

[cleveland.com](https://www.cleveland.com)

# It's official. State legislatures cannot overrule voters in choosing presidential electors: Mark Brown

Published: Jul. 12, 2023, 5:27 a.m.

5–7 minutes



The U.S. Supreme Court is seen Tuesday, May 16, 2023, in Washington. Alex Brandon | AP Photo

By

- [Guest Columnist, cleveland.com](https://www.cleveland.com)

COLUMBUS, Ohio -- The U.S. Supreme Court in [Moore v. Harper](#) has ruled that state legislatures are governed by the rule of law. State constitutions and their judicial interpretations thus apply to congressional elections. State legislatures, like Ohio's GOP-dominated General Assembly, are not free to do as they please.

The June 27 ruling came out of North Carolina, where the GOP-

controlled legislature had gerrymandered the state's congressional districts to favor Republican candidates. The North Carolina Supreme Court ruled that this violated the state's constitution. The GOP cried foul before the U.S. Supreme Court, arguing that the state supreme court violated the Elections Clause in Article I of the federal Constitution by rejecting the legislature's map.

Law students learn early about [Marbury v. Madison](#), constitutional supremacy and the role courts play in America's system of government. Simply put, government officials and their legislatively enacted laws are subservient to constitutions, both state and federal. It might thus seem surprising that North Carolina's GOP had the temerity to claim that North Carolina's Republican legislature could ignore North Carolina's constitution.

Still, there was a kernel of plausibility to the GOP's claim – albeit one that was rejected by the U.S. Supreme Court just eight years ago in a case from [Arizona](#). Section 4 of Article I, the federal "Elections Clause," provides that the "[Times, Places and Manner](#) of holding" congressional elections "shall be prescribed in each State by the Legislature thereof."

Most of the federal Constitution's grants and limitations on states' powers speak literally to "states." [Section 10 of Article I](#) provides that "No State shall enter into any Treaty," for example, while [Section 8 of Article I](#) reserves "to the States ... the Authority of training the Militia."

Because section 4 of Article I directs power to "the Legislature" of the state, the argument goes, the Framers meant to distinguish federal elections from all other state business. With federal elections, state legislatures act independently of state

constitutions.

There are lots of problems with this argument, but history itself is probably its largest obstacle. Congressional elections have for 200 years been subjected to state constitutional constraints. As an example, Chief Justice John Roberts in the “Moore” ruling pointed to early 19th-century state constitutional requirements demanding written ballots. He could have also pointed to early 20th-century state court decisions invalidating state legislative restrictions on congressional candidates under state constitutions. Multiply these historical instances by dozens of others involving voter registration, vote counting and victory thresholds – all of which have been applied to congressional elections over the years – and the independent legislature argument was historical toast.

What does this mean for Ohio? Not much in terms of Ohio’s congressional maps. Had the GOP not tightened its control of the Ohio Supreme Court following Republican Chief Justice Maureen O’Connor’s retirement, the holding would have loomed large. But since Justice Sharon Kennedy, a Republican who, unlike O’Connor, voted for the gerrymandered maps, replaced her, and since Gov. Mike DeWine appointed Joe Deters, another Republican, to fill Kennedy’s seat, all bets are that the Ohio Supreme Court will overturn its previous rejections of Ohio’s gerrymandered maps and let the GOP-controlled General Assembly draw whatever it wants. Gerrymandering will only get worse in Ohio.





Mark Brown is a law professor and the Newton D. Baker/Baker & Hostetler Chair at Capital University Law School.

For Ohio's presidential elections, in contrast, the Moore ruling means a lot. Because Article II of the federal Constitution, like Article I, provides that state "legislatures" direct the method of choosing their presidential electors, the same "independent state legislature" argument was made by Donald Trump (and a host of GOP supporters, including Ohio's [Dave Yost](#)). In addition to his bizarre factual fraud claims, Trump argued that independent state legislatures are entitled to appoint their own electors free from state constitutional constraint.

Moore pulls the legal rug out from under that argument. Judicially ordered accommodations during the 2022 pandemic-infested presidential election were never illegal. It is time to stop apologizing for Trump's claims. Perhaps most importantly, Moore makes clear that state legislatures cannot do what Trump demanded on Jan. 6. There is a rule of law after all.

*Mark Brown is a professor of law and the Newton D. Baker/Baker & Hostetler Chair at Capital University Law School in Columbus.*

**Have something to say about this topic?**

- \* [Send a letter to the editor](#), which will be considered for print publication.
- \* Email general questions about our editorial board or comments or corrections on this editorial to Elizabeth Sullivan, director of