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Legal Sidebar

The Political Question Doctrine: Political Process, Elections, and Gerrymandering (Part 6)

June 14, 2022

This Legal Sidebar is the sixth in a six-part series that discusses the Supreme Court's political question doctrine, which instructs that federal courts should forbear from resolving questions when doing so would require the judiciary to make policy decisions, exercise discretion beyond its competency, or encroach on powers the Constitution vests in the legislative or executive branches. By limiting the range of cases federal courts can consider, the political question doctrine is intended to maintain the separation of powers and recognize the roles of the legislative and executive branches in interpreting the Constitution. Understanding the political question doctrine may assist Members of Congress in recognizing when actions of Congress or the executive branch would not be subject to judicial review. For additional background on this topic and citations to relevant sources, please see the Constitution of the United States, Analysis and Interpretation.

The Court in the modern era has applied the political question doctrine to some aspects of legislative regulation of elections, particularly in the area of partisan gerrymandering. Partisan gerrymandering is "the practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Government officials seeking to draw legislative districts to affect election results may adopt several different tactics. For instance, they may create districts containing different numbers of voters, effectively diluting the votes of individuals in more populous districts. In the alternative, legislators may create districts that contain equal numbers of voters but where boundaries are drawn to manipulate the concentration of voters in each district based on characteristics such as voters' race or their political affiliation. The Supreme Court has held that equal protection challenges to race-based gerrymandering and one-person-one-vote claims based on unequal districts are justiciable. However, for decades the Court was unable to agree on an approach to challenges to *partisan* gerrymandering.

Unlike one-person-one-vote cases, a partisan gerrymandering case typically involves a voter in a district that is not malapportioned based on population but rather has been drawn to disadvantage one political party. In the words of the Supreme Court, in a political gerrymander, voters affiliated with a disfavored party are either (1) "packed" into a few districts—in effect conceding those districts by large margins and

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LSB10761

"wasting" votes that could help the disfavored party compete in other areas—or (2) "cracked" into small groups and spread across multiple districts so that they cannot achieve a majority in any one district. In these circumstances, plaintiffs cannot argue that their votes are inherently worth less than that of any other voter—rather, they must argue that the creation of a district that disfavors a particular political party violates the Constitution for other reasons.

Supreme Court jurisprudence related to partisan gerrymandering has evolved over time. In fractured opinions in the 1986 case *Davis v. Bandemer*, six Justices of the Court concluded that political gerrymandering claims were justiciable. Justice O'Connor concurred in the judgment in *Bandemer* but disputed that the issue presented was justiciable. She argued that "[t]he Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims" and that the case before the Court required "precisely the sort of 'initial policy determination of a kind clearly for nonjudicial discretion' that *Baker v. Carr* recognized as characteristic of political questions." Justice O'Connor concluded that "the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out . . . present a political question in the truest sense of the term."

Subsequent Supreme Court decisions cast doubt on *Bandemer*'s holding. In the years following *Bandemer*, multiple Justices of the Supreme Court concluded in non-binding opinions that challenges to partisan gerrymandering are nonjusticiable. Like Justice O'Connor in *Bandemer*, those Justices focused primarily on the second and third *Baker* factors: the "lack of judicially discoverable and manageable standards for resolving" these cases and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." For instance, in 2004, in *Vieth v. Jubelirer*, a plurality of four Justices voted to overturn *Bandemer* and concluded that political gerrymandering claims were not justiciable due to the lack of such standards. Justice Kennedy, concurring in the judgment, wrote separately to express his view that, while no standards existed at the time, they might "emerge in the future." Thus, five Justices concluded that the specific political gerrymandering claims at issue in *Vieth* were nonjusticiable, but a majority of the Court left open the possibility of exercising jurisdiction over some future partisan gerrymandering claims. In other cases, the Court divided on or otherwise declined to reach the merits of cases involving partisan gerrymandering.

A majority of the Court addressed the justiciability of partisan gerrymandering claims in the 2019 case *Rucho v. Common Cause*. In that case, voters in North Carolina and Maryland challenged the partisan gerrymandering of their districts under the First Amendment; the Equal Protection Clause; the Elections Clause; and Article I, Section 2, of the Constitution. The Supreme Court, in a five-to-four decision, held that partisan gerrymandering claims are not justiciable. Chief Justice Roberts's majority opinion described districting as an inherently political process that the Constitution entrusts to state legislatures and Congress. The Court further explained that the Constitution imposes no absolute right to proportionate political representation. Absent a right to strict proportional representation, the Court opined, courts deciding partisan gerrymandering cases would inevitably need to "make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." Thus, unlike claims alleging racial gerrymandering (which is always unconstitutional) or malapportionment (which is "relatively easy to administer as a matter of math"), the *Rucho* Court recognized that the inherently political nature of redistricting would require courts adjudicating partisan gerrymandering claims to adjudicate when partisanship has gone "too far" in influencing the redistricting process.

Quoting Justice Kennedy's concurrence in *Vieth*, the Court stated that any appropriate standard for resolving partisan gerrymandering claims "must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'" However, after looking to the text of the Constitution and to various tests proposed by the parties, the *Rucho* Court concluded that it could identify no "limited and precise standard that is judicially discernable and manageable" for evaluating when partisan activity goes

too far. Explaining that "federal courts are not equipped to apportion political power as a matter of fairness," the Court emphasized that, by intervening in disputes over partisan redistricting, federal courts would "inject [themselves] into the most heated partisan issues" and "would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." The Court thus concluded that "partisan gerrymandering claims present political questions beyond the reach of the federal courts" because "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." While acknowledging that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust," the *Rucho* majority rejected the notion that "this Court *can* address the problem of partisan gerrymandering because it *must*." Rather, the Court asserted, state courts, state legislatures, and Congress all have authority to address partisan gerrymandering.

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