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Partisan Gerrymandering and the Failure of Rucho v Common Cause

Introduction

Partisan gerrymandering is the process of drawing congressional district lines in such a manner as to favor the election of more candidates from the preferred party. The term gerrymander originates from a Massachusetts districting plan for the state senate that resembled a salamander. Elbridge Gerry was the governor of Massachusetts at the time and was criticized for his role in creating it and thus the term "gerrymander" was created by combining his first name with "salamander" (*Arizona State Legislature v. Arizona. Independent Redistricting Commission*). As Chief Justice Roberts noted, "the practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution." (*Rucho v. Common Cause* 8) By "cracking" and "packing" certain voters into certain district, legislatures can engineer elections that result in the apportionment of a highly disproportionate number of seats for their preferred candidates (*Vieth v. Jubilerer*). Cracking refers to the spreading of a group of party members into several districts as a means of diluting their voting power in any one district. Packing occurs when a large number of party supporters are placed in one district, thus ensuring that a large number of those votes are wasted and not applied to other, more competitive districts. Both methods are popular forms of partisan gerrymandering and are used to the benefit of both the Republican and Democratic party in numerous states.

There has been a long judicial history over the justiciability of partisan gerrymandering, meaning the courts have grappled with the validity of appealing to the judicial system for relief.

Recently however, the Supreme Court declared the issue non-justiciable in *Rucho v. Common Cause*. By a 5-4 party-line vote, the Court absolved itself of the responsibility of adjudicating on partisan gerrymandering. Chief Justice Roberts delivered the majority opinion, stating that the issue is a political question and therefore better suited for the legislature to handle. The crux of the majority's argument hinged on a lack of legal standard in the Constitution to determine how partisanship is too much in drawing district lines. The Court maintained that racial gerrymandering and other issues involving redistricting are still within its purview, but explicitly ruled out claims of partisan gerrymandering.

The majority in *Rucho* erred in declaring partisan gerrymandering non-justiciable because there is, in fact, a judicially discoverable and manageable standard supported by the First Amendment. Partisan symmetry provides a framework by which to measure partisan bias in a given state districting plan. Just as the Court has done in a number of legal areas, it could create a threshold for a prima facie violation based on deviation from partisan symmetry. The Court also erred in declaring partisan gerrymandering constitutional, ignoring Sections 2 and 4 of Article 1 of the Constitution, the First Amendment, and the Equal Protection Clause. By failing to remedy the constitutional violation of egregious partisan gerrymandering, the Court failed to protect our representative democracy.

Rucho **Background and Decision**

In February of 2016, a district court struck down two congressional districts in North Carolina on the grounds that they were racially gerrymandered. The General Assembly reassessed the plan and returned with one based on both neutral and partisan criteria (Wynn 2021). The goal of the plan was explicitly stated by redistricting committee chair Representative

David Lewis, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country" (*Rucho* 2). The map worked exactly as North Carolina Republicans had hoped in the November 2016 elections, securing 10 of the 13 seats despite Republicans winning only 53% of the total vote statewide (Wynn). A similar story unfolded two years later when 9 of 12 seats went to Republicans even though they only won 50% of the vote. Before the election in August of 2016, Common Cause, a progressive nonprofit organization, the League of Women Voters of North Carolina, and a group of individual voters filed suits against state Senator Robert Rucho and Representative David Lewis. Complaints were filed under sections 2 and 4 of Article 1, the First Amendment, and the Equal Protection Clause (*Rucho* 3). A similar case in Maryland, *Benisek v. Lamone,* in which Republican groups complained of Democratic state legislators unfairly drawing districts, was consolidated into *Rucho* when it eventually reached the Supreme Court. The electoral results in Maryland were similar, though they favored Democrats instead of Republicans. Democrats secured 7 of 8 seats despite only gathering 65% of the vote.

Chief Justice John Roberts wrote the majority opinion. He began by declaring that the Framers did not intend for the courts to be involved and created the Elections Clause to prevent such overreach. The Elections Clause defers to states the discretion to decide "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations (*Rucho* 2*).* In Roberts' view, the power to decide specifics related to Congressional elections is firmly vested in the legislative sector.

Roberts continued, stressing that the issue of partisan gerrymandering presented political questions and the Court could not intervene because of the "lack of judicially

discoverable and manageable standards for resolving them" (*Baker v. Carr*). Moreover, partisan gerrymandering is especially tricky because the Court has previously held that "a jurisdiction may engage in constitutional political gerrymandering" (*Hunt v. Cromartie*). Thus, the primary issue at stake is when gerrymandering has exceeded an acceptable degree. Again, Roberts stressed that deciding a "fair" amount of partisan gerrymandering presents a number of unanswerable political questions that are beyond the jurisdiction of the Court. "Fairness" could mean ensuring a number of safe seats for a party to guarantee a certain degree of representation or to ensure a certain number of competitive districts. Both assurances could, and likely would, require cracking and packing to achieve. There is an inherent political component in such deliberations of fairness and thus the Court is not the appropriate body to address the matter.

Justice Roberts then rebuked the appellants' insistence that the Elections Clause is applicable in this context. The Elections Clause states that state legislatures shall prescribe the "Times, Places, and Manner of holding elections for Senators and Representatives" (U.S. Const. art. I, § 4). Roberts claimed that the Elections Clause does not provide a "judicially enforceable limit on the political considerations that the States and Congress may take into account when districting" (*Rucho* 9).

He then described the role of the courts in adjudicating redistricting cases as being limited to one-person one-vote and racial gerrymandering cases. Racial gerrymandering cases exact strict scrutiny where partisan gerrymandering cases do not. Moreover, racial gerrymandering claims do not "ask for a fair share of political power and influence" as partisan claims do (21). Racial claims ask for the elimination of a racial classification, but it is impossible

to eliminate partisanship from the districting process because of its aforementioned permissibility.

Roberts also took issue with basing judicial decisions on predictions about the elections. He stated that predicting elections is not a simple task and "asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise" (24). Because of a variety of factors, including the "quality of candidates, the tone of candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout," predicting elections is too difficult a task for Roberts and attempting to do so would be an overextension of the Court's reach (24).

Critique of Majority Opinion

Before attacking the substantive claims of the majority opinion, it is important to note the numerous ways in which Roberts departed from conventional court standards. First and foremost, Roberts mischaracterized the opposing parties' arguments. Judge Andrew James Wynn, who ruled on *Rucho* in the Fourth Circuit Court of Appeals, describes the fair characterization of the opponents' arguments as a "well-established decisional tool" (Wynn 2021). Roberts insisted that the plaintiffs' claims "sound[ed] in a desire for proportional representation" (*Rucho* 16). He further asserted that the plaintiffs asked judges to "take the extraordinary step of reallocating power and influence between political parties" (22). However, the plaintiffs never asked for any such thing. In oral arguments, the plaintiffs conceded "the natural geography of the state doesn't lend itself to proportional representation" and that their evidentiary maps "do not in any way measure deviations from

proportional representation" (Wynn 2021). By mischaracterizing their arguments, Roberts was able to avoid directly addressing the true substance of the plaintiffs' claims.

The Court disregarded another "well-established decisional tool" under Federal Rule of Civil Procedure 52(a)(6) that states that an appellate court "must accept a District Court's findings of fact unless clearly erroneous" (Wynn). The District Court stipulated that the partisan symmetry defense and the maps created under expert analyses were not based on a desire for proportional representation. The majority ignored these findings, seemingly rejecting them, but failed to make an assertion that they were erroneous. Additionally, Roberts' assertion that the Court cannot predict future elections shows that the findings of the District Court were either ignored or disregarded. Expert witnesses showed that in the specific context of this case, past election data was a reliable metric for predicting future electoral outcomes. Moreover, their predictions came true to a high degree of certainty, showing that predicting electoral outcomes was not the onerous task Roberts suggested. However, the majority ignored the findings of the District Court as it presented inconvenient and contradictory evidence.

Also missing from the majority opinion were several cases of relevant precedent brought forward by the plaintiffs. The plaintiffs referenced *Cook v. Gralike* to support their claim that the Elections Clause only allows states to implement "neutral provisions" in elections and *US Term Limits v. Thornton* to show that the Elections Clause does not allow states to "dictate electoral outcomes" (Wynn 2021). There are no references to either case in the majority opinion, suggesting an unwillingness to engage in the substance of the plaintiffs' arguments. Judge Wynn errs, however, in asserting that the Court fails to engage the argument under Article 1 Section 2. While the rebuttal is brief, Roberts does point to *Vieth* to show that

Article 1 Section 2 does not provide "a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting" (37).

Unconstitutionality of Partisan Gerrymandering

Article 1 Section 2 of the Constitution states that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Instead of the Members of the House being "chosen every second year by the people," partisan gerrymandering allows state-legislatures to "cherry-pick voters to ensure their reelection" (*Rucho* 8). Despite what Justice Roberts may think of the difficulty of predicting elections, state legislatures have reduced electoral outcomes to a precise science. The effectiveness of partisan gerrymandering speaks for itself, especially in the context of North Carolina and Maryland. Both states were able to turn slight popular majorities into overwhelming seat majorities. Legislatures have become incredibly adept at engineering their desired electoral outcomes.

The Court has long recognized the idea "that the voters should choose their representatives, not the other way around" as a "core principle of republican government" (*Arizona State Legislature* v. *Arizona Independent Redistricting* 35*).* Partisan gerrymandering ensures the opposite, that legislators choose their representatives. Thus, Article 1 Section 2 implies that that partisan gerrymandering in any capacity can be unconstitutional as it constitutes an attempt by legislators to choose their voters.

The Elections Clause also provides a sufficient rationale to declare partisan gerrymandering unconstitutional. The *Thornton* Court held that "the Elections Clause does not serve 'as a source of power [for States] to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints'" (*Thornton* 833-834).

Partisan gerrymandering has the power to dictate electoral outcomes, as shown in Maryland and North Carolina, to a high degree of accuracy and reliability. It also favors voters based on their geographic location, giving them more of a say in influencing the composition of Congress. *Cook v. Gralike* held that the Elections Clause only allows state legislatures to implement "procedural regulations" (523). Moreover, *Cook* allowed for only "neutral provisions as to the time, place, and manner of elections" (527)

If interpreted literally, the language in *Cook* and *Term Limits* prescribe an unambiguous course of action in response to partisan gerrymandering. Procedural regulations concern decisions related to polling locations, voting times, ballot registration forms and other laws that don't directly impact electoral outcomes. However, Jamal Greene's assessment of the history of the Elections Clause disregards the more dramatic implications of "procedural regulations." He finds that the Framers intended that "congressional oversight of electoral regulations would lead, through institutional checks and balances, to federal elections conducted in the spirit of republican government" (Greene 1026). Ensuring a republican form of government, as written in the Guarantee Clause, would surely involve more than simple procedural regulations.

Greene's view closely corresponds with Roberts' view in *Rucho* that an assertion based on Section 2 or 4 of Article 1 "is an objection more likely grounded in the Guarantee Clause," (30) which the Court has previously concluded "does not provide the basis for a justiciable claim" (*Baker v. Carr, Pacific States Telephone & Telegraph Co.* v. *Oregon).* There is a legitimate basis for the vesting Congress with the authority to ensure a Republican form of government. However, when Congress fails to uphold this duty, Greene argues that the Court is within its jurisdiction to issue a writ of mandamus to Congress to encourage action. Greene advocates for

such a measure because he views elections as distinct from other political questions. The manipulation of elections "threatens to eviscerate the democratic check itself, providing the people with no means of redress," which is "the epitome of non-republican government" (Greene 1053).

Equal protection is a weaker defense against partisan gerrymandering because, unlike in racial gerrymandering, the victims are members of a political party and are thus not a "discrete and insular minority" (*Carolene Products*). However, the *Davis* court unequivocally stated that the fact that an equal protection claim is submitted by a political group, rather than a racial group, "does not distinguish it in terms of justiciability" (124). Justiciability, of course, does not imply unconstitutionality. However, *Davis* shows that the Court cannot simply dismiss equal protection claims simply because that claim is levied by a political party.

Roberts' claim that political parties are not entitled to equal voting weight is based on an understanding of political party members as merely a social group. Justice Scalia supported this view, stating that party members are akin to social groups like "farmers or urban dwellers, Christian fundamentalists or Jews" (*Vieth* 18). However, political parties are fundamentally different than other social groups because Congress is not organized based on affiliation with any of these aforementioned groups. Congress is organized by party and a number of significant consequences follow from that structure. The controlling party chooses the speaker of the House as well as heads of committees that can decide which legislation is worthy of review. Most importantly, the legislative output of Congress is certainly a function of the controlling party. Thus, a voter is denied equal protection under the law if he is less able to influence the partisan composition of Congress than another voter of a different party.

Legal Precedent of the Justiciability of Partisan Gerrymandering

The justiciability of state laws regulating congressional elections has long been established. *Baker v. Carr* supported the justiciability of cases that involve the drawing of congressional districts based on precedents set in *Smiley v. Holm*, *Koenig v. Flynn*, and *Carroll v. Becker* (Bondurant 2021). *Baker* held that political question doctrine created in *Colegrove v. Green* does not bar federal courts from intervening in state election laws because "the validity of state election laws under the Constitution is no different than the validity of any state laws in any other cases" (Bondurant). Professor Michael Gerhardt goes even further, defining *Baker* as a "super precedent," meaning that the "correctness [of the Court's decision] is no longer a viable issue for courts to decide" (Gerhardt 1206). Gerhardt reasons that *Baker* rises to the threshold of "super precedent" because it "not only set forth the enduring test for determining nonjusticiable political questions but also recognized the justiciability of constitutional challenges to gerrymandering (1212). *Baker* established a framework for determining political questions while also firmly establishing the justiciability of gerrymandering.

The court affirmed the justiciability of partisan gerrymandering two year after *Baker* in *Wesberry v. Sanders. Wesberry* ensured equal representation by requiring districts to be the same size. Reiterating the core sentiment in *Baker,* the majority ruled that the constitutionality of laws apportioning congressional districts is not a political question. Justice Hugo Black wrote in the majority opinion that it would "defeat the principle solemnly embodied in the Great Compromise -- equal representation in the House for equal numbers of people -- for us to hold that … legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others" (*Wesberry* 376).

The Court again affirmed the necessity of equal district sizes in *Reynolds v. Sims*, securing the principle of one-person one-vote. The *Reynolds* Court found that the Constitution forbids "sophisticated as well as simple-minded modes of discrimination" and that "weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable" (377). The "sophisticated" types of discrimination described in *Reynolds* and the differential weighing of votes "by any method or means" provides a broad category by which partisan gerrymandering claims can be heard. The *Rucho* majority may disagree as to the validity of vote dilution, but *Carr*, *Wesberry*, and *Reynolds* all affirm that the "constitutionality of state laws that divide the people of a state into districts is … quintessentially a judicial question" (Bondurant 1062).

The aforementioned cases are examples of one-person one-vote cases and concern the size of congressional districts. Roberts disputed the relevance of these cases as they relate to partisan gerrymandering: "This Court's one-person, one-vote cases recognize that each person is entitled to an equal say in the election of representatives. It hardly follows from that principle that a person is entitled to have his political party achieve representation commensurate to its share of statewide support" (*Rucho* 16). Roberts' understanding of the plaintiffs' claims are erroneous when one considers partisan symmetry as a measure of egregious partisan gerrymandering. Partisan symmetry does not require "representation commensurate to its share of statewide support" but rather equality with regard to the rules of the game. An electoral rule that makes it harder for one party to secure representation is inherently unfair.

The more recent cases of *Davis v. Bandemer* and *Vieth v. Jubilerer* also upheld the justiciability of partisan gerrymandering. Justice Powell, a conservative justice, stated in *Davis*

that it would be a mistake for the Court to "avoid their responsibility to enforce the Equal Protection Clause by finding that a claim of gerrymandering is nonjusticiable" just because it may be "difficult to develop and apply standards that will identify the unconstitutional gerrymander" (109). Five of nine justices in *Vieth* agreed that partisan gerrymandering was justiciable but could not agree upon a standard to apply. It is important to note that the only reason the Court rejected both plaintiffs' claims in *Vieth* and *Davis* is because they were rooted in an underlying desire for proportional representation. Thus, any standard for measuring partisan gerrymandering must avoid any appearance of measuring proportional representation. Justice Kennedy was the saving vote in *Vieth* that decided to leave the issue open in the even that a standard should emerge in the future. As it so happens, a measure does exist that the courts could use to create a manageable standard. Partisan symmetry is a component of a workable standard that is "clear, manageable, and politically neutral" (*Vieth* 308) and does not advocate for proportional representation.

A Discernible and Manageable Standard Based on the First Amendment

It is first important to define partisan symmetry as a potential judicial tool. The concept was first introduced in *LULAC v. Perry* as a component of a measure of unconstitutional partisan gerrymandering. Bernard Grofman and Gary King, creators of the standard, filed an Amicus Brief to have the test included in at least a part of the Court's approach. While *LULAC* did not resolve the issue of partisan gerrymandering, a majority of Justices lent some level of endorsement to the plan. Justice Stevens and Breyer commended it as a "helpful (though certainly not talismanic) tool," cautioning that it not be used in isolation to measure unconstitutional partisanship (*LULAC* Footnote 10). Justice Stevens advocated for partisan

symmetry to be one of eight criteria he would use to judge effects-based violations of Equal Protection. Partisan symmetry is a promising metric because, unlike competing ideas, it is accommodating of unique factors in each state that lead to discrepancies in the allocation of seats. It does not insist on proportional representation, as Justice Roberts might assume, but rather focuses on all voters receiving equal treatment under the law regardless of their political party.

The basic principle of partisan symmetry is that one party should be able to translate its votes into seats as efficiently and effectively as the opposing party. Partisan symmetry does not prescribe that a certain percentage of votes translate into a certain percentage of seats, but that the relationship between the two be the same for both parties. For instance, if one party garners 55% of the vote and receives all of the seats available, the opposing party must also receive all the seats if they are able to acquire 55% of the vote.

Partisan symmetry can be a component of a discernible standard under the First Amendment. Kennedy's judgment in *Vieth* states that there is a clear interest in the First Amendment of "not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views" (9). When a state engages in a partisan gerrymander, it burdens and penalizes citizens based on their association with a political party by diluting their vote. Partisan symmetry shows that citizens of one party are burdened by a partisan gerrymander because it is more difficutl for members of that party to translate votes into seats. As was the case in North Carolina, members of the Democratic Party found it more difficult to fundraise and mobilize voters due to the rigged system. Justice Roberts' contended that it was difficult to

determine “how much of a decline in voter engagement [was] enough to constitute a First Amendment burden” *(Rucho* 27). The District Court, however, had no difficulty in ruling that the greater ease that the Republican Party had in translating votes to seats was enough to dictate that their relative speech had been enhanced compared to the Democrats.

Buckley v. Valeo stated that election regulations that “restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” (49). The voice of Democrats in Maryland and Republicans in North Carolina has been enhanced relative to each opposing party based on their relative ease of translating votes into representation. Partisan symmetry does not ask for proportional representation but instead requires that parties receive equal seat outcomes for equal support. This principle is not grounded in a group-rights philosophy that the *Rucho* majority rejected but rather the idea that no individual should receive an electoral advantage based on partisan affiliation.

As a judicial tool, partisan symmetry should be included in a multi-step criteria for deducing when partisan gerrymandering has exceeded constitutionality. Bernard Grofman recommends that partisan symmetry be a component of a plan that provides the court with a threshold for determining a prima facie constitutional violation. This recommendation is further supported by Justices Souter, Breyer, and Ginsburg in *LULAC*. Creating a prima facie standard allows the burden to be shifted to the defendant after a violation has been discovered. *Brown v. Thomson*, which pertained to district sizes, advanced a four-part test in which, after a deviation of 10% between the size of districts was found, the burden shifted to the state to justify the deviation based on compelling state interests (*Brown*). Grofman explains a number of proposals based on the Court’s adjudication in racial vote dilution and one-person one-vote

cases that could form a manageable standard for determining too much partisan bias. Among the proposals is one based on the Court's jurisprudence in Section 2 of the Voting Rights Act, which designated a prima facie violation when a disfavored party lost out on at least one seat as a result of racial gerrymandering (*Thornburg v. Gingles*). The same principle could be applied to partisan gerrymandering. If plaintiffs could show that they lost out on at least one seat as a result of partisan gerrymandering, that would trigger a prima facie violation that would require a reassessment of the State's compelling interests. Most importantly, it is the role of the courts to establish a measure of unconstitutional partisan dominance. In *LULAC,* Justice Stevens rebutted Kennedy's complaint that Grofman and King failed to provide guidance as to how much partisanship was permissible: "I believe it is the role of this Court, not social scientists, to determine how much partisan dominance is too much" (Footnote 9). Grofman has merely provided a tool that can be used to create a clear and politically neutral standard.

Once a violation has been established, then the state would be required to show why the plan furthers a compelling and legitimate state interest. The burden would thus be shifted to the state to defend its new plan. In this instance, the approach described in Justice Kagan's dissent would be most useful. Justice Kagan explains that modern technology developed by researchers at Duke University allows mapmakers to generate thousands of maps based on every traditional state districting criteria except partisan considerations. The thousands of maps produce a continuum representing "the most favorable to Republicans on one end, the most favorable to Democrats on the other" (3). Creating this continuum allows us to see how far a state has deviated from the "median" of this continuum. The median map would essentially serve as a baseline against which to compare a state's districting map. The map in North

Carolina featured more bias than all 3000, meaning that all 3000 maps would have produced an additional seat for Democrats. As Kagan suggests, we can at least start here as a measure of too much partisanship in gerrymandering. If a state can show that its map falls within this enormous range of partisan bias after a prima facia violation of partisan symmetry, that indicates some level of commitment to neutral state districting criteria and thus state interests.

Partisan symmetry is compatible with Kagan's approach because it does not require proportionality and respects differences in state political geography. States can have partisan symmetry that apportion a highly disproportionate amount of seats. A state's traditional and neutral districting criteria can and does sometimes result in districts that are naturally cracked or packed. As Kagan notes, Massachusetts' political geography is such that Republicans never receive any seats because they are relatively evenly spread across the state whereas Maryland's Republicans are more clumped together. In a multi-step test, the Court could dictate that states would have to justify significant deviations from partisan symmetry by "pointing to a legitimate interest such as compactness, respecting municipal boundaries, minority rights, or respecting communities of interest that result in natural gerrymandering (Grofman, 21).

The majority's assertion that using a state's own criteria as a baseline "does not make sense' because such criteria "will vary from state to state and year to year" is disingenuous considering that it has no problem allowing state legislatures full autonomy to draw their own districts *(Rucho* 27). Moreover, using a state's criteria ensures that a standard of judging partisan bias isn't based on a "judge-made conception of electoral fairness" (*Rucho* 15).

Intent

Intent is a difficult and onerous component of adjudication. The Court has found it difficult and nearly impossible to establish intent when a facially neutral action leads to discriminatory effects (*Arlington Heights v. Metropolitan Housing Corp*). In the case of partisan gerrymandering, establishing intent is especially difficult because the Supreme Court has upheld the permissibility of partisan considerations in districting (*Bush v. Vera, Hunt v. Cromartie, Gaffney v. Cummings).* Thus, the issue at hand remains a question of degree. However, if the court were to establish a standard for prima facie violations, then the process could be flipped. Intent would not have to be examined until a prima facie violation of partisan gerrymandering was found. If the Court were to adopt an intent requirement, lawmakers would certainly be less brazen than the defendants in *Rucho* in admitting their intent to engineer a partisan advantage in districting. Thus, the court would have to rely on circumstantial claims such as odd shape or a number of state actions such as "excluding the opposing party from the redistricting process or hiring a private partisan firm" (Keraga 831). Intent is a relatively easy requirement to avoid as a defendant and thus its inclusion in a test of partisan gerrymandering unconstitutionality is mainly to "mitigate the [Majority's] concerns about overreach" (817). Exercising restraint in this area is of interest to the liberal judges as well. Justice Kagan wrote in her *Rucho* dissent that her framework would "limit courts to correcting only egregious gerrymanders, judges do not become omnipresent players in the political process" (2).

Conclusion

Rucho v. Common Cause eliminated the ability of the judiciary to rule on partisan gerrymandering claims. By claiming that the issue presented a "political question," the majority

was able to avoid intervening and, in Justice Elena Kagan's view, "refuse[d] to remedy a constitutional violation because it [thought] the task beyond judicial capabilities" (1). Egregious partisan gerrymandering violates core elements of the constitution and thus demands judicial intervention. Partisan gerrymandering dilutes the votes of some citizens and places a burden on individuals based on their political affiliations. Using partisan symmetry to measure the burden is judicially discernible because it is rooted in protections guaranteed by the First Amendment and manageable because it provides an objective measure that can contribute to a plan that delineates a prima facie violation. Partisan symmetry is a useful tool because it does not advocate proportional representation, but rather that all members of a district have an equal voice. Using partisan symmetry in isolation is not advisable. Rather, it should be a component of a multi-part plan involving partisan symmetry, the ensemble of computer-generated with neutral districting principles, and intent. These three tools could prove effective in the future of partisan gerrymandering cases, but legal challenges seem unlikely now that the Court has effectively shut the door.

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