

5-2020

You've Got (Political) Questions? We've Got No Answers

Michael R. Dimino

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Election Law Commons](#)

Recommended Citation

Michael R. Dimino, *You've Got (Political) Questions? We've Got No Answers*, 71 Mercer L. Rev. 719 (2020).

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

You've Got (Political) Questions? We've Got No Answers

by Michael R. Dimino*

I. INTRODUCTION

In *Rucho v. Common Cause*,¹ the Supreme Court of the United States held that partisan-gerrymandering claims present non-justiciable political questions.² The decision seemingly settled a controversy that had existed for decades, during which the Court was simultaneously unwilling to declare partisan-gerrymandering claims non-justiciable and unable to agree on a judicially manageable standard for adjudicating those claims.³ In *Rucho*, for the first time, a five-Justice majority definitively concluded that there are no judicially manageable standards to determine the constitutionality of partisan gerrymanders, and therefore held that federal courts lacked jurisdiction to hear cases raising such claims.⁴

Although the Court correctly determined that the partisan-gerrymandering claims should be dismissed, the Court should not have based its decision on the political-question doctrine. Rather, the Court should have held simply that the Constitution does not contain a right against excessive partisanship in districting. *Rucho*

*Professor of Law, Widener University Commonwealth Law School. State University of New York at Buffalo (summa cum laude); Harvard Law School (J.D., 2001, cum laude). Member, Harvard Journal of Law and Public Policy, (1999–2001); Articles Editor (2000–2001). Member, State Bars of New York and Pennsylvania.

1. 139 S. Ct. 2484 (2019).

2. *Id.* at 2506–07.

3. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (dismissing a partisan-gerrymandering case for want of a judicially manageable standard, but dividing 4–1–4, with a plurality viewing such claims as inherently non-justiciable, and Justice Kennedy writing a concurrence concluding only that no judicially manageable standard had yet developed); *Davis v. Bandemer*, 478 U.S. 109 (1986) (holding that partisan-gerrymandering claims are justiciable, but dividing on the standard for deciding when partisan-gerrymanders are unconstitutional).

4. 139 S. Ct. at 2508.

should have been dismissed for failure to state a claim on which relief could be granted, rather than for lack of jurisdiction.⁵ Resting the decision on the political-question doctrine has led some to suggest that state courts (which are not bound by the Article III case-or-controversy limitations on federal-court jurisdiction) can reach the merits of partisan-gerrymandering claims and hold districting schemes that give too much of an advantage to one party unconstitutional.⁶

My thesis, however, is not simply that the Court should have issued a broader holding than it did. Rather, my thesis is that the Court issued a broader holding than it acknowledged—that what appeared to be a political-question holding was in reality a holding on the merits. Stated differently, the Court’s application of the political-question doctrine made it indistinguishable from an analysis of the merits.

Rucho did not hold (in fact, the Court could not have held) that all possible standards for deciding partisan-gerrymandering claims would be unmanageable by the judiciary. In fact, the Court itself suggested that standards contained in state constitutions were judicially manageable.⁷ Rather, the Court’s holding was that the Federal Constitution contained no judicially manageable standards for adjudicating partisan-gerrymandering claims, and as a result there was no jurisdiction.⁸

II. POLITICAL QUESTIONS, REAL AND APPARENT

The federal courts lack authority to decide “[q]uestions, in their nature political”⁹—questions, that is, that should be decided by the “political branches” and not the courts.¹⁰ Where the political-question doctrine is applicable, it operates as a jurisdictional bar, preventing

5. Compare FED. R. CIV. P. 12(b)(1) (providing for dismissal for “lack of subject-matter jurisdiction”) with FED. R. CIV. P. 12(b)(6) (providing for dismissal for “failure to state a claim upon which relief can be granted”).

6. Compare Michael Solimine, *State Courts as Forums for Partisan Gerrymandering Claims after Common Cause v. Rucho (Rucho Symposium)*, ELECTION LAW BLOG, <https://electionlawblog.org/?p=105902> (last visited Oct. 31, 2019) (arguing that state courts may hear such claims after *Rucho*), with Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015), and John Harrison, *The Political Question Doctrines*, 67 AM. U.L. REV. 457 (2017) (pre-*Rucho* articles arguing that state courts may not be used to evade the political-question doctrine).

7. See *Rucho*, 139 S. Ct. at 2507–08.

8. *Id.* at 2508.

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

10. *Rucho*, 139 S. Ct. at 2494 (quoting *Vieth*, 541 U.S. at 277).

federal courts from intervening even when the government fails to meet its constitutional obligations.¹¹

Political questions, properly limited, are those cases “in which the challenged government action is subject to legal constraint, but, the constraint, for some reason, is not judicially enforceable.”¹² *Baker v. Carr* famously catalogued the kinds of questions that would be considered political:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹³

Rucho involved the second of these types of political questions: those issues for the resolution of which there is no “judicially discoverable and manageable standard[.]”¹⁴

When the Constitution contains a standard but the standard is not judicially enforceable, the political-question doctrine should apply and the case should be dismissed for lack of jurisdiction.¹⁵ Where, however, there is no standard in the Constitution for anyone to apply, the Court should dismiss on the merits rather than relying on the political-question doctrine.¹⁶ Those cases are not true political-question cases at all. Rather, they are decisions on the merits that the Constitution does not entitle the challenger to relief.

As *Baker* indicated, political questions include more than simply those issues lacking judicially discoverable and manageable standards for resolving them; rather, they include a range of issues that should be resolved by the political branches instead of the judiciary. For example, a political question—a question for the political branches—would be presented if the Constitution or other governing law committed the

11. *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

12. JONATHAN R. SIEGEL, *FEDERAL COURTS: CASES AND MATERIALS* 217 (2d ed. 2019).

13. *Baker*, 369 U.S. at 217.

14. *Rucho*, 139 S. Ct. at 277–78 (quoting *Baker*, 369 U.S. at 217).

15. *See* FED. R. CIV. P. 12(b)(1).

16. *See* FED. R. CIV. P. 12(b)(6).

resolution of that question to another branch.¹⁷ For example, in *Morgan v. United States*,¹⁸ the United States Court of Appeals for the District of Columbia Circuit refused to hear a case challenging the House of Representatives' decision as to which candidate had won a disputed election.¹⁹ The court pointed to Article I, § 5, clause 1 of the Constitution,²⁰ which provides that "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members."²¹ The standard was readily ascertainable—the candidate with the higher vote total should have been seated—but the matter was not one for the judiciary to resolve.²² Thus, the case presented a political question.²³

Similarly, in *Pacific States Telephone and Telegraph Co. v. Oregon*,²⁴ the Court refused to decide whether Oregon's constitutional provision authorizing the initiative and referendum violated the portion of the federal Constitution requiring Congress to "guarantee to every State in this Union a Republican Form of Government[.]"²⁵ The Court concluded that the Constitution gave Congress, not the courts, the responsibility to guarantee republican government in the states, and therefore the Supreme Court did not decide for itself whether Oregon's government was "republican" within the meaning of the Constitution.²⁶

As others have pointed out, however, the Supreme Court sometimes invokes the political-question doctrine in another, very different, way. In this second use of the political-question doctrine (which Professor Jonathan Siegel has called a "bogus" use of the doctrine),²⁷ the Court dismisses a case only after determining that the plaintiff should lose on the merits.²⁸ Thus, a plaintiff who files suit alleging that the government acted unconstitutionally might find his or her case dismissed under the political-question doctrine if the court concludes that the government actually had the ability to take the challenged

17. Grove, *supra* note 6, at 1909.

18. 801 F.2d 445 (D.C. Cir. 1986).

19. *Id.* at 446–47.

20. U.S. CONST. art. I, § 5, cl. 1.

21. *Morgan*, 801 F.2d at 447 (quoting U.S. CONST. art. I, § 5, cl. 1).

22. *Id.* at 450.

23. *Id.*

24. 223 U.S. 118 (1912).

25. *Id.* at 136–37, 151 (quoting U.S. CONST. art. IV, § 4).

26. *Id.* at 150–51.

27. See SIEGEL, *supra* note 12, at 217; Jonathan R. Siegel, *Political Questions and Political Remedies*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 243 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007). See also Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597 (1976).

28. See *Nixon v. United Staets*, 506 U.S. 224 (1993).

action—in other words, the Constitution entrusted the government with the authority to decide whether to act in the challenged way.²⁹

Nixon v. United States provides an example.³⁰ There, the Supreme Court held that it would not decide whether the procedures used in an impeachment proceeding satisfied the Senate's obligation to "try" impeachments.³¹ Part of the Court's analysis rested on the conclusion that the meaning of the word "try" was committed to the Senate, and that the courts had no authority to opine on the question.³² Elsewhere, however, the Court justified its dismissal of the case by saying that the word "try" was broad enough to include the procedure that had been alleged to be unconstitutional.³³ That is, the Court determined that the Constitution had not been violated, and it used that determination to justify its decision to dismiss the case and (paradoxically) to avoid deciding whether the Constitution had been violated.³⁴

Although the Supreme Court has never acknowledged the difference between these two kinds of political questions, there should be a distinction between cases for which there can be no judicially manageable standard and those for which there is no judicially discoverable standard in the law being interpreted. Only the first group should be considered political questions because they represent the core separation-of-powers concern of the political-question doctrine: ensuring that the matter is decided by a branch other than the judiciary.

Indeed, this interpretation permits *Baker's* second category to be a natural companion to the first and third (albeit with some overlap). There is a political question either when the Constitution's text commits the matter to another branch (as in *Morgan*);³⁵ or when the text is ambiguous about the branch that should decide a question, but the standards for resolving the matter are not the kind that could be applied by courts;³⁶ or when the resolution of the matter turned on policy determinations "of a kind clearly for nonjudicial discretion."³⁷

29. *See id.* at 237–38.

30. *See id.* at 224.

31. *Id.* at 238; *See* U.S. CONST. art. I, § 3, cl. 6.

32. *Nixon*, 506 U.S. at 229–34.

33. *See id.* at 229–30.

34. *Id.* at 237–38.

35. 801 F.2d at 446–47.

36. Question in this category might include whether "the public Safety . . . require[s]" a suspension of the writ of habeas corpus, U.S. CONST. art. I, § 9, cl. 2, or whether an impost is "absolutely necessary for executing [a state's] inspection Laws," *id.* art. I, § 10, cl. 2.

37. *Baker*, 369 U.S. at 217.

Cases in which the Constitution contains no judicially discoverable limit on the government's discretion, however, are different. Those cases should be decided on the merits—and dismissed because the Constitution does not render the government's action illegal. Indeed, if a court examines the constitutional provision in question and discovers no limit on government action, then the court is already examining the merits of the case. Nothing is gained by characterizing the dismissal as jurisdictional.³⁸

In *Rucho*, the Court could not find a standard in the Constitution for assessing when partisanship had been too much of a factor in districting.³⁹ What the Court was really saying was that there was no point at which there is an unconstitutionally large amount of partisanship. Therefore, the Constitution contains no right against partisan-gerrymandering and the Court should have said as much.

III. *RUCHO V. COMMON CAUSE*

Rucho v. Common Cause involved a constitutional challenge to two partisan-gerrymanders.⁴⁰ *Rucho* itself involved a congressional redistricting that split North Carolina's thirteen districts 10–3 in favor of Republicans.⁴¹ The companion case of *Lamone v. Benisek* involved a redistricting that split Maryland's eight congressional districts 7–1 in favor of Democrats.⁴² In each case the partisan motivation was absolutely clear.⁴³ Voters and interest groups challenged the gerrymanders, alleging that they violated the Equal Protection Clause;⁴⁴ the First Amendment;⁴⁵ the provision of Article I, § 2 of the Constitution⁴⁶ providing for popular election of the House of

38. The Constitution's terms are often vague, and such provisions as the Due Process Clauses and the Free Speech Clause of the First Amendment can hardly be said to contain a standard for enforcing the limitations they place on government. Thus, if *Rucho* imposed a strict jurisdictional requirement that each provision of the Constitution contain an enforcement standard, there would be a judicial abdication of large areas of constitutional law. My claim is far more modest. I argue only that if courts determine that a vague provision of the Constitution allows the government to engage in certain behavior, they should hold on the merits that the Constitution has not been violated, rather than holding that the vagueness of the provision deprives them of jurisdiction.

39. 139 S. Ct. at 2500.

40. *Id.* at 2491.

41. *Id.*

42. *Id.* at 2493.

43. *See id.* at 2491, 2493.

44. U.S. CONST. amend. XIV, § 1.

45. *Id.* amend. I.

46. *Id.* art. I, § 1, cl. 1.

Representatives; and Article I, § 4, clause 1,⁴⁷ according to which the states may provide for the “Times, Places and Manner” of congressional elections.⁴⁸

The Supreme Court held that the challenges had to be dismissed because they presented a political question.⁴⁹ According to the Court, political gerrymandering was a political question because of the second of *Baker v. Carr*'s six criteria: There was a “lack of judicially discoverable and manageable standards for”⁵⁰ determining when any particular partisan-gerrymander violated the Constitution.⁵¹ Repeatedly the Court explained that the reason it could not declare the gerrymanders unconstitutional was the lack of appropriate standards for distinguishing between constitutional and unconstitutional uses of partisanship in districting.⁵²

The Court seemingly accepted that, on the merits, excessive partisanship in districting violated the Constitution.⁵³ At the same time, the Court was quite clear that partisanship could be a factor in districting decisions, at least to some extent.⁵⁴ The problem was in drawing the line. The Court thought it was powerless to hear the case because the Constitution contained no sufficiently definite test for determining when partisan considerations were unconstitutionally excessive—when redistricting was tainted by too much partisanship.⁵⁵

47. *Id.* art. I, § 4, cl. 1.

48. *Rucho*, 139 S. Ct. at 2492–93 (quoting U.S. CONST. art. I, § 4, cl. 1).

49. *Id.* at 2506–07.

50. *Baker*, 369 U.S. at 217.

51. *See Rucho*, 139 S. Ct. at 2506–07 (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

52. *Id.* at 2500, 2502, 2505, 2507.

53. *See id.* at 2507 (“Our conclusion does not condone excessive partisan gerrymandering.”). *See also id.* at 2497 (“The ‘central problem’ . . . is ‘determining when political gerrymandering has gone too far.’”) (quoting *Vieth*, 541 U.S. at 296 (plurality opinion)); *id.* at 2499 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)) (requiring “a standard that can reliably differentiate unconstitutional from ‘constitutional political gerrymandering,’” thereby implying that some amount of political gerrymandering was unconstitutional). *Accord id.* at 2504 (criticizing one proposal as not amounting to “a serious standard for separating constitutional from unconstitutional partisan gerrymandering”); *id.* at 2505 (arguing that a proposal was an unsatisfactory “way of distinguishing permissible from impermissible partisan motivation”).

54. *See id.* at 2497 (“[A] jurisdiction may engage in constitutional political gerrymandering.”) (quoting *Cromartie*, 526 U.S. at 551); *id.* at 2501 (“[L]egislatures have the authority to engage in a certain degree of partisan gerrymandering[.]”); *id.* at 2502 (“A partisan gerrymandering claim cannot ask for the elimination of partisanship.”).

55. *Id.* at 2508.

Crucially, however, the Court did not (and could not) argue that it would be impossible to develop judicially manageable standards for drawing that line. Rather, the Court's holding was that there were no judicially manageable standards in the Constitution.⁵⁶ Thus, the key question was not whether courts were capable of policing excessive partisanship in districting, but whether the Constitution specified a rule for distinguishing between excessive and permissible amounts of partisanship in districting. As the Court explained, "[j]udicial action must be governed by standard, by rule,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws."⁵⁷

The difference between asking whether, on the one hand, it is possible to develop a judicially manageable standard and, on the other hand, asking whether the Constitution contains a judicially manageable standard is extremely important because one could easily imagine a judicially manageable standard for adjudicating partisan-gerrymandering claims. A constitutional rule simply banning all consideration of partisan advantage would probably be manageable, as would a rule that permitted some consideration of partisanship but outlawed districting plans where partisanship predominated over "neutral" considerations. In fact, the Court regularly applies the predominant-factor test in evaluating claims of racial, rather than partisan, gerrymandering,⁵⁸ so the test must be judicially manageable.

Other, more mathematically complicated, standards—such as consideration of the "efficiency gap," which measures the "wasted votes" cast for each party (those votes cast for losing candidates or those cast for winning candidates in excess of the number needed to win the election)—have also been suggested by litigants, scholars, and lower courts.⁵⁹ Despite the apparent complexity of those standards, they provide objective, numerical measures of partisanship in districting, and therefore would be capable of objective application in individual cases by judges looking to apply judicially manageable standards.

Thus, if the jurisdictional question turned on whether a judicially manageable standard could be applied to partisan-gerrymandering claims, such claims would be justiciable. Instead, *Rucho* held that the

56. *Id.*

57. *Id.* at 2507 (quoting *Vieth*, 541 U.S. at 278 (plurality opinion)).

58. See *Miller v. Johnson*, 515 U.S. 900, 916–17 (1995).

59. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. Rev. 831 (2015); Eric M. McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUDIES Q. 55 (2014).

case had to be dismissed because the Constitution itself did not contain any of those judicially manageable standards.⁶⁰ In rejecting all of the proposed tests for assessing unconstitutional levels of partisan gerrymandering, the Court stated that “none meets the need for a limited and precise standard that is judicially discernible and manageable.”⁶¹ For the matter to be justiciable, in other words, the standard must not only be manageable, it must be discernible in the law. Because the challengers could provide no substantial argument that the Constitution itself contained a limit on the amount of allowable partisanship in districting, their suggestion that the Court adopt newly developed standards missed the point.

The Constitution must permit partisan-gerrymandering, reasoned the Court, because it had always done so.⁶² The Court discussed historical examples dating from the very first congressional elections,⁶³ demonstrating that while gerrymandering has always been controversial and much criticized, the Framers thought that the remedy for gerrymandering was not action in the courts but Congress’s power to “make or alter” the state-drafted “Times, Places and Manner” of federal elections.⁶⁴ As the Court concluded, “[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities.”⁶⁵

Not only did history demonstrate that the Constitution contained no right against partisan gerrymanders, but the theory of fairness that underlay the constitutional claims had also been rejected by the Court.⁶⁶ As the Court explained, “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation.”⁶⁷ That is, they allege that the challenged districting scheme results in one party receiving fewer legislative seats than it “should” have,⁶⁸ or that “groups

60. 139 S. Ct. at 2508.

61. *Id.* at 2502.

62. *See id.* at 2505.

63. *Id.* at 2494–95.

64. *Id.* at 2495 (quoting U.S. CONST., art. I, § 4, cl. 1).

65. *Id.* at 2497.

66. *Id.* at 2501.

67. *Id.* at 2499.

68. *Cf.* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1677 (2001) (“The notion of dilution . . . hinges on the assumption that like-minded voters should have a fair chance to coalesce—that is, that an individual’s ability to aggregate her vote with others matters in a representative democracy.”).

with a certain level of political support should [but do not] enjoy a commensurate level of political power and influence.”⁶⁹

But the Court has repeatedly rejected the contention that any group—racial, political, ideological, or otherwise—is constitutionally entitled to any particular electoral results.⁷⁰ As the Court has noted, electoral results can depend on innumerable factors, including local issues and the quality of the candidates.⁷¹ The only way to guarantee that parties will receive a “fair” amount of seats compared to their statewide share of the popular vote is to adopt a system where voters select parties rather than particular candidates. While there is much to commend such a system as a matter of political theory, it is not plausible to believe that the Constitution mandates it.⁷²

Again and again, *Rucho* returned to its conclusion that the Constitution contained no judicially manageable standard because the Constitution permits at least some political gerrymandering.⁷³ The “basic reason” that the Court could not take the predominant-factor test from the racial-gerrymandering cases and apply it in the partisan-gerrymandering context had nothing to do with the manageability of the standard.⁷⁴ Rather, the difference was the substance of the Constitution: “while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, ‘a jurisdiction may engage in constitutional political gerrymandering.’”⁷⁵ “A permissible intent—

69. *Rucho*, 139 S. Ct. at 2499.

70. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 75–76 & n.22 (1980); *White v. Regester*, 412 U.S. 755, 765–66 (1973) (“To sustain such claims [of vote dilution under the Constitution], it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.”).

71. *See Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971). *See also Rucho*, 139 S. Ct. at 2503.

Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates’ campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. *Id.*

72. *Cf. Holder v. Hall*, 512 U.S. 874, 909 (1994) (Thomas, J., concurring in the judgment) (arguing that judging minority vote dilution on the basis of minority voters’ ability to form majorities in single-member districts “is merely a political choice”).

73. 139 S. Ct. at 2501.

74. *Id.* at 2497.

75. *Id.* at 2497 (quoting *Cromartie*, 526 U.S. at 551). *See also id.* at 2499 (quoting *Cromartie*, 526 U.S. at 551) (noting the existence of “constitutional political

securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent ‘predominates.’”⁷⁶

That was the key. Partisan-gerrymandering was “permissible.” The Constitution—on the merits—allowed line-drawers to act in furtherance of a partisan motivation. And that “permissible intent” continued to be permissible even when it was the predominant consideration in drawing district lines.⁷⁷ The reason the Constitution lacked a judicially manageable standard for striking down partisan-gerrymanders—the basis of the Court’s supposedly jurisdictional holding—was that it was “permissible” to draw district lines with the predominant purpose of partisanship.⁷⁸ That is no different from deciding on the merits that the Constitution does not render partisan gerrymandering unconstitutional.

The Court similarly distinguished other areas in which the Court has been tasked with developing its own standards to enforce generally worded provisions in the Constitution or statutes: “[T]hose instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. . . . Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion.”⁷⁹ As the Court summarized, “the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly.”⁸⁰ Notice: the Court did not say, “there is [or can be] no objective measure”; rather, the question for the Court was whether an objective measure was supplied by the Constitution.⁸¹

Reinforcing the point, the Court looked to specific constitutional provisions that might limit the use of partisanship in districting to see if they contained judicially manageable standards.⁸² By separately

gerrymandering”); *id.* (stating that the plaintiffs were “[u]nable to claim that the Constitution requires proportional representation . . . [of political parties]”); *id.* at 2501 (“[L]egislatures have the authority to engage in a certain degree of partisan gerrymandering[.]”); *id.* at 2502 (“A partisan gerrymandering claim cannot ask for the elimination of partisanship.”); *Cox v. Larios*, 542 U.S. 947, 952 (Scalia, J., dissenting) (arguing that “politics as usual” is a “‘traditional’ redistricting criterion”).

76. *Id.* at 2503.

77. *Id.* at 2502–03.

78. *Id.*

79. *Id.* at 2505–06. As stated, *see* note 38, *supra*, the Court overstates the degree to which the Constitution contains enforcement standards.

80. *Id.* at 2501.

81. *See id.* at 2494, 2501.

82. *Id.* at 2502, 2504, 2506.

evaluating the Equal Protection Clause, the First Amendment, Article I § 2, and the Guarantee Clause, the Court demonstrated that the availability *vel non* of judicially manageable standards is to be determined by reference to the law being interpreted.⁸³ If it was sufficient for the Court (or the parties, or *amici* or scholars) to develop theretofore unimagined judicially manageable standards, it would have been unnecessary to consider whether those standards appeared in any particular provision of the Constitution. A judicially manageable standard would either have existed or not; its existence would not have depended on which constitutional provision was invoked. Instead, the Court insisted that the standard be in a particular constitutional provision, which therefore required the Court to determine whether anything in the Equal Protection Clause, the First Amendment, or Article I provided a standard for saying how much was too much.⁸⁴

Rucho noted that some states have specific constitutional provisions limiting the government's ability to use partisan gerrymandering, and suggested that those provisions might provide judicially manageable standards for determining which gerrymanders were unconstitutional.⁸⁵ The Court made special mention of Florida's "Fair Districts Amendment,"⁸⁶ which provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."⁸⁷ Pointing out that "there is no 'Fair Districts Amendment' to the Federal Constitution," the Court suggested that the U.S. Constitution lacked the "standards and guidance" that the Florida provision provided to its state courts.⁸⁸

The Court's discussion of Florida's specific prohibition on partisan gerrymandering (along with similar provisions in other states' laws) confirms that judicially manageable standards must be found in the text being interpreted. Florida's experience showed that a judicially manageable standard not only was possible, but such a standard was in fact being managed by the Florida judiciary.⁸⁹ But the Court properly dismissed the Florida experience as irrelevant to the question whether

83. *Id.*

84. *Id.* at 2508.

85. *Id.* at 2507–08.

86. FLA. CONST. art. III, § 20(a)

87. *Rucho*, 139 S. Ct. at 2507–08 (quoting FLA. CONST. art. III, § 20(a) and similar provisions from Iowa and Delaware).

88. *Id.* at 2507.

89. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

the United States Constitution contained a judicially manageable standard to adjudicate partisan-gerrymandering claims.⁹⁰

Paradoxically, however, the Court's approach of looking to the Constitution for a judicially manageable standard required the Court to interpret the Constitution before deciding that it had no jurisdiction to decide the case. Ordinarily, jurisdiction must be considered as a threshold matter.⁹¹ If jurisdiction is lacking, "the only function remaining to the court is that of announcing the fact and dismissing the cause."⁹² But if the basis of refusing jurisdiction is the Constitution's absence of standards, then it is necessary to examine the Constitution to see what standards are subsumed in the constitutional language. As *Rucho* demonstrates, it is not sufficient simply to say that there are judicially manageable standards for deciding cases under the Equal Protection Clause; rather, the Court needs to determine what the standards are for distinguishing successful from unsuccessful partisan-gerrymandering challenges under that clause.⁹³ And the standard for separating successful from unsuccessful claims is little different from deciding the case on the merits. After all, the court in *Rucho* found the case non-justiciable precisely because the Constitution did not contain a right to proportionality or any other particular standard of partisan fairness.⁹⁴ There is no meaningful difference between that and simply stating that the Constitution does not contain a right to any degree of partisan fairness.

Rucho never appears to acknowledge that its unwillingness to accept jurisdiction unless it could first discern a judicially manageable standard is quite inconsistent with the Court's approach in *Baker*.⁹⁵

90. See *Rucho*, 139 S. Ct. at 2508.

91. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92–102 (1998) (rejecting the use of "hypothetical jurisdiction"); *Cf. Shapiro v. McManus*, 136 S. Ct. 450 (2015) (holding that, under 28 U.S.C. § 2284, judges should determine whether to appoint a three-judge district court in cases challenging congressional-district apportionments before deciding the merits of those challenges).

92. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

93. See 139 S. Ct. at 2502.

94. *Id.*

95. The clearest departure from *Baker* was *Rucho*'s dismissal of the lower court's argument that the Article I, § 2 was violated because "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.'" *Rucho*, 139 S. Ct. at 2506 (quoting *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 940 (M.D.N.C. 2018)). The Supreme Court correctly noted that the district court's rationale "seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4 . . ." *Id.* Dismissal was therefore required because the Court had already held that the Guarantee Clause was non-justiciable. See *Pacific States Tel. & Tel.*, 223 U.S. 118. But *Baker* had

There, the Court announced that there were standards for adjudicating the constitutionality of unequally populated districts because “[j]udicial standards under the Equal Protection Clause are well developed and familiar[.]”⁹⁶ Exactly what standard would be applied, however, was not announced until two years later, in *Reynolds v. Sims*,⁹⁷ when the Court formulated the one-person, one-vote standard.⁹⁸

The *Rucho* Court, however, quite properly abandoned this aspect of *Baker*.⁹⁹ *Baker*’s refusal to announce the standards it would use to adjudicate the constitutionality of unequally populated districts provided reason to doubt its assurance that there were judicially manageable standards.¹⁰⁰ One cannot determine whether there are judicially manageable standards without determining what those standards are. It is only upon identifying the standards, after all, that one can determine whether the judiciary is capable of managing them.

However, *Rucho* was wrong to rest its conclusion on the political-question doctrine. Announcing that the Constitution allows some partisan gerrymandering and contains no judicially manageable standards for enforcing a ban on excessive partisan gerrymandering is tantamount to announcing that the Constitution simply does not contain a right against excessive partisan gerrymandering. The historical evidence that the Court identified early in its opinion demonstrates clearly that political considerations have been a common (if commonly criticized) feature of districting ever since the country was founded.¹⁰¹ Rather than focus on the lack of standards for distinguishing permissible from impermissible gerrymanders, the Court should have allowed the historical evidence to point to its most natural conclusion: the Constitution simply contains no limit on partisanship in districting.

found jurisdiction under the Equal Protection Clause to adjudicate a claim that was exactly the same in substance as the Guarantee Clause claim that had been rejected a few years earlier in *Colegrove v. Green*, 328 U.S. 549 (1946), as non-justiciable. *See Baker*, 369 U.S. at 226–27 (“[T]he appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender.”).

96. *Baker*, 369 U.S. at 226.

97. 377 U.S. 533 (1964).

98. *Id.* at 577.

99. 139 S. Ct. at 2495–96.

100. *See* 377 U.S. at 217.

101. *See Rucho*, 139 S. Ct. at 2493–94.

IV. CONCLUSION

Unless there are enforceable limits on partisanship in districting, line-drawers are likely to continue to seek partisan advantage when drawing district lines. Thus, except in those jurisdictions where state constitutions place limits on partisan-gerrymandering, *Rucho* is likely to lead to districts that produce disproportionate results when compared to statewide vote totals. This result is unfortunate. I count myself among those who object to the gerrymandering of districts for partisan ends. Ideally, in my view, districts would be as competitive as possible, so as to make representatives responsive to public opinion. And a very different system that would allocate legislative seats proportionately by party appeals to an instinctive sense of fairness.¹⁰²

But neither responsiveness nor fairness is required by the Constitution. As *Rucho* noted, “the fact that such gerrymandering is ‘incompatible with democratic principles’ . . . does not mean that the solution lies with the federal judiciary.”¹⁰³ Neither does it mean that The Constitution gives judges the responsibility to force the rest of government to follow its theories of democracy.¹⁰⁴

102. *See id.* at 2506 (“Excessive partisanship in districting leads to results that reasonably seem unjust.”).

103. *Id.* (quoting *Ariz. State Legislature v. Ariz. Independent Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

104. *See Holder*, 512 U.S. at 902–03 (Thomas, J., concurring in the judgment).

