



Issue Advisory: Restoring Democracy - Court Ruling Approves Independent Commissions to Counter Gerrymandering

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In 1989, NOW members at the National NOW Conference adopted a resolution calling for “direct and equal representation for women in elected office and at all levels of government.” It reminded readers at the time that only five percent of the members of Congress and 17 percent of members of state legislatures were women. The resolution resolved that the goal of equal representation for women can only be accomplished by “pursuing legal strategies which challenge reapportionment plans for gender and racial bias” and “requiring redistricting guidelines that make gender balance and increasing representation of women a priority.”

In the intervening decades, the partisan use of reapportionment and redistricting to dilute the power of certain groups of voters and to facilitate capture and long-term control of legislative bodies has only intensified. In 1990, Republicans held control of only six state legislatures. In the 25 years since, not only has the party gained incredible political control, the Republican Party has become radically right-wing and regressive in their legislative agendas.

Currently, 31 governors’ offices (an increase of eight since the 2010 elections) are held by Republicans; the GOP now has a majority in 68 out of 98 state legislative chambers, resulting in 30 state legislatures under Republican control. In 23 states now, both the entirety of the state legislature and the governorship are held by Republicans (Democrats only have that level of control in seven states). Conservative Republicans currently control both the U.S. House of Representatives (246 to 188) and the Senate (54 to 44), despite the fact that Republican voters constitute only 41 percent of the public today.

Gerrymandering Skews Representation - What do these facts have in common? They are all enabled and perpetuated by a practice called gerrymandering, or the drawing of state legislative and congressional districts lines in way that favors one political party. The result is often unrepresentative and unresponsive legislative bodies, suppression of minority views, biased law-making, and enactment of often extreme measures.

Things are likely to remain this way at least until after the 2020 Census. At least once per decade, usually soon after a census, states redraw their district lines; populations change, some states gain districts and some lose districts, and this is reflected in a process of re-apportionment. District boundaries are redrawn to ensure that each district has roughly the same number of people and that people’s votes are being counted equally. In most states, whichever party has control of the legislature during the redistricting process wields enormous power — by making sure that the lines are drawn in a way that favors their own party, they can influence elections for years to come.

Gerrymandering that empowers conservative politicians has a negative impact on the gender makeup of elected bodies. Men at state and federal levels overwhelmingly outnumber women legislators; only 24.4 percent of state legislators are women (and, of course, not all are feminists). In Congress, only 19.7 percent are women. By the way, the U.S. lags behind many nations in the proportion of women as compared to the men in elective office.

A particularly salient example of the gender imbalance caused by partisan gerrymandering (or we can call it "gendermandering") is that of Sen. Wendy Davis (D), who rose to national prominence after she filibustered the Texas State Senate for thirteen hours in the summer of 2013 to block a restrictive anti-abortion bill. She won the war but lost the battle – the bill was passed during an emergency second session (called for by then-Gov. Rick Perry, a Republican and vocal opponent of abortion rights). But a new redistricting scheme in Texas, created by the Republican majority and made possible by less stringent oversight after the Supreme Court gutted an essential provision of the Voting Rights Act in *Shelby v. Holder* [570 U.S. ____ (2013)], ensured that Wendy Davis, along with many other Democrats in Texas, would lose their seats to Republicans.

Capture of Legislatures Brings Right Wing Agenda - In the 2010 elections, conservative Republican candidates captured control of many state legislatures having campaigned on the theme of restoring a healthy economy in the wake of the 2007-2009 "Great Recession." But once in office, they dropped their focus on the economy and launched an extreme right-wing agenda — cutting taxes on upper income earners, cutting state budgets for education and other human needs programs, firing public employees, attacking unions and passing pre-emptive bills that forbid localities from adopting progressive measures like paid leave and minimum wage increases. They have also passed numerous laws to make it harder to vote: Some of these laws are being challenged in court, but in 15 states there are new restrictions that will affect the turn-out during the 2016 presidential election.

Their extreme agenda, unfortunately, included a huge swell in the number of restrictions on abortion rights. Between 2010 and 2015, legislatures in 30 states enacted 282 abortion restrictions, more than the total number enacted in the past decade combined. They also began passing scores of harsh restrictions on women's reproductive health access. Since 2010, 231 state laws that restrict a woman's right to an abortion have been adopted — most of them in Republican-controlled legislatures. And, as of October, 2015, two sweeping anti-LGBTQIA bills have been passed this year alone, in Indiana and Arkansas, with more pending in other states.

This wave of harmful legislation will not end until conservatives stop controlling the machinery of determining state legislative and Congressional districts.

Gerrymandering: A Self-Sustaining Cycle - Republican efforts at controlling the redistricting process in the states and in Congress began decades ago: in 1990 Republicans controlled only a half dozen legislatures. But a long-term and successful strategy led to capture of legislative majorities and consequent control of the redistricting process following the 2010 Census.

Combined with the Supreme Court's 2013 repeal of essential provisions of the Voting Rights Act of 1965, equitable voting practices have suffered some serious hits in recent years. In the 2012

general election, Democrats running for Congress received 1.4 million more votes than Republicans, but Republicans won the House by a 234 to 201 seat margin. This happened because when Congressional districts were redrawn following the 2010 Census, as required every ten years by the Constitution, in many states Republicans controlled key elective positions, so they redrew those lines to enhance their representation. For the 2014 Congressional elections, Republicans were able to capture even more seats, increasing their majority control to 247 seats compared to the Democrats' 188.

If congressional district lines are drawn in certain ways, it is easy to diffuse the voting power of large groups of people, and there are enormously powerful organizations dedicated to doing so. In the 2012 election, the Republican State Leadership Committee deployed a \$30 million plan to redraw congressional districts in a way that maximized the chances of their party's candidates becoming elected, and they were wildly successful.

Historically, both parties have made use of gerrymandering, but in seven of the ten states in which the party with the majority of votes did *not* win a majority of the seats, Republicans drew the district lines. Clearly this is an unequally partisan issue, and one that fundamentally undermines the core democratic concept of "one person, one vote" if some party members' votes are being contorted to carry more weight.

In a very real-world example of how gerrymandering can take away a certain group's voting power, in 2014 a panel of federal judges found Virginia's congressional map unconstitutional because it placed Black voters into just one district, which severely restricted their influence. This dilution of political power means that minority voices are being muted in elections.

Gerrymandered U.S. House Means Fewer Women - We know that gerrymandering helps to perpetuate an un-representative U.S. House of Representatives by tilting the playing field in a way that heavily favors Republican incumbents. Let's look the numbers. Of the 435 members of the House, only 84 are women. And, out of the 247 Republican members, only 22 are women, meaning that less than 1 in 10 Republican House members are women. Additionally, not one major committee in the House is led by a woman. In the Senate, only one woman chairs a major committee: Sen. Lisa Murkowski (R-Alaska) who heads the Energy and Natural Resources Committee.

The best way to prompt change towards a more representative legislature is to provide a fair and manageable path for women candidates who are members of the political party dedicated to progressive change to run for office. This path simply does not exist if districts are drawn in a way that makes it extremely difficult for a Democrat or a woman to become elected. Instead, it keeps the same regressive, out-of-touch politicians in power with little opportunity for change.

Another serious consequence of having Republican-drawn districts is that state legislatures become rigidly conservative, which makes it almost impossible to pass progressive policies that help women, whether it be for reproductive autonomy or the economic security of their families.

Voters Take Equality into Their Own Hands: The Cases for Independent Redistricting

Luckily, the tide could be turning. In late June, the U.S. Supreme Court ruled in favor of the Arizona Independent Redistricting Commission in their case against the Arizona State Legislature. They upheld the constitutionality of a non-partisan citizen groups' ability to draw congressional district boundaries after each census, taking away the power usually vested in the legislators themselves. However, as might seem obvious, when an elected official is given the ability to draw a district themselves, with all census information given to them including voter demographics such as race, partisanship, age, and gender, they are predictably going to create a district that gives them and their party the highest chance of winning.

Also in June, the Supreme Court remanded two cases from Alabama, *Alabama Democratic Conference v. Alabama* and *Alabama Legislative Black Caucus v. Alabama*, back to lower courts. Both cases challenge Alabama's 2012 Republican-led redistricting.

The redistricting plan aimed to honor the "one person, one vote" doctrine by keeping variations in population between voting districts below 1 percent and to comply with provisions in the Voting Rights Act by maintaining the percentages of minority (generally Black) voters in minority-majority districts. However, this had the adverse effect of packing many more black voters than before into minority-majority districts, thereby diluting their power in others.

The issues in these cases are whether some provisions of the Voting Rights Act — minimizing population variance between districts and ensuring at least some minority-majority districts — are unfair if they have the consequence of diluting minority voting power as a whole by cramming minority voters into just a few districts. The case is further complicated because separating racial gerrymandering from partisan gerrymandering can be difficult, as the two are often synonymous — Black voters are the most reliable Democratic voters in the state of Alabama.

These cases were remanded to the district court in Alabama for reconsideration along with a similar case from Virginia, *Wittman v. Personhuballah*, (Virginia's third district is notoriously convoluted, and Virginia suffers from similar problems). It is likely that, because of this ruling, at least some districts will be found to have been unconstitutionally gerrymandered. This is a small victory for minority voters, and perhaps states will be more restrained when it comes to gerrymandering and the Voting Rights Act, but the lack of an actual decision from the Supreme Court makes this victory a small one. (Update: On Nov. 13, the Supreme Court announced that it would review whether Virginia lawmakers packed minority voters into one congressional district at the expense of their influence elsewhere. Virginia is 20 percent African American, yet they account for only 12 percent of state legislators and just one Congressman out of 11 from Virginia.)

Citizens Can Redraw Districts Maps - Gerrymandering is an arguably unavoidable consequence of legislator-drawn districts, something the Arizona Independent Redistricting Commission was created to avoid. A non-partisan body of citizens redrawing the lines to meet the criteria of

equal population, equal racial representation, and various other state-by-state requirements represents an exciting step into a future of elections that will not unfairly, undemocratically, and disproportionately favor older, incumbent Republican candidates.

Until this recent decision, there had been some ambiguity as to who is constitutionally allowed to draw congressional districts. The Elections Clause of the Constitution states that,

"The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof..."

The plaintiffs in the Arizona case argued that by stating that only the "legislature" can choose the times, places, and manner of elections, only legislators themselves can draw the district lines. However, the Court disagreed. In writing the majority opinion, Justice Ruth Bader Ginsburg argued that it,

"would be perverse to interpret the term 'Legislature' in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in".

This essentially reasserts the notion that in a democracy, voters themselves have lawmaking power, and the right to free and fair elections in which representatives don't get to pick who votes for them, which feels a whole lot like common sense. The majority opinion is groundbreaking because it provides a stronghold against partisan gerrymandering by guaranteeing states the freedom to draw district lines using an independent commission. Although this may seem like a minor political change, its effects may be fundamental in bringing about a much-needed and profound reform.

More States Adopt Independent Commissions - Other states have enacted independent commissions to lessen the chances of gerrymandering. Prior to 2010, Florida's electoral districts had been gerrymandered in a way that heavily disadvantaged minority communities. These actions had been held as constitutional by Florida courts, who determined that gerrymandering was just a "partisan strategy" rather than blatant racial disenfranchisement. In response, a group of Florida citizens drafted a ballot proposal (validated by 375,170 voter signatures) to change Florida's state constitution in a way that enables an independent commission to draw district lines. The bill passed in 2011 and the Supreme Court's recent decision has affirmed its legitimacy in Florida.

This November voters in Ohio overwhelmingly approved a ballot measure for a constitutional amendment to create a bipartisan redistricting commission to draw legislative districts starting in 2021. The win came after three decades of efforts in Ohio to address what some regarded as one the most gerrymandered states. The new commission will reduce the ability of one political party to dominate the commission and will also allow the election of everyday citizens. A tough new set of rules will govern the process to maximize demographic and geographic diversity. The amendment does not relate to congressional re-districting, but several state legislators have proposed a plan to expand the commission's authority to include congressional re-districting.

Another success story comes from California. In the 2012 congressional election, Democrats received 62 percent of the House vote and elected 38 democrats and 15 republicans, which exactly matched the average mock, computer-drawn Congressional delegation created through a computer algorithm which constructs districts strictly based on geography and census data. Additionally, studies have found that after the districts were redrawn by an independent commission, competition for seats increased from five to eighteen percent and increased Latino representation.

So let's celebrate the Supreme Court decision in the Arizona case, but also recognize that this is merely a springboard from which to mend an undemocratic practice that acts to maintain the cycle of inequality and restrict the passage of progressive legislation. It's time for NOW activists to consider pushing for independent commissions in all 50 states, ensuring that our representatives and senators are elected fairly to create a diverse legislature that will properly advocate for and serve its people.

Supreme Court Will Consider Two Related Cases - The future of gerrymandering may be in peril as two upcoming Supreme Court cases may drastically impact legislators' ability to craft district lines.

The first, *Shapiro v. McManus*, comes out of Maryland, widely regarded as having some of the worst, most partisan gerrymandering in the country. When the plaintiff, Mr. Shapiro, a former federal worker from Bethesda, brought forward a case claiming partisan gerrymandering was a form of discrimination, his case was dismissed (only to be appealed, of course). The case is ostensibly about whether a single judge may dismiss a redistricting lawsuit rather than referring it to a panel of three judges (whether redistricting cases, which are often political, perhaps should be heard by a panel rather than a lone judge). If the Court were to rule in Shapiro's favor, redistricting suits would therefore move through the judicial system faster and make it easier for voters who feel that their voting rights have been violated to receive accessible, timely adjudication.

If the Court were to issue a broader ruling on the case — deciding not just how redistricting cases must be handled but also the outcome of the case itself — it could mean limitations on redistricting on purely *partisan* grounds. In fact, his case was based on a first amendment claim, rather than the Equal Protection Clause of the fourteenth amendment, the standard for similar claims.

Regardless of whether the Supreme Court issues a ruling on Shapiro's original claim, we may still see some progress for voting rights claims in general. Oral arguments for this case were heard on November 4th, 2015.

Who Has Right to Equal Representation? - Perhaps the most anticipated case before the Supreme Court this term will be *Evenwel v. Abbott*. The case hinges on whether the three-judge district court correctly held that the "one-person, one-vote" principle under the Equal

Protection Clause allows States to use total population, and does not require states to use voter population, when apportioning state legislative districts.

The appellants in this case come from districts that have significantly more registered voters than in some neighboring districts — they argue that the Texas State Legislature's redistricting plan, which considers only a given area's total population rather than its population of eligible voters, is unconstitutional as it violates their right to have their votes count equally with those of voters in other districts.

But if the Court rules in favor of the appellants, it would have a disastrous effect on the voting representation of minority communities, especially in states like Texas which may have large Hispanic communities where a relatively small proportion of the population are eligible voters. The Court will therefore need to consider what is more important, the rights of *voters* or the rights of *those who are affected by legislation* — that is, everyone. In this case, even in a community where a relatively smaller proportion of the population are eligible voters, and those voters' ballots perhaps count more relative to their communities versus other districts, they are still, in effect, representing the needs of their communities. Diluting their power, and the voices of their communities, does a disservice to justice.

So let's hope the Court rules in favor of voting rights, the backbone of this nation, rather than cement partisan control of the voting process.

Take Action

Many of these issues will be decided in the courts, but that doesn't mean that there is no room for action. If you live in a state where the redistricting process is controlled by the state legislature, you may want to promote an independent commission in your state. Some states may not have been victim to gerrymandering, so it is a good idea to first establish whether that is true for your state. Understandably, majority political parties may be loath to cede their control of the redistricting process. States that have moved to independent redistricting have usually done so by public referendum, or a ballot measure. Find out how to get a measure on the ballot in your state and work to make independent redistricting a measure in the next election. The odds are in your favor – voters have overwhelmingly voted in favor of independent redistricting in states where it has passed.

Resources

How GOP Gerrymanders Away Democracy,
<https://consortiumnews.com/2014/01/10/how-gop-gerrymanders-away-democracy/>

Redistricting,
<http://www.brennancenter.org/issues/redistricting>

Redistricting for Advocates,
<http://www.brennancenter.org/analysis/redistricting-advocates>

Redistricting Laws Roundup 2015,
<https://www.brennancenter.org/redistricting-laws-roundup-2015>

The Supreme Court and the Freedom to Gerrymander,
<https://www.brennancenter.org/blog/supreme-court-and-freedom-gerrymander>

A Stealth Attack on Voting Rights Is Brewing,
<http://www.brennancenter.org/analysis/stealth-attack-voting-rights-brewing>

In 2016, Integrity of Our Democracy At Stake,
<http://www.brennancenter.org/blog/2016-integrity-our-democracy-stake>

Arizona State Legislature v. Arizona Independent Redistricting Commission (Amicus Brief),
<http://www.brennancenter.org/legal-work/arizona-state-legislature-v-arizona-independent-redistricting-commission>

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<http://www.brennancenter.org/legal-work/evenwel-v-abbott>

National Conference of State Legislatures – State and Legislative Partisan Composition,
<http://www.ncsl.org/>

United States House of Representatives elections, 2012,
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https://en.wikipedia.org/wiki/United_States_House_of_Representatives_elections,_2014

Republican Push to Promote Women Stumbles as White Guys Sweep Committee Chairs
http://www.huffingtonpost.com/2014/11/19/women-in-congress_n_6186080.html

Women in the U.S. Congress 2015,
<http://www.cawp.rutgers.edu/women-us-congress-2015>