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Benjamin Plener Cover

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# *Rucho* for Minimalists

by Benjamin Plener Cover\*

## I. INTRODUCTION

In one of last term's most consequential cases, *Rucho v. Common Cause*,<sup>1</sup> the Supreme Court of the United States decided, 5–4, that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.”<sup>2</sup> This limits the power of the federal courts to address what many, this author included, consider a significant threat to American democracy: the manipulation of electoral maps to favor certain voters or candidates. Federal courts may still intervene to vindicate the one-person-one-vote principle, enforce the Voting Rights Act (VRA),<sup>3</sup> or invalidate racial gerrymanders.<sup>4</sup> But not to limit partisan gerrymandering.<sup>5</sup> Writing for the majority, Chief Justice Roberts emphasized that he “does not condone excessive partisan gerrymandering[.]” but insisted this problem must be addressed by state courts, direct democracy, or Congress rather than the federal courts.<sup>6</sup> For while partisan gerrymandering is “incompatible with

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1. 139 S. Ct. 2484 (2019).
2. *Id.* at 2506–07, *vacating both* Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018), *and* Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018).
3. Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437.
4. *Rucho*, 135 S. Ct. at 2495–2508.
5. *Id.* at 2508.
6. *Id.* at 2507.

democratic principles,”<sup>7</sup> regulating it is incompatible with the limited role of the federal judiciary.<sup>8</sup> When it comes to federal judicial intervention in electoral districting, partisan gerrymandering is where the Court draws the line.<sup>9</sup>

While *Rucho* has generated a robust debate about the decision’s correctness and implications,<sup>10</sup> relatively little attention has focused on the decision’s precise holding. But how exactly does the Court define those “partisan gerrymandering claims”<sup>11</sup> it deems foreclosed? The short answer is: it doesn’t. While the majority opinion alone uses the term *gerrymander*, or a variation thereof, seventy times, it never quite provides an explicit definition.<sup>12</sup> Yet, the term calls for a definition. As words go, it is an unusually imprecise one: it is “a portmanteau of the surname ‘Gerry’ and the word ‘salamander’” that we now use as both noun and verb.<sup>13</sup> As I have argued elsewhere, *gerrymandering*, “like its amphibian namesake,” has proven “slippery, repeatedly eluding efforts to curb it[.]” partly because it is “a slippery concept resistant to precise, consensus-garnering definition[.]”<sup>14</sup> So, in this Essay, I do not consider whether *Rucho* was correctly decided (though I think it was not), nor do I predict its consequences (which I think depend on future contingencies). Instead, I ask a logically prior question: what precisely is its scope? And here’s my answer: *Rucho* holds non-justiciable “allocative” claims of partisan gerrymandering, those that define the harm alleged and the remedy sought in terms of the allocation of seats to the rival political parties, but leaves unaddressed “non-allocative” claims, those that define harm and remedy without reference to the votes-seats relationship.

In this Essay, I offer two examples of non-allocative political gerrymandering claims not considered—and thus, not foreclosed—by

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7. *Id.* at 2506 (quoting *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

8. *Id.* at 2506–07.

9. *Id.*

10. See Rick Hasen, *ELB Symposium: Partisan Gerrymandering After Rucho*, Election Law Blog (July 5, 2019, 7:20 am), <https://electionlawblog.org/?p=105878>. See also Nicholas Stephanopoulos, *The Anti-Carolene Court*, Sup. Ct. Rev. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3483321](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483321).

11. *Rucho*, 139 S. Ct. at 2506–07.

12. See, e.g., *Rucho*, 139 S. Ct. at 2491.

13. Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1143–44 (2018). The pejorative term was invented in 1812 to critique an electoral map whose salamander-like appearance allegedly betrayed the political machinations of then-Governor Elbridge Gerry. *Id.* at 1144.

14. *Id.*

*Rucho*. The first is less likely but makes the conceptual point with greatest clarity: a claim that a mapmaker manipulates electoral boundaries for the sole purpose of excluding the residence of a targeted legislator from the district she represents to punish and suppress her speech. The second is the primary idea motivating this Essay: a claim that a mapmaker intentionally and without adequate justification differentially distributes the geographic benefits and burdens of electoral districting on the basis of party affiliation. A concrete example would be an allegation that the mapmaker intentionally and unjustifiably split “blue” counties far more than “red” counties.<sup>15</sup> A federal court could adjudicate these non-allocative claims without saying a word about how many seats each party should win. These claims lie outside the ambit of *Rucho*’s holding because they avoid the justiciability problems *Rucho* identifies. If this reading is correct, the Supreme Court could one day vindicate a non-allocative claim of political gerrymandering without reversing *Rucho*.

Part II situates *Rucho* in jurisprudential context, by briefly tracing the Court’s struggle to determine whether and how federal courts can regulate electoral districting. After initial reluctance to intervene, the Court embraced the one-person-one-vote principle based on a non-allocative theory of vote dilution, whereby a mapmaker dilutes the weight of a disfavored voter by placing her in an overpopulated district.<sup>16</sup> But the Court has struggled to conceptualize and address claims that a mapmaker has manipulated districts’ shape, rather than their population size, to favor voters or candidates on the basis of politics.<sup>17</sup> Part III presents the argument that *Rucho* is limited to allocative claims of partisan gerrymandering. Since the Court never defines the term explicitly, its precise scope must be determined based on context, prior caselaw, and the logic of the majority’s justiciability analysis. This analysis demonstrates that the Court conceptualized partisan gerrymandering as allocative vote dilution, whereby a mapmaker reallocates votes towards a favored party by subjecting disfavored voters to packing and cracking techniques that diminish the efficacy of their votes. While some have framed partisan

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15. Throughout this Essay, I refer to counties (or voters, or candidates) as red (or blue) to connote their support of (or affiliation with) the Republican (or Democratic) Party. Prior to the contested presidential election in 2000, broadcast networks tended to alternate this color-coding, but since *Bush v. Gore*, 531 U.S. 98, blue and red have become party loyalists. See Philip Bump, *Red vs. Blue: A history of how we use political colors*, WASH. POST (Nov. 8, 2016, 7:27 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/08/red-vs-blue-a-brief-history-of-how-we-use-political-colors/>.

16. *Rucho*, 139 S. Ct. at 2501.

17. *Id.* at 2497.

gerrymandering in terms of associational harm rather than vote dilution, this associational framing is still allocative or at least quasi-allocative in the sense that neither harm nor remedy can be quantified without reference to the votes-seats relationship. Part IV presents two examples of non-allocative claims of political gerrymander that are not foreclosed by *Rucho*, one based on candidate exclusion, the other on differential geographic burdens.

## II. THE COURT'S DOCTRINAL EVOLUTION

To understand *Rucho*, we must briefly consider the conceptual and jurisprudential terrain upon which it stands. *Rucho* is the Court's most recent pronouncement on federal judicial regulation of electoral districting,<sup>18</sup> but it is certainly not its first, and it won't be the last. The Court has struggled with these questions for over a century, and its answers have varied over time and with the type of gerrymandering at issue. The Court's evolving approach led the *Rucho* majority to conceive of partisan gerrymandering in allocative terms.<sup>19</sup> This Section provides the essential background: a primer on how gerrymandering has repeatedly eluded the Court's grasp.

### A. Early Resistance to Intervention

Gerrymandering has plagued the American electoral system from its inception to the present day: the States have relied heavily on geographic electoral districting (GED), whereby voters select representatives through separate elections in geographic subunits that partition the jurisdiction;<sup>20</sup> mapmakers have abused their districting power, subordinating the public interest in sound representation to advance the narrower interests of favored candidates or voters; citizens have decried how such gerrymandering can turn districting into "the business of rigging elections[;]"<sup>21</sup> and the Supreme Court has hesitated to intervene.

The Court has long understood Article III of the federal Constitution<sup>22</sup> to both confer and constrain judicial power, limiting the federal courts to exercise power "judicial" in nature and adjudicate only

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18. *Id.* at 2506–07.

19. *Id.* at 2499.

20. See Nicholas Stephanopoulos, *Our Election Exceptionalism*, 80 U. CHI. L. REV. 769, 808 (2013). See also Cover, *supra* note 13, at 1142 n.28.

21. *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004). (Kennedy, J., concurring in the judgment) (quoting John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1).

22. U.S. CONST. art. III.

those “Cases” or “Controversies” to which this power “shall extend[.]”<sup>23</sup> From this textual basis, the Court has derived a “political question” doctrine that precludes federal court adjudication of certain disputes deemed more amenable to political rather than judicial resolution based on considerations of authority, competence, or prudence.<sup>24</sup> A dispute may present a non-justiciable political question because its “resolution is textually committed to a coordinate political department”<sup>25</sup> or because a federal court cannot discern “judicially discoverable and manageable standards” to resolve it “without an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>26</sup>

Federal court regulation of electoral districting implicates these considerations of authority, competence, and prudence in the context of electoral federalism and separation of powers. GED is not the only way to run elections for multimember bodies like Congress, state legislatures, and city councils. Each representative could be selected through “at-large” jurisdiction-wide contests.<sup>27</sup> Or seats on the multimember body could be apportioned to political parties in proportion to the votes they earn in a single jurisdiction-wide election under some system of proportional representation (PR).<sup>28</sup> But GED has

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23. U.S. CONST. art. III, § 2.

24. *Baker v. Carr*, 369 U.S. 186, 209 (1962). The Court synthesized the political question doctrine into a six-factor inquiry. *Id.* at 217. My discussion here draws on an influential opinion by Justice Sotomayor, which organizes the six *Baker* factors into these three categories. *Zivotofsky v. Clinton*, 566 U.S. 189, 202–07 (2012) (Sotomayor, J., concurring in part and concurring in the judgment).

25. *Zivotofsky*, 566 U.S. at 203. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 229 (1993) (challenge to impeachment procedures presents non-justiciable political question because Article I, Section 3 gives the Senate the “sole Power to try all Impeachments.”).

26. *Baker*, 369 U.S. at 217. *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (challenge to riot-response practices presents non-justiciable political question in part because Court lacks competence to evaluate “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force”).

27. This is how many Representatives were selected in the nation’s first five decades, *Karcher v. Daggett*, 462 U.S. 725, 745, n.3 (1983) (Stevens, J., concurring), and how every Senator is selected today, U.S. CONST. amend. XVII, cl. 1.

28. PR is often used in other countries and sometimes used at the local level in the U.S. *See Electoral Systems Around the World*, FAIRVOTE, [https://www.fairvote.org/research\\_electoralsystems\\_world](https://www.fairvote.org/research_electoralsystems_world) (last visited Nov. 11, 2019) (As of 2012, 29 of 35 major democracies surveyed used some form of PR); *Jurisdictions Using Fair Representation Voting*, FAIRVOTE, [https://www.fairvote.org/jurisdictions\\_using\\_fair\\_rep#full\\_list\\_of\\_fair\\_voting\\_jurisdictions](https://www.fairvote.org/jurisdictions_using_fair_rep#full_list_of_fair_voting_jurisdictions) (last visited Nov. 9, 2019) (over 200 U.S. jurisdictions use some form of PR in local elections).

advantages over at-large elections<sup>29</sup> and PR.<sup>30</sup> And the federal Constitution neither mandates nor proscribes these practices. The Elections Clause<sup>31</sup> simply authorizes the States and Congress to regulate elections for federal legislators,<sup>32</sup> while other provisions empower Congress to judge federal legislative elections.<sup>33</sup> Congress has used this power to both require and constrain electoral districting. Federal statute has required electoral districting for selection of Representatives for over 175 years and currently requires single-member electoral districting.<sup>34</sup> While the Elections Clause applies only to federal elections, the federal Constitution contemplates state and congressional regulation of state and local elections.<sup>35</sup> But the

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29. See *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“The very essence of districting is to produce a different—a more ‘politically fair’—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.”).

30. These advantages include: representation of less populous communities with distinct geographic-based interests; a relationship between representative and constituent; more robust and competitive elections; and the stability, accountability, and moderation associated with a two-party system. See Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1350–51 (1987).

31. U.S. CONST. art. I, § 4, cl. 1.

32. U.S. CONST. art. I, § 4. The Court has interpreted the Elections Clause broadly to cover the decisions of whether and how to draw electoral districts. See *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

33. U.S. CONST. art. I, § 5 (“[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members”). See also U.S. CONST. art. I, § 2, cl. 3, *as modified* by U.S. CONST. amend. XIV, § 2 (apportionment based on decennial census conducted “in such manner as [Congress] shall by Law direct”).

34. See An Act for the apportionment of Representatives among the several States according to the sixth census, ch. 47, § 2, 5 Stat. 1, 491 (enacted June 25, 1842); 2 U.S.C. § 2c. Federal statute once did, but no longer does, impose requirements of contiguity, compactness, and equal population. Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 14, 14, *invalidated* by *Wood v. Broom*, 287 U.S. 1, 8 (1932) (holding statute was impliedly repealed by the Act of 1929).

35. Voter qualifications for elections of federal legislators are based on voter qualification for elections of state legislators. U.S. CONST. art. I, § 2, cl. 1. Congress has broad, but not unlimited, authority to regulate state and location elections pursuant to its power to enforce the guarantees of due process and equal protection, U.S. CONST. amend. XIV, § 5, and the prohibition against race-based vote denial, U.S. CONST. amend. XV, § 2. Compare *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding the original Voting Rights Act as a valid exercise of congressional enforcement power), with *Shelby Cty. v. Holder*, 570 U.S. 529, 530 (2013) (invalidating a provision of the current Voting Rights Act as beyond the scope of Congress’s enforcement powers).

text provides no specific directive on whether or how electoral districts are to be drawn. The Constitution speaks of individual rights and structural principles implicated by districting, but only in sweeping generalities such as “equal protection,” “privileges and immunities,” “freedom of speech,” election “by the People,” and “a Republican Form of Government.”<sup>36</sup>

For these reasons, the Court was reluctant to intervene, preferring to leave districting matters to the States and to Congress. Before the reapportionment revolution, the Court entertained procedural challenges to electoral maps, but refused to invalidate them on substantive grounds.<sup>37</sup> In 1946, writing for a plurality in *Colegrove v. Green*,<sup>38</sup> Justice Frankfurter famously warned that “Courts ought not to enter this political thicket.”<sup>39</sup> Frankfurter read the Elections Clause as an exclusive grant of power and concluded that electoral districting was “of a peculiarly political nature and therefore not meet for judicial determination.”<sup>40</sup> The relief petitioners sought was “beyond [the Court’s] competence to grant” because “[t]he remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”<sup>41</sup>

#### *B. Malapportionment as Non-Allocative Vote Dilution*

But ultimately the Court reversed course, declared malapportionment claims justiciable, and embraced the doctrine of “one person, one vote” (OPOV)<sup>42</sup> based on an intuitive theory of vote dilution. This theory rests on the principle, long recognized by the Court, that the right to vote is implicated when an electoral practice operates to reduce the efficacy, or “dilute” the power, of a person’s vote. For

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36. U.S. CONST. amend. XIV, § 1, cl. 4; U.S. CONST. amend. XIV, § 1, cl. 2; U.S. CONST. amend. I, cl. 3; U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. IV, § 4, cl. 1.

37. Compare *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) and *Smiley*, 285 U.S. 355; with *Wood*, 287 U.S. 1.

38. 328 U.S. 549, 556 (1946).

39. *Id.*

40. *Id.* at 552.

41. *Id.* at 552, 556. Of the seven Justices who participated in the decision, only two joined Frankfurter’s plurality. Three others favored intervention. *Id.* at 550. Justice Rutledge, the deciding vote, thought the Court could, but should not, intervene in part because invalidation of the electoral map could result in at-large elections—a “cure . . . worse than the disease.” *Id.* at 566 (Rutledge, J., concurring in the judgment).

42. *Baker*, 369 U.S. at 208–10 (justiciability); *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964) (House of Representatives); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (state legislatures); *Avery v. Midland Cty.*, 390 U.S. 474 (1968) (general purpose local governing bodies).



example, the Court previously held that Congress had the power to criminalize “ballot-box stuffing”—unlawfully casting numerous ballots for a favored candidate—because that practice “diluted” the power of other ballots lawfully cast.<sup>43</sup> OPOV extends this concept of vote dilution from the “ballot-stuffing” context to the malapportionment context. Since “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise”<sup>44</sup> the concept of “political equality . . . can mean only one thing—one person, one vote.”<sup>45</sup>

Note that this conception of vote dilution is non-allocative. Malapportionment dilutes a person’s vote by placing that person in a relatively populous district.<sup>46</sup> The existence and extent of this vote dilution can be quantified based solely on population figures for each electoral district, without any consideration of which party wins which seat.<sup>47</sup> Judges adjudicating these claims need not consider the allocation of political power; they simply “multiply and divide.”<sup>48</sup>

### C. Conceptualizing Shape Manipulation

As the Court developed the OPOV doctrine, questions quickly arose about other forms of gerrymandering. OPOV constrained districts’ (population) size, but not their shape. And mapmakers could still favor certain candidates or voters while maintaining substantial population equality by manipulating the shape of districts boundaries or using multimember districts to submerge disfavored voters.<sup>49</sup> Shortly after *Reynolds v. Sims*,<sup>50</sup> the Court refused to declare multi-member districts *per se* unconstitutional, but recognized such districts would “constitute

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43. *United States v. Saylor*, 322 U.S. 385, 386 (1944) (federal criminal prohibition protected the right of Americans in federal elections against “having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted.”). See also *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884); *United States v. Classic*, 313 U.S. 299, 314 (1941).

44. *Reynolds*, 377 U.S. at 555 (citing *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

45. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

46. See *City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980).

47. *Karcher*, 462 U.S. at 751 (Stevens, J., concurring).

48. *Id.*

49. *Id.* at 765 (“[I]f the shape of legislative districts is entirely unconstrained, the dominant majority could [replace a malapportioned map with] an even more grotesque-appearing map that reflects acceptable numerical equality with even greater political inequality.”). *Gaffney*, 412 U.S. at 751 (“A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory . . .”).

50. 377 U.S. 533 (1964).

an invidious discrimination . . . if [they] . . . ‘operate to minimize or cancel out the voting strength of racial or political elements of the voting population.’”<sup>51</sup>

In 1973, the Court approved a bipartisan gerrymander, intentionally drawn to produce “a proportionate number of Republican and Democratic legislative seats” based on vote shares in the three prior statewide elections.<sup>52</sup> The Court was untroubled “that virtually every Senate and House district line was drawn with [this] conscious intent”<sup>53</sup> and that the mapmakers carved up the state into safe blue districts and safe red districts to secure this goal.<sup>54</sup> The Court warned that electoral maps “may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized” but refused to “attempt[] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States.”<sup>55</sup> The only potentially viable political gerrymandering claim became a partisan gerrymandering claim. But while the Court developed a doctrinal framework for claims of racial gerrymandering,<sup>56</sup> it left partisan gerrymandering unaddressed.<sup>57</sup>

The Court squarely addressed a partisan gerrymandering claim for the first time in 1986, and the question fractured the Court: six Justices agreed the issue was justiciable but disagreed on the proper standard; Justice White proposed a more stringent standard while Justice Powell proposed a more flexible one; and the other three Justices insisted there was no standard because the issue was non-justiciable.<sup>58</sup> When the

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51. *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (quoting *Fortson*, 379 U.S. at 439); *White v. Regester*, 412 U.S. 755, 765 (1973); *Bolden*, 446 U.S. at 66.

52. *Gaffney*, 412 U.S. at 738.

53. *Id.* at 752.

54. *Id.* at 738 n.4 (seventy safe blue seats, sixty safe red seats, twenty-one swing seats).

55. *Id.* at 754.

56. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Shaw v. Reno*, 509 U.S. 630 (1993); *Chavis*, 403 U.S. 124; *Regester*, 412 U.S. 755; *Bolden*, 446 U.S. 55.

57. Justice Stevens urged the Court to invalidate any electoral map that “serve[s] no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political . . .” *Karcher*, 462 U.S. at 748 (Stevens, J., concurring). Justice Stevens suggested the Court could identify such a map by considering the process that produced it and substantive factors of irregular district shape and respect for local political boundaries. *Id.* at 750–51 (Stevens, J., concurring).

58. *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O’Connor, J., concurring) (joined by Chief Justice Burger and Justice Rehnquist); *id.* at 124 (plurality) (written by Justice White and joined by Justices Brennan, Marshall, and Blackmun); *id.* at 161 (Powell, J., concurring in part and dissenting in part) (joined by Justice Stevens).

Court reconsidered the question in the 2004, the dissensus persisted: the four more liberal Justices agreed on justiciability, but not the proper standard; the four more conservative Justices insisted the question was non-justiciable; and Justice Kennedy split the difference with Hamlet-esque indecision, rejecting every standard he considered, but holding out hope the right standard might one day emerge.<sup>59</sup> In the eighteen years between *Bandemer*<sup>60</sup> and *Vieth*,<sup>61</sup> not a single plaintiff survived the motions stage under Justice White's more stringent standard.<sup>62</sup> This standard, in turn, did not survive *Vieth*, but the doctrinal limbo did, as federal judges, uncertain whether partisan gerrymandering claims were to be or not to be, uniformly rejected them.

Until two years ago. That's when a three-judge federal panel, for the first time ever, struck down an electoral map as a partisan gerrymander, based on a standard tailor-made to satisfy Justice Kennedy.<sup>63</sup> The Court reversed the decision on standing grounds without reaching the merits, remanding so each plaintiff could satisfactorily demonstrate residence in a challenged district.<sup>64</sup> But shortly after that punt, more federal panels found more partisan gerrymanders.<sup>65</sup> Whack-a-mole style, more cases headed to the Court, these ones harder to dismiss on procedural grounds.<sup>66</sup> The Court ordered full briefing and argument in two of them: *Rucho*, involving an alleged pro-Republican gerrymander in North Carolina, and *Benisek*,<sup>67</sup>

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59. *Vieth*, 541 U.S. at 281 (plurality) (opinion written by Justice Scalia and joined by Chief Justice Rehnquist and Justices, O'Connor, and Thomas); *id.* at 339 (Stevens, J., dissenting); *id.* at 346–47 (Souter, J., dissenting) (joined by Justice Ginsberg); *id.* at 356–67 (Breyer, J., dissenting); *id.* at 306–17 (Kennedy, J., concurring). Two years later, Justice Kennedy clarified the criteria any adequate standard must satisfy. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413–23 (2006) [hereinafter LULAC].

60. 478 U.S. 109 (1986).

61. 541 U.S. 267 (2004).

62. *Id.* at 279–80.

63. *See Whitford v. Gill*, 218 F. Supp 3d 837, 884 (W.D. Wis. 2016).

64. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

65. *See, e.g., Shapiro v. McManus*, 136 S. Ct. 450 (2015); *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

66. By federal statute, nonfrivolous constitutional challenges to congressional or state legislative electoral maps are heard by a three-judge federal panel, 28 U.S.C. § 2284(a); *Shapiro*, 136 S. Ct. at 455, with direct, nondiscretionary appeal to the Supreme Court. 28 U.S.C. § 1253; *Cooper*, 137 S. Ct. 1455, 1465 n.2 (2017); so the Court cannot simply deny cert for these cases. *See Cover, supra* note 13, 1138 at n.14.

67. 138 S. Ct. 1942 (2018).

involving an alleged pro-Democratic gerrymander in Maryland.<sup>68</sup> While the Court considered these two consolidated cases, federal panels struck down congressional maps in Ohio and Michigan.<sup>69</sup> If the Court were to finally end this doctrinal limbo and embrace a standard for partisan gerrymandering claims, it was now or never. But with Justice Kennedy retired, and Justice Kavanaugh on the Court, Chief Justice Roberts had become the swing vote. And Chief Justice Roberts, it seems, chose never, embracing many of the arguments made by Justice O'Connor in *Bandemer* and Justice Scalia in *Vieth*.<sup>70</sup> In this way, the decision in *Rucho* ended a debate the Court began thirty-three years prior. I turn now to a reading of *Rucho*, in light of the way partisan gerrymandering has been framed through this debate, from *Bandemer* to *Vieth* to *Gill*.<sup>71</sup>

### III. *RUCHO* FORECLOSES ONLY ALLOCATIVE CLAIMS

#### A. *Rucho's Allocative Framing*

This debate was primarily framed in terms of “vote dilution,” but a new type of vote dilution. Whereas malapportionment vote dilution is based on a district’s population size, this new kind of vote dilution is based on district shape.<sup>72</sup> Malapportionment dilutes a person’s vote by placing that person in a district that is overpopulated.<sup>73</sup> Shape manipulation dilutes a person’s vote by placing that person in a district that has been subjected to the “familiar techniques of political gerrymandering.”<sup>74</sup> While the vote dilution of malapportionment is

68. *Common Cause*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated by Rucho*, 139 S. Ct. 2484; *Benisek*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated by Benisek v. Lamone*, 138 S. Ct. 1942.

69. *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 994 (S.D. Ohio 2019); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 879 (E.D. Mich. 2019) (*vacated by Chatfield v. League of Women Voters*, 2019 U.S. LEXIS 6515 (Oct. 21, 2019)).

70. *Rucho*, 139 S. Ct. at 2497–98 (citing *Bandemer*, 478 U.S. at 147) (O'Connor, J., concurring); *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

71. *Compare Rucho*, 139 S. Ct. 2484, *with Bandemer*, 478 U.S. 109, *Veith*, 541 U.S. 267, *and Gill*, 138 S. Ct. 1916.

72. The panel that the Court reversed in *Bandemer* emphasized this distinction from the outset, noting the issue was not “voters per district, but rather . . . the shapes of the districts.” *Bandemer v. Davis*, 603 F. Supp. 1479, 1491 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986). *See also Bandemer*, 478 U.S. at 124.

73. *See Bolden*, 446 U.S. at 116.

74. *Bandemer*, 478 U.S. at 117 n.6 (plurality opinion). We now call these techniques “packing” and “cracking.” *Rucho*, 139 S. Ct. at 2500–01 (“packing” and “cracking”); *Vieth*, 541 U.S. at 289 (same); *Gill*, 138 S. Ct. at 1924 (same); *Common Cause*, 318 F. Supp. 3d at 799 (same); *Benson*, 373 F. Supp. 3d at 897–98 (same); *Householder*, 373 F. Supp. 3d at

non-allocative, this new kind of vote dilution is inescapably allocative, because it depends on the way a district's shape limits a party's ability to translate votes into seats.<sup>75</sup> This allocative theory of vote dilution links the geographic relationship between voters and districts to the aggregate relationship between seats and votes. "Allocative vote dilution" occurs when a mapmaker strategically distributes voters across districts so that one party (say, blue) wins more seats and the other (red) wins fewer.<sup>76</sup> To favor the blue party, the mapmaker targets red voters, dividing (i.e. "cracking") them into multiple districts where blue prevails by a small margin, or concentrating (i.e. "packing") them into districts where red wins by a large margin.<sup>77</sup> Cracking channels votes to red candidates who lose. Packing channels them to red candidates who were going to win anyway. Both strategies create districts where (many) red votes do not help to elect additional red candidates. As a result, red votes translate into relatively few red seats. By manipulating district shape, the mapmaker dilutes the potency of red votes and thereby reallocates to the blue party seats that would otherwise have gone to the red party. Hence the term: allocative vote dilution.<sup>78</sup>

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994 (same). Earlier cases referred to "stacking" and "splitting." See *Bandemer*, 603 F. Supp. at 1491 ("stacking" or "cracking" or "splitting"); *Bandemer*, 478 U.S. at 116–17 (plurality opinion) ("stacking" and "splitting"); *LULAC*, 548 U.S. at 445 ("splitting").

75. See *Bandemer*, 603 F. Supp. at 1491 (map allegedly diminished "the ability of the targeted group to elect representatives according to their proportion of the population"); *Vieth*, 541 U.S. at 354 (Souter, J., dissenting) ("the point of the gerrymander is to capture seats by manipulating district lines to diminish the weight of the other party's votes in elections"); *Gill*, 138 S. Ct. at 1922–23 (map allegedly "diminish[ed] the ability of Wisconsin Democrats to convert Democratic votes into Democratic seats in the legislature."); *Common Cause*, 318 F. Supp. 3d at 800 (the map "intentionally ensur[ed] that Representatives from one party have a disproportionate voice in Congress"); *Benson*, 373 F. Supp. 3d at 898 (through gerrymandering, "a dominant party can prevent a disfavored party from ever obtaining a majority of the seats."); *Householder*, 373 F. Supp. 3d at 994 ("districts that are so skewed toward one party that the electoral outcome is predetermined").

76. The theory generally assumes that every candidate affiliates with, and every voter supports, one of the two major parties, thus ignoring third-party and independent candidates and voters. Though it is possible to define partisan gerrymandering with more than two parties, this two-party assumption generally prevails in practice and in discourse because it simplifies the analysis and in modern American elections many candidates and voters do indeed identify with one of the two major political parties. See Eric McGhee, *Measuring Efficiency in Redistricting*, 16 Election L.J. 417, 426–31 (2017).

77. See *supra* note 49.

78. In *Bandemer*, Justice Powell suggested a flexible standard similar to the one Justice Stevens proposed in *Karcher*. *Bandemer*, 478 U.S. at 164 (Powell, J., concurring in part and dissenting in part) (citing *Karcher*, 462 U.S. at 755–59 (Stevens, J., concurring)). Under this standard, a court could at least sometimes identify a partisan gerrymander

This is what the *Rucho* majority has in mind when it refers to a claim of partisan gerrymandering. Recall that Chief Justice Roberts authored the majority opinion in both *Rucho* and *Gill*. In *Rucho*, Roberts describes *Gill*'s holding as follows: "a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly 'cracked' or 'packed' district."<sup>79</sup> The Court in *Rucho* similarly speaks in terms of allocative vote dilution when it characterizes the decisions of the three-judge panels below.<sup>80</sup>

### B. *Rucho*'s Allocative Logic

Just as the *Rucho* Court's opinion is expressed in the language of allocative vote dilution, its justiciability analysis is predicated on the logic of allocative vote dilution. Why does the Court foreclose partisan gerrymandering claims? Because such claims present non-justiciable political questions. Why do such claims present non-justiciable political questions? Because there is no adequate standard with which to adjudicate them.<sup>81</sup> The bulk of the majority's analysis consists of

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without ever considering the proper votes-seats relationship. *Id.* at 173, n.12 (Powell, J., concurring) ("In some cases, proof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering."). But the *Bandemer* plurality rejected this approach, insisted that a partisan gerrymandering claim requires, as "a threshold showing of discriminatory vote dilution," *id.* at 143, a demonstration that the electoral map "will consistently degrade a voter's or a group of voters' influence on the political process as a whole," *id.* at 143. This showing requires more than "a mere lack of proportionate results in one election." *Id.* at 139–40. Plaintiffs must demonstrate both "a history (actual or projected) of disproportionate results" and "indicia of lack of political power and the denial of fair representation." *Id.* From that point on, partisan gerrymandering claims were understood as claims of allocative vote dilution.

79. *Rucho*, 139 S. Ct. at 2492 (citing *Gill*, 138 S. Ct. at 1921).

80. *Id.* at 2502 (explaining that the panel that decided *Common Cause*, 318 F. Supp. 3d 777, "concluded that . . . North Carolina's 2016 Plan violated [equal protection] by intentionally diluting the voting strength of Democrats" such that in all but one district "the dilution of [Democratic] votes . . . in [the] district—by virtue of cracking or packing—is likely to persist in subsequent elections . . ."). See also *id.* at 2493 (explaining that the panel that decided *Benisek*, 348 F. Supp. 3d at 498, "concluded that . . . the Plan violated the First Amendment by diminishing their 'ability to elect their candidate of choice' because of their party affiliation and voting history"). The *Benisek* panel found that "Democrat[s] . . . craft[ed] a map that would specifically transform the Sixth District into one that would predictably elect a Democrat by removing [about 66,000] Republican voters from the District and [adding 24,000] Democratic voters in their place," thereby reallocating the blue–red seat split in the state's congressional delegation from 6–2 to 7–1. *Benisek*, 348 F. Supp. 3d at 518. *Common Cause* and *Benisek* were consolidated in *Rucho*, 139 S. Ct. 2482.

81. With the reapportionment revolution, the Court rejected Justice Frankfurter's suggestion in *Colegrove* that the constitutional text exclusively committed to Congress

critiquing each standard the appellees and the dissent propose and ultimately concluding that “none meets the need for a limited and precise standard that is judicially discernible and manageable.”<sup>82</sup> This conclusion is predicated on the allocative nature of the underlying legal theory in two ways. First, because the relief the petitioner seeks asks much from the court—a reallocation of political power—the court demands much from the standard, subjecting each proffered candidate to the most exacting scrutiny. Second, because the alleged harm—an unfair allocation of political power—involves the votes-seats relationship, it is exceedingly difficult to craft a standard that survives this exacting scrutiny.

The Court repeatedly emphasizes the allocative nature of the relief sought. The theory essentially asks the federal courts to “apportion political power”<sup>83</sup> by “tak[ing] the extraordinary step of reallocating power and influence between political parties.”<sup>84</sup> Such allocative relief would entail an “intervention . . . unlimited in scope and duration,” because every redrawn map could be challenged as a partisan gerrymander and the one-person-one-vote doctrine requires the redrawing of every map in every state at least once a decade.<sup>85</sup> This unlimited intervention would constitute “an unprecedented expansion of judicial power . . . into one of the most intensely partisan aspects of American political life.”<sup>86</sup> The *Rucho* Court is clearly troubled by the prospect of “the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.”<sup>87</sup> Whenever the Supreme Court strikes down a state law, federalism and separation of powers concerns arise. But when the Court strikes down an electoral map, in a way that inures to the benefit of one and the detriment of the other major political party, these concerns are heightened, as are the risks that the intervention will undermine the perceived legitimacy of the Court as an apolitical and nonpartisan institution. At this moment, when American politics have been particularly polarized and the Supreme Court nomination

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and the States substantive questions of electoral districting. *Baker*, 369 U.S. at 226. *Rucho* did not revisit that question. See *Rucho*, at 2495–96 (citing *Wesberry*, 376 U.S. 1; *Shaw*, 509 U.S. 630) (“[O]ur cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.”).

82. *Id.* at 2502.

83. *Id.* at 2499–2500 (embracing Justice Scalia’s plurality opinion in *Vieth*, 541 U.S. at 291, that “[f]airness’ [is not] a judicially manageable standard”).

84. *Id.* at 2502.

85. *Id.* at 2507.

86. *Id.*

87. *Id.*

process has been particularly politicized, it is not surprising that Chief Justice Roberts, *Rucho*'s author and an institutionalist deeply committed to preserving the perceived legitimacy of the Court, would be particularly reluctant for the Court to assume this allocative function. In short, this request for allocative relief asks a great deal from the Court.

And so the Court asks a great deal from the petitioners in the form of a legal standard to constrain, guide, and legitimize the judicial exercise of allocative power. "If federal courts are to 'inject themselves into the most heated partisan issues'"<sup>88</sup> "they must be armed with a standard that can reliably differentiate unconstitutional from 'constitutional political gerrymandering.'"<sup>89</sup> If there are "no legal standards to limit and direct their decisions" then "[f]ederal judges have no license to reallocate political power between the two major political parties."<sup>90</sup> And the quality of this standard—the extent of its capacity to constrain, guide, and legitimize—must be commensurate with the scope of the allocative power the standard is designed to constrain, guide, and legitimize. Thus, the standard must be: "grounded in a 'limited and precise rationale'"<sup>91</sup> "clear, manageable, and politically neutral";<sup>92</sup> "limited and precise" once again;<sup>93</sup> and "judicially discernible and manageable."<sup>94</sup> When evaluating proffered standards, the *Rucho* Court will accept nothing less than the gold standard.

While the allocative nature of the relief sought leads the Court to demand a great deal from the governing legal standard, the allocative nature of the alleged harm makes it exceedingly difficult for any standard to meet these demands. Essentially, the alleged harm is too few seats for the disfavored party.<sup>95</sup> As I argue *infra*, this claim of too few seats is ultimately an allegation of theft, which requires a theory of electoral property rights.<sup>96</sup> This theory must answer two tough questions: (1) what is the baseline?, i.e. how many seats should a party get (for a given vote share)?; and (2) what is the threshold?, i.e. how far can the allocation depart from this baseline before the constitution line

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88. *Id.* at 2499 (quoting *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment)).

89. *Id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

90. *Id.* at 2507 (citing *Vieth*, 541 U.S. at 278 (plurality opinion)).

91. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring)).

92. *Id.* (quoting *Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring)).

93. *Id.* at 2502.

94. *Id.*

95. More precisely, the alleged harm is an unacceptably low expected seat share given the disfavored party's expected vote share.

96. *See infra* Part IV.



is crossed? As discussed *supra*, the Constitution provides limited textual guidance.<sup>97</sup> So the justiciability of partisan gerrymandering claims based on a theory of allocative vote dilution reduces to this challenge: can you discern from this limited textual guidance a legal standard that will determine when a map gives one political party too few seats in a way that is sufficiently “limited and precise”;<sup>98</sup> “clear, manageable, and politically neutral”<sup>99</sup> to adequately constrain, guide, and legitimize “an unprecedented expansion of judicial power . . . into one of the most intensely partisan aspects of American political life” whereby the Court greenlights “an intervention . . . unlimited in scope and duration,” consisting of “the extraordinary step of reallocating power and influence between political parties”?<sup>100</sup>

And there’s one more thing, an additional constraint that makes it ever harder to identify an adequate standard. Ask the average American how many seats a party should win if they earn 60% of the vote, and some might answer “60%.” Indeed, this may be the most obvious, the most intuitive, the most popular response. This intuition is called strict proportionality, the notion that a party’s seat share should equal its vote share.<sup>101</sup> It’s an elegant, compelling, attractive answer to the baseline question of how many seats a party should get. And it’s off limits.<sup>102</sup> So the challenge is to identify a standard not predicated on a norm of proportional representation that satisfies the majority’s exacting scrutiny.<sup>103</sup> Appellees, amici, and the dissent all offered

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97. See *supra* Part II.

98. *Rucho*, 139 S. Ct. at 2502.

99. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring)).

100. *Id.* at 2502, 2507.

101. See Cover, *supra* note 13, at 1148–49.

102. Throughout the Court’s decades-long dissensus on partisan gerrymandering, the proposition that has garnered the most support is that the Constitution contains no requirement of strict proportional representation. *Rucho*, 139 S. Ct. at 2499 (plurality opinion) (quoting *Bandemer*, 478 U.S. at 130) (“Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation[.]”). See also *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986); *Bolden*, 446 U.S. at 75–76; *Bandemer*, 478 U.S. at 132; *LULAC*, 548 U.S. at 419.

103. *Rucho*, 139 S. Ct. at 2501. The allocative logic of the *Rucho* majority’s justiciability analysis is revealed with particular clarity by its contrast between partisan gerrymandering claims of vote dilution, which are allocative, and malapportionment claims of vote dilution, which are not. OPOV “is relatively easy to administer as a matter of math [but the] same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly.” *Id.* OPOV is based on “the principle that each person must have an equal say in the election of representatives,” that “each vote must carry equal weight.” *Id.* Allocative vote dilution is based on the principle “that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide

candidates thoughtfully designed to meet this challenge, and the majority rejected each one.<sup>104</sup>

*C. Quasi-Allocative Associational Harm*

In his *Vieth* concurrence, Justice Kennedy suggested a First Amendment<sup>105</sup> analysis to partisan gerrymandering based on “whether political classifications were used to burden a group’s representational rights.”<sup>106</sup> In her *Gill* concurrence, Justice Kagan developed Justice Kennedy’s insight, observing that “the associational harm of a partisan gerrymander is distinct from vote dilution” and suggesting that while standing for a vote dilution claim is district-specific, standing for an associational claim is state-wide.<sup>107</sup> Justice Kagan argued that a partisan gerrymander inflicted a legal injury upon a state resident and active member of the disfavored party, even if the member suffered no vote dilution because his individual district was not subject to cracking or packing techniques.<sup>108</sup>

[I]f the gerrymander ravaged the party he works to support, then he indeed suffers harm . . . . This is the kind of “burden” to “a group of voters’ representational rights” Justice Kennedy spoke of . . . . deprived of their natural political strength by a partisan gerrymander, [members of the state’s disfavored party] may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives) . . . . And what is true for party members may be doubly true for party officials and triply true for the party itself . . . . By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.<sup>109</sup>

Following Justice Kagan’s suggestion, those federal panels finding partisan gerrymanders in the period between *Gill* and *Rucho* found both vote dilution and associational harm.<sup>110</sup>

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support[.]” that “each party must be influential in proportion to its number of supporters.” *Id.* According to *Rucho*, the former principle can be discerned from the constitutional text, but the latter one cannot.

104. *Id.* at 2502–06.

105. U.S. CONST. amend. I.

106. *Vieth*, 541 U.S. at 315.

107. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

108. *Id.* (Kagan, J., concurring).

109. *Id.* (Kagan, J., concurring).

110. *Common Cause*, 318 F. Supp. 3d 777; *Benisek*, 348 F. Supp. 3d 493; *Householder*, 373 F. Supp. 3d 978; *Benson*, 373 F. Supp. 3d 867.

While Justice Kagan's theory of partisan gerrymandering is based on associational harm rather than vote dilution, it is still allocative in an important sense because the ultimate cause of the relevant representational burdens is the misallocation of power to parties incommensurate with their popularity. The reason it is harder to engage in associational activities like "fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office" is because the map distorts the votes-seats relationship in a way that "ravag[e]s the [disfavored] party," "depriv[ing it of its] natural political strength" and "placing [it] at an enduring electoral disadvantage."<sup>111</sup> In this sense, the associational claim is quasi-allocative: while the harm can be expressed as disparate burdens on associational activities, the cause of the harm is misallocation of power between rival political parties and so the only remedy is reallocation of power between those parties. This quasi-allocative associational claim presents the same justiciability problems as the allocative vote dilution claim: it asks the Court to perform allocative interventions based on some legal standard that identifies an ideal baseline allocation of political power and prohibits deviation from this baseline beyond some specified threshold of constitutional tolerance.

The *Rucho* majority could have rejected this associational theory because it is quasi-allocative. Instead, after a brief discussion, the *Rucho* majority dismissed it, declaring that "the slight anecdotal evidence [of First Amendment burdens] found sufficient . . . in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering."<sup>112</sup>

#### IV. NON-ALLOCATIVE CLAIMS

Allocative vote-dilution is not the only way to define or conceptualize partisan gerrymandering. A plausible claim of partisan gerrymandering can be based on alternative, non-allocative, theories of constitutional

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111. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

112. *Rucho*, 139 S. Ct. at 2504. Finally, the *Rucho* Court summarily noted and readily rejected two additional arguments embraced by the North Carolina panel: (1) a State exceeds its power under the Elections Clause when it draws a congressional map to "disfavor the interests of supporters of a particular candidate or party in drawing congressional districts[.]" *id.* at 2506 (quoting *Common Cause*, 318 F. Supp. 3d at 937); and (2) "partisan gerrymanders violate 'the core principle of [our] republican government' preserved in Art. I, § 2, 'namely, that the voters should choose their representatives, not the other way around.'" *Id.* (quoting *Ariz. State Legislature*, 135 S. Ct. at 2677 (alteration in original)). The *Rucho* Court viewed these structural legal theories as claims under the Guarantee Clause, which are generally considered non-justiciable. *Id.*

harm and remedy. These claims were never considered, and thus are not foreclosed, by *Rucho*.<sup>113</sup> And these non-allocative claims do not present the same justiciability problems as the allocative vote dilution theory of partisan gerrymandering,<sup>114</sup> so they may be within the reach of the federal courts.

#### A. *Theft, Robbery, & Gerrymandering*

Obviously, the reallocation of political power is partisan gerrymandering's primary purpose, and the misallocation of political power is one of partisan gerrymandering's greatest evils. But, as others have long noted, the harm of partisan gerrymandering is not limited to the distortion of the votes-seats relationship.<sup>115</sup> In this sense, if partisan gerrymandering were conceptualized as a crime, that crime would be robbery and not merely theft. From the perspective of cold hard cash, the legal harm suffered by a robbery victim is precisely the benefit motivating the robber—the illicit transfer of property from its rightful owner to its wrongful taker. But robbery is more than theft. It inflicts harm upon the victim, and upon society, distinct from and greater than the simple property transfer that motivates the robber. Many of these harms are independent of that property transfer, and obtained even when an attempted robbery is unsuccessful or the property transfer itself is lawful.<sup>116</sup> Partisan gerrymandering is like robbery. It is an aggressive transfer of political power (measured in legislative seats) from one (political) party (the victim) to another (the perpetrator). Like

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113. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”). *PKD Labs. Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) (“[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.”). *See also* *Citizens United v. FEC*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring) (the Court’s policy is “never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”) (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)).

114. *See Rucho*, 139 S. Ct. at 2502 (“[P]artisan gerrymandering claims . . . ask for a fair share of political power and influence, with all the justiciability conundrums that entails.”).

115. *See* Nicholas Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115 (2018); Richard Briffault, *Electoral Redistricting and the Supreme Court: Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL’Y 397 (2005); Ellen D. Katz, *The Law of Democracy: New Issues in Minority Representation: Resurrecting the White Primary*, 153 U. PA. L. REV. 325 (2004).

116. Imagine that A loses her wallet, B finds it, A discovers that B has her wallet, and A demands its return at gunpoint. No illicit property transfer. But still, we can agree, not cool.

the robber, the mapmaker wants power and uses aggressive and harmful cartographic manipulations to get it, by reallocating (i.e. taking) it from the rival party. And like the robbery victim, the rival party wants its power back, and wants the federal courts to give it back by invalidating the “power-stealing” map as an unconstitutional partisan gerrymander.

The *Rucho* Court declined this request for federal judicial intervention for two reasons.<sup>117</sup> First, it framed the issue exclusively in terms of power transfer, essentially treating partisan gerrymandering as theft and nothing more.<sup>118</sup> Second, it concluded that, while this kind of electoral theft may be unlawful, the Court could not intervene, because it could not determine the logically prior question upon which any claim of theft depends: the original distribution of electoral property rights, i.e. the pre-theft allocation of political power.<sup>119</sup> In fairness to the *Rucho* majority, gerrymandering is quite different from your run-of-the-mill robbery in this respect: there is rarely a disagreement over whether the wallet taken during the robbery properly belongs to the robber or his victim; but there is strong disagreement about the lawful allocation of political power from which partisan gerrymandering improperly departs. In this sense, partisan gerrymandering is an unusual kind of robbery, like one perpetrated by one spouse against the other during the pendency of a bitter divorce and legal dispute over the proper allocation of marital assets. Is the husband stealing money from his wife, or simply taking back what is rightfully his? Unsure, the *Rucho* majority thought it better not to get involved.

But robbery is more than theft, and partisan gerrymandering is more than the reallocation of political power. And just as robbery occasions both individual and societal harms independent of any illicit property transfer, partisan gerrymandering inflicts both individual and structural harms independent of any illicit power transfer. Even if a stranger has your wallet, or an estranged spouse has your money, you shouldn't demand it back at gunpoint. Robbery is about money, but it's not only about money. And partisan gerrymandering is about power, but it's not only about power. We can define and proscribe robbery without determining how much money each party should have. And we can define and proscribe partisan gerrymandering without deciding how many seats each political party should have.

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117. *Rucho*, 139 S. Ct. at 2493–2502.

118. *Id.* at 2493–2498.

119. *Id.* at 2498–2502.

*B. Bond Redux: Speech-Based Candidate Exclusion*

In the 1960s, the Georgia House of Representatives refused to seat a duly-elected member who opposed the draft and the Vietnam War.<sup>120</sup> The Supreme Court unanimously ruled that Bond's exclusion violated his First Amendment rights in a way that burdened his constituents and undermined the operation of representative government.<sup>121</sup> (Note that the Court decided solely on First Amendment grounds and explicitly declined to consider any claim of racial animus.)<sup>122</sup>

Now, suppose that, some six decades later, Bond's son, Michael Julian Bond,<sup>123</sup> wins a seat to the Georgia House and then makes political statements that incur the wrath of his fellow representatives. Michael's political opponents have read *Bond v. Floyd*,<sup>124</sup> so they know they cannot simply exclude him from House membership because they find his views repugnant. But they've also read *Rucho*, so they know the federal courts will not entertain claims of "partisan gerrymandering" so long as districts are equipopulous and racial considerations do not predominate. So, shortly before the next election, they redraw the map for state legislative districts, "wigg[ing] and jogg[ing] boundary lines,"<sup>125</sup> not to malapportion or racially gerrymander or maximize power for one party, but to exclude Michael's home from the House district he represents. Presto: Michael is disqualified from seeking reelection because he does not meet the durational residency requirement for candidacy.<sup>126</sup>

When Michael challenges this new map in federal court as a First Amendment violation, which precedent governs: *Bond* or *Rucho*? If we

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120. *Bond v. Floyd*, 385 U.S. 116, 122–23 (1966). Julian Bond, like most of the 136th House district, was Black. While Bond challenged this refusal and litigated the case all the way up to the Supreme Court, he won his seat twice more by overwhelming margins. Twice more the House refused to seat him, insisting his views "bring discredit and disrespect" to the House, give aid and comfort to America's enemies, violate federal law, and demonstrate his inability to sincerely take the oath of office.

121. *Id.* at 135–37.

122. *Id.* at 135.

123. Michael Julian Bond has worked for the Atlanta branch of the NAACP and currently serves on the Atlanta City Council. *Council Members: Michael Julian Bond*, Atlanta City Council, <https://citycouncil.atlantaga.gov/council-members/michael-julian-bond> (last visited Nov. 10, 2019).

124. 385 U.S. 116.

125. *Rucho*, 139 S. Ct. at 2497 (quoting *Gaffney*, 412 U.S. at 738, 752, n.18).

126. GA. CONST. art. III, § II, ¶ III(b) ("At the time of their election, the members of the House of Representatives . . . shall have been legal residents of . . . the district from which elected for at least one year."). Other states impose similar durational electoral district residency requirements on candidates. *E.g.*, CAL. CONST. art IV, § 2 (one year); IDAHO CONST. art. III, § 6 (same); MISS. CONST. art. 4, § 41 (two years).

read *Rucho* broadly, the federal court must reject the challenge as a non-justiciable political question. But if we read *Rucho* narrowly to foreclose only claims of allocative vote dilution, the relevant precedent is *Bond*, not *Rucho*. Michael's claim is not allocative, and so it does not trigger the justiciability problems that allocative claims entail and upon which *Rucho*'s holding was based.<sup>127</sup> Michael is not asking a federal court to apportion or reallocate political power between rival political parties. Indeed, it is irrelevant to Michael's claim whether he runs as a Democrat, a Republican, a third-party candidate or an independent. The legal harm he alleges is not the intentional suppression of his party's power, but the intentional suppression of his individual voice as retaliation for his exercise of First Amendment rights to free expression. This violation of individual First Amendment rights burdens Michael's constituents and undermines the operation of representative government irrespective of any votes–seats relationship. The court can adjudicate this claim without any consideration of how many seats a party should get, or what departure from this baseline the constitution tolerates. All the court has to do is apply the eminently discernible and manageable standard of *Bond v. Floyd* and declare it impermissible for a legislative body to exclude a legislator because it disagrees with that legislator's views. Whether the exclusion is accomplished directly through legislative fiat or indirectly by redrawing the district boundary around his house is a distinction without a difference.

### C. Differential Geographic Representational Burdens

The more relevant and interesting case of non-allocative harm involves burdens on geographic-based representational interests. This sort of harm happens all the time and a three-judge federal panel deciding a partisan gerrymandering case recently acknowledged it in a brief passage of its opinion that has not yet received the attention it deserves.<sup>128</sup>

The case was *Ohio A. Philip Randolph Institute v. Householder*,<sup>129</sup> and it was decided just eight weeks before *Rucho*.<sup>130</sup> (The case was cited in Justice Kagan's dissent, but not in *Rucho*'s majority opinion.)<sup>131</sup> In *Householder*, a three-judge panel unanimously found that Ohio's

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127. See *Rucho*, 139 S. Ct. at 2502.

128. See *Householder*, 373 F. Supp. 3d at 1074–75.

129. 373 F. Supp. 3d 978.

130. *Householder* was decided May 3, 2019. *Id.* at 978. *Rucho* was decided June 27, 2019. *Rucho*, 139 S. Ct. at 2484.

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

congressional map violated the Equal Protection Clause,<sup>132</sup> the First Amendment, and the Elections Clause.<sup>133</sup> This conclusion was mostly based on an allocative vote dilution theory of partisan gerrymandering, under which statewide evidence of partisan effect on the votes-seats relationship supports district-specific evidence of vote-diluting packing and cracking.<sup>134</sup> But the panel also recognized a First Amendment associational claim requiring a “separate analysis” based on the premise that “[t]he ‘associational harm of a partisan gerrymander . . . is distinct from vote dilution.’”<sup>135</sup> Many of the representational burdens identified by the panel, like those Justice Kagan suggested in her *Gill* concurrence, are logically dependent on an underlying premise of misallocated political power.<sup>136</sup> But while the panel catalogued many allocative or quasi-allocative burdens, it also referred to several non-allocative representational burdens, burdens that make it harder for people to engage in the associational activities of representative democracy and that critically do not depend on the allocation or misallocation of political power to rival parties.<sup>137</sup> Many of these references credit the findings of political scientist David Niven, one of the plaintiff’s expert witnesses.<sup>138</sup> Niven identified meaningful representational burdens independent of any votes-seat relationship. For example, he cited political science literature demonstrating that the splitting of neighborhoods, cities, and counties causes a demobilizing effect by rendering campaigning more difficult.<sup>139</sup> And he found that the challenged map differentially imposed this burden on members of the disfavored party.<sup>140</sup> Specifically, it split over 50% more census tracts than its predecessor,<sup>141</sup> and it split a higher proportion of Democratic

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132. U.S. CONST. amend. XIV, § 1.

133. *Householder*, 373 F. Supp. 3d at 1150–51, 1154.

134. *Id.* at 1150–51.

135. *Id.* at 1151 (quoting *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring)).

136. *Id.* at 1155–59 (citing adverse impact on candidate recruitment, fundraising, mobilization, and campaign activity). The *Householder* panel acknowledges the quasi-allocative nature of the associational claim, suggesting that a “partisan gerrymandering is a double-barreled constitutional issue” and many of the facts relevant to this claim “overlap” with those relevant to the vote-dilution claim because the right to associate overlaps with the right to cast an effective vote. *Id.* at 1154–55 (citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

137. *Id.* at 994.

138. *Id.* at 1038.

139. *Id.* at 1040.

140. *Id.*

141. *Id.* at 1039.



census tracts (around 13.5%) than Republican census tracts (around 9.5%).<sup>142</sup>

David Niven and I are currently developing this idea into a new way to conceptualize and measure partisan gerrymandering that is “geographic” rather than “allocative.” Our approach does not rely on any votes-seats relationship. Instead, we consider the extent to which a map differentially burdens the legally cognizable representational interests of disfavored voters, where those interests are defined in terms of the very geographic relationships that the *Rucho* majority and opponents of redistricting reform cite as justifying electoral districting in the first place. We identify multiple quantitative measures that capture geographic representational interests well established in state law, judicial decisions, and academic scholarship. One is based on the proximity to a Congressperson’s district office. Others are based on the alignment of district boundaries with those of census tracts, counties, and electoral boundaries for other offices. Any map will necessarily burden these interests to some extent—voters must travel some distance to visit the district office of their congressional representative, and district boundaries must sometimes split census tracts, counties, or other electoral districts to meet legitimate requirements like population equality and Voting Rights Act compliance. But mapmakers should eschew—and courts should scrutinize—district lines that differentially and unnecessarily impose these burdens on groups of voters defined by partisan affiliation or race. Many current maps do precisely that, to a statistically significant degree, especially when enacted through a legislative process dominated by one party.

#### V. CONCLUSION

Partisan gerrymandering imposes harm beyond any distortion of the votes-seats relationship. This is why federal courts can adjudicate non-allocative claims of partisan gerrymandering without encountering the justiciability problems entailed by allocative claims. This trans-allocative framing of partisan gerrymandering is relevant in other contexts. If state courts adjudicate partisan gerrymandering claims based on state constitutional provisions, they will encounter justiciability issues similar to those identified by the *Rucho* majority. So non-allocative claims may help state courts, too. More broadly, greater emphasis on the non-allocative aspects of partisan gerrymandering may prove helpful outside the courtroom: to analysts studying partisan gerrymandering and to mapmakers trying to draw fair maps.

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142. *Id.* at 1040.