
*Article III — Justiciability —
Political Question Doctrine — Rucho v. Common Cause*

Electoral districting creates electoral outcomes. If electoral districting is left to incumbent legislatures, it becomes a tool to stack the political process against disempowered opponents. If courts intervene, they risk wading into the “political thicket” of regulating political representation.¹ Partisan gerrymandering is emblematic of the problem.² Left unchecked, partisan gerrymandering permits outsized partisan advantages; but judicial review gives unelected judges influence over the partisan composition of legislatures. Beginning with *Davis v. Bandemer*³ and continuing up to as recently as *Gill v. Whitford*,⁴ the Supreme Court has declined every invitation to invalidate a partisan gerrymander.⁵ Last Term, in *Rucho v. Common Cause*,⁶ the Court closed the door on partisan gerrymandering claims. It found that such claims presented nonjusticiable political questions better left to the political branches for resolution.⁷ However, the Court’s decision is inflected with prudential considerations that suggest there are limits to its holding.

Rucho considered challenges to two partisan gerrymanders, one in North Carolina and one in Maryland.⁸ In North Carolina, the Republican-controlled General Assembly redrew congressional districts in 2016 with the aim of electing as many Republicans as possible — ten Republicans to thirteen seats.⁹ Shortly after, in the 2016 congressional elections, North Carolina elected ten Republicans and three Democrats under the new districting plan.¹⁰ In the 2018 elections, North Carolina elected nine Republicans and three Democrats.¹¹ Yet Republicans won only fifty-three percent of the statewide vote in 2016 and fifty percent of the vote in 2018.¹² Likewise, in Maryland, the Democrat-controlled state legislature redrew the state’s congressional districts in 2011 to maximize Democratic representation.¹³ Under the guidance of Democratic Governor Martin O’Malley, the redistricting committee aimed to secure the election of

¹ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

² Partisan gerrymandering is the drawing of electoral districts to benefit a political party, usually by “packing” or “cracking” opposition support. See *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018).

³ 478 U.S. 109, 113 (1986).

⁴ 138 S. Ct. 1916, 1923.

⁵ See *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 423 (2006); *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring in the judgment).

⁶ 139 S. Ct. 2484 (2019).

⁷ *Id.* at 2506–07.

⁸ *Id.* at 2491.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* A Republican won the last seat, but a new election was called due to alleged fraud. *Id.* at 2492.

¹² *Id.* at 2510 (Kagan, J., dissenting).

¹³ See *id.* at 2493 (majority opinion).

seven Democrats to eight congressional seats by flipping one incumbent Republican district, the Maryland Sixth District.¹⁴ To decrease the size of the Sixth District by 10,000 residents, the committee removed 360,000 residents from the district and added 350,000 new residents — an elaborate turnover that netted 24,000 additional registered Democrats and 66,000 fewer registered Republicans.¹⁵ In the 2012 election, Maryland voters flipped the Sixth District to elect seven Democrats statewide, and that district has remained Democratic through every subsequent election.¹⁶

Both the North Carolina and Maryland gerrymanders quickly prompted suit. In North Carolina, multiple parties challenged the 2016 plan in federal district court, alleging that it: (1) diluted the electoral strength of Democratic voters, violating the Equal Protection Clause; (2) retaliated against voters for their support of Democratic candidates, violating the First Amendment; (3) denied voters the right to elect their preferred candidates, violating the Constitution’s requirement in Article I, Section 2 that representatives be chosen “by the People of the several States”; and (4) exceeded the State’s authority under the Elections Clause to determine the “Times, Places and Manner of holding Elections.”¹⁷ Similarly, in Maryland, voters filed suit claiming violations of the First Amendment, the Elections Clause, and Article I, Section 2.¹⁸

In the North Carolina case, the district court found the 2016 plan unconstitutional. Writing for the three-judge panel, Judge Wynn¹⁹ first determined that partisan gerrymandering claims are justiciable because they implicate voting rights, the “constitutional mechanism” through which all other rights are protected from legislative interference.²⁰ Having passed that threshold, the court found that the plan violated the Equal Protection Clause using a three-part test: the plan reflected a predominant intent to secure a partisan advantage, produced lasting discriminatory effects under a variety of measures, and lacked a valid governmental justification.²¹ The court also held that the plan violated the First Amendment because the plan discriminated on the basis of viewpoint and burdened speech and associational rights.²² Finally, the court found the plan violated both the

¹⁴ *Id.*

¹⁵ *Id.* A congressional district is comprised of roughly 711,000 residents, *see* KRISTIN D. BURNETT, CONGRESSIONAL APPORTIONMENT I (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [<https://perma.cc/66RW-RQH9>], so the redistricting caused 100% gross population movement to achieve a 1.4% change in total population size.

¹⁶ *Rucho*, 139 S. Ct. at 2493.

¹⁷ *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 606 (M.D.N.C. 2018) (first quoting U.S. CONST. art. I, § 2, cl. 1; and then quoting *id.* art. I, § 4, cl. 1).

¹⁸ *Rucho*, 139 S. Ct. at 2493.

¹⁹ Judge Wynn was joined by Judge Britt.

²⁰ *Rucho*, 279 F. Supp. 3d at 624; *see id.* at 623–24.

²¹ *Id.* at 672; *see id.* at 637–72.

²² *Id.* at 672–83. Writing separately, Judge Osteen, Jr., rejected this First Amendment analysis but otherwise concurred with the majority. *Id.* at 692 (Osteen, Jr., J., concurring in part and dissenting in part).

Elections Clause and Article I, Section 2, reasoning that partisan gerrymanders inhibited the respective aims of those provisions: preventing electoral manipulation and ensuring representative government of the people.²³ On direct appeal, the Supreme Court remanded the case to determine whether the plaintiffs had established standing consistent with its decision in *Gill*.²⁴ The district court subsequently found that the plaintiffs had standing and reaffirmed its previous merits holding on the plan's unconstitutionality.²⁵ The defendants again appealed to the Supreme Court.

At the same time, in the Maryland case, the district court found the redrawing of the Sixth District unconstitutional under the First Amendment.²⁶ Writing for the panel, Judge Niemeyer²⁷ held that the gerrymander violated the plaintiffs' representational rights: the redistricting diminished the value of their vote "*because of* the political views they have expressed through their party affiliation and voting history."²⁸ Separately, the gerrymander also burdened the plaintiffs' associational rights as fundraising, campaigning, and other electioneering activities became more difficult "in an atmosphere of general confusion and apathy" caused by the gerrymander.²⁹ In concurrence, Chief Judge Bredar counseled against considering electoral outcomes in determining whether a gerrymander violated representational rights and argued that the decision should have rested on the violation of associational rights alone.³⁰ The defendants appealed directly to the Supreme Court, which consolidated this case with the appeal arising out of North Carolina.

The Supreme Court vacated and remanded for dismissal.³¹ Writing for the Court, Chief Justice Roberts³² held partisan gerrymandering claims nonjusticiable.³³ Such claims present political questions that lie beyond the Court's jurisdiction and must find their resolution through political processes.³⁴ The Chief Justice's reasoning began with history. Partisan gerrymanders predate independence, and the Framers were mindful of the problem when drafting the Elections Clause.³⁵ As a result, the Elections Clause

²³ *Id.* at 685–90 (majority opinion).

²⁴ *Rucho v. Common Cause*, 138 S. Ct. 2679, 2679 (2018) (mem.).

²⁵ *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 799–801 (M.D.N.C. 2018).

²⁶ *Benisek v. Lamone*, 348 F. Supp. 3d 493, 520 (D. Md. 2018).

²⁷ Judge Niemeyer was joined by Judge Russell, who also joined Chief Judge Bredar's concurrence.

²⁸ *Benisek*, 348 F. Supp. 3d at 514.

²⁹ *Id.* at 524.

³⁰ *Id.* at 527 (Bredar, C.J., concurring in the judgment).

³¹ *Rucho*, 139 S. Ct. at 2508.

³² The Chief Justice was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh.

³³ *Rucho*, 139 S. Ct. at 2506–08.

³⁴ *Id.* at 2506.

³⁵ This clause gives states the power to set "the Times, Places and Manner" of congressional elections, but reserves to Congress the authority to "make or alter such Regulations." U.S. CONST. art. I, § 4, cl. 1. The Court noted that this revisionary power was viewed as "necessary to counter state legislatures set on undermining fair representation, including through malapportionment." *Rucho*, 139 S. Ct. at 2495.

evinces a “characteristic approach” that leaves to Congress the power to check state efforts to undermine fair representation, a power that Congress has exercised.³⁶ Notably, this history is silent on the role of federal courts.³⁷ And while the Court’s subsequent malapportionment and racial gerrymandering cases have waded into districting, the Chief Justice stressed that the Court has never invalidated a partisan gerrymander, from *Gaffney v. Cummings*³⁸ through *Gill*.³⁹ For the Chief Justice, these cases highlighted why the justiciability of partisan gerrymandering claims presented an open question: unlike race, partisan advantage is a permissible consideration in districting.⁴⁰ Thus, the constitutionality of a partisan gerrymander does not turn on a question of kind, but a question of degree.⁴¹

The Court decided there was no “judicially manageable standard[.]” for determining at what point a partisan gerrymander becomes unconstitutional.⁴² To begin, the Court rejected out of hand the use of proportionality as a standard, explaining that there is no constitutional basis for requiring proportional representation.⁴³ Nor did the Court think a general requirement of “fairness” could provide a judicially manageable standard: fairness could be measured in terms of competitiveness or stability or process, the choice of which would be “political, not legal.”⁴⁴ And even settling the definition of fairness would not resolve the question of degree, or how the Court should remedy any violations.⁴⁵

The Court methodically rejected all proposed tests as flawed. It gave little credence to the North Carolina district court’s consideration of intent as a constitutional factor, noting that partisan intent is constitutionally permissible.⁴⁶ Nor did the Court have confidence in the district court’s other factors. It rejected the additional consideration of whether vote dilution was likely to persist because “asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.”⁴⁷ And the Court declined to consider whether there was an actual burden on First Amendment rights, because that test cannot distinguish permissible from impermissible partisan gerrymanders and would thus require eliminating

³⁶ *Rucho*, 139 S. Ct. at 2496, 2495–96.

³⁷ *Id.* at 2496.

³⁸ 412 U.S. 735, 754 (1973).

³⁹ *Rucho*, 139 S. Ct. at 2496–98.

⁴⁰ *Id.* at 2497.

⁴¹ *Id.*

⁴² *Id.* at 2491, 2508. As the Court explained, one of the key considerations in “determining whether a claim is a nonjusticiable political question” is “whether there is ‘a lack of judicially discoverable and manageable standards’ for resolving it.” *Id.* at 2496 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁴³ *Id.* at 2499.

⁴⁴ *Id.* at 2500; *see id.* at 2499–500.

⁴⁵ *Id.* at 2501.

⁴⁶ *Id.* at 2502–03.

⁴⁷ *Id.* at 2503–04.

all such gerrymanders.⁴⁸ The Court then turned to the dissent's proposal to judge gerrymanders in relation to a median map.⁴⁹ Chief Justice Roberts argued that a median map provides only a baseline (not a solution to the question of degree), and an arbitrary one at that, subject to the variable representations of state mapmakers.⁵⁰ Finally, the Court rejected the district court's use of Article I, Section 2 and the Elections Clause to invalidate partisan gerrymanders.⁵¹ The Court then favorably cited to various state and congressional efforts to curb gerrymandering, highlighting the political channels through which the issue could be resolved.⁵²

Justice Kagan dissented, characterizing the Court's opinion as a failure to protect the democratic system.⁵³ First, Justice Kagan underscored the silences in the majority opinion, emphasizing that "[t]he majority disputes none of what I have said . . . about how gerrymanders undermine democracy."⁵⁴ Moreover, she noted the agreement among Justices past and present that extreme partisan gerrymanders are unconstitutional.⁵⁵ In light of this constitutional harm, the dissent decried the majority's decision to "decline[] to provide any remedy."⁵⁶ Unifying the tests used by the lower courts, the dissent distilled a general framework for evaluating the constitutionality of partisan gerrymanders — "(1) intent; (2) effects; and (3) causation"⁵⁷ — which it applied to the facts of the North Carolina and Maryland gerrymanders to illustrate the framework's workability.⁵⁸ The majority's concerns about judicial neutrality and issues of degree held little sway with the dissent. Under the proposed framework, neutrality would be ensured by requiring that courts consider the median map or the state's own nonpartisan districting criteria.⁵⁹ Difficult questions of degree could be left for another day: the North Carolina and Maryland plans, Justice Kagan argued, presented the most egregious of partisan gerrymanders.⁶⁰ Finally, the dissent attacked the majority's reliance on the political process, highlighting the institutional incentives for legislatures to retain control over districting.⁶¹ And indeed, Justice Kagan noted that the state courts'

⁴⁸ *Id.* at 2505.

⁴⁹ *Id.* The dissent's proposal reflected the "extreme outlier" approach used by the district court. *See* *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 893–94 (M.D.N.C. 2018).

⁵⁰ *Rucho*, 139 S. Ct. at 2505.

⁵¹ *Id.* at 2506.

⁵² *Id.* at 2507–08.

⁵³ *Id.* at 2509–12 (Kagan, J., dissenting). Justice Kagan was joined by Justices Ginsburg, Breyer, and Sotomayor.

⁵⁴ *Id.* at 2512.

⁵⁵ *Id.* at 2513; *see id.* at 2514–15 (listing opinions where Justices reached this conclusion).

⁵⁶ *Id.* at 2515.

⁵⁷ *Id.* at 2516.

⁵⁸ *Id.* at 2517–19.

⁵⁹ *Id.* at 2520.

⁶⁰ *Id.* at 2521 ("How about the following for a first-cut answer: This much is too much.").

⁶¹ *Id.* at 2523–24.

willingness to engage partisan gerrymandering begs the question why federal courts cannot do the same.⁶²

Rucho is driven in large part by prudential considerations. Although the Court invoked Article III's requirement of judicially manageable standards to dismiss partisan gerrymandering claims as nonjusticiable, this constitutional framing is unconvincing. Instead, the majority's reasoning turned on the many pragmatic aspects of asserting judicial review in such cases. That is, the Court, in deciding whether it is capable of adjudicating partisan gerrymandering claims, also looked at whether it *should* adjudicate these claims. Because this approach is rooted in more circumstantial considerations, some situations involving partisan gerrymandering could still justify judicial intervention. *Rucho* has its limits.

The political question doctrine recognizes that there exist some claims, otherwise justiciable, that are inappropriate for judicial resolution.⁶³ Scholars have developed two theories of the doctrine, usually described as “classical” and “prudential.” Under the classical view, the doctrine is applicable only where “the Constitution has committed the determination of the issue to another agency of government than the courts,” as determined by ordinary methods of constitutional interpretation.⁶⁴ Under the prudential view, the application of the doctrine is more discretionary.⁶⁵ If the Court feels that judicial review would be delegitimizing, or that other institutions are better equipped to resolve the issue, it could choose to apply the political question doctrine.⁶⁶ Thus, the political question doctrine is a constitutional requirement under the classical view, but a judicially created tool under the prudential view. Both theories are helpful for understanding the Court's opinion in *Rucho*.

The *Rucho* Court framed its holding as a constitutional mandate derived from Article III, evoking a classical approach. *Rucho*, unlike past political question decisions,⁶⁷ is based solely on the lack of judicially manageable standards for determining a constitutional violation in partisan gerrymandering claims.⁶⁸ The Court has long required the application of judicially manageable standards to these claims. Justice Kennedy, concurring in *Vieth v. Jubelirer*,⁶⁹ explained that otherwise, “intervening

⁶² *Id.* at 2524.

⁶³ RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 237 (7th ed. 2015).

⁶⁴ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959).

⁶⁵ See Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

⁶⁶ *Id.* at 50. Sometimes, the “functionality” justification is described separately. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 523, 529–30 (1966).

⁶⁷ See *Gilligan v. Morgan*, 413 U.S. 1, 6–7 (1973) (relying upon a textual commitment of authority to a coordinate branch); see also *Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (same).

⁶⁸ See *Rucho*, 139 S. Ct. at 2494.

⁶⁹ 541 U.S. 267 (2004).

courts . . . would risk assuming political, not legal, responsibility.”⁷⁰ The *Vieth* plurality made clear that it viewed the need for judicially manageable standards as a product of Article III.⁷¹ Likewise, the Court in *Rucho* located this requirement in that same provision: Article III constrains federal courts to deciding only cases and controversies “capable of resolution through the judicial process”⁷² — so judicial review must be conducted “according to *legal* principles.”⁷³ Thus, the Court thought that adjudicating partisan gerrymandering claims in the absence of judicially manageable standards would be outside the judicial function conferred by Article III.⁷⁴ Instead, the Constitution imagined that these judicially unenforceable claims would be resolved by the political process. By this logic, the Court had no choice but to abdicate jurisdiction, grounding *Rucho*’s political question finding in the classical mold.⁷⁵

This classical framing of the Court’s decision sits uncomfortably. For one thing, the Article III justification leads to a doctrinal oddity. State courts are not bound by federal jurisdictional devices, so a state court could technically adjudicate a federal partisan gerrymandering claim, thereby exerting more control over federal constitutional law than a federal court.⁷⁶ This seems an unlikely result and suggests that *Rucho*’s Article III grounding is incomplete.⁷⁷ In addition, the Court’s interpretation of Article III might not control its ability to hear equal protection claims. Amendments to the Constitution could displace the presumption that, pursuant to Article III, issues lacking judicially manageable standards should be left to the political process.⁷⁸ A classical reading of *Rucho* would imply that the Equal Protection Clause accounted for the possibility of judicial incompetence, and in those cases left to state legislatures the exclusive power to

⁷⁰ *Id.* at 307 (Kennedy, J., concurring in the judgment); *see also* Davis v. Bandemer, 478 U.S. 109, 148, 152 (1986) (O’Connor, J., concurring in the judgment).

⁷¹ *See Vieth*, 541 U.S. at 278 (plurality opinion).

⁷² *Rucho*, 139 S. Ct. at 2494 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

⁷³ *Id.* (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)).

⁷⁴ *See id.* at 2508; *Zivotofsky v. Clinton*, 566 U.S. 189, 203–04 (2012) (Sotomayor, J., concurring in part and concurring in the judgment).

⁷⁵ This outcome fits the Court’s broader trend of shifting justiciability doctrine away from prudential grounding and toward constitutional justifications. *See* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-11, at 345 (3d ed. 2000).

⁷⁶ *See* Will Baude, *Can Federal Partisan Gerrymandering Claims Be Brought in State Court?*, VOLOKH CONSPIRACY: REASON (June 28, 2019, 3:26 PM), <https://reason.com/2019/06/28/can-federal-partisan-gerrymandering-claims-be-brought-in-state-court> [<https://perma.cc/7Y6T-TYEF>]; Nicholas Stephanopoulos, *Can Federal Partisan Gerrymandering Claims Still Be Brought in State Court?*, ELECTION L. BLOG (June 30, 2019, 10:30 AM), <https://electionlawblog.org/?p=105900> [<https://perma.cc/YR4B-MZTE>].

⁷⁷ *See* 13C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3534.3 (3d ed. 2019).

⁷⁸ *See* Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1041 (1985).

interpret and enforce the protections of that provision.⁷⁹ But the Fourteenth Amendment's history and application make it hard to imagine that states were expected to play any role in elucidating its protections.⁸⁰

More importantly, the Court's search for judicially manageable standards is itself quite discretionary and lies beyond ordinary methods of constitutional interpretation. As Professor Richard Fallon has argued, the Court has never given a clear definition of judicially manageable standards, nor does it do so in *Rucho*.⁸¹ Rather, the Court hinted at concerns over predictability,⁸² effectiveness,⁸³ practical limitations⁸⁴ — a whole host of “practical desiderata” involving its ability to exercise its judicial function.⁸⁵ The open-ended nature of the factors in this analysis suggests that judicial manageability is not a binary matter, but a matter of degree.⁸⁶ That is, the Court must first decide how unmanageable a standard is, and then decide if the standard is sufficiently unmanageable to warrant judicial abdication. These questions do not seem answerable by any constitutional rule, and if they are, the Court has not elucidated how.

Instead, the Court has exercised some degree of interpretive discretion. In *Rucho*, the decision of whether unmanageability warrants judicial abdication involved practical considerations that lie beyond the constitutional meaning of Article III. Two, in particular, stand out — the problem of remedies and the existing progress in the political branches.

First, the Court took special notice of the particularly delegitimizing nature of the remedy sought in partisan gerrymandering claims. The typical remedy in districting cases is remand to the legislature for a new map; however, if a revised map is still constitutionally infirm or the legislature fails to agree on a map, federal courts must draw (or select) a map.⁸⁷ This remedial approach presented many problems for the Court.⁸⁸ Should it select a constitutionally permissible gerrymander or an entirely neutral map?⁸⁹ “Should a court ‘reverse gerrymander’ other parts of a State to

⁷⁹ See Richard H. Fallon, Jr., Political Questions and the Ultra Vires Conundrum 13 (Aug. 17, 2019) (unpublished manuscript) (on file with the Harvard Law School Library).

⁸⁰ See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 34–56 (1955) (summarizing the congressional debates over the implications of the Equal Protection Clause for state governments); cf. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁸¹ See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1281 (2006); see also Fallon, *supra* note 79, at 13–15.

⁸² *Rucho*, 139 S. Ct. at 2503–06.

⁸³ *Id.* at 2504–05.

⁸⁴ *Id.* at 2503–04.

⁸⁵ Fallon, *supra* note 81, at 1287; see *id.* at 1287–93.

⁸⁶ *Id.* at 1293 (drawing upon *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality opinion)).

⁸⁷ See, e.g., *Benisek v. Lamone*, 348 F. Supp. 3d 493, 525 (D. Md. 2018); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 944 (M.D.N.C. 2018).

⁸⁸ See *Rucho*, 139 S. Ct. at 2501. See generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 648–53 (2006).

⁸⁹ See Transcript of Oral Argument at 30, 42–43, *Rucho*, 139 S. Ct. 2484 (No. 18-422).

counteract ‘natural’ gerrymandering caused, for example, by the urban concentration of one party?’⁹⁰ Should it reallocate seats from one party to the other?⁹¹ The Court appears to think that whatever remedy it chooses, there will be some partisan favoritism, or at least the appearance of it. Thus, judicial review of alleged partisan gerrymanders would come at the cost of the Court’s legitimacy. These concerns speak to the prudence of exercising judicial review, not the Court’s constitutional authority.

In addition, the Court considered institutional functionality, again suggesting that its decision rests on prudential considerations. The Court argued, in essence, that judicial review would produce minimal benefits given that the political process has shown itself capable of remedying the extreme partisan gerrymanders.⁹² Like the *Vieth* plurality, *Rucho* made reference to the history of the Elections Clause, highlighting that “Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering.”⁹³ Moreover, the Chief Justice pointed out that states had proven responsive to partisan gerrymandering, emphasizing recent state adoption of independent redistricting commissions and constitutional amendments.⁹⁴ And at oral argument, Justice Kavanaugh queried: “[H]ave we really reached the moment, even though it would be a big lift for this Court to get involved, where the other actors can’t do it?”⁹⁵ That is a question of whether the Court *should* engage in judicial review, not whether it can. *Rucho* is more prudential than it claims.

Why does it matter that *Rucho* relies on prudential reasoning? For one thing, it provides insight into which considerations could prompt the Court to revisit *Rucho* in the future. If constitutional interpretation of Article III is the sole reason for *Rucho*’s holding, then the only justifiable basis for overturning *Rucho* would be if judicially manageable standards — in the sense of the Court’s ability — emerged in the future.⁹⁶ But if *Rucho* is a more prudential decision, then changes in factors other than judicial competence might justify a second look.⁹⁷ Admittedly, it may be premature to suggest reconsideration of *Rucho* so soon.⁹⁸ But understanding the pressure points in *Rucho*’s reasoning has another a benefit — it sheds light on

⁹⁰ *Rucho*, 139 S. Ct. at 2501.

⁹¹ See *id.*; Transcript of Oral Argument, *supra* note 89, at 44–45.

⁹² See *Rucho*, 139 S. Ct. at 2508.

⁹³ *Id.* at 2495; see *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (plurality opinion).

⁹⁴ *Rucho*, 139 S. Ct. at 2507–08. Many of these developments occurred after the Court decided *Vieth* and *LULAC v. Perry*, 548 U.S. 399 (2006).

⁹⁵ See Transcript of Oral Argument, *supra* note 89, at 68–69.

⁹⁶ See *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring in the judgment). Alternatively, this result could be reached if existing standards looked judicially manageable to a future Court.

⁹⁷ See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 267–69 (2018).

⁹⁸ As Justice Kagan commented: “Maybe things will happen that will convince [the Court] to change its mind. Maybe the world will look different enough in however many years. . . .” *Justice Kagan Remarks at Georgetown University Law Center* at 30:54, C-SPAN (July 18, 2019, 4:03 PM),

Rucho's scope. All political question decisions, categorical as they are, have a limit beyond which courts should, and must, resume judicial responsibility.⁹⁹ Because the Court adopted prudential reasoning in *Rucho*, it would presumably use similar reasoning to determine the decision's applicability in other contexts. That is, the prudential factors that weighed against judicial review in *Rucho* provide clues as to where *Rucho* might run out.

There are several ways that partisan gerrymandering might evolve to garner judicial attention. First, the political process may fail to adequately correct for partisan gerrymanders. The current landscape of state reform gave the *Rucho* Court confidence that the political process was capable of protecting rights without judicial review. But if reform stalls or states hold out, then perhaps that process is not better positioned to resolve partisan gerrymandering — some claims could prove incapable of resolution by political means.¹⁰⁰ Second, partisan gerrymanders may take on a more extreme flavor. The North Carolina and Maryland gerrymanders were severe, but they still adhered to some traditional norms of electoral districting, like contiguity and decennial redistricting.¹⁰¹ If those norms are relaxed, gerrymanders become even more harmful,¹⁰² undermining democracy further and raising the cost of judicial inaction. Third, extreme developments in gerrymandering, such as noncontiguity or biennial redistricting, would naturally lend themselves to more neutral remedies for courts to impose.¹⁰³ Loose requirements of contiguity or decennial districting could be judicially enforced without the same delegitimizing appearance of partisan bias. The Court might not expect these developments to occur, but if they do, *Rucho*'s logic suggests the Court will not turn a blind eye.

For the past thirty years, the Court has flirted with the possibility of adjudicating partisan gerrymandering claims, despite never finding a plan unconstitutional. In *Rucho*, the Court retreated further away from the fight over partisan districting, insisting that gerrymandering disputes fall beyond the bounds of its Article III authority. But the Court's conclusion rests on inductive reasoning about the propriety of judicial review, not deductive reasoning about the Constitution's grant of judicial power — and if the prudential factors underpinning *Rucho*'s outcome should shift, then perhaps the Court should shift too.

<https://www.c-span.org/video/?462748-1/justice-kagan-remarks-georgetown-university-law-center> [<https://perma.cc/HQ5D-XNJV>].

⁹⁹ See, e.g., Fallon, *supra* note 79, at 6–7.

¹⁰⁰ Indeed, only fourteen states will redistrict by commission in 2020. See *Redistricting Commissions: State Legislative Plans*, NAT'L CONF. ST. LEGISLATURES (Apr. 18, 2019), <http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx> [<https://perma.cc/2CHF-XZ8J>].

¹⁰¹ See *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498–501 (D. Md. 2018); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 598–605 (M.D.N.C. 2018).

¹⁰² Noncontiguity permits perfect gerrymanders based on past voting data alone; biennial districting (before every election) would reduce electoral risk. See Aaron Goldzimer & Nicholas Stephanopoulos, *Democrats Can't Be Afraid to Gerrymander Now*, SLATE (July 3, 2019, 4:05 PM), <https://slate.com/news-and-politics/2019/07/democrats-gerrymandering-scotus-rucho.html> [<https://perma.cc/LMQ3-YPRN>].

¹⁰³ *But cf.* *LULAC v. Perry*, 548 U.S. 399, 423 (2006) (upholding a mid-decade redistricting).