AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Judicial Power and Constitutional Authority: Constitutional Litigation

**Virginia House of Delegates v. Bethune-Hill**, \_\_\_ U.S. \_\_\_ (2019)

*In 2018, a federal district court concluded in a lawsuit filed by Golden Bethune-Hill and other Virginia voters that the Virginia legislature had engaged in a racial gerrymander when apportioning state legislative districts. When the state attorney general refused to appeal, the Virginia House of Delegates asked to intervene and bring the case to the Supreme Court of the United States. Bethune-Hill objected on the ground that House lacked standing to represent the interests of the state or house members.*

*The Supreme Court, by a 5-4 vote, ruled that the Virginia House of Delegates lacked standing under Article III to appeal the decision of the federal district court. Justice Ruth Bader Ginsburg’s majority opinion maintained that the House of Delegates did not have the legal authority to represent the interests of the state or of the House of Delegates. Why does Ginsburg conclude that the House of Delegates does not authority to represent Virginia? Why she conclude that the House of Delegates does not have authority to challenge the election rules that determine the composition of the House of Delegates? Why do Justice Samuel Alito and the other dissenters disagree? Who has the better of the argument? In most standing cases, liberals favor while conservatives oppose. In this case, the four most liberal justices opposed standing that was favored by four of the five conservatives on the Supreme Court. Are the facts of this case sufficiently different to explain the voting pattern on legal grounds? Are the liberals being unprincipled? Are the conservatives being unprincipled? Is everyone but Justice Clarence Thomas, who voted with the majority, being unprincipled?*

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d3b90b911e98c309ebae4bf89b2) delivered the opinion of the Court.

. . . .

To reach the merits of a case, an Article III court must have jurisdiction. “One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so.” The three elements of standing, this Court has reiterated, are (1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision. Although rulings on standing often turn on a plaintiff's stake in initially filing suit, “Article III demands that an ‘actual controversy’ persist throughout all stages of litigation.” . . . As the Court has repeatedly recognized, to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing. . . .

The House urges first that it has standing to represent the State's interests. Of course, “a State has standing to defend the constitutionality of its statute.” No doubt, then, the State itself could press this appeal. And, as this Court has held, “a State must be able to designate agents to represent it in federal court.” . . . To begin with, the House has not identified any legal basis for its claimed authority to litigate on the State's behalf. Authority and responsibility for representing the State's interests in civil litigation, Virginia law prescribes, rest exclusively with the State's Attorney General. . . . Virginia has thus chosen to speak as a sovereign entity with a single voice. In this regard, the State has adopted an approach resembling that of the Federal Government, which “centraliz[es]” the decision whether to seek certiorari by “reserving litigation in this Court to the Attorney General and the Solicitor General.” . . .

The House observes that Virginia state courts have permitted it to intervene to defend legislation. But the sole case the House cites on this point—*Vesilind v. Virginia State Bd. of Elections* (2018)—does not bear the weight the House would place upon it. In [*Vesilind*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044642951&pubNum=0000711&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the House intervened in support of defendants in the trial court, and continued to defend the trial court's favorable judgment on appeal. The House's participation in [*Vesilind*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044642951&pubNum=0000711&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) thus occurred in the same defensive posture as did the House's participation in earlier phases of this case, when the House did not need to establish standing. . . .

. . . .

Moreover, even if, contrary to the governing statute, we indulged the assumption that Virginia had authorized the House to represent the State's interests, as a factual matter the House never indicated in the District Court that it was appearing in that capacity. Throughout this litigation, the House has purported to represent its own interests. Thus, in its motion to intervene, the House observed that it was “the legislative body that actually drew the redistricting plan at issue,” and argued that the existing parties—including the State Defendants—could not adequately protect its interests. Nowhere in its motion did the House suggest it was intervening as agent of the State. . . .

. . . .

This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage. The Court's precedent thus lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment.

Seeking to demonstrate its asserted injury, the House emphasizes its role in enacting redistricting legislation in particular. The House observes that, under Virginia law, “members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly.” But the Virginia constitutional provision the House cites allocates redistricting authority to the “General Assembly,” of which the House constitutes only a part. That fact distinguishes this case *from Arizona State Legislature v. Arizona Independent Redistricting Comm'n* (2015), in which the Court recognized the standing of the Arizona House and Senate—acting together—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature's authority under the Federal Constitution over congressional redistricting. In contrast to this case, in [*Arizona State Legislature*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036562395&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority. Just as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.

. . . .

Nor does *Coleman v. Miller* (1939), aid the House. There, the Court recognized the standing of 20 state legislators who voted against a resolution ratifying the proposed Child Labor Amendment to the Federal Constitution. The resolution passed, the opposing legislators stated, only because the Lieutenant Governor cast a tie-breaking vote—a procedure the legislators argued was impermissible under [Article V of the Federal Constitution](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTV&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). As the Court has since observed, [*Coleman*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1939121424&pubNum=0000780&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) stands “at most” “for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” . . . At issue here, instead, is the constitutionality of a concededly enacted redistricting plan. As we have already explained, a single House of a bicameral legislature generally lacks standing to appeal in cases of this order.

Aside from its role in enacting the invalidated redistricting plan, the House, echoed by the dissent, asserts that the House has standing because altered district boundaries may affect its composition. For support, the House and the dissent rely on *Sixty-seventh Minnesota State Senate v. Beens* (1972) (per curiam), in which this Court allowed the Minnesota Senate to challenge a District Court malapportionment litigation order that reduced the Senate's size from 67 to 35 members. . . . [*Beens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127113&pubNum=0000780&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) predated this Court's decisions . . . holding that intervenor status alone is insufficient to establish standing to appeal. . . . But even assuming, arguendo, that [*Beens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127113&pubNum=0000780&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))was, and remains, binding precedent on standing, the order there at issue injured the Minnesota Senate in a way the order challenged here does not injure the Virginia House. Cutting the size of a legislative chamber in half would necessarily alter its day-to-day operations. Among other things, leadership selection, committee structures, and voting rules would likely require alteration. By contrast, although redrawing district lines indeed may affect the membership of the chamber, the House as an institution has no cognizable interest in the identity of its members. . . .

Analogizing to “group[s] other than a legislative body,” the dissent insists that the House has suffered an “obvious” injury. But groups like the string quartet and basketball team posited by the dissent select their own members. Similarly, the political parties involved in the cases the dissent cites select their own leadership and candidates. In stark contrast, the House does not select its own members. Instead, it is a representative body composed of members chosen by the people. Changes to its membership brought about by the voting public thus inflict no cognizable injury on the House.

The House additionally asserts injury from the creation of what it calls “divided constituencies,” suggesting that a court order causing legislators to seek reelection in districts different from those they currently represent affects the House's representational nature. But legislative districts change frequently—indeed, after every decennial census—and the Virginia Constitution resolves any confusion over which district is being represented. It provides that delegates continue to represent the districts that elected them, even if their reelection campaigns will be waged in different districts. We see little reason why the same would not hold true after districting changes caused by judicial decisions, and we thus foresee no representational confusion. And if harms centered on costlier or more difficult election campaigns are cognizable, . . . those harms would be suffered by individual legislators or candidates, not by the House as a body.

. . . .

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d3b90b911e98c309ebae4bf89b2), with whom THE CHIEF JUSTICE, Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d3b90b911e98c309ebae4bf89b2), and Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d3b90b911e98c309ebae4bf89b2) join, dissenting.

. . . .

Our decision in *Lujan v. Defenders of Wildlife* (1992), identified the three elements that constitute the “irreducible constitutional minimum of standing” demanded by Article III. A party invoking the jurisdiction of a federal court must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” . . .

I begin with “injury in fact.” It is clear, in my judgment, that the new districting plan ordered by the lower court will harm the House in a very fundamental way. A legislative districting plan powerfully affects a legislative body's output of work. Each legislator represents a particular district, and each district contains a particular set of constituents with particular interests and views. . . . When the boundaries of a district are changed, the constituents and communities of interest present within the district are altered, and this is likely to change the way in which the district's representative does his or her work. And while every individual voter will end up being represented by a legislator no matter which districting plan is ultimately used, it matters a lot how voters with shared interests and views are concentrated or split up. The cumulative effects of all the decisions that go into a districting plan have an important impact on the overall work of the body.

. . . .

What the Court says on this point is striking. According to the Court, “the House as an institution has no cognizable interest in the identity of its members,” and thus suffers no injury from the imposition of a districting plan that “may affect the membership of the chamber” or the “content of legislation its future members may elect to enact.” . . . It seems obvious that any group consisting of members who must work together to achieve the group's aims has a keen interest in the identity of its members, and it follows that the group also has a strong interest in how its members are selected. And what is more important to such a group than the content of its work?

Apply what the Court says to a group other than a legislative body and it is immediately obvious that the Court is wrong. Does a string quartet have an interest in the identity of its cellist? Does a basketball team have an interest in the identity of its point guard? Does a board of directors have an interest in the identity of its chairperson? Does it matter to these groups how their members are selected? Do these groups care if the selection method affects their performance? Of course.

The Virginia House of Delegates exists for a purpose: to represent and serve the interests of the people of the Commonwealth. The way in which its members are selected has a powerful effect on how it goes about this purpose—a proposition reflected by the Commonwealth's choice to mandate certain districting criteria in its constitution. As far as the House's standing, we must assume that the districting plan enacted by the legislature embodies the House's judgment regarding the method of selecting members that best enables it to serve the people of the Commonwealth. . . .

In *Sixty-seventh Minnesota State Senate v. Beens* (1972) (*per curiam*), we held that the Minnesota Senate had standing to appeal a district court order reapportioning the Senate's seats. In reaching that conclusion, we noted that “certainly” such an order “directly affected” the Senate. The same is true here. There can be no doubt that the new districting plan “directly affect[s]” the House whose districts it redefines and whose legislatively drawn districts have been replaced with a court-ordered map. . . .

In an effort to distinguish [*Beens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127113&pubNum=0000780&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), it is argued that the District Court decision at issue there, which slashed the number of senators in half, “ha[d] a distinct and more direct effect on the body itself than a mere shift in district lines.” But even if the effect of the court order was greater in [*Beens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127113&pubNum=0000780&originatingDoc=I34518d3b90b911e98c309ebae4bf89b2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) than it is here, it is the existence—not the extent—of an injury that matters for purposes of Article III standing.

. . . .

. . . [I]t is revealing that the Court never asserts that the effect of the court-ordered plan at issue would not cause the House “concrete” harm. Instead, the Court claims only that any harm would not be “ ‘judicially cognizable.’” . . . The Solicitor General's brief argues as follows:

In the federal system, the Constitution gives Congress only ‘legislative Powers,’ and the ‘power to seek judicial relief ... cannot possibly be regarded as merely in aid of the legislative function. As a result, ‘once Congress makes its choice in enacting legislation, its participation ends.’. . . *The same is true here*. A branch of a state government that makes rather than enforces the law does not itself have a cognizable Article III interest in the defense of its laws.

These arguments are seriously flawed because the States are under no obligation to follow the Federal Constitution’s model when it comes to the separation of powers.. If one House of Congress or one or more Members of Congress attempt to invoke the power of a federal court, the court must consider whether this attempt is consistent with the structure created by the Federal Constitution An interest asserted by a Member of Congress or by one or both Houses of Congress that is inconsistent with that structure may not be judicially cognizable. But I do not see how we can say anything similar about the standing of state legislators or state legislative bodies. The separation of powers (or the lack thereof) under a state constitution is purely a matter of state law, and neither the Court nor the Virginia Solicitor General has provided any support for the proposition that Virginia law bars the House from defending, in its own right, the constitutionality of a districting plan.

. . . .