

# US Supreme Court rejects far-right “independent state legislature” theory

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In a 6-3 ruling handed down on Tuesday, the US Supreme Court rejected the “independent state legislature” theory promoted by the Republican right in connection with both the failed Trump coup of January 6, 2021 and the high court’s theft of the 2000 presidential election.

According to this deeply anti-democratic pseudo-legal theory, state legislatures have unilateral and virtually unchallengeable powers to run federal elections for Congress and the presidency. This authority extends to gerrymandering congressional districts and directly choosing a state’s presidential electors, either by overriding the popular vote or failing to even hold one. According to this mangling of clauses in the US Constitution dealing with the organization of federal elections and the designation of presidential electors, decisions taken by state legislatures are not subject to judicial review by state or federal courts.

The case, *Moore v. Harper*, was brought to the US Supreme Court last year by Tim Moore, the Republican speaker of the North Carolina House of Representatives, asking the high court to overturn a ruling by the state Supreme Court throwing out a gerrymandered map of congressional districts. The Republican appeal was based on the claim that the state Supreme Court had no power of review under the US Constitution.

The US Supreme Court, with a 6-3 far-right Republican majority, including three justices appointed by the leader of the January 6 coup, Donald Trump, agreed last June to hear the appeal, generating immense anxiety within the political establishment over a ruling that could potentially topple at a single stroke the entire edifice of traditional bourgeois rule.

Political control of the North Carolina Supreme Court shifted from Democratic to Republican following the November 2022 elections, and in early 2023 the new Republican majority reversed the previous ruling and granted the Republican legislature carte blanche to rig the electoral map in favor of the GOP for the 2024 elections.

Nevertheless, Chief Justice John Roberts decided to use the case to have the court weigh in on the independent state legislature controversy, over the protests of the Biden

administration and other challengers, who argued that the specific dispute had been rendered moot and feared that the far-right majority on the court might uphold the theory.

The claims of the theory are based on a highly tendentious and “originalist” reading of two clauses in the US Constitution that deal briefly with the role of state legislatures in federal elections. The Elections clause states that the “times, places and manner of holding elections” for US senators and representatives “shall be prescribed in each state by the legislature thereof,” with the proviso that the US Congress can pass laws making changes.

The Electors clause says that “Each state shall appoint, in such manner as the legislature thereof may direct, a number of [presidential] electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress.”

The “independent state legislature” theory played a significant role in the 5-4 Supreme Court ruling in 2000’s *Bush v. Gore* decision halting vote counting in Florida and handing the presidential election to George W. Bush, who had lost the popular vote to Democrat Al Gore. The Republican-controlled state legislature was threatening to abort a vote recount on its own and certify a slate of pro-Bush electors, but was blocked by the state Supreme Court. The US high court intervened to override the state court and steal the election for Bush, without any real opposition from Gore and the Democrats.

Chief Justice William Rehnquist wrote a concurring opinion, joined by the two most right-wing Republicans on the court, Antonin Scalia and Clarence Thomas, explicitly invoking the supposed power of the state legislature, under the Electors clause of the US Constitution, to appoint presidential electors as it saw fit. The opinion stated that “the state legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution. ... The state, of course, after granting the franchise in the special context of Article II, can

take back the power to appoint electors.”

The fraudulent theory figured centrally in Trump’s attempt to overturn the 2020 election, which he lost by 7 million popular votes and a substantial margin in the Electoral College. As the WSWS wrote last August after the Supreme Court agreed to hear the North Carolina Republicans’ appeal:

In preparation for the violent coup attempt on January 6 of last year, Trump’s legal team, headed by the fascistic ex-mayor of New York City, Rudy Giuliani, insisted that state legislatures, invoking baseless accusations of fraud, could unilaterally overturn the popular vote, reject electors committed to Joe Biden, and certify pro-Trump electors to vote in the Electoral College.

It was on this legally fraudulent basis that Trump conspirators, including Giuliani, John Eastman and Ginni Thomas, the wife of Supreme Court Justice Clarence Thomas, urged Republican-controlled legislatures in battleground states won by Biden to submit fake slates of electors pledged to Trump.

The majority decision in *Moore v. Harper* was authored by Roberts and joined by two other Republicans—Amy Coney Barrett and Brett Kavanaugh—and the three Democrats—Sonia Sotomayor, Elena Kagan and Ketanji Brown Jackson. The dissent was authored by Clarence Thomas and joined in whole or part by Samuel Alito and Neil Gorsuch.

The Constitution, Roberts wrote, “does not exempt state legislatures from the ordinary constraints imposed by state law.” He added, “The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.”

In his dissent, Thomas argued that since the specific issue in the North Carolina Republicans’ appeal was moot, the court should have refrained from taking the case. At the same time, he made clear that he disagreed with the substance of the majority decision and favored the anti-democratic “independent state legislature” theory.

While the Democrats are hailing the ruling as the salvation of democracy, workers would make a fatal error if they placed any confidence in the Supreme Court or looked to it to defend their basic rights.

The fact that the Supreme Court even agreed to hear the Republicans’ appeal is indicative of the extreme fragility of bourgeois democratic forms in the US and the ongoing coup preparations by Trump and the Republican Party, which is

increasingly assuming an openly fascist character.

This is the same court that a year ago abolished the constitutional right to an abortion and is systematically destroying basic democratic principles such as the separation of church and state. At the beginning of this month eight of the nine justices, including two of the Democrats, united to deliver a ruling undermining the right to strike.

The unelected and unaccountable body, whose members enjoy lifetime tenures, is riven with corruption. Recent reports by *ProPublica* and other publications have documented millions of dollars in payoffs from billionaire political donors and fascistic ideologues. The three far-right justices who dissented from the majority ruling on Tuesday are the most prominent bribe-takers. Thomas has received millions in free, exotic vacations from a Texas billionaire Republican donor and admirer of Hitler. Gorsuch, Trump’s first appointee, shortly after being elevated to the court sold property to the chief executive of a major law firm that often has business before the court and did not disclose the identity of the buyer. Alito rode on the private jet of a billionaire Republican donor to an exclusive fishing vacation, and failed to report either the junket or the fact that his benefactor, Paul Singer, subsequently had business before the court.

Political responsibility for this rests with the Biden administration, the Democratic Party and their promoters in the trade union bureaucracy and the pseudo-left organizations. No leading Democrats are even demanding the impeachment or resignation of Thomas and other justices guilty of gross corruption. Meanwhile, all the justices are backing Roberts’ refusal to testify before Congress or impose a mandatory ethics code.

Terrified of a mass movement from below of angry and rebellious workers and a turn to revolutionary socialism, they are working in tandem to suppress the class struggle and impose the full cost of the US-NATO war against Russia and war preparations against China on the working class through social cuts, layoffs and cuts in real wages. They thereby help the Republican far-right capitalize on frustration, confusion and hatred for the entire political setup.



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