PREVIEW in the Classroom Case Study
*Rucho v. Common Cause*

Argument Date: March 26, 2019

Can courts hear extreme partisan gerrymander challenges to state congressional maps? If so, was North Carolina’s 2016 congressional map an unconstitutional partisan gerrymander?

**Key Definitions:**

*Partisan gerrymandering:* The process of setting electoral districts, gerrymandering is a practice intended to establish a political advantage for a particular party or group by manipulating district boundaries.

*Preliminary injunction:* A temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.

*Summary judgement:* This allows for a speedy disposition of a controversy without the need for trial.

*Reapportion:* To assign or distribute something again or in a different way.

*Standing:* A party’s right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in federal court, a plaintiff must show that the challenged conduct has caused actual injury and that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.

*Justiciability:* Being appropriate or suitable for review by a court.

*Contiguity of districts:* Contiguity refers to the principle that electoral districts in a state be physically adjacent or connected.

*Compactness of districts:* Compactness refers to a district's geographical shape. Ideally a district should be more like a circle, square, or polygon, and less like a hot dog, salamander, or star. This is one way to ensure some amount of closeness between voters of the same district.

*One-person, one-vote:* The “One-Person, One-Vote” principle refers to the rule that one person's voting power ought to 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)
**Case at a Glance**
In 2016, North Carolina was ordered by a federal court to redraw its congressional districts because the existing map included districts that were racially gerrymandered. Racial gerrymandering is a practice of spreading minority voters across voting districts, leaving them too few in number in any given district to elect their preferred candidates. The Supreme Court has ruled that this is unconstitutional.

When the General Assembly in North Carolina went to redraw the districting map it used an explicitly political criterion, along with traditional and race-neutral criteria, to ensure that 10 of its congressional districts remained “Republican,” while just 3 remained “Democratic.”

Voting-rights organizations and individual voters sued North Carolina, arguing that the state’s map was an impermissible partisan gerrymander. The three-judge panel at the district court ruled that the plaintiffs had standing to sue, the case was justiciable, and the plaintiffs prevailed on the merits. The state’s Republican legislators appealed to the Supreme Court.

**Rucho v. Common Cause**

**Facts of the Case:**
In February 2016, the North Carolina General Assembly set out to redraw its congressional districting map. The General Assembly took this unusual, mid-census step in order to comply with an order from the United States District Court for the Middle District of North Carolina. The court ruled that the state’s then-existing map—the map it adopted in 2011—was an unconstitutional racial gerrymander, and ordered the state to redraw the map within two weeks.

Senator Robert Rucho and Representative David Lewis (both Republicans) engaged mapmaker Dr. Thomas Hofeller to help with the effort. They directed Dr. Hofeller to use traditional districting criteria (like preserving contiguity and compactness of districts) and state and federal districting requirements (like the one-person, one-vote rule), but not to use race. The assemblymen also directed Dr. Hofeller to use political data in order to preserve the existing partisan makeup of the state’s congressional delegation (10 Republicans and 3 Democrats).

The General Assembly appointed a new districting committee, and Mr. Lewis presented the committee with a set of seven districting criteria. Five of these were traditional districting criteria. The remaining two dealt with politics and race. One of these, titled “Partisan Advantage,” said that “the Committee shall make reasonable efforts to construct districts . . . to maintain” a “partisan makeup . . . [of] 10 Republicans and 3 Democrats.” The other, titled “Political data,” said that “[t]he only data other than population data to be used . . . shall be election results in statewide contests since January 1, 2008 . . . .” The committee agreed on the five traditional districting criteria unanimously; it adopted the political and anti-race criteria along party lines.
The map achieved its political purpose by “cracking” and “packing” Democratic voters. “Cracking” means that the map disperses Democratic voters across Republican-dominated districts in order to dilute and neutralize those Democratic votes; this strategy maximizes the number of Republican districts on the map.

“Packing” means that the map consolidates Democratic voters into hyper-majorities in the smallest number of districts possible; this minimizes the number of Democratic districts on the map. By using both strategies, a legislature can create a congressional delegation that is dramatically out of proportion to the actual overall vote count. (Of course, a Democratic-controlled legislature could use the same strategies for its own purpose.)

Mr. Lewis delivered a series of statements reflecting his partisan purpose. Among other partisan statements, he said, “[W]e want to make clear that . . . to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage.” He also stated, “I proposed that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it’s possible to draw a map with 11 Republicans and 2 Democrats.” When pushed to increase the number of Democratic districts and achieve a closer split, Mr. Lewis said that this would simply amount to a different kind of political gerrymander.

Ultimately, the committee approved Dr. Hofeller’s map by a party-line vote. The General Assembly approved it, with minor modifications, also along party lines. The map took effect in June 2016 and governed the 2016 and 2018 elections.

In the 2016 election, Republicans won just 53 percent of the statewide vote, but they won 10 of congressional seats and Democrats won 3 of the seats.

Common Cause, the North Carolina Democratic Party, and voters from each of the 13 districts sued, Common Cause v. Rucho, arguing that the map constituted an impermissible partisan gerrymander. The League of Women Voters and 12 individual voters sued separately, making the same claim. A three-judge district court consolidated the cases, conducted a four-day bench trial, and found that the new map was the product of an unconstitutional partisan gerrymander and ordered the state to draw a new one. The state’s Republican legislators appealed to the Supreme Court.

On June 18, 2018, the Supreme Court ruled that a different group of plaintiffs had not shown that they had a legal right, known as standing, to bring a statewide challenge to Wisconsin’s districting maps in Gill v. Whitford. The Court held that in order to bring a partisan gerrymandering claim, plaintiffs must challenge particular legislative districts, district-by-district, and not the entire map. The Court then ordered the district court to take a new at the case (Common Cause v. Rucho) and to decide if the plaintiffs have standing to sue in light of Gill v. Whitford.
The district court again ruled in favor of the plaintiffs. The court ruled that the plaintiffs had standing; that the plaintiffs’ claims were justiciable; and that the plaintiffs prevailed on the merits. The court prohibited the state from using the map in future elections after November 2018 and ordered the General Assembly to redraw the map. The state legislators then appealed again to the Supreme Court.

The state used the challenged map in the 2018 elections. Democrats won a slight majority (51 percent) in the statewide congressional vote. Still, Republicans won seats in 9 districts; Democrats won seats in just 3.

**Issues before the Court**

1. Do the plaintiffs have legal standing to sue North Carolina for drawing its congressional map as an extreme partisan gerrymander?
2. Can the courts hear a case challenging a state’s congressional map as an extreme partisan gerrymander?
3. If so, did North Carolina draw its congressional map using a political criterion, in violation of the First Amendment, the Equal Protection Clause, or the Elections Clause?

**CASE ANALYSIS**

This case involves three discrete issues: standing, justiciability, and the merits. Common Cause and The League of Women Voters filed two separate briefs. Their arguments are shown together, as the *appellees*, except where they differ. Please note that at the district court level Common Cause and the League of Women Voters are called the plaintiffs because they filed suit in court. The Republican state legislators of North Carolina filed a direct appeal to the Supreme Court making them the *appellants* and Common Cause and the League of Women Voters the *appellees*.

**Standing**

Arguments for the Appellants, the Republican legislators for the state of North Carolina

- The state argues that the plaintiffs lack standing, because their claims “at bottom are complaints about the partisan composition of the statewide congressional delegation.” This is exactly the kind of map-wide challenge that the Court rejected in *Gill*. The state acknowledges that the plaintiffs tried to fine-tune their claims in light of *Gill*, but it contends that they still failed to establish standing under *Gill*. In particular, the state claims that the plaintiffs cannot establish standing under *Gill* by showing merely that their votes would have carried more weight in alternative and hypothetical districts, or that they suffered other, even more generalized harms (like having a hard time convincing other voters to vote).
Arguments for the Appellees, Common Cause and the League of Women Voters

- The plaintiffs counter that their claims are exactly the kind that *Gill* recognized. They say that *Gill* held that individuals can bring vote-dilution claims by showing that they were placed in cracked or packed districts, so that their votes carry less weight. The appellees contend that they established that the state’s map dilutes individuals’ votes by showing that the map’s individual districts were “extreme statistical outliers, causing extreme dilution of the voter-plaintiffs’ votes.” Moreover, the appellees claim that under the *Gill* concurrence the burdens that the state’s map places on voters’ and political parties’ rights to expression and association—a diminished ability to fundraise and recruit candidates and volunteers in gerrymandered districts—are sufficient to establish standing.

**Justiciability**

In order to get into federal court and stay there, the plaintiffs have to have standing to sue. This means that they must have suffered an actual injury, or will imminently suffer an injury; that the defendant’s challenged actions caused that injury; and that the requested relief will redress the injury. Moreover, the case must raise an issue that the courts (as opposed to Congress or the executive branch) can resolve. In particular, the case must be reviewable in the courts under the applicable law, and it must have “judicially manageable standards”—a concrete test that the courts can apply.

Arguments for the Appellants, the Republican legislators for the state of North Carolina

- The state argues that even if the appellees have standing, their challenge is non-justiciable. The state claims that the text of the Constitution (the Elections Clause) delegates primary responsibility for districting to state legislatures subject to congressional oversight. The state says that this explicit textual commitment to the state legislatures (or Congress) means that the question is inappropriate for the federal courts. Moreover, the state claims that there are no judicially manageable standards for adjudicating partisan gerrymandering claims—that there is no agreed-upon constitutional test for the Court to apply. The state contends that this lack of standards—and the Court’s inability to articulate a standard—means that the courts should forbear from hearing partisan gerrymandering claims.

Arguments for the Appellees, Common Cause and the League of Women Voters

- The appellees counter that under Supreme Court precedent political gerrymandering claims are justiciable. They point to the fact that courts hear other kinds of sensitive election issues, like racial gerrymandering, and say that political gerrymandering claims are no different.
• The appellees contend that the state is wrong that the Elections Clause prevents the courts from ruling; instead, they say, “[a]ccording to almost a century of precedent, the Elections Clause authorizes judicial review of States’ regulations of congressional elections.” Moreover, they claim that there are judicially manageable standards to judge political gerrymandering. They say that precedent under the First Amendment, the Equal Protection Clause, and the Elections Clause all set standards that courts could apply to political gerrymandering. Indeed, they point out that the district court in this case set and applied a “discernible and manageable test.” They argue that the state is wrong to worry that courts cannot determine when political considerations become “excessive,” because the relevant question is whether the state used political considerations for invidious ends.

• Finally, they contend that the lower court’s use of different tests only shows how different possible tests complement each other (underscoring that there is a discernible test), not that they are at odds (which could suggest that there is no discernible test).

**Merits**

Arguments for the Appellants, the Republican legislators for the state of North Carolina

• The state argues that even if the case is justiciable, and even if the Court can articulate a standard for judging partisan gerrymandering, its map clears any partisan gerrymandering test. The state contends that its map “fares well when measured by traditional districting criteria,” and outperforms any recent state congressional map “in terms of divided counties or split precincts.”

• The state acknowledges that it “was quite candid about its partisan objectives” in drawing the map, but it says that its substitution of a clear partisan purpose for any racial purpose was in response to a district court’s ruling that its earlier map amounted to an unconstitutional racial gerrymander.

• Finally, the state claims that Court precedent permits some degree of intentional partisan gerrymandering—and that it was simply relying on that precedent.

Arguments for the Appellee, Common Cause

• Common Cause counters that the state’s map fails three different and well-established constitutional standards. Common Cause argues that the map burdens political expression and association in violation of the First Amendment. It says that the map is based on “intentional invidious discrimination” in violation of the Equal Protection Clause. And it contends that the map is based on a “naked intent to disfavor a class of candidates” and “dictate electoral outcomes” in violation of the Elections Clause.
Amicus arguments made in support of the appellants

Wisconsin State Senate and Wisconsin State Assembly

- Federal courts do not have the tools to measure a district’s alleged discriminatory effect in partisan gerrymandering claims. “Courts cannot measure whether alleged partisan influence has exceeded some hidden constitutional limit. Even if voters could be reliably counted as Democrats or Republicans, territorial redistricting and traditional redistricting criteria will inevitably (and lawfully) have partisan effects. . . The resulting statewide map will have a partisan tilt, even if generated by a computer programmed to ignore partisan voting patterns.”

The American Civil Rights Union and Southeastern Legal Foundation

- The First Amendment provides no basis for overturning the 2016 North Carolina congressional redistricting plan. “The text of the First Amendment says nothing about voting. Instead, it expressly protects the freedoms of speech, the press, peaceful assembly, and petition.”

- “Political gerrymandering claims are only an attempt to enlist the courts in leveling the political playing field. If Congress cannot do that constitutionally when regulating political speech, then the courts should refrain from doing so as well.”

Amicus arguments made in support of the appellees

American Jewish Committee

- “Partisan gerrymandering undermines democracy by subverting the public’s expectation that the government will be accountable to the People. It not only insulates the majority party from accountability at the polls, but also stifles the public debate that is indispensable to meaningfully contested elections. . . What incentive does the public have to actively participate in the political marketplace of ideas if electoral and policy outcomes appear to be predetermined by district lines? And what incentive is there to organize in opposition to the majority if the party in power has drawn the map to enhance its own voice and to diminish that of those who hold different political views? Such lack of government neutrality offends the principles that animate the First Amendment.”

American Civil Liberties Union (ACLU)

- Courts are well-suited and equipped to determine whether the state acted with intent to entrench a partisan advantage through direct or circumstantial evidence. “Determining motive in the context of redistricting has never proved beyond the competence of courts.”
Bipartisan Group of Current and Former Members of the House of Representatives

• “Extreme partisan gerrymandering harms our political system, and harms the functioning of the House of Representatives in particular. . . A cascade of negative results follows: artificially drawn ‘safe’ districts tend to make general elections less competitive and give party insiders, or small groups of “base” primary voters, much greater influence than the general electorate . . . The premise of extreme partisan gerrymandering is that politicians choose their voters rather than voters choosing their representatives. That stands on its head the Framers’ understanding that the House was to be the institution most directly connected to and representative of the People themselves. “

Significance:

This case and its companion, Lamone v. Benisek, give the Court its second chance in recent years to grapple with partisan gerrymandering. Last Term, the Court dodged the question and ruled instead that the appellees, the Wisconsin Democratic voters, lacked legal standing.

This time, the parties and lower courts, with the benefit of last Term’s rulings, prepared the cases more thoroughly. Thus, the appellees moved to establish standing in light of Gill; the parties refined their justiciability arguments; and the parties and the lower court grappled with different constitutional tests, presenting an array of tests for the Court to choose from. If the Court is going to take up the underlying merits issue, this is the time.

Still, that’s a big “if.” The Court could dodge the underlying question again on standing grounds or, more likely, by ruling that the issue is non-justiciable.

Whatever the Court does, its ruling (or non-ruling) could have a dramatic impact, and soon. State legislatures will start to redraw their own districts and their states’ congressional districts as soon as they get the results of the 2020 census. Whether they can use political gerrymandering, and how, could tilt the electoral scales for one party or another (depending on the state) for a decade to come.

This classroom case study was modified from PREVIEW of United States Supreme Court Cases 46, no. 6 (March 18, 2019): 34–36, authored by Steven D. Schwinn, professor of law at the John Marshall Law School. © 2019 American Bar Association
Focus Questions:

1. After reading the case study, what questions do you have regarding the case?

2. Use the case study to determine the two strongest arguments made for the Republican legislators for the state of North Carolina and the three strongest arguments made for the Common Cause and the League of Women Voters.

3. What are some of the interests the Court will have to balance in coming to a decision in this case?

4. Do you think that Common Cause and the League of Women Voters have established a strong enough argument to establish their legal standing to sue? Why or why not?

5. Do you think the courts should be the branch to address partisan gerrymandering claims? Why or why not?