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## Partisan Gerrymander Review After Rucho: Proof is in the Procedure

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# **PARTISAN GERRYMANDER REVIEW AFTER RUCHO: PROOF IS IN THE PROCEDURE**

KEVIN MORRIS\*

*In Rucho v. Common Cause, the U.S. Supreme Court purported to end over three decades of partisan gerrymander review by the federal courts. I believe the Court's decision is problematic. Partisan gerrymandering distorts democratic governance through effects that have been increasingly documented, and it seems likely that those effects will compound and continue largely unabated absent the availability of federal judicial review. But my intent is not to argue against Rucho, rather to work within its parameters and overcome it. That means understanding the nature of the problem that the Court wrestled with, recognizing the Court's structural concerns, and then tracing the limits of its reasoning. All of which, I believe, points to the procedural guarantee of the Due Process Clause as a plausible constitutional basis for reinvigorated federal judicial review of partisan gerrymandering challenges. By targeting identifiable groups for vote dilution, partisan gerrymandering functions more like adjudicatory acts rather than traditional legislative acts, and therefore may require additional procedural safeguards in connection with their adoption than the lawmaking process itself provides. Moreover, review of redistricting procedures and the formulation of corresponding safeguards, in contrast to substantive review of redistricting maps as has been done in the past, draws on the special competence of judges. Finally, procedural review does not shift the locus of redistricting authority but instead de-weaponizes it; it does not attempt to wrest control but only to formalize it. A judicial focus on redistricting procedures can thus limit and discipline review so as to prevent judicial overreach, a concern which has long troubled the Court, while at the same time checking the worst partisan redistricting abuses.*

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## I. INTRODUCTION

Free and fair elections are like the grammar of democracy, to which partisan gerrymandering represents an error. A very serious one. For the last several decades, the federal courts remained an open forum for litigants challenging partisan gerrymanders as unconstitutional. But that may have come

to an end with the Supreme Court's decision in *Rucho v. Common Cause*,<sup>1</sup> which held that claims of excessive partisanship in redistricting are not justiciable—that is, not suitable for federal judicial resolution. Fearing that federal courts might become mired in politics, the Court in *Rucho* seemingly closed the courthouse doors to such claims—or did it? I will argue that there may yet remain daylight for federal judicial review.

My present purpose is twofold—first, in practical terms, to underscore the problem; and second, in (principally) legal terms, to outline and argue for a judicial proposal to curtail it. To that end, Section II provides background on the practice of partisan gerrymandering and surveys its troublesome political effects. This Section also reviews the history of partisan gerrymandering challenges in the Supreme Court, up to and including the Court's decision in *Rucho*. In *Rucho*, the Court repeated longstanding institutional concerns over judicial meddling in political affairs before ultimately concluding that partisan gerrymandering challenges “present political questions beyond the reach of the federal courts.”<sup>2</sup> After examining how the Court ended up there, Section III diagnoses the basic conceptual puzzle at the center of the Court's reasoning and also traces the legal limits of that reasoning, which together suggest the outlines of a reinvigorated but restrained federal court role in curbing the worst excesses of partisan redistricting.

Section IV suggests that the prospect of judicial review remains even after *Rucho*, particularly via the Due Process Clause of the Fourteenth Amendment. On that note, this Article is principally forward-looking. My aim is not to wrestle with *Rucho* but to overcome it. With that in mind, any continued role for the federal courts in remedying the worst partisan redistricting abuses must comport with *Rucho*'s reasoning and meet the justiciability prerequisites articulated therein. Because those conditions will serve as a roadmap for what follows, I recite them here at the outset. According to *Rucho*, any exercise of judicial review must (1) identify a plausible constitutional basis, (2) be guided by judicially manageable standards, and (3) exhibit a limited scope of review.<sup>3</sup>

Section V makes the case. Proceeding serially through the *Rucho* conditions, this Section argues, first, that the Due Process Clause—specifically, its procedural aspect—represents a plausible constitutional basis for grounding federal judicial review of partisan gerrymandering challenges. We know from *Rucho* that the Equal Protection Clause and First Amendment do not fit the bill—so I've looked elsewhere.<sup>4</sup> The right to vote is fundamental in our

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1. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

2. *Id.* at 2506–07.

3. *Id.*

4. *See id.* at 2499, 2504.

democratic system of government,<sup>5</sup> and the Court has held that its dilution and devaluation through partisan gerrymandering constitutes a cognizable injury.<sup>6</sup> Moreover, because partisan gerrymandering is, I argue, functionally akin to *adjudication* as opposed to traditional *legislation*, those affected may be entitled under the Due Process Clause to greater procedural protections than the lawmaking process alone affords. That is where the federal courts can carve out a role. In other words, the judiciary can police the process by which redistricting plans are enacted, ensuring that such process squares with constitutionally mandated safeguards. Next, this Section shows that procedural review can foster the development of judicially manageable standards which eluded the Court in *Rucho*. Lastly, this Section demonstrates that procedural review satisfies the final prerequisite to justiciability set out in *Rucho*. Specifically, as shown by courts in other contexts and echoed by scholars, a judicial focus on process over substance can promote democratic governance while simultaneously limiting the risk of institutional encroachment.

## II. BACKGROUND

### A. *What is Partisan Gerrymandering?*

Because this Article offers a solution, we ought to begin by establishing some intimacy with the problem. Partisan gerrymandering is the practice of deliberately redrawing geographic district lines to tilt voting outcomes for partisan advantage. The practice gets its name from Elbridge Gerry, the former governor of Massachusetts who approved the State's highly partisan 1812 districting map, the salamander-like contours of which inspired the curious epithet ("Gerry-mander").<sup>7</sup> Geometric oddity aside, however, one might wonder from the start—what's the trouble? Is partisan gerrymandering a *genuine* problem? Or, given that American politics is transparently a contest for official influence, is the practice instead just a form of electioneering gamesmanship incident to political sport? The answer, I believe, is that partisan gerrymandering is deeply troublesome. It gives rise to a spectrum of political effects that corrode the presuppositions of representative democracy itself,

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5. See *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511, § 20501(a)(1) (2021) ("The Congress finds that (1) the right of citizens of the United States to vote is a fundamental right.").

6. See *Davis v. Bandemer*, 478 U.S. 109, 125, 143 (1986).

7. See *Rucho*, 139 S. Ct. at 2494.

effects that have been documented with increasing clarity in recent years.<sup>8</sup> I will not attempt here to exhaustively recount the vices that attend the practice as my principal design lies elsewhere, but I will nevertheless present a survey to motivate the proposal that follows.

Let's start with redistricting itself. Redistricting is the process of redrawing the lines that divide the electorate into voting groups for purposes of determining legislative representation. Each state redraws its district lines at least once a decade following decennial census returns.<sup>9</sup> The basic purpose of redistricting, at least when legitimate, is to secure "fair and effective representation for all citizens" as populations shift and grow.<sup>10</sup> States are responsible for redistricting—both for federal congressional delegations<sup>11</sup> and state legislative seats<sup>12</sup>—and each state does things a bit differently,<sup>13</sup> albeit subject to certain legal limitations in each case.<sup>14</sup> In most states, the legislature is the body responsible for drawing district maps, which are adopted just like other pieces of legislation.<sup>15</sup> Several states, however, employ commissions of

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8. See, e.g., Devin Caughey, Chris Tausanovitch & Christopher Warshaw, *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 *ELECT. L.J.* 453 (2017); Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 *WM. & MARY L. REV.* 2115 (2018); Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 *LEGIS. STUD. Q.* 609 (2020); JUSTIN LEVITT & ERIKA WOOD, *A CITIZEN'S GUIDE TO REDISTRICTING 10–15* (2010), <https://www.brennancenter.org/our-work/research-reports/citizens-guide-redistricting-2010-edition> [<https://perma.cc/446M-893R>].

9. See LEVITT & WOOD, *supra* note 8, at 16; see generally Justin Levitt & Michael P. McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 *GEO. L.J.* 1247 (2007); 50 *STATE GUIDE TO REDISTRICTING* (2018), <https://www.brennancenter.org/our-work/research-reports/50-state-guide-redistricting> [<https://perma.cc/4C75-M5X9>].

10. *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964); see also *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.").

11. See U.S. CONST., art. I, § 4. *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) ("Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").

12. *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015) ("[R]edistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking.").

13. See LEVITT & WOOD, *supra* note 8, at 20–36; see generally Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–2002*, 4 *STATE POL. & POL'Y Q.* 371, 372 (2004).

14. For example, States must comply with the "one person, one vote" rule established by the Supreme Court, and they cannot redistrict on the basis of race. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019). Congress has the authority to regulate congressional elections under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1., and the States also have independent authority to regulate the redistricting process, see LEVITT & WOOD, *supra* note 8, at 20–36, 68–71; *Rucho*, 139 S. Ct. at 2507–08.

15. See LEVITT & WOOD, *supra* note 8, at 20–36.

varying composition to aid in the process, whether by recommending plans or, in a handful of cases, assuming primary mapmaking responsibility.<sup>16</sup>

There is general agreement that redistricting should accommodate some mixture of traditional neutral criteria such as district size, shape (compactness and contiguity), and composition (including, for example, minority representation), together with political boundaries like county or municipality lines, and geographic boundaries like waterways or mountains.<sup>17</sup> However, because redistricting leads to predictable electoral outcomes—at present, technology and detailed election data enable “very, very, very well-informed guesses”<sup>18</sup> regarding future voting behavior—partisan influence on redistricting is inevitable.<sup>19</sup> But that’s not necessarily a bad thing. Indeed, “redistricting in most cases will implicate a political calculus in which various interests compete for recognition”<sup>20</sup>—and appropriately so.<sup>21</sup> When single-member districts are the norm, as is the case throughout the United States, political redistricting considerations can actually promote certain “desirable democratic ends, such as maintaining relatively stable legislatures”<sup>22</sup> and enhancing legislative responsiveness.<sup>23</sup> Accordingly, *some measure* of partisan bias is expected and permitted.<sup>24</sup> The key issue, as we will see, is judging the right dosage.<sup>25</sup>

16. *See id.*

17. *See id.* at 50–56; *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part, and dissenting in part) (noting that “the Court [in *Reynolds*] plainly recognized that redistricting should be based on a number of neutral criteria, of which districts of equal population was only one”); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (noting traditional districting criteria); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (same); *see generally* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985) (articulating and reviewing redistricting criteria).

18. LEVITT & WOOD, *supra* note 8, at 57; *see also* *Rucho v. Common Cause*, 139 S. Ct. at 2513 (Kagan, J., dissenting) (noting that “advancements in computing technology” and the availability of “more granular data about party preference and voting behavior than ever before” have made enabled mapmakers to “insulate[] politicians against all but the most titanic shifts in the political tides”).

19. *Bandemer*, 478 U.S. at 128 (“It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena.”); *see also* *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004) (“[S]ome intent to gain political advantage is inescapable whenever political bodies devise a district plan . . .”).

20. *Miller*, 515 U.S. at 914.

21. *See Vieth*, 541 U.S. at 356–60 (Breyer, J., dissenting).

22. *Id.* at 360.

23. *See* Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 554 (1994); Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J. L. PUB. POL’Y 443, 456–58 (2005).

24. *See* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

25. *See id.* at 2497 (“The ‘central problem’ [in reviewing partisan gerrymandering challenges] . . . is ‘determining when political gerrymandering has gone too far.’”); *Vieth*, 541 U.S. at 296–97 (noting that the “central problem” is solving an unanswerable question—namely, “[h]ow much political motivation and effect is too much?”).

*B. Political Effects*

Democracy assumes at its foundation that “[s]ince legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.”<sup>26</sup> Yet by cleverly divvying the electorate to mute political opposition, gerrymanders deliberately erode that assumption. Partisan gerrymandering thus frays the “intimate sympathy”<sup>27</sup> between the government and the governed on which representative democracy depends, inverting the “core principle of republican government”—namely, that “voters should choose their representatives, not the other way around.”<sup>28</sup>

That, in a nutshell, is the problem. And it is not a hollow bromide, as we’ll see below. The practice has a long history of occurrence *and* condemnation in this country.<sup>29</sup> It was “known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution.”<sup>30</sup> And in our young nation’s first congressional elections, none other than George Washington accused Patrick Henry of drawing Virginia’s district lines to deny a seat to James Madison.<sup>31</sup> Not long after, the practice was baptized in infamy with Governor Gerry’s contorted map, widely decried for its flagrancy.<sup>32</sup>

The deep dissonance between partisan entrenchment and representative democracy may be intuitive enough, but empirical evidence confirms that gerrymandering has pronounced effects on our political process, trickling down from distorted legislative composition through party activities to individual voting behavior.<sup>33</sup> Political scientists have developed various statistical metrics to gauge partisan redistricting bias. They differ in assumptions and mechanics, but their purpose is the same.<sup>34</sup> During oral argument in the lead up to *Rucho*,

26. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

27. *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting).

28. *Id.*; Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 *YALE L. & POL’Y REV.* 301, 304 (1991) (“Gerrymandering violates the American constitutional tradition by conceding to legislatures a power of self-selection. Self-constitutive legislatures, or self-constitutive governing institutions of any kind, make no sense under a Constitution whose most arresting innovation was the dispersion of power.”).

29. *See Rucho*, 139 S. Ct. at 2494 (“Partisan gerrymandering is nothing new. Nor is frustration with it.”).

30. *Id.*

31. *See id.*; LEVITT & WOOD, *supra* note 8, at 8.

32. *See Rucho*, 139 S. Ct. at 2494.

33. *See generally* Caughey, Tausanovitch & Warshaw, *supra* note 8; Stephanopoulos, *supra* note 8; Stephanopoulos & Warshaw, *supra* note 8.

34. *See generally* Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of A Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 *STAN. L. REV.* 1503 (2018); Eric McGhee,

Chief Justice Roberts dismissed such metrics as “sociological gobbledygook,”<sup>35</sup> and others have expressed doubt about the use of quantitative methods in adjudicating constitutional rights.<sup>36</sup> Putting aside the merit of social science as an extra-legal source of constitutional hallmarks, however, empirically based statistical metrics remain perhaps the most objective tools available for judging the effect of partisan gerrymandering on the political process.<sup>37</sup> In other words, even if such tools are not themselves fashioned into a solution, they can nonetheless help us assess the problem.

As an illustration, the *efficiency gap* measures partisan districting bias by calculating the comparative share of each party’s “wasted” votes in an election.<sup>38</sup> Wasted votes are those that, given the composition of the relevant district, effectively have no electoral impact—in other words, “all the votes cast for a party in a district that the party loses, as well as the votes cast in excess of 50% in a district that the party wins.”<sup>39</sup> The idea is that partisan gerrymanders deliberately minimize the number of wasted votes for the favored party while maximizing the number of wasted votes for the opposition. That means that partisan bias can be evaluated by measuring the relative efficiency by which favored party votes are converted into favorable election results.<sup>40</sup> To illustrate, suppose that Party A loses District 1 with a popular vote of 49%, then all of the Party A votes in District 1 are wasted; and further suppose that Party A wins District 2 with a popular vote of 99%, then 49% (or 99% minus 50%) of the Party A votes in District 2 are likewise wasted. In each case, Party A accumulates far more wasted votes than its political opposition—say, Party B. Partisan gerrymanders aggregate these results across the entire redistricting

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*Partisan Gerrymandering and Political Science*, 23 ANN. REV. POL. SCI. 171 (2020); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 2 (2007).

35. See Adam Liptak, *A Case for Math, Not ‘Gobbledygook,’ in Judging Partisan Voting Maps*, N.Y. TIMES, Jan. 15, 2018. The Chief Justice made the comment during oral argument for *Gill v. Whitford*, 138 S. Ct. 1916 (2018); Transcript of Oral Argument at 40, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

36. See *LULAC v. Perry*, 548 U.S. 399, 468–69 n.9 (2006) (Stevens, J., concurring in part, and dissenting in part) (“I believe it is the role of this Court, not social scientists, to determine how much partisan dominance is too much.”); Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 983 (2019) (“Judicial adoption of a radically new definition of rights as quantitative outcomes would be novel and problematic. It would transform the role of statistical analysis from providing evidence of rights violations to defining the content of rights.”).

37. See McGhee, *supra* note 34, at 177.

38. See McGhee, *supra* note 34, at 174–75; see generally Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

39. McGhee, *supra* note 34, at 174; see also Stephanopoulos & McGhee, *supra* note 38, at 834.

40. See McGhee, *supra* note 34, at 174–75; Stephanopoulos & McGhee, *supra* note 38, at 834–35, 850.

plan. And they work. Studies show that partisan redistricting can and does significantly skew voting efficiency.<sup>41</sup>

For example, in a 2018 study, Nicholas Stephanopoulos examined state house and congressional election data from 1972 to 2014 and concluded that, as measured by the efficiency gap, “unified control of the redistricting process significantly benefits the party in charge . . . to a greater extent than any other variable.”<sup>42</sup> Such control favors partisan tilt more than other factors often thought to influence districting fairness, such as a State’s minority representation or political geography. By skewing voting efficiency, the favored party in power thus secures exaggerated legislative representation.

Evidence further suggests that partisan gerrymandering also causes ideological distortion—that is, its impact extends beyond legislative seat counts alone. Partisan gerrymanders shift the “ideological location of the median voter in the legislature,”<sup>43</sup> which, in turn, strongly influences policymaking.<sup>44</sup> As one set of commentators recently explained:

[P]artisan gerrymandering does not merely make it easier for one party to win elections. Rather, by biasing the relationship between votes and seats, it also undermines congruence with voters’ preferences, skewing the ideological composition of the legislature and the ideological character of policymaking away from the preferences of the median voter (and thus from a majority of the electorate).<sup>45</sup>

Here’s how it works. When a party wins a legislative majority, it shifts the ideological valence of the median legislator.<sup>46</sup> In other words, “[a]s the seat share of the majority party grows, the median [legislator] will be closer to the center of the majority party.”<sup>47</sup> Median legislators, in turn, have a disproportionate influence on policymaking because “new legislation cannot pass without the median’s support.”<sup>48</sup> Thus, as legislative composition and median ideological valence bend, so does policy.<sup>49</sup> And policy, after all, is where gerrymanders cash out. Tracing the straight line from redistricting through skewed electoral results and legislative seat shares to median legislators and policymaking, we can see the political significance of partisan gerrymanders. That significance underscores both the powerful political

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41. See, e.g., Stephanopoulos, *supra* note 8, at 2143.

42. Stephanopoulos, *supra* note 8, at 2143 (emphasis added).

43. Caughey, Tausanovitch & Warshaw, *supra* note 8, at 457.

44. *Id.* at 456–57, 464–65.

45. *Id.* at 456.

46. *Id.* at 462.

47. *Id.*

48. *Id.* at 457.

49. *Id.* at 464–65.

incentive to devise gerrymanders, and the perversity that follows when they are successfully deployed. To make matters worse, many of the effects noted above are lasting.<sup>50</sup> The disabling consequences of gerrymandering on party function are likely to “play out over several future elections.”<sup>51</sup> Further, enacted legislation—the central ambition of partisan gerrymanders—is notoriously difficult to reverse, “not least because new laws require majorities in both legislative chambers (or supermajorities, if vetoed by the governor).”<sup>52</sup>

The effects also extend further downstream, beyond legislative composition and policymaking and into the functioning of political parties themselves.<sup>53</sup> Evidence shows that systematic frustration of political aims through partisan disadvantage wrought by gerrymanders erodes party health, demoralizing and ultimately demobilizing opposition party voters, thus compounding the effects noted above.<sup>54</sup> These results are most pronounced on “party elites” like party officials, donors and candidates—that is, those individuals and groups with the most to lose.<sup>55</sup> For example, partisan districting disadvantage has resulted in material reductions in candidate quality, the number of districts contested, and fund-raising success.<sup>56</sup> Similar though less pronounced effects extend to the rank-and-file, as evidenced by reduced voter turnout.<sup>57</sup> These effects have now been observed and measured—and the more severe the disadvantage, the more severe the result.<sup>58</sup>

Data analysis and advanced mapmaking techniques are also exacerbating the problem by facilitating ever more potent gerrymanders. Technological advances have “ma[de] gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in political tides.”<sup>59</sup> And the payoff? Here are some examples. A North Carolina

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50. See, e.g., Caughey, Tausanovitch & Warshaw, *supra* note 8, at 468; Stephanopoulos & Warshaw, *supra* note 8, at 609; Samuel S.–H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1268 (2016) (“[C]hanges in technical tools and population clustering, as well as a greater awareness of the advantages of aggressive districting, further enhance the possibility that gerrymandered districts may be more durable now than they were even ten years ago.”).

51. Stephanopoulos & Warshaw, *supra* note 8, at 621.

52. Caughey, Tausanovitch & Warshaw, *supra* note 8, at 459.

53. See Stephanopoulos & Warshaw, *supra* note 8, at 635.

54. See *id.* at 610, 612.

55. *Id.* at 610, 612.

56. *Id.* at 635, 636.

57. *Id.* at 610.

58. *Id.* at 636.

59. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting); see also *Vieth v. Jubelirer*, 541 U.S. 267, 364 (2004) (Breyer, J., dissenting) (“The combination of increasingly precise map-drawing technology and increasingly frequent map drawing means that a party may be able to bring about a gerrymander that is not only precise, but virtually impossible to dislodge. Thus, court action may prove necessary.”); Wang, *supra* note 50, at 1268–69.

redistricting plan challenged in *Rucho* was drawn by Republicans using advanced mapmaking technology and secured the following results in back-to-back elections: (i) in 2016, Republican congressional candidates won 10 of 13 state seats on 53% of the statewide vote; (ii) in 2018, Republican congressional candidates won 9 of 12 seats on 50% of the statewide vote.<sup>60</sup> Maryland Democrats employed similar technology to achieve similarly distorted results in the other redistricting map challenged in *Rucho*.<sup>61</sup> Unfortunately, the North Carolina and Maryland plans are emblematic but not unique.<sup>62</sup> Indeed, statistical evidence indicates that partisan redistricting distortion has worsened over time as our politics have become increasingly polarized,<sup>63</sup> and continuing technological advances will no doubt push that trend.

To summarize, partisan gerrymanders are anathema to the logic and design of representative democracy, have had documented and potentially long-lasting effects on the political process ranging from policymaking to party health, and technology has and will continue to improve the efficiency with which favored parties can force their advantage. The short sketch above ought, I hope, to have signaled a genuine problem—or set of problems—that calls out for correction. If so, what role, if any, should the federal courts play? In *Rucho*, the Court set aside three decades of precedent and answered: None.<sup>64</sup> To be sure, other avenues for reform remain—namely, federal legislation, state legislation, and even state litigation.<sup>65</sup> But none offer more than a dull glimmer of hope. Congress and state legislatures each have the power to regulate the redistricting process, but any prospect of legislative reform is beset with obvious and intractable conflicts of interest. As the dissent in *Rucho* pointed out, “[t]he politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves

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60. See *Rucho*, 139 S. Ct. at 2510 (Kagan, J., dissenting).

61. See *id.* Maryland’s gerrymandered map enabled Democrats to win seven out of eight House seats in four consecutive elections from 2012–2018 without having received more than 65% of the vote in any single election. *Id.* at 2511.

62. See *id.* at 2513.

63. See Stephanopoulos & McGhee, *supra* note 38, at 836 (calculating partisan efficiency-gap trends over time from 1972 to 2012 and concluding that “[t]he severity of today’s gerrymandering is . . . unprecedented in modern times”); Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408, 423–27 (2008) (concluding that across economic, foreign-policy, civil-rights, and moral issues, partisanship has increased over time); Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1380 (2020) (noting that “Democrats and Republicans have not been more bitterly divided along partisan lines since Reconstruction, nor more aggressively hostile to each other in the history of the two major parties.”).

64. *Rucho*, 139 S. Ct. at 2506–08.

65. See *id.* at 2507–08.

in office through partisan gerrymandering, the chances for legislative reform are slight.”<sup>66</sup>

I will review the *Rucho* decision as the pivot to my proposal that follows, but we can profitably work our way into the Court’s conclusion if we view it as representing the culminating resolution of a long-standing tension within the Court itself regarding the propriety of judicial intervention into the domain of electoral redistricting. That tension brewed at the surface of the Court’s earlier partisan gerrymandering decisions, to which I turn next.

### C. Legal Status

The Court’s partisan gerrymandering jurisprudence has been marked by a conspicuous tension between honoring *democratic principles*, on the one hand, and the *institutional constraints* under which those principles operate, on the other. We will see this theme repeated several times, as the contest played out over decades. The Court has acknowledged that free and fair elections are fundamental to representative democracy<sup>67</sup> and, further, that partisan gerrymandering frustrates that imperative.<sup>68</sup> So, in the context of partisan

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66. *Id.* at 2524 (Kagan, J., dissenting); *see also* *United States v. Brown*, 381 U.S. 437, 446 n.20 (1965) (“If . . . the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly in many instances, decided rights which should have been left to judiciary controversy.”) (quoting Thomas Jefferson, Notes on the State of Virginia 157–58 (Paul Leicester Ford ed. 1894) (court addition of emphasis omitted)). On this point, it must be mentioned that the most recent legislative effort to ban partisan gerrymandering of congressional districts—the Freedom to Vote: John R. Lewis Act—was passed by the U.S. House of Representatives but stalled in the U.S. Senate in January 2022. Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. §§ 5001, 5003 (2021–22), <https://www.congress.gov/bill/117th-congress/house-bill/5746/actions> [<https://perma.cc/5Q3M-3WGR>].

67. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

68. *See, e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (holding that partisan gerrymanders may constitute unconstitutional discrimination insofar as they “consistently degrade a voter’s or a group of voters’ influence on the political process as a whole”); *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (acknowledging the “incompatibility of severe partisan gerrymanders with democratic principles”); *id.* at 360 (Breyer, J., dissenting) (stating that “use of purely political boundary-drawing factors can amount to a serious . . . [constitutional] abuse” in the form of partisan entrenchment); *id.* at 343 (Souter, J., dissenting) (“[T]he consequence of a vote cast can be minimized or maximized [through redistricting], and if unfairness is sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality.”); *id.* at 317–18 (Stevens, J., dissenting) (“The concept of equal justice under law requires the State to govern impartially. . . . [but] when partisanship is the legislature’s sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.”); *Rucho*, 139 S. Ct. at 2506 (acknowledging that partisan gerrymandering is “incompatible with democratic principles”); *id.* at 2525 (J. Kagan, dissenting) (“[G]errymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense.”).

gerrymandering challenges, it has shown a corresponding impulse to vindicate democratic principles and the fundamental right to vote which they presuppose.<sup>69</sup> However, the Court has also shown a second, countervailing impulse to guard against judicial trespass over institutional boundaries—specifically, the boundary separating the judicial and legislative powers of government.<sup>70</sup> The latter impulse ultimately prevailed in *Rucho*, when the Court weighted institutional over democratic integrity in denying federal judicial review.

i. *Davis v. Bandemer*

Partisan gerrymander review in the federal courts officially began with the Court’s fractured decision in *Davis v. Bandemer*.<sup>71</sup> In *Bandemer*, a majority of the Court held that such claims are justiciable under the Equal Protection Clause of the Fourteenth Amendment yet failed to agree on the appropriate governing standard. Four Justices agreed on one standard;<sup>72</sup> two on another;<sup>73</sup> while three disclaimed judicial involvement entirely.<sup>74</sup> The four-Justice plurality standard prevailed for the time being, requiring plaintiffs to show (i) partisan intent and (ii) discriminatory effects in order to invalidate a redistricting plan.<sup>75</sup> Partisan intent would be easy enough to demonstrate, the plurality reasoned, given that

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69. See *Bandemer*, 478 U.S. at 143 (partisan gerrymandering challenges are justiciable); *Vieth*, 541 U.S. at 355–56 (Breyer, J., dissenting) (same); *id.* at 343 (Souter, J., dissenting) (same); *id.* at 317 (Stevens, J. dissenting) (same); *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting) (same).

70. See *Bandemer*, 478 U.S. at 133 (eschewing a “low threshold” for partisan gerrymandering challenges because it would “too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature”); *id.* at 161 (O’Connor, J., concurring in judgment) (stating that the justiciability of partisan gerrymandering challenges poses “unacceptable” risks to our political institutions); *Vieth*, 541 U.S. at 291 (plurality) (expressing concern that the justiciability of partisan gerrymandering claims will result in the “courts intrusion into a process that is the very foundation of democratic decisionmaking”); *Rucho*, 139 S. Ct. at 2507 (stating that the justiciability of partisan gerrymandering challenges constitutes an “expansion of judicial authority” into “one of the most intensely partisan aspects of American political life”).

71. *Bandemer*, 478 U.S. at 109.

72. See *id.* at 113–44 (plurality consisting of J. White, Brennan, Marshall, and Blackmun).

73. See *id.* at 161–85 (partial concurrence consisting of J. Powell and Stevens).

74. See *id.* at 144–61 (concurrence consisting of J. O’Connor, Burger, and C.J. Rehnquist).

75. See *id.* at 127. Justices Powell and Stevens, who supported justiciability, agreed with the plurality’s standard in general but disagreed on emphasis. *Id.* at 161–62 (Powell, J., concurring in part, and dissenting in part). The plurality essentially took discriminatory intent for granted, *id.* at 129 (“As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.”) but required challengers to meet a heavy burden in proving discriminatory effects. Justices Powell and Stevens, by contrast, would have required only a reduced showing of discriminatory effects if the record as a whole—including “the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting”—supported a finding that the mapmaker acted with no other purpose than to promote partisan advantage, *id.* at 165, 171–72 n.10, 173 (Powell, J., concurring in part, and dissenting in part).

politics is “inseparable from districting.”<sup>76</sup> But in order to avoid “embroil[ing] the judiciary in second-guessing . . . a political task for the legislature,”<sup>77</sup> the plurality stringently construed the effects prong to require that plaintiffs present extensive evidence demonstrating “the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”<sup>78</sup> This standard was criticized as cloudy and unworkable both by members of the Court that supported justiciability<sup>79</sup> and by those who did not.<sup>80</sup>

Justice O’Connor, for example, adopting a tone of skepticism echoed in later cases, would have rejected justiciability altogether, as she concluded that the Equal Protection Clause simply “does not supply judicially manageable standards for resolving purely political gerrymandering claims.”<sup>81</sup> For Justice O’Connor, the problem wasn’t just with the plurality’s standard, but with *any* proposed standard. The reason being that partisan gerrymandering challenges rely, even if only in a “loose” sense, upon the substantive notion of proportional representation—that is, that electoral results should be commensurate with statewide popular support.<sup>82</sup> But, according to Justice O’Connor, the Equal Protection Clause does not supply such a norm because “winner-take-all, district-based elections” like those employed throughout the country almost never produce strictly proportional results.<sup>83</sup> And “[a]bsent any such norm [of proportional representation],” Justice O’Connor continued, any proposed standard must by necessity be “so standardless as to make adjudication of political gerrymandering claims impossible.”<sup>84</sup>

Sounding the institutional alarm, Justice O’Connor warned that judicial redistricting review would end in “pervasive and unwarranted judicial superintendence” of state legislatures as the courts, lacking relevant expertise, “attempt[ed] to recreate the complex process of legislative apportionment.”<sup>85</sup> The risks posed by such judicial intervention—specifically, “political

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76. *Id.* at 128 (White, J.).

77. *Id.* at 133.

78. *Id.* at 132.

79. *See id.* at 171 (Powell, J., concurring in part, and dissenting in part) (“The final and most basic flaw in the plurality’s opinion is its failure to enunciate any standard that affords guidance to legislatures and courts.”).

80. *See id.* at 145, 155 (O’Connor, J., concurring in judgment) (noting that the “nebulous” standard proposed by the plurality would “either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality” unsupported by the Equal Protection Clause).

81. *Id.* at 147.

82. *See id.* at 156–57.

83. *See id.* at 158–60.

84. *Id.* at 157.

85. *Id.* at 147.

instability and judicial malaise<sup>86</sup>—were unacceptable, and she concluded that redistricting must therefore remain a political matter outside the federal courts’ reach.

ii. *Vieth v. Jubelirer*

Collective indecision again plagued the Court decades later when it next took up the matter in a pair of cases in short succession—*Vieth v. Jubelirer*<sup>87</sup> and *League of United Latin American Citizens (LULAC) v. Perry*.<sup>88</sup> The Court reviewed and rejected the partisan gerrymandering challenges in each case, but in neither case did a majority of the Court articulate a governing standard to clarify matters after *Bandemer*. In *Vieth*, the more important of the two, four Justices voted in favor of continued justiciability but offered three different review standards<sup>89</sup>—notably, each different than the *Bandemer* plurality’s standard—and four Justices voted against justiciability.<sup>90</sup> Justice Kennedy, the ninth and remaining Justice, brokered an unsatisfying compromise of sorts.

Justice Scalia, writing for the four Justices rejecting judicial involvement, conceded that “an *excessive* injection of politics [in redistricting] is *unlawful*,”<sup>91</sup> but he nevertheless echoed Justice O’Connor’s institutional concerns about judicial encroachment into political affairs absent a manageable governing standard.<sup>92</sup> In words that would themselves be repeated years later in *Rucho*, Justice Scalia distilled and reformulated the issue presented by partisan gerrymandering challenges, explaining that the “*central problem*” is determining “[h]ow much political motivation and effect is *too much*?”<sup>93</sup> But that question, according to Justice Scalia, is “unanswerable” because it

86. *Id.*

87. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

88. *LULAC v. Perry*, 548 U.S. 399 (2006).

89. First, Justice Stevens, largely following Justice Powell’s opinion in *Bandemer*, would have held a partisan gerrymander unconstitutional insofar as the record showed that “partisanship is the legislature’s sole motivation—when any pretense of neutrality is forsaken unabashedly, and all traditional districting criteria are subverted for partisan advantage.” *Vieth*, 541 U.S. at 318 (Stevens, J., dissenting). Second, Justice Breyer would have adopted a similar standard, proposing that courts look for indicia of “the *unjustified* use of political factors to entrench a minority in power.” *Id.* at 360 (Breyer, J., dissenting) (emphasis in original). Third, Justice Souter, joined by Justice Ginsburg, proposed a five-part test modelled after the burden-shifting framework developed in the context of employment law, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), to ferret out the legislature’s redistricting motives. *Vieth*, 541 U.S. at 346–47 (Souter, J., dissenting).

90. *See Vieth*, 541 U.S. at 281, 305–06 (Scalia, J., joined by Rehnquist, O’Connor, and Thomas) (plurality opinion).

91. *Id.* at 293 (emphasis in original).

92. *See id.* at 291 (stressing the necessity of clear judicial standards “to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking”).

93. *Id.* at 291, 296–97 (emphasis added).

“requires a quantifying judgment that is unguided and ill-suited to the development of judicial standards.”<sup>94</sup> Here we see Justice Scalia directly tuning in Justice O’Connor’s *Bandemer* critique. The difficulty, plainly put, is with judicial measurement.

Trying to gauge partisan *excess* will inevitably, Justice Scalia urged, ensnare the federal courts in electoral determinations outside their competence.<sup>95</sup> The political process itself should, instead, be trusted to work out a remedy.<sup>96</sup> Any assist the federal courts might offer in expediting such remedy, he continued, did not justify the “regular insertion of the judiciary into districting, with the delay and uncertainty that brings to the political process and the partisan enmity it brings upon the courts.”<sup>97</sup>

Though the dissenting Justices in *Vieth* offered individual variations, they all sounded the same themes. Namely—first, that the federal courts have an important role to play in identifying and remedying the worst redistricting abuses; and second, that the judiciary is capable of determining whether a map “crosses the constitutional line”<sup>98</sup> between permissible and *excessive* partisan bias.<sup>99</sup> Regarding that line of demarcation, which Justice Scalia found so elusive, the key for each of the dissenters was for the courts to look not for precise articulation but instead for “strong indicia of [partisan] abuse.”<sup>100</sup> “Instead of coming up with a[n] [exact] verbal formula for *too much*,”<sup>101</sup> which Justice Souter acknowledged in dissent could prove an impossible task, “the Court’s job must be to identify [objective] clues . . . indicating that partisan competition has reached an extremity of unfairness.”<sup>102</sup> Those clues would include, among other things, consideration of the map’s respect for traditional districting principles,<sup>103</sup> deviation from hypothetical, impartially drawn comparator maps,<sup>104</sup> and scrutiny of the “process by which the districting schemes were enacted.”<sup>105</sup>

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94. *Id.* at 296.

95. *See id.* at 290 (“[R]equiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.”).

96. *See id.* at 276–281.

97. *Id.* at 301.

98. *Id.* at 367 (Breyer, J., dissenting).

99. *Id.* at 336, 344, 365.

100. *Id.* at 365.

101. *Id.* at 344 (Souter, J., dissenting) (emphasis added).

102. *Id.*

103. *See id.* at 318, 335–36 (Stevens, J., dissenting); *id.* at 367 (Breyer, J., dissenting); *id.* at 347–50 (Souter, J., dissenting).

104. *See id.* at 349–50 (Souter, J., dissenting).

105. *See id.* at 323 (Stevens, J., dissenting).

Justice Kennedy, at the center of these two camps, managed to blend them in a provisional compromise. He too was animated by an institutional concern that “intervening courts—even when proceeding with the best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.”<sup>106</sup> But, recognizing that partisan gerrymanders burden the rights of voters and thereby threaten democratic principles, he was also reluctant to entirely foreclose judicial review.<sup>107</sup> In the end, Justice Kennedy resolved the Court split in favor of justiciability—with a caveat. Justice Kennedy rejected all existing proposals but preserved justiciability on the possibility that “workable standards” might emerge at some later date.<sup>108</sup> But, then again, they might not.<sup>109</sup> This, unsurprisingly, only further muddied the legal waters.<sup>110</sup>

Thus, having revisited the issue of partisan gerrymandering decades after the confused result in *Bandemer*, the Court in *Vieth* not only failed to clarify matters but seemed to leave the issue in a rather curious predicament. The legal status of partisan gerrymandering challenges after *Vieth* occupied a kind of superposition—challenges remained justiciable *in principle* but were, effectively, nonjusticiable *in fact*.<sup>111</sup> Time would tell.

### iii. *Rucho v. Common Cause*

A decade and a half later, the waiting game seemed to end with *Rucho*. The Court revisited partisan gerrymandering in a pair of cases—*Gill v. Whitford*,<sup>112</sup> which addressed the issue of standing, and *Rucho*,<sup>113</sup> which is the more important case for present purposes. In *Rucho*, the Court appeared to end the federal courts’ involvement, collapsing the post-*Vieth* uncertainty *against* justiciability.<sup>114</sup>

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106. *Id.* at 307 (Kennedy, J., concurring in judgment).

107. *See id.* at 309–17.

108. *See id.* at 311–13, 317.

109. *See id.* at 309 (noting that “weighty arguments [exist] for holding [partisan gerrymandering] cases . . . to be nonjusticiable; and those arguments may prevail in the long run”).

110. *See, e.g.*, Michael S. Kang, *When Courts Won’t Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1097–98 (2007).

111. *See Vieth v. Jubelirer*, 541 U.S. 267, 304 (Scalia, J.) (plurality opinion) (interpreting Justice Kennedy’s compromise position as “announcing that there may well be a valid claim [for partisan gerrymandering], but we are not yet prepared to figure it out”).

112. *Gill v. Whitford*, 138 S. Ct. 1916 (Wis. 2018).

113. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

114. *Id.* at 2508.

The Court's reasoning in *Rucho* rings loudly with institutional concerns over judicial encroachment into the legislative process of redistricting.<sup>115</sup> The decision underscored the confusion that plagued partisan gerrymandering challenges since *Bandemer*, tracing that confusion to the "central problem" articulated by Justice Scalia in *Vieth*—to reiterate, the challenge of crafting a principled answer to the question of whether partisan bias is *excessive*.<sup>116</sup> To provide an answer, the Court continued, would require the development of "a standard that can reliably differentiate" between constitutional and unconstitutional gerrymanders.<sup>117</sup> But skeptical that any corresponding legal standards could be precisely and narrowly crafted to "limit and direct [judicial] decisions,"<sup>118</sup> the Court, like the skeptics in *Bandemer* and *Vieth* beforehand, was spurred by concerns that judges would inevitably be drawn into the role of legislators and invited "to make their own political judgment about how much representation particular political parties deserve."<sup>119</sup> Seating such judgments within the judiciary would, in sum, "commit [the] courts to unprecedented intervention in the American political process."<sup>120</sup>

The *Rucho* Court thus refused to shoulder the risk of judicial error, a risk it believed was compounded by the gravity of the resulting institutional intrusion.<sup>121</sup> In doing so, the Court nevertheless articulated a list of essentials prerequisite to any exercise of federal judicial review: (1) first, there must be a "plausible grant of authority" to adjudicate the claim rooted in the Constitution; (2) second, there must be "principled, rational" standards to guide judicial review; and (3) third, as a corollary to the second element, the federal courts' involvement should be limited in scope.<sup>122</sup> The Court concluded that partisan gerrymandering claims failed on all counts, thus rejecting justiciability and tying a knot on the same thread of skepticism anchored in *Bandemer* and woven through the Court's intervening decisions.

I suggested above that the Court's partisan gerrymandering decisions are inflected with a conspicuous tension between concerns for democratic principles and institutional constraints. In each case, Justices on either side of

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115. See *id.* at 2502–07; see also Case Comment, *Article III—Justiciability—Political Question Doctrine—Rucho v. Common Cause*, 133 HARV. L. REV. 252, 257 (2019) ("*Rucho* is driven in large part by prudential considerations.>").

116. *Vieth*, 541 U.S. at 293, 296; See generally *Rucho*, 139 S. Ct. at 2497–2501.

117. *Rucho*, 139 S. Ct. at 2499, 2504–05.

118. *Id.* at 2507.

119. *Id.* at 2499 (emphasis omitted).

120. *Id.* at 2498.

121. See *id.* ("With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.") (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J.)).

122. See *Rucho*, 139 S. Ct. at 2498–2502, 2507.

the justiciability divide have nodded to the importance of these competing elements. In *Bandemer*, democratic principles narrowly prevailed. In *Vieth*, we saw a stalemate temporarily brokered by Justice Kennedy's restless admixture of then-present doubt and the possible promise of a future reconciliation. And in *Rucho*, concern for institutional constraints finally won out.

What is it about the issue presented by partisan gerrymandering challenges that has buoyed such persistent skepticism of judicial resolution? I will now turn to examine that question.

### III. THE PUZZLE OF PARTISAN GERRYMANDER REVIEW

I believe partisan gerrymanders are amenable to court review in a way that both protects democratic principles against legislative debasement and preserves important institutional boundaries, as I will discuss below. But the fact that this issue has proved so nettlesome for more than three decades should signal that there is perhaps something peculiar either about the issue or prior approaches. Recall that, as understood by the Court, the central problem presented by partisan gerrymandering claims is determining exactly when redistricting partisanship is *excessive*—or, to put it another way, in drawing a precise constitutional dividing line.<sup>123</sup> A preliminary examination of the nature of that inquiry will both illuminate the judicial challenge presented and explain the muddled attempts to answer it. It will also, importantly, suggest a way ahead.

Significantly, the partisan gerrymandering claims at issue from *Bandemer* through *Rucho* were raised and evaluated principally under the Equal Protection Clause.<sup>124</sup> Recent plaintiffs, including those in *Rucho*, have also asserted First Amendment claims,<sup>125</sup> but the crux under either banner is, as understood by the Court, essentially the same.<sup>126</sup> It is a question of measurement and degree.

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123. See *id.* at 2497–2501, 2504.

124. See *Davis v. Bandemer*, 478 U.S. 109, 113 (1986); *Vieth*, 541 U.S. at 272; *LULAC v. Perry*, 548 U.S. 399 at 404, 409 (2006); *Gill v. Whitford*, No. 16-1161, slip op. at 1 (Wis. Ct. App. June 18, 2018); *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018); *Rucho*, 139 S. Ct. at 2491.

125. See *LULAC*, 548 U.S. at 409; *Gill*, No. 16-1161, slip op. at 1; *Rucho*, 139 S. Ct. at 2491.

126. See *Rucho*, 139 S. Ct. at 2504–05 (stating that a First Amendment analysis of partisan gerrymandering “provides no standard for determining when partisan activity goes too far . . . [and] offers no ‘clear’ and ‘manageable’ way of distinguishing permissible from impermissible partisan motivation”).

The central problem calls for substantive line drawing and in so doing presents what philosophers call a *sorites* paradox.<sup>127</sup> The paradox emerges when we try to precisify vague terms, and may be summarized as follows:

[I]f we are asked by gradual stages, is such and such a person a rich man or a poor man, famous or undistinguished, are yonder objects many or few, great or small, long or short, broad or narrow, we do not know at what point in the addition or subtraction to give a definite answer.<sup>128</sup>

The classic example asks how many stones make a *heap* (“*sorites*” derives from the Greek word for “*heap*”)—that is, how many stones must be collected together to create a *heap* of stones, or conversely, how many must be removed from a *heap* to destroy it?<sup>129</sup>

Let’s illustrate. Imagine that I place a single stone in front of you. This lone stone obviously does not constitute a *heap*. Now I place a second stone, a third, a fourth, and so on, adding stones to the growing collection one at a time. At what point does the collection of stones in front of you become a *heap*? Surely by the time I reach, say, a *billion* stones—right? But can we point to a single stone along the way that marks the transition from *non-heap* to *heap*? It seems not. But if not, does that mean we never actually arrive at a *heap* of stones, no matter how large the collection? Now imagine, conversely, that a truck dumps a *billion* stones in front of you to start. In this alternative scenario, you begin with what is indisputably a *heap* of stones. Imagine this time that I remove stones, rather than adding them—again, one at a time. When there is just a solitary stone remaining, we would like to say that what began as a *heap* is no longer—correct? But can we point to a single stone that marks the transition, this time in reverse, from *heap* to *non-heap*? Again, it seems not. And if not, does that mean we never actually make the transition at all? That’s the paradox. It appears that every collection of stones both *is* and *is not* a *heap*.

The puzzle arises when our demands become misaligned with our ordinary linguistic expectations. For many descriptive terms—for example, terms like *heap*, or qualifiers like *excessive* (along with innumerable others)—we assume that very small, incremental changes in the object under inquiry do not actually make a difference.<sup>130</sup> We don’t ordinarily ask questions like, “*exactly how many stones make up a heap?*,” or similarly, “*exactly how much spaghetti is*

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127. See STEPHEN READ, THINKING ABOUT LOGIC: AN INTRODUCTION TO THE PHILOSOPHY OF LOGIC 173–202 (1994); DOMINIC HYDE & DIANA RAFFMAN, *Sorites Paradox*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. 2018).

128. READ, *supra* note 127, at 173 (quoting Cicero, *Academica*, tr. H. Rackman, bk. 2 at 49 and 92).

129. READ, *supra* note 127, at 173–74.

130. See *id.* at 173–74; HYDE & RAFFMAN, *supra* note 127, at 4.

*too much for dinner?*,” because we don’t ordinarily expect *exact* answers. Course-grained questions simply do not call for fine-grained answers. But if we nevertheless insist on precision where our ordinary language itself does not demand (or supply) it, as I have tried to show with the scenarios above, we are in trouble from the start. Some terms are unavoidably fuzzy and attempts to cut fine edges are destined for paradox. “In whatever form, the challenge of the *sorites* argument is to identify a [precise] cut-off point [for imprecise terms].”<sup>131</sup>

The *soritical* nature of the issue presented by partisan gerrymandering challenges is evident on the face of Justice Scalia’s distillation—to paraphrase, how can courts determine when redistricting partisanship is *excessive*? To make the analogy plain, let’s tease it out a bit. The central question presupposes a rough spectrum of partisan redistricting bias, perhaps starting with a map at one pole that does in fact exactly achieve proportional representation and ending at the opposite pole with something like a generalized statute declaring “[a]ll future apportionment shall be drawn so as most to burden Party X’s rights to fair and effective representation.”<sup>132</sup> The former map would obviously be fair and permissible, the latter obviously not. As we move inward from these poles, however, we begin to lose the determinacy of their example. And somewhere in the middle, as Justice Scalia clearly sensed, we lose all assurance of judgment. Claims of *excessive* redistricting partisanship sit squarely within this *soritical* no-man’s land.

The upshot is that *any* effort to draw a precise line separating constitutional and unconstitutional gerrymanders using imprecise terms like *excessive* will inevitably end in paradox. If some minimal quantum of partisanship is permitted, and we’ve already established that it is, then wouldn’t *just a little bit more* partisanship also be permitted? And conversely, if some amount of partisanship is prohibited, then wouldn’t *just a little bit less* partisanship also be prohibited? And so on, in either direction, just as with the stone examples presented above. It seems that we cannot point to a single stone separating *heaps* and *non-heaps*; similarly, we cannot point to a single quantum of partisan bias—even if it were precisely measurable—separating *permissible* from *excessive* partisanship in redistricting. On this score, Justice Scalia was absolutely right. Blunt terms don’t cut fine lines. How, then, are we supposed to sort redistricting plans into those that are constitutional and those that are not? This, slightly rephrased, is the central problem and dilemma of partisan gerrymander review as understood by the Court thus far.<sup>133</sup>

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131. READ, *supra* note 127, at 175.

132. Vieth v. Jubelirer, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring).

133. See Rucho v. Common Cause, 139 S. Ct. 2484, 2504 (2019) (insisting on a “standard for separating constitutional from unconstitutional partisan gerrymandering”).

Unpacking the central problem posed by partisan gerrymander review, we can see why the Court ended up where it did. For those Justices rejecting justiciability, the perceived institutional injury that would result from judicial trespass on political affairs was simply too powerful to allow for any margin of error in answering the central problem. So, for them, a clear and precise solution was indispensable. Yet, by insisting on precision, the Court was—by its own admission<sup>134</sup>—caught in an “unanswerable” paradox.<sup>135</sup>

As Section II was intended to make clear, the growing evils of partisan gerrymandering demand correction, but as this Section III has shown, a precise judicial drawing-line will remain elusive.<sup>136</sup> We began with Justice Scalia’s formulation of the central problem facing the courts, which steered us into paradox. But if the question is problematic and the answers untenable, we should ask a better question. Rather than inquiring about substantive redistricting standards, perhaps we should instead investigate the redistricting process. I will elaborate at length on that suggestion in Section V, but I turn next to lay some preliminary groundwork showing that such an endeavor is worthwhile even after *Rucho*.

#### IV. MOVING FORWARD AFTER *RUCHO*

So, does *Rucho* mark the end of partisan gerrymander review by the federal courts, *forever*? Not necessarily. To state the obvious, the Court could change its mind. Should circumstances change—that is, should the evils of partisan gerrymandering become more widespread and conspicuous, and should alternative avenues for redistricting reform prove fruitless—the Court may elect to revisit the issue. To that end, citizens, political scientists, and lawyers should continue to mind the measurable political effects of *Rucho*. I expect there will be some.

In any event, *Rucho*’s precedential value is delimited by the Court’s reasoning—its *ratio decidendi*—on the facts presented in that case.<sup>137</sup> Recall that in *Rucho* the Court concluded partisan gerrymandering challenges under the Equal Protection Clause and the First Amendment fall short of the justiciability test.<sup>138</sup> That is what *Rucho* stands for.

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134. See *Vieth*, 541 U.S. at 296–97 (Scalia, J.).

135. By contrast, those Justices supporting justiciability recognized that the problem itself does not demand precision, so for them there was no need to go looking for it—particularly in light of the injury at issue. In other words, the pernicious effects of partisan gerrymandering were grave enough to justify an inexact, standards-based solution tolerating a measure of uncertainty at the boundaries and even occasional judicial error, a risk that the courts could be trusted to manage within a narrow margin. They would have avoided the paradox by recalibrating the inquiry. See, e.g., *supra* note 89.

136. See discussion *Infra* Sections II and III.

137. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020).

138. See *Rucho*, 139 S. Ct. at 2491, 2508.

I suggest the Due Process Clause of the Fourteenth Amendment provides a viable alternative. The Court has not yet ruled out a procedural due process challenge to partisan gerrymandering—not in *Rucho*, nor in its prior partisan gerrymandering cases. That means that, insofar as a procedural due process challenge satisfies the Court’s justiciability conditions, it would not be foreclosed by *Rucho*’s holding. Examining whether judicial review under the Due Process Clause measures up will be the focus of the remainder of this Article. In the end, I conclude that it does.

To recapitulate what has been said so far and transition to what follows—partisan gerrymandering presents a very real challenge to democratic governance and there is good reason to believe that wide-ranging reform will not be soon forthcoming from other institutional corners. Accordingly, the federal courts should have an important role to play in checking, or at least inhibiting, the very worst abuses. That role was seemingly blocked by the Court in *Rucho*. Confronted with a *sortes* paradox in its attempt to determine a permissible measure of districting partisanship under the Equal Protection Clause and First Amendment, the Court was unable to discern a judicial solution and disclaimed involvement. But, properly understood, *Rucho* established parameters for, rather than an absolute prohibition on, judicial review going forward. I believe that challenges to partisan gerrymandering asserted under the Due Process Clause fall squarely within those parameters.

## V. A PROCEDURAL DUE PROCESS SOLUTION

### A. *A Plausible Basis for Judicial Review*

The first prerequisite to partisan gerrymander review under *Rucho* is to identify a “plausible grant of authority in the Constitution.”<sup>139</sup> In this Section, I will argue that the Due Process Clause of the Fourteenth Amendment—specifically, its guarantee of safeguarding procedures—provides such a basis.

Procedural due process requires that the government abide by certain minimal procedures, including notice and some form of hearing, when it deprives persons of substantive rights.<sup>140</sup> The right to vote is a constitutionally protected right and, as the Court’s voting-rights jurisprudence makes clear, partisan gerrymanders deny that right insofar as they dilute it.<sup>141</sup> Such deprivation, I maintain, implicates the procedural guarantee of the Due Process Clause. Further, after a short primer, I end this Section by concluding that the

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139. *Id.* at 2507.

140. See *Goldberg v. Kelly*, 397 U.S. 254, 261–65 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29; 533 (2004).

141. *Reynolds v. Sims*, 377 U.S. 533, 555, 566 (1964).

text and purpose of the Constitution's Due Process Clauses, together with certain of the Court's precedents, support the notion that partisan gerrymanders are *adjudicative*—rather than *legislative*—acts, and therefore demand enhanced procedural safeguards.

i. Due Process Generally

The Fourteenth Amendment provides that “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>142</sup> At its core, the concept of due process is animated by the recognition that sometimes government goes astray—either through arbitrary abuses of power<sup>143</sup> or through erroneous decision making<sup>144</sup>—and the concomitant wish to avoid the perils that follow.

With this purpose in mind, the Fourteenth Amendment's Due Process Clause has been operationalized to encompass two complementary aspects—substantive and procedural.<sup>145</sup> Substantive due process guarantees certain fundamental rights, including those enumerated in the Bill of Rights,<sup>146</sup> and it limits the government's power to intrude on those rights “regardless of the fairness of the procedures used to implement them.”<sup>147</sup> It does so by requiring that all government action be sufficiently justified,<sup>148</sup> and its most stringent applications underwrite some of the modern Court's civil-rights jurisprudence.<sup>149</sup> By contrast, procedural due process presupposes substantive rights but does not purport to define them. It is, instead, a guarantee of fair procedure *only*. “In a procedural due process claim, it is not the deprivation of

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142. U.S. CONST. amend. XIV, § 1.

143. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action.”); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (“[H]istory reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta . . . was ‘intended to secure the individual from the arbitrary exercise of the powers of government,’ . . . [and] to prevent governmental power from being ‘used for purposes of oppression.’”) (citations omitted).

144. *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (“[A] primary function of legal process is to minimize the risk of erroneous decisions.”); *Carey v. Phipps*, 435 U.S. 247, 259 (1978) (“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.”); *Silver v. New York Stock Exch.*, 373 U.S. 341, 366 (1963) (“Experience teaches, however, that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring.”).

145. See, e.g., *Kelley v. Johnson*, 425 U.S. 238, 244 (1976); *Zinermon v. Burch*, 494 U.S. 113, 125–27 (1990).

146. See *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

147. *Daniels*, 474 U.S. at 331.

148. See Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

149. See generally *id.*; see also Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 *TEX. L.R.* 275, 322–40 (2014).

property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law*—without adequate procedures.”<sup>150</sup>

## ii. Procedural Due Process

The doctrine of substantive due process has served as launching pad for arguments urging stronger protections of individual liberties, but my focus in this Article will be on procedural due process alone. The significance of procedural due process should not be discounted. After all, it is “procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.”<sup>151</sup> Fair procedure, in a word, “marks much of the difference between rule by law and rule by fiat.”<sup>152</sup> It is an important premise of this Article that, as a fundamental tenet of our system of government, the demands of procedural due process must pilot *any and all* government action that works a deprivation.

A constitutional procedural due process violation occurs when the government deprives a person of life, liberty or property without appropriate procedural safeguards.<sup>153</sup> As a general concept whose prescriptions affix to any government deprivation, the constitutional right to procedural due process “is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions.”<sup>154</sup> Importantly, however, the analytic framework is flexible—the appropriate form and measure of process is calibrated to the circumstances at issue.<sup>155</sup> I will circle back to this key point later.

But there is a constitutional floor—at minimum, constitutional procedural due process requires the affected parties be notified and given an opportunity to avoid the threatened deprivation through a hearing held “at a meaningful time and in a meaningful manner.”<sup>156</sup> A trial-like hearing is not required in every case, or even in most cases, as “the formality and procedural requisites for the

150. *Daniels*, 474 U.S. at 339 (Stevens, J., concurring) (emphasis in original).

151. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting).

152. *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

153. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

154. *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

155. *Mathews*, 424 U.S. at 334 (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”) (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

156. *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *accord Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”); *Roth*, 408 U.S. at 570 n.7 (“[I]t is fundamental that except in emergency . . . due process requires that when a State seeks to terminate (a protected) interest . . . it must afford ‘notice and opportunity for hearing appropriate to the nature of the case’ before the termination becomes effective.”) (quoting *Bell v. Burson* 402 U.S. 535, 542 (1971)).

hearing [will] vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.”<sup>157</sup> But traditional elements of a fair hearing include the right to appear, to contest the government’s decision, and to review and rebut the basis of the decision, all before a neutral decisionmaker.<sup>158</sup>

The demands of procedural due process are triggered only when the government threatens a protected interest, but once that initial showing is made, courts must then determine what procedures are appropriate to guard against an unlawful deprivation. In that regard, courts apply the balancing test set out by the Supreme Court in *Mathews v. Eldridge*.<sup>159</sup> Under *Mathews*, a reviewing court must formulate and tailor neutral procedures to meet the circumstances upon consideration of (1) the private interest at stake, (2) the risk of erroneous deprivation through the procedures used and the value of additional procedures, and (3) the government’s interest, including the burdens of additional procedural requirements.<sup>160</sup>

### iii. Procedural Due Process and Partisan Gerrymandering

Partisan gerrymandering deprives certain individuals of a constitutionally protected interest—specifically, the full-value of the right to vote—and therefore implicates the demands of procedural due process. As discussed above, the right to vote is fundamental. Moreover, the right to vote is more than a ballot formality; instead, the Constitution guarantees to every eligible citizen a vote of equal worth and dignity.<sup>161</sup> Partisan gerrymanders effectively discount the value of certain votes by diluting their strength. Such dilution “reduce[s] the weight of certain citizens’ votes, and thereby deprive[s] them of their capacity to ‘fully and effectively participate in the political process.’”<sup>162</sup> Moreover, it is firmly established that the right to vote “can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>163</sup> Simply put, then, partisan gerrymanders affect a constitutionally protected right and they deprive that right insofar as they devalue it. The question is, given the constitutional

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157. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.8 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)).

158. *See Mathews*, 424 U.S. at 333–34; *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

159. *Mathews*, 424 U.S. at 334–35; *see Hamdi*, 542 U.S. at 529.

160. *Mathews*, 424 U.S. at 335.

161. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

162. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting) (quoting *Reynolds*, 377 U.S. at 565) (alterations omitted).

163. *Reynolds*, 377 U.S. at 555; *accord Rucho*, 139 S. Ct. at 2514 (Kagan, J., dissenting).

deprivation at issue, what is the appropriate form and measure of process that is due?

iv. The Legislative Process as Procedural Due Process

When a legislature enacts generally applicable laws, affected parties generally are not entitled to procedural due process beyond the lawmaking process itself. That much is clear.<sup>164</sup> But when a legislature does otherwise—for example, by targeting individuals or identifiable groups—due process may require something more. This distinction is critical, serving as the fulcrum on which my argument ultimately turns.

Let’s start with traditional legislation. To illustrate the general principle, in *Townsend v. Yeomans*,<sup>165</sup> the Court denied a constitutional procedural due process claim brought by tobacco warehousemen in Georgia because the challenged government action—a state statute fixing maximum warehouse fees—was a generally applicable law. The warehousemen in *Townsend* alleged that the state legislature deprived them of economic profits without adequate procedural safeguards because it had adopted the statute at issue without first conducting appropriate investigation into the tobacco market or the economic impact of the measure.<sup>166</sup> The Court rejected the challenge. It explained:

There is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation. The result of particular legislative inquiries through commissions or otherwise may be most helpful in portraying the exigencies to which the legislative action has been addressed and in fortifying conclusions as to reasonableness . . . . But the Legislature, *acting within its sphere*, is presumed to know the needs of the people of the state. Whether or not special inquiries should be made is a matter for the legislative discretion.<sup>167</sup>

In other words, insofar as the state legislature had acted “within its sphere”—that is, by making generally applicable laws—it could act to deprive the rights of certain individuals without any further process beyond the lawmaking process itself.

Although the government actor in *Bi-Metallic Investment Co. v. State Board of Equalization*<sup>168</sup> was a state agency rather than a state legislature, the controlling principle was the same. In *Bi-Metallic*, a landowner in the City of

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164. See, e.g., *Atkins v. Parker*, 472 U.S. 115, 130 n.32 (1985) (collecting cases); RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONST. L. § 17.8(c) (5th ed. 2020).

165. *Townsend v. Yeomans*, 301 U.S. 441, 451 (1937).

166. *Id.*

167. *Id.* (emphasis added) (internal citations omissions).

168. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

Denver challenged an order of the Colorado State Board of Equalization increasing the valuation of all taxable property in the City.<sup>169</sup> The landowner charged the Board with violating constitutional procedural due process protections because it did not give him an opportunity to be heard before the tax order was issued.<sup>170</sup> Because the order was generally applicable, however, the Court held that constitutional procedural due process did not require a hearing.<sup>171</sup> Notably, the Court assumed that “the proper state machinery ha[d] been used” and that, with respect to the challenged tax order, all affected landowners “st[ood] alike.”<sup>172</sup> On those assumptions—that is, that the challenged order was generally applicable and the lawmaking process itself was not suspect—the Court concluded that any affected parties were “protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”<sup>173</sup> In other words, in the absence of individualized determinations, the Court concluded that the democratic legislative process was, *per se*, due process.<sup>174</sup> Generally applicable laws, the Court explained, “affect the person or property of individuals, sometimes to the point of ruin,”<sup>175</sup> but that alone is not reason enough to augment the lawmaking process.

*Townsend* and *Bi-Metallic* stand for the proposition that when state legislatures or their administrative delegates adopt generally applicable measures—*i.e.*, when they *legislate*—no further process is required beyond the lawmaking process itself, even if certain individuals suffer the loss of protected interests. Legislatures are presumed, in a representative democracy, to represent the interests of the people. That means that the interests of the people—including their constitutionally protected interests—are pressed and assayed by proxy as part of the political give-and-take that occurs when legislatures make law. Insofar as the result is a generally applicable law, no further process is required.

Importantly, however, the idea that the legislative process constitutes due process is not absolute. When a legislature makes particularized determinations, targeting the law’s application to individuals or groups based on facts and characteristics unique to those affected, it breaches the divide between *legislative* and *adjudicative* action and its lawmaking process is no longer insulated from constitutional augmentation.

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169. *Id.* at 443.

170. *Id.* at 444.

171. *Id.* at 445–46.

172. *Id.* at 445.

173. *Id.*

174. *Id.*

175. *Id.*

The line between *legislative* and *adjudicative* acts is neither clean nor absolute,<sup>176</sup> but understanding has coalesced around the following basic hallmarks: *legislative* action is generally applicable and addresses prospective conduct; *adjudicative* action is partial and targets certain individuals or groups on the basis of past or existing conduct or characteristics.<sup>177</sup> As we've seen, when a legislature makes generally applicable laws, the lawmaking process is sufficient.<sup>178</sup> On other hand, when a legislature instead targets the law to specific persons or groups, the affected individuals “may be entitled to procedural due process above and beyond that which already has been provided” by the lawmaking process.<sup>179</sup>

In order to flesh out the important distinction between *legislative* and *adjudicative* acts, I will briefly survey its history. As I make my case, it will be important to understand why the distinction was strictly drawn in American government charters, including the U.S. Constitution. A historical understanding will aid us in applying it to the issue of partisan gerrymanders.

#### v. Legislation v. Adjudication

##### 1. *History of the Distinction as Separation of Powers*

Americans separated *legislative* and *adjudicative* actions in significant part to defend and preserve the supremacy of due process guarantees against transgression by overzealous legislatures keen on depriving individual rights, starting with Parliament.<sup>180</sup> During the colonial period, Parliament was “the highest court in the land and the final expositor of the content of the law of the land.”<sup>181</sup> Moreover, Parliament “directly adjudicated a wide range of legal

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176. See ROTUNDA & NOWAK, *supra* note 164, § 17.8(c) (“The line between rulemaking and adjudication is not at all clear.”); *accord* L C & S, Inc. v. Warren Cnty. Area Plan Comm’n, 244 F.3d 601, 603 (7th Cir. 2001) (“Unfortunately the line between legislation and adjudication is not always easy to draw.”).

177. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1731–34 (2012); ROTUNDA & NOWAK, *supra* note 164, § 17.8(c) (“When an agency promulgates generalized rules there is no constitutional right to a hearing for a specific individual. However when the agency makes rules that might be termed adjudicative in that they affect a very defined group of interests, then persons representing those interests should be granted some fair procedure to safeguard their life, liberty or property.”); *accord* United States v. Brown, 381 U.S. 437, 446 (1965) (“[T]he Framers of the Constitution sought to guard against such dangers [as legislative prosecution] by limiting legislatures to the task of rule-making. ‘It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.’”) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810)); *75 Acres, LLC v. Miami–Dade Cnty., Fla.*, 338 F.3d 1288, 1294 (11th Cir. 2003).

178. See *Bi–Metallic*, 239 U.S. at 445–46; *Townsend*, 301 U.S. at 451.

179. *75 Acres, LLC*, 338 F.3d at 1294.

180. See Chapman & McConnell, *supra* note 177, at 1699–1703.

181. *Id.* at 1693.

disputes between British parties, and adjudicated a number of matters as the sole judge of the law and customs of Parliament.”<sup>182</sup> With this melding of functions, Parliament not only made the law but could also apply it unilaterally across a range of contexts to deprive subjects of rights without common law procedures.<sup>183</sup> When Parliament exercised its broad sovereign prerogative against the colonies, Americans famously decried the lack of representation in Parliament.<sup>184</sup> But, importantly and directly relevant to the current discussion, they also argued that Parliament violated due process when it passed laws depriving them of rights without a hearing.<sup>185</sup> These complaints were closely intertwined in the colonial lament that Americans lacked a political voice in Parliament—that is, they lacked representation on the front end (*legislation*) and due process on the back end (*adjudication*) of Parliament’s actions.<sup>186</sup>

Particularly instructive of American attitudes in the founding era is the colonial reaction to the Coercive Acts passed by Parliament in the lead up to the Revolutionary War. In 1774, Parliament passed the Coercive Acts to punish Massachusetts for the Boston Tea Party, which had taken place the prior year.<sup>187</sup> In the familiar retelling of that event, a group of Americans boarded merchant vessels in Boston Harbor and dumped several hundred chests of tea owned by the East India Company overboard, as a symbolic act of resistance to British taxing measures.<sup>188</sup> Among other things, the Coercive Acts closed Boston Harbor until the inhabitants of Boston repaid the East India Company for its losses.<sup>189</sup> For the colonists, there would be no trial, no jury, no impartial adjudicator—in a word, no procedural due process. In response, colonists complained that, by premitting any trial requiring proof of liability and damages, the judgment imposed by the Coercive Acts amounted to “a legislative usurpation of the essential[] judicial function of resolving a legal dispute between two parties.”<sup>190</sup>

The Coercive Acts also sought to prevent similar re-occurrences by altering the terms of the Massachusetts Charter to wrest control from colonists in favor

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182. *Id.* at 1693–94.

183. *Id.* at 1694.

184. See Judge Grant Dorfman, *The Founders’ Legal Case: “No Taxation Without Representation” Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1378–79 (2008); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 870 (1978).

185. See Chapman & McConnell, *supra* note 177, at 1694, 1699–1703.

186. *Id.* at 1694.

187. *Id.* at 1700; See David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 287 (2012).

188. See, e.g., *id.*

189. See Chapman & McConnell, *supra* note 177, at 1700.

190. *Id.*

of the Crown.<sup>191</sup> Specifically, Parliament replaced Massachusetts’s elected council with a Crown-appointed governor, granted judicial appointment authority to that governor, and gave governor-appointed sheriffs the authority to appoint juries.<sup>192</sup> Colonists were incensed as Parliament altered their form of government and stripped them of certain chartered liberties, again without any opportunity to be heard on the matter.<sup>193</sup> Even Parliament, colonists insisted, was duty-bound to respect the procedural guarantees of due process.<sup>194</sup>

The colonists’ deep distrust of Parliament engendered by these, and other events bubbled over into their early approaches to self-governance.<sup>195</sup> Prime among the political innovations of the new nation were two features devised to prevent the type of abuses committed by Parliament in the Revolutionary period, and subsequently confirmed by the actions of local legislatures in the earliest experiments with independent American state governments.

First, Americans adopted supra-legislative written constitutions founded on the idea of popular—as opposed to legislative—sovereignty.<sup>196</sup> After some early missteps with state constitutions that provided few checks on legislative power, Americans throughout the colonies recognized that, much like Parliament had done before, “faction-ridden, unchecked state legislatures” were prone to tread on private rights.<sup>197</sup> Legislatures had to be constrained by law, and supra-legislative written constitutions—ratified directly by the people themselves—were conceived to that end.<sup>198</sup>

Second, early Americans insisted on the structural separation of government powers.<sup>199</sup> Having witnessed the abuses of corporate unification of *legislative* and *adjudicative* government functions in Parliament and early state assemblies, Americans sought to fracture control by cleaving the functions of government into discrete and independent executive, legislative, and judicial institutions.<sup>200</sup> Legislatures would be vested with authority to make general laws, and an independent judiciary would be tasked with applying it to specific persons. The effect of these innovations was to corner legislatures by design,

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191. *See id.* at 1701.

192. *See id.*

193. *See id.*

194. *See id.* at 1701–03.

195. *See id.* at 1703–06.

196. *See id.* at 1704–05.

197. *Id.* at 1704; *see* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 59–60 (2005).

198. *See* Chapman & McConnell, *supra* note 177, at 1704–05; *see* AMAR, *supra* note 197, at 105–06, 211.

199. *See* Chapman & McConnell, *supra* note 177, at 1705; *see* AMAR, *supra* note 197, at 59–64.

200. *See* AMAR, *supra* note 197, at 59–64.

with supra-legislative constraints on one side and an independent judiciary on the other, thus channeling legislative discretion principally into generally applicable *legislative*—as opposed to targeted *adjudicative*—actions.<sup>201</sup>

The principle of separation of powers was constitutionalized in most American charters following independence, including the U.S. Constitution.<sup>202</sup> For example, the U.S. Constitution assigns the legislative, executive, and judicial functions of the federal government to separate and independent institutions, governed by Articles I, II, and III, respectively.<sup>203</sup> Moreover, Article I delimits all American legislative powers—including those exercised by Congress *and* state legislatures—with express prohibitions on bills of attainder and *ex post facto* laws.<sup>204</sup> Bills of attainder are laws that direct punishment on a specific person or group without trial,<sup>205</sup> while *ex post facto* laws apply retroactively to punish past acts.<sup>206</sup> Ostensibly *legislative*, bills of attainder and *ex post facto* laws both operate *adjudicatively*, and therein lies the problem. They do not establish general rules of conduct but instead target particular individuals or groups for legal punishment. And they were commonly weaponized by Parliament as a political tactic to subvert due process and punish opponents without trial.<sup>207</sup> Early Americans had taken notice—even before the Constitution completely banned such “legislative trickery,” many states had already done so.<sup>208</sup> And the Framers thought them evil enough to expressly prohibit them at *any* level of government.

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201. See Chapman & McConnell, *supra* note 177, at 1703–06; AMAR, *supra* note 197, at 63–64.

202. See Chapman & McConnell, *supra* note 177, at 1705–06; AMAR, *supra* note 197, at 59–64.

203. U.S. CONST. art. I, II, III.

204. U.S. CONST. art. I, § 9 (“No Bill of Attainder or ex post facto Law shall be passed.”); see Chapman & McConnell, *supra* note 177, at 1717–19.

205. See ROTUNDA & NOWAK, *supra* note 164, § 15.9(c) (“A bill of attainder is a legislatively declared punishment (often with a legislative finding of guilt regarding some crime or activity) for certain specific individuals. A bill of attainder may name the individuals or it may describe a class of persons subject to punishment because of specific conduct when in effect the description of that conduct operates to designate particular persons.”); *United States v. Lovett*, 328 U.S. 303, 315–16 (1946) (“[N]o matter what their form, [legislative acts] that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.”).

206. See ROTUNDA & NOWAK, *supra* note 164, § 15.9(b)(i) (“An *ex post facto* law is a measure that imposes criminal liability on past transactions . . . . An *ex post facto* clause violation involves both a change to substantive law and the application of the changed law to a particular defendant.”); See *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (“[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.”) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925)).

207. See AMAR, *supra* note 197, at 125.

208. See *id.*

The structural separation and assignment of government powers between independent institutions, together with the related prohibitions on particularly egregious breaches of that separation in the form of bills of attainder and *ex post facto* laws, as Professor Akhil Reed Amar has explained, “reflected a strong commitment to the ideal that legislation, at least if punitive, should be general and prospective. Otherwise, a legislature could simply impose penalties upon political opponents by name, and no one, howsoever virtuous their conduct, would be safe.”<sup>209</sup>

When the Fifth Amendment was ratified in 1791 it put a finer point on what was already implicit in the existing constitutional structure by expressly providing that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>210</sup> And consistent with the structurally expressed understanding of the Framers, the history of the Fifth Amendment’s Due Process Clause shows that it too was broadly conceived as “a limit on the powers of *all three branches*”<sup>211</sup> of the federal government. It was not conceived simply as a formal limit on certain enforcement proceedings. It was, instead, a fundamental sovereign mandate as broad as the problem it was intended to address, guaranteeing that all government deprivations comport with basic procedural fairness.

That mandate was extended in full to state legislatures after the Civil War via the Fourteenth Amendment Due Process Clause.<sup>212</sup> The Civil War and Reconstruction Amendments that followed dramatically re-worked the American constitutional scheme of government, but “[t]he basic idea of due process, both at the Founding and at the time of adoption of the Fourteenth Amendment, was that the law of the land required each branch of government to operate in a distinctive manner, at least when the effect was to deprive a person of liberty or property.”<sup>213</sup>

Thus, the notion of due process was historically conceived in broad terms to interpose fair procedures between the law as generally promulgated and as specified to particular individuals or groups in connection with the deprivation of protected interests. The Fifth and Fourteenth Amendments, with their

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209. *Id.* at 124; *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 90 (1980) (“The Ex Post Facto and Bill of Attainder Clauses prove on analysis to be separation of powers provisions, enjoining the legislature to act prospectively and by general rule (just as the judiciary is implicitly enjoined by Article III to act retrospectively and by specific decree).”).

210. U.S. CONST., amend. V; *see* Chapman & McConnell, *supra* note 177, at 1717–18; AMAR, *supra* note 197, at 63–64, 329–30.

211. Chapman & McConnell, *supra* note 177, at 1721 (emphasis added); *see* AMAR, *supra* note 197, at 316, 329–30.

212. U.S. CONST., amend. XIV; *see* Chapman & McConnell, *supra* note 177, at 1726–27; AMAR, *supra* note 197, at 385–89.

213. Chapman & McConnell, *supra* note 177, at 1781.

respective guarantees of “due process of law,” made express—first with respect to the federal government and then to state governments—what was implicit in the Constitution’s structural design from the beginning: all persons are guaranteed due process protections against government deprivations, including—even particularly—those threatened by the legislature.

2. *Cases—Direct and Indirect Application of Procedural Due Process to Legislatures*

The historical sketch above shows that early Americans conceived of due process as a fundamental procedural safeguard against private deprivations threatened by *any* institution of government. I will now survey a series of Supreme Court cases that have carried that conception forward in practice, specifically to legislatures.

These cases further underscore the distinction between *legislative* and *adjudicative* government functions and confirm the point I’ve repeated throughout this Section—namely, that legislatures must respect procedural due process guarantees when they target and deprive particular persons or groups of protected interests. There are two general types of cases I will review. First are those where the Court has held the requirements of constitutional procedural due process are directly implicated when a legislature acts. The second type of case implicates procedural due process indirectly via the Court’s review of bills of attainder and *ex post facto* laws. As we saw above, the constitutional prohibition on bills of attainder and *ex post facto* laws are of a piece with the Framers’ intent to preserve due process protections through the deliberate bifurcation of *legislative* and *adjudicative* functions.

a. Direct Cases

The first case for consideration is *Londoner v. Denver*,<sup>214</sup> in which the Court reviewed a challenge to a local tax ordinance. The city council of Denver approved an ordinance imposing a tax assessment on certain real property abutting road improvements. Prior to approval, city officials published notice of the proposed assessment to which several landowners filed objections. However, without a hearing on the landowners’ objections, the City approved the assessment. The landowners filed suit alleging the tax ordinance violated procedural due process. Notably, unlike the general tax valuation increase at issue in *Bi-Metallic* discussed earlier,<sup>215</sup> the ordinance in *Londoner* was not an across-the-board measure; instead, it levied a tax on a limited subset of

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214. *Londoner v. Denver*, 210 U.S. 373 (1908).

215. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915).

landowners.<sup>216</sup> The tax assessment thus operated as an *adjudication* because the measure itself “determine[ed] whether, in what amount, and upon whom it shall be levied.”<sup>217</sup> For that reason, the Court sided with the landowners and voided the tax assessment, concluding that “due process of law requires that at some stage of the proceedings, before [a particularized deprivation occurs], [an individual affected by the action] shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.”<sup>218</sup>

The Court reached a similar result under very different circumstances in *Groppi v. Leslie*,<sup>219</sup> which concerned a contempt resolution adopted by the Wisconsin State Assembly. In *Groppi*, the Court held the State Assembly violated procedural due process when it punished the petitioner, a protestor who led an “occupation” of the Assembly floor to protest state welfare budget cuts.<sup>220</sup> Shortly after the petitioner’s initial arrest and confinement, the Assembly passed a contempt resolution ordering him confined in jail for up to six months.<sup>221</sup> Although he was served with notice of the resolution in jail, he was not given an opportunity to rebut the resolution before its adoption.<sup>222</sup> He alleged the denial of procedural due process, and the Court agreed.<sup>223</sup> The Court conceded that the Assembly had the authority to punish the petitioner for his actions.<sup>224</sup> But the question before the Court was what procedures were required by the Due Process Clause beforehand.<sup>225</sup> The Court noted “the panoply of procedural rights that are accorded a defendant in a criminal trial” were not required in every circumstance; nevertheless, the Court stressed that “reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are ‘basic in our system of jurisprudence.’”<sup>226</sup> The Court construed the contempt resolution as an *adjudicative* act because it targeted a specific individual for punishment, and given the nature of the act, the Court held that procedural due process required a “hearing appropriate to the nature of the case.”<sup>227</sup>

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216. *Londoner*, 210 U.S. at 380–86.

217. *Id.* at 385.

218. *Id.* at 385–86.

219. *Groppi v. Leslie*, 404 U.S. 496 (1972).

220. *Id.* at 498.

221. *Id.* at 496–97.

222. *Id.* at 498–99.

223. *Id.* at 498–507.

224. *Id.* at 499.

225. *Id.* at 500.

226. *Id.* at 501–02 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

227. *Id.* at 503, 507.

## b. Indirect Cases

As explained above, bills of attainder and *ex post facto* laws were two particularly egregious forms of *legislative* rifling expressly forbidden under the Constitution to avoid targeted legal punishments. And the universal ban on these measures further enforced the separation of powers drawn by the independent assignment of *legislative* and *adjudicative* functions. That structural separation, properly understood in tandem with the Due Process Clauses of the Fifth and Fourteenth Amendments, was framed in significant part to ensure that legislatures comport with supra-legislative procedural safeguards. When called on to review bills of attainder and *ex post facto* laws, the Court has made these points plain.

For example, in *U.S. v. Brown*,<sup>228</sup> the Court reviewed the constitutionality of a provision of the Labor-Management Report and Disclosure Act of 1959 (the “Act”), which made it a crime for a member of the Communist Party to serve as an officer or employee of a labor union. An “open and avowed” Communist was elected to the board of a local labor union and subsequently indicted for violation of the Act. He was convicted following a jury trial, but appealed and alleged, among other things, that the provision at issue violated the constitutional ban on bills of attainder.<sup>229</sup> The Court agreed.<sup>230</sup> The constitutional prohibition on bills of attainder, the Court explained, was one of multiple related “barriers . . . erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments.”<sup>231</sup> With the history of Parliament’s use and abuse as backdrop, the constitutional ban on bills of attainder “was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”<sup>232</sup> The constitutional prohibition on bills of attainder was intended, in short, to bar “legislative punishment, of any form or severity, of specifically designated persons or groups.”<sup>233</sup> The trouble with the Act, the Court concluded, was that it did not prospectively criminalize certain conduct through a generally applicable measure, but instead specified punishment to “easily ascertainable members of a group.”<sup>234</sup>

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228. *United States v. Brown*, 381 U.S. 437, 438 (1965).

229. *Id.* at 437.

230. *Id.* at 461–62.

231. *Id.* at 444 (citing *The Federalist*, No. 48, pp. 383–84 (Hamilton ed. 1880) (Madison)) (emphasis omitted).

232. *Id.* at 442.

233. *Id.* at 447.

234. *Id.* 448–49.

The Court struck many of the same chords decades earlier in *Cummings v. Missouri*,<sup>235</sup> when it examined the constitutionality of certain provisions of the Missouri constitution of 1865, which imposed a loyalty oath as precondition to, among other things, voting, holding public office, practicing law, or acting as a teacher or religious official in the State. The Court invalidated the loyalty oath as both a bill of attainder and an *ex post facto* law.<sup>236</sup> In reaching this conclusion, Justice Field, writing for the Court, traced the origin and rationale for their constitutional prohibition. His discourse is illuminating, providing further depth on these measures and the broader topic of separation of powers that will aid us later in determining whether partisan gerrymanders are *legislative* or *adjudicative* acts.

Field defined a bill of attainder as “a legislative act which inflicts punishment without a judicial trial”—that is, an instance where “the legislative body . . . exercises the powers and office of judge” by targeting punishment on specific persons or groups.<sup>237</sup> Bills of attainder might be directed against individuals or “against a whole class,”<sup>238</sup> but in either case the distinctive vice of such bills is the scope of application—partial and targeted rather than generally applicable. Importantly, on the issue of punishment, Field concluded that legal punishment properly understood was punishment *broadly* understood, “embracing deprivation or suspension of *[any] political or civil rights*.”<sup>239</sup>

Moreover, Field clarified that bills of attainder might inflict punishment absolutely or conditionally—for example, by confiscating property or, less obviously, by requiring “expurgatory oath[s]” as a precondition to the exercise of protected rights.<sup>240</sup> In any event, the defect in all such bills, at bottom, is that they “creat[e] . . . deprivation[s] without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice.”<sup>241</sup> The legal disabilities imposed by the Missouri loyalty oath constituted legal punishment against a subset of individuals; and because the Missouri constitution imposed such punishment “without any of the forms or safeguards of trial,” the Court found that it constituted an unlawful bill of attainder.<sup>242</sup>

Field reasoned similarly in concluding that the Missouri loyalty oath likewise violated the Constitution’s prohibition on *ex post facto* laws.<sup>243</sup> An *ex*

235. *Cummings v. Missouri* 71 U.S. 277 (1866).

236. *Id.* at 325, 328–32.

237. *Id.* at 323.

238. *Id.*

239. *Id.* at 322 (emphasis added).

240. *Id.* at 325.

241. *Id.*

242. *Id.* at 323.

243. *Id.* at 328–32.

*post facto* law is “one which imposes a punishment for an act [that] was not punishable at the time it was committed.”<sup>244</sup> The loyalty oaths at issue clearly “aimed at past acts, and not future acts,” and therefore ran afoul of the Constitution.<sup>245</sup> Much like bills of attainder, Field explained, *ex post facto* laws “assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath.”<sup>246</sup>

Legislatures may not determine that certain persons or groups are guilty and target the law’s application accordingly, for to do otherwise is to *adjudicate* rather than *legislate*, unlawfully circumventing the procedural safeguards guaranteed by due process. That, in sum, is the lesson to be drawn from the Constitution’s prohibition on bills of attainder and *ex post facto* laws. Instead, as *Brown* and *Cummings* make clear, when a legislature makes laws imposing punishment it must do so by proscribing certain general conduct. It cannot, by contrast, condition punishment on the past or present characteristics and behavior of specific persons or groups.

#### vi. Recap of Plausibility

Taking stock of what has preceded, we may summarize as follows. The Fourteenth Amendment Due Process Clause guarantees that state governments—*inclusive of legislatures*—must provide procedural safeguards when depriving individuals of protected interests. However, those safeguards are flexible. When a legislature enacts generally applicable law—that is, when it acts *legislatively*—the lawmaking process itself is sufficient. But when a legislature identifies persons or groups for punishment—that is, when the legislature acts *adjudicatively*—due process demands more.

The structural separation of powers was framed to secure basic due process protections by assigning oversight to a separate institution—namely, the judiciary—interposed between lawmakers and subjects. Lessons from the colonial and early post-Revolutionary period show that, absent such protection, legislatures are prone to abuse their lawmaking powers to target political opponents for punishment. Bills of attainder and *ex post facto* laws are emblematic of the types of abuses the Framers sought to avoid by constitutional design. Each consists of *adjudication* in the guise of *legislation*.

Bringing this understanding to bear on the issue of redistricting, I contend that when a legislature adopts a partisan gerrymander it does not merely establish a general and prospective law. Instead, it targets a subgroup of

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244. *Id.* at 325–26.

245. *Id.* at 327.

246. *Id.* at 328.

political opponents for legal punishment. To be sure, insofar as redistricting simply governs district membership in the abstract (*e.g.*, establishing, for example, who belongs in the 14<sup>th</sup> district versus the 15<sup>th</sup> district), redistricting is indeed general and prospective. Every citizen “stands alike” before a redistricting plan in this regard. So, in this limited regard, the lawmaking process alone is process enough under *Townsend* and *Bi-Metallic*. Nothing further is required. But when the redistricting process is employed to target political opponents, when it is used as a tool to dilute the votes of partisan opponents, it ceases to be generally applicable and prospective. It ceases to be *legislative*.

Partisan gerrymanders are not bills of attainder or *ex post facto* laws,<sup>247</sup> but they are a close cousin. They have a similar *modus operandi*, targeting identifiable subsets of the population for legal punishment. The kinship is most obvious in comparison with loyalty oaths, like the one at issue in *Cummings*. Just as with other bills of attainder and *ex post facto* laws, loyalty oaths target particular persons or groups for punishment. But loyalty oaths, like partisan gerrymanders, employ a tactic of functional deception. They are insidious in the following respect—they target by transmuting unique *past or present* identifying facts about *specific* persons or groups into *prospective* and ostensibly *general* behavior via the oath requirement. The target itself is the same, but the approach is different.

Partisan gerrymanders target punishment—in the form of vote dilution—against individuals based on unique identifying past (voting record) and present (party membership) facts about the intended targets. When a partisan gerrymander is adopted, the party in power does not say, in bald terms, that opposition party voters are entitled only to a fraction of a full vote. That would clearly be unlawful. So, rather than conditioning punishment directly and expressly on identifying facts about the target, partisan gerrymanders—just like loyalty oaths—condition punishment on the prospective failure to disavow those facts. To borrow Justice Field’s words from *Cummings* with some revision, partisan gerrymanders “assume that [opposition party voters] are guilty; they call upon the [voters] to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory [vote].”<sup>248</sup> With a loyalty oath, a right is conditioned on a pledge of allegiance; with partisan gerrymanders, a right—specifically, the right to a full-valued vote—is conditioned on a similar pledge, namely a vote for the favored party on election day.

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247. At least I am not here arguing as much.

248. *Cummings v. Missouri*, 71 U.S. 277, 328 (1866).

Now, it might be argued in defense of partisan gerrymanders that because the alleged deprivation is conditional, it is, in fact, no such thing. In other words, opposition party voters can simply switch and vote for the favored party and thereby avoid punishment. Every voter has a prospective choice; after all, “[p]olitical affiliation is not an immutable characteristic,”<sup>249</sup> and some voters certainly do switch allegiances. But that truism misses the point. Individual voting behavior is patterned and durable, a fact empirically demonstrated and obviously presupposed by the practice of partisan gerrymandering itself. That being the case, the opportunity for an individual to prospectively switch allegiances in the voting booth to secure a full-valued vote does not remove the dilutive sting of partisan gerrymandering nor, as we saw in *Cummings*, does the conditional nature of the deprivation rescue its constitutionality. It is not enough to say that a voter can avoid punishment by changing their vote to match the legislature’s partisan preferences.

The upshot is that partisan gerrymandering: (i) targets a discrete, durable, and clearly identifiable group of persons—specifically, political opponents; and (ii) punishes members of that group by depriving them of a protected constitutional interest in the form of vote dilution. Therefore, I contend, partisan gerrymandering constitutes an *adjudication*—that is, not just a deprivation, but an *adjudicatory* deprivation—and procedures beyond the lawmaking process alone may be required under the Due Process Clause. I turn to that matter next, reviewing partisan gerrymanders under the *Mathews* balancing test set forth above.

### B. Manageability of Judicial Standards

The overriding purpose of procedural due process, as noted earlier, is to guard the individual against arbitrary government action. Courts are given wide latitude in operationalizing such purpose on the understanding that “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”<sup>250</sup> The proper measure of process is thus fixed in *each* case—rather than across cases—by examining the respective private and government interests at stake under the framework articulated in *Mathews*, which if you recall, requires comparative consideration of: (1) the private interest at stake; (2) the risk of erroneous deprivation given the existing procedures and the value of additional procedures; and (3) the government’s interest, including the burdens of additional procedural requirements.<sup>251</sup>

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249. *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004).

250. *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961).

251. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

## i. Nature and Weight of the Private Interest

The first *Mathews* factor to consider is the nature and weight of the private interest at stake.

The private right implicated by partisan gerrymandering is the right to vote—“a fundamental political right, because preservative of all rights.”<sup>252</sup> Because this right’s heavy constitutional weight was discussed earlier, we need not dwell here long. It should suffice to quote directly from the Court’s decision in *Reynolds*, which announced the one-person, one-vote rule nearly six decades ago. In reaching its decision, the Court described both the fundamental character of the right to vote and the significant deprivation that results from its devaluation through partisan gerrymandering:

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . . The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.<sup>253</sup>

The right to vote standing alone thus represents a powerful private interest, but something further to consider in the balance is the indefinite length of the harm that results from partisan gerrymandering. The gravity of a private interest considered under *Mathews* compounds with the duration of its deprivation.<sup>254</sup> Vote dilution has no fixed expiration, and the potential corrective of cyclical redistricting occurs infrequently. Moreover, the dilutive effects on some voters may become entrenched because many of the distortive political effects of partisan gerrymanders are durable and cannot be counted on to ebb through regular political turnover—politics is a tumultuous sea with irregular tides. In short, the fundamental constitutional importance of the right

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252. *Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

253. *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964) (citations omitted).

254. See *Mackey v. Montrym*, 443 U.S. 1, 12 (1979) (“The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved.”); *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) (“[T]he possible length of wrongful deprivation of . . . is an important factor in assessing the impact of official action on the private interests.”).

to vote and the indefinite length of its devaluation together weigh heavily on the private interest side of the *Mathews* ledger.

ii. The Risk of Error and Value of Additional Procedures

The next *Mathews* factor to consider is the risk of erroneous deprivation presented by existing procedures and the value of additional or alternative procedural safeguards.

To start, we must gauge the existing risk of error. In the context of redistricting, error consists of partisan excess. And, as things currently stand, the risk of error is significant. To be sure, the process of redistricting is not monolithic—it is a local state process with fifty different approaches, some better than others. But baseline redistricting procedures, which are more often than not entrusted exclusively to state legislatures, cannot be relied on to produce consistently and reliably fair redistricting outcomes nationwide. That risk is shown by the examples of North Carolina and Maryland, whose distorted maps were at issue in *Rucho*,<sup>255</sup> and the broader trend toward partisan extremity which will no doubt be pushed by technological advances.

It is important to further consider that, by disclaiming justiciability, the Court in *Rucho* removed one important barrier—or at least a limiting principle—against partisan redistricting abuse: federal court review. The power of such protection presumably eroded over time as review by the federal courts proved to be a mostly empty threat. But until *Rucho* the prospect of litigation and the threat of judicial review at least remained *in principle*, and we might have expected the average legislature to discount its tendency to excess by the odds of judicial reversal. *Rucho* collapsed the measure of that discount. After *Rucho*, legislatures have even less reason to shield naked partisanship in redistricting. The unabashed partisanship exhibited in North Carolina and Maryland may become the new norm absent any federal judicial backstop. *Rucho*'s disclaimer of federal justiciability compounded the risk of excessive partisanship, and it is this enlarged post-*Rucho* risk that must be reckoned for present purposes.

With that said, if current baseline legislative procedures cannot be trusted to constrain this growing risk of partisan redistricting abuse, it seems intuitive that additional procedures might do some good. But how so? To drill down a bit—additional procedural safeguards can, as understood through the lens of

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255. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491–93 (2019).

Bayesian probability theory, bolster our confidence in redistricting outcomes by serving as evidence to confirm or disconfirm partisan excess.<sup>256</sup>

In other words, *procedural fairness* can be linked inferentially to *substantive fairness*. To illustrate, let's treat the constitutionality of a redistricting plan as a hypothesis and, as such, presume at the outset that the plan is probably fair. Next, let's look at the procedures used to adopt that plan. Our presumptive confidence in the plan's fairness may go up or down depending on the manner in which the plan was adopted. Now, if we assume as a general matter that *excessive* partisan gerrymanders are less likely to bear certain procedural hallmarks than the *average fair* redistricting plan—this is an assumption, to be sure, but I think a reasonable one—then it follows, under Bayesian principles, that evidence such procedures were actually employed reduces the conditional probability that the districting map under review is tainted.<sup>257</sup> In short, evidence of fair procedures can bolster confidence in fair outcomes. It's that simple—and that is the key value of additional procedures.

The idea is that “when there is uncertainty about a hypothesis [in this case, the constitutionality of a redistricting map], observational evidence can sometimes *raise or lower the probability* of the hypothesis.”<sup>258</sup> As relevant here, I suggest that such observational evidence includes the procedural mechanics of redistricting plan adoption. Critically, in reviewing such procedural evidence, courts don't have to say what a fair plan looks like—they don't have to answer Justice Scalia's “unanswerable” question. Courts can avoid the paradox. All they have to do, instead, is assume that the employment of certain minimal procedures is more likely to be shared by fair plans than unfair ones—whatever such plans might look like, and without parsing them. What those procedural safeguards themselves should look like is a separate

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256. See JAMES JOYCE, *Bayes' Theorem*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. 2003); PETER GODFREY-SMITH, *THEORY AND REALITY* 202–18 (2003). In short, Bayesianism provides a way of understanding (and calculating) how we update our beliefs in light of new evidence. This allusion to Bayesianism is an important one, I think, but one that does not demand further digression here. I will thus save the reader from the formula for Bayes' theorem or an extended discussion, both of which may be found in the cited sources.

257. Godfrey-Smith uses the following example to make the point:

Imagine you are unsure about whether someone is at a party. The hypothesis that he is at the party is *h*. Then you see his car outside. This is evidence *e*. Suppose that before seeing the car, you think the probability of his going to the party is 0.5, and the probability of his car's being outside if he is at the party is 0.8, because he usually drives to such events, while the probability of his car's being outside if he is *not* at the party is only 0.1. Then we can work out the probability that he is at the party *given* that his car is outside. [According to Bayes' formula], seeing the car [strongly] confirms the hypothesis that the person is at the party.

GODFREY-SMITH, *supra* note 256, at 204.

258. *Id.* at 203.

matter, one that is particularly well-suited to judicial review as will be discussed below.

iii. Government Interests

Having noted the fundamental importance of the right to vote and the ongoing risk of erroneous deprivation through partisan gerrymanders, along with the evidentiary value of additional procedural safeguards, we must finally consider the offsetting government interests under *Mathews*.

Balanced against the important private interests here are the state government interests in preserving both autonomy—particularly with respect to political processes—and the public purse. “[I]t is characteristic of our federal system,” the Court has explained, “that States retain autonomy to establish their own governmental processes.”<sup>259</sup> This is an important countervailing interest, sensitivity to which has figured prominently in the Court’s partisan gerrymandering jurisprudence. For instance, in *Rucho*, the Court cautioned that “[a]n important reason for those careful constraints [on the federal judiciary] is that . . . [t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of the politics in the United States.”<sup>260</sup> A separate but related government interest concerns conservation of public fiscal and administrative resources. Recognizing government resources are finite, the Court has advised that any benefit accruing to private interests from additional procedural requirements must be considered in light of the general public interest in managing “administrative burden[s] and other societal costs” that would be incurred upon imposition of such requirements.<sup>261</sup>

Although the relevant state interests are powerful, in this context, the surplus after offset under *Mathews* is on the private side. The Court must, for good reason, be mindful of state autonomy—it is, after all, “[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”<sup>262</sup> However, heavy as the government’s interest may be, state autonomy is not absolute.<sup>263</sup> Indeed, state autonomy is no more weighty an interest than other powerful government interests the Court has considered and held must yield to accommodate the

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259. *Arizona State Legis. v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015).

260. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019) (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986)).

261. *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976).

262. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

263. See, e.g., *Arizona State Legi.*, 135 S. Ct. at 2679 (Roberts, J., dissenting) (“The States do not . . . ‘retain autonomy to establish their own governmental processes,’ if those ‘processes’ violate the United States Constitution.”).

demands of constitutional minimums—for example, national security and the regulation of foreign affairs.<sup>264</sup>

Moreover, the state government interest in autonomous political processes is itself subsumed under a more capacious one—namely, the public’s interest in governmental legitimacy. The separation of federal and state governments, and likewise the separation of powers within each level of government, are foundational principles conceived and implemented in our layered system of government in order to preserve individual rights and institutional legitimacy. State autonomy is not an end in itself but is instead the instrument of more elementary ambitions. And those ambitions are advanced, rather than frustrated, by guarding against the excesses of partisan gerrymandering. Pure partisan interests are partial interests and, as such, should not be confused with public interests simply because they bear the imprimatur of a numerical majority on the assembly floor. This is especially true when, as is the risk with partisan gerrymanders, such majority reflects districting ingenuity more sharply than popular preferences. Because it is the public interest we are currently concerned to articulate, I think it is relevant to mention recent polls show the majority of Americans favor redistricting reform.<sup>265</sup>

As for the cost and administrative burden of additional procedural safeguards, fiscal concerns are important but not controlling.<sup>266</sup> They must of course be considered in context, and on this point the Court has observed that “[t]here can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal [due process] requirement has been neglected or ignored.”<sup>267</sup> Additional procedural safeguards would cost time and money, but there is no reason to believe the cost would be prohibitive here. Indeed, some states currently mandate redistricting procedures beyond the legislative process itself—including, for example, the use of commissions, public hearings, and public reporting.<sup>268</sup>

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264. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 531–33 (2004) (holding that the exigencies of ongoing combat do not override minimum due process protections); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–65 (1963) (“It is fundamental that the great powers of Congress to conduct war and to regulate the Nation’s foreign relations are subject to the constitutional requirements of due process.”).

265. *See* *Americans Are United Against Partisan Gerrymandering*, BRENNAN CENTER FOR JUSTICE (Mar. 15, 2019), <https://www.brennancenter.org/our-work/research-reports/americans-are-united-against-partisan-gerrymandering> [<https://perma.cc/U6Y3-9J7R>].

266. *See* *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (finding that an eligible recipient’s receipt of public assistance outweighed the state’s competing interest in conserving fiscal and administrative resources for due-process purposes).

267. *Ohio Bell Tel. Co. v. Public Utils. Comm’n of Ohio*, 301 U.S. 292, 305 (1937).

268. *See* 50 STATE GUIDE TO REDISTRICTING, *supra* note 9.

#### iv. Demonstrating Manageability

The results of the preceding study under the *Mathews* formula are, by my calculation, that there is a credit due on the side of private interests, which must be balanced by additional procedural protections to guard against partisan excess in redistricting. The present risk of such excess, compounded by *Rucho*'s disclaimer of justiciability, is significant. And the value of additional procedures consists in bolstering confidence in redistricting outcomes. Having further made the case above that procedural review of partisan gerrymandering is manageable, the task now is to show as much—to outline what kinds of procedures would be appropriate in this context, fully recognizing that due process jurisprudence is guided by both principle and practicalities.

Procedural requirements bend to circumstances but are rigid in essentials. The basic rudiments include notice, some form of hearing and an impartial decisionmaker.<sup>269</sup> I will address each element in turn, offering loose recommendations while noting the types of considerations that might inform any constitutional determination. The practical difficulties here are significant—owing most acutely to the large number of affected individuals—but those difficulties are offset by the fact that those individuals affected are similarly situated. The formulation of procedural safeguards can accommodate that reality.

##### *I. Notice*

The first element of constitutional due process is notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>270</sup> Where individual interests are “identical with that of a class,” however, notice need not be personally delivered in every case, as “notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all.”<sup>271</sup> In the context of redistricting, states may legitimately consider costs and any corresponding administrative drain in selecting the appropriate mix of traditional (*e.g.*, mail, email, website,

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269. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.”).

270. *Mullane*, 339 U.S. at 314.

271. *Id.* at 319.

newspapers, billboards, television, radio, etc.) and new mediums (e.g., social media platforms like Facebook and Twitter) to utilize in delivering notice.<sup>272</sup> Notice contents need not be lengthy, but should at minimum: (i) identify the time and place of hearing(s) on the state’s proposed redistricting maps; and (ii) direct recipients to a public website where copies of the proposed maps and associated materials (discussed below) may be accessed. Notice should also be given at least fourteen days in advance of the hearing(s) to provide affected parties with sufficient time to arrange attendance and to meaningfully inspect any proposed redistricting maps and accompanying materials.

## 2. Hearing

Next, due process requires “some form of hearing . . . before an individual is finally deprived of a [protected] interest.”<sup>273</sup> The formality and mechanics of the hearing can vary—a trial-like hearing is not required, nor would it be practicable to approximate one in this context.<sup>274</sup> Given the large number of affected individuals and the similarity of interests at stake, the legislature must be given latitude to limit hearings—their number, duration, and content—on the understanding that widespread notice and access will likely facilitate review and comment at a sufficient level of competence to “safeguard the interests of all.”<sup>275</sup> This might mean, in practical terms, holding several hearings throughout the state but limiting attendance and the in-person presentation of testimony and evidence. Hearings should, however, be scheduled at times and places that would be reasonably calculated to permit broad public attendance. To maximize access and compensate for obvious limitations on in-person participation, the hearings should be made available via live-streaming and recording. Meanwhile, states should allow for the supplementation of in-person

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272. Courts might take a cue from established caselaw regarding the sufficiency of class action settlement notices under Federal Rule of Civil Procedure 23(e)(1). Federal courts around the country have developed guidelines to interpret and apply Rule 23’s general admonition that class notice must be directed “in a reasonable manner to all class members who would be bound.” And in doing so, they have had to consider practical challenges similar to those that would be presented by redistricting notice. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1259, 1284 (11th Cir. 2021) (approving an “innovative and comprehensive” settlement notice program designed to reach nearly 150 million class members affected by a data breach, which included “multiple emails, a social media campaign, newspaper and radio advertising, a settlement website, and a call center to answer questions”).

273. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

274. *See Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (“The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”).

275. *Mullane*, 339 U.S. at 319; *see also Bd. of Regents v. Roth*, 408 U.S. 564, 570 (1972) (“[A] weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process.”).

testimony and evidence through online submissions via a publicly accessible website.<sup>276</sup>

The central motivation of the hearing requirement, again, is to provide some opportunity for the affected parties to meet the proposed deprivation before it occurs. Public engagement through redistricting hearings will help to inform mapmakers of the consequences of their decisions, which should, in turn, reduce the likelihood of excess.

### 3. Impartiality

The last, and perhaps most challenging, procedural due process requirement is ensuring the redistricting process is fair and impartial. Decision making impartiality is key because, as the Court has explained:

The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law . . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.<sup>277</sup>

The challenge with ensuring redistricting impartiality is a familiar one. On the one hand, existing, unadulterated legislative redistricting processes are inherently beset with conflicts of interest and the potential for partisan bias. On the other hand, some measure of bias is expected and permitted. That being the case, neutrality in this context must be qualified. The goal is *not* to eliminate partisanship altogether, but instead to ensure that the redistricting process *as a whole* is reasonably fair.

Anticipating an objection, fairness may seem an unfit legal criterion in light of the *sortes* discussion in Section III. The search for *fairness*—that is, the inverse of *excess*—in redistricting should sound familiar because it is precisely the issue over which the Court repeatedly stumbled, as detailed above. There is, however, a very important difference between the type of fairness that eluded the Court in its decisions up to and including *Rucho* (*i.e.*, substantive) and the type of fairness I am now advocating (*i.e.*, procedural). The key lies in legal

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276. Model Legislation for Independent Redistricting Commissions, BRENNAN CENTER FOR JUSTICE (Dec. 12, 2019), [https://www.brennancenter.org/sites/default/files/2019-12/2019\\_10\\_ModelBills\\_longtextFINAL.pdf](https://www.brennancenter.org/sites/default/files/2019-12/2019_10_ModelBills_longtextFINAL.pdf) [<https://perma.cc/WG6S-MAJD>], includes this and many other valuable recommendations designed to improve the redistricting process. Of course, the Brennan Center's procedural recommendations are included in proposed model legislation, whereas I am here arguing for the judicial imposition of certain redistricting procedures as a constitutional mandate.

277. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citations omissions).

framing. By employing a procedural rather than substantive lens, the search for redistricting fairness avoids the type of confusion that culminated in *Rucho*. A *sorites* paradox arises in the first instance when we demand more precision than our terms can accommodate. And, as we saw above, the reason partisan gerrymander review proved so troublesome for the Court in the past was that certain members of the Court—reviewing challenges under the rubric of the Equal Protection Clause and First Amendment—insisted on a precise *substantive* dividing line.<sup>278</sup>

However, a *procedural* approach to the issue should avoid similar confusion. The reason being that the Court has explicitly recognized that procedural due process, by its nature, will not submit to precise specification. Instead, as noted above, “[i]t is axiomatic that due process ‘is flexible and calls for such procedural protections as the particular situation [requires].’”<sup>279</sup> In other words, the Court’s own jurisprudence should steer judicial redistricting review clear of the insistence on precisification that caused such difficulty for the Court when it approached the issue substantively. Moreover, as I’ve noted, procedural fairness—unlike its substantive counterpart—is squarely within the judicial wheelhouse, requiring no special electoral or political expertise.<sup>280</sup> The *Rucho* Court wrote at length on its concern that federal courts are not well-equipped to make the kind of judgments regarding electoral fairness needed to adjudicate partisan gerrymandering claims.<sup>281</sup> And, the Court added, the cost of misplaced review would be widespread, clumsy, and unwelcome judicial intrusion.<sup>282</sup> That may be true enough. But even crediting *Rucho*’s concerns, they need not be dispositive. They can, instead, be allayed by a flexible, process-based approach.

Procedural review disclaims the problematic ambition for precision. Accordingly, under procedural review, the redistricting process could be assessed for impartiality by looking for indicia of fairness along several procedural dimensions rather than a precise substantive dividing line. The list of factors below is not intended to be exhaustive, and none should be

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278. See discussion *supra* Section III.

279. *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

280. See ELY, *supra* note 209, at 102 (noting that judges are “experts on process”); Jason Parkin, *Dialogic Due Process*, 167 U. PENN. L. REV. 1115, 1122–23 (2019) (“Throughout American history, the nation’s courts have been the arbiters of whether the government has provided due process of law before depriving someone of ‘life, liberty, or property.’”); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1890 (2016) (“In the textbooks, procedural due process is a strictly judicial enterprise.”).

281. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496–2508 (2019).

282. *Id.* at 2507–08.

dispositive, but the list illustrates the kinds of key process-related questions that a reviewing court should ask and consider:

- *Who drew the map?* Even if not constitutionally required, the employment of an independent commission (whether as mapmaker or advisor) or independent mapmaking consultants, would strongly signal impartiality. Other related considerations could include the size, composition and qualifications of the commission, along with provision for independent funding.
- *What criteria did the mapmaker consider, and how were the criteria prioritized?* The mapmaker should publish for public inspection, along with its proposed map, the criteria employed in the map's creation. The express prioritization of traditional redistricting criteria like equal population, minority representation, compactness, contiguity, and preservation of communities of interest, together with the subordination or prohibition of partisan considerations would indicate the process was sufficiently impartial.
- *Did the mapmaker consider alternative maps as well as the impact of the proposed map on, for example, partisan efficiency, racial minorities, and communities of interest?* The widespread availability of mapmaking technology and electoral data has made it easier than ever for citizens to participate in the mapmaking process by creating and submitting their own maps. Moreover, the same technology and data have also made it easier for mapmakers to gauge the ramified impacts of redistricting across categories, including but not limited to partisan efficiency, racial minorities, and communities of interest. Relevant to the question of impartiality would be evidence that other alternative maps were considered and, if so, explanations why the alternative maps were not selected.
- *How was the map adopted?* Impartiality might be further evidenced by supermajority voting requirements by the body—whether the legislature or an independent commission—tasked with adopting the redistricting plan. Actual bipartisan support for the proposed map, even in the absence of supermajority voting requirements, would likewise indicate procedural fairness.
- *Did the final decisionmaker provide a statement of reasons and evidence in support of the map?* The ultimate decisionmaker should supply a report both explaining its reasons for adopting the final map and identifying the evidence on which it relied in reaching its decision. The

inclusion of a supporting report would go a long way toward showing, notwithstanding the inscrutable motives of those involved, that the decisionmaking process itself was not arbitrary.

The above considerations are illustrative rather than prescriptive, intended to identify the key process nodes that merit judicial inspection, but which may, nevertheless, be tailored and scaled by individual states to meet distinct preferences.

The goal in the end, to be clear, is not for the courts to co-opt the redistricting process or even to establish uniform best practices. Quite the opposite. The purpose, instead, is to grant each state room for flexible redistricting decision making and *some* partisan leeway while looking for sufficient evidentiary markers of impartiality in the process to win judicial confidence that a redistricting plan does not fall below the baseline presumption of constitutional fairness.

To bring the point home it may be helpful to consider, by contrast, a redistricting plan that displayed no semblance of impartiality—the 2016 North Carolina congressional map. Recall from *Rucho* that North Carolina Republicans redrew the state’s congressional map to strongly favor Republican candidates, with very successful effect.<sup>283</sup> The process which led to that skewed partisan effort included the following. The Republican-led state redistricting committee hired a Republican districting specialist to create a map maximizing Republican voting strength—that is, maximizing Democrat vote dilution.<sup>284</sup> Expressly included among the list of approved redistricting criteria was maintenance of the existing Republican partisan advantage.<sup>285</sup> The committee’s co-chair acknowledged the maps were drawn to maximize Republican advantage, and the map was ultimately enacted on a party-line vote.<sup>286</sup> It is precisely this type of unabashed partisanship that, I contend, violates the procedural due process requirement that affected individuals be given a “fair opportunity to rebut”<sup>287</sup> the government’s decision before a neutral decisionmaker, and which judicial review guided by the above considerations could forestall.

I have aimed thus far to show that procedural review of redistricting is not only plausible under the Due Process Clause, but being squarely within the federal courts’ competence, also manageable. Plausibility and manageability are two-thirds of the Court’s wish list announced in *Rucho*, which represent the

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283. *See id.* at 2509–10 (Kagan, J., dissenting).

284. *Id.* at 2510.

285. *Id.*

286. *Id.*

287. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

watermark of any proposal advocating justiciability. The last remaining precondition is to show that procedural review would limit the scope of judicial intervention. I have already hinted at this prospect at various points throughout, but I will directly address that final issue next.

### C. Limited Scope of Judicial Review

To cap off my argument, I intend to meet the Court's prudential concern that partisan gerrymander review poses too great a risk of unwarranted judicial encroachment into political affairs. The Court's concern in this regard—voiced as early as *Bandemer* and ultimately dispositive in *Rucho*—is that review implicates questions of electoral fairness “outside the courts’ competence,” and if not sufficiently constrained, such review could lead to “unprecedented intervention in the American political process.”<sup>288</sup> Moreover, “regular insertion of the judiciary into districting”<sup>289</sup> would incite political enmity toward the courts.

I have suggested procedural review of redistricting decisions can allay such concerns. The idea is not a new one. As other commentators have pointed out, in contrast to the type of substantive review that gave rise to the Court's concerns, procedural review with its focus on decision making processes attempts to “ameliorate the supposed tension between judicial review and democracy.”<sup>290</sup> The twin prudential virtues of a procedural approach to partisan gerrymander review are, first, that it pulls the federal courts out of the tricky business of reviewing substantive redistricting decisions for which they are ill-equipped; and second, that it simultaneously limits judicial intervention by disciplining the scope of review, each of which virtues works to limit the structural risk of judicial encroachment.

I will present two studies in support—one judicial and one academic. First, to illustrate these virtues in practice, I will present a case study from a superficially different but functionally similar context—state corporate law. The development and application of the business judgment rule by state courts is particularly germane to the present discussion because it shows that a procedural approach actually works in practice both to preserve judicial review and limit judicial intrusion. Second, to shore up the intellectual foundations of a procedural approach to partisan gerrymander review, I will briefly survey John Hart Ely's theory of judicial review, which is itself premised upon the idea

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288. *Rucho*, 139 S. Ct. at 2494, 2498.

289. *Vieth v. Jubelirer*, 541 U.S. 267, 301 (2004) (Scalia, J.).

290. Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1709 (2002).

that courts have an important but narrowly limited—and procedurally oriented—role to play in our constitutional system of government.<sup>291</sup>

i. Corporate Law and The Business Judgment Rule

The same overriding concern that animated the Court’s decision in *Rucho* spurred and shaped the development of what is known as the business judgment rule, a key concept in state corporate law.<sup>292</sup> The rule, successfully applied in the context of high-stakes shareholder litigation over decades by courts throughout the country, resolves the uneasy judicial predicament presented in a dispute between an elected and expert decision making body vested with centralized decision making authority, on one hand, and an aggrieved balloter, on the other. It operates in the context of corporate shareholder suits alleging board misconduct as a judicial presumption that, “in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”<sup>293</sup> That is the rule in its articulated doctrinal form, but to understand it and draw out the relevant analogy to constitutional procedural due process review and the Court’s concerns regarding judicial encroachment in the context of partisan gerrymander review, it will help to understand the rule’s rationale.

The corporate form separates ownership and control.<sup>294</sup> That separation can sometimes lead to a misalignment of interests between those who own the company (shareholders) and those who direct it (the board), by creating space for incentives for self-dealing opportunism by board members vested with decision making authority.<sup>295</sup> In other words, there is a risk that board members will act on their own partial interests rather than the shareholders’ broader interests.<sup>296</sup> There is, as a result, a “constant tension” in the corporate context between board authority and accountability.<sup>297</sup> In shareholder litigation alleging board misconduct, the courts are asked to mediate that tension. As one commentator put it, in words reminiscent of the Court’s framing of partisan gerrymander review, “[c]hoosing the appropriate balance between authority

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291. See generally ELY, *supra* note 209, at 90.

292. See Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625, 631 (2000); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (“The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors.”).

293. *Van Gorkom*, 488 A.2d at 872 (quoting *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984)).

294. Bainbridge, *supra* note 292, at 105.

295. See *id.* at 107–09.

296. See *id.*

297. *Id.* at 129.

and accountability is the central problem of business judgment jurisprudence.”<sup>298</sup>

The challenge for courts reviewing shareholder-derivative suits, like that presented by partisan gerrymandering claims, is one of measurement. The difficulty is compounded by conspicuous asymmetries in expertise between the authority making the decision and the court asked to review it—asymmetries which courts recognize as a factor militating against casual intervention.<sup>299</sup> Simply put, “judges are poorly positioned to evaluate the wisdom of business decisions.”<sup>300</sup> Mindful of the narrow bounds of their own competence, moreover, courts are aware that a heavy judicial hand can invite litigation, further disrupting board decision making and corporate function.<sup>301</sup> The business judgment rule constitutes the judicial response to the above concerns. The rule “is designed to effect a compromise—on a case-by-case basis—between two competing values: authority and accountability. These values refer, respectively, to the need to preserve the board of directors’ decision-making discretion and the need to hold the board accountable for its decisions.”<sup>302</sup>

Application of the rule and the grounds from which it emerged are illustrated by *Brehm v. Eisner*,<sup>303</sup> a well-known corporate law case decided by the Delaware Supreme Court. In *Brehm*, the court rejected a suit brought by Disney shareholders alleging the board breached fiduciary duties and wasted company assets when it terminated the company’s President, costing the company over \$140 million in severance payout. Rejecting review of the substantive fairness of the termination decision itself, the court, as a threshold matter, examined the process which culminated in the board’s decision. The court concluded that the board had adequately informed itself of the payout economics and considered “pertinent issues surrounding” the termination, and for that reason the board’s decision making process passed muster—even if the decision itself was a bad one.<sup>304</sup>

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298. *Id.*

299. *See id.* at 117–21; *see also* *Dodge v Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“[J]udges are not business experts.”); *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) (“[C]ourts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured, by the courts or otherwise.”).

300. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 313 (Del. 2015).

301. *See id.*

302. Bainbridge, *supra* note 292, at 84.

303. *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

304. *Id.* at 263–64, 266.

The case ultimately concerned a disagreement regarding the board's business judgment, but the court stressed that corporate law does not impose "[a]spirational ideals of good corporate governance practices for boards of directors."<sup>305</sup> To do so would, in the court's words, "invite courts to become super-directors, measuring matters of degree in business decision making."<sup>306</sup> That refrain should sound familiar. Notably, in reaching its conclusion, the *Brehm* court underscored the procedural character of its review:

Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. Due care in the decisionmaking context is *process* due care only. . . . Thus, directors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available.<sup>307</sup>

Shareholder litigation and partisan gerrymandering challenges arise from superficially different facts and do not run in perfect parallel; nevertheless, each is born from similar circumstances and presents similar exigencies that must be harmonized when courts are called on to intervene. The lesson from corporate law, captured in the business judgment rule, is that those exigencies—specifically, the demand for governing accountability and the need for judicial restraint—can be successfully mediated by procedural review. With a focus on decision making process over substance the courts are able to mind their lane while still redressing misconduct by decision making authorities.

## ii. Ely's Process-Based Theory of Judicial Review

Ely's process-based theory of judicial review was motivated in large part to address the very concern voiced by the Court in *Rucho* regarding judicial encroachment into political processes. The Constitution's short text includes many gaps that need filling, and Ely's concern was to find a way to justify the Court's role in that regard without inviting, as the Court in *Rucho* cautioned against, judicial expansion into a "council of legislative revision."<sup>308</sup> Ely took his cue from the text and structure of the Constitution, which, although concerned with preserving individual liberty, was nevertheless heavily

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305. *Id.* at 256.

306. *Id.* at 266.

307. *Id.* at 264, 264 n.66.

308. ELY, *supra* note 209, at 73.

weighted toward procedural safeguards rather than substantive choices in its design.<sup>309</sup> As Ely explained:

[T]he selection and accommodation of substantive values is left almost entirely to the political process and instead the [Constitution] is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might be capaciously designated process writ large—with ensuring broad participation in the processes and distributions of government.<sup>310</sup>

On this process-oriented reading of the Constitution, the narrow role of the federal judiciary seems clear—to police the government’s “mechanisms of decision and distribution” while leaving substantive decisions to democratically elected and politically accountable officials.<sup>311</sup> With a focus on process over substance, Ely argued, the courts retain an important role in guarding against government abuse but without risking judicial encroachment into the “selection and accommodation of substantive values.”<sup>312</sup>

Moreover, Ely noted, the courts are as “conspicuously” well-suited—based on expertise and perspective—to address procedural questions as they are ill-suited to address substantive ones.<sup>313</sup> Questions regarding “what procedures are needed fairly to make what decisions,” Ely insisted, “are the sorts of questions lawyers and judges are good at.”<sup>314</sup> The judiciary’s unique competence thus felicitously aligned with the text and structure of the Constitution, on Ely’s account, to both cabin the expanse of judicial review and prevent the malfunction of political processes.

Ely likened his theory of judicial review to antitrust regulation, justifying judicial intervention only when the “political market”—meaning representative democracy—goes awry.<sup>315</sup> Importantly, government does not go wrong simply because “it sometimes generates outcomes with which we disagree.”<sup>316</sup> That

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309. *Id.* at 87–101.

310. *Id.* at 87.

311. *Id.* at 181. The Court itself has not wholeheartedly embraced a process-oriented mode of judicial review, but it has nodded in that direction in limited circumstances. For a critical discussion, see generally Frickey & Smith, *supra* note 290.

312. ELY, *supra* note 209, at 87.

313. *Id.* at 102 (“Lawyers are experts on process writ small, the processes by which facts are found and contending parties are allowed to present their claims. And to a degree they are experts on process writ larger, the processes by which issues of public policy are fairly determined: lawyers do seem genuinely to have a feel, indeed it is hard to see what other special value they have, for ways of insuring that everyone gets his or her fair say.”).

314. *Id.* at 21.

315. *Id.* at 103.

316. *Id.*

can and will happen, but it does not justify judicial intervention. Regular elections mean that representative democracy is capable of self-correction in this respect—at least when properly functioning. Trouble arises when irregularities emerge in the democratic process itself, thus eroding the health and legitimacy of the political market. That is where, according to Ely, the courts come in to play—to remedy problems in the process, which he described as follows:

Malfunction occurs when the [democratic] *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.<sup>317</sup>

In other words, according to Ely, “unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.”<sup>318</sup>

Matters of voting and representation are fundamental presuppositions of representative democracy, but the mechanics of their expression can malfunction over time. According to Ely, independent and impartial judges - as opposed to elected representatives who, based on obvious conflicts of interest, “are the last persons we should trust”<sup>319</sup> to identify and correct malfunction - are particularly adapted to the task of identifying and stepping in to facilitate correction of such malfunction.<sup>320</sup> That task comports with and is justified by the text and structure of the Constitution. And, importantly, it has the further virtue of restraining the courts.<sup>321</sup>

317. *Id.*

318. *Id.* at 117.

319. *Id.* at 103.

320. *Id.* (noting that appointed judges are “in a position objectively to assess claims—though no one could suppose the evaluation won’t be full of judgment calls—that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are”). Members of the Court have at various times voiced a similar sentiment, including Justice Kagan in her *Rucho* dissent. As Justice Kagan explained, “the need for judicial review is at its most urgent in cases like [partisan gerrymandering]” because “politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.” *Rucho v. Common Cause*, 139 S. Ct. 2482, 2523 (2019) (Kagan, J., dissenting) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring)).

321. See ELY, *supra* note 209, at 73–104.

Ely's theory of judicial review is much grander than what I need for present purposes—indeed, my limited proposal could be deduced as a special case. I cite Ely's example merely to add body to the notion that procedural review of partisan gerrymanders should satisfy the Court's prudential concerns and limit judicial intervention.

#### VI. CONCLUSION

To wrap things up, judicial review of redistricting procedures versus outcomes comports with the Constitution's text and design; could be manageably applied; and finally, should rebut and allay the Court's repeated concern that partisan gerrymander review will inevitably mire the federal courts in politics. I began this Article by underscoring the preconditions for federal judicial review as articulated in *Rucho*. As the preceding has shown, a procedural approach to partisan gerrymander review under the aegis of the Due Process Clause satisfies those preconditions.