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Partisan Gerrymandering—A Continuing Threat



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In their Government and Election Law column, Jerry H. Goldfeder and Myrna Pérez discuss partisan gerrymandering of electoral districts, which has infected American elections since the beginning of the republic.

Partisan gerrymandering of electoral districts has infected American elections since the beginning of the republic. In recent decades, state legislatures—which, for the most part, draw the lines—have honed the practice into a political tool to ensure that a political party retains a majority (or supermajority) in the state even though such majorities do not reflect actual vote totals. Extreme partisan gerrymandering has become easier as political operatives have grown more savvy in this field and are able to access increasingly powerful mapping and data analysis tools.

A typical example is the state of Wisconsin. In 2016, 49.8% of the voters cast ballots for Democratic party candidates running for Congress. Yet, as a result of the Republican-controlled legislature that drew the district lines, five Republicans were elected to congress, and only three Democrats were. To be sure, Democrats have done this in the past as well. In Maryland,

in 2016, despite a Democratic vote that was only 60% of the vote total, democrats received seven out of eight congressional seats.

The Wisconsin gerrymander was challenged, but the U.S. Supreme Court held that the plaintiffs did not have standing to bring their claims and vacated the judgment of the lower court that had previously struck down the gerrymander. Advocates on both sides of the issue hoped that the next case taken by the Supreme Court would resolve the issue one way or the other.

Unfortunately for those opposing partisan gerrymandering, the Supreme Court did so in June 2019 in *Rucho v. Common Cause*, by washing their hands of the matter. As in so many other cases relating to voting restrictions, this one originated in North Carolina. In 2016, Republicans received 53% of the total state vote and managed to elect 10 out of the state's 13 congress members. Challengers argued that the state's 2016 remedial congressional map was an unconstitutional partisan gerrymander in violation of the First Amendment, the Equal Protection Clause, and Article I §§2 and 4 of the U.S. Constitution. The court ruled that partisan gerrymandering was non-justiciable in federal courts, basing its decision on the ground that it was unworkable for the federal judiciary to evaluate the fairness of political maps—thus leaving these decisions to state legislatures and state courts. Accordingly, the Supreme Court remanded two other gerrymandering cases—*Ohio A. Philip Randolph Institute v. Householder* and *League of Women Voters of Michigan v. Benson*—to their respective lower courts, effectively dismissing them on the same ground of non-justiciability. The effect of *Rucho*, therefore, is that states will be free from having their partisan gerrymandering challenged in federal courts. This is especially disturbing as the 2020 census is in progress and states will be drawing new state legislative and congressional lines for the next decade.

Although the federal courts are no longer open to hearing partisan gerrymandering claims, challenges to partisan gerrymandering continue to be asserted in state courts and legislatures, and through the initiative and referendum process. Recently, a North Carolina superior court struck down the state's legislative maps as partisan gerrymanders in violation of the state's constitution, and voters recently filed a lawsuit challenging its congressional map on the same ground. Pennsylvania's Supreme Court also recently struck down its congressional map as a partisan gerrymander in violation of the state's constitution. In Colorado, the legislature approved two ballot measures to create an independent redistricting commission to draw both state and congressional district lines. And in 2018 voters in several states approved redistricting reforms through referenda: Michigan voters amended its constitution to create an independent redistricting commission for 2021; and Ohio voters similarly passed redistricting reforms through a referendum. Federal courts are, of course, still open to racial gerrymander claims, for example, brought under §2 of the Voting Rights Act. We were all reminded of this by Justice

Elena Kagan in *Cooper v. Harris*, where she noted that a racial gerrymander is illegal even if the motive was political.

In 2014, the New York state legislature proposed a constitutional amendment to establish a so-called independent redistricting commission to take effect in 2020, which voters then approved. This commission will not have full authority to create electoral maps, however. It will operate only in an advisory capacity to the legislature. It will be comprised of 10 commissioners—four appointed by each major political party and two selected by the other eight commissioners, who may not be affiliated with either major political party. Although New York’s commission does not function the way an independent redistricting commission such as California does, New Yorkers should see to it that the commission improves the process for the Empire State.

Thus, although the Supreme Court’s *Rucho* decision dealt a substantial setback to the challenge against partisan gerrymandering, voters are availing themselves of the state courts and legislative processes to ensure that fairer district lines are drawn and that the partisan make-up of state legislatures and congressional delegations are more reflective of the voters’ will. As the next round of redistricting begins to unfold, voting rights advocates—and those committed to representative government—will be paying close attention.

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