

Common Cause v. Lewis: Partisan Gerrymandering Claim Held a Justiciable Controversy under North Carolina Constitution

By Breonna A. Grant and Benjamin E. Griffith

Justice delayed is justice denied for the people of North Carolina who have yet to vote in an election with constitutional maps since the 2010 census was completed. —Karen Hobert Flynn, Common Cause President

Partisan gerrymandering is the intentional manipulation of district boundaries to discriminate against a group of voters on the basis of their political views. In this sense, it is the act of creating restrictive barriers that negatively affect a district's voting agency. The divisive nature of partisan gerrymandering strategically segments electoral districts to favor the specific political interest of a particular party, and it can thus be used to effectively dilute the voting strength of an opposing party. Such practices, often accompanied by packing and cracking of districts, can and do result in electoral districts that resemble winding snakes rather than compact political subdivisions. Ultimately, these splice-and-dice divisions can adulterate minority party voting strength while undermining democracy.

While many still believe that partisan gerrymandering is a political fabrication or perhaps “fake news,” the very act of unfairly apportioning districts in ways that decimate one party's voting strength while enhancing that of another party is an issue that has been battled over in the federal courts for over three decades. Recently, Pennsylvania relied upon its state constitution to find a manageable and legally workable standard for grappling with and arriving at a practical and principled means of adjudicating partisan gerrymandering claims. *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, 178 A. 3d 737 (Pa. Jan. 22, 2018).



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In 2018, the U.S. Supreme Court in *Benisek v. Lamone*, No. 18-726 (June 27, 2019) and *Rucho v. Common Cause*, 588 U.S. ___, No. 18-422 (June 27, 2019), available at https://www.supremecourt.gov/opinions/18pdf/18-422_9ol1.pdf, held that “partisan gerrymandering is a political issue outside the purview of federal court.” Dissenting Justices Sotomayor and Kagan expressed the view that it was irresponsible of the Supreme Court to be so passive in the face of a clear injustice:

In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply. *Id.* Slip op. at 2515.

The dissenting Justices took the majority to task for abandoning its responsibility to address issues of a clear violation of the civil rights of voters who had been effectively marginalized. Justice Kagan's dissent was a thundering rejection of judicial abdication:

The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have, because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). That is what the courts below did. Their decisions are worth a read. *Id.* Slip op. at 2524–2525.

Although Justices Sotomayor and Kagan believed the Supreme Court should have directly addressed these issues, the majority held such claims nonjusticiable in the federal courts. *Benisek* and *Rucho* left room, however, for state courts to enforce state constitutions with respect to partisan gerrymandering claims. First in Pennsylvania and now in North Carolina, the courts have embraced the challenge and recognized the viability of partisan gerrymandering claims under their respective state constitutions. Our focus here will be on the most recent challenge that was adjudicated in a North Carolina state court

on September 3, 2019. *Common Cause v. Lewis*, General Court of Justice, Superior Court Division, 18 CVS 014001, State of North Carolina, Wake County (Sept. 3, 2019).

In *Common Cause v. Lewis*, Common Cause brought suit against the Chairman of the House Select Committee on Redistricting, David Lewis, setting the stage for a partisan gerrymandering claim arising under the North Carolina Constitution. Common Cause claimed that (1) the Republicans drew the 2017 House and Senate redistricting plans to maximize their political power, (2) the 2017 plans were designed intentionally to maximize Republican partisan advantage on a statewide basis, (3) the 2017 plans were drawn to garner Republican partisan advantage within specific country grouping, (4) the plans protected the Republican majorities in the 2018 elections, (5) the 2017 plans harmed the organizational and individual plaintiffs, and (6) the 2017 plans violated the North Carolina Constitution, specifically its Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses.

The North Carolina Constitution states that there are “four requirements for state legislative districts: roughly equal population, contiguous, counties not divided, and only drawn once every ten years.” With this starting point, the trial court used the North Carolina Constitution’s own language to decide if Democratic voters represented by Common Cause had been harshly affected by partisan gerrymandering. Concluding that Common Cause had indeed been adversely affected by partisan gerrymandering, the trial court found that the Republican party had divided counties in ways that made no systematic sense. While the Republicans claimed that they merely used the 2010 census to construct their maps, the trial court disagreed, finding that the voters aligned with the Democratic Party had indeed been slighted by unfair maps. The maps reflected districts that were not contiguous and failed to equally divide the population, thereby creating a large advantage for the Republican party and its voters.

While many aligned with the Republican Party claimed that the partisan gerrymandering claims asserted by Common Cause were without merit, they went further and accused the Democratic Party of trying to stretch clauses of the North Carolina Constitution beyond anything established by precedent. But the maps do not lie. The lack of impartiality that was manifest from the maps themselves was a significant factor that led the North Carolina court to rule in favor of Common Cause on the basis of unfairness and unconstitutionality. If the maps were to be left as they were created in 2017, the Democratic vote would suffer from severe dilution and atrophy, ultimately rendering those votes useless.

While the Republican Party argued that the North Carolina Constitution had no provision that directly addressed the issue of partisan gerrymandering, the trial court read in a provision of fairness when assessing whether a district has suffered from this type of partisan manipulation. The trial court ultimately held that such practices and the 2017 plan that emanated from them were unconstitutional and that the 2017 plan could not be used for the next election.

Following the trial court’s September 3, 2019, decision and throughout October 2019, the North Carolina Republican party and Common Cause worked jointly in an effort to redraw the Senate and House redistricting maps as directed by the trial court. To many this has taken on the appearance of a championship fight for democracy and justice; however, sadly, a speedy resolution may not be forthcoming. Republican and Democrats have debated through a series of messy quarrels over what the correct remedial map will look like.

The Republicans produced a draft of a map two weeks after the September 3 ruling that Common Cause immediately rejected as a racially gerrymandered map, just slightly adapted. Common Cause submitted a remedial map that was produced in conjunction with data provided by a renowned mapping expert, Dr. Jowei Chen, following which the Republican Party scrapped the map, questioned Dr. Chen’s third-party involvement and characterized Chen as an unnecessary third party.

The fight to find the right map has just begun and will provide a long, hard, tiresome battle over the next several months. Delays notwithstanding, *Common Cause v. Lewis* sheds light on the serious, and up to now problematic, issue of partisan gerrymandering. More importantly, this case begins to answer the question of how do we as a nation effectively address the issue of gerrymandering and restore the efficacy of our democracy? While this is no easy question to answer, we recall the Pennsylvania Supreme Court’s reminder that “[i]t is a core principle of our republican form of government that ‘the voters should choose their representatives, not the other way around.’” *Id.* at 739–41. Similar to the Pennsylvania Supreme Court’s decision in *League of Women Voters v. Commonwealth of Pennsylvania* in its reliance on the Pennsylvania state constitution to find a manageable and enforceable standard for adjudicating partisan gerrymandering claims, the North Carolina state court’s September 3, 2019, decision demonstrates the hard but achievable process that is required for one to tackle these types of issues. *Common Cause v. Lewis* gives us hope that there are still responsive and noble state legislatures, representing states with constitutions that can provide principled support for well-pleaded and factually supported partisan gerrymandering claims and that the trial court judges when confronted with an affront to democracy can and will do their part to assess, attack, and address gerrymandering practices that undermine our faith in democracy.

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