

Right-wing US Supreme Court justices appear divided over “independent state legislature” threat to democracy

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On Wednesday, the United States Supreme Court engaged in more than three hours of oral arguments, double the allotted time, on whether a state Supreme Court can hold that laws regulating federal elections enacted by the state legislature violate state constitutional guarantees, such as free elections and equal protection.

The six-justice right-wing majority appeared evenly split on the so-called “independent state legislature theory,” which threatens to undermine what remains of US democracy by allowing partisan legislators unchallengeable and unreviewable authority to rig elections, suppress ballot access, and even reject the popular vote.

Moore v. Harper arose from the North Carolina legislature’s extreme partisan gerrymandering of the state’s 14 US Congressional Districts following the 2020 Census reapportionment. North Carolina is the ninth most populous state, with some 10,500,000 inhabitants.

Republicans currently in control of the North Carolina state legislature are asserting that the US Constitution, by delegating responsibility for setting the “times, places and manner” of congressional elections to the various state legislatures, precluded the North Carolina Supreme Court from ruling that their gerrymandered congressional map violated the state Constitution.

Supporters of former president Donald Trump claimed that a separate but similar constitutional provision—that presidential electors shall be appointed “in such a manner as the [state] Legislature thereof may direct”—authorized Republican-dominated state legislatures in battleground states to “appoint” alternate slates of pro-Trump electors following his defeat at the polls, a component of the failed January 2021 coup.

The North Carolina Supreme Court rejected the redrawn map of Congressional Districts as violating the state’s

constitutional guarantee of free elections, calling the new map an “egregious and intentional” partisan gerrymander, “designed to enhance Republican performance, and thereby give a greater voice to those voters than to any others.” It ordered the lower court to appoint experts and draw up a new map.

The Republican legislators sued in federal court to restore their map, which data showed would have created 10 safe Republican seats. After lower courts dismissed the Republican legislators’ case, the Supreme Court rejected their emergency petition, although Justices Clarence Thomas, Samuel Alito and Neil Gorsuch voted in favor.

Using the map as revised by the courts, the 2022 midterms resulted in the election of seven Democrats and seven Republicans to the House of Representatives from North Carolina, a “purple” state with voter registrations evenly divided between the two parties.

In their brief, the Republican legislators—led by Timothy Moore, the speaker of the state’s House of Representatives—argued that the US Constitution’s use of “the Legislature” in the election clause means that only the legislature has the power to regulate elections, with no role for state courts.

Defending the state Supreme Court’s ruling, North Carolina, which has a Democratic governor and attorney general, attacked this interpretation as “extreme and dangerous,” writing that the legislature has “never before claimed the power that its current leaders assert here: the power to prescribe federal election regulations that violate the State’s constitution and are immune from judicial review.”

The two senior right-wing justices, Thomas and Alito, joined by Trump nominee Gorsuch, supported the Republican legislators’ authoritarian arguments.

The three moderate Democrats—Elena Kagan, Sonia

Sotomayor and Ketanji Brown-Jackson—repeatedly pointed out the obvious: that the “independent state legislature theory” is a legal absurdity because legislatures are created by state constitutions and are therefore constrained by state constitutional provisions, as interpreted by state Supreme Courts.

The three remaining votes, Chief Justice John Roberts and the other two Trump nominees, Brett Kavanaugh and Amy Coney Barrett, seemed skeptical of the Republican legislators’ extreme position, perhaps looking for a middle ground. Two of their votes are required to form a majority with one or the other blocs. A decision is expected in the next two to four months.

During the argument itself, Gorsuch crudely smeared supporters of state constitutional limits on legislatures by referring to an 1830 Virginia provision “trying to constitutionalize the 3/5 rule with respect to African Americans,” a constitutional provision added to the Maryland Constitution over a century ago that tried to disenfranchise females following the Nineteenth Amendment, and Civil War-era constitutional provisions that would “not have permitted absent soldiers from voting in their home state elections.” Gorsuch concluded that “the political saliency point... depends on whose ox is being gored at what particular time.”

Thomas also belittled challengers to the Republican legislators, repeating the “whose-ox-is-gored” cliché and posing a provocative hypothetical about gerrymandering to increase minority representation. Alito, displaying his customary arrogance and hypocrisy, suggested that state court judges should not be given the task of assessing the constitutionality of voting maps because they are too susceptible to political pressure.

On the other side, after calling the “independent legislature” a “theory with big consequences,” Kagan stated, “If a legislature engages in the most extreme forms of gerrymandering, there is no state constitutional remedy for that, even if the courts think that’s a violation of the Constitution. It would say that legislatures could enact all manner of restrictions on voting, get rid of all kinds of voter protections that the state Constitution in fact prohibits. It might allow the legislatures to insert themselves, to give themselves a role, in the certification of elections and the way election results are calculated.”

“This is a proposal that gets rid of the normal checks and balances on the way big governmental decisions are made in this country,” Kagan added. “It gets rid of all those checks and balances at exactly the time when they are needed most.”

Kagan, of course, is setting forth exactly why Thomas, Alito, Gorsuch and their fascistic allies in the Republican Party so vociferously support the “independent legislature theory.”

The Republican legislators’ lawyer, David Thompson, conceded that the North Carolina Supreme Court correctly applied the state Constitution when striking down the gerrymandered congressional map, but argued that a state Supreme Court is powerless to review how its state’s legislature runs federal elections. In response, Kagan recited three contrary US Supreme Court precedents.

In 1932’s *Smiley v. Holm*, the US Supreme Court upheld the Minnesota governor’s veto of a congressional map enacted by the state legislature, holding that when acting under the elections clause, a state legislature must comply with restrictions imposed by its state Constitution.

In 2015’s *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the US Supreme Court upheld an independent redistricting commission created by a referendum amending the state Constitution. Nothing in the elections clause or the Supreme Court’s cases, Justice Ruth Bader Ginsburg wrote, indicates that state legislatures can regulate federal elections in ways that are contrary to the state’s Constitution.

In 2019’s *Rucho v. Common Cause*, an earlier challenge to a North Carolina congressional map, a divided US Supreme Court ruled that federal courts cannot review claims of partisan gerrymandering. The majority acknowledged, however, that state constitutional provisions “provide standards and guidance for state courts to apply.”

The independent state legislature theory has never been the basis of a US Supreme Court ruling. It first appeared in a concurring opinion by then-Chief Justice William Rehnquist in *Bush v. Gore*, a ruling that halted the counting of Florida ballots on a different basis, thus stealing the 2000 presidential election for George W. Bush without any opposition from the Democrats.



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