

THE “PROPORTIONAL REPRESENTATION” STRAWMAN IN *RUCHO*

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THIS IS NOT NORMAL

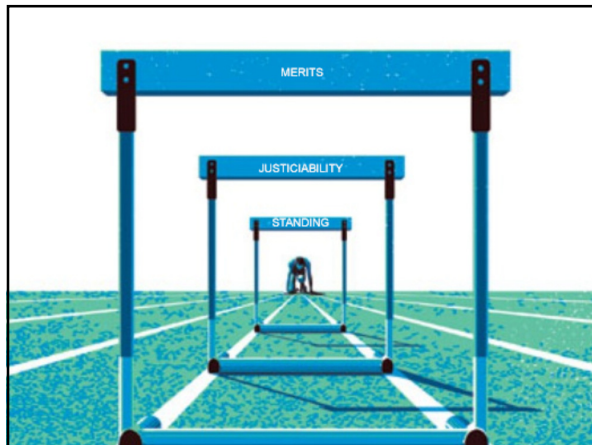
How the GOP gerrymander blocked the blue wave in NC

BY THOMAS HALL AND STEPHEN LEE
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Democrats will pick up at least 26 seats and take a majority in the House of Representatives if preliminary results from last Tuesday's midterm elections hold. But partisan gerrymandering is still a major issue. Our analysis of North Carolina's results shows that the party would almost certainly have won more if Republicans hadn't deliberately drawn districts to limit Democratic chances.

North Carolina's congressional district lines are already the subject of [federal litigation](#) claiming they give Republicans a systematic, unconstitutional advantage in winning seats. The Nov. 6 results bear those claims out. Democrats won roughly 50 percent of the vote in North Carolina, their best performance in almost a decade. But despite an extraordinary year, they netted just three of the state's 13 congressional seats — the same as in 2014 and 2016. That happened because a promising Democratic wave crashed against one of the country's [most extreme](#) gerrymanders.



STANDING PRECEDENTS

- **Baker v. Carr (1962)**
Voter-plaintiffs challenging 1901 TN statute's “irrational disregard of the standard of apportionment prescribed by the State’s Constitution or of any standard, effecting a gross disproportion of representation to voting population” assert constitutional injury from “classification [that] disfavors the voters in the counties in which they reside”
- **Gill v. Whitford (2018)**

STANDING PRECEDENTS

- **Baker v. Carr (1962)**
- **Gill v. Whitford (2018)**
“To the extent the plaintiffs’ alleged harm is the dilution of their votes, that injury is **district specific**.”

Concurrence (Kagan +3):

“The vote of a citizen who lives in a packed or cracked district ‘carries less weight – has less consequence – than it would under a neutrally drawn map. So when she shows that her district has been packed or cracked, she proves, as she must to establish standing, that she is ‘among the injured.’”

JUSTICIABILITY PRECEDENTS

- **Baker v. Carr (1962)**
EP challenge to “arbitrary and capricious” state action in TN legislative districting: **justiciable**
- **Gaffney v. Cummings (1973)**
- **Davis v. Bandemer (1986)**
- **Vieth v. Jubelirer (2004)**
- **Rucho v. Common Cause; Benisek v. Lamone (2019)**

JUSTICIABILITY PRECEDENTS

- Baker v. Carr (1962)
- **Gaffney v. Cummings (1973)**
EP challenge to CT legislative districting “not to minimize or eliminate the political strength of any group or party, but to ... provide a rough sort of proportional representation”: “**judicial interest ... at its lowest ebb**”
- Davis v. Bandemer (1986)
- Vieth v. Jubelirer (2004)
- Rucho v. Common Cause; Benisek v. Lamone (2019)

JUSTICIABILITY PRECEDENTS

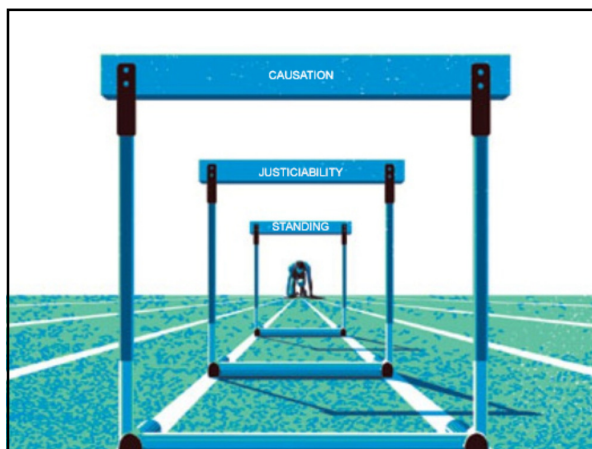
- Baker v. Carr (1962)
- Gaffney v. Cummings (1973)
- **Davis v. Bandemer (1986)**
EP challenge to IN legislative districting resulting in partisan bias in 1982 election: **justiciable**, despite lack of “a likely arithmetic presumption in the instant context”
- Vieth v. Jubelirer (2004)
- Rucho v. Common Cause; Benisek v. Lamone (2019)

JUSTICIABILITY PRECEDENTS

- Baker v. Carr (1962)
- Gaffney v. Cummings (1973)
- Davis v. Bandemer (1986)
- **Vieth v. Jubelirer (2004)**
EP & Art. I challenge to PA congressional districting in which partisan considerations were “**predominant**”: **justiciable**
Plurality (Scalia +3):
“[T]he fact that partisan districting is a lawful and common practice means that there is almost always room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation...”

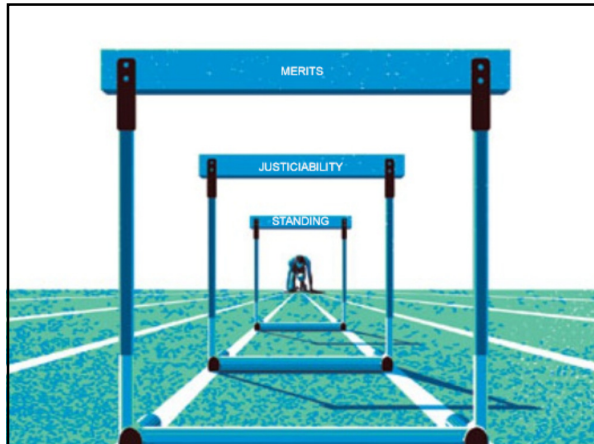
JUSTICIABILITY PRECEDENTS

- Baker v. Carr (1962)
- Gaffney v. Cummings (1973)
- Davis v. Bandemer (1986)
- **Vieth v. Jubelirer (2004)**
EP & Art. I challenge to PA congressional districting in which partisan considerations were “predominant”: **justiciable**
Plurality (Scalia +3):
Not justiciable, given lack of judicially discoverable and manageable standards after 18 years
- Rucho v. Common Cause; Benisek v. Lamone (2019)



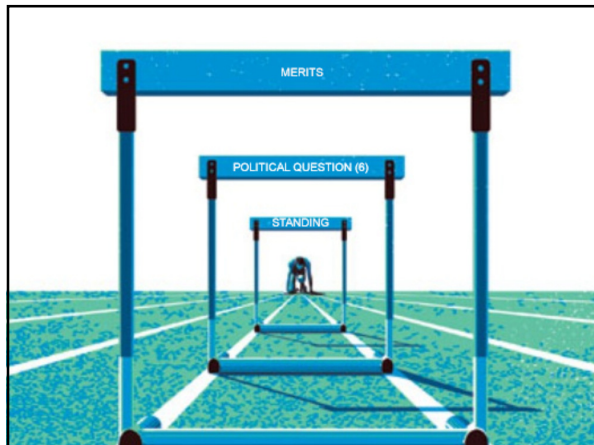
OTHER CAUSES OF PARTISAN BIAS

1. Inherent disproportionality of “**winner-take-all**, district-based elections” (*Bandemer*)
2. **Cross-election variation** in political affiliations of voters and strength of individual candidates yields “possibly transitory” measurements of partisan performance (*Bandemer, Vieth*)
3. “All the **other goals** that the map seeks to pursue” that might confound identification of “the predominant motivation behind the entire statewide plan” (*Vieth*)
4. The “natural packing effect” of **political geography** on “political groups that tend to cluster” (*Vieth, Gill*)



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- Vieth v. Jubelirer (2004)
- **Rucho v. Common Cause; Benisek v. Lamone (2019)**
EP, Art. I, & 1A challenges to NC, MD congressional maps that were extreme outliers: **not justiciable**



POLITICAL QUESTION HURDLES

1. Constitutional **commitment** of the issue to a **political** branch
2. Lack of judicially **discoverable and manageable standards**
3. Impossibility of deciding without an **initial policy determination** of a kind clearly for nonjudicial discretion
4. Impossibility of deciding without expressing **lack of respect** to coordinate branches
5. Unusual **need for unquestioning adherence** to prior decision
6. Potential **embarrassment** from conflicting pronouncements

— Vieth v. Jubelirer (2004) (plurality op.)
(quoting Baker v. Carr (1962) and describing these tests as “probably listed in descending order of both importance and certainty”)

POLITICAL QUESTIONS IN *RUCHO*

1. Constitutional **commitment** of the issue to a **political** branch
Elections Clause, Federalist No. 59: Framers committed “discretionary power over elections” to Congress and/or state legislatures; no indication of intent to involve courts
But: “In two areas—one-person, one-vote and racial gerrymandering—our 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.”
2. Lack of judicially **discoverable and manageable standards**
3. Impossibility of deciding without an **initial policy determination** of a kind clearly for nonjudicial discretion
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(majority op.) (Roberts, C.J.)

POLITICAL QUESTIONS IN *RUCHO*

1. Constitutional **commitment** of the issue to a **political** branch
2. Lack of judicially **discoverable and manageable standards**
“How much is too much? At what point does permissible partisanship become unconstitutional?”
“[T]he one-person, one-vote rule is relatively easy to administer as a matter of math. 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.”
3. Impossibility of deciding without an **initial policy determination** of a kind clearly for nonjudicial discretion
4. Impossibility of deciding without expressing **lack of respect** to coordinate branches
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POLITICAL QUESTIONS IN *RUCHO*

1. Constitutional **commitment** of the issue to a **political** branch
2. Lack of judicially **discoverable and manageable standards**
3. Impossibility of deciding without an **initial policy determination** of a kind clearly for nonjudicial discretion
 - “Plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular parties deserve...”
 - “Deciding among ... different visions of fairness ... poses basic questions that are political, not legal.”
4. Impossibility of deciding without expressing **lack of respect** to coordinate branches
5. Unusual **need for unquestioning adherence** to prior decision
6. Potential **embarrassment** from conflicting pronouncements

(majority op.) (Roberts, C.J.)

ROBERTS'S FALSE FRAMING

“Partisan gerrymandering claims invariably sound in a desire for **proportional representation.**”

“Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own **political judgment about how much representation particular political parties deserve**—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end.” [Judicially created fairness standard]

“[V]ote dilution’ in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that **each party must be influential in proportion** to its number of supporters.”

ROBERTS'S FALSE FRAMING

[Judicially created fairness standards]

“There is a large measure of ‘unfairness’ in any **winner-take all** system...”

“[M]aking as many districts as possible more competitive could ... produce an overwhelming majority for the winning party...”

“[Y]ielding to the gravitational pull of proportionality ... to ensure each party its ‘appropriate’ share of ‘safe’ seats ... comes at the expense of competitive districts...”

(majority op.) (Roberts, C.J.)

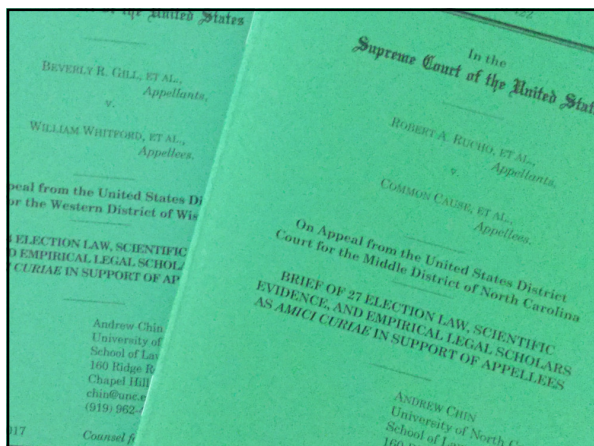
ROBERTS'S FALSE FRAMING

[Judicially created fairness standards]

“Or perhaps fairness should be measured by adherence to **‘traditional’ districting criteria...**”

“But protecting incumbents, for example, enshrines a particular partisan distribution. And the ‘natural political geography’ of a State...can itself lead to inherently packed districts.”

(majority op.) (Roberts, C.J.)



DISTRICT-SPECIFIC INJURIES

B. Professor Mattingly’s analysis provides (1) a robust statistical basis for inferring that the defendants merely complied with their stated legitimate redistricting criteria as constraints and did not pursue them as objectives, and (2) reliable district-specific evidence to support the Panel’s findings of vote dilution injuries in Districts 1, 4, 9, 12 and 13.....

C. Professor Chen’s analysis provides (1) a reasonable basis for inferring that the defendants merely complied with their stated legitimate redistricting criteria as constraints and did not pursue them as objectives, and (2) reliable residence-specific evidence to support the Panel’s findings of vote dilution injuries in Districts 1, 2, 3, 8, 9, 10, 11, and 12.....

OTHER CAUSES OF PARTISAN BIAS

D. Professor Mattingly's and Professor Chen's analyses overcome the analytical infirmities of the tests rejected in *Bandemer*, *Vieth*, and *LULAC*. 18

OTHER CAUSES OF PARTISAN BIAS

1. Inherent disproportionality of "winner-take-all, district-based elections" (*Bandemer*)
2. Cross-election variation in political affiliations of voters and strength of individual candidates yields "possibly transitory" measurements of partisan performance (*Bandemer, Vieth*)
3. "All the other goals that the map seeks to pursue" that might confound identification of "the predominant motivation behind the entire statewide plan" (*Vieth*)
4. The "natural packing effect" of political geography on "political groups that tend to cluster" (*Vieth, Gill*)

OTHER CAUSES OF PARTISAN BIAS

1. Inherent disproportionality of "winner-take-all, district-based elections" (*Bandemer*)
"Mattingly's and Chen's analyses nowhere involve any test of proportional representation or any other a priori normative baseline concerning the functional relationship between seats and votes."
2. Cross-election variation in political affiliations of voters and strength of individual candidates yields "possibly transitory" measurements of partisan performance (*Bandemer, Vieth*)
3. "All the other goals that the map seeks to pursue" that might confound identification of "the predominant motivation behind the entire statewide plan" (*Vieth*)
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2. Cross-election variation in political affiliations of voters and strength of individual candidates yields "possibly transitory" measurements of partisan performance (*Bandemer, Vieth*)
Consistent results between 2012 and 2016;
robustness under uniform swing perturbations;
use of data "reflect[ing] a broad variety of candidates and electoral conditions"
3. "All the other goals that the map seeks to pursue" that might confound identification of "the predominant motivation behind the entire statewide plan" (*Vieth*)
4. The "natural packing effect" of political geography on "political groups that tend to cluster" (*Vieth, Gill*)

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3. "All the other goals that the map seeks to pursue" that might confound identification of "the predominant motivation behind the entire statewide plan" (*Vieth*)
"[C]rucially, Mattingly's and Chen's analyses also demonstrated that the defendants merely complied with their stated legitimate criteria as **constraints** and did not pursue them as **objectives**."
4. The "natural packing effect" of political geography on "political groups that tend to cluster" (*Vieth, Gill*)

OTHER CAUSES OF PARTISAN BIAS

1. Inherent disproportionality of "winner-take-all, district-based elections" (*Bandemer*)
2. Cross-election variation in political affiliations of voters and strength of individual candidates yields "possibly transitory" measurements of partisan performance (*Bandemer, Vieth*)
3. No test for whether "[partisan] classifications ... were applied in an invidious manner or in a way unrelated to any legitimate legislative objective" (*Vieth* (Kennedy))
"[C]rucially, Mattingly's and Chen's analyses also demonstrated that the defendants merely complied with their stated legitimate criteria as **constraints** and did not pursue them as **objectives**."
4. The "natural packing effect" of political geography on "political groups that tend to cluster" (*Vieth, Gill*)

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“Since all of Mattingly’s and Chen’s computer-generated plans **overlay the same political geography** as the 2016 Plan, many exhibited partisan effects from the natural packing and cracking similar to those in the 2016 Plan, while deliberately packed and cracked districts in the challenged plan had **no counterpart** among the computer-generated plans.”

NORMALCY, NOT PROPORTIONALITY



Gonzalez v. City of Aurora, Ill.
(7th Cir. 2008) (Easterbrook, C.J.)

Today, however, computers can use census data to generate many variations on compact districts with equal population. One could do this exercise a hundred or a thousand times, each time placing the center of the first (or “seed”) district in a different location. That would generate a hundred or a thousand different maps, and the software could easily check these to determine the ethnic makeup of the districts.

NORMALCY, NOT PROPORTIONALITY



Gonzalez v. City of Aurora, Ill.
(7th Cir. 2008) (Easterbrook, C.J.)

Suppose that after 1,000 different maps of Aurora’s wards have been generated, 10% have two or three “safe” districts for Latinos and the other 90% look something like the actual map drawn in 2002: one safe district and two “influence districts” where no candidate is likely to win without substantial Latino support. Then we could confidently conclude that Aurora’s map did not dilute the effectiveness of the Latino vote. But suppose, instead, that Latinos are sufficiently concentrated that the random, race-blind exercise we have proposed yields three “Latino effective” districts at least 50% of the time. Then a court might sensibly conclude that Aurora had diluted the Latino vote by undermining the normal effects of the choices that Aurora’s citizens had made about where to live. Redistricting software can not answer all hard questions, but it provides a means to implement a pure effects test without demanding proportional representation.

NORMALCY, NOT PROPORTIONALITY

D. An extreme outlier standard does not expect or enforce proportional representation.



Brief for Amicus Curiae
Eric Lander

MUDDYING THE DISTINCTION

With respect to state legislative districts, this Court held that, as a general matter, an apportionment plan with a maximum population range under 10% falls within the category of minor deviations, but a plan with larger disparities requires justification by the State. See, e.g., *Volnovich v. Quilter*, 507 U.S. 146 (1993); *Gaffney v. Cummings*, 412 U.S. 735 (1973).¹⁹

Concerning the degree of excessiveness, this Court might someday choose, after the benefit of some experience, to provide a presumptive threshold for excessive partisan gerrymandering—just as it did for legislative redistricting cases after *Baker v. Carr*.



Brief for Amicus Curiae
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MUDDYING THE DISTINCTION

“We can ... find the median outcome ... in a world with no partisan manipulation.... The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution.”

—Kagan, J., dissenting, citing Lander

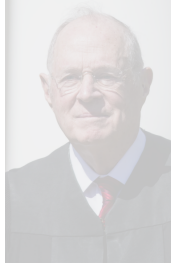
“Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? ... The dissent’s answer says it all: ‘This much is too much.’ That is not even trying to articulate a standard or rule.”

—Roberts, C.J.

KENNEDY'S GONE

"[N]ew technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards."

Vieth v. Jubelirer (2004)
(Kennedy, J., concurring)

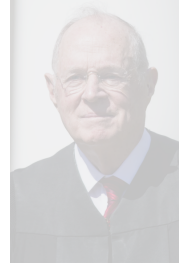


KENNEDY'S GONE

Liability "must rest on something more than the conclusion that political classifications were applied."

Liability "must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."

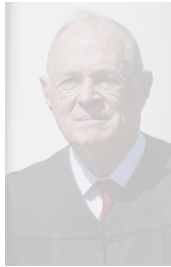
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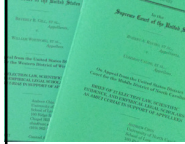
KENNEDY'S GONE

"If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated."

Vieth v. Jubelirer (2004)
(Kennedy, J., concurring)



THIS IS NOT NORMAL



In deliberately muting the effects of cross-election variation, the defendants effectively barred Democratic voters in each packed or cracked district from "directly influenc[ing] the election returns and ... secur[ing] the attention of the winning candidate." *Bandemer*, 478 U.S. at 133, at least by the means of "shift[ing] from one election to the next" or voting against "an utterly incompetent candidate" that give political affiliation its mutable character. *See Vieth*, 541 at 287. The defendants thereby created an abnormal and discriminatory arrangement of the electoral system in which each packed or cracked plaintiff's disfavored partisan affiliation, while mutable in principle, was frozen in practical effect. "consistently degrad[ing] the plaintiffs] ... influence on the political process as a whole." *Bandemer*, 478 U.S. at 132.