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# Freedom of Association, Extreme Partisan Gerrymandering, Justiciability and the Unmistakable Political Question Controversy

*L. Darnell Weeden\**

## I. INTRODUCTION

The issue to be addressed is whether partisan gerrymandering is a political question not capable of judicial resolution by federal courts, or whether partisan gerrymandering is instead a politicized issue that justices on the Court intentionally do not want to address at this time because they want to remain politicized while not appearing to be a politicized Supreme Court. The Court on June 27, 2019, in a 5-4 decision, held that partisan gerrymandering allegations are political issues that federal courts should not consider.<sup>1</sup> By now, it should be common knowledge that all of the justices who voted to accept the view that partisan gerrymandering is a political question were appointed by a Republican president, while all of the justices who voted to hear the partisan gerrymandering issue on the merits were appointed by a president who identified as a Democrat.

I reject the Court's analysis and conclusion that partisan gerrymandering is a political question, and argue that the Court is obligated to resolve partisan First Amendment gerrymandering issues to redress the injuries suffered by plaintiffs. The Supreme Court should address partisan gerrymandering issues on the merits. The effort by a group of California Democrats in proposing legislation requiring congressional districts to be redrawn by independent redistricting commissions on

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1. Jacqueline Thomsen, *California Democrats Unveil Redistricting Reform Bill After Supreme Court Partisan Gerrymandering Ruling*, THE HILL (June 28, 2019 1:03 PM), <https://thehill.com/homenews/house/450903-california-democrats-unveil-redistricting-reform-bill-after-supreme-court>.

June 28, 2019, the day after the Supreme Court held that courts lack the ability to judge partisan gerrymandering allegations,<sup>2</sup> is a step in the right direction because of the belief that the commissions will take every reasonable effort to avoid partisan gerrymandering. The proposed federal legislation requires each state to create independent commissions and it gives the duty of creating legislative boundaries for congressional districting to those commissions.<sup>3</sup> House Rules Committee Chairwoman Zoe Lofgren (D-Calif.) said, “If the U.S. Supreme Court won't fight to protect Americans' votes, then Congress will.”<sup>4</sup> Lofgren also declared, “Our democracy cannot function properly unless every person's vote counts equally, and voters choose their elected officials, not the other way around. My bill would fix our broken re-districting process to ensure all voices are heard and politicians are held accountable.”<sup>5</sup> Under the proposed federal law the commissions and not the state legislature create the boundaries for each congressional district.<sup>6</sup> The proposed independent commission legislation is not new because virtually identical legislation was approved by the House in 2019.<sup>7</sup>

The legislative fate of the federal independent commission proposal is currently very problematic. “However, Senate Majority Leader Mitch McConnell (R-Ky.) has said that he won't bring it up for a vote on the Senate floor.”<sup>8</sup> Perhaps the Republican Senator McConnell does not want to take steps to do away with partisan gerrymandering because of a demonstrated partisan advantage for Republicans.<sup>9</sup> “In the drawing of lines for hundreds of U.S. and state legislative seats . . . according to an Associated Press (AP) analysis: Republicans had a real advantage.”<sup>10</sup> The AP study included 435 U.S. races as well as approximately 4,700 state legislative seats during the 2016 election cycle to

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2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See Associated Press, *Analysis: Partisan Gerrymandering Has Benefited Republicans More than Democrats*, BUS. INSIDER (June 25, 2017, 12:25 PM), <https://www.businessinsider.com/partisan-gerrymandering-has-benefited-republicans-more-than-democrats-2017-6>.

10. *Id.*

determine whether partisan gerrymandering typically delivered more benefits to Republicans or Democrats.<sup>11</sup> The study identified the Republican Party as the party that benefited most from partisan gerrymandering.<sup>12</sup> “The analysis found four times as many states with Republican-skewed state House or Assembly districts than Democratic ones. Among the two dozen most populated states that determine the vast majority of Congress, there were nearly three times as many with Republican-tilted U.S. House districts.”<sup>13</sup> In the highly contested political frontlines of Michigan, North Carolina, Pennsylvania, Wisconsin, Florida, and Virginia, the Republicans maintain a partisan gerrymandering redistricting benefit. All of those long-established battleground states had their congressional legislative districts designed by Republicans after the last census in 2010.<sup>14</sup> In addition, the AP analysis determined “that Republicans won as many as 22 additional U.S. House seats over what would have been expected based on the average vote share in congressional districts across the country. That helped provide the GOP with a comfortable majority over Democrats instead of a narrow one.”<sup>15</sup> The AP study is consistent with a study conducted by the Brennan Center for Justice at the New York University School of Law during the 2012-2016 congressional election cycles.<sup>16</sup> The Brennan Center also found Republicans benefited more from partisan gerrymandering than Democrats and concluded there was “clear evidence that aggressive gerrymandering is distorting the nation’s congressional maps,” presenting a “threat to democracy.”<sup>17</sup>

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*; see also Michael Li, *Extreme Maps*, BRENNAN CENTER FOR JUSTICE (May 9, 2017), <https://www.brennancenter.org/our-work/research-reports/extreme-maps> (“Using data from the 2012, 2014, and 2016 election cycles, Extreme Maps finds that partisan bias resulting largely from the worst gerrymandering abuses in just a few battleground states provides Republicans a durable advantage of 16-17 seats in the current Congress, representing a significant portion of the 24 seats Democrats would need to gain control of the House in 2020. These ‘extreme maps’ were all drawn in states under single-party control; the report finds that conversely, maps drawn by independent commissions, courts, or split-party state governments had significantly less partisan bias in their maps.”).

17. *Id.*; see also Associated Press, *Partisan gerrymandering benefited Republicans in 2016 election – report*, THE GUARDIAN (June 25, 2017), <https://www.theguardian.com/us-news/2017/jun/25/partisan-gerrymandering-republicans-2016-report> (“A separate statistical analysis conducted for the AP by the Princeton University Gerrymandering Project found that the

Since political context matters, the issue of partisan gerrymandering cries out for federal judicial relief from the Court. The partisan gerrymandering issue will perhaps reappear before the Court as soon as Republicans believe that extreme partisan gerrymander produces a concrete injury to Republicans rather than an advantage. In the near future, an inconsistent conservative majority on a politicized Supreme Court could reach the right conclusion for the wrong reason by deciding that partisan gerrymandering is no longer a political question incapable of judicial resolution when the evidence demonstrates a persistent pattern of an advantage for Democrats utilizing partisan gerrymanders. Judicial prudence demands that a truly impartial and independent Court will follow the examples of lower courts and commentators and hear the merits of partisan gerrymandering claims. As soon as the Court is ready to do so, it may address those constitutional allegations on the merits and reverse the position that partisan gerrymandering presents a political question. This article implies that the Supreme Court's holding that partisan gerrymandering is a political question creates a plausible argument that a majority of the justices may have become politicized on the partisan gerrymandering issue.

Part I briefly discusses the partisan burdens placed on the freedom of association prior to the Supreme Court's decision in *Rucho v. Common Cause*.<sup>18</sup> Part II presents a historical judicial treatment of partisan gerrymandering. Part III contends a statewide right of political association injury in a "district-specific, extreme partisan" gerrymandering case is justiciable because judicially discernable and manageable standards exist to redress the plaintiff's allegation that she has suffered a concrete harm because of the associational burdens created by partisan gerrymandering. Part III also reminds us that it is important to acknowledge that the lower federal courts' judgments discovering standing in partisan gerrymandering cases establish that these partisan

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extreme Republican advantages in some states were no fluke. The Republican edge in Michigan's state House districts had only a 1-in-16,000 probability of occurring by chance; in Wisconsin's Assembly districts, there was a mere 1-in-60,000 likelihood of it happening randomly, the analysis found. The AP's findings are similar to recent ones from the Brennan Center for Justice at the New York University School of Law, which used three statistical tests to analyze the 2012-2016 congressional elections. Its report found a persistent Republican advantage and 'clear evidence that aggressive gerrymandering is distorting the nation's congressional maps', posing a 'threat to democracy'. The Brennan Center did not analyze state legislative elections. The AP's analysis was based on a formula developed by University of Chicago law professor Nick Stephanopoulos and Eric McGhee, a researcher at the nonpartisan Public Policy Institute of California.'").

18. See generally *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

gerrymandering cases should not be considered political question issues because the lower federal courts are quite capable of resolving partisan gerrymander issues under a First Amendment freedom of association analysis. In Part IV, an analysis of the extreme partisan gerrymandering issue in *Gill v. Whitford* indicates that it is unnecessary to treat partisan gerrymandering as a political question. In Part V, the post-*Gill v. Whitford* lower court partisan gerrymandering cases demonstrate how to judicially apply discernable and manageable standards to redress a partisan gerrymandering issue without violating the political question doctrine. In Part VI, the article proclaims the Supreme Court's conclusion in *Rucho v. Common Cause*, that partisan gerrymandering allegations are nonjusticiable political questions not capable of federal judicial resolution, is so flawed the Supreme Court should reconsider this question as soon as possible. Part VI supports the view asserted by Justice Kagan in her powerful dissent in *Rucho*<sup>19</sup> that for the first time in its history, the Supreme Court has declined to provide relief for a constitutional infringement because it considers the duty outside the scope of judicial expertise. Part VI argues that the refusal to grant judicial relief from partisan gerrymandering creates the plausible appearance that some of the justices may be too politicized to exercise their judicial expertise to provide relief for a constitutional violation alleging partisan gerrymandering because partisan gerrymandering currently benefits the Republican Party. The conclusion in Part VII rejects the Supreme Court's Court big-picture claim that partisan gerrymandering should be treated as a political question because partisan gerrymandering cannot be politically neutral or manageable.<sup>20</sup> The Supreme Court's political question rationale should be rejected because the lower courts, with a rationale that is superior to the Supreme Court's rationale in logic if not in law, have developed standards that allow for neutral and manageable oversight of partisan gerrymandering.<sup>21</sup>

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19. *Id.* at 2516 (Kagan, J., dissenting).

20. *Id.*

21. *Id.*

I. THE PARTISAN BURDENS PLACE ON THE FREEDOM OF ASSOCIATION PRIOR TO THE SUPREME COURT'S DECISION IN *RUCHO V. COMMON CAUSE*

The Supreme Court's June 27, 2019, rather surprising refusal to render a decision on the merits in a partisan gerrymandering case in *Rucho v. Common Cause* based on the belief that partisan gerrymandering presents a political question the Supreme Court cannot resolve, is misguided.<sup>22</sup> States have used the gerrymandering process to adopt extremely partisan redistricting plans.<sup>23</sup> Minority party voters may be "cracked" by the process of dividing a party's followers into multiple legislative districts so that they fail to reach an electoral majority in an election in any of the districts.<sup>24</sup> Sometimes minority party voters are also described as being "packed" in a gerrymandering process which overpopulates the minority party's voters inside a small number of districts where the minority party candidates are likely to win with large majorities. Packing typically has the practical effect of assuring that a minority party candidate's significant voting majority fails to significantly increase legislative seats for representatives of the minority party.<sup>25</sup> Packing undermines representative democracy because notwithstanding minority party candidates receiving significantly larger statewide voter support than the majority party, the number of minority party representatives to actually serve in the legislature fails to reasonably correlate with the collective associational ballots cast to support the views of minority party candidates statewide.<sup>26</sup>

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22. See generally *Rucho*, 139 S. Ct. 2484.

23. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. OF CHI. L. REV. 831, 834, 849-50 (2015).

24. *Id.*

25. See Michael Li, Thomas Wolf & Annie Lo, *The State of Redistricting Litigation (October 14, 2019)*, BRENNAN CENTER (Aug. 2, 2019), <https://www.brennan-center.org/blog/state-redistricting-litigation> (last visited July 15, 2019).

26. See Stephanopoulos, *supra* note 23, at 836-837 ("In the current cycle, for example, the Florida, Ohio, Pennsylvania, and Virginia congressional plans have gaps of at least two seats that are unlikely to dissipate given plausible changes in voters' preferences. Likewise, the Idaho, Indiana, Kansas, Massachusetts, Michigan, Missouri, North Carolina, Ohio, Oklahoma, Rhode Island, Virginia, Wisconsin, and Wyoming state house plans have gaps of at least 8 percent that also are unlikely to fade away in future elections."); see also *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016) *vacated and remanded*, 138 S. Ct. 1916 (2018).

Opponents of extreme partisan gerrymandering have attacked the issue of the excessive partisan gerrymandering process with an efficiency gap theory because the efficiency gap shows how the associational value of a vote is wasted.<sup>27</sup> Proponents of the efficiency gap theory contend that regardless of whether a minority party voter actually lives in a district that was packed or cracked, the minority party has been injured statewide as a result of the political exploitation of district boundaries because minority party voters' statewide expressive freedom of association is infringed upon.<sup>28</sup> A voter suffers a concrete statewide injury when the minority party's larger expressive associational voting voice is granted lesser actual representative power in the state legislature, while the majority party who won a lesser amount of the cast ballots statewide is rewarded with greater representative power. The majority party's greater legislative representation visits a statewide injury on the minority party voters because their collective voting majority is not reflected in the partisan makeup of the state legislature. Excessive partisan redistricting distorts the collective associational representational rights of the legislatively underrepresented minority party.<sup>29</sup> The potential power of packing and cracking "can be measured by a single calculation: an 'efficiency gap' that compares each party's respective 'wasted' votes across all legislative districts. 'Wasted' votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win."<sup>30</sup> Under an expanded version of the efficiency gap theory, when partisan voting statewide produces a large majority voting preference for the minority party and the minority party remains the minority party, an associational injury occurs.<sup>31</sup> An association injury exists because the partisan majority votes cast are wasted, producing a collective statewide injury given that the state legislature is very likely to produce partisan laws that apply statewide and are not restricted to a specific legislative district.<sup>32</sup>

The author believes scholars, legal analysts, and litigators, unlike the Supreme Court, actually accepted Justice Kagan's challenge in her concurring opinion in *Gill v. Whitford*.<sup>33</sup> Justice Kagan challenged the

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27. *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1924-26.

32. *Id.* at 1924.

33. *Id.* at 1934.



plaintiffs on remand to offer the court more than a vote dilution theory for an individual voter in a partisan redistricting gerrymandering case and to also develop the freedom of association right to support a statewide collective injury under the First Amendment. According to Justice Kagan, partisan gerrymandering not only unmistakably burdens individual voters, but also causes harm of a different type by infringing on voters' First Amendment right to the freedom association.<sup>34</sup>

There are good reasons supporting the development of the right to the freedom of association in an excessively partisan gerrymandering litigation. Under a First Amendment Freedom of Association analysis, plaintiffs presenting the challenge in excessive partisan gerrymandering cases should not be required to prove that their particular voting district was packed or cracked in support of their statewide injury-in-fact standing claim.<sup>35</sup> The packing or cracking of a district has no appropriate link to their substantive associational injury-in-fact claim to a collective entitlement to a representative number of seats in the legislature based on the number of partisan votes cast by the voters statewide.<sup>36</sup> Without any hesitation, Justice Kagan correctly asserts that the Court should consider everything about the right to freedom of association in a partisan gerrymandering challenge from standing on down to remedy.<sup>37</sup> It is my contention that if extreme partisan redistricting plan cause voters in the state to lose seats in the legislature, those voters have suffered enough state wide partisan harm to support Article III standing.<sup>38</sup>

The freedom of association was first officially recognized in *NAACP v. Alabama*, a 1958 case, as a fundamental right subject to strict scrutiny, which means the government must demonstrate that an efficiency gap cracking or packing regulation is required to serve a compelling justification and must be accomplished by least restrictive means.<sup>39</sup> The Court reasoned that freedom of association is an inseparable aspect of the liberty assured by the Due Process Clause of the

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34. *Id.* at 1934, 1938-39.

35. *Id.* at 1938-39.

36. *Id.*

37. *Id.* at 1938-40.

38. *Contra id.* at 1916, 1931.

39. See Charles E. Rice, *The Constitutional Right of Association*, 16 HASTINGS L.J. 491, 491-492 (1965) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of

Fourteenth Amendment.<sup>40</sup> After *NAACP v. Alabama*, the Supreme Court's decisions referred to constitutionally-protected 'freedom of association' in two distinct senses: as embracing (1) the choice "to enter into and maintain certain intimate human relationships"<sup>41</sup> as safeguarding one's personal liberty, and (2) "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."<sup>42</sup> The Supreme Court said the right of association included "political assemblies . . . , social and legal, and economic benefit' of citizens."<sup>43</sup> Recognizing a fundamental right in the freedom of association pertaining to political, social, legal, and economic matters, the Supreme Court further developed the idea of a fundamental right of association in relation to voting by holding that "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively"<sup>44</sup> may not be unduly burdened. The Supreme Court in *California Democratic Party v. Jones* emphasized the need for a compelling government interest by least restrictive means to protect a political party's right of expressive association under the First Amendment, and the Court asserted representative democracy "is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."<sup>45</sup>

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the Fourteenth Amendment, which embraces freedom of speech.") (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)); see also *Patterson*, at 460–61 ("Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

40. See *Patterson*, 357 U.S. at 460–61.

41. *City of Dallas v. Stanglin*, 490 U.S. 19, 23–24 (1989).

42. *Id.*

43. *Stanglin*, 490 U.S. at 26 ("that '[t]he right to freely associate is not limited to "political" assemblies, but includes those that "pertain to the social, legal, and economic benefit" of our citizens.'" (quoting *Stanglin v. City of Dallas*, 744 S.W.2d 165, 168 (Tex. App. 1987), *writ denied* (Mar. 2, 1988), *rev'd*, 490 U.S. 19 (1989)); see also Kathleen M. Sullivan & Noah Feldman, CONSTITUTIONAL LAW 1413 (19<sup>th</sup> ed. 2016).

44. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

45. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

## II. A HISTORICAL JUDICIAL TREATMENT OF PARTISAN GERRYMANDERING

Before 1962, legislative districting controversies were considered to be non-justiciable political questions because plaintiffs had to state a case or controversy that satisfied the criteria for making an appropriate judicial determination.<sup>46</sup> In 1973, the Supreme Court first considered the issue of partisan gerrymandering in *Gaffney v. Cummings*.<sup>47</sup> In *Gaffney*, Justice White concluded in the majority opinion that the presence of political purposes in congressional redistricting is constitutionally permissible.<sup>48</sup> The *Gaffney* Court concluded that since taking politics out of the redistricting process was an unmanageable job for judges, the Supreme Court should not even try to limit the undemocratic impact to politics on legislative redistricting.<sup>49</sup> The implication of *Gaffney* was a lack of judicially manageable standards to regulate the limit on the anti-democratic impact of extreme politics in redistricting.<sup>50</sup> The *Gaffney* Court suggested that partisan gerrymandering could possibly be unconstitutional, but failed to instruct how to apply manageable judicial standards to determine whether partisan gerrymandering violates the constitution.<sup>51</sup>

In 1986, the Supreme Court reviewed *Davis v. Bandemer* and addressed the constitutionality of political gerrymandering (used loosely to describe the common practice of the party in power choosing the redistricting plan that gives it an advantage at the polls), and held that a “threshold showing of discriminatory vote dilution is required for a

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46. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”); see also Sullivan & Feldman, *supra* note 43 at 814.

47. Richard E. Finneran & Steven K. Luther, *Filling the Gap in the Efficiency Gap: Measuring Partisan Gerrymandering on a Per-District Basis*, 46 HASTINGS CONST. L.Q. 385, 392 (2019) (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973)).

48. *Id.*

49. *Id.*

50. *Id.* (relying on *Gaffney*, 412 U.S. at 754).

51. *Id.*

prima facie case of an equal protection violation,”<sup>52</sup> which is satisfied by showing intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.<sup>53</sup> Despite this language, partisan gerrymandering claims have been rather unsuccessful in seeking constitutional protection under the Equal Protection Clause.<sup>54</sup> Chief Justice Roberts correctly perceived in *Whitford* that the Supreme Court’s prior attempts to resolve partisan gerrymandering claims simply failed to provide clear and adequate judicial standards on how to resolve partisan gerrymandering allegations.<sup>55</sup> The 1986 partisan gerrymandering case of *Davis v. Bandemer* serves so far as the only case where the Court has held that allegations of partisan gerrymandering are hypothetically justiciable, stating that a potential Equal Protection Clause violation may exist where the electoral scheme extensively burdens an actual voter’s chance to realistically impact partisan political practices.<sup>56</sup> *Bandemer* recognizes partisan gerrymandering cases as hypothetically justiciable, and that an Equal Protection Clause violation could possibly exist in a case where the electoral scheme extensively burdens an actual voter’s chance to realistically impact partisan political practice.<sup>57</sup> Although the Court in *Bandemer* agreed that partisan gerrymandering claims were theoretically justiciable under the equal protection clause, it rejected the District Court’s legal and factual bases for concluding that the Indiana reapportionment plan burden enough constitutionally protected rights to constitute a breach of the Equal Protection Clause on the merits of the case.<sup>58</sup>

In *Vieth v. Jubelirer*,<sup>59</sup> a gerrymandering case, Pennsylvania Democrats challenged a redistricting plan they believed gave excessively promising partisan prospects to Republicans by sacrificing established redistricting principles.<sup>60</sup> Justice Kennedy concurred in the judgment (on affirming the circuit court and overturning *Bandemer*), but he

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52. *Davis v. Bandemer*, 478 U.S. 109, 143 (1986).

53. See also Sullivan & Feldman, *supra* note 43 at 821.

54. Finneran, *supra* note 47 at 392.

55. *Id.* (citing Gill v. Whitford, 138 S. Ct. 1916, 1926 (2018)).

56. *Id.* at 393 (citing *Davis v. Bandemer*, 478 U.S. 109 (1986)).

57. *Id.* (citing *Bandemer*, 478 U.S. at 133 (O’Connor, J., concurring) (Justice O’Connor was joined by Chief Justice Warren E. Burger and Justice William Rehnquist)).

58. *Davis v. Bandemer*, 478 U.S. 109, 129-30 (1986).

59. Finneran, *supra* note 47 at 394 (citing *Vieth v. Jubelirer*, 541 U.S. 267 (2004)).

60. *Id.* (citing *Vieth*, 541 U.S. at 272).

made it clear that he had hope for future “workable standards” that would “emerge to measure these burdens,” and that “courts should be prepared to order relief.”<sup>61</sup> It is worth noting that “Justice Kennedy’s opinion concurring in the judgment preserved *Bandemer*, even though he agreed with the plurality that no workable standard had yet been advanced to adjudicate partisan gerrymandering claims.”<sup>62</sup> Subsequent partisan gerrymandering cases (including *Rucho*) made it clear that the Supreme Court has rejected the effects test in *Bandemer* as unacceptable because of the lack of discernable judicial standards to resolve the issue.

The Court’s last partisan equal protection clause gerrymandering pronouncement before *Whitford* came in *League of United Latin American Citizens (LULAC) v. Perry*.<sup>63</sup> In *LULAC*, the Court addressed whether a judicially manageable standard had been established in partisan gerrymandering cases under an equal protection analysis. The Court in *LULAC* decided that a partisan gerrymandering injury is required to be based on an injury to real voters.<sup>64</sup> The pre-*Whitford* cases demonstrate that the Court has avoided granting relief on the merits in partisan gerrymandering cases under an equal protection analysis.<sup>65</sup>

III. A STATEWIDE RIGHT OF POLITICAL ASSOCIATION  
INJURY IN A “DISTRICT-SPECIFIC, EXTREME PARTISAN”  
GERRYMANDERING CASE IS JUSTICIABLE BECAUSE  
JUDICIALLY DISCERNABLE AND MANAGEABLE STANDARDS  
EXIST TO REDRESS THE ALLEGATION THAT A PLAINTIFF  
SUFFERED CONCRETE HARM BECAUSE OF THE  
ASSOCIATIONAL BURDENS CREATED BY PARTISAN  
GERRYMANDERING

The expressive association freedoms claimed under the First Amendment cry out for relief from the Court because the failure to award legislative seats statewide reasonably proportionate to the ballots cast for any political party is a significant burden on expressive

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61. *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring)).

62. *Finneran*, *supra* note 47 at 394

63. *Id.* at 395 (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) [hereinafter *LULAC*]).

64. *Id.* (citing *LULAC*, 548 U.S. at 420).

65. *Id.* at 395-96.

representational rights. I believe the Court could readily order an offending state legislature to correct the problem and subject the legislature to initial monitoring by the courts as needed. A showing of actual harm is easily demonstrated when a group of partisan voters collectively and expressively casts ballots that entitle them to majority representation in the legislature to advance their expressive political agenda but the voters do not receive representation proportional to their votes. I think the right to collective representation by voters is severely burdened by significant underrepresentation of legislative seats. The actual harm suffered by an actual group of voters, or an individual voter should be redressed by the Court.<sup>66</sup> The fact that lower federal courts have granted standing in partisan gerrymandering cases supports the argument that partisan cases are not correctly treated as political question issues because these cases reveal that federal courts are quite capable of resolving partisan gerrymander issues under a First Amendment freedom of association analysis. Partisan gerrymandering causes real proportional representation harm to real voters who do not receive representation statewide proportional to their statewide vote; it is not a political question because non-politicized lower federal courts use manageable discernable judicial standards to grant relief from unconstitutional partisan gerrymandering issues caused by a state legislature's collective proportional representation harm of plaintiffs.

In 2018, in *Gill v. Whitford*, the Supreme Court held that because the plaintiffs challenging partisan gerrymandering suffered a district-specific gerrymandering injury, the plaintiffs on remand must also show a statewide injury-in-fact in order to meet the standing requirement under the Supreme Court's unsettled and unresolved gerrymandering justiciability jurisprudence.<sup>67</sup> In 2019, *Gill v. Whitford* was remanded to the trial court where the plaintiffs raised justiciability, standing, First Amendment and Fourteenth Amendment political gerrymandering issues.<sup>68</sup> The trial court allowed discovery to proceed as scheduled over a motion to stay, but the court said it would delay the trial and any decision on the merits until after the Supreme Court had

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66. *See id.* at 396.

67. *See generally* *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

68. *See* *Whitford v. Gill*, No. 15-CV-421-JDP, 2019 WL 294800 (W.D. Wis. Jan. 23, 2019).

decided *Common Cause v. Rucho*<sup>69</sup> and *Benisek v. Lamone*,<sup>70</sup> as those decisions could produce game-changing implications for the issues raised by *Whitford*.<sup>71</sup> The Court's decision in *Common Cause v. Rucho* unfortunately denied a federal judicial remedy because of the political question doctrine.<sup>72</sup> Because I predict that the Court's holding and rationale in *Common Cause v. Rucho*<sup>73</sup> will have a relatively short shelf-life, it is worthwhile to review those cases which implicitly or directly did not determine partisan gerrymandering to be a political question.<sup>74</sup>

*Gill v. Whitford* held that plaintiff voters lacked standing because they had not demonstrated a particularized injury because the injury was district-specific and not statewide. The plaintiffs alleged the state's redistricting plan because of partisan gerrymandering negatively impacted the composition of the state legislature because partisan gerrymandering "unreasonably burdens their First Amendment rights of association."<sup>75</sup> The right of political association safeguards a collective concern in the honest operation of the electoral process.<sup>76</sup> Extreme partisan gerrymandering infringes on the right of association by severely impeding one's fair and reasonable representation in the electoral process without a compelling government interest.<sup>77</sup> The right of political association without burdensome representative dilution statewide is similar to the First Amendment's prohibition on con-

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69. 318 F. Supp. 3d 777 (M.D.N.C. 2018).

70. 348 F. Supp. 3d 493 (D. Md. 2018).

71. See *Whitford*, 2019 WL 294800; see also *Benisek*, 348 F. Supp. 3d at 493; *Common Cause*, 318 F. Supp. 3d at 777.

72. See generally *Rucho v. Common Cause*, 139 S.Ct. at 2484 (2019).

73. *Id.*

74. See *Ohio A. Philip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988, 996-97 (S.D. Ohio 2018).

75. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 854, 55 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

76. See Brief of Amici Curiae Election Law and Constitutional Law Scholars in Support of Appellees at 7-8, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No.16-1161), 2017 WL 3948425 ("This Court's patronage cases similarly recognize that the right of association protects both the individual interest in associating with like-minded others and the collective interest in 'the free functioning of the electoral process.' . . . Elrod and its progeny also illustrate the centrality of political parties to the right of association—and the corresponding harms arising from the dominant party's discrimination against a non-dominant party to entrench itself in power.").

77. *Id.* at 19.

tent and viewpoint discrimination as violations of the freedom of expression.<sup>78</sup> When citizens vote for a political party in furtherance of political goals with like-minded individuals, the government may not undermine collective associational political expression in the absence of a compelling government interest.<sup>79</sup> Supporters of these extreme partisan gerrymandering plans leave the collective associational rights of minority party voters behind with the flawed argument that in the absence of a significant discriminatory effect on a minority political party with a majority of the popular vote, the minority political party has not suffered a harm in not having partisan seats reasonably correlated with that of the popular vote. An intentional redistricting plan that yields districts designed to give one party an unreasonable and unfair electoral advantage over another creates a chilling effect on the political association rights statewide in violation of the First Amendment's strict scrutiny requirements.<sup>80</sup> Evidence reveals that the purpose of partisan gerrymandering plans is to severely impair the effectiveness of the collective political speech of a collection of citizens on the basis of their political affiliation.<sup>81</sup>

After *Gill v. Whitford*, recent decisions in several federal district courts have granted standing to challengers of the extreme partisan gerrymandering practice of “cracking” and “packing” under the theory that the challengers may have suffered a statewide political injury as a result of an unconstitutional infringement on their collective right of expressive association.<sup>82</sup> In my view, it is significant to note that the

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78. See *id.* at 5 (“Freedom of association is closely linked to the First Amendment’s prohibition on content and viewpoint discrimination. This Court has held that, ‘[a]bove all else, the First Amendment ‘means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’ This principle applies with special force where political speech is concerned, to ensure that the dominant political group may not stifle or diminish the collective voice of its opponents.” (quoting *Police Department v. Mosley*, 408 U.S. 92, 95 (1972)).

79. *Id.* at 19.

80. *Contra id.* at 16 (“In the context of redistricting, then, there must be a significant *discriminatory* effect on a political party and its adherents for the restriction to be deemed ‘severe.’ The mere fact that a redistricting plan yields districts that tend to result in one party’s having an electoral advantage over another does not alone demonstrate discrimination or compel strict scrutiny.” (Cf. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992))).

81. See Steven Semeraro, *Partisan Gerrymandering: Is There No Shame in It or Have Politicians Become Shameless?*, 48 U. Mem. L. Rev. 1, 40 (2017) (“[I]nstead of choosing to respect statewide vote totals, the majority party in the legislature used statistical predictions to choose a map that would produce radically disproportional results. Choosing that map revealed the drafters’ requisite intent to discriminate . . .”).

82. See generally *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Benisek v. Lamone*,



lower court's grant of standing in partisan gerrymandering cases demonstrates that these cases are not properly treated as political question issues because the federal courts are quite capable of resolving partisan gerrymander issues under a First Amendment freedom of association analysis. Although this article focuses on the implications of extreme partisan gerrymandering on the right to the freedom of political association and expression, recent polls suggest that the public may have come to believe that highly partisan judicial appointments have unreasonably influenced the Supreme Court's interest in establishing clear rules to eliminate the negative impact of partisan gerrymandering by deciding that redistricting with intentional partisan bias is not prohibited.<sup>83</sup> In *Rucho v. Common Cause*,<sup>84</sup> the Court clearly refused to judicially remove the negative impact of partisan gerrymandering on the electoral process by declaring that partisan gerrymandering claims are political questions outside the reach of federal courts.

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348 F. Supp. 3d 493 (D. Md. 2018); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D. N.C. 2018); *Ohio A. Philip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988 (S.D. Ohio 2018), *appeal docketed*, No. 19-70 (U.S. July 12, 2019).

83. See *New Bipartisan Poll Shows Support for Supreme Court to Establish Clear Rules for Gerrymandering*, CAMPAIGN LEGAL CENTER (Jan. 28, 2019), <https://campaignlegal.org/update/new-bipartisan-poll-shows-support-supreme-court-establish-clear-rules-gerrymandering> ("Nearly three-quarters of voters support the U.S. Supreme Court establishing clear rules for when gerrymandering violates the Constitution, with broad support extending across partisan and racial lines . . . [a]t least 60 percent of Democrats, Independents and Republicans support the creation of independent redistricting commissions."); see also Jenny Jarvie, *Why Texas Is Texas: A Gerrymandering Case Cuts to the Core of the State's Transformation*, L.A. TIMES (Jul. 11, 2017, 3:00 AM), <http://www.latimes.com/nation/la-na-texas-gerrymander-20170711-story.html> ("Voting rights advocates have long accused Texas Republicans of working to undermine the growing political clout of Latino and African American voters by intentionally—and unfairly—cramming them into districts or splitting them up so they are outnumbered. Republican legislators still control roughly two-thirds of State House and Senate and congressional seats."); Olga Pierce & Kate Rabinowitz, *'Partisan' Gerrymandering Is Still About Race*, PROPUBLICA (Oct. 9, 2017, 6:48 PM), <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race> ("This is, in fact, a dilution of Democratic voting power. But it also places thousands of African-American and Latino citizens in a heavily white district where they have little hope of electing a candidate who will represent their interests.")

84. 139 S. Ct. 2484.

IV. *GILL V. WHITFORD* INDICATES IT IS UNNECESSARY TO TREAT PARTISAN GERRYMANDERING AS A POLITICAL QUESTION

Gerrymandering issues are justiciable only if there is a showing of discriminatory intent and effect.<sup>85</sup> The Supreme Court of the United States has held that a showing of simply a political advantage is not enough to demonstrate discriminatory intent and effect as to show a cognizable injury.<sup>86</sup> The alleged harm of a dilution of votes is limited to the district in which a plaintiff lives because the plaintiff has not suffered a statewide injury.<sup>87</sup> However, the First Amendment implicates an “associational” injury from partisan gerrymandering because partisan gerrymandering burdens “the ability of like-minded people across the State to affiliate in a political party and carry out that organization’s activities and object[ives]. . . This ‘associational harm of a partisan gerrymander is distinct from vote dilution.’”<sup>88</sup> While rejecting “district-specific vote-dilution claims under the First Amendment, partisan plaintiffs ‘could make use of statewide evidence and seek a statewide remedy.’”<sup>89</sup> Redressing the alleged statewide harm requires a state legislature to revise only such districts as are necessary to reshape the voter’s district so that the voter may be unpacked or uncracked.<sup>90</sup> “[S]ome members of the Supreme Court have expressed the view that judicial enforcement of the principle that each voter has a right to have his vote treated equally must be limited to situations where the dilution is based on classifications such as race and population. These reservations have been grounded in the concern that distinguishing between legitimate and illegitimate political motivations is not a task to be undertaken by judges.”<sup>91</sup> Justice Kennedy’s and Justice Steven’s opinions in *Vieth v. Jubelirer*<sup>92</sup> articulate their belief that in partisan gerrymandering cases the First Amendment may prohibit the

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85. See *Shaw v. Reno*, 509 U.S. 630, 660 (1993) (White, J., dissenting).

86. *Id.* at 659 (White, J., dissenting)

87. See *Gill v. Whitford*, 138 S. Ct. 1916, 1930-31 (2018).

88. See *Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 712 (S.D. Ohio, 2019) (quoting *Gill*, 137 S. Ct. at 1938).

89. *Id.* (quoting *Gill*, 137 S. Ct. at 1934).

90. See *Gill*, 138 S. Ct. at 1921.

91. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 883 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

92. 541 U.S. 267 (2004).

state from placing burdens on voters on the basis of their allies or their viewpoints.<sup>93</sup>

The Supreme Court has expressed an emphasis on ensuring that an individual's vote receive the same weight as every other person's vote, which necessarily implicates that individual's associational rights.<sup>94</sup> The Court previously has observed the link between the right to vote and the right to associate by describing a partisan unit whose members share a particular viewpoint, associational preference, or economic status.<sup>95</sup> Analogous to ballot-access cases where independent party members were unduly burdened by State regulations that infringed on those party members' right of association, minority party members such as those in *Gill v. Whitford* are significantly burdened by extreme partisan gerrymandering and lack of fair representation.<sup>96</sup> "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and voters whose political preferences lie outside the existing political parties."<sup>97</sup> In *Whitford* it was said, "[W]hen the state places an artificial burden on the ability of voters of a certain political persuasion to form a legislative majority, it necessarily diminishes the weight of the vote of each of those voters when compared to the votes of individuals favoring another view. The burdened voter simply has a diminished or even no opportunity to effect a legislative majority. That voter is, in essence, an unequal participant in the decisions of the body

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93. *See id.* at 270, 294 (Justice Kennedy's concurring opinion: "While the equal protection standard continues to govern such cases, the First Amendment may prove to offer a sounder and more prudential basis for judicial intervention in political gerrymandering cases. First Amendment analysis does not dwell on whether a generally permissible classification has been used for an impermissible purpose, but concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association"; Justice Steven's dissenting opinion: "To say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny. Only an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs").

94. *See Whitford*, 218 F. Supp. 3d at 881.

95. *Id.*

96. *See id.*

97. *See Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983).

politic.”<sup>98</sup> Justice Stevens expressed that the freedom of association in political belief and affiliation constituted the core of those activities that are protected by the First Amendment, and any infringement by the government to burden those interests is subject to strict scrutiny.<sup>99</sup> According to Professor Steven Semeraro, data show that as a result of modern sophisticated redistricting software, when designing districts, controlling political parties are able with pinpoint precision to significantly distort the true representation of minority party voters in their political party as a whole within a state, essentially shutting the minority party out of the political process while ignoring traditional districting requirements such as compactness, contiguity, and the like.<sup>100</sup>

According to the complaint in *Gill v. Whitford*, the Wisconsin redistricting plan known as Act 43 was drafted to purposely distribute the predicted Republican vote share with greater efficiency so that it translated into a greater number of seats, while purposely distributing the Democratic vote share with less efficiency so that it would translate into fewer seats.<sup>101</sup> The plaintiffs alleged the act was drafted and enacted with the specific discriminatory intent to maximize the electoral advantage of Republicans and harm Democrats to the greatest possible extent.<sup>102</sup> Furthermore, according to the plaintiffs, the act resulted in a specific discriminatory effect as demonstrated by data which shows a substantial Republican efficiency gap advantage in 2012 as well as in 2014, although a very reliable “Demonstration Plan” reduced the efficiency gap to 2% in 2012, with an operation equal to Act 43 in all the additional applicable metric.<sup>103</sup> It is the contention of the plaintiffs that

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98. See *Whitford*, 218 F. Supp. 3d at 882–83.

99. *Id.* at 875. (citations omitted)

100. See *Shaw v. Reno*, 509 U.S. 630, 663 (1993) (White, J., dissenting) (“[A]n equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively*’ . . . By this, I meant that the group must exhibit ‘strong indicia of lack of political power and the denial of fair representation,’ so that it could be said that it has ‘essentially been shut out of the political process.’” (quoting *Davis v. Bandemer*, 478 U.S. 109, 133, 140 (1986)); see also, Semeraro *supra* note 81 at 27 (“As early as 2004 . . . redistricting software was so sophisticated and powerful that . . . [g]errymanderers could thus pick and choose among different maps until they found the one that produced their desired partisan result while also according with some traditional districting principles and thus triggering the least suspicion.”).

101. See *Whitford*, 218 F. Supp. 3d at 855.

102. *Id.* at 855.

103. *Id.*

the “Demonstration Plan” directly evidences the majority party’s intent to discriminate against the minority party members’ right of expressive political association without a compelling justification and without considering least restrictive means, because the majority party adopted ACT 43 because it knew that Act would waste a significant number of votes cast for the Democrats. The injury-in-fact, when considered together with the underlying issue of a lack of representation as a whole, is not a mere dilution of votes in regards to a political edge, but an infringement of the minority party members’ right to association.<sup>104</sup> Moreover, additional data demonstrates circumstantial evidence of intentional repression of ethnic and racial minorities’ power in the political process.<sup>105</sup> For example, in Wisconsin’s 2012 election, the majority party received 60.6% of the legislative seats, but the majority party won less than half of the popular vote. And in 2014, although the minority party won the same proportion of the vote as in 2012, its legislative seats were reduced to 36.4% of the available seats.<sup>106</sup> Thus, according to the plaintiffs’ complaint, this type of extreme political gerrymandering infringes on one’s ability to advance the group’s shared viewpoints by translating that partisan association into political power through the ballot,<sup>107</sup> and demonstrates the majority party’s intent to discriminate against a rival group and its supporters

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104. See *Davis v. Bandemer*, 478 U.S. 109 at 110 (Justice White’s plurality opinion: “unconstitutional discrimination occurs only when 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.”).

105. See Joshua Butera, *Partisan Gerrymandering and Qualifications Clause*, 95 B.U. L. REV. 303, 328 (2015) (“The strongest evidence would likely come from election results data before and after redistricting. In addition, the election results data should show the significant difficulty for a candidate to win when the district was drawn with the intent that candidates from that party not be able to win. For example, in North Carolina in 2012, it should not be difficult to prove that gerrymandering substantially harmed Democratic candidates when they won 51% of the votes cast statewide but a minority of the state’s seats.”).

106. See Brief of Amici Curiae Election Law and Constitutional Law Scholars in Support of Appellees, *supra* note 76 at 3 (“Here, there can be no doubt that Wisconsin’s plan severely burdens the associational rights of the minority party and its adherents. To cite just one example of the abundant evidence of party-based discrimination in the record: Republicans received roughly 48% of the statewide vote and garnered 60.6% of the state’s Assembly seats in 2012; two years later, when Democrats received the same percentage of the vote, they captured only 36.4% of the seats, or 24 seats fewer out of a total of 99. There is no compelling justification for the discriminatory burden that Wisconsin’s plan imposes on the non-dominant party and its adherents.”).

107. *Id.* at 11-12.

with the purpose and effect of diminishing the minority party's collective voice as a whole in the electoral process.<sup>108</sup> The argument of the plaintiffs against extreme partisan gerrymandering is good public policy because voters are more likely to come out vote for the party candidate of their choice if they believe both their individual ballot and collective ballots invoking the right of association matter when it comes to determining how many legislative seats their political party will be entitled to. The creation of extreme partisan gerrymandering plans that create an efficiency gap above 7% statewide will continue to favor the entrenched party throughout the life of the plan under any *likely* electoral scenario.<sup>109</sup> In the absence of an "unprecedented political earthquake," the partisan gerrymandering plan would keep the minority party at a disadvantage as a political party statewide while severally burdening the minority party's associational rights over the life of the plan.<sup>110</sup> The sheer magnitude of the difference between those less restrictive alternative plans that would create an efficiency gap of 2.2% for example, and those above 7%, illustrates clear intention that the discriminatory burden on associational rights is not the necessary byproduct of other governmental interests, but rather is the purpose and primary consequence of extreme partisan gerrymandering plans.<sup>111</sup>

#### V. THE POST-*GILL V. WHITFORD* LOWER COURT PARTISAN GERRYMANDERING CASES DEMONSTRATE HOW COURTS CAN ADDRESS PARTISAN GERRYMANDERING WITH DISCERNABLE AND MANAGEABLE STANDARDS WITHOUT VIOLATING THE POLITICAL QUESTION DOCTRINE

There are a number of post-*Gill* federal court decisions addressing the First Amendment gerrymandering issue with very plausible claim recognition theories. For example, about two months after the Supreme Court's decision in *Gill*, in *Ohio A. Philip Randolph Institute v. Smith*, a federal district court in Ohio, while speaking about the plaintiff's First Amendment rights in the context of a gerrymandering challenge, acknowledged that First Amendment issues may appear

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108. *Id.* at 12.

109. *Id.* at 21-24. (citing *Whitford v. Gill*, 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018))

110. *Id.* (quoting *Whitford*, 218 F. Supp. 3d at 905).

111. *Id.* at 24.

when legislative apportionment has the purpose and effect of burdening a group of voters' representational rights because of their perspectives on partisan politics.<sup>112</sup>

After the 2010 Census, the Republican-dominated Ohio General Assembly authorized redrawing congressional districts.<sup>113</sup> It was alleged that Republicans used the 2011 reapportionment map to intentionally advance their interest in controlling legislative districts.<sup>114</sup> The plaintiffs asserted that the Republicans' goal was to consolidate Republican congressional supremacy.<sup>115</sup>

In a concurring opinion in *Gill*, Justice Kagan took the position that in a partisan gerrymandering case alleging a violation of the First Amendment it is very plausible for a plaintiff to satisfy the standing test.<sup>116</sup> Justice Kagan believes that for purpose of standing, an injury-in-fact in a partisan gerrymandering case takes place if the partisan conduct unduly burdens the ability of voters of a targeted political party all over the State to freely associate in order to promote a partisan agenda.<sup>117</sup> If the associational injury is statewide, then by necessary implication the relevant statewide standing requirement has been met.<sup>118</sup> The plaintiffs contend they established an injury-in-fact under Justice Kagan's test because the 2011 map unduly burdens the partisan power of Democrats to freely associate.<sup>119</sup> The plaintiffs claim that the map burdens the right of association of voters for supporting or identifying with the views of Democrats.<sup>120</sup> Additionally, the plaintiffs asserted that because of a lack of either a legitimate state interest or a compelling state interest, Ohio's partisan district boundaries failed because of a lack of adequate justification.<sup>121</sup> The court appropriately found that the individual Ohio plaintiffs each alleged specific facts signifying a "concrete and particularized" injury.<sup>122</sup> The individual plaintiffs

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112. *Ohio A. Philip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988, 996-97 (S.D. Ohio 2018), *appeal docketed*, No. 19-70 (U.S. July 12, 2019).

113. *Id.* at 993.

114. *Id.* at 997.

115. *Id.*

116. *Id.*

117. *Id.* (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

claimed they suffered definite burdens on their freedom of association because partisan gerrymandering undermined the Democrats' proficiency in implementing plans, which qualifies as an injury under Justice Kagan's analysis.<sup>123</sup> Justice Kagan's injury-in-fact theory for partisan gerrymandering strongly suggests that harms caused by partisan gerrymandering are justiciable because they are capable of judicial resolution and should not be categorically treated as political questions.<sup>124</sup>

The 2011 map burdens plaintiffs' partisan activities by targeting Democrats with unreasonable partisan attacks.<sup>125</sup> Plaintiffs demonstrated injury-in-fact, under the Kagan rationale, because the 2011 map increased the challenge of appealing to voters during the course of registration.<sup>126</sup>

All of the plaintiffs in *Ohio A. Philip Randolph Institute v. Smith* have adequately pleaded an injury-in-fact under the standards expressed in Justice Kagan's concurrence in *Gill*.<sup>127</sup> Moreover, a three-judge district court panel in Maryland adopted a theory of the injury-in-fact separate from the proposal made by Justice Kagan.<sup>128</sup> The Maryland panel discussed a partisan gerrymandering claim as being prohibited by the First Amendment.<sup>129</sup> The *Shapiro* panel believed that to present an injury-in-fact, "the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference."<sup>130</sup> A First Amendment claim of partisan gerrymandering is plausible if the intentional manipulation of redistricting the data makes it more difficult for targeted partisan voters to freely associate in order to achieve electoral success because of their past exercise of their right of freedom of partisan association.<sup>131</sup> Under the standing requirement, the plaintiffs have a duty to plead sufficient facts to show that the injury they have

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123. *Id.* (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)).

124. *See id.*

125. *Id.* (citing *Gill*, 138 S.Ct. at 1938 (Kagan, J., concurring)).

126. *Id.* (citing *Gill*, 138 S.Ct. at 1939 (Kagan, J., concurring)).

127. *Id.*

128. *Id.*

129. *Id.* at 996, 998 (citing *Shapiro v. McManus*, 203 F. Supp. 3d 595, 595-98 (D. Md. 2016)).

130. *Id.* at 997 (citing *Shapiro*, 203 F. Supp. 3d at 597).

131. *Id.*



suffered is legitimately caused by the challenged conduct of the defendant.<sup>132</sup> The plaintiffs met the standing causation requirement by alleging that the state created the map with an express intent of burdening a minority political party, and that the map assisted in realizing this impermissible goal.<sup>133</sup> The plaintiffs satisfy the standing redressability mandate by showing that a favorable decision would redress their claimed First Amendment injury.<sup>134</sup> Their injury could be redressed since they are requesting an injunction that stops Ohio from creating congressional maps with the intent of burdening a group's representational rights because of "their political beliefs, political party membership, registration, affiliations or political activities, or voting histories."<sup>135</sup>

I support the view that the standing analysis is relevant to a political question under a non-justiciability analysis when a federal court decides that even if the plaintiff has suffered an injury, the injury is not capable of a judicial resolution because of a lack of discernable manageable judicial standards. The lower federal court federal cases in both Ohio and Maryland simply use the standing analysis with an emphasis on injury to demonstrate that are not truly non-justiciable political questions because they are capable of judicial resolution.

## VI. THE COURT'S *RUCHO V. COMMON CAUSE* HOLDING THAT PARTISAN GERRYMANDERING CLAIMS ARE POLITICAL QUESTIONS NOT CAPABLE OF FEDERAL JUDICIAL RESOLUTION IS UNMISTAKABLY FLAWED

### *A. Facts of Rucho v. Common Cause before the Supreme Court*

Plaintiffs in North Carolina and Maryland challenged congressional districting plans in their states alleging the reapportionment plans violated the constitution because they were designed to promote extremely partisan interest in reapportionment.<sup>136</sup> This section focuses

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132. *Id.* (citing *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180 (2000)).

133. *Id.*

134. *Id.*

135. *Id.* (quoting *Friends of the Earth*, 528 U.S. at 180)

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

on their First Amendment allegations. The federal district courts in both states ruled in favor of the plaintiffs, and the defendants appealed directly to the Supreme Court.<sup>137</sup> While considering these cases, the Court once again abandoned its duty to hold that claims of excessive partisanship in districting are “justiciable” and properly suited for resolution by the federal courts.<sup>138</sup> The Supreme Court did not invalidate a districting plan as creating an unconstitutional partisan gerrymander<sup>139</sup> because the Court inexplicably fails to understand the available judicially manageable standards for deciding such claims easily identified by the lower courts.<sup>140</sup> If the lower courts have been able to identify manageable judicial standards, why can’t the Supreme Court? One plausible explanation may be that some of the justices on the Court may implicitly want to preserve a Republican gerrymandering advantage.<sup>141</sup> Of course, it could be merely coincidental that all of the justices voting to treat partisan gerrymandering as a political question were from the political party with a current demonstrated partisan gerrymandering advantage. Unlike the Supreme Court, the courts below appropriately exercised judicial power when they found that the highly partisan districting plans were unconstitutional.<sup>142</sup>

The partisan gerrymandering case, *Rucho v. Common Cause*, involves a challenge to a Republican-sponsored congressional redistricting plan in North Carolina.<sup>143</sup> The second partisan congressional gerrymandering case before the Court, *Lamone v. Benisek*, involved a Democrat-sponsored plan in the state of Maryland.<sup>144</sup> The plaintiffs alleged the districting scheme was prohibited by the First Amendment.<sup>145</sup> The federal district court considered the plaintiffs’ allegations

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137. *Id.*

138. *Contra id.*

139. *Id.*

140. *Ohio A. Philip Randolph Inst.*, 335 F.Supp.3d at 998 (citing *Shapiro v. McManus*, 203 F. Supp.3d 595–98 (D. Md. 2019)).

141. See Associated Press, *supra* note 9.

142. See *Ohio A. Philip Randolph Inst.*, 335 F.Supp.3d at 998 (citing *Shapiro*, 203 F. Supp. 3d at 595–98).

143. *Rucho*, 139 S. Ct. at 2491.

144. *Id.* at 2493.

145. *Id.*

and decided that the Maryland plan infringed upon the plaintiffs' freedom of association.<sup>146</sup> An appeal was filed with the Supreme Court by way of 28 United States Code Section 1253.<sup>147</sup>

*B. Analysis of Rucho v. Common Cause before the Supreme Court*

The Supreme Court refused to hold extreme partisan gerrymandering was unconstitutional.<sup>148</sup> The Court's 5-4 judgment in *Rucho v. Common Cause*, that partisan gerrymandering of federal legislative districts was not capable of judicial resolution by the federal courts because of the lack of discernable manageable judicial standards, was rendered without any legitimate constitutional justification, according to a stinging dissent by Justice Elena Kagan.<sup>149</sup> Chief Justice John Roberts, author of the majority opinion, said that what the allegedly injured plaintiffs were requesting was an exceptional extension of judicial power.<sup>150</sup> According to Chief Justice Roberts, the dissent wanted an unprecedented increase in judicial influence in partisan gerrymandering.<sup>151</sup> The Supreme Court has consistently refused to invalidate a partisan gerrymander as prohibited by the constitution—and the Court has rejected the many prior invitations it has received over the last 45 years to prohibit partisan gerrymandering.<sup>152</sup> This requested increase of judicial influence involving partisan gerrymandering would involve judging extremely partisan American political life as it is linked to reapportionment.<sup>153</sup> Chief Justice Roberts believes the Supreme Court should reject the opportunity to resolve partisan gerrymandering claims on the merits because undue judicial influence would inherently exist if the Supreme Court involves itself in resolving partisan gerrymandering issues.<sup>154</sup> According to Chief Justice Roberts, once the Supreme Court started to adjudicate partisan gerrymandering cases, its

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146. *Id.* (quoting *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (D. Md. 2018), *vacated and remanded sub nom. Rucho*, 139 S. Ct. 2484 (2019)).

147. *Id.*

148. Galen Druke, *Partisan Gerrymandering Isn't The Supreme Court's Problem Anymore*, FIVE THIRTY EIGHT (June 27, 2019, 1:34 PM), <https://fivethirtyeight.com/features/partisan-gerrymandering-isnt-the-supreme-courts-problem-anymore/>.

149. *Id.*

150. *Id.*

151. *Rucho*, 139 S. Ct. at 2507.

152. *Id.*

153. *Id.*

154. *Id.*

authority would be unrestrained in range and time.<sup>155</sup> If federal judges heard partisan gerrymandering cases on the merits, the undue judicial influence problem would continue to repeat itself nationally “with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.”<sup>156</sup> In her dissent, Justice Kagan reminded Chief Justice Roberts that the Court had abandoned its affirmative duty to resolve the constitutional violations created by partisan gerrymandering.<sup>157</sup> Justice Kagan’s dissent was appropriately critical of Chief Justice Roberts’ claim that the dissent was seeking to expand judicial power, because the dissent proposed a well-reasoned traditional constitutional law analysis to allow the Supreme Court to exercise its judicial power to resolve a partisan gerrymandering problem that should be prohibited by the constitution.<sup>158</sup> According to Justice Kagan, “For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.”<sup>159</sup> Justice Kagan reasoned that placing restrictions on gerrymandered districts is unequivocally within the scope of the Supreme Court.<sup>160</sup> Justice Kagan said, “The partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people.”<sup>161</sup> In the past, prior to retiring in 2018, Justice Anthony Kennedy took the position “that partisan gerrymandering was within the purview of the court but that the justices should hold off on ruling any particular gerrymander unconstitutional until a manageable standard for measuring gerrymandering emerged.”<sup>162</sup> By ruling that partisan gerrymandering is not an issue for the federal courts to resolve, the Supreme Court failed to do its job of protecting American democracy

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155. *Id.*

156. *Id.*

157. Galen Druke, *Partisan Gerrymandering Isn't The Supreme Court's Problem Anymore*, FIVE THIRTY EIGHT (June 27, 2019, 1:34 PM), <https://fivethirtyeight.com/features/partisan-gerrymandering-isnt-the-supreme-courts-problem-anymore/>

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

by rejecting the excellent road map for resolving partisan gerrymandering issues handed to it by the lower court in *Rucho v. Common Cause*.<sup>163</sup> A majority of Americans who may take issue with extreme partisan gerrymandering<sup>164</sup> may now also question whether the Supreme Court was acting in an impartial manner to protect the rights of voters. Americans may question whether the Court operates free of partisan politics, because each justice voted on the partisan gerrymandering issue in a manner that may have suggested to a casual observer that the justice was either a so-called Republican justice or a so-called Democrat justice rather than an independent justice of the Court serving free of political pressure or prestige.

Representative Hakeem Jeffries, who leads the House Democratic Caucus, recently suggested on CNN's "New Day" that the role of Supreme Court justices and the court-packing question should be an issue given focused consideration for the November 2020 federal elections.<sup>165</sup> The court-packing concept is questionable as a historical and practical matter, but it resurfaced in 2019.<sup>166</sup> A court-packing strategy was perhaps inspired by the 2016 denial of President Barack Obama's nominee Merrick Garland a confirmation hearing before the Senate.<sup>167</sup> Senate Majority Leader Mitch McConnell said that although the Obama nominee to the Supreme Court was not given an opportunity to fill a vacant seat, under similar circumstances he would encourage the Senate to accept and give its consent to confirm a Trump-sponsored Supreme Court candidate.<sup>168</sup> "McConnell's comments were an audacious reversal of his 2016 election-year position blocking Garland for the vacancy caused by the sudden death that February of Justice Antonin Scalia. McConnell argued that the seat should be filled by whoever won the then-upcoming presidential election."<sup>169</sup> One leading candidate for the Democratic Presidential nomination, Senator Bernie Sanders of Vermont, does not endorse the Supreme-Court-

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163. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492-93 (2019).

164. Druke, *supra* note 157.

165. Joan Biskupic, *Democrats Look At Packing The Supreme Court To Pack The Vote*, CNN POLITICS (last updated May 21, 2019 6:04 AM), <https://www.cnn.com/2019/05/31/politics/democrats-supreme-court-packing-politics/index.html>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

packing schemes.<sup>170</sup> Senator Sanders disapproves of “court packing” because he appropriately believes it is likely to benefit Republicans.<sup>171</sup> Sanders proposed term limits for Supreme Court justices.

Separate and distinct from the Court packing issue both parties have engaged in activities that have placed the Supreme Court and the entire judiciary in the center of current politics.<sup>172</sup> In July of 2019, President Trump tweeted that “the country needs ‘more Republicans . . . And must ALWAYS hold the Supreme Court.’” Also during this month, he “disparaged a judge based on his appointment by the Democrat Obama.”<sup>173</sup> While commenting on a ruling that an accounting firm was required to deliver Trump’s financial records, the President characterized the decision as an improper decision rendered by an Obama-appointed judge.<sup>174</sup> Trump’s and Senator McConnell’s partisan comments regarding the federal judiciary undermine the optic of federal judicial independence.<sup>175</sup> New York University Law Professor Barry Friedman contends that a politicized judiciary is totally at war with the goal of independent judicial review.<sup>176</sup> Chief Justice John Roberts has attempted to discourage public officials from referring to federal judges as either an Obama Judge or a Trump judge.<sup>177</sup> Chief Justice Roberts advanced the view that America has a remarkable collection of dedicated judges committed to treating equally those coming into their courts.<sup>178</sup>

The Court’s *Rucho v. Common Cause* opinion may very well incite politicization claims.<sup>179</sup> In *Rucho v. Common Cause*,<sup>180</sup> the issue of judicial politicization instinctively appears in the mind of a reasonable observer when a group of five Supreme Court justices appointed by presidents identified with the Republican Party vote to support a political question theory that has the practical effect of leaving in place an established partisan gerrymandering advantage for the Republican

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See generally* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

180. *Id.*

Party.<sup>181</sup> The Supreme Court ruled that partisan gerrymandering claims were not justiciable without a well-reasoned justification.<sup>182</sup> While reviewing Justice Kagan's dissenting opinion<sup>183</sup> that partisan gerrymandering is justiciable, it occurred to me that it is very likely that a politicized justice on the Court would apply the political question doctrine to partisan gerrymandering in an effort to preserve a Republican partisan gerrymandering advantage.<sup>184</sup> It is plausible to argue there are five politicized Republican appointed Justices on the Roberts Court because after conceding that excessive partisan gerrymandering produces outcomes incompatible with democratic principles, the Supreme Court denies plaintiffs a federal judicial remedy.<sup>185</sup> I reject the Court's assertion that the federal judiciary does not know how to develop manageable standards to protect core democratic principles, because the lower federal courts have demonstrated how to utilize judicial standards to resolve partisan gerrymandering issues.<sup>186</sup> It is my position that an implicitly politicized majority of justices on the Court decided that partisan gerrymandering claims present political questions beyond the scope of the federal courts because of the demonstrated partisan gerrymandering advantage currently held by the Republicans.<sup>187</sup> "Supreme Court justices insist that politics plays no role in their decision-making. But their voting patterns and the titanic partisan confirmation battles for seats on the court tell a different story."<sup>188</sup> The belief that politics play no role in the decision-making process was made "before the start of a successful 10-month Republican blockade of President Barack Obama's nomination of Judge Merrick B. Garland. The senators who refused to give Judge Garland a hearing appeared to disagree with the chief justice's assessment."<sup>189</sup> According to Adam Liptak,<sup>190</sup> who reports on the United States Supreme

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181. See ASSOCIATED PRESS, *supra* note 9.

182. See generally *Rucho*, 139 S. Ct. 2484.

183. *Id.* at 2509 (Kagan, J., dissenting).

184. See ASSOCIATED PRESS, *supra* note 9.

185. *Rucho*, 139 S. Ct. at 2507.

186. *Contra, id.*

187. See ASSOCIATED PRESS, *supra* note 9.

188. Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View*, THE NEW YORK TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/politics/supreme-court-judges-partisanship.html>.

189. *Id.*

190. Adam Liptak, THE NEW YORK TIMES, <https://www.nytimes.com/by/adam-liptak>, (last visited Dec. 8, 2019) ("Adam Liptak covers the United States Supreme Court and writes

Court and authors Sidebar, a column on legal activities, “Political science data tends to support the politicians rather than the justices when it comes to whether politics plays a part in judges’ decisions. The data demonstrates a significant correlation between judges’ political affiliations and their voting.”<sup>191</sup> One very informed commentator, Michael W. McConnell, a former federal appeals court judge and current law professor at Stanford, believes the goal of judging federal case without a political component at Supreme Court is only aspirational.<sup>192</sup>

I advance the argument that the public may perceive that Republican-appointed justices on the Supreme Court refuse to address the First Amendment freedom of association partisan gerrymandering issues because partisan gerrymandering typically preserves electoral power for the Republican Party.<sup>193</sup> Unlike the indirectly politicized majority, I believe the Supreme Court’s conclusion in *Rucho v. Common Cause* condones excessive partisan gerrymandering while sending complaints about partisan gerrymandering to an inferior state court for a judicial remedy.<sup>194</sup>

The introductory paragraph of Justice Kagan’s dissent in *Rucho v. Common Cause* appropriately captures the unnecessary harm created by the Supreme Court’s blatant refusal to remedy a constitutional violation, and is an adequate response to the flawed and unacceptable justification articulated by the Court for treating all partisan gerrymandering as a political question.<sup>195</sup> Unlike Chief Justice Roberts, I believe when excessive partisanship in districting leads to results that reasonably seem unjust and “incompatible with democratic principles,” federal judges may be required to regulate political power between the two major political parties based upon reasoned merits found in the Constitution.<sup>196</sup> Judicial review of partisan gerrymandering meets those basic requirements.<sup>197</sup>

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Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The New York Times’s news staff in 2002. He was a finalist for the 2009 Pulitzer Prize in explanatory reporting. He has taught courses on the Supreme Court and the First Amendment at several law schools, including Yale and the University of Chicago.”)

191. Liptak, *supra* note 188.

192. *Id.*

193. See ASSOCIATED PRESS, *supra* note 9.

194. *Contra* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

195. *Id.* at 2509 (Kagan, J., dissenting).

196. *Contra* *Rucho*, 139 S. Ct. at 2506-07.

197. *Contra id.* at 2507



Chief Justice Robert's treatment of partisan gerrymandering as a political question should also be rejected because Justice Kagan pointed out how partisan gerrymandering may violate people's constitutional rights.<sup>198</sup> "That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years. Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others,"<sup>199</sup> said Justice Kagan.

According to Justice Kagan, the majority's claim that it cannot render a judicial remedy because it thinks the task is beyond judicial capabilities should be rejected.<sup>200</sup> Under my analysis, the politicized majority did not want to treat the partisan gerrymandering issue as a constitutional violation because it did not want to confront the demonstrated partisan gerrymandering advantage for the Republicans. Partisan gerrymandering should not be treated as an ordinary constitutional disruption, because partisan gerrymanders in the cases before the Court robbed citizens of their fundamental constitutional right to have a say equally about political endeavors, to connect with others in order to broadcast political beliefs, and to choose political representatives.<sup>201</sup>

## VII. CONCLUSION

Excessive partisan gerrymanders debase and dishonor America's democracy by reversing the fundamental American belief that all governmental power originates with the people.<sup>202</sup> An insightful Justice Kagan, while speaking about harm caused by partisan gerrymandering, said, "These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government."<sup>203</sup> I consider a politicized justice on the Supreme Court to be a justice who

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198. *Id.* at 2513 (Kagan, J., dissenting)

199. *Id.*

200. *Id.* at 2509 (Kagan, J., dissenting).

201. *Id.*

202. *Id.*

203. *Id.*

very predictably engages in suspect legal reasoning in an effort to support the position of the political party identified with the president who nominated him or her for a position on the Court. Scrutinizing a partisan, politically inspired gerrymander is *not* beyond the competence of courts with judges or justices who follow the dictates of the Constitution rather than the recognized goals of partisan politicians seeking a political advantage at the expense of democracy.<sup>204</sup> Justice Kagan said, “The majority’s abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims.”<sup>205</sup>

The observed judicial standards utilized by lower courts to conclude that partisan gerrymandering is not a political question actually meet the standards set by an apparently politicized majority on the Court.<sup>206</sup> Objective judicial standards, when applied by judges who are not politicized, allow lower federal court judges to protect the freedom of association of partisan voters.<sup>207</sup> Proper judicial standards, when applied by judges who are truly independent of partisan bias, will limit courts to fixing only egregious gerrymanders and will prevent impartial judges from excessively getting involved in the political process.<sup>208</sup> Neutral judicial standards when applied by the lower courts in an impartial manner permit “judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.”<sup>209</sup> After the majority of the justices in *Rucho v. Common Cause* identified some risks every impartial judge would like to escape, the majority simply ignored the fact that for several years now, federal courts throughout the nation have developed standards for resolving partisan gerrymandering claims.<sup>210</sup> The standard for adjudicating partisan gerrymandering claims may appear to be virtually impossible for a politicized justice on the Supreme Court who cannot identify with a

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204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 2516 (Kagan, J., dissenting) (citing *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2010)); *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867, 881 (E.D. Mich. 2019).

concept of electoral fairness that denies the Republican Party its current demonstrated partisan gerrymandering benefit advantage.