Combatting gerrymandering in the wake of recent Supreme Court decisions
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Metropolitan Club Remarks, August 14, 2019 (updated September 23, 2019)

My organization, the Campaign Legal Center, is a nonpartisan, nonprofit legal organization here in Washington that works in the areas of campaign finance, voting rights, redistricting, and government ethics. Today, I will be reflecting on redistricting in the wake of the Supreme Court's recent decisions, but I am happy to take questions on anything else afterwards.

As you know, legislative and Congressional districts are redrawn every ten years after the Census. The Constitution specifies that "the times, places and manner" of elections for members of Congress shall be determined by the state legislatures. The decennial redistricting process provides opportunity for legislative majorities to draw district lines to entrench the majority party, when the legislatures (and the Governor, in some states) are in the hands of one party.

Since the Supreme Court's one person one vote decision in *Reynolds v. Sims* (1964), each of these districts must be approximately the same size. Since the Voting Rights Act of 1965, they cannot be drawn to disadvantage racial minorities. The Voting Rights Act says nothing about partisan gerrymandering, though.

Gerrymandering dates back to the early 19th century, when Governor Eldridge Gerry of Massachusetts and the state legislature drew new districts for the state Senate. A cartoonist depicted one of the districts as a salamander, or "Gerrymander." It was attacked as wrong then, and since, but has acquired the patina of time.

However, today's gerrymandering is not our grandfathers' gerrymandering. It is worse by an order of magnitude due to two forces: the power of computers (and detailed available voter and consumer data), and the hyper-partisanship of many states. Back in 1812, Governor Gerry drew his map with a quill pen and only general information about the overlap between towns and voting patterns. Today's mapmakers have access to huge computing power and big data to the point that they know how almost every household on a block votes, drawing gerrymanders with great precision—and even redrawing them mid-decade to account for pesky voters changing their minds.

Gerrymandering should not be a partisan subject—it is not unique to one party or another. Republicans have recently had the advantage thanks to their sweep of state legislatures in 2010, but who knows what the political landscape will look like after 2020? Republicans have gerrymandered districts in Wisconsin, North Carolina, and Pennsylvania; Democrats have gerrymandered districts in Maryland, Illinois, and Massachusetts.

In Wisconsin in 2011, Republican lawmakers gerrymandered the legislature so successfully that the next year (2012) Republicans "lost" the election with only 49% of the statewide vote to the Democrats' 51% but won 61% of the seats in the legislature. This of course was the subject of

Gill v. Whitford, the gerrymandering case that CLC argued in 2017 in the U.S. Supreme Court. The Court ducked the core question and returned it to the district court without resolution of the gerrymandering question.

This past term, the Supreme Court took up two more cases, involving a Republican gerrymander in North Carolina and a Democratic gerrymander in Maryland. In both cases, lower courts had found that the lines drawn were unconstitutional because they were extreme gerrymanders.

Some background here is important.

The 2017 Wisconsin case will go down as a great missed opportunity for those who believe the federal courts should intervene to stop egregious partisan gerrymandering.

In 2004, in the *Vieth* case out of Pennsylvania, all nine Justices held that extreme partisan gerrymandering violates the Constitution because the government is discriminating against one political party.

But then the Court split 4-4-1, effectively allowing the Pennsylvania gerrymander to stand, and putting the underlying question off for another day, and another case. Four Justices in *Vieth* said the Pennsylvania gerrymander was an extreme partisan gerrymander and should be thrown out.

Four Justices said that it was impossible for federal courts to know when a partisan gerrymander was so extreme as to be unconstitutional, and therefore the Courts should not take cases challenging gerrymanders. They should be considered "non justiciable" or "political questions," and the federal courts should stay out of them—even though they involve potentially unconstitutional behavior by state governments.

One Justice—Justice Kennedy—joined neither opinion. The Justice famously in the middle said that there might be a test federal courts could use to determine when a gerrymander is unconstitutionally "extreme," but that it had not been identified yet. So Kennedy basically said "Go forth and seek—come back to us when you have found."

That is where things stood when the Wisconsin case arrived at the Court in 2017. CLC and Paul Smith, our star Supreme Court litigator, had won in the three-judge lower court, and that court had identified several standards or tests they thought showed that the Wisconsin gerrymander was, by any measure, excessively partisan. The case was described as a love note to Justice Kennedy, because Mr. Smith and his CLC colleagues arrived saying, "Justice Kennedy, the lower Courts have found at least one—likely several—standards you can use to judge the partisanship of gerrymanders."

For whatever reason, Justice Kennedy refused to bite. By a 5-4 vote, the case was returned without decision to the lower court, to determine whether the plaintiffs had standing. Days

after this punt, Justice Kennedy announced his retirement, and Justice Kavanaugh sat on the Court in his stead when the North Carolina and Maryland cases were argued this spring.

In North Carolina, Republican state legislators did their own backroom map-drawing ahead of the 2016 elections for maps of U.S. congressional districts. As in Wisconsin, their plan worked: In 2016, Republican congressional candidates won about half of the statewide North Carolina vote, but won 10 of the 13 congressional districts.

In both cases, the facts were largely undisputed by the time the Supreme Court heard argument: No one seriously questioned that these were partisan gerrymanders.

In North Carolina, one of the Republicans leading the backroom effort admitted on the record what the motivations were: "I propose that we draw the maps to give a partisan advantage to 10 Republicans and three Democrats," he said, "because I do not believe it's possible to draw a map with 11 Republicans and two Democrats."[1]

In Maryland, plaintiffs were challenging a single district they argue was unconstitutionally gerrymandered by Democrats to defeat an incumbent Republican congressman. Democratic lawmakers and consultants created the state's congressional map behind closed doors, conceding that their express goal was to draw the map in a way that maximized the number of Democratic districts.

The Democratic lawmakers were successful, moving around enough voters to ensure that Democrats won seven of eight congressional districts, defeating an incumbent Republican in the process.

The Campaign Legal Center challenged the North Carolina maps on behalf of the North Carolina League of Women Voters. In January of last year, a U.S. District Court in North Carolina struck down the maps as unconstitutional partisan gerrymanders. The Campaign Legal Center also filed an amicus brief in the Maryland case.

Thus, the question squarely before the Court last spring was whether these admittedly partisan gerrymanders were so egregious that they violated the U.S. Constitution, as the lower Courts had found. Inextricably woven into this was the "Justice Kennedy" question from the Pennsylvania case of 2004: Had the courts identified one or more reliable tests to separate minor partisan gerrymanders from unconstitutionally egregious ones?

Put differently, can federal courts ever find it is unconstitutional for one party—the one in power—to use the power of government to disadvantage the other party—the minority party? Or is that a permissible—even if perhaps malodorous—use of government power?

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[1] Ella Nilsen, *North Carolina's extreme gerrymandering could save the House Republican majority*, Vox (May 8, 2018), https://www.vox.com/policy-and-politics/2018/5/8/17271766/north-carolina-gerrymandering-2018-midterms-partisan-redistricting.

Unfortunately, the Court earlier this summer not only refused to rule the extreme Maryland and North Carolina maps unconstitutional—but it also said that partisan gerrymandering is not capable of being adjudicated by the federal courts no matter the facts of the case.

Let me be clear about my views on this: I believe that Justice Kagan was right in her dissent when she said that the result was "tragically wrong."[2] It removed the possibility of federal judicial review and with it a key line of defense against extreme, out-of-control gerrymandering that in all likelihood will only get worse.

The majority opinion, authored by Chief Justice John Roberts, claimed that there was no justiciable standard by which federal courts could evaluate when map-drawing had gone too far. He said, what about close cases—how will the Court decide? "If a 5-3 allocation corresponds most closely to statewide vote totals, is a 6-2 allocation permissible…?" A good question—except for two things. First, no one argued that the North Carolina and Maryland gerrymanders were "close cases." Second, he was discounting all the recent examples of lower courts that have done the fact-based work of determining when a gerrymander has gone too far—including in both the Maryland and North Carolina cases, but also in other recent cases involving Ohio and Michigan.

As Justice Kagan put it in her dissent, "The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims."

The Roberts opinion pointed to action by legislatures or citizen initiatives as a possible fix for overly partisan gerrymanders—but this has been shown to be a difficult solution in practice, impossible in some states. First, the legislatures that did the gerrymandering, or were created by it, are highly unlikely to now draw lines that disadvantage themselves or turn over redistricting to citizen commissions.

This was illustrated in a wonderful exchange in the oral argument:[3]

> Justice Gorsuch said to one of the lawyers for the North Carolina plaintiffs, "What do we do…about the [states that] have dealt with this problem through citizen initiatives..? Why should we wade into this when that alternative exists?"
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> The lawyer responded that "the simple answer, Justice Gorsuch, is this: The vast majority of states east of the Mississippi, including specifically North Carolina, do not have citizen initiative."
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> Justice Gorsuch then asked, "Can you amend your constitutions?"

[2] Opinion and dissent *available at* https://www.supremecourt.gov/opinions/18pdf/18-422_9ol1.pdf.
[3] Oral argument transcript *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-422_5hd5.pdf.

> The lawyer responded by pointing out that, in North Carolina, "You can only amend the constitution with the approval of the legislature, in proposing an amendment that gets to the ballot and is then ratified."

This encapsulates the argument made by Justice Kagan and the minority—this is an instance—maybe a very rare instance—just like "one person one vote"—when the only way to deal with an unconstitutional act by a state legislature is through the Courts, because the ballot box has been rigged, and citizens in many states have no way around the gerrymander.

"Of all times to abandon the Court's duty . . . this was not the one," wrote Kagan, noting that "the practices challenged in these cases imperil our system of government."

So, now that this June's 5-4 Supreme Court decision closed the doors of the federal courts to challenges to even openly partisan gerrymanders, what happens next?

Independent Redistricting Commissions?

The obvious solution is to take map-drawing out of politicians' hands all together in the form of independent redistricting commissions. Five more states (Ohio, Colorado, Missouri, Michigan, and Utah) passed these commissions by ballot initiative last November.

CLC is currently working with eight more states that are looking to create them in 2020.

The problem, as the lawyer pointed out to Justice Gorsuch, is that there are a limited number of states where citizen initiatives are even an option.

Not all "Commissions" are equally effective. Some are independent, some are bipartisan in equal numbers. Some only redistrict for Congressional seats, some only for state legislative seats. So the bottom line is that while we are optimistic about passing independent redistricting commissions on the ballot where that is an option, relying on citizen-based initiatives will not be effective in many states.

So, what are the other options? As I have noted, legislatures seldom vote to give up their redistricting power to Commissions.

This year, the Democratic-controlled New Hampshire legislature did vote to do just that. New Hampshire has a Republican governor, and both the legislature and governor must agree on a redistricting plan, so arguably the legislature was not giving up much. The commission proposal had bipartisan support in the legislature. But Governor Sununu vetoed the Commission bill anyway.

The justifications the governor gave for the veto included that map-drawing should be vested in elected state representatives rather than "unelected and unaccountable" members of a

commission; that there were "partisan out-of-state organizations" advocating for the bill; and that gerrymandering is "extremely rare" in the state.[4]

While New Hampshire is not the worst example of partisan gerrymandering, analyses are not consistent with the governor's claim. For example, New Hampshire Public Radio concluded in 2016, after examining 30 years of numbers, that the data showed "an undeniable gerrymander that, with few exceptions, benefits Republicans," specifically, in the New Hampshire State Senate.[5]

Even when Commissions are adopted by citizen initiatives, the majority political establishment fights back.

This summer, a group of Republicans in Michigan, where voters passed an independent redistricting commission via ballot initiative last year, sued to have the initiative declared unconstitutional.[6] The voter initiative said that party officials could not serve on the new non-partisan Commission. The Republicans argue that this discriminates against them by virtue of their party activities. This is effectively an argument that the First Amendment protects their right to gerrymander!

Another approach some state legislatures are using in the wake of 2018 is to try to weaken the ballot initiative process itself—and try to make it harder for initiatives to get on the ballot in the first place. In Michigan, in December 2018, the outgoing governor signed a bill imposing more stringent signature requirements (such as by requiring the initiatives to collect signatures from at least 7 of Michigan's 14 congressional districts). And already this year, states like Arkansas and Utah have passed legislation making it harder for ballot initiatives to get on the ballot, and many more states have introduced similar bills.

State constitutional challenges?

In Pennsylvania last year, the state Supreme Court overturned the state's mapping scheme for U.S. congressional districts, deeming it an unconstitutional partisan gerrymander under the state constitution. A special master was appointed and the maps were redrawn.

The U.S. Supreme Court's decision this summer does not impact state constitutional challenges, so we are likely to see more of these challenges in the years to come. One such case is already underway in North Carolina now—the only way for citizens there to challenge that legislature's

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[4] Press Release, State of New Hampshire Office of the Governor, Governor's Veto Message Regarding House Bill 706 (Aug. 9, 2019), https://www.governor.nh.gov/news-media/press-2019/documents/hb-706-veto-message.pdf.

[5] Dan Barrick, Rebecca Lavoie & Natasha Haverty, *As New Hampshire Shifts to a Swing State, Why Do Legislative Lines Still Favor Republicans?*, NHPR (Apr. 20, 2016), https://www.nhpr.org/post/new-hampshire-shifts-swing-state-why-do-legislative-lines-still-favor-republicans#stream/0; *see also* Peter Biello, *How Gerrymandering Skewed the 2016 Elections*, NHPR (June 27, 2017), https://www.nhpr.org/post/how-gerrymandering-skewed-2016-elections#stream/0.

[6] *See* Leah Litman, *Republicans Say the First Amendment Protects the Right to Gerrymander*, SLATE (Aug. 5, 2019), https://slate.com/news-and-politics/2019/08/michigan-partisan-gerrymander-lawsuit.html.

gerrymander, as there is no citizen initiative process in that state, and constitutional amendments must be approved by the legislature before they can be placed on the ballot. [7]

Finally, federal legislation?

Justice Roberts' opinion noted specifically that Congress *could* address this problem through legislation—just as state legislatures *could* take action through laws instituting independent redistricting commissions in their states.

We saw a model of what this could look like in Democratic leadership's reform package introduced the first new week of the new Congress, HR 1. Among many reforms in campaign finance, ethics, and voting rights, the bill would end partisan gerrymandering by requiring states to form independent redistricting commissions.

The problem is that both Houses of Congress actually have to pass this reform—and the President has to sign it into law. Senate Majority Leader Mitch McConnell has already said he will not bring the bill to the Senate floor. So that is a post-2020 question—depending on the political realities then.

Similarly, are state redistricting commissions themselves even constitutional? In an Arizona case of several years ago, the legislature challenged an initiative that had passed, and a 5-4 majority on the U.S. Supreme Court said that it was ok. Justice Kennedy was among the five in the majority, and Roberts wrote a strong dissent, raising the question of a new challenge. If this issue came before the Court again, would the Court observe stare decisis—or not?

Further, it is an unresolved question whether Congress could require states to adopt independent commissions for state legislative redistricting. There is a good argument that it could under the 14th amendment, or the federal guarantee of a "Republican form of government." But how the current U.S. Supreme Court would think about that is unclear—despite Chief Justice Roberts' language this year. A bait and switch is not unknown in the U.S. Supreme Court.

CLC and other dedicated organizations will continue fighting gerrymandering wherever we can—which poll after poll shows that the overwhelming majority of Americans want, too. Unfortunately, the Supreme Court's misguided decision this summer, in combination with the other obstacles I have discussed, mean that it will be a much more challenging fight than it should be.

[7] In September 2019, a North Carolina state court struck down the state legislative maps, finding them extreme partisan gerrymanders under the state constitution. That ruling does not cover U.S. congressional districts in North Carolina. *See* Michael Wines & Richard Fausset, *North Carolina's Legislative Maps Are Thrown Out by State Court Panel*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/us/north-carolina-gerrymander-unconstitutional.html. In the wake of the decision, the state legislative districts are now being redrawn.