they were contrary to the state constitution, indicating that they violated the principle of equality between the two sides of a political dispute in subsequent elections. Representatives of the General Assembly, arguing that that in line with the ISLT a state law was not subject to the scrutiny of any state body – especially courts, referred to the federal Supreme Court as an entity exercising supervision over state judiciaries in dealing with issues concerning the interpretation of the US Constitution. In light of *Rucho v. Common Cause*, if the Supreme Court grants the right to state legislators, parties with a parliamentary majority at the state level will be free not only to shape electoral districts, but also to make the rules for elections – unsupervised by anyone whatsoever.

In anticipation of the Supreme Court's ruling on the matter, there has been increasing wave of criticism of the most far-reaching interpretation of the federal constitution's election clauses among legal academics, scholars, and commentators. The doubts raised concern the constitutionality of the independent state legislature theory. The constitutional arguments opposing the ISLT are related mainly to the American concept of the system of sources of law and their interrelationships, as stems from the US Constitution. Article VI of the 1789 US Constitution establishes the *Supremacy Clause*,[42] which is crucial to the functioning of the United States as a federal state. A.R. Amar points out that the drafting of this provision determines the system rank of the sources of law listed therein, providing an order of precedence

41 M.J. Klarman, *The Degradation of American Democracy – and the Court*, "Harvard Law Review" 2020, 134(1), pp. 190–194.

42 Article VI of the US Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

 DOI: 10.7206/kp.2080-1084.608

for these sources. Thus, state constitutions retain primacy over other legal acts in the state legal order, just like the federal Constitution with regard to federal law, international agreements, and state law. This view is based on the line of argument expressed by John Marshall in his decision issued in the case *Marbury v. Madison*.[43] He pointed out that "[i]t is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."[44] Thus, there are no grounds not to apply these general principles of interpretation of a legal text and the principle of the primacy of the written constitution in the system in which it applies to state law and state constitutions. This means that it is reasonable to reject the claim according to which the electoral clauses of Articles I and II of the US Constitution make an exception to the Supremacy Clause understood as above by explicitly entrusting the power to establish rules of electoral law to state legislatures. It would seem that if the granting of certain powers to a public authority, expressed openly in the federal constitution, were the basis for excluding acts issued for the purpose of their execution from the overall structure of the system of sources of law – and therefore the requirement of their compliance with the Constitution, a similar reservation could be made to all laws. After all, Article I of the US Constitution entrusts Congress with the exclusive authority to enact laws on a broad range of issues. And this does not mean that these acts are exempt from judicial review. Therefore, if Congress is not "independent" in the sphere of the constitutional powers awarded, state legislatures shall definitely not be considered "independent" either.[45] Such a situation would threaten the foundations of democracy. First of all, it would make it impossible to constitutionally 'curb' the system, especially when the judiciary would need to exercise its constitutional powers. Authors also point to another threat posed by the ISLT. Still, in light of the comments on the established line of judicial decisions on gerrymandering, it may be considered unlikely. M.A. Lemely believes that there is nothing to prevent the Supreme Court from revising its view on this issue and other matters related to election law – according to which such matters remain outside of its jurisdiction. Then, every electoral dispute will become a federal

[43] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[44] Op. cit., p. 180, after: A.R. Amar, *America's Constitution: A Biography*, New York 2005, p. 303.

[45] A.R. Amar, V. Amar, op. cit., p. 21.

constitutional issue, and it will be the Supreme Court – not the state legislatures – that will prove to be the biggest beneficiary of the concept of independent state legislatures, disrupting not only the fragile balance between political power and the judiciary, but also fundamentally transforming the relationship between the states and the central government.[46]

In theory, the positive outcome of the final shape of the state legislature's findings on the rules for conducting federal elections should be the streamlining of the electoral process and subjecting these regulations to democratic control to be exercised by the electorate in local elections. This is based on the assumption that the voters at the ballot box will take a stand on these laws by refusing to support the party responsible for introducing the contested changes in the law. However, none of these goals seems to be achievable after all. On the contrary, if this concept became reality, it would lead to legal chaos that could have a devastating effect on the organisation of elections. It is quite easy to imagine a situation in which a state court, following the Supreme Court's ruling excluding state legislatures' jurisdiction in matters related to the regulation of federal elections, would overrule the legislatures' decisions as incompatible with a given state's constitution insofar as they relate to state elections, leaving them valid with regard to federal elections. An important thing to recall here is that in the United States, federal and state elections are held at the same time, usually on the same day. Organisational problems could be more than likely. This, in turn, especially with little difference in votes between candidates, could lead to undermining election results. It is also hard to accept a situation where citizens exercise actual control over the rules of federal elections through the ballot box. After all, the real purpose of many election law reforms is to consolidate the advantage of the ruling party in a given state.[47] The probability that a ruling party becomes punished for action in such a manner in an election will be therefore even less likely than under the previous legislation.

Despite all these doubts concerning the theory of independent state legislatures, after the trial held in December 2022, it is hard to predict the direction in which this precedent-setting case is heading.[48] One thing is certain, though – *gerrymandering* and other electoral manipulation undermine democracy by allowing political

[46] M.A. Lemely, *The Imperial Supreme Court*, "Harvard Law Review Forum" 2023, 136, pp. 109–110.

[47] C. Shapiro, op. cit., pp. 42–44; A.R. Amar, V. Amar, op. cit., pp. 29–30.

[48] Justices C. Thomas, S. Alito, and N. Gorsuch have already signalled in preliminary proceedings that they were inclined to agree with the arguments in favour of the ISLT. Justice S. Sotomayor, Justice E. Kagan, and Justice K. Brown Jackson have taken the opposite view. It is still unclear how the three remaining judges – Chief Justice J. Roberts, Justice B. Kavanaugh, and Justice A. Coney Barrett – will vote.

 DOI: 10.7206/kp.2080-1084.608

parties to stay in power against the will of the voters, which will ultimately lead to its downfall[49] and that is why this ruling will be so crucial.

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[49] E. Kagan's dissenting opinion to the decision issued in *Rucho…*, p. 2525.

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Translation of that article into English was financed under Agreement Nr RCN/SN/0331/2021/11 with funds from the Ministry of Education and Science, allocated to the "Rozwój czasopism naukowych" programme.