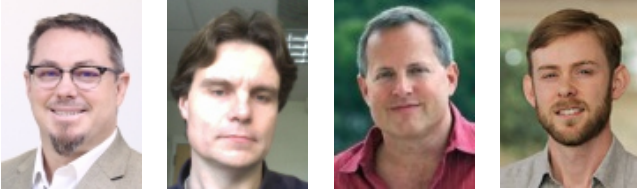


The Supreme Court’s quiet gerrymandering revolution and the road to minority rule



This month the US Supreme Court heard oral arguments in a Wisconsin case over the constitutionality of the Republican-dominated state legislature’s redistricting plan. [Michael Latner](#), [Anthony McGann](#), [Charles Anthony Smith](#), and [Alex Keena](#) argue that while this case is important, no matter what it decides, the Supreme Court

has already enabled large-scale gerrymandering. They write that the Court’s 2004 decision to not intervene in a similar case has led to several state legislatures gerrymandering their Congressional seats in one party’s favor. Left unchecked, they argue, this trend could lead to unified minority control of the elected branches of government by 2020.

On October 3rd the Supreme Court heard oral argument in a case that will, for better or worse, literally reshape American democracy. Wisconsin plaintiffs in *Whitford v Gill* asked for constitutional protection against the dilution of their votes from extreme partisan gerrymandering in the state, the practice of drawing legislative and Congressional district boundaries to maximize the seat advantage for the incumbent party.

Several justices voiced concern over the courts jumping into this political thicket. But there was no acknowledgement that this Court has been an enabler in allowing political parties to draw electoral districts with the explicit goal of maximizing electoral advantage, over the right of citizens to cast an equally weighted vote.

The Supreme Court has enabled a quiet revolution leading to extreme partisan gerrymandering

In [Gerrymandering](#) in America: The House of Representatives, The Supreme Court and the Future of Popular Sovereignty we show that the amplification of partisan gerrymandering can be traced directly back to the Court’s 2004 decision in [Vieth v Jubelirer](#). A plurality of Justices in that case, led by Antonin Scalia, held that partisan gerrymanders were [non-judiciable](#), and that courts could not intervene. But even in his concurring opinion, Justice Anthony Kennedy foresaw that “if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow.”

With such a clear signal from the Court that there was no longer a threat of judicial review, parties in control of state legislatures were unrestrained in their pursuit of partisan advantage. After the first round of post-*Vieth* redistricting, the level of partisan bias in the 2012 Congressional elections nearly tripled. The magnitude of bias even increased in states that were already gerrymandered by the governing party in the 2001 redistricting cycle. The Court’s action in *Vieth* thus initiated a quiet revolution, enabling legislatures in several states to undermine political equality, and has sparked a smoldering constitutional crisis.

Justices Roberts and Gorsuch ignore the Constitutional crisis already underway

During oral arguments in *Whitford*, Chief Justice John Roberts warned against the prospect of “very serious harm to the status and integrity of the decisions of this Court” if, as he suggested, the Court would “have to decide in every case whether the Democrats win or the Republicans win.”

Justice Neil Gorsuch went further, reminding the audience that what is at stake is “the arcane matter, the Constitution.” It is Congress, Gorsuch claimed, rather than the judiciary, which is authorized under the 14th, 15th and 26th Amendments with “the power, when state legislators don’t provide the right to vote equally, (or) to dilute Congressional representation.” But none of the Justices considered the degree to which congressional representation has already been diluted, so as to effectively neuter Congress from acting on that authority. This is the constitutional crisis that is already underway. State legislatures, enabled by *Vieth*, have avenged the [Anti-Federalists](#), who had been opposed to federal power.

Through their manipulation of Congressional district boundaries, the composition of the House of Representatives, the only federal institution, in the words of [James Madison](#), “which ought to be dependent on the people alone,” is effectively selected by state legislatures every ten years, rather than elected by the people every two years. It is the separation of state and federal powers, the very foundation of federalism, which ought to be the primary concern of the Supreme Court.

Just as the “one person, one vote” standard that emerged from racial gerrymandering and reapportionment cases used the authority of the federal judiciary to enforce political equality when states were unable or unwilling to, so now the judiciary should correct the fragmented ruling in *Vieth* and protect citizens who live in states where their political affiliation determines the weight of their vote. State legislatures must be restrained in order to preserve the constitutional separation of powers.



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Traditional districting principles will not protect us

Oral arguments in *Whitford* demonstrated, in stunning fashion, how traditional principles like equal population requirements, compactness, and effective representation of racial minorities under the Voting Rights Act, are inadequate to protect voters from political discrimination.

Justice Kennedy pressed defendants to consider a 1st Amendment perspective on voting as an expression of political speech, asking “If the state has a law or constitutional amendment that’s saying all legitimate factors (traditional districting principles) must be used in a way to favor party X or party Y, is that lawful?”

Erin Murphy, speaking for the defense, conceded that such legislation would be “an equal protection (14th Amendment) violation, but you could think of it just as well, I think, as a First Amendment violation, in the sense that it is viewpoint discrimination against the individuals who the legislation is saying you have to specifically draw the maps in a way to injure...” The importance of this concession to Justice Kennedy’s hypothetical is that it is not hypothetical at all, but actually what North Carolina legislators acknowledged in 2016, when they [declared](#) that political data was being used “to gain partisan advantage on the map...”

State legislators now justify discriminating against another party’s voters by relying on other, seemingly neutral criteria, such as the geographic compactness of districts. The problem is that compactness is not neutral; prioritizing compactness can result in districts where Democrats, concentrated in big cities, win by overwhelming margins, while Republicans win more districts by smaller margins because their voters are more spread out.

The direct impact of the *Vieth* decision on the behavior of state legislators was brought home in one of Justice Sotomayor’s lines of questioning. In a tense back and forth with defense’s Mr. Tseytlin, Sotomayor noted that “People involved in the process had traditional maps that complied with traditional criteria and then went back and threw out those maps and created more, some that were more partisan...why didn’t they take one of the earlier maps?”

Mr. Tseytlin: “Because there was no constitutional requirement that they do so...”

Justice Sotomayor: “That’s the point.”

The road to minority rule

In one of the more ominous moments of oral argument, Mr. Smith proclaimed that if the Court does nothing to remedy partisan gerrymandering, “you’re going to have a festival of copycat gerrymandering the likes of which this country has never seen.” The only problem with this dire warning is that it is seven years too late. The revolution happened in the last redistricting, and we are now living through the consequences. But it could get worse. If we do not act to shore up the institutions of majority rule, the thing that makes a republic a “thing of the people” ceases to operate.

First, consider the US Senate, an elective chamber that is minoritarian by design (though supermajoritarian in its decision-making process, maybe the worst possible combination). About 20 percent of the US population controls a majority of seats, due to the massive underrepresentation of more populous states. In 2018 and 2020, it is plausible that a majority of voters are continually denied majority control, resulting in minority rule in the upper chamber of Congress.

Second, while the Electoral College was not *designed* to thwart majority rule, it has in two of the last five elections, raising the specter of another minority winner in 2020. Indeed, given the polarization of parties and recent state election returns, there is approximately a [one in three](#) chance of the Electoral College enabling minority control of the executive.

Finally, in the House of Representatives, even a Democratic “wave” election similar to 2008, with a majority as large as 56 percent of the electorate, could still yield a majority of seats for the Republican Party in 2018 [as a result of partisan gerrymandering](#). And again in 2020. Indeed, it is entirely plausible that, *without judicial intervention, 2020 will mark the beginning of unified minority control of the elected branches of government*.

Reflecting on the threat posed by rogue states to the unity of the federal republic at the Constitutional Convention, Alexander Hamilton warned that “bad principles in government, though slow, are sure in their operation, and will gradually destroy it.” We concur, and urge the Supreme Court to correct the gradual but corrosive impact of extreme partisan gerrymandering unleashed by their decision in *Vieth*.

- This article is based on the authors’ new book, [Gerrymandering in America](#) (Cambridge, 2016).

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

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