Chapter 9

The law of gerrymandering

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CHAPTER SUMMARY

How do judges think about partisan gerrymandering? This chapter, by two law professors, is an answer to that question. The authors highlight both parallels between racial and partisan gerrymandering and divergences in the legal logic.

1 BACKDROP

The challenges of apportionment and redistricting are as old as representative government itself, and certainly predate the founding of America. When the U.S. Supreme Court established its "one person one vote" doctrine and required congressional districts to have equal population, the majority pointed to the "rotten boroughs" of pre-colonial Britain "under which one man could send two members of Parliament to represent the borough of Old Sarum while London's million people sent but four."[1] The Founders grappled with these same concerns during the constitutional convention in 1787. In fact, George Washington's sole substantive proposal at the convention was that each member of Congress represent no more than 30,000 people to guard against such disparities and to ensure that representatives retained a familiarity with the local circumstances of their constituents. Had Washington's proposal been ratified, our House of Representatives would currently comprise more than 10,200 members! As it turns out, the Constitution enshrined a rule in the opposite direction, specifying that each member of Congress represent no fewer than 30,000 people. (As of 2020 each member of Congress represents a district of approximately 750,000 people).

[1] *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).

While much of this book is devoted to shape metrics and vote metrics, our goal in this chapter is to outline the basic framework for how judges think about the challenges of gerrymandering. Many readers will find the jurisprudence of gerrymandering to be misguided or inadequate to the task. However, because judges often have the final say on whether a gerrymander violates constitutional principles, and if so, what kind of remedies are available to those who are wronged, it is imperative to have a productive understanding of the legal underpinnings of gerrymandering cases that have come before the courts and a sense for how judges may evaluate future redistricting challenges.

1.1 WHY ARE COURTS INVOLVED AT ALL?

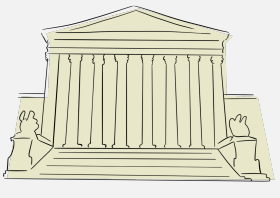
At the root of all redistricting cases is a simple, but important question: why are federal courts involved in the redistricting process at all? Courts are organized at both the state and the federal level. Federal courts have limited jurisdiction to hear cases about federal law, but the guiding document—the U.S. Constitution—does not explicitly address the problem of gerrymandering. In fact, the Constitution places immense responsibility on the states when it comes to the design and composition of the electoral structures of representative democracy. Furthermore, when it comes to partisan gerrymandering, courts not only recognize that they are on uncertain constitutional footing, but they also recognize that redistricting is primarily a political task that involves a pull and haul between different theories of democracy and political representation. All of these factors raise the question whether gerrymandering ought to be "justiciable" in the first place—that is, whether this is an issue that the federal courts ought to resolve or whether this is an issue that is best left to the political process.

On June 27, 2019 the U.S. Supreme Court, by a 5-4 margin, held that federal courts should not intervene in partisan gerrymandering cases. In its opinion in *Rucho v. Common Cause*, the Court overturned two lower court rulings that had been consolidated on appeal. The first ruling had invalidated a partisan gerrymander in North Carolina that awarded 10 of the state's 13 congressional districts to Republicans despite Republican candidates winning just 53.2% of the overall vote. The second ruling had invalidated a partisan gerrymander in Maryland that awarded 7 of the state's 8 congressional districts to Democrats despite Democratic candidates winning less than two-thirds of the overall vote. While the Supreme Court acknowledged that these gerrymanders were "incompatible with democratic principles" and "lead to results that reasonably seem unjust," the majority concluded that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."[2] The decision in *Rucho v. Common Cause* returns the Court to its posture prior to 1962 when it consistently avoided "political questions" related to electoral design, apportionment, and the drawing of districts.

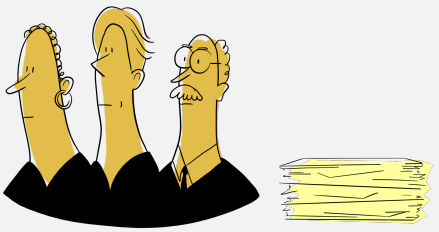
[2] *Rucho v. Common Cause*, No. 18-422, slip op. at 30.

9.1 STRUCTURE OF THE COURTS

Federal cases normally start in the lower courts (district/trial court) and can proceed "up" from there to appeals and then sometimes to SCOTUS, the Supreme Court of the United States. Often several cases will be fused into one as they work their way up. The Supreme Court can sometimes *remand* cases back to lower courts, so a single case can sometimes travel up and down the ladder repeatedly.

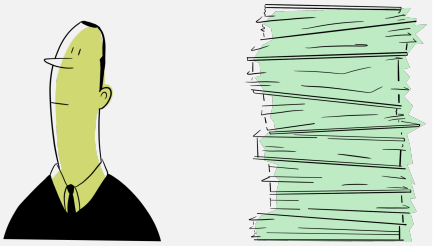


Supreme Court SCOTUS has discretion over which cases they hear. To have your case heard, you have to file a "writ of certiorari" or "cert petition." Of the 3,888 cert petitions filed in 2019–2020, they agreed to hear **74** cases. Cases are heard *en banc*, with all nine Justices together.



Circuit/Appeals Court Whereas district court cases deal with law and facts, appeals typically just focus on questions of law. There are 12 regional circuit courts and one federal circuit court of appeals; each appeal is heard by a panel of three judges. **51,693** cases were appealed to the level of appellate/circuit court in 2019–2020.

District/Trial Court Facts of the case are established at this stage, sometimes with the use of experts who provide reports and testimony. There's a single judge at trial who is usually randomly assigned to each case, and if you lose you can appeal. **425,925** district/trial court cases were held in 2019–2020.



The circuit courts have various reputations, making judge-shopping possible. This is why challenges to Obamacare often started in Texas (5th circuit) and challenges to Trump's immigration policies often started in Hawaii (9th circuit).

Redistricting cases (and a very small number of other kinds of cases) do **not** proceed through the regular process of working their way up this chain. In 28 U.S.C. § 2284, Congress specified that redistricting cases in particular should start with a three-judge hearing at the district court level—in addition to the usual district court judge, the chief judge of their circuit appoints two additional judges, one of whom must be a circuit court judge. Decisions of these three-judge panels are then appealed directly to the Supreme Court, which has mandatory jurisdiction (see 28 U.S.C. § 1253), meaning they have to do *something* with the case.

In a landmark 1962 case *Baker v. Carr*, the Court abandoned its hands-off approach to apportionment and entered the political thicket by holding that questions about how lines are drawn implicate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.[3] After *Baker v. Carr*, courts had relatively little difficulty formulating a principle for individual equality—"one person, one vote"—yet a benchmark for evaluating *group harms* proved more difficult to articulate. Thus, even though the Court had decided in 1962 that it had a constitutional role to play in resolving disputes about the design of districts, there was a lot of uncertainty about whether the Court would also resolve political gerrymandering disputes.

In 1973 the Supreme Court seemed willing to apply the Constitution to partisan gerrymandering claims in the case *Gaffney v. Cummings*. *Gaffney* was a bipartisan gerrymandering case where both parties agreed to protect their incumbents. (This arrangement is sometimes referred to as a "sweetheart" gerrymander). The Supreme Court was asked to scrutinize the gerrymandered plan and determine whether it violated the Equal Protection Clause of the U.S. Constitution's 14th Amendment. The Court obliged, but ultimately upheld the plan "because it attempted to reflect the relative strength of the parties in locating and defining election districts."[4]

Gaffney was the last time the Court would unanimously agree that partisan gerrymandering claims are justiciable (though not the last time the Court would uphold a gerrymandered map). In the two major cases after *Gaffney*, *Davis v. Bandemer* and *Vieth v. Jubelirer*, the Court badly split on the question of justiciability and in both cases the Court upheld the gerrymandered plans in the face of strong dissenting opinions.

Thirteen years after *Gaffney*, in the 1986 case of *Davis v. Bandemer*, the Court heard a case about a partisan gerrymander. The Democrats in Indiana filed suit against the Republicans, claiming that the Republicans had violated their constitutional rights by gerrymandering the state's electoral districts to minimize Democratic political power. *Bandemer* showed that the Court had become very divided when it came to the issue of partisan gerrymandering.

Three Justices said that the judicial enterprise of regulating partisan gerrymandering was "flawed from its inception."[5] These Justices would have dismissed the case altogether as nonjusticiable.[6] From their perspective, the federal courts had no business resolving partisan gerrymandering claims. Six Justices, however, reiterated the importance of judicial intervention, but were split on how the courts should proceed. Four of the Justices criticized the trial court's reliance on election outcomes from a single election, writing that "the power to influence the political process is not limited to winning elections"[7] and that "[r]elying on a single elec-

[3] "We conclude that the complaint's allegations [that the state of Tennessee's refusal to redistrict for 60 years] present[s] a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision," *Baker v. Carr*, 369 U.S. 186, 237 (1962).

[4] *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973).

[5] *Davis v. Bandemer*, 478 U.S. 109, 147 (1986).

[6] "The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment,"478 U.S. at 147.

[7] 478 U.S. at 132.

tion to prove unconstitutional discrimination is unsatisfactory."[8] These Justices voted to reverse the lower court, which had struck down the Indiana map, but they failed to offer an evaluative standard for the lower court to apply on "remand" (the term used when a higher court sends a case back to a lower court and asks it to try the case again with new instructions). Finally, two Justices articulated what they believed to be a judicially manageable standard by importing a set of criteria for fair redistricting to guide the lower court:

> "The most important of these factors are the shapes of voting districts and adherence to established political subdivisions. Other relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted and legislative history reflecting contemporaneous legislative goals. To make out a case of unconstitutional partisan gerrymandering, the plaintiff should be required to offer proof concerning these factors, which bear directly on the fairness of a redistricting plan, as well as evidence concerning population disparities and statistics tending to show vote dilution. No one factor should be dispositive."[9]

Overall, a majority of the Court concluded that partisan gerrymandering claims were justiciable, but reversed the decision of the lower court, which had erred in its reliance on the principle that "any apportionment scheme that purposely prevents proportional representation is unconstitutional."[10] The upshot of the Court's 3-4-2 decision was that the partisan gerrymander in Indiana remained in place for the rest of the decade. The split decision was also a harbinger of the courts' inability to develop a consensus on the issue of partisan gerrymandering.

The Supreme Court did not hear another partisan gerrymandering case until 2004, when it split badly again in *Vieth v. Jubelirer*. The question in *Vieth* was "whether [the Court's] decision in *Bandemer* was in error, and, if not, what the standard [for adjudicating partisan gerrymanders] should be."[11] In the eighteen years between *Bandemer* and *Vieth*, the lower courts had struggled to coalesce around a single standard. In his *Vieth* concurrence, Justice Scalia lamented that the *Bandemer* decision "has almost invariably produced the same result (except for incurring of attorney's fees) as would have obtained if the question were nonjusticiable: Judicial intervention has been refused."[12] Scalia was joined by three other Justices in holding that there are no judicially manageable standards to distinguish benign partisan gerrymanders from gerrymanders that go too far. Five Justices disagreed. Pointing to the forty-year history of judicial involvement in highly political cases since *Baker v. Carr*[13] and the Court's duty to protect the fundamental right to

[8] Id. at 135.
[9] Id. at 173.
[10] Id. at 129-130.
[11] *Vieth v. Jubelirer*, 541 U.S. 267, 272 (2004).
[12] Id. at 279.
[13] See, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968); *Kirkpatrick v. Preisler*, 394 U.S. 542 (1969); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989).

vote,[14] these Justices emphasized the importance of allowing courts to intervene in gerrymandering cases. However, like the Justices in *Bandemer*, they could not agree on a standard for identifying an invidious gerrymander. Two of the Justices argued that gerrymanders are unconstitutional when excessively partisan; either when partisanship is the *sole* motivation in their design (Stevens) or when partisanship is used in an unjustified way (Breyer). Justices Ginsburg and Souter argued that if a plaintiff could show (1) that she belonged to a cohesive political group, (2) that her group was intentionally cracked or packed into a district with borders that violated traditional districting principles (e.g., contiguity, compactness, and respect for existing political and geographic boundaries), and (3) if she could produce a hypothetical district that increased the political power of her political group with fewer deviations from these traditional principles, then the burden of proof would shift to the state legislature to rebut the plaintiff's evidence.

Justice Kennedy cast a split vote. While he agreed that partisan gerrymandering was a justiciable issue, he rejected the standards proposed by Justices Stevens, Breyer, Souter, and Ginsburg and wrote that he could not think of a single judicially manageable standard. Kennedy concluded: "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future."[15] The resulting 4-1-4 plurality opinion either perfectly illustrates why the Court should not be involved in partisan gerrymandering cases in the first place or reflects just how close the Court is to reining in an abuse of power (just one vote!).

By 2019, Justice Kennedy had retired. In his absence the Supreme Court (again by a single vote) decided that federal courts should extract themselves from the political thicket of partisan gerrymandering. The majority in *Rucho v. Common Cause* wrote

> "Sometimes...the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. In such a case the claim is said to present a 'political question' and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction."[16]

The Court then cited to *Baker v. Carr* to signal that the jurisprudence on partisan gerrymandering had come full circle. To fully understand this development, we need to unpack what the Court means when it says a claim presents a "political question." In *Rucho* the Court explains that not all cases dealing with political issues are political questions. Rather, a case poses a political question when there is "a lack of judicially discoverable and manageable standards for resolving it."[17] This definition begs two questions: (1) how does a court distinguish between standards and rules? and (2) what does it mean for a standard to be judicially discoverable and manageable?

[14] "Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution," 541 U.S. at 311.
[15] Id.
[16] *Rucho v. Common Cause*, slip op. at 7
[17] Id.

1.2 LEGAL STANDARDS

Simply put, a legal standard is a guideline for judges. A standard typically identifies factors for judges to consider and might provide direction for evaluating the relative weight of each factor, without any single factor being dispositive. Legal standards are less strict than legal rules, which provide bright-line definitions and thresholds, or that otherwise compel a particular outcome. In other words, a legal standard provides judges with more discretion than a legal rule. For example, in the gerrymandering context, a legal rule might dictate that any district with a Reock score less than .1 is unconstitutional or that any districting plan where the efficiency gap is greater than .07 in three or more consecutive elections is unconstitutional. A legal standard, on the other hand, may direct judges to reject districts with "irregular shapes" or to invalidate plans with "historically anomalous" partisan asymmetry. Legal standards may also require judges to balance various interests simultaneously. For example, judges may be asked to balance the rights of individuals to be treated equally against the rights of elected officials to draw new districts after each Census. Or a judge may be asked to balance the interest of government responsiveness (which might suggest more competitive districts) with government representativeness (which might suggest more homogeneous districts). Legal standards provide flexibility to individual judges, which means there is no guarantee of fairness *ex ante*. However, legal standards allow judges to tailor their considerations to each individual case, thus protecting against unintended consequences and ensuring fair outcomes *ex post*.

Importantly, standards can be relevant to both the procedure and substance of a case. For example, in *Rucho* the plaintiffs presented the Court with a procedural standard: a districting plan should be ruled unconstitutional if the evidence shows (1) that districts were drawn with partisan intent, (2) that a districting plan discriminates against voters based on their partisanship, and (3) that there is a nexus between the intent (1) and the effect (2). Baked into this legal standard are empirical questions—how much partisan discrimination is too much?—that can be addressed in ways that look like a "standard" (e.g., outliers among an ensemble of possible districting plans) or that look like a "rule" (e.g., two standard deviations from the median plan among an ensemble of districting plans).

The holding in *Rucho v. Common Cause* is complicated by the fact that the Justices conflated these points in their consideration of the case. At oral argument, the attorney for Common Cause began his testimony with reference to an expert's ensemble of districting plans that showed why North Carolina's gerrymander was an outlier; the 10-3 split in favor of Republicans did not appear a single time in the ensemble of 1,000 plans. Justices Kavanaugh and Roberts interrupted each other to immediately push back on this *empirical* finding with questions about what the appropriate *legal* standard should be: how relevant is the inquiry into the legislature's intent in the first place? When the attorney suggested that the Court adopt the sliding-scale balancing-test legal standard[18] used in other election law cases

[18] According to the "Anderson Burdick" standard referred to by the attorney for Common Cause, courts pragmatically balance the burden or injury imposed by a given election law against the justifications for this burden offered by the state. As the burden becomes more severe, courts require more persuasive and compelling justifications from the state.

(see *Anderson v. Celebrezze* and *Burdick v. Takushi*), Justices Alito and Gorsuch replied by asking the attorney what empirical standard the court should adopt for distinguishing benign gerrymanders from unconstitutional gerrymanders. Further complicating the discussion, Justice Gorsuch proposed non-standard-like numerical cutoffs:

> "So aren't we just back in the business of deciding what degree of tolerance we're willing to put up with from proportional representation? We might pluck a number out of the air or see that, you know, maybe two-thirds is used for veto overrides, so we like that. Where are we going to get the number on the business end of this?"[19]

When the lawyer representing the League of Women Voters stepped up to the lectern, she tried to redirect the Justices back to the three-prong test described above (that courts should look for evidence of (1) discriminatory intent, (2) discriminatory effect, and (3) a nexus between the two). Justice Gorsuch continued his push for a numerical cutoff:

> "...we talked a lot about last year the efficiency gap, which is how far a deviation from proportional representation. And we were told, I think, six or seven percent of deviation would be okay, and that would not be an untoward effect. But anything above six or seven percent. Today we're talking about two-thirds is an effect. We need to have a number or some formula to determine what effect is enough to state a claim and what isn't, otherwise every case is going to come to this Court. And I'm—I'm—I'm still waiting to hear what that might–what that number, what that formula might be..."[20]

The Supreme Court ultimately concluded that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." However, it remains unclear whether the Court reached this conclusion because of unsatisfactory answers related to legal standards, to empirical standards, or to something else. What is clear is that whatever the standards may have been, the majority believed they were not judicially discoverable and manageable, which cuts right to the heart of the political question doctrine.

1.3 JUDICIALLY DISCOVERABLE AND MANAGEABLE

The phrase "judicially discoverable and manageable" is a term of art that was first articulated in *Baker v. Carr*. In *Baker* the Supreme Court decided to assert itself in the debate about apportionment and redistricting just 16 years after explicitly avoiding what it had called the political thicket. In *Baker* the Court distinguished between cases that posed "political questions" (and were thus not justiciable) and cases where judicial intervention would be appropriate. The Court was not seeking to sidestep cases that were political in nature. Instead, the Court was asking whether the federal courts have the competency to adjudicate a particular category

[19] *Rucho v. Common Cause*, Transcript of Oral Argument at 43–44.
[20] Id. at 60–61.

of cases and, if not, to leave the resolution of these cases to the political process. The competency of the courts is measured in two ways.

First, courts must be able to look to the U.S. Constitution for a theory of harm and provide a remedy that flows from a constitutional framework, past practice, and precedent. In other words, for a standard to be "judicially discoverable and manageable" the courts should be focused primarily on legal questions (e.g., has the plaintiff suffered a cognizable harm? Has the government violated the plaintiff's constitutional rights?) as opposed to questions about political theory, public policy, and/or empirical data.

Second, courts as an institution must be properly situated to adequately address the central conflict of a case. Are courts able to adequately compile all of the relevant information to resolve the dispute? Are courts an effective venue for the contest of ideas related to the dispute? Do judges have the capacity to digest the implications of the dispute? Are judicial opinions likely to be viewed as legitimate and binding? Are other branches of government and the general public likely to adhere to judicial conclusions? Because these considerations are largely pragmatic, the Court's invocation of the political question doctrine can appear idiosyncratic and inconsistent over time. Thus, just as the Court invoked the political question doctrine to shield itself from apportionment cases in 1946 only to drop that shield sixteen years later, the Court could easily reassert its voice with respect to partisan gerrymandering in the not-too-distant future. If and when the federal courts reopen their doors to these claims, what kinds of legal arguments would they likely consider? Below we provide an overview of the legal landscape of partisan gerrymandering. We begin by distinguishing the legally thorny and open question of partisan gerrymandering from the equally thorny but more settled caselaw dealing with racial gerrymandering.

2 PARTISAN VS. RACIAL GERRYMANDERING

One argument that opponents of partisan gerrymandering sometimes make is that partisan gerrymandering is just like racial gerrymandering. This is because, in general, judges agree that racial gerrymanders—redistricting plans that dilute the voting power of racial minorities—raise constitutional questions that can be heard in court. One reason that racial gerrymandering has been deemed justiciable is that race is a protected class under the Constitution, meaning laws that treat people differently based on their race can only be justified if they are necessary for achieving a compelling governmental interest (for example, race-based school funding programs in pursuit of educational equality). Courts have assumed the responsibility of refereeing disputes about whether laws that draw distinctions based on race are narrowly tailored and in pursuit of compelling interests. In addition to this constitutional protection, Congress created additional statutory protections for racial minorities in the Voting Rights Act (VRA) of 1965, discussed in detail in Chapter 6–Chapter 7. The VRA explicitly prohibits any election practice or procedure that abridges the right of racial minorities to vote and to elect candidates of their choice. As a result, courts have been open to legal challenges of racial gerrymanders. In sum: over the course of many cases, the Supreme Court

has articulated a set of judicially manageable standards to enforce both the Equal Protection Clause of the 14th Amendment and the Voting Rights Act. In the context of the 14th Amendment, courts require plaintiffs to provide evidence that race was the "predominant factor" in deciding where to draw district lines (*Miller v. Johnson*).[21] Courts sometimes point to "bizarrely" or "irregularly" shaped districts as evidence that race was central to their design, but the shape of a district is insufficient by itself to overturn a racial gerrymander. For cases alleging vote dilution under the VRA, courts do not explicitly require plaintiffs to provide evidence of intentional discrimination (though that evidence is always very powerful). Instead they require plaintiffs to show how, in the "totality of circumstances," racially drawn districts "interact with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives" (*Thornburg v. Gingles*).[22] Both the "predominant factor" standard and the "totality of circumstances" test have proven to be judicially manageable, and on their face these standards could easily be imported to cases dealing with partisan gerrymandering. Indeed, one vital skill for lawyers is the ability to draw analogies to relevant, settled precedent and racial gerrymanders present a tempting analogy. It is not surprising, then, that the standards suggested by Justices Stevens and Breyer in *Vieth* to address partisan gerrymandering parallel the "predominant factor" test from the race-based case of Miller v. Johnson. Or that the various factors proposed by the dissenting Justices in *Bandemer*, as well as the multi-pronged test proposed by Justices Souter and Ginsburg in *Vieth*, are easily analogized to the "totality of circumstances" test in VRA cases.

On the other hand, racial gerrymandering differs from partisan gerrymandering in important ways that may limit the power of these analogies. Perhaps most importantly, the original purpose of the 14th Amendment's Equal Protection Clause was to provide legal protection from political oppression directed at former slaves. As an original matter, the equal protection clause was not intended to protect the legal rights of other groups such as women, gays and lesbians, and certainly not Democrats or Republicans as such.[23] Writing for the plurality in *Vieth*, Justice Scalia argued that "the Constitution clearly contemplates districting by political entities" whereas "the purpose of segregating voters on the basis of race is not a lawful one." Thus, "to the extent that our racial gerrymandering cases represent a model of discernible and manageable standards, they provide no comfort here [in the partisan context]."[24] Justice Kennedy was silent in *Vieth* on the question of importing the judicial standards from racial gerrymandering cases. Although he presumably agreed with Justice Scalia that racial gerrymandering cases start on stronger constitutional footing given America's long history of race discrimination, Kennedy's particular concern in *Vieth* was not about constitutional footing; he argued that courts *should* hear partisan gerrymandering challenges. The open question to Kennedy was whether there were judicially discoverable and manage-

[21] 515 U.S. 900 (1995).

[22] 478 U.S. 30, 47 (1986).

[23] As a practical matter, the Supreme Court has interpreted the Equal Protection Clause to guard against all race-based, ethnicity-based, and gender-based discrimination. The Court has also cited to the Equal Protection Clause to protect nonracial groups such as minorities defined by a shared language. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[24] *Vieth v. Jubelirer*, 541 U.S. at 286.

able standards to evaluate a gerrymander. The racial gerrymandering cases proved that there were, yet Kennedy chose not to adopt them, with very little commentary about his thinking. In *Rucho v. Common Cause* the Supreme Court definitively dismissed the parallels between racial and partisan gerrymandering:

> "Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. Nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion. Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship."[25]

Because the Court limited its comparison to just racial gerrymandering cases, it is possible that a future Court could find important parallels and lessons from racial vote dilution cases, which *do* ask for a fair share of political power and influence, which *do* provide a group-based remedy for an individualized harm, and which *do* involve an inquiry into both the discriminatory intent and effect of the law. Notably, however, the appellees (Common Cause et al.) in *Rucho* relied heavily on the logic of vote dilution in their briefs and testimony, with almost no references to racial gerrymandering. The parties and the Court were talking past each other. In any case, future attempts to articulate a new standard will likely need to distinguish themselves from, not analogize themselves to, the standards used by courts in the race cases.

3 CONSTITUTIONAL PROVISIONS REGULATING PARTISANSHIP

3.1 GUARANTEE CLAUSE

One of the earliest proposed legal standards for evaluating partisan gerrymanders was based on the argument that these gerrymanders deprive individuals of a truly representative government. Article IV of the U.S. Constitution reads, "The United States shall guarantee to every State in this Union a Republican Form of Government." According to one possible legal standard based on this Guarantee Clause, a partisan gerrymander would violate the constitution when districts skew electoral outcomes so much that members of the state legislature do not properly represent a state's population. Relevant data for this inquiry might include

[25] *Rucho v. Common Cause*, slip op. at 21.

a comparison of policy outcomes to the preferences of the electorate,[26] or more simply a comparison of electoral outcomes to the distribution of registered voters as evidence that elected officials and their constituents are not ideologically aligned.[27] The Supreme Court has repeatedly rejected the Guarantee Clause as an appropriate basis for any legal challenge, let alone partisan gerrymandering cases. In 1849 the Supreme Court declared that legal challenges based on the Guarantee Clause are nonjusticiable. The case, *Luther v. Borden*, held that "no one, we believe, has ever doubted [that] the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure."[28] Later challenges to the ballot initiative process and other direct democracy procedures that allegedly violate the Guarantee Clause (for excluding elected officials) were dismissed by the Court.[29] In 1946, the Court summarily dismissed a challenge that Illinois's congressional districts violated the Guarantee Clause by writing a "violation of the great guaranty of a republican form of government in States cannot be challenged in the courts." (*Colegrove v. Green*).[30] As we outlined above, the Supreme Court changed its position about the justiciability of apportionment and districting procedures in 1962, but its decision was not rooted in a new understanding of the Guarantee Clause. Instead the Court held that malapportionment and gerrymandering implicate rights protected under the Equal Protection Clause of the 14th Amendment. Thus, future challenges to partisan gerrymandering based on the Guarantee Clause are likely dead on arrival, barring a reversal of long-standing precedent.

3.2 EQUAL PROTECTION CLAUSE

The Supreme Court's holding in *Baker v. Carr* that an apportionment scheme might deprive voters of equal protection of the laws not only introduced judicial review into the districting process, but also helped to clarify what harm(s) the Court was worried about. As a result, nearly every challenge to partisan gerrymandering since 1962 has relied on the Equal Protection Clause. The 14th Amendment to the U.S. Constitution states, in part, that "No State shall...deny to any person within its jurisdiction the equal protection of the laws." A legal standard based on equal protection requires a court to examine whether a partisan gerrymander is rationally related to a legitimate state interest.[31] This inquiry has two factors: (1) are partisan considerations illegitimate? and (2) is the gerrymander itself so invidious that it lacks any rational justification? With respect to the first factor, the Supreme Court has acknowledged that as long as redistricting is overseen by legislatures, partisan considerations will naturally play a role in the process. Thus, a holding that any gerrymander created with partisan intent violates the Equal Protection Clause will open the floodgates of litigation since every single district in the United States is

[26] See, e.g., Lax, Jeffrey R. and Justin H. Phillips. 2012. "The Democratic Deficit in the States," American Journal of Political Science, Vol. 56, No. 1, pp. 148–166.

[27] See, e.g., Stephanopoulos, Nicholas O. 2014. "Elections and Alignment," Columbia Law Review, vol. 114, pp. 283–365.

[28] 48 U.S. 43 (1849).

[29] See, e.g., *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912).

[30] 328 U.S. 549, 556 (1946).

[31] Compare this with the stricter standard for racial gerrymanders discussed above, which must be narrowly tailored to achieve a compelling state interest (a standard referred to as "strict scrutiny").

infected with some level of partisanship. To avoid this floodgate, the Court could evaluate partisan consideration along a continuum and articulate a threshold beyond which partisan motives become illegitimate.[32] As a reminder, two Justices in the 2004 case *Vieth v. Jubelirer* adopted this approach and argued that partisan motivation is okay, but becomes illegitimate when "the minority's hold on power is purely the result of partisan manipulation and not other factors"[33] or "when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage."[34] However, this approach did not garner a majority of votes in *Vieth* and one of the two Justices that espoused this view (Stevens) has since retired.

The remaining factor for assessing whether a gerrymander violates the Equal Protection Clause asks courts to evaluate whether the redistricting plan is so extreme that it lacks any rational relationship to representative government. This inquiry has split the Supreme Court as well, with several Justices presenting their own view about when a gerrymander becomes too extreme. Some Justices have focused on the districting *process*: were both parties involved in the plan's design? Did the legislature hold public hearings or meetings? Were traditional districting criteria considered and/or followed? Others have focused on the real and predicted effects of the redistricting plan. This latter assessment of a plan's *effects* has garnered the most attention by the news media, academics, and others. Much like the judicial inquiry into the motivations behind a gerrymander, the analysis of a districting plan's *outcomes* looks at a continuum of partisan differences and tries to identify a threshold beyond which the unequal political opportunities of the minority party goes too far. Courts have measured this unequal opportunity in various ways, using many of the metrics featured in other chapters of this volume. One theme that runs through many lower court opinions is partisan symmetry, which the Supreme Court has described as "a helpful (though not talismanic) tool."[35] The principle of partisan symmetry states that the two parties should be treated equally in structural or systematic terms. One way to operationalize this principle is to compare counterfactual voting data: for instance, if Democrats win 48% of the vote but earn 55% of the seats in a given election, partisan symmetry demands that in other circumstances, if Republicans had won 48% of the vote they should have earned 55% of the seats. The high-level logic of partisan symmetry has guided the courts in their evaluations of various gerrymanders, though the courts have not coalesced around any particular measure, and in a 2006 challenge to a partisan gerrymander in Texas Justice Kennedy wrote that "asymmetry alone is not a reliable measure of unconstitutional partisanship."[36] Metrics inspired by the logic of partisan symmetry include numerical differences in district-based voter distributions such as the efficiency gap and the mean–median difference. After

[32] Justin Levitt has argued that partisanship should be evaluated along a spectrum that distinguishes partisan considerations by type (e.g., coincidental, ideological, responsive, tribal) rather than by degree. See Levitt, Justin. 2014. "The Partisanship Spectrum," William & Mary Law Review, vol. 55, pp. 1787–1868. See also Levitt, Justin. 2018. "Intent is Enough: Invidious Partisanship in Redistricting," William & Mary Law Review, vol. 59, pp. 1993–2051.

[33] 541 U.S. at 360.

[34] Id at 318.

[35] *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 468 (2006) (fn. 9).

[36] *LULAC v. Perry*, 548 U.S. 399, 420 (2006)

Davis v. Bandemer, all measurements are additionally expected to demonstrate the durability of a partisan effect (e.g., predicted losses over multiple election cycles). In *Rucho* the plaintiffs relied on both symmetry measures and on ensembles of districting plans—hundreds of thousands of plans sampled from the universe of all possible plans—that incorporated traditional districting criteria such as compactness and contiguity. In this approach, the challenged plan was flagged as an extreme gerrymander because it was an outlier among the ensemble's distribution.

In short, judges have a plethora of metrics available to them for deciding when, how, and why a redistricting plan potentially violates the Equal Protection Clause. This surplus of options has proven to be a double-edged sword as individual judges have gravitated toward different measures in different cases. However, all four of the dissenting Justices in *Rucho* signed on to the opinion that outlier analysis of ensembles is the most promising approach for determining a partisan gerrymander. No other single approach has ever been endorsed by as many Justices, which should serve as a signal to lower court judges if the federal courts reopen their doors to partisan gerrymandering claims. Whether or not this happens, equality-based arguments at the state level (more on this below) are likely to be buttressed by ensembles and outlier analysis.

3.3 FIRST AMENDMENT

Whereas the Equal Protection Clause protects individuals from being treated differently in general, the First Amendment protects individuals from viewpoint discrimination by the government and has been used to protect the associational rights of political organizations. The First Amendment states that "Congress shall make no law...abridging the freedom of speech." This Free Speech Clause prevents the government from treating people differently *based on their political beliefs*. Justice Kennedy highlighted this possible constitutional hook in his *Vieth* opinion when he wrote:

> "The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest 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."[37]

Pointing to various First Amendment cases, Kennedy concluded that "In the context of partisan gerrymandering, First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." Justice Kagan picked up on this idea in her concurring opinion in *Gill v. Whitford* in 2018, citing to Kennedy six times and arguing that "partisan gerrymandering no doubt burdens individual votes, but it also causes other harms," specifically associational harms under the First Amendment.[38] Unlike the Fourteenth Amendment, which has generated many metrics measuring deviations from equality, there is no developed caselaw or clearly articulated standard for

[37] *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (J. Kennedy, concurring).
[38] Id.

courts to consider in the face of a First Amendment challenge to partisan gerrymandering. In *Rucho v. Common Cause* the Court considered a First Amendment challenge to Maryland's 6th congressional district, which was represented by a Democrat for twenty-two years between 1971 and 1993, and then by a Republican for twenty years from 1993 to 2013. (This case was consolidated with the challenge to North Carolina's districts.) During the 2011 redistricting cycle, the 6th district was redrawn to heavily favor Democrats who controlled both legislative chambers and the governor's mansion. The result was immediate and drastic. The Republican incumbent who was reelected in 2010 by 28 points lost his bid in 2012 by more than 20 points. A group of Republican voters filed suit, alleging that the 6th district was reconfigured in 2011 as retaliation for supporting Republican candidates—in other words, retaliation based on how they voted—in violation of the First Amendment. At trial, the lower court held that to prevail the plaintiffs must provide evidence that (1) the district was intentionally drawn to burden voters based on how they voted, (2) that the burden resulted in a "tangible and concrete adverse effect," and finally that (2) was caused by (1). Upon a showing of all three, the burden would shift to the state to prove there was some lawful alternative to explain the district's design. Notice that the trial court's inquiry is not very different from the framework of the Equal Protection Clause. In both cases, courts look for evidence of partisan intent and partisan effects. The difference is that under the First Amendment the effects are framed in terms of their burden on voters instead of the relationship of voting power between different groups.

While the lower court concluded that the redistricting plan in Maryland violated the First Amendment associational rights of Republican voters, the Supreme Court in *Rucho* vacated the ruling on the grounds that there was "no 'clear' and 'manageable' way of distinguishing permissible from impermissible partisan motivation."[39] The lower court found Republicans in Maryland's 6th district had suffered in their attempts to fundraise, attract volunteers, and generate interest in voting after having their voting power diluted. The majority in *Rucho* was unconvinced, asking "how many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded?"[40] Appellees did not have a satisfactory answer for these questions.

To date, relatively scant attention has been paid to the First Amendment in the gerrymandering context, and there is room for important contributions by mathematicians, social scientists, computer scientists, and others defining the scope of adverse impacts on the associational rights of voters and parties, measuring the severity and extent of this "burden," and conceptualizing the operation of "but-for causation" as part of the inquiry.

3.4 ELECTIONS CLAUSE

Legal scholars have also pointed to the Elections Clause of the Constitution as a way to walk the fine line of maintaining a republican form of government while

[39] *Rucho v. Common Cause*, slip op. at 27.
[40] Id. at 26.

limiting the judicial role as much as possible.[41] The Elections Clause is found in Article 1§4 of the Constitution, which reads, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations." Richard Pildes notes that under the Elections Clause, partisan gerrymandering is an explicit yet limited power. Because the Supreme Court has accepted since *Marbury v. Madison* in 1803 that one of its central roles is to police the limits of powers that are enumerated in the Constitution, the Elections Clause provides support to the claim that partisan gerrymandering is a justiciable issue.[42] The majority in *Rucho v. Common Cause* curtly dismissed this argument in a single sentence: "we are unconvinced by that novel approach."[43]

In a different line of attack, Ned Foley has argued that because the Elections Clause grants ultimate authority over the "places and manner" of elections to Congress, Congress could immediately supersede any federal court ruling it disagreed with. This power-sharing arrangement should presumably clip the wings of those who worry that the Court is overstepping its properly prescribed judicial role, such as Justice Kennedy and Chief Justice Roberts. According to Foley, when a court nullifies a state's congressional map under the Elections Clause, it acknowledges that Congress is free, even welcome, to intervene. The Court in *Rucho* recognized this power-sharing arrangement with Congress, but held that Congress must be the first mover, no matter how small the action. In fact, the Court acknowledged that a resolution from Congress merely stipulating that no districting plan shall be drawn to unduly favor any person or party would provide the green light for courts to reassert themselves as gerrymandering referees.

3.5 STATE CONSTITUTIONS

All nine Justices in *Rucho v. Common Cause* encourage states to take up the task of policing gerrymanders, whether through litigation or the political process. The majority concludes its opinion with the following consolation:

> "Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts."[44]

Most state constitutions explicitly protect the right to vote and provide for free and fair elections. For example, Article I §10 of the North Carolina state constitution declares that "all elections shall be free." In September 2019, a panel of three state judges pointed to this clause in the state's constitution to invalidate the same gerrymandered plan that the U.S. Supreme Court had side-stepped in *Rucho*. The judges argued that the "Free Elections Clause is one of the clauses that makes the North

[41] Foley, Edward B. 2018. "Constitutional Preservation and the Judicial Review of Partisan Gerrymanders," University of Georgia Law Review (forthcoming 2018).

[42] Pildes, Richard H. 2018. "The Elections Clause as a Structural Constraint on Partisan Gerrymandering of Congress," SCOTUSblog Symposium, 19 June, 2018.

[43] Slip op. at 29.

[44] Slip op. at 31.

Carolina Constitution more detailed and specific than the federal Constitution in the protection of the rights of its citizens"[45] and held that "extreme partisan gerrymandering…is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly."[46] The Pennsylvania state constitution includes a similar provision that "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Eighteen plaintiffs, one from each congressional district in Pennsylvania, recently challenged the 2011 congressional maps that were drawn by the Republican-majority legislature. The plaintiffs, all Democrats, alleged that the maps were unconstitutional under the state constitution. In February 2018 the state supreme court sided with the plaintiffs and struck down the plan as an unconstitutional gerrymander under Article 1§5 of the state constitution. The court wrote that "while federal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter…We conclude that in this matter [the state constitution] provides a constitutional standard, and remedy, even if the federal charter does not."

The standard adopted by the court looked similar to the approach taken in federal courts with respect to the Equal Protection Clause. The court noted that traditional redistricting criteria were subordinated to partisan motivations. Experts at trial also provided evidence that the congressional map was an outlier compared to an ensemble of thousands of alternative plans with respect to measures of compactness and partisanship. The efficiency gap was also used to show that Republicans experienced significant partisan advantage under the challenged plan. Based on this evidence, the court held that because the 2011 congressional map "aimed at achieving unfair partisan gain," it "undermines voters' ability to exercise their right to vote in free and 'equal' elections if the term is to be interpreted in any credible way." When the legislature could not generate a satisfactory new map, the court hired an outside expert called a "special master" to draw a new map that was hastily installed in time for the 2018 midterm election, which saw the delegation swing from 13-5 to 9-9 under the new plan.

The experience in Pennsylvania is not without controversy. The Republican-majority legislature was upset by the court's ruling and the president of the state senate filed ethics complaints against the judges. A dozen state lawmakers later threatened to impeach the judges who voted to strike down the map, an act that threatened the separation of powers and independent judiciary in Pennsylvania, but also plays into the fears of Chief Justice Roberts who has repeatedly worried that when the U.S. Supreme Court inserts itself into political matters the entire judiciary risks being perceived as partisan and biased. Nevertheless, the Pennsylvania state supreme court illustrates that state constitutions and state courts are relevant and important to the inquiry into partisan gerrymanders. In other words, there are fifty legal frontiers waiting to be explored.

[45] *Common Cause v. Lewis*, 18 CVS 014001 at p. 299.
[46] Id. at p. 302.

4 ALTERNATIVE APPROACHES

Although nearly every challenge to partisan gerrymandering relies on constitutional language, two alternative approaches are worth noting.

4.1 RACE AS PARTY

First, because the distinction between partisan and racial gerrymanders is not always very clear, one possible strategy is to focus on the racial effects of a partisan gerrymander. In other words, instead of analogizing to the legal standards used in racial cases, the idea is to coopt the racial gerrymandering framework altogether. Race and party are currently correlated quite closely in most states, meaning a partisan gerrymander is likely to look like a racial gerrymander.[47] To the extent that courts are receptive to challenges based on race, not party, plaintiffs are more likely to succeed in striking down a partisan map if they focus on the racial effects. In 2016, the 4th Circuit invalidated a partisan-motivated voter suppression bill in North Carolina (that did not include a redistricting plan) in part because the state legislature was shown to have used race as a proxy for partisanship. See North Carolina State Conference of *NAACP v. McCrory* (2016). In the gerrymandering context, however, the correlation between race and party has not yet doomed any partisan gerrymanders on racial grounds. On the contrary, states have defended racial gerrymanders by arguing that the true motivation was partisanship, and in one case (see below) a racial gerrymander was replaced with an openly partisan one.

In Texas, a three-judge panel struck down the state's 2011 congressional redistricting plan because it was an impermissible racial gerrymander. The state had argued that there was no proof their plan was "enacted for the purpose of diluting minority voting strength rather than protecting incumbents and preserving Republican political strength won in the 2010 elections." Nevertheless, the state updated its redistricting plan in 2013. This new plan met a similar fate at the lower court, which found that Texas had used "race as a tool for partisan goals" with the goal of "intentionally destroy[ing] an existing district with significant minority population that consistently elected a Democrat." However, in *Abbott v. Perez* (2018) the U.S. Supreme Court reversed the lower court and upheld the 2013 districting plan.

North Carolina's 2011 congressional redistricting plan was also struck down by a three-judge panel because the court held that two districts were unconstitutional racial gerrymanders. The Supreme Court upheld this ruling in *Cooper v. Harris* (2017) while applauding the "formidable task" of lower courts who must make a "sensitive inquiry into all the circumstantial and direct evidence of intent to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." Recognizing the legal implications of racial vs. partisan gerrymandering, the North Carolina state legislature responded by enacting a bold and extreme partisan gerrymander. Representative David Lewis,

[47] See, e.g., Hasen, Richard L. 2018. "Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases," William & Mary Law Review, Vol. 59, No. 5, pp. 1837–1886.

who co-chaired the legislature's Joint Select Committee on Redistricting, openly acknowledged his desire to maximize Republican seats. At one hearing he argued that the goal was to "draw the maps to give a partisan advantage to ten Republicans and three Democrats because I do not believe it's possible to draw a map with 11 Republicans and two Democrats." When confronted with the observation that this was the very definition of a partisan gerrymander, Lewis responded that "a political gerrymander is not against the law." Representative Lewis was right, at least for the time being. Despite his brazen statements, the Supreme Court in *Rucho v. Common Cause* (2018) declined to prevent the districts from being used during the 2018 election, and finally found for the defendants in 2019, with a sweeping new determination that partisan gerrymandering is nonjusticiable.

4.2 STATE AND FEDERAL STATUTES

Finally, legal standards and remedies are available through political channels. Much like the Voting Rights Act has proven especially powerful in cases challenging racial gerrymanders, Congress and state legislatures can enact statutes to complement (or substitute for) constitutional protections. Remember that the Supreme Court has explicitly rejected numerous times the argument that the Constitution guarantees a right to proportional representation. For example, when the lower court in *Bandemer* invalidated Indiana's 1981 partisan gerrymander because it "purposely prevented proportional representation," the Supreme Court reversed the decision and wrote that "our cases clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," 478 U.S. 109, 130 (1986). Although the Constitution doesn't *require* proportional representation, this does not mean that proportional representation is *forbidden*. Any state legislature is free to enact a benchmark of proportional representation into its redistricting process (or partisan symmetry, or a mean–median threshold, or some other metric of fairness). And Congress is also free to create a benchmark of proportional representation (or other criteria) for states to follow when drawing congressional districts. Although this outcome is unlikely in many states, the point is that partisan gerrymandering is as much a political issue as a legal one. In other words, states are not constrained by the limited number of provisions in the U.S. Constitution that speak to fairness and representation. While proportional representation may be a pipe dream, states are also free to adopt redistricting standards that incorporate any new ideas at all: ensembles, curvature, the efficiency gap, Reock scores, you name it.

5 A CALL TO ACTION

The purpose of this book is to introduce readers from diverse backgrounds to the challenges of defining and evaluating all kinds of gerrymanders. Our goal in this chapter is to press these constituencies to understand the multiple levels of why political gerrymandering is a difficult legal problem to solve. Gerrymandering is a sickness whose cause(s) and cure(s) are hotly contested. Imagine you are sick

and a series of doctors says "you are going to die, but we have no clue why and no idea how to cure you. All we know is that we are unanimous in the fact that you are going to die." Understanding the cause(s) of gerrymandering is just as important as, and perhaps necessary to, understanding its cure(s). This understanding can be evidence-based, driven by logic and theory, or even based on intuition. But our understanding needs to be articulated clearly, widely disseminated, and ultimately popularized.

Empirical data may or may not provide a magic bullet that resolves this issue, but quality data will no doubt play an important role. For example, to the extent that the Court is concerned about the durational impact of a gerrymandering plan (see, e.g., in *Bandemer v. Davis*) data on population shifts, changing sentiments, and campaign strategy may prove useful. To the extent that the Court's preferred standard is based on the idea of partisan symmetry, metrics like the efficiency gap and the mean–median difference will be more relevant. Hand-drawn demonstration plans and computer-generated alternative plans will presumably continue to be used as persuasive evidence. And whether courts evaluate electoral harms under the Equal Protection Clause or the First Amendment, debates about the best way to combine data from past elections, to project future elections, or to harness other predictive analytics are likely to come into play.[48]

Perhaps most importantly, despite our disproportionate focus on the U.S. Supreme Court, there are real opportunities for action at the state and local level. Justice Brandeis famously wrote that "it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[49]

Regardless of the outcome of the various gerrymandering cases the Court will hear in the next few years, there is room for readers to exercise their preferred solutions; first at the local and state level and then perhaps at the federal level. School boards, city councils, and state legislatures can be laboratories for establishing new frameworks that will change the way people think about gerrymandering. These laboratories are also venues for testing out new theories, experimenting with different methodologies, and observing the effectiveness of various remedies (e.g., single-member districts vs. transferable votes). More testing will lead to more understanding, and more understanding will improve the quality of challenges raised in the courts in the future.

Justice Felix Frankfurter served on the Supreme Court from 1939 to 1962. He was skeptical that courts were equipped to address the problems of political gerrymandering. Whether or not you agree with his view on the justiciability of these issues, Frankfurter gently reminded readers that the source of all government power "ultimately lies with the people…the vigilance of the people in exercising their political rights."[50] We are far from a settled legal equilibrium, meaning all hands on deck.

[48] For a more detailed framework about how empirical data and mathematical tools can most effectively be utilized in litigation, see Wang, Samuel S.-H. 2018. "An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into a Two-Part Framework," Harvard Law Review Blog, 11 April at https:// blog.harvardlawreview.org/an-antidote-for-gobbledygook-organizing-the-judges-partisan-gerrymandering-toolkit- into-a-two-part-framework/.

[49] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 388 (1932)

[50] *Colegrove v. Green*, 328 U.S. 549, 554–555 (1946).