

Panel 1: Partisan Gerrymandering

The Constitution mandates that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States.” U.S. Const. art. I, § 2. The 17th Amendment further directs that “[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof.” U.S. Const. amend. XVII.

The number of U.S. Representatives for each state is based on its population. The Constitution reserves to state legislatures the power to determine “The Times, Places and Manner of holding Elections for Senators and Representatives.” U.S. Const. art. I, § 4. The Constitution does not, however, mandate the creation of any congressional districts within each state, nor does it impose a specific process or other requirements on states when drawing or re-drawing the maps that define the state’s districts for its U.S. Representatives or for state legislative districts.

In the early 1960s, the United States Supreme Court began deciding cases brought by voters who asserted that their votes were being unconstitutionally “diluted” in a variety of ways. In Baker v. Carr (1962), the Court held that a malapportionment claim challenging the composition of the Tennessee legislature was justiciable, and rejected the argument that the complaint presented a “political question” that federal courts could not address. In Reynolds v. Sims (1964), another state legislature malapportionment case, the Court first articulated its “one person, one vote” standard, and mandated that each voting district in Alabama be of equal population. The Court grounded its decision in the Equal Protection clause of the 14th Amendment.

That same year, the Supreme Court held that Georgia’s voting districts for the U.S. House of Representatives had to be of equal population size. Wesberry v. Sanders (1964). In Wesberry, the Court relied on the “chosen...by the People” language of art. I, § 2.

More recently, plaintiff-voters claimed in a number of cases that state officials have unconstitutionally diluted their votes in elections for U.S. Representatives by employing a redistricting method called “partisan gerrymandering.” Partisan gerrymandering occurs when state officials draw district lines to guarantee re-election of the majority party that controlled the redistricting process instead of creating districts that reflect the actual political make-up of the state. Succinctly stated, partisan gerrymandering empowers elected officials to choose their voters rather than allowing voters to choose their representatives. Contemporary gerrymandering is greatly aided by the use of massive computing power and sophisticated algorithms that enable the party controlling the redistricting process to draw state and Congressional voting maps that favor that party to an extreme degree.

In 1986, the Supreme Court relied on its one-person-one-vote equal protection decisions to conclude that the partisan gerrymandering issue before it did not constitute a non-justiciable political question. Davis v. Bandemer, 478 U.S. 109, 125 (1986) (Indiana state legislature). While

the Supreme Court never expressly overruled the Bandemer justiciability holding, see Gill v. Whitford, 138 S. Ct. 1916, 1927-29 (reviewing post-Bandemer cases), a majority of Supreme Court justices had never reached consensus on a specific “standard for what constitutes an unconstitutional partisan gerrymander.” Gill, 138 S.Ct. at 1927.

Despite its holding in *Bandemer* that such claims are justiciable under the Equal Protection clause, the Court, in a 5-4 decision, held that the plaintiffs’ allegations of unconstitutional partisan gerrymandering presented a “political question” beyond the decision-making ability and authority of the federal courts. Rucho v. Common Cause (decided June 27, 2019). Rucho had the effect of overturning, among others, Ohio A. Philip Randolph Institute v. Householder, 373 F. Supp. 3d 978 (S.D. Ohio 2019). In that case, a federal district court held that Ohio’s voting map for races for U.S. House seats was the product of unconstitutional partisan gerrymandering, and ordered that it be redrawn. Evidence in that case showed that Democrats were unable in four consecutive elections to win more than 4 of Ohio’s 16 Congressional seats, even though Democrats tallied between 39% and 47% votes statewide in those elections. 373 F. Supp. at 1074.

Was Rucho correctly decided? What paths remain open to plaintiffs in such cases?