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There is a way forward on disputed congressional map - the Ohio Supreme Court can draw it: Mark Brown

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Phillip Strach, a North Carolina lawyer representing Ohio's Republican legislative leaders, defends the Ohio Redistricting Commission's proposed state legislative maps in a Dec. 8, 2021 hearing before the Ohio Supreme Court. In a guest column today, law professor Mark Brown of Capital University Law School in Columbus argues that the state high court likely retains the ability under the Ohio Constitution's language on congressional redistricting to impose its own map to correct constitutional violations.

By

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COLUMBUS, Ohio -- Ohio's Redistricting Commission has now submitted [a second congressional map](#) after being told by the Ohio Supreme Court that its first violated the Ohio Constitution. This new map, however, also appears to violate Ohio's Constitution.

The question now is: Where to go from here? Can the Ohio Supreme Court, given Republican recalcitrance, draw the map itself? The answer is likely yes.

Unlike maps drawn for Ohio's General Assembly, which, under Article XI of Ohio's Constitution, "[no court](#)" can itself draw, section 3 of Article XIX of Ohio's Constitution grants to Ohio's high court [exclusive, original jurisdiction](#) over congressional redistricting without a similar limitation. One thus presumes the Ohio Supreme Court could exercise its traditional equitable powers to do what is necessary to correct a violation of Ohio's Constitution by drawing congressional maps. It could also enjoin any looming primary deadlines, if need be.

The difficulty, if any, may rest in federal law. Section 4 of Article I of the U.S. Constitution delegates to state "legislatures" the power in the first instance to regulate congressional elections. That same clause then provides that Congress can override whatever state legislatures have done, something Congress has done frequently over the course of the nation's history.

Flowing from this shared responsibility over congressional elections are two possible restrictions on what the Ohio Supreme Court might do. The first is (today) called the "independent state

legislature doctrine,” though this argument is more accurately called a “for-the-most-part-rejected independent state legislature theory.” Barring the U.S. Supreme Court’s overturning a seven-year-old precedent -- [Arizona State Legislature v. Arizona Independent Redistricting Commission](#) -- it should not present an impediment to the Ohio Supreme Court’s authority over proposed congressional maps.

The U.S. Supreme Court in [Arizona Independent Redistricting](#) ruled that Article I’s reference to state “legislatures” was meant to include the whole of a state’s legislative process, whatever it might be. “Our precedent,” the Court observed, “teaches that redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” Adding constitutional amendments by initiative, which is what Arizona voters had done in that case, is part of the legislative process. Thus, there was “no constitutional barrier to a State’s empowerment of its people by embracing that form of lawmaking,” and the “the people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.”

The U.S. Supreme Court did not stop there. It added that a state’s chosen districts are controlling “whether [adopted] by the legislature, court decree, or a commission established by the people’s exercise of the initiative.” Thus, the Supreme Court made clear that a state court’s involvement, drawing of the map and ultimate “decree” are part of the acceptable legislative process under section 4 of Article I of the Constitution, something several sister states like Pennsylvania and North Carolina have recognized.

The trickier problem is presented by a restriction put in place by Congress. Section 2a(c) of title 2 of the United States Code provides that a state must redistrict its congressional districts “in the manner provided by the [state] law thereof.” If it does not, then a federal default applies, which in Ohio’s case is at-large voting.

The argument that this statute prohibits the Ohio Supreme Court from drawing Ohio’s congressional map is not convincing.



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The Court in Arizona Independent Redistricting Commission concluded that Congress’ use of the words “law thereof” was meant to embrace the whole of a state’s legislative process, just like Article I. To the extent the Ohio Supreme Court sees fit to correct Ohio’s state constitutional violation by drawing a map, this would be part of the “law” of Ohio and the federal default would not apply.

Arizona Independent Redistricting Commission establishes that state constitutions and judicial corrections of violations of those constitutions bind state legislatures under Article I and federal law. State supreme courts, like Ohio’s, are thus free to use their inherent constitutional authority to correct congressional

redistricting violations. This authority includes drawing the maps themselves.

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