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Planned Obsolescence: The Supreme Court and Partisan Redistricting

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I. Introduction

Partisan redistricting, more commonly known as gerrymandering, is the act of a political party in power using its majority to draw district maps in such a way that it stays in power or increases its power.[1] The United States Census takes place every ten years as mandated by Article I, Section 2 of the Constitution, when the maps for state and national Congress are redrawn to better allocate representation among the people. Examples of this include the two cases that are discussed in *Rucho v Common Cause*, the redistricting case from 2019. In this case, both the Democrat-controlled government of Maryland and the Republican-controlled government of North Carolina attempted to cement their majorities by gerrymandering their maps. For example, in the case of Maryland, those that were drawing the maps attempted to take the one House seat away that was controlled by a Republican and give it to a Democrat.[2] If that plan were to succeed, then any Republican in the state of Maryland would not have a Representative in Congress who represents their interests. This is the reality for many areas of America.

Partisan redistricting is nothing new; in the years following the ratification of the Constitution, partisan redistricting took place in an attempt to deny James Madison a seat in the very first Congressional elections.[3] The gerrymander itself is named after Elbridge Gerry, who in 1812 approved maps that Democratic-Republicans had drawn to keep their majority.[4] However, as compared to as long as it has gone on, the Supreme Court has only recently taken up the issue due to the decision in 1964's *Baker v Carr*. In 2018 and 2019, there were two major cases that

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[1] Tausanovitch, Alex. "The Impact of Partisan Gerrymandering." Center for American Progress, 1 October 2019. Accessed April 5 2019.
[2] "Rucho v. Common Cause." Oyez. Accessed February 19, 2020. https://www.oyez.org/cases/2018/18-422.
[3] Majority Opinion of Justice Roberts, *Rucho v Common Cause*, 139 S.Ct. 2484 WL pg. 2496
[4] Ibid.

were decided in *Gill v Whitford* (2018) and *Rucho v Common Cause* (2019). This paper seeks to analyze these recent cases while proposing solutions to solve the issue. This paper will start with the values at stake when considering why partisan redistricting is an issue. Then, before analyzing *Gill* and *Rucho*, relevant Supreme Court precedent will be examined to examine how the two cases came about and the decisions that were made before them. *Gill* and *Rucho* will then be analyzed, including the facts of the cases, the majority opinion in each case, along with the dissenting opinion in *Rucho*. Finally, the paper will focus on solutions to partisan redistricting and tests the Court can use to determine when it is too egregious.

I. Values at Stake: Voting, Representation and Democracy

In examining the Supreme Court's decisions around partisan redistricting, we first have to determine why it matters and the values that matter when analyzing these cases. Why is partisan redistricting an issue? The idea itself creates systems that hurt and suppress voters including vote dilution, increased partisanship, and the entrenching of the power of one political party. Imagine for a second that a voter lives in a district that is heavily gerrymandered. He identifies with Party A, but Party B has a stranglehold over the district, consistently winning over 60% of the vote. Representative Smith has been Party B's representative for twenty five years, as his district consistently elects him and any challenger from Party A doesn't stand a chance. Representative Smith never has to listen to anyone in Party A because he is not trying to get their votes; he doesn't need to. He can do anything that aligns with his base of voters and they will consistently elect him with over 60% of the vote. He does not have to compromise and he can vote 100% of the time on legislation that aligns with his party. This is how partisan gerrymandering increases partisanship; if Representative Smith never needs to attract voters of

Party B, he's free to just be a vote for his party. He never has to compromise for ideals that matter to Party A. This has pushed his ideology farther to the right or left, whatever his party aligns with. Representative Smith, in never needing to attract voters of the other side, has been able to hold his office for twenty five years. His power has been entrenched, meaning unless he retires or has a challenger from his party, he has a seat in Congress. This seems like an out of reach hypothetical, but this example is happening in many areas of America that are gerrymandered. For example, in the 2018 election, Maryland's 3rd District was so gerrymandered that the Representative who won the seat won with 70% of the vote. The winner of North Carolina's 12th District, which spans most of the middle of the state in a thin line, won 73% of the vote. The Representative who won Louisiana's Second District did so with 80% of the vote.[56] These are just three examples of an incredibly unfair practice that happens across the country.

The voters in a district are not fairly able to elect someone who represents their interests. The ideals that matter when analyzing redistricting cases are democracy, representation and voting. Democracy is the ideal that the basis of our country was founded upon. The American Revolution was sparked originally because the colonists did not have representation or say in what was happening to them in English Parliament. The Declaration of Independence was written as a rebuke to the monarchy that had chained them while simultaneously declaring that America would be independent, allowing for the people to choose who would lead them. Democracy is the foundation for all American laws, systems, and ideas. Justice Kagan explains in her dissent in *Rucho v Common Cause*: "Governments," the Declaration of Independence

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[5] Ballotpedia Staff. "Margin of victory analysis for the 2018 congressional elections" Ballotpedia, n.d., Accessed 13 April 2020.
[6] Ingraham, Christopher. "America's Most Gerrymandered Congressional Districts." The Washington Post, 15 May, 2014, Accessed April 13 2020.

states, “deriv[e] their just Powers from the Consent of the Governed.” The Constitution begins: “We the People of the United States.” The Gettysburg Address (almost) ends: “[G]overnment of the people, by the people, for the people.” If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance. And partisan gerrymandering can make it meaningless.”[7] Partisan redistricting denies the people their democracy by denying the people to choose who represents them. It entrenches partisanship within Congress, denying the people Representatives who serve their interests and giving them Representatives who serve the interest of the political party that drew the lines that elected them. Democracy is potentially the most violated right by partisan redistricting purely because it denies the founding notions of the nation.

The ideal of representation means that citizens have a right to have somebody who represents them in Congress; it's why it is called the House of Representatives and why members of the House are called Representatives. They directly represent the people who elect them. This form of representation was created through Article One, reading “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States”[8] However, this does not mean that the people have a right to a representative who agrees with them from their district; no Representative is going to legally win 100% of the votes in their

[7] Justice Kagan, Dissenting Opinion in Rucho v Common Cause, 139 S.Ct. 2484 WL pgs. 2511-2512

[8] United States Constitution, Article I, Section Two

district because there will always be someone who disagrees with them. The elections should be as fair as possible so the people can have someone who represents all of their interests as much as possible. More competitive elections leads to more compromise and the people getting more of what they want out of the person that represents them. Partisan redistricting violates this principle; if the election is safe and the candidate doesn't need to sway anyone from the other party, they are less likely to attempt to compromise to sway moderates and voters of the opposing party. So while partisan redistricting doesn't break the right to representation by denying a representative, it denies voters in an area their preference and creates candidates who stray closer to partisan lines.

The right to vote has been enshrined within the Constitution since the founding of the United States through the same passage that creates the right to representation. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States"[9] It was later cemented in the Constitution even more through the Fifteenth Amendment ("the right of citizens to vote shall not be denied on account of race, color, or previous condition of servitude"),[10] the Nineteenth Amendment ("the right of citizens to vote shall not be denied on account of sex"),[11] the Twenty-fourth Amendment ("the right of citizens to vote for [federal officers] shall not be denied by reason of failure to pay any poll or other tax"),[12] and the Twenty-sixth Amendment ("the right of citizens who are eighteen years or older to vote shall not be denied on account of age").[13] United States law, passed by Congress, has also helped enforce these provisions, specifically the Voting Rights Act of 1965 (abbreviated VRA).

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[9] Ibid.
[10] United States Constitution, Text of the Fifteenth Amendment
[11] United States Constitution, Text of the Nineteenth Amendment
[12] United States Constitution, Text of the Twenty-fourth Amendment
[13] United States Constitution, Text of the Twenty-sixth Amendment

The VRA specifically targeted states that were denying minority voters their rights in violation the Fifteenth Amendment, creating blanket, federal laws that prohibited discrimination against voters who were minorities.[14] All of these laws and amendments show how fair voting for someone to represent the citizens of an area is an incredibly protected American ideal. Partisan redistricting violates this ideal by denying a fair vote for a candidate who best represents an area's interest by cracking or packing said area. Partisan redistricting dilutes the votes of people in an area if the lines are drawn in such a way that denies a majority of people their political preference.

II. Two Paths Through Supreme Court Decisions

While partisan redistricting has been around since the founding of America, the Supreme Court has comparatively only recently taken up the issue. There are two paths through the Supreme Court that can be considered in the realm of partisan redistricting; they are partisan redistricting by state legislatures and redistricting by independent redistricting commissions. Redistricting by state legislatures will be the main focus here, but independent commissions have a place to be discussed as well. Regardless, both start with *Baker v Carr* in 1962. Justice Brennan, writing for the majority, wrote that redistricting was not a political question and that the issue could be decided by the courts, as redistricting could violate the Equal Protection Clause of the Fourteenth Amendment.[15] The path splits here into the Courts decisions on the two different kinds of redistricting.

A. Independent Redistricting Commissions

[14] United States Department of Justice, "History of Federal Voting Laws." US Department of Justice, Accessed April 2 2020.
[15] "Baker v. Carr." Oyez. Accessed September 17th, 2019.

Independent redistricting commissions are attempts by states to use independent reform to draw district lines, taking the power out of the politicians who reside within the seats. Every state who has enacted one of these commissions has done so differently. For example, Iowa completely removed the power from the state legislature and has put it into the hands of the Legislative Service Agency, which has the power to draw the lines for both Congressional and state districts without looking at any data about partisan ideologies. Referred to as the Iowa system, this creates a very fair and balanced map in the state.[1617] Other states like California and Arizona have created independent redistricting commissions which take the power away from the legislatures and give it to independent commissions made up of the people. Specifically, the Arizona commission has faced challenges in the Supreme Court. However, the precursor to these challenges is *Gaffney v Cummings* in 1974. Connecticut's legislature had not been able to draw a fair map for their state, so based on their state constitution, the process was delivered to an independent redistricting commission. This commission tried to make things as fair as possible by mathematically calculating partisan ideology and making the districts as fair as possible through a political fairness principle. The Supreme Court upheld this principle, saying that political fairness is a valid principle for redistricting.[18]

While *Gaffney* was the base for independent redistricting for political fairness, the commissions themselves wouldn't be tried until 2015's *Arizona State Legislature v Arizona Independent Redistricting Commission*. In 2012 the Arizona Independent Redistricting Commission (AIRC) had just finished drawing their new map after the 2010 census. When the

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[16] The National Conference of State Legislatures, "The 'Iowa Model' for Redistricting." National Conference for State Legislatures.
[17] Woods, Michael. "Gerrymandering (Almost) Gone Wild: How the Supreme Court Saved Independent Redistricting Reform," Florida Law Review, 2016, pg. 1514
[18] "Gaffney v Cummings," Oyez. Accessed November 23rd, 2019

map was submitted, the Arizona state legislature filed suit against the group claiming that the existence of the AIRC was a violation of the Elections Clause of the Constitution.[19] Article One of the Constitution contains the Elections Clause, which says "elections shall be prescribed in each State by the Legislature thereof."[20] Along party lines, the Court decided 5-4 that the AIRC was a legitimate body as they were created by the people. Justice Ginsburg for the majority wrote that "The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation."[21] This case is important for a variety of reasons, but the most important is that it upheld the viability of independent redistricting commissions as a solution to partisan redistricting. If the Court had ruled the other way, these commissions would be ruled unconstitutional, forcing the issue into the singular path.

Following *Arizona State Legislature v AIRC*, another independent redistricting case came forward to the Supreme Court, also involving the AIRC. *Harris v Arizona Independent Redistricting Commission* was decided in 2016, again a challenge to the maps that were drawn in 2012. Voters in Arizona claimed that the map that was drawn unfairly packed more Republicans into the more populated districts and more Democrats into the less populated districts. The AIRC said that they were drawn this way to comply with the Voting Rights Act, as preclearance was still a requirement. Preclearance meant that the Department of Justice had to approve any maps that were made in areas that had previously racially discriminated against voters.The questions in this case were whether or not drawing districts to over-populate in favor of one party is a

[19] "Arizona State Legislature v Arizona Independent Redistricting Commission" Oyez. Accessed November 9th, 2019
[20] United States Constitution, Article I, Section Four
[21] Justice Ginsburg, Arizona State Legislature v Arizona Independent Redistricting Commission, 135 S.Ct. 2652, 2015. Accessed at Westlaw pg. 2253

violation of one-person, one-vote and if trying to obtain preclearance from the Justice Department is also a viable reason for deviation.[22] The Supreme Court in a unanimous 9-0 decision ruled in favor of the AIRC, saying that the reasons for the AIRC having population deviations were legitimate reasons to deviate from the norm.. More importantly, this case upheld *Gaffney* and again reinforced independent redistricting commissions.

The Supreme Court has been kind to independent redistricting commissions in recent years and has upheld their validity. Independent redistricting commissions are currently the most viable way to have non-partisan reform; however, not many states have them. As it stands, only eight states have independent redistricting commissions, with a few more putting the suggestions on their ballots for 2020. Independent redistricting commissions are the fairest way to redraw the lines, so why aren't more states redistricting with independent commissions? Michael Woods for the Florida Law Review calls it a classic prisoner's dilemma: neither party wants to create an independent commission while they are in power. To create an independent commission while the party is in power will take away the power the party has. When given the chance, both Democrats and Republicans have redistricted in their party's favor.[23] All of the commissions have been created through constitutional amendments that the voters of each state have passed. It is unlikely that every state will follow this example, so voters in these states have looked towards the Supreme Court for a solution.

B. Redistricting by State Legislatures

[22] "Harris v Arizona Independent Redistricting Commission" Oyez. Accessed November 16th, 2019

[23] Woods, Michael. "Gerrymandering (Almost) Gone Wild: How the Supreme Court Saved Independent Redistricting Reform," Florida Law Review, 2016, pg.1526

However, the Supreme Court has been less kind in recent years to overly-partisan gerrymanders by state legislatures. In 1964, the Supreme Court decided two other reapportionment cases, *Reynolds v Sims* and *Wesberry v Sanders*. These cases decided that Congressional districts themselves could be considered constitutional or not (*Wesberry v Sanders*) and the Equal Protection Clause requires that states must give Congressional districts the same number of people (*Reynolds v Sims*), applying the standard of "one person, one vote".[24] One person, one vote is incredibly important for the issue of partisan redistricting, as it has made it harder to crack and pack people into certain districts and still achieve the same outcome.

Decided in 1986 in the Burger Court, *Davis v Bandemer* dealt directly with the issue of partisan redistricting. Whereas all of the previous cases (*Baker, Gaffney, Reynolds)* had dealt with partisan redistricting indirectly or had nothing to do with it, *Bandemer* was the first one to deal with partisan redistricting itself. The facts of the case are simple. The state of Indiana redistricted after the 1980 census and the state's Democrats filed suit claiming that the partisan redistricting disproportionately gave Republicans the advantage. In a 7-2 plurality decision, Justice White once again wrote the opinion. The Court ruled that partisan redistricting is a justiciable issue and that the district court erred in judgement. On the justiciability issue, Justice White wrote, "we have repeatedly stated that districting that would "operate to minimize or cancel out the voting strength of racial or political elements of the voting population" would raise a constitutional question," quoting the political question doctrine that Justice Brennan laid out in *Baker v Carr*.[25] The plurality in this case ruled on the basis that there *could* be a solution, not that there was a solution at the time. The plurality had decided that there was a need for some

[24] National Conference of State Legislatures, "Redistricting and the Supreme Court: The Most Important Cases." Accessed September 3rd, 2019.
[25] Justice White, Davis v Bandemer, 106 S.Ct. 2797. Accessed at Westlaw, pg. 119

sort of protection against partisan redistricting, but they could not find some sort of solution for applying the test. They kept the test broad in the hopes that there would be another case that could discern the features of it.

It wasn't until 20 years later in *Veith v Jubelirer* (2004) that the Supreme Court made another decision on partisan redistricting. Decided by the Rehnquist Court, this case focused on Pennsylvania's redistricting after the 2000 census. The Republican controlled legislature created a plan that very clearly gave Republicans the advantage. Democratic voters filed suit claiming all kinds of constitutional violations, the only one of which that went through was the one person, one vote issue. Justice Antonin Scalia wrote for the 4-1-4 plurality opinion saying that they could not rule on the case because there was not a workable solution under the Fourteenth Amendment to the issues presented: ""Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by Bandemer exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that Bandemer was wrongly decided."[26] However, Justice Kennedy wrote a concurring opinion in which he argued that the door should not be shut on the issue yet, as there could be a solution under the First Amendment. "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights."[27] Kennedy is advocating that there is a potential test that could be found under the First Amendment; this kept

[26] Justice Scalia, Vieth v Jubelirer. 124 S.Ct. 1769. Accessed at Westlaw, pg. 281
[27] Ibid. pg. 314

the door open. This Amendment covers partisan concerns and makes sure people have freedom of association and freedom to choose politically which party they want to support. This takes us to the cases that were decided in the last few years, *Gill v Whitford* and *Rucho v Common Cause*.

III. Gill v Whitford (2018)

A. A Brief Background of the Facts

Post *Veith*, the Supreme Court would not make another decision in the lane of strict partisan gerrymandering by politicians until 2018s *Gill v Whitford* . The facts for *Gill* are somewhat straightforward: Wisconsin elected a Republican majority to its state legislature, the first time that this has happened in 40 years. The Republican Party in Wisconsin wanted to keep their legislative majority, so when the time came to draw the state maps again, they chose to draw them so that they would advantage Republicans in almost every scenario. Democratic voters from the state chose to file suit before the plan was even implemented, saying that their rights were being infringed upon. The rights that the plaintiffs said were being infringed were their First Amendment right to association and their Fourteenth Amendment right to Equal Protection. The defendants in the case argued that the Democratic voters do not have standing for the case because as individual voters, they only have a say in whether or not their home district has violations.[28]

Something else that is very important to note here is that the challengers to the Wisconsin plan submitted a formula to show how egregious the partisan gerrymandering was. Known as the efficiency gap, the test is able, for the first time ever, to quantify gerrymandering into a number.

[28] *Gill v Whitford* (2018), 138 S.Ct. 1916 WL pg. 1920

How it works is fairly simple, as explained by Nicholas Stephanopoulos, one of the attorneys in *Gill*: "To illustrate, take a state with five districts: two won easily by Democrats, 76 percent to 24 percent, and three won more narrowly by Republicans, 59 percent to 41 percent. Democrats waste 26 percent of the vote in the two districts they win and 41 percent in the three districts they lose. Republicans waste 24 percent of the vote in the two districts they lose and 9 percent in the three districts they win. Over all, Democrats get 55 percent of the statewide vote but just 40 percent of the seats, yielding a pro-Republican efficiency gap of 20 percent."[29] This quantifiable metric was part of the reason that *Gill* was granted certiorari at the Supreme Court. However, it was never decided whether or not it was viable due to the outcome of the case.

B. Indecision (Kind Of)

In a unanimous decision, the Supreme Court chose to dodge all of the Constitutional questions presented by holding that the Wisconsin Democrats lacked Article III standing to file suit. Chief Justice Roberts wrote for the majority, "The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiff may not rely on "the kind of undifferentiated, generalized grievance about the conduct of the government that we have refused to countenance in the past."[30] Justice Roberts basically said that voters can't challenge a whole map on the

[29] Stephanopoulos, Nicholas. "The research that convinced SCOTUS to take the Wisconsin gerrymandering case, explained." Vox, Accessed March 31, 2020. https://www.vox.com/the-big-idea/2017/7/11/15949750/research-gerrymandering-wisconsin-supreme-court-partisanship
[30] Chief Justice Roberts, *Gill v Whitford* (2018), 138 S.Ct. 1916 WL pg. 1931

grounds that it affects every citizen. Voters can challenge their own district(s), as that is what personally affects an individual voter. However, there isn't legal standing to challenge the policies of other districts because one voter doesn't live in those districts and their vote doesn't go towards the individuals running in areas other than their own. The challengers in this case attempted to challenge the entire map based on how their interests were being challenged in the legislature, which is not a valid reason under Article III. Due to this, it was also never decided whether or not the efficiency gap was a valuable test to determine when partisan gerrymandering was too egregious.

Challenges of this nature are still able to be presented as Constitutional issues, provided that there is standing. All nine Justices of the Court agreed with this decision but allowed the case to be remanded so the challengers of the map could attempt to show the individual harm within each of their districts. The Justices did not want to completely shut down the plaintiff's claim that they might have some sort of injury, so they allowed the voters to come up with concrete individual claims that their vote had been diluted. Basically, the Court said that the case could continue as long as the plaintiffs were not advocating for all districts, just their own. Along with this, the Supreme Court once again dodged the bullet of attempting to create a judicially manageable standard to curb partisan redistricting. This case is not super crucial in the pathway of partisan decisions: it is just another decision by the Court to not make an effective decision.

This case still holds some sort of analytical value. The Supreme Court remanded this case on Article III standing of only being able to represent yourself rather than others. The map challengers could not challenge the whole map on behalf of everybody. They could only challenge their individual districts. This does not make sense; inherently, if a decision changes one district, other districts would have to change either by gaining or losing part of their district.

If one district changes, then another has to, and then another. Changing the makeup of one district changes the entire map in a domino effect. So if one district was forced to be redrawn, the entire map would have to be redrawn. So while the Court is right in saying that an individual does not have Article III standing to sue on behalf of others, a statewide map could be challenged on the grounds that changing one district changes the others. Hypothetically, if the Wisconsin Democrats were to find one person from each district who was unhappy with the map, they could challenge the entire map as a whole. This remains to be tested, but this is a potential workaround to challenge an entire unjust map. However, there is no point in challenging an entire map if the Supreme Court won't hear the case.

IV. *Rucho v Common Cause* and *Lamone v Benisek* (2019)

A. Background of the Facts

Rucho v Common Cause and *Lamone v Benisek* were consolidated into one case to be decided before the Supreme Court. Both have similar backgrounds: in *Rucho*, North Carolina Republicans drew their statewide map egregiously, attempting to gain an advantage for their party. Challengers of the plan called this an unconstitutional gerrymander. In *Lamone*, Maryland Democrats sought to redraw their map to disadvantage Republicans, taking the one majority Republican district away and ensuring a Democratic victory. This case was also challenged as an unconstitutional partisan gerrymander. Both challengers alleged that the maps were violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2 of the Constitution. Circuit courts in both cases ruled that the maps

were unfairly drawn to disadvantage one party. The Supreme Court consolidated the two cases together and made a decision in the summer of 2019.[31]

In a 5-4 decision along partisan lines, the Supreme Court ruled that partisan redistricting claims are non-justiciable under the political questions doctrine. Chief Justice Roberts wrote the majority joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. The dissenting opinion was written by Justice Kagan, joined by Ginsburg, Bryer, and Sotomayor.

B. Justice Roberts Opinion: An Exercise in Omittance

1. Roberts' Basic Argument

The majority decision revolved around two connected ideas: idea one is that Justice Roberts stated that the Founding Fathers knew about partisan gerrymandering and chose to empower the state legislatures to redistrict as they saw fit. In his own words, Roberts writes, "The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress… At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing."[32] To back up this point, Robert's quotes Federalist 59 written by Alexander Hamilton, as Hamilton had said that elections should stay within the power of the legislature. This connects to his second idea that this creates a political question for the state legislatures to figure out. Political questions are not suited for judicial resolution and should be left up to the political branches. They did not rule on whether or not it was constitutional, they

[31] "Rucho v. Common Cause." Oyez. Accessed February 19, 2020. https://www.oyez.org/cases/2018/18-422.
[32] Ibid. pg. 2496

just said it wasn't justiciable. Benjamin Battles, the Vermont Solicitor General, wrote for SCOTUSBlog "Two things the court's opinion did not do are worth noting. First, the court did not in any way bless the maps North Carolina and Maryland officials created in these cases. Rather it described them as "highly partisan, by any measure" and "blatant examples of partisanship driving districting decisions." Second, the court did not hold that extreme partisan gerrymandering is constitutional. Although it rejected the standards the lower courts applied, it did not seriously question the harms those standards sought to address."[33] The majority didn't explicitly say that partisan redistricting was good or bad; rather, they said that because no lower court or the Supreme Court had found a judicially manageable solution, the issue was to be better decided by the legislative branches of each state. He writes in his opinion "There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts."[34] He and the majority reasoned that it would be impossible for the Court to determine a test for what is considered fair. Therefore, to solve the issue, the legislatures of the states or the national Congress would need to pass some sort of legislation that curbs their own power.

Justice Roberts and the majority continued to remove the precedent of partisan redistricting from where it began. In the beginning with *Davis v Bandemer*, the Court had ruled that it was probably justiciable to rule on partisan redistricting claims. The Court attempted to reverse this in *Veith*, and finally did with this case. However, this case represents planned

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[33] Battles, Benjamin. "Gerrymandering symposium: Court to foxes — Please guard henhouse." SCOTUSBlog, 28th June 2019. Accessed April 13 2020.
[34] Majority Opinion of Chief Justice Roberts, Rucho v Common Cause, 139 S.Ct. 2484 WL pg. 2500

obsolescence. The majority cut out facts and precedent to fit their own narrative rather than looking at the whole picture. There are multiple examples of this throughout Robert's opinion.

2. Omittances and Contradictions of the Federalist Papers

First is the earlier citation of the Federalist Papers. While it is true that Alexander Hamilton wrote in Federalist 59 that "it will ... not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former."[35] There is other evidence, however, that the majority omitted to fit their narrative. The argument that Hamilton is making in Federalist 59 is that the states **should not** have the power to regulate their own elections for the federal House: "Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs."[36] Hamilton was arguing that allowing for the state legislatures to decide their own elections could destroy the Union, as certain states could band together and just not send delegates to Congress, ultimately returning the United States to the system of government under the Articles of Confederation. Roberts twisted his meaning to leave this part out of the majority opinion.

This is the only one of the Federalist Papers that Roberts cites, but there are other documents that would fit to condemn partisan redistricting. In Federalist 57, James Madison sought out to quell fears about the House of Representatives "putting the few above the many."

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[35] Ibid.
[36] Alexander Hamilton, Federalist 59. Accessed from the Avalon Project.

In this essay, he wrote "I will add a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, *that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society* (emphasis added). If it be asked what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer the genius of the whole system, the nature of just and constitutional laws… if this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature as well as on the people, the people will be prepared to tolerate anything but liberty."[37] Madison, Hamilton, and Jay sought to write the Federalist Papers to convince the people of the United States that the Constitution was the best form of government possible. They were afraid of tyranny and oligarchy, and set out to quell the same fears of the people. Federalist 57 is an important precedent for how the Founders felt about representatives controlling their own outcomes.

3. "Proportional Representation"

The Founding Fathers certainly cared about the power of the people to choose their own electors. For Justice Roberts to omit entire papers that disprove his argument and omit the important facts of the Federalist Paper that is cited proves a point about trying to fit the facts to his narrative. Another example of this is Roberts discussing proportional representation: "*The Founders certainly did not think proportional representation was required* (emphasis added). For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress."[38] He also writes, "Partisan gerrymandering claims

[37] James Madison, Federalist 57. Accessed in "The Essential Federalist and Anti-Federalist Papers" by David Wooton. Pg. 260-261
[38] Majority Opinion of Justice Roberts, *Rucho v Common Cause*, 139 S.Ct. 2484 WL pg. 2499

rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Such claims invariably sound in a desire for proportional representation, but the Constitution does not require proportional representation, and federal courts are neither equipped nor authorized to apportion political power as a matter of fairness."[39] Justice Roberts when referring to proportional representation is not referring to the idea in the Constitution that people have equal representation in the House proportional to the number of people in their district (representation by population); rather, he is referring to the European idea of proportional representation, where districts will have multiple representatives proportional to the size of their political parties (considered split representation). He takes this originalist view to make a correct point about how the American people at the time of the Founders wanted their districts to be represented by one person, via a winner-take-all-system that is still in effect today.

However, the flaw in Justice Roberts' argument is that he uses an opposition to the European ideal of proportional representation to show why partisan redistricting should be accepted. The systems and processes that have been created through Supreme Court precedent and Constitutional Amendments, such as one-person one-vote and the Equal Protection Clause have nullified racial gerrymandering in these single member districts. Later on, Justices of the Supreme Court (like the plurality in *Bandmer*, Justice Kennedy in his *Vieth* opinion, and Justice Kagan in her *Rucho* dissent) would apply this logic to partisan redistricting to explain how it dilutes votes.

Roberts uses a European example of proportional representation to point out that only one party can win a district. While this is true, it doesn't make it right for that party winner to

[39] Ibid. pg. 2488

change their district to make it easier for them to keep their power. This goes against all of the ideals that matter when electing representatives, including the democracy, representation and voting . While Roberts' argument is true that states would send single party delegations to Congress and that the words "proportional representation" do not show up in the Constitution (although "Representatives shall be apportioned among the several States according to their respective numbers" does)[40], the systems and processes set up in the Constitution represent not the European idea, but the alternate definition. The Founders attempted to create a system where the people and their rights were protected by the system itself, making it harder for politicians to take the power into their own hands. The main example of this in the Constitution is the creation of the House itself.

The reason that Congress is set up bicameral is so that there can be one house that has representation by population. The House of Representatives is representation by population because the people in larger states like California and New York have more representatives, as they have more people. Smaller, less populous states like Rhode Island have less representatives that they send to the House. The Senate fixes the issue for the smaller states by giving every state equal representation in their body. representation by population is why we have districts and the House. Originally, the Founders were worried about having the larger states have all of the power in Congress, but the bicameral system was created to solve this issue. The larger states would have more power in the House, as they had larger populations, but the Senate would have two delegates from each state so the smaller states would have more of a say. Regardless, with the passage of the 17th Amendment, the people under this system have the right to vote for their Representatives and Senators. This system is also meant to protect the people. Common Cause

[40]United States Constitution, Article I, Section 2, Later changed by the Fourteenth Amendment

in their brief for their case wrote about how the system protects its voters: “Through the Elections Clause [Art. I, § 4], the Constitution delegated to the States the power to regulate the ‘Times, Places and Manner of holding Elections for Senators and Representatives,’ subject to a grant of authority to Congress to ‘make or alter such Regulations.’” *Cook v. Gralike,* 531 U.S. 510, 522 (2001). By contrast, Article I, § 2 grants “the People”—and not State legislatures—the power to “cho[ose]” representatives. Together, these clauses provide a “safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves,” thus “ensur[ing] to the people their rights of election.” *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n,* 135 S. Ct. 2652, 2672 (2015) (citation omitted)." The people’s right to have representatives who represent their interests are protected under these clauses in the Constitution The process of how electoral districts were to be decided is also enshrined within the Constitution. Article 1 § 2 of the Constitution states “The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.”[41]

The number of people per district was later changed by federal law,[42] but it stands that the Founding Fathers had a plan for how representation would work per district. The larger states would not be able to overrun the smaller states in the Senate and the House would be able to directly represent the people. The system lends itself to the idea that the people have the power in controlling who represents them. Frequent elections for House members were in place so that the people could constantly and consistently have a voice in who represents them, mainly to fight corruption or “having the few above the many.” The idea to fight corruption, as exemplified by

[41] United States Constitution, Article 1 Section 2
[42] US House of Representatives, “Historical Highlights: The Permanent Apportionment Act of 1929”

Madison again in Federalist 57, was to allow the people to vote somebody out of office if they felt they were corrupt: "the House of Representatives is so constituted as to support in the members of a habitual recollection of their dependence on the people… when they must descend to the level from which they were raised; there for ever to remain, unless a faithful discharge of their trust shall have established their title to a renewal of it"[43] This is what the Founders wanted, but the times have changed. American society today is divided incredibly politically, so if one party has an advantage, they want to keep it. It is impossible for the voters who think someone is corrupt to be voted out of office if district lines are drawn in such a way that the opposite party has no chance to have their votes heard.

4. Contradictions in Supreme Court Precedent

In debunking Justice Roberts' opinion on the Founding Fathers as it ties into partisan gerrymandering, it follows that the second part of his argument also fails. Roberts came to a logical conclusion: if the Founding Fathers assigned the task to the state legislatures, then partisan redistricting is a political question. If part one fails, then so does part two. To back up this point, the views of the Founding Fathers are not the only thing that is omitted by the majority opinion. The majority also set out to omit Court precedent to fit their narrative. The majority opinion contradicts itself in analyzing whether or not the issue is a political question. This is mainly in the discussion about *Gaffney v Cummings*.

While *Baker v Carr* was the first kind of redistricting case, the first partisan redistricting case would be *Gaffney v Cummings*. *Gaffney* is cited by Roberts multiple times throughout the opinion and Justice Roberts contradicts himself whenever it is mentioned. Roberts writes

[43] James Madison, Federalist 57. Accessed in "The Essential Federalist and Anti-Federalist Papers" by David Wooton. Pg. 260-261

"Gaffney rejected an equal protection challenge."[44] *Gaffney* upheld a plan that attempted to achieve political fairness as valid. Justice White wrote "The asserted justification for the divergences… was 'the State's policy of maintaining the integrity of political subdivision lines,' a policy we found to be rational and wholly sufficient to justify the district population disparities of the size and quality that had been found to exist."[45] However, Justice Roberts still cites *Gaffney* as precedent that supports his viewpoint, saying that "In upholding [Connecticut's] plan, we reasoned that districting "inevitably has and is intended to have substantial political consequences"[46] and "[i]t would be idle ... to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."[47] Justice Roberts applies his views to this case to explain in his view how the Court has previously allowed partisan redistricting to occur, saying that redistricting inherently has political consequences and that *Gaffney* is flawed precedent that decries any sort of partisan redistricting. This contradicts the point of *Gaffney*; the case does not say "partisan redistricting is not allowed," it merely states that drawing a map in favor of equality between the political parties is a sufficient reason to justify different sizes of districts. Roberts equates "equal protection for parties is sufficient for population differences" to "partisan redistricting is allowed because politics is a viable reason for population differences." Roberts' reasoning is the opposite of what *Gaffney* intended.

C. The Dissenting Opinion of Justice Kagan

While the majority opinion focused on an originalist interpretation of the Constitution, Justice Kagan for the dissenting opinion took more of a contemporary approach that focused on

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[44] Majority Opinion of Justice Roberts, WL pg. 2497
[45] Justice White, Gaffney v Cummings. 93 S.Ct. 2321, 1973. Accessed at Westlaw, pg. 742
[46] Roberts pg. 2497
[47] Ibid. pg. 2504

tests that would work. She was joined in her opinion by Justices Ginsburg, Breyer, and Sotomayor. She also starts to pick apart the majority opinion for what she saw as violations of Constitutional rights: "The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives."[48]

Justice Kagan writes that partisan gerrymandering amounts to vote dilution, which violates the Equal Protection Clause of the Fourteenth Amendment. "If districters declared that they were drawing a map "so as most to burden [the votes of] Party X's" supporters, it would violate the Equal Protection Clause. For (in the language of the one-person-one-vote decisions) it would infringe those voters' rights to "equal [electoral] participation."[49] What Justice Kagan is saying is that vote dilution is a violation of the Equal Protection Clause. Using vote dilution to crack and pack members of an opposing political party into a district to create an advantage for the gerrymanderer's political party infringes upon the right to equal participation in the political process. Packing and cracking are the acts of putting all of the members of the opposing political party into one district so the other districts have less members and spreading all of the opposing members of a party across the districts so they cannot have a majority, respectively. "Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map). In short, the mapmaker has made some votes count for less, because they are likely to go for the other party."[50] Vote dilution also violates the ideals that matter in redistricting (democracy, representation, and voting). Equal protection in the political process means that a vote is equal to all other votes, regardless of what party it is cast

[48] Justice Kagan, Dissenting Opinion in Rucho v Common Cause, 139 S.Ct. 2484 WL pg. 2509
[49] Justice Kagan, Dissenting Opinion in Rucho v Common Cause, 139 S.Ct. 2484 WL pg. 2514
[50] Ibid.

for. Democracy rests on the ability for the people to have their voice and vote be heard, but in a system that dispenses votes, one voice is worth less than another. Representation rests on the ability for the people to have trustworthy representatives who can listen to them. Representatives who use vote dilution and violate Equal Protection for their own benefit cannot be trustworthy to hold office.

She addresses First Amendment violations to freedom of association and freedom of speech, as suppression of political parties and representation violate these rights. and "[The First Amendment] gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." She is stunned that the Court would so boldly violate the ideals of democracy, representation, and voting that are protected by the First Amendment. Freedom of association and speech are what make the American political system of democracy work. Without them, Americans would be living under tyranny, unable to support candidates who line up with their ideals. This is why partisan redistricting violates the First Amendment: Americans are unable to support candidates who line up with their ideals. Their votes are being diluted so the person that they want cannot win. They are being discriminated against because of who they've voted for in the past. They are unable to choose their representatives, violating their ideals to representation.

Kagan doesn't go in depth into Roberts' ideas behind what the Founding Fathers intended when it comes to partisan redistricting. Instead, she quotes the Declaration of Independence and the Gettysburg Address; "'Governments,' the Declaration of Independence states, 'deriv[e] their just Powers from the Consent of the Governed.' The Constitution begins: 'We the People of the United States.' The Gettysburg Address (almost) ends: '[G]overnment of the people, by the

people, for the people.' If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign."[51] She also quotes the Federalist Papers, specifically Madison in Federalist 37; "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people."[52] Kagan also takes the time to explain the differences in gerrymandering at the time of the Founders and now: the modern abilities of people to make maps with the technology that is available is so much more precise than the maps that were drawn at the time of the Founding.[53] These quotes are not to counter the majority's argument about the Founding Fathers' interpretation. Rather, it's to prove a point that the foundation of American government rests on the ability for the people to pick their own representatives.

This is the Constitutional argument she is attempting to make. She cites all of the precedent in addition to adding decisions the Court has made in 2015 and 2016 with the cases surrounding the Arizona State Legislature. Kagan writes "The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles"…recognition [of the issue] would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. The other is that political gerrymanders have always been with us "[54] Kagan is arguing that politicians cannot represent themselves and draw their own district lines, as it does not play into

[51] Ibid. pg. 2511
[52] Ibid.
[53] Ibid. pg. 2512-2513
[54] Ibid. 2512

our foundation of democracy. No politician is going to do anything that would limit their own power. Seeking a legislative option is next to impossible.

In her opinion as well, she dives deep into the idea that there are plans that work that would be effective to curb partisan redistricting, providing specific examples of plans that lower courts proposed and how they would work. Kagan also takes the time in her dissent to outline a test that the lower courts used that determines whether or not partisan redistricting is too egregious. If there is a justiciable test that is able to determine when partisan redistricting occurs, it disproves Justice Roberts' and the majority's reasoning that partisan redistricting is a political question. She explains "As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day."[55] In practice, this test makes sense, it's politically neutral, and was used effectively by the Circuit Court in both *Rucho* and *Lamone* to strike down the maps. Justice Roberts wrote about what the definition of fair in a partisan gerrymandering case is; he describes three different kinds of fairness in regards to redistricting and then goes on to say "Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and

[55] Ibid. 2516-2517

precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts."[56] Fairness, by Roberts' opinion, can never be manageable for the courts because there are so many definitions of what fair can mean. However, using math, it is somewhat easy to get a definition of fair. Combining Kagan's plan with the efficiency gap may create something that has a good definition of fairness.

D. Analysis of Opinions In Regards to American Ideals

It's important to view these cases in regards to the First and Fourteenth Amendment rights that are violated when partisan gerrymandering occurs, but it's also important to remember the ideals that voters and citizens hold democracy, representation, and voting. Starting with *Gill*, are any of these ideals violated by the Court's decision? The answer is not really. The Court, in punting the decision to be decided in *Rucho*, did not make a decision that violated any of these ideals. In saying that a few voters cannot represent every district, they actually protected the rights of those voters to be represented. Granted, they could have potentially ended partisan redistricting as a whole, so they didn't fix any of the rights that the process already infringes upon. However, they also didn't make them worse. The decision basically left the people's rights where they were.

Rucho is a different story; all three ideals are violated by the Court's decision in *Rucho*. Starting with representation, saying that partisan redistricting is not a justiciable issue denies thousands of voters a choice for who represents them; these voters are forced to be represented by someone who won't listen to their political beliefs and is less likely to compromise if their

[56] Majority Opinion of Justice Roberts pg. 2500

seat is completely safe. This entrenches political parties and moves both Democrats and Republicans farther left and right, respectively. The right to vote is violated along the same lines; there's no point in voting for a preferred candidate if they're running in a district that they have no chance of winning due to gerrymandering. This allows candidates who are in the safe district to spend less time campaigning and less time being accountable to their constituents.

In terms of democracy and voting, this case upends these ideals completely. The people are not choosing their representatives; the representatives are choosing themselves. Justice Kagan said it best in her *Rucho* dissent: "The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." She is describing the violation of rights that are laid out in Article I and the First Amendment. Article I is the foundation of democracy, as it lays out that we elect representatives and how we elect those representatives. Violation of this right is one of the most egregious missteps the Supreme Court has made in recent years.

V. Constitutional Tests that Would Work

A. How To Move Forward

Although the decision in *Rucho* would signify that the first path of partisan redistricting has ended, this is not the case. As the majority says, it is not unconstitutional for gerrymandering to exist. However, it may be considered unethical by the people that politicians represent. If the Constitution is viewed as a living, breathing document rather than in an originalist light, then the times may eventually change to deem partisan redistricting as unconstitutional. To examine this, it's worth a look at how redistricting currently acts and how it may change.

There are rules that those who are drawing district lines follow for their map to be considered legal, split into federal and state laws. There are only two federal laws that mapmakers must follow: equal population (one person, one vote) and the provisions in the Voting Rights Act. Equal population means that districts have to have roughly the same amount of people in said district. The Voting Rights Act protects minorities by denying district lines that unfairly discriminate against minorities.[57] While there are only two federal laws, states have other protections. Almost all states have a contiguity clause, meaning that the district area can't be broken by another district. Most states also respect political boundaries, such as counties and townships, without splitting them among different districts. Compactness is another requirement by many states, which means that the higher the population of an area, the smaller the district.[58] These state rules are in place to protect the voters' right to be heard and have their vote matter. The federal rules are to protect against racial gerrymandering. Racial gerrymandering is in itself a whole other problem, but thankfully, Congress has installed protections against it and the Supreme Court has ruled that it is unconstitutional for racial gerrymandering to take place. In the mid-1990s, the Court decided *Shaw v Reno* (1993) and *Miller v Johnson* (1995), which decided that racial gerrymandering does not fall in line with the Fourteenth Amendment's Equal Protection Clause.

The connections between partisan redistricting and racial redistricting make a case that partisan redistricting should be unconstitutional as well. Using the earlier example of Maryland in *Rucho*, what if the state of Maryland had broken up black areas and forced those that were black to be represented by someone who was white, unable to represent their interests? Racial

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[57] Levitt, Justin. *All About Redistricting; Federal Criteria*. Loyola Law School. Accessed March 29, 2019. http://redistricting.lls.edu/where.php#race

[58] Levitt, Justin. *All About Redistricting; State Criteria*. Loyola Law School. Accessed March 29, 2019. http://redistricting.lls.edu/where-state.php

redistricting is discrimination against a group for being a certain race, which clearly, is a violation of the Equal Protection Clause. So shouldn't discrimination against somebody for their political beliefs fall under the same umbrella? If a company were to deny somebody a job based on whether or not they're a Democrat or a Republican, thats just as much discrimination as if they had denied somebody a job because they're a different race. According to Justice Kennedy in his opinion in *Veith*, this could be considered a First Amendment violation of the right to freedom of association. Association applies to political parties as well, as they are organizations that organize for a political movement. This political movement is also speech, another First Amendment right. The NAACP Legal Defense Fund wrote an amicus brief supporting the Common Cause appellees, in which they argued that "Racial discrimination, of course, is morally, historically, and legally distinct from partisan subordination. Partisan impulses have, however, repeatedly provided disturbing incentives for officials of both major parties to draw districts that disadvantage minority voters. The absence of a meaningful partisan gerrymandering doctrine has not only fostered this abuse, but also led to further detrimental impacts for voters and for the law."[59] So not only does partisan redistricting supply the ability for mapmakers to discriminate against those of a certain party, it also allows for mapmakers to discriminate by race, claiming partisan interests. Kristen Clarke and Jon Greenbaum, writing for SCOTUSBlog, explain "Nonetheless, [the *Rucho* decision] will have a negative effect for civil-rights lawyers and advocates who seek to ensure fair maps. In many instances, it will enable map-drawers who have racial motivations or a combination of racial motivations and partisan motivations to claim that they made decisions only for partisan reasons and not for racial ones. The reality is that in many areas of the country, partisanship and race are closely intertwined. This is particularly true

[59] Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. et al. in Support of Appellees, Rucho v Common Cause WL pg. 23

in the South, where in numerous places many African-Americans vote Democratic and a substantial majority of whites vote Republican. Sophisticated map-drawers not only know this but also can perform sophisticated statistical analyses whereby they can predict election outcomes based on the racial demographics of the district. Thus, race can be used as a means for achieving a partisan outcome."[60]

However, there is a counter argument to be made. One, the history of slavery and race relations in the United States make race a much more sensitive subject. Somebody who is discriminated upon by race has definitely felt the effects more than somebody who is discriminated against for having certain political beliefs. The reasons that the Thirteenth, Fourteenth, and Fifteenth Amendments originally existed was the protection of racial minorities from discrimination. Although they have implied protection from the Supreme Court, political minorities do not have that explicit protection in the Constitution that minorities have. Two, it is much easier to judge somebody based on their race rather than their political beliefs: people can most likely just look at somebody to determine their race, whereas they probably have to have a conversation with somebody to determine their political beliefs. It is much easier to discriminate based on race. But saying race redistricting is wrong doesn't make partisan redistricting right. As Clark and Greenbaum explain, using data for partisan redistricting helps those that want to discriminate by race. Saying that one form of redistricting for gain is right and one is wrong is not possible, as they are intertwined. Redistricting by party is inherently redistricting by race in some areas of America. There are some who use partsianship as a mask for race discrimination,

[60] Clarke, Kristen and Jon Greenbaum. "Gerrymandering symposium: The racial implications of yesterday's partisan gerrymandering decision." SCOTUSBlog, 28th June 2019. Accessed April 13 2020.

being still ruled as legitimate due to the partisan implications. It has never been easier to use data to discriminate against minorities while still calling it partisan redistricting.

Due to increased levels of technology, it has been easier every year to collect data to gerrymander maps based on political party. Without that data, politicians wouldn't be able to cement their majority. There's voting records, district history, and previous maps to show how an area is likely to vote. It has become easier than ever to determine someone's voting habits. For example, the Republican Party started their REDMAP initiative prior to the 2010 redistricting cycle with the aim of increasing Republican majorities and protecting the ones they had. The initiative sought to spend millions of dollars on somewhat competitive races to ensure that the politicians who were drawing the lines were Republican. Their goals are still on their website: "The rationale was straightforward: Controlling the redistricting process in these states would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn. Drawing new district lines in states with the most redistricting activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[61]

Vann Newkirk writing for The Atlantic described how the Republican majority increased based on their efforts; "REDMAP was a spectacular success. First, on the strength of fundraising efforts in pivotal states with changing demographics—places like Wisconsin and North Carolina that have become new swing states—Republicans overran 2010 state legislative races in backwoods districts, to the tune of nearly 700 state legislative seats, the largest increase in modern electoral history. Additionally, Republicans outspent Democrats by over $300 million in

[61] REDMAP Admin. "2012 REDMAP Summary Report." REDMAP: The Redistricting Majority Project, 4 January 2013. Accessed 10 April 2020.

that year's gubernatorial races, which netted them six additional gubernatorial positions… all of which were flipped from Democratic incumbents."[62] The REDMAP initiative is proof that data can be used to create ways for politicians and parties to create new majorities, discriminating against those that belong to the other party. Analysis of this data is something that can also be used to create a test to determine when partisan gerrymandering occurs; this ties in well to the plan that Justice Kagan proposed in her *Rucho* dissent and with the efficiency gap. These are the three things that make a solution that would work: Justice Kagan's *Rucho* framework, the efficiency gap, and technology.

B. A Solution that Would Work

Technology can change the Supreme Court's decision because it can legitimize a test through data. This is something that Kennedy wrote in his *Vieth* opinion: "Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards."[63] Wendy Tam Cho writing for the Southern California Law Review wrote about Kennedy's prediction, saying "Indeed, more sophisticated technology has fueled the threat of gerrymandering. With the aid of computers and advanced software, map drawers now have the ability to adhere tightly and meticulously to legal districting practices while simultaneously and surreptitiously entrenching

[62] Newkirk, Vann R, II. "How Redistricting Became A Technological Arms Race". The Atlantic, 28 October 2017. Accessed 3 March 2020.
[63] Justice Kennedy, Vieth v Jubelirer. 124 S.Ct. 1769. Accessed at Westlaw, pg.312-313

power. Moreover, computing power and software sophistication are only improving over time--a fact certainly not lost on Justice Kagan, who last year wrote in Gill v. Whitford, "[t]he 2010 redistricting cycle produced some of the worst partisan gerrymanders on record. The technology will only get better, so the 2020 cycle will only get worse."[64] So while technology has made maps that are uneven, there is already technology that can make maps as even as possible. As *Gill* was being decided, a few computer scientists, including Phillip Klein, wrote an algorithm that allows for compact, mathematical, politically neutral districts. "known as Lloyd's algorithm, it starts by randomly placing a number of "centers" on a map (the centers might represent something like a fire station in a resource optimization problem) and then executing two simple steps repeatedly. 'For the first step, you assign clients to the center nearest to them,' Klein explained. 'For the second step, you move the centers to get them closer to the clients that you just assigned. The two steps are repeated until there's no improvement made by either step. When that happens, the algorithm terminates and you have a stable solution.'"[65] This algorithm can be adjusted to take into concerns such as where voters of a certain party lie and the other rules of redistricting, such as race or communities of interest, along with voting records and the previous map to adjust for fairness.

Others, such as Michael McDonald writing for the Yale Law Journal, suggest a Predominance Test that measures the compactness of a district: "If widely adopted, this test could reinvigorate compactness as a meaningful redistricting constraint. In a nutshell, the proposed Predominance Test works in the following manner: first, create a maximally compact comparison plan by (1) drawing any mandatory districts and freezing them into place; and (2)

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[64] Tam Cho, Wendy. "Technology-Enabled Coin Flips For Determining Partisan Redistricting" Southern California Law Review Postscript, 2019. Accessed 14 April 2020. WL pgs. 12-13
[65] Stacey, Kevin. "Researchers Devise an Algorithm to Combat Gerrymandering." Brown University, Phys.org. Accessed March 28 2020.

drawing the most compact plan possible for the remaining districts, while respecting equal population and contiguity. Then, compare districts in the target plan (the plan being analyzed) to their maximally compact district equivalents. If the compactness of a target district is less than fifty percent of the maximally compact district, then discretionary factors have predominated over compactness and a violation has occurred."[66] If these are too complicated, there are very easy ways to redraw the maps to see if there are better solutions. For example, FiveThirtyEight's Atlas of Redistricting allows for readers to instantly redraw the current lines to better suit Democrats, Republicans, or to make districts as competitive as possible. Their maps use all of the data and reasoning that those who are drawing the official maps use, while making a very easy tool to see how areas are gerrymandered.[67]

Now, combine this with Justice Kagan's framework in *Rucho* and the efficiency gap. Justice Kagan's test has three parts: "(1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map."[68] For number one, the efficiency gap is a viable measure for intent. There is a quantifiable metric to show if a map was drawn in such a way that it disadvantages one party or the other. For number two, history and previous maps can help to determine how close elections were in certain areas compared to

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[66] McDonald, Michael. "The Predominance Test: A Judicially Manageable Compactness Standard for Redistricting" Yale Law Journal, 7 August 2019. Accessed 13 April 2020
[67] Bycoffe, Aaron et al. "The Atlas of Redistricting." FiveThirtyEight. 25 January 2018. Accessed 11 November 2019.
[68] Justice Kagan, Dissenting Opinion in Rucho v Common Cause, 139 S.Ct. 2484 WL pg.2516-2517

where they are with the new map. Applying the efficiency gap to previous maps and comparing to the current map can show how the map has changed. For number three, the algorithm that Philip Klein and his colleagues created can create a map that does not violate any of the rules or considerations that take place when maps are drawn. Their algorithm can also be used as a solution to drawing a map that has been deemed too egregious. This is a test that would work and is politically neutral.

VI. Conclusion

The American citizen has certain ideals that they account for as being a part of the society they live in. These ideals include democracy, representation, and the right to vote. Partisan redistricting violates all of these ideals, not allowing voters to participate equally in the process, not allowing voters to choose their representative, and diluting their vote to the point where it doesn't matter. The violation of these ideals not only disenfranchises voters, but violates their Constitutional rights. Citizens have Equal Protection under the Fourteenth Amendment, along with the freedom of speech, expression, and association with their political candidate under the First Amendment. The Supreme Court for nearly sixty years had protected these rights from partisan redistricting with their decisions until *Gill v Whitford* and *Rucho v Common Cause*. The Roberts Court in *Rucho* ruled that partisan redistricting was a political question that couldn't be decided by the courts because there wasn't a test that could determine when violations had occurred. However, there are multiple tests that could work, including combining Justice Kagan's framework in her *Rucho* dissent, the efficiency gap, and technology.

Whether or not this solution would work in front of the Supreme Court is something that is up in the air. However difficult it is to beat math and data, the majority of the Court may once

again argue that fairness is not an applicable measure; but it doesn't have to be. Being able to draw a politically neutral map that gets as close as possible to an efficiency gap of zero for both parties should be fair enough. The Court has not yet ruled on whether or not the efficiency gap is a viable test to measure partisan gerrymandering, and there may not be a chance to. The Supreme Court has ruled that partisan redistricting is not justiciable for now; it's hard to determine when a new case will make its way to the Court if the Justices won't vote to hear it. It would take the creation of a new test that piques their interest enough to hear it. For now, the citizens have to take the power into their own hands by creating independent redistricting commissions.

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