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Dave Bordewyk, Jennifer Widman, Ann Volin
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"Court Rejects Radical Legislative Theory,
Defends Democracy"

David Adler

It is difficult to overestimate the importance of the U.S. Supreme Court's repudiation of the "independent state legislature" theory in Harper v. Moore. The widely admired conservative judge, J. Michael Luttig, called it "the most important case, since the founding, for American democracy."

Indeed, nothing less than the preservation of judicial review, checks and balances and the vital role of courts in defending the constitutional order were at stake in this case. In fine, the North Carolina legislature boldly asserted that its authority to regulate federal elections was immune to judicial constraint and the limitations imposed by its state constitution.

The question before the U.S. Supreme Court, as Chief Justice John Roberts framed it for a 6-3 majority, was whether the North Carolina Supreme Court had authority to override the legislature's exercise in partisan gerrymandering. The legislature, in asserting the independent state legislature theory, essentially a claim of legislative omnipotence, had argued that the "Elections Clause" of the U.S. Constitution—Article 1, section 4—insulated it from judicial review.

The "Elections Clause" states: "The 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, except as to the Places of chusing Senators."

Chief Justice Roberts, writing for a majority that included Justices Sotomayor, Elena Kagan, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson, was emphatic. "The Elections Clause, Roberts wrote, "does not insulate state legislatures from the ordinary exercise of state judicial review."

The radical assertion of the North Carolina legislature has no foundation in our constitutional architecture—text, intentions of the Framers, Federalist Papers, Supreme Court precedents, history, or traditions. The theory could not be more remote from our constitutional moorings and republican principles.

America's colonial founders rejected during the revolutionary period the doctrine of legislative omnipotence, which formed the centerpiece of English law in the 18th century. Sir William Blackstone's magisterial Commentaries on the Laws of England, the source of great learning for colonial lawyers, had emphasized the absolute authority of Parliament. "I know that it is generally laid down more largely, that acts of parliament contrary to reason are void," Blackstone wrote in reference to the influence of Sir Edward Coke, whose writings and ideas inspired American revolutionaries. "But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it."

The principle of legislative omnipotence did not win adherents in the colonies, but rather fed the flames of revolt because, as Edmund Burke, a parliamentary champion of the revolution, stated, the deductions drawn from "illimitable sovereignty" could not be reconciled with the colonists' dream of freedom. The colonists, Burke justly stated to the House of

Commons, "will cast sovereignty in your face. Nobody will be argued into slavery."

America's revolutionaries rejected in the Declaration of Independence the legislative efforts of parliament to extend "unwarranted jurisdiction" over the colonists. Undesirable English practice and history presented no stumbling block for the colonial innovators, who rejected notions of absolute obedience to the legislature. Instead, they embraced Coke's early assertion of judicial review as a means of checking the unconstitutional ambitions of legislative bodies. James Madison, in Federalist No. 14, remarked on the peculiar colonial habit of innovation in the science of politics: "They reared the fabrics of government which have no model on the face of the globe."

The fact is, as Chief Justice Roberts observed, state courts had been exercising the power of judicial review prior to the gathering of delegates at the Constitutional Convention. State precedents were familiar, not remarkable, to the Framers of the Constitution, who had no stomach for legislative omnipotence. In Philadelphia, delegates conversed knowledgeably about the application of judicial review in various states. Madison, for example, spoke enthusiastically about the Rhode Island "judges who refused to execute an unconstitutional law." Such discussion was not confined to Philadelphia. In the Virginia Ratifying Convention, Judge Edmund Pendelton and Patrick Henry praised "honorable" judges who exercised judicial review to defend state constitutions against legislative excesses.

The assertion of the independent state legislative theory by the North Carolina legislature founders on the shoals of constitutional facts and history. Had the legislature prevailed, courts would be barred from exercising oversight authority over lawmakers' actions on voter ID, redistricting, and

other matters involving voting and election laws. The availability of judicial checks would have been surrendered to the doctrine of legislative omnipotence, which colonial revolutionaries had wisely and clearly rejected.

In the Convention, Madison explained why delegates, in drafting the Elections Clause, had circumscribed state legislative authority to regulate federal elections. "It was impossible to foresee all the abuses" legislators would try to enact. Instead of immunity from judicial review and the constraints of the Constitution, the Framers granted to Congress the ultimate authority to alter state regulations of elections and provided, contrary to the North Carolina assertions, no insulation from the checks and balances that characterize American Constitutionalism and have defended so well for 230 years the virtues and values of the republic.