

# Now It's Up to the People to End Gerrymandering

The High Court decided to do nothing about a practice that, in the words of dissenting Justice Elena Kagan, “beats democracy,” writes Marjorie Cohn.

By **Marjorie Cohn**

*Truthout*



The Supreme Court has abdicated its responsibility to strike down partisan gerrymandering. This occurs when one party intentionally manipulates district boundaries to skew its voting power, notwithstanding the will of the voters. Although both parties engage in partisan gerrymandering, Republicans **benefit from it far more** than Democrats.

Chief Justice John Roberts, writing for the conservative 5-4 majority in ***Rucho v. Common Cause***, admitted that excessive partisan gerrymandering is “incompatible with democratic principles” and “leads to results that reasonably seem unjust.” But, the High Court held, challenges to the practice “present political questions beyond the reach of the federal courts.”

In her passionate dissent, joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor, Justice Elena Kagan noted that extreme partisan gerrymanders “deprive citizens of the most fundamental of their constitutional rights” – the rights of equal participation in the political process, “to join with others to advance political beliefs, and to choose their political representatives.” Kagan wrote,

“For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.”

The Court consolidated two partisan gerrymandering cases for its decision in *Rucho*. The North Carolina case involved gerrymandering by Republicans. In the Maryland case, it was Democrats who engaged in gerrymandering.

North Carolina’s Republican legislative leadership drew a congressional map to entrench long-term Republican majorities. Although they won roughly 50 percent of the popular vote, Republicans picked up a majority of available seats in the 2018 Midterm elections by the extreme margin of 10-3.

In Maryland, Democrats used voters’ histories and party affiliations to move 70,000 Republican voters out of a district and 24,000 Democratic voters in.

Federal district courts in both North Carolina and Maryland struck down the partisan gerrymanders. The High Court reversed the district court decisions and concluded there are no standards for federal courts to use in gauging the constitutionality of partisan gerrymanders.

### **Federal Courts Have Formulas**

But federal courts have actually devised formulas to strike them down. “The majority’s abdication comes just when courts across the country ... have coalesced around manageable judicial standards to resolve partisan gerrymandering claims,” Kagan pointed out. These courts used “neutral and manageable – and eminently legal – standards.”

Kagan cited the three-part test the federal district courts in North Carolina and Maryland, and other courts around the country, used to decide vote dilution claims. The test examines intent, effects and causation. First, plaintiffs must show that the state officials' "predominant purpose" in drawing district lines was to "entrench [their party] in power" by diluting the votes of the rival party. Second, plaintiffs must establish that the lines drawn "substantially" diluted their votes. Third, the burden shifts to the state to posit a "legitimate, non-partisan justification to save its map."

Applying that test to the North Carolina and Maryland cases, Kagan determined that illegal partisan gerrymandering had occurred in both. "By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office," she wrote. "They had beat democracy."

But the majority was willing to sacrifice democracy on the altar of partisanship. There is no case more impactful than this one, and it's no accident that it was the right-wing Republicans who upheld partisan gerrymandering.

In a 2004 concurrence, Justice Anthony Kennedy signaled his openness to striking down extreme partisan gerrymanders, which amount to "rigging elections." He wrote in *Vieth v. Jubelirer*, "It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied."

Kennedy's retirement and Mitch McConnell's replacement of

Obama's nominee Merrick Garland with Trump appointee Neil Gorsuch all but foreclosed the possibility that the Court would review partisan gerrymandering.

Kagan ended her powerful dissent by warning that this is not the moment for the Court to back down. "Of all times to abandon the Court's duty to declare the law, this was not the one," she wrote. "The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent."

### **Looking Ahead**

Partisan gerrymandering is "far more effective and durable" now than in the past, Kagan observed, because advances in technology provide mapmakers with "more granular data about party preference and voting behavior than ever before." They can utilize it "with unprecedented efficiency and precision."

The *Rucho* decision "is almost guaranteed to facilitate massive election rigging in the future," Ari Melber, senior writer at *Mother Jones*, told Amy Goodman on *Democracy Now!*. We can no longer look to the federal courts, to which the disenfranchised have traditionally turned for relief, he said.

Now that the High Court has denied judicial review of partisan gerrymandering in federal courts, it is up to the people in the several states to remedy it.

Independent citizen-led commissions in states such as

Michigan, Colorado, Utah and Missouri draw fair and representative district maps. But in most states, “the party that controls the legislature draws districts for both the U.S. House of Representatives and the state legislature,” Berkeley Law School Dean Erwin Chemerinsky wrote in the *Los Angeles Times*. “They inevitably do so in a way to maximize their political control.”

The Supreme Court has struck down racial gerrymandering as violative of the Equal Protection Clause of the Constitution. But after *Rucho*, claims of partisan gerrymandering will no longer be reviewed by federal courts.

The National Democratic Redistricting Committee, led by Eric Holder, attorney general in the Obama administration, plans to file racial gerrymandering claims in federal court and partisan gerrymandering claims in state courts. The organization is also considering support of constitutional amendments to establish independent redistricting commissions in Oklahoma, Arkansas and New Hampshire.

The House has passed H.R. 1 – the For the People Act – that would require states to draw congressional districts utilizing independent redistricting commissions. Members of these commissions would “represent diverse communities across the state, by establishing fair redistricting criteria, and by mandating greater transparency for the redistricting process,” according to the Brennan Center for Justice.

Sen. Michael Bennet (D-Colorado) has introduced the Fair Maps Act, which would establish baseline criteria for map-drawing and provide a private legal cause of action for

voters to challenge skewed maps in court.

But, as Kagan noted, “The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.”

The remedy for partisan gerrymandering lies with the people. “The Supreme Court’s decision has made one thing clear,” Jessica Post, executive director of the Democratic Legislative Campaign Committee, said. “The only way we’ll end partisan gerrymandering is by voting Republicans out of power in state legislatures.”

One-half of the states allow voter ballot initiatives. Voter advocates can organize campaigns to put measures on the ballot that require independent redistricting commissions rather than politicians to draw the maps. It is up to the people to make the voting system fair.

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# America's Hypocrisy on Democracy

U.S. politicians often lecture other nations about their flawed governance as if American democracy is the gold standard, but anti-democratic measures like gerrymandering belie that self-image, says ex-CIA analyst Paul R. Pillar.

By Paul R. Pillar

An old fear about Islamist political parties entering government is that once in power, even if they had gained their position through democratic means, they would subvert democracy for the sake of maintaining power.

The U.S. government explicitly mentioned the specter of "one man, one vote, one time" in condoning in 1992 the Algerian military's cancellation of the second round of a legislative election that the Islamic Salvation Front, which had won a plurality in the first round, was poised to win. The military's intervention touched off a vicious civil war in which hundreds of thousands of Algerians died.

History has indeed offered examples of rulers coming to power through democratic means and then clinging to power through undemocratic means. Adolf Hitler became chancellor of Germany only after his Nazi Party had won pluralities in two successive free elections in 1932. But there is no reason to associate such scenarios with Islamists more so than with parties of other ideological persuasions.

A relevant modern data point is Tunisia, the one Arab country in which democracy took hold as a result of the Arab Spring. The Islamist Ennahdha Party won a free election in 2011 and formed a government but willingly stepped down in 2014 after it lost much of its public support, very much in the mold of how governments in parliamentary democracies in the West vacate office after losing the public's confidence.

The more common recent pattern regarding Islamists in office has been for their opponents to cut their tenures short through undemocratic means. This has included, besides Algeria in 1992, the Turkish military's "coup by memorandum" to oust a mildly Islamist civilian government in 1997, and the Egyptian military's coup in 2013 that toppled President Mohamed Morsi, a member of the Muslim Brotherhood.

Democracy in Turkey today is being rapidly eroded, but this involves not the ideological coloration of the Justice and Development Party but instead the megalomania of President Recep Tayyip Erdogan, who has been using Turkish

nationalist themes more than Islamist ones in cementing his hold on power.

### **Anti-Democratic Gerrymandering**

All this, important though it is, ought to be less important to Americans who are concerned about preserving democracy than what has been happening in their own country. The gerrymandering case that is before the Supreme Court this week is especially important in that respect, because it gets directly to the phenomenon of one person, one vote, one time.

That phenomenon is what has occurred in Wisconsin, where the case now before the court originated. Republican legislators, once in power, secretly and aggressively devised new legislative boundaries that have enabled them to retain their grip on power even after, in subsequent elections, losing majority support among the citizens of Wisconsin.

Given the power of those same legislators to draw Congressional districts as well as their own districts, the disconnect between the will of the people and the ideology of representatives extends to the federal as well as the state level.

The methods used may be different from those used by some of the foreign rulers who have transitioned from democratically elected leaders to autocrats using nondemocratic means. The prime method used in gerrymandering in the United States is not brown shirts in the streets but rather computing power used to crunch demographic data and to try out endless variations of how lines might be drawn to gain maximum partisan advantage. But the result is the same: rulers stay in power even after most citizens no longer want them there.

Gerrymandering is not the only such undemocratic tool being used to the same effect. There also are the Republican-sponsored voter suppression laws designed to impede people's ability to exercise the right to vote, and to do so in ways that fall most heavily on those presumed to be more likely to support the opposition party. These methods are rationalized through unsupported assertions about widespread voter identification fraud. President Trump has even established a commission founded on such a lie, to provide momentum for still more voter suppression measures.

### **Excuses Not to Act**

When any case such as the Wisconsin case comes before the Supreme Court, there always are voices calling for the court to defer to elected branches of the government on what is a "political" question. But such a position is groundless when gerrymandering is involved. The problem at the very heart of the case concerns the composition of the political branch that has been drawing district



lines. For the court to defer to that political branch would mean not that it is avoiding a decision but rather that it is deciding in favor of the pro-gerrymandering side.

Of course, the politicization of the U.S. Supreme Court is a long-established feature of American government and politics. The effects of gerrymandering and the voter suppression laws have been amplified by supposed “strict constructionists” construing the First Amendment guarantee of free speech so loosely as to strike down laws governing campaign financing. Moreover, the composition of the court that is now deliberating on the gerrymandering case is itself the product of an extra-constitutional exercise of power by a Senate majority that refused to perform its constitutional duty of considering a nomination by the then-incumbent president.

The health or sickness of democracy overseas has been a major focus of U.S. foreign policy debate and much policymaking. Some strains of policy thinking have even led to costly overseas military expeditions rationalized as efforts to install democracy in lands overseas. Any Americans thinking along such lines should stop and think first about how democracy in the United States appears to observers overseas. It is not an especially pretty sight.

The United States today is a less healthy democracy than what prevails in many other advanced industrial countries of the West. There is a foreign policy equity involved – in terms of the soft power that comes from being a conspicuously healthy democracy– but what is most important is what kind of political system Americans themselves can enjoy.

Of all the advantages of democracy that democratic theorists have posited, surely the most important is the ability of citizens to remove leaders whom they no longer support. There is no better guarantee that government will be run in the interests of the governed.

The case now before the Supreme Court will go a long way toward determining whether U.S. democracy will exhibit this principle or instead will be a case of one person, one vote, one time.

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