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Legal Sidebar

Partisan Gerrymandering Claims Not Subject to Federal Court Review: Considerations Going Forward

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Partisan gerrymandering, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," is an issue that has vexed the federal courts for more than three decades. On June 27, 2019, the Supreme Court, by a 5 to 4 vote, ruled that claims of unconstitutional partisan gerrymandering are not subject to federal court review because they present non-justiciable political questions, removing the issue from the federal court's purview. In *Rucho v. Common Cause* and *Lamone v. Benisek* (hereafter *Rucho*) the Court viewed the Elections Clause of the Constitution as solely assigning disputes about partisan gerrymandering to the state legislatures, subject to a check by the U.S. Congress. Moreover, in contrast to one-person, one-vote and racial gerrymandering claims, the Court determined that no test exists for adjudicating partisan gerrymandering claims that is both judicially discernible and manageable. However, the Court suggested that Congress, as well as state legislatures, could play a role in regulating partisan gerrymandering.

To contextualize the ruling, this Sidebar begins with a brief review of prior Supreme Court precedent and arguments over partisan gerrymandering, before addressing the issues considered by the Court in *Rucho*. (An earlier Legal Sidebar discussed this background in greater depth.) Next, the Sidebar discusses the Court's ruling, before concluding with a discussion of its implications and legislative options for Congress.

Background

Prior to the 1960s, the Supreme Court had determined that challenges to redistricting plans presented non-justiciable political questions that were most appropriately addressed by the political branches of government, not the judiciary. In 1962, however, in the landmark ruling of *Baker v. Carr,* the Court held that a constitutional challenge to a redistricting plan is justiciable, identifying factors for determining when a case presents a non-justiciable political question, including "a lack of [a] judicially discoverable and manageable standard[] for resolving it." Since then, while invalidating redistricting maps on equal protection grounds for other reasons—based on inequality of population among districts or one-person,

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one-vote and as *racial* gerrymanders—the Court has not nullified a map because of *partisan* gerrymandering.

In part, the reason for the Court's reluctance to invalidate state maps as impermissibly partisan is that redistricting has traditionally been viewed as an inherently political process. Moreover, critics of federal court adjudication of partisan gerrymandering claims have argued that such lawsuits would open the floodgates of litigation and that it would be judicially difficult to police because it is unclear how much partisanship in redistricting is too much. On the other hand, critics of this view have argued that extreme partisan gerrymandering is "incompatible with democratic principles" by entrenching an unaccountable political class in power with the aid of modern redistricting software—using "pinpoint precision" to maximize partisanship—thereby requiring some role by the unelected judiciary.

In prior cases presenting a claim of unconstitutional partisan gerrymandering, the Court left open the possibility that such claims could be judicially reviewable, but did not ascertain a discernible and manageable standard for adjudicating such claims. In those cases, Justice Kennedy cast the deciding vote, leaving open the possibility that claims could be held justiciable in some future case, under a yet to be determined standard. Last year, the Supreme Court considered claims of partisan gerrymandering raising nearly identical questions to those that were before the Court in *Rucho*, but ultimately issued narrow rulings on procedural grounds specific to those cases. *Rucho* marked the first opinion on partisan gerrymandering since Justice Kennedy left the Court.

Lower Court Rulings

Prior to the Supreme Court's consideration, the cases consolidated in the *Rucho* opinion were heard by three-judge federal district courts in North Carolina and Maryland. Specifically, the North Carolina case involved a challenge by Common Cause, the League of Women Voters, and several voters that the North Carolina congressional redistricting map amounted to an unconstitutional partisan gerrymander, favoring the Republican party, in violation of the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and Article I of the Constitution. Similarly, the Maryland case involved a challenge by seven registered Republican voters who lived in Maryland's Sixth congressional district before the enactment of the 2011 congressional redistricting map, who argued that the 2011 district constituted an unconstitutional partisan gerrymander, favoring the Democratic Party, in violation of the First Amendment.

In both cases, the lower courts invalidated the challenged redistricting plans under standards they viewed to be judicially discernible and manageable. In the North Carolina case, the court determined that a redistricting map violates the Equal Protection Clause as an unconstitutional partisan gerrymander when (1) the map drawer's predominant intent was to entrench a specific political party's power; (2) the resulting dilution of voting power by the disfavored party was likely to persist in later elections; and (3) the discriminatory effects were not attributable to other legitimate interests. Further, the court determined that a partisan gerrymandered map may violate provisions in Article I requiring "the People" to select their representatives and limiting the states to determining only "*neutral* provisions" regarding the "Times, Places, and Manner of holding Elections." Both courts concluded that a redistricting map violates the First Amendment if the challengers demonstrate that (1) the map drawers specifically intended to disadvantage voters based on their party affiliation and voting history; (2) the map burdened voters' representational and associational rights; and (3) the map drawers' intent to burden certain voters caused the "adverse impact." The North Carolina legislators and the Maryland officials appealed to the Supreme Court. (A provision of federal law provides for direct appeals to the Supreme Court in cases challenging the constitutionality of redistricting maps.)

Supreme Court Ruling

In *Rucho*, the Supreme Court held that, based on the political question doctrine, federal courts lack jurisdiction to resolve claims of unconstitutional partisan gerrymandering, vacating and remanding the North Carolina and Maryland lower court rulings with instructions to dismiss for lack of jurisdiction. In an opinion written by Chief Justice Roberts, the Court began by addressing the Framer's views on gerrymandering. According to the majority opinion, at the time of the Constitution's drafting and ratification, the Framers were well familiar with the controversies surrounding the practice of partisan gerrymandering. "At no point" during the Framers' debates, the Court observed, "was there a suggestion that the federal courts had a role to play." Instead, the Chief Justice viewed the Elections Clause as a purposeful assignment of disputes over partisan gerrymandering to the state legislatures, subject to a check by the U.S. Congress. In this vein, the Court noted that Congress has in fact exercised its power under the Elections Clause to address partisan gerrymandering on several occasions, such as by enacting laws to require single-member and compact districts.

Nonetheless, the Court acknowledged that there are two areas relating to redistricting where the Court has a unique role in policing the states—claims relating to (1) inequality of population among districts or "one-person, one-vote" and (2) racial gerrymandering. However, the Court distinguished those claims from claims of unconstitutional partisan gerrymandering, reasoning that while judicially discernible and manageable standards exist for adjudicating claims relating to one-person, one-vote and racial gerrymandering, partisan gerrymandering cases "have proved far more difficult to adjudicate." This difficulty stems from the fact, the Court explained, that while it is illegal for a redistricting map to violate the one-person, one-vote principle or to engage in racial discrimination, at least some degree of partisan influence in the redistricting process is inevitable and, as the Court has recognized, permissible. Hence, according to the Court, the challenge has been to identify a standard for determining how much partisan gerrymandering is "too much."

At the heart of the Chief Justice's opinion were three concerns stemming from what he viewed to be the central argument for federal adjudication for partisan gerrymandering claims: "an instinct" that if a political party garners a certain share of a statewide vote, as a matter of fairness courts should ensure that the party holds a proportional number of seats in the legislature. First, the Court stated that this expectation "is based on a norm that does not exist in our electoral system." Noting her extensive experience in state and local politics, the Court quoted Justice O'Connor's 1986 concurrence stating that the Court's cases "foreclose any claim that the Constitution requires proportional representation" for political parties. Echoing this argument, the *Rucho* Court observed the nation's long history of states electing their congressional representatives through "general ticket" or at-large elections, typically resulting in single-party congressional delegations. As a result, the Chief Justice explained, for an extended period of American history, a party could achieve nearly half of the statewide vote, but not hold a single seat in the House of Representatives, suggesting that proportional representation was simply not a value protected by the Constitution. Second, even if proportional representation were a constitutional right, determining how much representation political parties "deserve," based on each party's share of the vote, would require courts to allocate political power, a power to which courts are, in the view of the majority, not "equipped" to exercise. For the Court, resolving questions of fairness presents "basic questions that are political, not legal." Third, even if a court could establish a standard of fairness, the Chief Justice again maintained that there is no discernible and manageable standard for identifying when the amount of political gerrymandering in a redistricting map meets the threshold of unconstitutionality.

In so concluding, the Supreme Court rejected the tests that the district courts used in ascertaining unconstitutional partisan gerrymandering in North Carolina and Maryland. As to the North Carolina case, the Court criticized the "predominant intent" prong of the test adopted by the district court in holding the map in violation of the Equal Protection Clause. According to the Chief Justice, although this inquiry is

proper in the context of racial gerrymandering claims because drawing district lines based predominantly on race is inherently suspect, it does not apply in the context of partisan gerrymandering where some degree of political influence is permissible. Moreover, responding to the aspect of the test requiring challengers to demonstrate that partisan vote dilution "is likely to persist," the Court concluded that it would require courts to "forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent." That is, according to the Court, judges under this test would "not only have to pick the winner—they have to beat the point spread." The Court also disapproved of the test the district courts adopted in both the North Carolina and Maryland cases in holding the maps in violation of the First Amendment's guarantee of freedom to associate. As a threshold matter, the Court determined that the subject redistricting plans do not facially restrict speech, association, or any other First Amendment guarantees as voters in diluted districts remain free to associate and speak on political matters. More directly, the Court concluded that under the premise that partisan gerrymandering constitutes retaliation because of an individual's political views, "any level of partisanship in districting would constitute an infringement of their First Amendment rights." As a consequence, the Court viewed the First Amendment standard as failing to provide a manageable approach for determining when partisan activity has gone too far. In addition, the Court rejected North Carolina's reliance on Article I of the Constitution as the basis to invalidate a redistricting map, concluding that the text of the Constitution provided no enforceable limit for considering partisan gerrymandering claims.

In concluding his opinion, the Chief Justice acknowledged that excessive partisan gerrymandering "reasonably seems unjust," stressing that the ruling "does not condone" it. Nonetheless, maintaining that the Court cannot address the problem simply "because it *must,"* the majority viewed any solutions to extreme partisan gerrymandering to lie with Congress and the states, not the courts. Characterizing the dissent and the challengers' request that the Court ascertain a standard for adjudication as seeking "an unprecedented expansion of judicial power," the Chief Justice cautioned that such an "intervention would be unlimited in scope and duration … recur[ring] over and over again around the country with each new round of redistricting." Instead, the Court maintained, many states have constitutional provisions and laws providing standards for state courts to address excessive partisan gerrymandering, which have been invoked with successful results. Furthermore, citing examples of past and currently pending legislation, the Court reiterated that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."

Justice Kagan wrote a dissent on behalf of four Justices arguing that the Court has the power to establish a standard for adjudicating unconstitutionally excessive partisan gerrymandering and its "abdication" in *Rucho* "may irreparably damage our system of government." According to the dissent, the standards proposed by the challengers and the lower courts are not "unsupported and out-of-date musings about the unpredictability of the American voter," but instead, are "evidence-based, data-based, statistics-based." Moreover, responding to the Court's suggestion that Congress and the states have the power to ameliorate excessive partisan gerrymandering, the dissent maintained that the prospects for legislative reform are poor because the legislators who currently hold power as a result of partisan gerrymandering are unlikely to promote change. Instead, for the dissent, the only solution to what they view as a crisis of the political process was a means to challenge extreme partisan gerrymandering outside of that process, through the unelected federal judiciary.

Considerations Going Forward

As a result of *Rucho*, federal courts lack subject matter jurisdiction to resolve claims of unconstitutional partisan gerrymandering. However, *Rucho* suggests that Congress and the states have the power to address extreme partisan gerrymandering should they so choose. For example, as observed by the Court, several bills that take various approaches to address partisan gerrymandering have been introduced in the

116th Congress. For example, H.R. 1, the "For the People Act of 2019," which passed the House of Representatives on March 8, 2019, would eliminate legislatures from the redistricting process and require each state to establish a nonpartisan, independent congressional redistricting commission, in accordance with certain criteria. H.R. 44, the "Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2019," would prohibit states from carrying out more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the Voting Rights Act of 1965 (VRA). (At least one scholar has argued that limiting redistricting to once per decade renders it "less likely that redistricting will occur under conditions favoring partisan gerrymandering.") H.R. 141, the "Redistricting Transparency Act of 2019," would, based on the view that public oversight of redistricting may lessen partisan influence in the process, require state congressional redistricting entities to establish and maintain a public Internet site and conduct redistricting under procedures that provide opportunities for public participation. Notably, the Court in *Rucho* specifically stated that it expressed "no view" on any pending proposals, but observed "that the avenue for reform established by the Framers, and used by Congress in the past, remains open."

With regard to the states, *Rucho* does not preclude state courts from considering such claims under applicable state constitutional provisions. For example, in 2015, the Florida Supreme Court invalidated a Florida congressional redistricting map as violating a state constitutional provision addressing partisan gerrymandering. Similarly, in 2018, the Pennsylvania Supreme Court struck down the state's congressional redistricting map under a Pennsylvania constitutional provision. Looking ahead, as a result of *Rucho,* these state remedies, coupled with any congressional action, will be the central avenues for regulating excessive partisan influence in the redistricting process.

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