Madisonian Republicanism has a showdown with Progressivism in the Arizona redistricting case

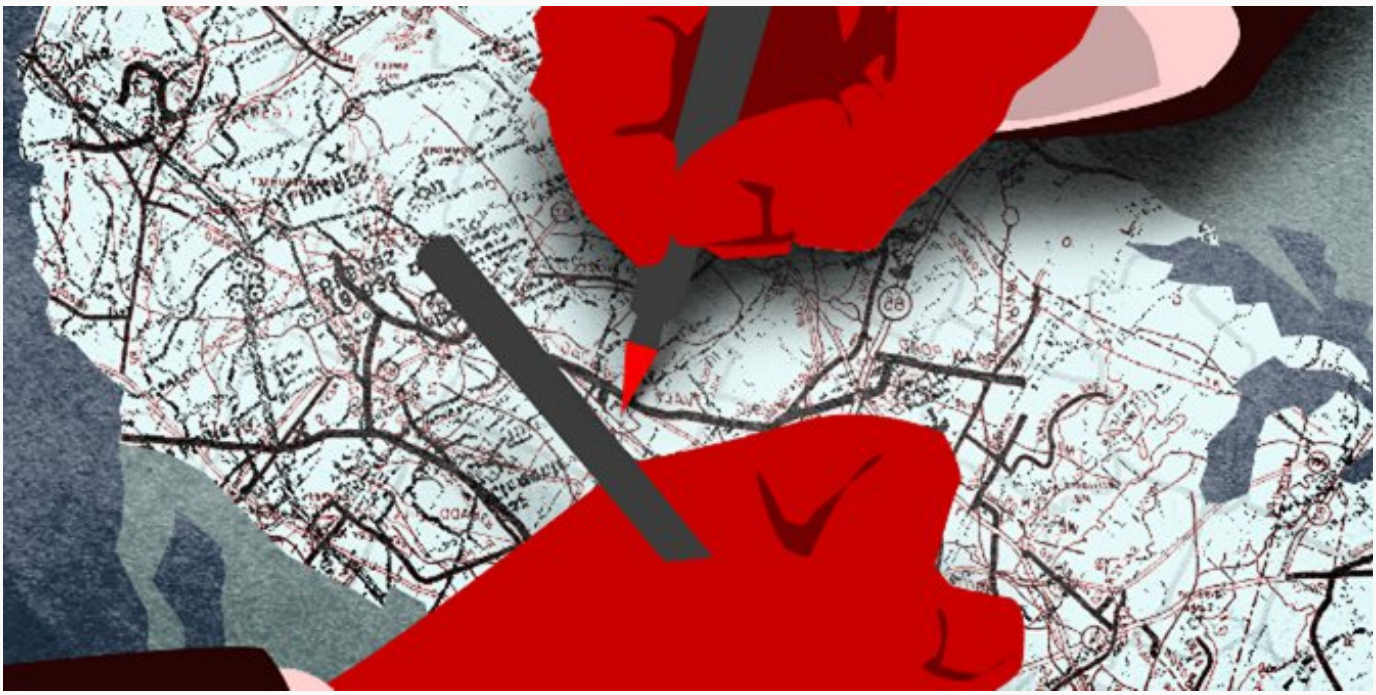
Last week oral arguments began at the Supreme Court on the state of Arizona's use of an independent commission to conduct the redistricting process once every decade, with the state's Republican-led legislature arguing that the commission is unconstitutional. **Keith Gaddie** *writes that the disagreement centers on the Supreme Court's interpretation of the term 'legislature', with those who are against the reform supporting a Madisonian interpretation that the legislature is solely the representative body, and not the legislative process. He argues that if the Supreme Court finds for the Arizona legislature, this will invest substantial power in state legislatures, and limit people's ability to determine where political power should reside in their states.*

Redistricting litigation is rarely really about process. Instead, it is about power – who has it, who uses it, and how it is used to determine who will have power in the future. In Arizona, different sets of elites are fighting for control of this power, and the outcome of the case holds real consequences for the ability of the public to control their government through direct democracy.

Arizona State Legislature v. Arizona Independent Redistricting Commission challenges the constitutionality of the independent redistricting commission created by Arizona voters in Prop 106. This amendment to Arizona's constitution limits the legislature's role in the redistricting process to the appointment of commissioners. The case raises two questions important to the future of U.S. redistricting reform: Can states use means other than direct legislative action to create congressional districts? And did Congress authorize such means?

This case hinges on the high court's interpretation of one term, 'legislature.' Art. I, s. 4 of the U.S. Constitution states that the "[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the **legislature** thereof" (emphasis added). Is a legislature only a representative body, elected by the people? Or, is it the legislative process encompassing the corpus of means by which a state might enact law under the state constitution? Appellants advance the former, literal interpretation which is invested in the Madisonian Republican tradition.

Defenders of the Arizona reform contend that it means the latter, and point to precedent which that the word 'legislature' encompasses the legislative process, including referenda and initiative. But this precedent is potentially soft according to the Arizona appellants, because in previous cases the redistricting processes "expressly contemplate a continuing major role" for the legislature; the Arizona reform limits legislative leadership to selecting four of five commissioners from a prescribed bipartisan/non-partisan list, and then exits the redistricting process.



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A second consideration is the latitude made available by the balance of Art. I, s. 4, which states that Congress can "make or alter such regulations" to conduct elections. Congress used this power to ban multimember districts in 1842, and then to ban at-large statewide House elections in 1967, leaving single-member districts as the only means to elect congressmen. In 1929 Congress granted by statute to any state the authority to determine district boundaries via means "prescribed by the law of such State," and this statute withstood litigation on other grounds in 1932. By the logic of this second part of Art. I, sec. 4, Arizona's commission should stand. State constitutions are the highest form of state law. If Arizonans see fit to limit the ability of lawmakers to shape legislative boundaries, and they do so through a legal mechanism then they could do so via these statutory grants. In opinion polls, Americans continue to view the redistricting process as corrupted, and the actions of Arizona and more recently California are consistent with the intended use of initiative and referenda. Indeed, the Court has long held that the ability to use initiative and referenda was an avenue available to the people, in order to correct for unfair redistricting.

Courts change. And so to does the understanding and interpretation of words and law. Herein resides the heart of the real conflict that sits before the Supreme Court – the ongoing tension to pull back from the impulses of the 20th century. From 1898 to 1918, 26 states adopted direct democracy to their constitutions in order to reform corrupted, compromised legislative processes that had been captured by a few narrow interests. In the American Progressive era, reformers recoiled against hyperpartisanship and a political spoils system that favored a few narrow economic elites. The introduction of these reforms altered the legislative process, as it evolved from the time of Madison and Jefferson, to encompass new and more direct forms of lawmaking.

The late Robert Dahl pointed out that the Framers operated under a 'profound ignorance' of the future. Madison and his cohort crafted a constitution that had difficulty embracing new forms of democratic government. The Framers underestimated the ability of the franchise to act with wisdom and protect property rights. As technology and American civilization progressed, the institutionalization of the roles of legislatures and the use of terms bound in time created tensions with new and durable political movements such as progressivism. For a century these conflicts have been reconciled through the application of interpretation of the Constitution.

But how will the Roberts Court act? And what are the consequences for progressivism? This Court has a progressive wing, a conservative wing, and there is no stable ideological majority from issue to issue. The Court is peculiar in this respect – it has found majorities for most every impulse. It has its libertarian moments, such as the expansion of privacy rights to encompass mobile electronic devices. It finds expansive authority to more broadly define marriage rights. It defies a sense of its ideology by sustaining a broad-based health care reform through

Congress's legislative authority to tax. But, it also pushed back against a major civil rights law, the Voting Rights Act of 1965, based on highly technical grounds regarding the nature of the coverage formula to implement the law

The oral arguments did not bode well for the survival of the Arizona commission. The progressive case for defining the legislature broadly found little support from the bench. If the Supreme Court finds for the Arizona legislature, it will circumscribe the ability of the people to reform their electoral institutions, and also invest substantial power in an institution that the Framers of the 18th century and the Progressives of the 20th century did not trust – state legislatures. In so doing, it will limit the ability of the people to determine where political power shall reside in their states.

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Note: This article gives the views of the author, and not the position of USAPP– American Politics and Policy, nor of the London School of Economics.

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