Using Supreme Court Oral Arguments in the Classroom

Oral argument excerpts from Rucho v. Common Cause, March 26, 2019

One-Person, One-Vote

The “One-Person, One-Vote” principle refers to the rule that one person's voting power should be roughly equivalent to another person's within the same state. The rule comes up in the context of Equal Protection and was established in Baker v. Carr (1962) and Reynolds v. Sims (1964).

In the following audio clips Justice Ginsburg discusses one-person, one-vote in relation to North Carolina’s redistricting map with attorney Mr. Clement.

Excerpt - Justice Ginsburg and Mr. Clement, attorney for appellants, Robert Rucho et al.

Justice Ginsburg: -- Mr. Clement, does one person have one vote that counts equally, which I take it to be the -- the message of those cases, now well accepted, does one person have one vote that counts equally with others if the impact of her vote is reduced based on her party affiliation?

Mr. Clement: The answer to that question, Justice Ginsburg, is yes. You still have an equal right to vote as an individual. And what the parties on the other side are really complaining of here is not a purely individual injury. What they're complaining of is that they're grouped in a district with either too many people who agree with them or too few people who agree with them, and, therefore, their vote is sort of diluted in some way. And I don't think that is, in the first place, an individual legally cognizable interest, so I think they have a standing problem. But even if they get over the standing problem, then I don't think that's a justiciable injury. And I would say more broadly, you know, lots and lots of voters live in a district where, either because of geography or because of state action, they're not going to have their preferred candidate elected.

Indeed, I'd go further and say most Americans don't get their preferred candidate elected because they have to choose from the candidates that are before them, and maybe based on the district they live in, it tends to give them a relatively liberal Democrat or a relatively conservative Republican when really what they'd prefer is somebody down the middle. And none of those things, I think, are things that you are constitutionally entitled to.

Focus Questions:

1. What questions do you have after hearing this clips from oral argument? Does it make you think differently about the case?

2. According to Mr. Clement, what constitutional protections exist with regards to voting? What is not protected?
3. Do you think that partisan gerrymandering goes against the principle of one-person, one-vote by possibly reducing the impact of someone’s vote based on their party affiliation? Why or why not?

Proportional Representation

There are many countries around the world that have an electoral system called proportional representation (Belgium, Italy, and Sweden to name a few). Proportional representation seeks to create an elected body that reflects the overall distribution of public support for each political party in an election. For example, if a political party wins 10% of the vote, it will win 10% of the seats in parliament and a party that wins 20% of the vote, will win 20% of the seats.

The United States, on the other hand, uses plurality to elect the U.S. House of Representatives as well as many state and local legislatures. Residents vote for their district’s representative, with the highest total vote-earner winning the election, even if he or she has received less than half of the vote.

During oral argument Mr. Clement states that the respondents in this case perceive the issue with the districting maps to be a lack of proportional representation, which the Constitution does not require. In the following audio clip Justice Sotomayor and Mr. Clement discuss proportional representation in regards to this case and the redistricting map that was chosen by North Carolina out of the thousands that were produced by the mapmaker’s computer simulation.

Excerpt - Justice Sotomayor and Mr. Clement, attorney for appellants, Robert Rucho et al.

Justice Sotomayor: Mr. Clement, let's go back to the why of that. You keep talking about proportional representation, but it's not, because what was shown is that 99 percent of the time you get a map that is more fair to both parties than the one that was chosen. . .

We have a legion of cases that say you can't treat political parties differently because it's an equal protection violation. And it's the same thing, whether it's because of their speech or their activities.

What we're telling you is pick any other map you want; just don't split counties, as was done here, sole -- based solely on your political views, because counties were split. Don't pick or don't -- you may use saving an incumbent, but don't kick one out because by kicking one out -- and there is a map that would keep all of the incumbents in place -- don't kick one out because you're excluding people based on their political views.

This is what this is about. You're discriminating on the basis of a group's speech and diluting their vote accordingly.
Mr. Clement: So, Justice Sotomayor, I would have three points, if I could get them out. I mean, one is the key word in your question is "fair." And what makes this unfair, I would submit, at the end of the day, is some principle of proportional representation.

Nobody thinks it's unfair, I don't think, that Republicans in Massachusetts under the current maps are never going to be able to elect somebody to Congress even though they're something like 35 percent of the population, nobody thinks that's unfair, because you really can't draw districts to do it because they're evenly distributed. It might be unfortunate for them, but I don't think it's unfair.

Focus Questions:

1. Justice Sotomayor mentions that it is a violation of equal protection to treat political parties differently, or to favor one party over another and that limiting political speech is similar. How does partisan gerrymandering limit political speech?

2. Both Justice Sotomayor and Mr. Clement talk about fairness. What do you think a “fair” election would look like?

Role of the Courts

In the following clips Justice Gorsuch and Justice Kavanaugh question what role the courts should play in gerrymandering cases and question what other states are doing to address this issue outside of the courts.

There are several states, including Colorado and Michigan, that will create independent commissions to decide the boundaries of congressional and legislative districts after the 2020 Census. These initiatives are intended to reduce the likelihood of any political party using its power to decide election boundaries.

On January 3, 2019 the 116th U.S. Congress introduced H.R.- 1, a bill “To expand Americans' access to the ballot box, reduce the influence of big money in politics, and strengthen ethics rules for public servants . . .” Among other things, the bill proposes that states establish independent, nonpartisan redistricting commissions. H.R.-1 passed in the House but will likely never pass the Senate.

Excerpt - Justice Gorsuch and Mr. Clement, attorney for appellants, Robert Rucho et al.

Justice Gorsuch: Mr. Clement, along those lines, in terms of Democratic accountability on this, one of the arguments that we've heard is that the Court must act because nobody else can as a practical matter.

But -- but given Arizona, and that is the holding of the Court, is that true? And to what extent have states, through their initiatives, citizen initiatives, or at the ballot box in
elections through their legislatures, amended their constitutions or otherwise provided for remedies in this area?

I just happen to know my home state of Colorado this last November had such a referendum on the ballot that passed overwhelmingly, as I recall. So I believe there are others and I'm just wondering, what's the scope of the problem here? I also know there are five states with only a single representative, right, so -- in Congress, so presumably this isn't a problem there.

Mr. Clement: That's right. And to the extent it's a problem at all, the scope of the issue, shall we say, is, you know, roughly 30 states that don't have some kind of mechanism like you've described or have multiple districts and, you know, I think even when you get to --

Justice Gorsuch: But how many -- my sense is there's a lot of movement in this area. I -- I believe there were four or five states along with Colorado just this last election that acted.

Mr. Clement: That's exactly right. Michigan is another state that passed a ballot initiative. And, of course, the other sort of place where there can be a solution to this, which is the most obvious one and is a solution no matter what you think of the Arizona independent case, is Congress.

And if you look at HR-1, the very first bill that the new Congress put on their agenda, it was an effort to essentially force states to have bipartisan commissions, now query whether that's constitutional, but it certainly shows that Congress is able to take action in this particular area.

Chief Justice Roberts: Well, I suppose the -- I suppose the members of Congress are pretty happy with the way the districting has been done. (Laughter.)

Mr. Clement: Well, you -- you might think, Mr. Chief Justice, but, actually, I don't think the majority of them are, because that was a bill that I think passed on party line votes.

And so, I mean, to the extent that -- that people, other justices of this Court in the past have been concerned about things like entrenchment and the like, I mean, it's a little odd here that we've had all of this supposedly partisan redistricting to benefit the composition of Congress, and yet a majority of Congress thinks that they should pass HR-1.

So I just don't know that there really is that much of a problem. And I do think it's -- you know, the particular context that arises here is the context of congressional redistricting, and one of the elements of the framers' structural solution was they didn't directly tell Congress: Why don't you district for yourself.

They said in the first instance let's have somebody else at the state level closer to the people do the districting and then we'll give Congress a role to supervise that.
Excerpt - Justice Kavanaugh, Justice Gorsuch, and Ms. Riggs, attorney for appellees, League of Women Voters

Justice Kavanaugh: I took -- I took some of your argument in the briefs and the amicus briefs to be that extreme partisan gerrymandering is a real problem for our democracy -- and I'm not going to dispute that -- and that the Court, even though it might be a problem to get involved in all these cases, should, in essence, recognize the emergency situation from your perspective. But what about, to pick up on something Justice Gorsuch said earlier, that there is a fair amount of activity going on in the states on redistricting and attention in Congress and in state supreme courts? In other words, have we reached the moment, even though it would be a -- have we really reached the moment, even though it would be a big lift for this Court to get involved, where the other actors can't do it?

Ms. Riggs: The North Carolinian plaintiffs in front of you can do nothing to solve this problem.

Justice Kavanaugh: But I'm thinking about more nationally. Your -- your -- the amicus briefs are certainly referencing a -- a problem in many states. And the idea, I think in the briefs, is this Court and this Court alone can step in. And -- and there is a fair amount of activity going on in the states, recognizing the same problem that you're recognizing.

Ms. Riggs: And as Mr. Bondurant acknowledged, east of the Mississippi there's a very small number of states where this is a possibility. This Court has rightfully been concerned about the burden on the Court and the reputation of the Court, but --

Justice Gorsuch: Well, but that -- that's on -- that's on initiatives, right? And even -- even there, I mean, there are -- I mean, New Jersey, Michigan, Ohio, have -- have -- have dealt with this in some way, just to pick a few that I -- I've got in front of me. But -- but you also have the state supreme court option, as -- as Justice Kennedy -- Kavanaugh pointed out. And we often overlook that possibility in -- in our -- in our federal system. What do we -- what do we do about that?

Ms. Riggs: Other options don't relieve this Court of its duty to vindicate constitutional rights. And, certainly, while the -- the reputation of the Court as an independent check is an important consideration, understand that on the facts of this case, the reputational risk to the Court of doing nothing when -- when David Lewis says, I'm going to draw a 10/three plan and if I could drew an 11/two plan, I would, the reputational risk of doing something is much, much less than the reputational risk of doing nothing, which will be read as a green light for this kind of discriminatory rhetoric and manipulation in redistricting from here on out.
This is -- this is a situation where, with all due respect, Justice O'Connor was not correct. This isn't self-correcting. Voters in North Carolina, no matter how hard -- no matter what level they turn out -- this was a swing election in 2018 for North Carolina voters, and they were not able to eliminate the bias in the plans.

Focus Questions:

1. What are some of the additional options for addressing issues of partisan gerrymandering, outside of the Supreme Court, that are mentioned in these two clips?

2. What challenges might arise in addressing this issue through a congressional mandate or legislation?

3. Why do you think the justices might be hesitant for the Court to get involved in partisan gerrymandering cases?

4. What reason does Ms. Riggs provide for why the Court should get involved?