

## In its Arizona redistricting decision, the Supreme Court has made explicit that redistricting initiatives are a state legislative action.

*This week, the Supreme Court found in favor of the state of Arizona's use of an independent commission to conduct the redistricting process once every decade. The state's Republican-led legislature had argued that the commission is unconstitutional. During oral arguments in March [Keith Gaddie](#) wrote that the disagreement centered on one word — the term 'legislature.' The Court's conservative wing fragmented. Some broke toward a literal interpretation of the word, while others argued a lack of standing over the case. The progressives joined with Justice Kennedy to support an evolving understanding of the word 'legislature' based on the evolution of state lawmaking institutions since 1787. The majority finds that states have broad latitude to define their legislative processes, simultaneously making a states' rights argument while also dramatically expanding the latitude of progressive institutions to be used for possible political reform.*



Conservative frustration with the US Supreme Court runs high in 2015. After some notable successes in recent years including the [overturn of a key provision of the Voting Rights Act](#) and the ability to use [religious exceptions for some corporations](#) when providing health benefits, there have been several notable reverses for conservatives, including cases related to [packing minority majority districts](#), [same sex marriage](#), and [Obamacare](#). There have been so many emotional failures because conservatives are testing the limits of their ideology in Congress and the states, in order to turn back the progressive impulses of the 20<sup>th</sup> century. In [Arizona State Legislature v. Arizona Independent Redistricting Commission](#) a conservative state legislature challenged its own state constitution under [Article. I, s. 4](#) of the U.S. Constitution. They failed. In the process, the High Court made explicit what had been implicit – that the variety of state constitutional mechanisms for making law (including initiatives) might all be considered 'legislatures.'

At issue was Arizona voters' creation and use of a redistricting commission to craft congressional district boundaries without the approval of the state legislature. The people removed lawmakers from all redistricting (state and federal) over concerns of gerrymandering. The state legislature desired an additional, Republican congressional district be created in Arizona's nine-member map. The commission did not comply. The legislature sued. As I observed in my [last post](#), redistricting is "about power." The power to gerrymander was taken away from the legislature by the people of Arizona. Lawmakers sought to take back that what they were denied, because they wanted to gerrymander. They used Art. I, s. 4 as their vehicle, hoping that a technical and literal interpretation of the word 'legislature' would prevail over the post Civil War evolution of republican democracy in the American states.

The majority in the Supreme Court agreed with the argument for evolutionary change and disagreed with the Arizona legislature, observing that "the Framers may not have imagined the modern initiative process ... but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power." They then invoke the author of Article I, James Madison, [who observed that](#) "the genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people."

One might argue that this is a conservative decision. It leaves the status quo in place, and it defers to the state constitution in matters of state policymaking. States are able to order their institutions, so long as they do not deny or abridge fundamental rights of the individual. In the case of Arizona's proposition 106, voters had exercised their right to enact "[any law which may be enacted by the Legislature.](#)" The Court has affirmed a [state right](#).

The minority would doubtlessly disagree with this states' rights characterization. Justice Roberts argues that "The Court's position has no basis in the text, structure, or history of the Constitution, and it contradicts precedents from both Congress and this Court." In effect, the Court has created this understanding of what is a legislature anew, out of whole cloth. More specifically, he refers to the decision as a "magic trick." A legislature for Justice Roberts is a republican form of legislature, the representative institution, rather than the potentially evolving legislative authority of the state.



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Two dissenting justices (Scalia and Thomas) invoke issues of standing, contending that this is an intragovernmental dispute and not within the jurisdiction of the Supreme Court under [Art. III, s. 2](#).

But, at the end of the day, this is a progressive decision. The Court made explicit what has been implicit since 1932—initiatives, in context of redistricting and election law, are legislative actions under Article I of the Constitution, as are gubernatorial vetoes and other state constitution authorized forms of legislative activity. This means that, barring explicit congressional action to the contrary, state constitutional mechanisms including initiatives can be used to invoke electoral reform and not be vulnerable to challenge because the Court has explicitly defined the assumed understanding of legislating and legislatures.

More generally, this case indicates the increasingly progressive impulse of Justice Anthony Kennedy is not confined to same sex marriage or health care legislation. The second-most senior member of the Court (after Justice Scalia) has broken left with an egalitarian impulse that harkens back to an older vision of conservatism that is out of step with the current movement. Whatever the motives are for this drift, it is increasingly bringing his behavior in line with that of his centrist predecessor, Justice Lewis Powell, and clearly affirms his importance in pulling the Court, and occasionally, the Chief Justice, to the left.

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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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