



# Supreme Court Once Again Considers Partisan Gerrymandering: Implications and Legislative Options

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Is there a standard for determining whether a redistricting map is an unconstitutional partisan gerrymander? Or, do claims of partisan gerrymandering raise political questions that lie beyond the jurisdiction of a federal court (i.e., are non-justiciable)? On March 26, 2019, the Supreme Court will hear oral argument in two cases—one from Maryland (*Lamone v. Benisek*) and another from North Carolina (*Rucho v. Common Cause*)—presenting these questions. In *Lamone* and *Rucho*, the Court is presented with the issue of partisan gerrymandering for the second consecutive term. Last year, the Supreme Court considered claims of partisan gerrymandering raising nearly identical questions to those currently before the Court, but ultimately issued narrow rulings on procedural grounds specific to [those cases](#). Last year’s rulings were only the latest in which the Court [considered, but ultimately did not directly answer](#), the question of whether a standard exists for ascertaining unconstitutional partisan gerrymandering. In [prior cases](#) presenting this issue, Justice Kennedy cast the deciding vote, leaving open the possibility that claims of unconstitutional partisan gerrymandering are justiciable under a yet to be determined standard. *Lamone* and *Rucho*, however, are the first partisan gerrymandering cases that the Court has considered since Justice Kennedy retired from the Court last year. Accordingly, the Court’s rulings could signal how the Court will approach an issue that could significantly affect how congressional and state legislative boundaries are drawn in the future.

This Sidebar begins by briefly discussing Supreme Court precedent addressing partisan gerrymandering, before examining the lower court rulings from Maryland and North Carolina presently before the Court. The Sidebar concludes by previewing the arguments before the Court, and notes possible outcomes and implications of a ruling, including legislative options for Congress.

## Supreme Court Precedent

Prior to the 1960s, the Supreme Court had determined that challenges to redistricting plans presented non-justiciable [political questions](#) that were most appropriately addressed by the political branches of government, not the judiciary. In 1962, however, in the landmark ruling of *Baker v. Carr*, the Court held that a constitutional challenge to a redistricting plan is justiciable, identifying factors for determining

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when a case presents a non-justiciable [political question](#), including “a lack of [a] judicially discoverable and manageable standard[] for resolving it.” Since then, while invalidating redistricting maps on equal protection grounds for other reasons—based on [malapportionment or unequal population](#) among [districts](#) and as [racial gerrymanders](#)—the Court has not nullified a map because of *partisan* gerrymandering.

As defined by the Court, [partisan gerrymandering](#) is “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” As redistricting has traditionally been viewed as an inherently political process best left for the legislative branches of state government, coupled with concern that a standard for adjudication would open the [floodgates](#) of litigation, partisan gerrymandering has long proved to be judicially difficult. Nonetheless, critics argue that extreme partisan gerrymandering is “[incompatible with democratic principles](#)” by [entrenching](#) an unaccountable political class in power with the aid of modern redistricting software—using “[pinpoint precision](#)” to maximize partisanship—thereby necessitating judicial review.

In prior cases presenting a claim of unconstitutional partisan gerrymandering, the Court has left open the possibility that such claims could be judicially reviewable, but has not ascertained a discernible and manageable standard for adjudicating such claims. For example, in a 2004 decision, *Vieth v. Jubelirer*, while a plurality of four Justices determined that a claim of unconstitutional partisan gerrymandering presented a non-justiciable political question, four other Justices concluded that such claims are justiciable, but did not agree upon a standard for courts to use in assessing such claims. The deciding vote in *Vieth*, Justice Kennedy, concluded that the claims presented in *Vieth* were non-justiciable because neither comprehensive, neutral principles for drawing electoral boundaries, nor rules limiting judicial intervention, exist. Nonetheless, Justice Kennedy did “not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” Justice Kennedy further [observed](#) that, in contrast to the Equal Protection Clause of the Fourteenth Amendment, the First Amendment “may offer a sounder and more prudential basis for intervention” in future claims concerning unconstitutional partisan gerrymandering because such claims “involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.” Two years later, in *LULAC v. Perry*, the Court was similarly divided, with a majority also not ascertaining a standard for resolving the challengers’ partisan gerrymandering claims.

In June 2018, in two cases from Wisconsin and Maryland, the Supreme Court again considered partisan gerrymandering claims. However, in neither case did the Court resolve whether the issue raised a political question, let alone establish a standard for assessing such claims. In *Gill v. Whitford*, the Court held that in order to establish standing to sue, a litigant pursuing a claim that partisan gerrymandering diluted their vote in violation of the Equal Protection Clause must demonstrate injuries to their interests as voters in their *specific* district, as opposed to an injury resulting from the *statewide* effect of the map. (Vote dilution arises when district boundaries devalue one citizen’s vote as compared to others and is accomplished by “packing” certain voters into a few districts, so that they win elections by large margins, and “cracking” certain voters among several districts, so that they fail to achieve a voting majority.) Justice Kagan joined by Justices Ginsburg, Breyer, and Sotomayor, concurred in *Gill*, arguing that, in lieu of an Equal Protection theory, challengers to partisan gerrymandering could more likely succeed on a claim that such practices result in First Amendment associational harm—a harm distinct from vote dilution. Quoting extensively from Justice Kennedy’s *Vieth* concurrence, Justice Kagan maintained that partisan gerrymandering violates the First Amendment by placing the disfavored party at an “enduring electoral disadvantage,” thereby burdening a group of voter’s representational rights because of their political association. Distancing itself from the concurrence, however, Chief Justice Roberts, writing for the Court, expressly declined to engage in such “speculative and advisory conclusions” regarding possible future cases, emphasizing that the Court’s reasoning in this case is set forth exclusively in the majority opinion.

On the same day the Court issued *Gill*, the Court also decided *Benisek v. Lamone*, holding that a district court did not abuse its discretion by denying a preliminary injunction to challengers claiming that a Maryland congressional district was an unconstitutional partisan gerrymander. Without evaluating the challengers' likelihood of success on the merits, the Court determined that the challengers lacked reasonable diligence in pursuing their claim needed to obtain preliminary relief by waiting until six years—and three general elections—after the 2011 redistricting map had been enacted, and over three years after filing their first complaint. As *Gill* and *Benisek* were decided on procedural grounds specific to those cases, they effectively preserved the Supreme Court's jurisprudential status quo on claims of unconstitutional partisan gerrymandering, leaving open the possibility that the Court could hold such claims to be judicially reviewable in the future, under a yet to be determined standard.

## Lower Court Rulings and Supreme Court Arguments

### Maryland

*Lamone* involves a challenge by seven registered Republican voters who lived in Maryland's Sixth congressional district prior to the enactment of the 2011 congressional redistricting map. Last November, a three-judge federal district court held that the map constituted an unconstitutional partisan gerrymander in violation of the [First Amendment](#). According to the court, the state intentionally moved 66,000 Republican voters from, and 24,000 Democratic voters to, the Sixth congressional district in order to dilute the value of the Republican vote because of those voters' political views. The court concluded that the state's retaliatory action impinged on both representational rights—by denying Republican voters' the opportunity to elect the candidate of their choice—and on associational rights—by stoking voter confusion, diminishing participation in organizational activities, and decreasing Republican fundraising. Moreover, the court determined that the plaintiffs established that, absent the state's retaliatory intent, the district's boundaries would not have been drawn to dilute the power of Republican voters to the same extent. Thus, according to the court's "retaliation" test, the voters established that the Maryland legislature violated the plaintiffs' First Amendment rights by demonstrating that (1) the map drawers specifically intended to disadvantage Republican voters based on their party affiliation and voting history; (2) the map burdened Republican voters' representational and associational rights; and (3) the map drawers' intent to burden Republican voters "was a but-for cause" of the "adverse impact." Ultimately, the court permanently enjoined the State of Maryland from using the congressional redistricting map after the 2018 congressional election, ordering a new map to be drawn in accordance with the ruling for use in the 2020 election. Maryland election officials [appealed](#) to the Supreme Court. (A provision of federal law provides for [direct appeals](#) to the Supreme Court in cases challenging the constitutionality of redistricting maps.)

On appeal, conceding that claims of unconstitutional partisan gerrymandering can be justiciable and urging the Court to develop a standard for adjudication, the Maryland election officials [maintain](#) that the lower court's First Amendment retaliation test falls short of the Supreme Court's guidelines, i.e., that a standard be clear, manageable, politically neutral, reliably fair, and precise. Specifically, the officials argue that the test did not set forth a sufficiently "limited and precise" standard for determining when partisanship has had more than a trivial effect on redistricting to raise constitutional questions. In this vein, the appellants contend that while Supreme Court [precedent](#) has recognized that political considerations—such as constituent interests, community interests, and proportional representation—can lawfully guide redistricting decisions, the lower court's retaliation test would wholly prohibit mapmakers from considering any political aims. Moreover, the election officials argue that the lower court's representational rights theory is merely a "species of vote dilution" similar to the claims at issue in *Vieth*. With regard to the lower court's associational rights theory, the officials contend that *any* change to a redistricting map could decrease voter enthusiasm and turnout, while increasing voter disconnection and

confusion, thereby affecting the associational rights of some voters. Furthermore, the election officials assert that the lower court's determination that a preexisting redistricting map is the benchmark for determining whether a new map establishes an unconstitutional partisan gerrymander does not provide a judicially manageable test because it "will almost inevitably yield absurd results," including preventing a legislature from remedying a past partisan gerrymander. Finally, they argue that the First Amendment retaliation framework is intended to apply only to executive action, cautioning that such an application could make actionable most legislation that is enacted with political motivation.

In response, the Maryland voters argue that the retaliation test adopted by the lower court is discernible and manageable. Highlighting similarities with [racial gerrymandering claims](#), which have long required courts to inquire into a legislature's intent and the burden it imposes on the challengers of a redistricting map, the voters argue that the retaliation test provides a manageable standard for federal courts. Further, the voters disagree with the election officials' characterization that the lower court's test disallows all consideration of party affiliation in redistricting. Instead, the voters argue that the retaliation test inquires whether political classifications were used to target a particular group of voters, thereby permitting a "wide range of very important political considerations" in redistricting.

## North Carolina

In *Rucho*, the lower court held, in response to a challenge by Common Cause, the League of Women Voters, and several voters, that a North Carolina congressional redistricting map is an unconstitutional partisan gerrymander in violation of the Equal Protection Clause of the [Fourteenth Amendment](#), the [First Amendment](#), and [Article I](#) of the Constitution. First, the court determined that a redistricting plan violates the Equal Protection Clause as an unconstitutional partisan gerrymander when the challengers show it (1) is intended to severely impede the effectiveness of an individual's vote, on the basis of their political affiliation; (2) has that effect; and (3) cannot be justified by other, legitimate legislative grounds. Applying this test to the challengers' presented evidence, the court held the state legislators' predominant intent in drawing the map was to "subordinate" non-Republican voter interests, while "entrench[ing]" Republican control of the state's congressional delegation. Further, the court held that the map had the effect of diluting Democratic votes through "cracking and packing," thereby ensconcing Republican Members of Congress in office, without the justification of political geography or other legitimate redistricting considerations. Second, the court determined that a redistricting plan violates the First Amendment as an unconstitutional partisan gerrymander, utilizing a test similar to the retaliation standard in *Lamone*. In applying this test, the court held that the plan was intended to disfavor supporters of non-Republican candidates, based on their past expressions of political belief; that the plan burdened their political speech and associational rights; and that a causal relationship existed between the legislature's discriminatory motive and the First Amendment burdens imposed by the plan. Third, the court determined that according to Supreme Court precedent interpreting the Constitution's [Elections Clause](#), the states' authority to regulate elections encompasses only "neutral provisions as to the time, place, and manner of elections." However, the legislature violated this neutrality principle, the court held, by creating a redistricting plan that disfavors the interests of specific candidates' or parties' supporters, representing an impermissible effort to dictate the outcome of a congressional election. Finally, the court concluded that [Article I, Section two of the Constitution](#), which provides that the "House of Representatives ... be composed by Members chosen ... by the People," does not authorize a state, as was done in this case, to enact a redistricting plan that impedes the will of the voters and favors the controlling party of the state legislature.

In appealing the lower court ruling, the North Carolina legislators first [maintain](#) that Common Cause lacks standing to sue because, despite efforts to "retrofit" their complaints in accordance with *Gill*, they allege a statewide harm. Hence, the legislators conclude that Common Cause failed to make the requisite proof that partisan gerrymandering detrimentally affected their ability to elect a Democrat in their *specific*

district. Next, the legislators dispute that any of the lower court’s legal bases for striking down the maps are justiciable because of the two critical factors that render a claim a non-justiciable political question: a textual commitment in the Constitution to a particular branch of government and a lack of judicially discernible and manageable standards. Regarding a textual commitment, the legislators argue that the framers of the Constitution delegated responsibility for the “politically fraught task” of redistricting to the politically accountable state legislatures, subject to congressional oversight. Hence, the legislators maintain that the text of the Constitution reflects that redistricting is “affirmatively inappropriate” for the politically independent judiciary. Moreover, observing that three decades of judicial struggle have not rendered a standard for adjudicating claims of unconstitutional partisan gerrymandering, the legislators conclude that such a standard does not exist. Further, the legislators contend that, given the inherently political nature of redistricting, the “amorphous tests” adopted by the lower court fail to provide guidance as to how much politics is “too much,” with most tests purporting to eliminate politics from redistricting completely.

In opposition, Common Cause [argues](#) that they have standing to sue because they “scrupulously followed” the Court’s most recent ruling in *Gill* by demonstrating injuries to their interests as voters in a specific district. Furthermore, they [counter](#) the legislators’ argument that, notwithstanding the specific facts or legal theories of a case, partisan gerrymandering claims are political questions. Quoting [Baker](#), however, Common Cause maintains that the political question doctrine requires a “fact-specific, case-by-case inquiry” in order to determine whether a specific claim is “susceptibl[e] to judicial handling,” thereby necessitating judicial review in this particular case. Furthermore, they maintain that the Constitution prohibits action specifically intended to subordinate a political group and that requiring a challenger to prove such invidious intent—as they argue was proven in this case—provides a meaningful limit on judicial involvement in claims of partisan gerrymandering. Likewise, in further support of the proposition that partisan political gerrymandering claims do not present a non-justiciable political question, the League of Women Voters [argues](#) that judicial review of such claims buttresses the Court’s general opposition to election laws that “threaten to entrench parties and undermine responsiveness.” Moreover, arguing that the test adopted by the lower court draws from Supreme Court precedent, the League observes that its effects prong parallels the established test used in racial vote dilution cases and the justification prong replicates the one-person, one-vote jurisprudence, serving to limit the test’s reach if there is a legitimate explanation for a dilutive district.

## Possible Outcomes and Implications

Rulings by the Supreme Court in [Lamone](#) and [Rucho](#) could have significant consequences for claims of unconstitutional partisan gerrymandering. The Court could rule in a variety of ways. As a threshold matter, the Court could craft a narrow ruling finding that the specific challengers to the redistricting maps lack standing, and dismiss the cases for procedural reasons. However, in view of the Court “[h]aving ducked a ruling on the merits of partisan gerrymandering last year,” at least one [Court watcher](#) has predicted that such a ruling is unlikely. A broader ruling could see the Court holding that partisan gerrymandering claims present a non-justiciable political question, foreclosing federal courts adjudicating partisan gerrymandering altogether. In contrast, the Court could adopt one of the standards that the lower courts applied or identify a new standard for courts to use in partisan gerrymandering cases. Such a change in Court precedent would likely result in numerous additional challenges to congressional and state legislative maps nationwide, affecting how maps are drawn during the next round of redistricting that follows the 2020 census.

As mentioned above, Justice Kennedy—who was widely seen as the critical swing vote on the issue of partisan gerrymandering—retired from the Court last year, meaning that his successor, Justice Kavanaugh, could be a key member of the Court to watch in *Lamone* and *Rucho*. Justice Kavanaugh, however, served on the D.C. Circuit prior to his elevation last September and, therefore, did not have the



opportunity to consider state redistricting disputes while on the lower court. During oral argument on March 26, the Justices' questions may signal whether they are likely to foreclose, or ascertain a standard for, adjudication of such claims. The Court is expected to issue decisions by the end of June.

## Legislative Options for Congress

If the Court forecloses claims of unconstitutional partisan gerrymandering by deciding that they present non-justiciable political questions, federal courts would lack jurisdiction to consider such claims, although [state courts](#) could consider claims under applicable state constitutional provisions. Such a ruling may suggest a role for the legislative branch in regulating partisan gerrymandering. In this vein, several pieces of legislation that take various approaches to address partisan gerrymandering have already been introduced in the 116<sup>th</sup> Congress. For example, [H.R. 1](#), the “For the People Act of 2019,” which passed the House of Representatives on March 8, 2019, would eliminate legislatures from the redistricting process and require each state to establish a nonpartisan, independent congressional redistricting commission, in accordance with certain criteria. [H.R. 44](#), the “Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2019,” would prohibit states from carrying out more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the Voting Rights Act of 1965 (VRA). (At least one [scholar has argued that](#) limiting redistricting to once per decade renders it “less likely that redistricting will occur under conditions favoring partisan gerrymandering.”) [H.R. 141](#), the “Redistricting Transparency Act of 2019,” would require state congressional redistricting entities to establish and maintain a public Internet site and conduct redistricting under procedures that provide opportunities for public participation, thereby arguably lessening the likelihood of partisan gerrymandering. On the other hand, should the Court identify a standard for ascertaining unconstitutional partisan gerrymandering, it is unlikely that Congress [would](#) have the authority to reverse the effects of a constitutional ruling through ordinary legislation.

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