



## Republican 'independent state legislature' theory pushes Nevada Republicans under the bus

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July 3, 2022

Republicans in North Carolina just successfully placed a novel legal theory before the Supreme Court that, if accepted, would defang decades of legal effort by Nevada Republicans.

**Last February**, the North Carolina Supreme Court ruled that the congressional boundary maps drawn by the Republican-majority state legislature during the last redistricting session — maps which granted Republican majorities to 11 of **much more narrowly** Republican North Carolina's 14 congressional districts — violated that state's constitution. Appealing the decision in **Moore v. Harper**, North Carolina's Republican Speaker of the House presented an argument against the decision based on the "independent state legislature" theory, which asserts that state legislatures — and state legislatures *alone* — are empowered by the U.S. Constitution to regulate federal elections. According to this theory, neither state courts, governors, nor even state constitutions may serve as a check on the **plenary** (absolute or unqualified, in other words) powers granted to state legislatures to, among other things, select presidential electors or define congressional district boundaries.

I'm not going to write much about the veracity of this theory — others, like Andy Craig for the **Cato Institute**, as well as writers for the **Brennan Center for Justice** and **FairVote**, **among others**, have each written about the textual, historical and practical incoherence of the doctrine. Intellectually interesting as all of that analysis might be, none of it actually matters anyway. When **Donald Trump talked** about how Pence should have kicked the 2020 election back to the state legislatures, he didn't have Democratic-controlled legislatures — like Nevada's — in mind, as his campaign demonstrated when they **sued the state** over legislatively approved changes in mail-in voting procedures in 2020.

The only reason this is coming up is because Republicans control **twenty-three state legislatures** outright, including the legislatures in key swing states like Pennsylvania and Wisconsin. If they didn't, they'd undoubtedly argue against the theory, were it presented by a hypothetical Democratic originalist, on the hoary grounds of limited government, separation of powers, and checks and balances they've used to rhetorically keep every (Democrat-controlled) branch of government in check since Barry Goldwater charged against a **Jumbo**-sized windmill.

In other words, North Carolina's Republicans, **backed** by the co-chairman of the **Federalist Society**, are **rule sharking** — they think they've found a rule in the Constitution which, if interpreted selectively, will give them partisan advantage. Now we all get to wait and see if the Supreme Court agrees with them.

That, however, brings us to Nevada's Republicans, who have labored against Democratic-controlled state legislatures for years and have used — with some success — the Governor's Mansion and the state Supreme Court over the past two decades to fight against congressional and legislative maps drafted and approved by Democratic-majority legislatures.

As Riley Snyder **explained** for *The Nevada Independent* last year, redistricting in Nevada has always had a, and I'll just quote directly, “a contentious and litigious history.” A litigious history, by definition, is one that involves litigation — courts, in other words, which, if you remember anything from your high school government class, are not a traditional component or function of any state legislature. For the better part of a decade, in fact, Nevadans lived in **court-drawn** congressional and legislative districts after then-Gov. Sandoval (a Republican) **vetoed** the maps proposed by the Democratic-majority Legislature in 2011.

I wonder if anyone has asked the **current president** of UNR how he feels about the constitutionality of a state executive branch veto of congressional districts drawn by a state legislature? I hear he used to be **a federal judge**, so I imagine his legal reasoning would be sounder than most.

More recently, meanwhile, Nevada Republicans — at the same time Republicans in other states were starting to articulate the “independent state legislature” theory — **went to court** to argue against the congressional and legislative maps drawn by the state legislature. **They lost**, in no small part due to precedent created by **Rucho v. Common Cause**, which, amusingly enough, was yet another case contesting North Carolina's redistricting process that reached the Supreme Court. In that case, the Supreme Court ruled that partisan gerrymandering is a political question beyond the reach of federal courts — based on the reasoning behind the Supreme Court's ruling, Nevada's district courts chose to adopt a similarly hands off approach for our state courts as well.

The very same hands off approach, in fact, that North Carolina's Speaker of the House is demanding the Supreme Court to compel his state's courts to adopt in *Moore v. Harper*.

To be clear, it's perfectly understandable why North Carolina's Republican Party is acting in its best interests. It's also perfectly understandable why national Republicans are more interested in supporting the preferred outcome of North Carolina's Republicans, regardless of how that

posture is already hurting Nevada's Republicans — ignoring the competence of Nevada's Republican Party for a moment (everyone else does), North Carolina's 14 congressional districts and 16 electoral votes are more numerous than Nevada's 4 congressional districts and 6 electoral votes.

However, the next time Nevada's Republicans go to court to oppose yet another set of congressional and legislative district maps drawn by a Democratic-majority Legislature (give them nine more years) and lose, I hope they take a moment to reflect upon how their comrades-in-arms in North Carolina, the Federalist Society, and even the Trump reelection campaign fatally weakened their chances in the courtroom.