Western New England Law Review

Volume 44 *44*
Issue 2

Article 4

2022

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WESTERN NEW ENGLAND LAW REVIEW

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# GERRYMANDERING, ENTRENCHMENT, AND "THE RIGHT TO ALTER OR ABOLISH": DEFINING THE GUARANTEE CLAUSE AS A JUDICIALLY MANAGEABLE STANDARD

JAMES R. BRAKEBILL*

*The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." Based on its original public meaning, the guarantee of a republican government protects core political rights and contains readily ascertainable standards founded on majority rule and a prohibition of minority-party entrenchment. The Supreme Court failed to develop a standard for adjudicating partisan gerrymandering claims because the Equal Protection Clause and the "one person, one vote" framework are fundamentally incompatible with the harms associated with partisan gerrymandering. Such claims involve harms to majority rights that strike at the core of the republican guarantee. The use of advanced technology and household-level data means partisan gerrymanders will only become increasingly precise and durable, leading to more situations where parties earning a minority share of votes nonetheless hold a permanent majority of seats. Given these new challenges, the Supreme Court should revisit partisan gerrymandering under the majoritarian standards derived from the Guarantee Clause.*

## INTRODUCTION

Partisan gerrymandering is perhaps the most political activity in the United States, yet it strikes at core legal rights the Supreme Court has historically protected. The Court has consistently found that the practice

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may violate the Constitution when done in an excessive manner.[1] Despite this, it has struggled to fit these claims into its existing body of redistricting jurisprudence. A majority of the Court has never been able to agree on a single standard by which to judge how much partisan gerrymandering crosses the line from party politics to unconstitutional discrimination.[2] For more than three decades following the Court's split opinion in *Davis v. Bandemer*,[3] political scientists and election law scholars struggled to articulate a standard for judging partisan gerrymanders. In the meantime, redistricting has been transformed by the rapid introduction of advanced technology and voter data. These tools have allowed States to craft redistricting plans that entrench one party into power for a decade.[4] The ability to draw district boundaries with surgical precision has unleashed a new breed of gerrymandering where one party is able to secure permanent majority status despite winning a minority share of votes.[5] Today, partisan gerrymandering not only threatens fair competition between parties but also the foundations of republican government.

At the heart of redistricting cases lie two important issues: what is the role of the Court in adjudicating these claims and, if it has a role, what legal standards must it apply to carry out that duty? Chief Justice Marshall famously announced in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[6] Over two hundred years later in *Rucho v. Common Cause*, Chief Justice Roberts declared partisan gerrymandering beyond the reach of federal courts by writing "this is not law."[7] For the first time, the Court held it could not remedy a violation of the Constitution because it had failed to develop a manageable standard.[8] The purpose of this Article is to argue that a legal

1. Rucho v. Common Cause, 139 S. Ct. 2484, 2514–15 (2019) (Kagan, J., dissenting) ("Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering . . . violates the Constitution."); *see, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 293 (2004) (plurality opinion) ("[A]n *excessive* injection of politics is *un*lawful."); *id.* at 316 (Kennedy, J., concurring); Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process . . . ."); *id.* at 165 (Powell, J., concurring).

2. *See* Charles Backstrom, Samuel Krislov & Leonard Robins, *Desperately Seeking Standards: The Court's Frustrating Attempts to Limit Political Gerrymandering*, 39 POL. SCI. & POL. 409, 409–10 (2006).

3. *Davis*, 478 U.S. at 113 (plurality opinion).

4. *See infra* Section I.B.

5. *See infra* Section I.B.

6. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

7. Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

8. *Id.* at 2515 (Kagan, J., dissenting) ("For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.").

standard has been before the Court since the founding of our republic. The Guarantee Clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.[9]

A review of the history and structure of the Clause reveals that it was included in the Constitution as a safeguard against minority-party entrenchment.[10] Interpreted as the founding generation would have understood it at the time of ratification, the republican guarantee was meant to ensure no state would have an electoral system inconsistent with majority rule and popular sovereignty. Despite such an important command, the Court has effectively written out the provision by holding that the Guarantee Clause is nonjusticiable. In recent decades, there has been a resurgence of legal scholarship arguing that the Court should reconsider its holdings on the Guarantee Clause.[11] The Court's decision in *Rucho* finding that Equal Protection doctrine supplies no manageable standards reinforces the view that it is time for the Court to revisit the Guarantee Clause in adjudicating partisan gerrymandering claims.[12] Because redistricting challenges brought in federal court are a rare class of cases where the Supreme Court has mandatory appellate jurisdiction, the Court will be required at a minimum to issue a judgment affirming or reversing a lower court's decision.[13] This means that the Supreme Court will not be able to ignore future partisan gerrymandering cases despite the holding in *Rucho*.

This Article proceeds in four Parts. After this introduction, Part I begins with an overview of the case law surrounding partisan gerrymandering and explains how the Court's decision in *Baker v. Carr*

9. U.S. CONST. art. IV, § 4.

10. *See infra* Part II.

11. *See, e.g.*, Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 849–50 (1994); New York v. United States, 505 U.S. 144, 184 (1992) (discussing scholarship's role in reviving the question of whether the Guarantee Clause is justiciable).

12. *See infra* Part III.

13. Shapiro v. McManus, 577 U.S. 39, 41 (2015); *see* 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order . . . in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."); *see also* Abbott v. Perez, 138 S. Ct. 2305, 2336 (2018) (Sotomayor, J., dissenting) ("Unlike the more typical certiorari process, for cases falling within § 1253, appellate review in this Court is mandatory."). These rules would not, however, apply to cases brought in state courts.

to focus on equal protection rather than the republican guarantee ultimately led to the Court's decision in *Rucho v. Common Cause*. It then discusses the role that technology and big data have in modern gerrymandering and party entrenchment. Part II explores the case law under the Guarantee Clause, examines the renewed interest in its justiciability, and argues that the original public meaning of the Clause included a role for the federal judiciary to protect individual political rights and popular sovereignty. Part III argues that extreme partisan gerrymandering violates the guarantee of a republican form of government when it consistently frustrates the right of the majority to alter or abolish its elected government. It then considers the practical issues of standing and manageable standards, finding that neither is a bar to justiciability. Finally, Part IV addresses the concerns many justices and commentators have about the role of the Supreme Court in redistricting cases and its legitimacy in adjudicating such matters.

## I. OVERVIEW OF PARTISAN GERRYMANDERING

Gerrymandering is as old as the country itself, and the Supreme Court has a long history of redistricting cases that explain why the Court eventually declared partisan gerrymandering nonjusticiable. Reviewing the doctrinal development is crucial to understanding why the traditional tools used by the Court to decide redistricting cases failed to produce a judicially manageable standard at a time when technological changes in redistricting make party entrenchment a greater threat than ever before.

### A. *Summary of Case Law and the Original Flaw in* Baker v. Carr

The Supreme Court has adjudicated apportionment and redistricting cases for nearly a century. Early redistricting issues were mostly limited to the failure of state legislatures to redistrict following each decennial census.[14] The majority of these cases focused on various iterations of the Reapportionment Act and the Elections Clause rather than individual rights.[15] In the first major redistricting case, *Colegrove v. Green*, the Court decided that even constitutional claims regarding vastly unequal congressional districts were not subject to judicial review.[16] The Court

14. Charles S. Bullock, III, *Redistricting: Racial and Partisan Issues Past and Present*, *in* LAW AND ELECTION POLITICS 230, 231 (Matthew J. Streb ed., 2d ed. 2013).

15. *See, e.g.*, Koenig v. Flynn, 285 U.S. 375, 379 (1932) (rejecting a challenge invoking the Elections Clause to New York's refusal to implement a new redistricting plan that was passed by the legislature but never signed by the governor); Carroll v. Becker, 285 U.S. 380, 382 (1932) (affirming under the Elections Clause a state court decision refusing writ of mandamus to implement a redistricting plan vetoed by the Missouri governor); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569–70 (1916) (holding that a state referendum disapproving a redistricting act was not void under the Reapportionment Act of 1911, ch. 5, 37 Stat. 13 (1911)).

16. Colegrove v. Green, 328 U.S. 549, 554 (1946) ("[D]ue regard for the Constitution as

notoriously stated that it "ought not to enter this political thicket"[17] because Article I conferred upon Congress authority for judging qualifications of its members and for regulating the redistricting process.[18] This was based largely on the now-rejected idea that courts cannot redraw district maps themselves nor can they compel a legislature to do so.[19]

After *Colegrove*, the Court waded into the thicket in *Gomillion v. Lightfoot* by invalidating the Alabama legislature's attempt to expel Black voters from the city of Tuskegee as a violation of the Fifteenth Amendment.[20] Although this was not a redistricting case, the Court's decision did have a major impact on the law of gerrymandering. With the Court having just intervened in legislative mapmaking, voters in Tennessee challenged that state's outdated legislative apportionment plan.[21] Just two years later, the Court ruled in *Baker v. Carr* that population inequality in apportionment schemes raises a justiciable issue.[22] Unlike *Colegrove*, *Baker* dealt with an equal protection challenge to state legislative districts rather than congressional districts.[23] This allowed the Court to distinguish the two cases since the Elections Clause does not govern state redistricting plans.[24] Over the objection that *Colegrove* barred the case, the Court quoted from *Gomillion*: "[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[25]

Much like *Gomillion*, *Baker* stands for the proposition that the Court may intervene in an inherently political process if it implicates an individual right protected by the Constitution. The Court's narrower understanding of what constitutes a political question enlarged the scope of judicial review by converting an apparent "political question" into a traditional constitutional claim.[26] Despite the landmark nature of *Baker*,

a viable system precludes judicial correction.").

17. *Id.* at 556.

18. *Id.* at 554 ("Authority for dealing with such problems resides [in Article I, Section 4].").

19. *Id.* at 553 ("Of course no court can affirmatively remap the Illinois districts . . . . At best [the Court] could only declare the existing electoral system invalid.").

20. Gomillion v. Lightfoot, 364 U.S. 339, 347–48 (1960).

21. Baker v. Carr, 369 U.S. 186, 187 (1962).

22. *Id.* at 237.

23. *Id.* at 187.

24. *Id.* at 234.

25. *Id.* at 231 (quoting *Gomillion*, 364 U.S. at 347).

26. *Id.* at 207–08; *Gomillion*, 364 U.S. at 346–47 (finding that the violation of the Fifteenth Amendment "lift[s] this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation"); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164–65 (1803) (contrasting political questions from cases involving individual rights, which can never be political questions).

the Court's transformation of what was fundamentally a Guarantee Clause issue into one of equal protection is at the root of the problems regarding partisan gerrymandering today.[27] Reframing a political question into a case concerning a constitutional right worthy of judicial protection is much easier in some cases than in others. Challenges to districts with unequal populations or with boundaries that harm racial minorities may be resolved under the Equal Protection Clause with little difficulty.[28] Partisan gerrymandering, however, presents more difficult questions where solutions are even harder to find when viewed as an equal protection problem.[29] Unlike race or sex, political partisanship is not an immutable characteristic, and political parties are not "discrete and insular minorities" where the Court's application of equal protection is at its strongest.[30]

The *Baker* Court relied on the Fourteenth Amendment due to its more familiar standards and accepted judicial analysis, but this choice all but guaranteed partisan gerrymandering would remain a political question. *Baker*'s flaw is evident in all of the Court's subsequent partisan gerrymandering decisions. The language from the Court's discussion of the Guarantee Clause and political question doctrine more generally have become commonplace in redistricting litigation. The question in many cases involving the political question doctrine and the subject of a large body of redistricting research revolves around the search for "judicially discoverable and manageable standards"[31] by which a court can judge how much political influence violates the Constitution.[32]

27. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 107 (2000) ("By conceiving the issue as arising under the Equal Protection Clause, the Court committed itself to the norm of equipopulous districts, without proper consideration of whether that is the proper standard."); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1484 (2005).

28. This is not meant to imply that the cases are easy. It means the Court has already identified the tools necessary to adjudicate them and is not left searching for standards. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2496–97 (2019) ("Laws that explicitly discriminate on the basis of race . . . [or] are unexplainable on grounds other than race, are of course presumptively invalid . . . . Partisan gerrymandering claims have proved far more difficult to adjudicate.").

29. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1675 (1993) (discussing the distinction "between judicial intervention on behalf of discrete and insular minorities—for whom the Court may invoke a special measure of judicial solicitude—and a realignment of political power between the major power blocs of the society"); *see also Rucho*, 139 S. Ct. at 2502 ("Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification.").

30. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

31. This commonly used phrase originates from *Baker v. Carr*, 369 U.S. 186, 217 (1962).

32. *See generally* Bernard Grofman, *Crafting a Judicially Manageable Standard for*

*Reynolds v. Sims* built on *Baker* to establish the "one person, one vote" rule as an equal protection requirement.[33] Again, the Court relied on the established standards developed under the Equal Protection Clause and thus refused to consider the Guarantee Clause issue.[34] When the Court applied the Fourteenth Amendment to a partisan gerrymander in *Gaffney v. Cummings*, it decided there was no standard for rooting out politics from such a political process.[35] *Davis v. Bandemer* presented the issue again but left the Court split on the issues of justiciability and the level of harm needed to violate the Constitution.[36] Six justices agreed that partisan gerrymandering claims were justiciable[37] but could not agree on a standard to distinguish benign gerrymandering from unconstitutional discrimination.[38] The Court produced another split decision in *Vieth v. Jubelirer*.[39] Justice Scalia, writing for a plurality, would have overruled *Bandemer* due to the lack of success in adjudicating such claims under the Equal Protection Clause.[40] Justice Kennedy's concurrence, perhaps the more well-known opinion from the case, left the door open if a judicially manageable standard could be developed.[41] Importantly, all Justices agreed that the "excessive injection of politics is unlawful."[42] The point of disagreement centered on when and how the Court should determine

*Partisan Gerrymandering: Five Necessary Elements*, 17 ELECTION L.J. 117 (2018); Samuel S.-H. Wang, Brian A. Remlinger, & Ben Williams, *An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into Tests of Opportunity and Outcome*, 17 ELECTION L.J. 302 (2018).

33. Reynolds v. Sims, 377 U.S. 533, 557–59 (1964).

34. *Id.* at 557 ("We indicated in *Baker*, however, that the Equal Protection Clause provides discoverable and manageable standards . . . .").

35. Gaffney v. Cummings, 412 U.S. 735, 753–54 (1973) ("Politics and political considerations are inseparable from districting and apportionment . . . . [W]e have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States.").

36. Davis v. Bandemer, 478 U.S. 109, 113 (1986).

37. *Id.* at 125 (concluding that partisan gerrymandering presents a justiciable issue).

38. *Id.* at 161 (Powell, J., concurring in part and dissenting in part).

39. Vieth v. Jubelirer, 541 U.S. 267, 271 (2004) (plurality opinion).

40. *Id.* at 281 ("Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists . . . . Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.").

41. *Id.* at 317 (Kennedy, J., concurring) ("If workable standards do emerge . . . courts should be prepared to order relief."). *But see id.* at 301 (plurality opinion) ("But it is *our* job, not the plaintiffs', to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim.").

42. *Id.* at 293 (plurality opinion) (noting the plurality's agreement with the dissent that "an *excessive* injection of politics is *un*lawful"); *id.* at 316 (Kennedy, J., concurring) (stating that the plurality's acknowledgement "is all the more reason to admit the possibility of later suits"); *id.* at 319 (Stevens, J., dissenting) (stating that severe partisan gerrymandering is unconstitutional); *id.* at 346 (Souter, J., dissenting) (arguing that partisan gerrymandering is justiciable).

what level of political influence is required before it rises to a violation of equal protection.[43]

In 2018, *Gill v. Whitford* brought partisan gerrymandering back to the Court for consideration.[44] Wisconsin Republicans redrew the state Assembly districts in 2011 following the 2010 census. In an effort driven by the Republican Party's Redistricting Majority Project, known as REDMAP, the districts were designed to virtually guarantee that Republicans would maintain control of the Assembly, and it was estimated that under any likely voting scenario, Republicans would win fifty-nine out of ninety-nine seats.[45] The plan turned out to be a success: in the 2012 election Republicans won sixty out of ninety-nine seats in the State Assembly with only 48.6% of the statewide vote.[46] Twelve Wisconsin Democratic voters sued alleging that the state's 2011 redistricting plan discriminated against them on the basis of partisanship.[47] The plaintiffs relied heavily on a metric called the Efficiency Gap which, unlike prior measures, attempts to distance itself from proportionality by focusing on the number of "wasted" votes cast for each party.[48]

Unfortunately, this claim presented a problem from the beginning. Voting is a personal right.[49] Individual voters are placed in a single district, and the boundaries of that district determine the extent of the harm. Therefore, the Court found that an alleged harm based on a theory of vote dilution is district-specific and so too is the remedy.[50] The problem in *Gill* was that the plaintiff's primary argument revolved around a theory of statewide injury which is incompatible with equal protection.[51] Indeed,

43. *Id.* at 290 (plurality opinion) (finding no standards exist to judge partisan gerrymandering claims); *id.* at 338–39 (Stevens, J., dissenting) (arguing that race-based gerrymandering standards should apply to partisan claims); *id.* at 347 (Souter, J., dissenting) (laying out a five-element standard).

44. Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018).

45. Whitford v. Gill, 218 F. Supp. 3d 837, 851 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916, 1923 (2018).

46. *Id.* at 853.

47. *Gill*, 138 S. Ct. at 1920.

48. *Id.* at 1932; Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 851 (2015) ("Wasted votes include both 'lost' votes (those cast for a losing candidate) and 'surplus' votes (those cast for a winning candidate but in excess of what she needed to prevail)."); Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUD. Q. 55, 68–69 (2014) (explaining the mathematical basis underlying the Efficiency Gap).

49. *Gill*, 138 S. Ct. at 1935 ("The harm of vote dilution . . . is 'individual and personal in nature.'" (quoting Reynolds v. Sims, 377 U.S. 533, 561 (1964))); *see also* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001) ("Vote dilution claims implicate a special kind of injury, one that does not fit easily with a conventional view of individual rights. That is because they require a court to consider the relative treatment of *groups* in determining whether an *individual* has been harmed." (emphasis added)).

50. *Gill*, 138 S. Ct. at 1930.

51. *Id.* at 1932 (stating that plaintiffs "rested their case at trial—and their arguments

the Efficiency Gap relies on votes in other districts and the likelihood of changing majorities in the legislative body.[52] Such factors hold little value if the harm and remedy are both specific to the voter and their district.[53] The Court unanimously decided that the plaintiffs lacked standing because a "generalized grievance about the conduct of government" is nonjusticiable.[54]

A year after punting the political question issue in *Gill*, the Court heard *Rucho v. Common Cause* together with *Lamone v. Benisek*.[55] Plaintiffs from North Carolina and Maryland challenged their respective congressional redistricting plans under the Equal Protection Clause.[56] In North Carolina, Republican legislators hired Dr. Thomas Hofeller to draw a plan that would "solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[57] He further strived "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate."[58] In Maryland, an effort led by then-Governor Martin O'Malley sought to enhance the Democrats' hold on Maryland's congressional delegation.[59] They successfully redrew the Sixth District in order to flip a seat held by a Republican for two decades.[60] Both of these redistricting plans were considered among the most egregious in the United States.[61]

The Court declared partisan gerrymandering a political question that is "beyond the reach of the federal courts."[62] In a 5-4 decision, Chief Justice Roberts wrote that federal courts "have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and

before this Court—on their theory of statewide injury").

52. Stephanopoulos & McGhee, *supra* note 48, at 851 ("The efficiency gap, then, is simply *the difference between the parties' respective wasted votes, divided by the total number of votes cast in the election*.").

53. *See* United States v. Hays, 515 U.S. 737, 747 (1995) (holding that a plaintiff only has standing to assert that their own district has been gerrymandered).

54. *Gill*, 138 S. Ct. at 1931.

55. Rucho v. Common Cause, 139 S. Ct. 2484, 2491–93 (2019).

56. *Id.* at 2491.

57. Common Cause v. Rucho, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019).

58. *Id.*

59. *See Rucho*, 139 S. Ct. at 2493.

60. Benisek v. Lamone, 348 F. Supp. 3d 493, 502 (D. Md. 2018), *vacated*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

61. Tucker Doherty, *The Gerrymandered Maps Headed to the Supreme Court*, POLITICO (Mar. 26, 2019, 5:03 AM), https://www.politico.com/story/2019/03/26/gerrymandering-supreme-court-maps-1235466 [https://perma.cc/7ZAN-DSCJ] (providing detailed maps of the North Carolina and Maryland redistricting plans challenged in *Rucho*).

62. *Rucho*, 139 S. Ct. at 2506–07.

direct their decisions."[63] Despite acknowledging that excessive partisan gerrymandering may be unconstitutional,[64] the Court concluded that fairness in redistricting "poses basic questions that are political, not legal."[65]

### B. *Modern Gerrymandering and Problems Posed by Technology and Big Data*

Modern gerrymandering practices have evolved significantly. As demonstrated by *Gill* and *Rucho*, redrawing district boundaries has gone from merely providing an electoral advantage to party entrenchment. To fully understand the threat modern gerrymandering poses to American democracy and republican government—and why a legal standard based on majority rule is so important—it is necessary to review the technological changes that have transformed redistricting. The practice was once limited to paper maps, colored pencils, and crude estimations of where partisan voters reside.[66] The introduction of computer technology to the redistricting process vastly improved mapmakers' ability to draw politically biased plans.[67] As the technology progressed, it became much easier and cheaper to design maps that give the controlling party a significant electoral advantage.[68] The powerful computers of today combined with advanced redistricting software and vast amounts of data have enhanced the danger posed by unrestricted partisan gerrymandering.

Computers were first introduced to the apportionment and redistricting process in the 1960s and 1970s.[69] The initial hope was that this would solve the problems plaguing noncomputer techniques, promote compromise, and make maps that were equal and compact.[70] The prevalence of technology in the redistricting process is a result of how the Census Bureau gathers its data, which is the basis for apportionment of

63. *Id.* at 2507.

64. *Id.* at 2497–99 (acknowledging the Court's prior decisions that excessive partisan gerrymandering may be unconstitutional but that the "central problem" is "determining when [it] has gone too far" (quoting Vieth v. Jubelirer, 541 U.S. 267, 296 (2004))).

65. ) *Id.* at 2500.

66. KIMBALL W. BRACE, TECHNOLOGY AND REDISTRICTING: A PERSONAL PROSPECTIVE ON THE USE OF TECHNOLOGY IN REDISTRICTING OVER THE PAST THIRTY YEARS 11–12 (2004) (describing the redistricting process in the 1970s and 1980s as involving large paper maps filled in with colored pencils and stick-on labels).

67. *Id.* at 16–18; MARK MONMONIER, BUSHMANDERS & BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS 104–07 (2001).

68. Redistricting software that cost $75,000 in 1980 decreased to $20,000 in 1990 and only cost $3,000 by 2000. *See* BRACE, *supra* note 66, at 18.

69. ) *See* MONMONIER, *supra* note 67, at 105.

70. Stuart S. Nagel, *Simplified Bipartisan Computer Redistricting*, 17 STAN. L. REV. 863, 863 (1965).

House seats and for determining district boundaries.[71] Beginning in 1970, the Census Bureau used an electronic street map to match household questionnaires with street addresses.[72] The system linked city blocks to streets and intersections, thereby allowing block-by-block counting.[73] Political cartographers could use this information to reassign blocks to new districts and easily compute district population totals.[74] Beginning in 1990, the Census Bureau introduced the database TIGER, which allowed for even more detail at the street level and covered the entire United States.[75] This data is then managed using geographic information system (GIS) software that allows the user to create districts with the relevant geographic units—blocks and census tracts—and demographic information, including age and race, provided by the Census Bureau.[76] This alone allows a cartographer to see the changes that adding or subtracting a single census block to or from a district will have on that district's population total, age, and racial makeup.[77] It is also common to merge decennial census and American Community Survey data with voter registration files showing partisanship and turnout.[78] The goal of combining voter information is to forecast future elections under a proposed redistricting plan. Combined with data about race and age, it is even possible to estimate the impact that aging populations may have on elections throughout the life of a redistricting plan.[79]

The most troubling aspect of the computerization of redistricting is not advanced technology or detailed public data but rather the introduction of data from other sources. Private firms maintain vast consumer data files about individuals' shopping habits, social media interactions, club memberships, vehicle registrations, magazine subscriptions, survey responses, and more.[80] Such data files have existed for many years and

71. PETER A. MORRISON & THOMAS M. BRYAN, REDISTRICTING: A MANUAL FOR ANALYSTS, PRACTITIONERS, AND CITIZENS 15–17 (2019).

72. *See id.*; *DIME Underwent Lots of Testing Too*, CENSUS BULL. (U.S. Census Bureau, Suitland, MD), Sept. 6, 1968, at 2.

73. MONMONIER, *supra* note 67, at 105.

74. *Id.* Because personal computers did not exist until the mid-1980s, this work would have initially been done using punch cards and large mainframe computers. BRACE, *supra* note 66, at 18.

75. MONMONIER, *supra* note 67, at 107.

76. MORRISON & BRYAN, *supra* note 71, at 16.

77. MONMONIER, *supra* note 67, at 106–07.

78. *Id.*; MORRISON & BRYAN, *supra* note 71, at 22–24.

79. MORRISON & BRYAN, *supra* note 71, at 41.

80. Daniel Kreiss, *Yes We Can (Profile You): A Brief Primer on Campaigns and Political Data*, 64 STAN. L. REV. ONLINE 70, 71 (2012); *see also* Angela Moscaritolo, *What Does Big Tech Know About You? Basically Everything*, PC MAG (Apr. 8, 2020), https://www.pcmag.com/news/what-does-big-tech-know-about-you-basically-everything [https://perma.cc/9T3J-DKKP] (explaining that social media companies collect information about users' contacts, calendar events, search history, status updates, purchase history, and

were initially used in advertising to microtarget consumers.[81] This strategy uses data to segment individuals into specific groups for content sharing so that advertisers can target specific groups of consumers with content most relevant to them.[82] Political campaigns soon began purchasing and merging this data with voter files in an effort to microtarget voters based on their social and political tendencies.[83] For example, many candidates, political parties, unions, and major-issue organizations use the nationwide voter database maintained by Catalist.[84] This gives campaigns an individual-level dataset with more than seven hundred data points for each voter.[85] The information does not end there, however. Catalist also allows campaigns to purchase predictive scores that estimate the voters' partisanship and likelihood of turnout.[86] Rather than knowing only whether the voter is a registered Democrat or Republican, for example, these predictive scores allow campaigns to see a voter's level of partisan support.[87]

Limitations in computing power once restricted how much of this data GIS software could realistically handle in the redistricting context.[88] As technology has advanced, mapmakers have been able to supplement census data with large amounts of personal data gathered by private firms.[89] Today, GIS software such as Maptitude can layer this information on top of existing census data.[90] The purpose of combining these datasets is to better understand the behavior of the electorate and be able to assign a more accurate partisan voting score to the smallest geographic unit down

fitness and health data).

81. JOSEPH TUROW, NICHE ENVY: MARKETING DISCRIMINATION IN THE DIGITAL AGE 62–70 (2006) (describing how direct marketers used consumer databases to target specific segments of consumers as early as the 1960s); Swish Goswami, *The Rising Concern Around Consumer Data and Privacy*, FORBES (Dec. 14, 2020, 7:40 AM), https://www.forbes.com/sites/forbestechcouncil/2020/12/14/the-rising-concern-around-consumer-data-and-privacy/?sh=70c2c668487e [https://perma.cc/2AN3-BJGH] (providing a brief history of consumer data).

82. TUROW, *supra* note 81, at 64–65; David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. ECON. PERSPS. 51, 60 (2014).

83. *See* Daniel Kreiss & Philip N. Howard, *New Challenges to Political Privacy: Lessons from the First U.S. Presidential Race in the Web 2.0 Era*, 4 INT'L J. COMM'N 1032, 1033–34 (2010).

84. EITAN D. HERSH, HACKING THE ELECTORATE: HOW CAMPAIGNS PERCEIVE VOTERS 54 (2015).

85. *Id.* at 69.

86. *Id.* at 72; Nickerson & Rogers, *supra* note 82, at 62–64.

87. HERSH, *supra* note 84, at 72.

88. *See* DAVID DALEY, RAT F**KED: WHY YOUR VOTE DOESN'T COUNT 51 (2016).

89. *Id.* at 50 ("Mapmakers have access not only to the massive amount of demographic data collected by the U.S. Census, but they can also purchase any number of other databases or public records.").

90. *See id.* at 53.

to the block level and sometimes even by household.[91] The result is a highly sophisticated map showing street-level information about residents' demographics and voting history, as well as a partisanship score based on income, education, club memberships, shopping habits, internet browsing, and even social connections.[92]

The relationship between voting, demographics, and social behavior provides a more accurate projection of which party even nonaffiliated households are likely to support and whether they are likely to vote at all.[93] The key reason for combining data in this way is to design partisan gerrymanders that will not only ensure a particular partisan advantage, but to make them endure for the life of the redistricting plans. Old-school gerrymandering simply made elections easier for the controlling party. The goal of today's gerrymandering is sustained partisan entrenchment that permanently locks out the minority party.

## II. REVISITING THE GUARANTEE CLAUSE

The problems posed by modern gerrymandering efforts require new solutions. The Equal Protection Clause is inadequate for policing these claims because the injury complained of—frustration of majority rule—is in fact protected under the Guarantee Clause. This warrants revisiting the Constitution's guarantee of a republican form of government to explore how it may be applied in the context of partisan gerrymandering.

### A. *History of Judicial Enforcement and Renewed Interest in Justiciability*

The most famous case involving the Guarantee Clause is *Luther v. Borden*.[94] The Supreme Court was asked to decide between two competing governments of Rhode Island during the Dorr Rebellion.[95] A group of citizens led by Thomas Dorr rebelled against the charter

91. *See* Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/ [https://perma.cc/XX8L-BMF2].

> [W]ith the rise of big data and big datasets, mapmakers have been able to scry—with remarkable accuracy—both the political leanings and voting likelihood of blocks and households, which then allow them much more fine-tuning of district lines . . . . [I]n 2010, they gained a remarkable amount of precision and could place individual voters in buckets and then districts.

*Id.*

92. ) DALEY, *supra* note 88, at 51–53; HERSH, *supra* note 84, at 69.

93. DALEY, *supra* note 88, at 56; HERSH, *supra* note 84, at 72–73 (explaining how Catalist's predictive partisan scoring and turnout propensity scoring are used to estimate vote choice and likelihood of turnout based on voter history and personal traits).

94. ) Luther v. Borden, 48 U.S. 1 (1849).

95. *See id.* at 34–35. *See generally* John S. Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 J. AM. LEGAL HIST. 111 (1972).

government of Rhode Island because of the state's suffrage restrictions.[96] The case arose after a representative of the charter government, Luther Borden, broke into Martin Luther's home to arrest him for supporting the rebellion.[97] Luther sued for trespass, and Borden argued he was acting on behalf of the charter government after it had imposed martial law.[98] Luther responded by alleging that the Dorr group was the true government.[99] Therefore, the case hinged on which was the state's legitimate government.[100] Rhode Island was nearly embroiled in a civil war when the Court declared that the question was for the political branches to decide rather than the judiciary.[101] Chief Justice Taney's majority opinion stated that the effects of a decision declaring the existing government illegitimate were too far-reaching and that the issue was constitutionally committed to Congress and the President.[102] Although *Luther* is considered a Guarantee Clause case, the plaintiff did not allege that the charter government was unrepublican.[103] Instead, Luther's argument was that the Dorr government superseded it.[104] The Court likely only reached the Guarantee Clause question as a means to avoid a conflict with the executive branch.[105] President Tyler had already recognized the preexisting government as legitimate and had considered sending troops to support it.[106] A judicial decision to the contrary would have presented a conflict between the federal branches with the Court's decision likely being ignored.

Even after *Luther*, however, the Court did not always invoke the political question doctrine to dismiss Guarantee Clause claims.[107] In

96. *See Luther*, 48 U.S. at 35.

97. *Id.*

98. *Id.* at 34–35.

99. *Id.* at 35 ("[P]laintiff insists . . . that [the charter] government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it.").

100. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1925–27 (2015).

101. *Luther*, 48 U.S. at 47.

102. *Id.* at 43.

103. Grove, *supra* note 100, at 1928.

104. *Id.*

105. A less charitable view is that Chief Justice Taney—who later authored *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV—had in mind future cases arguing slavery was incompatible with a republican form of government. *See* Grove, *supra* note 100, at 1928–29.

106. *Luther*, 48 U.S. at 44.

107. *See, e.g.*, Att'y Gen. of Mich. *ex rel.* Kies v. Lowrey, 199 U.S. 233, 237–39 (1905) (deciding that the creation of a school district did not violate the Guarantee Clause); Forsyth v. Hammond, 166 U.S. 506, 515–16, 519 (1897) (finding that the Guarantee Clause was not violated by a State's delegation of authority to the state judiciary to decide questions of annexation by a city); Duncan v. McCall, 139 U.S. 449, 461–62 (1891) (deciding a Guarantee Clause challenge to a Texas death penalty statute on the merits).

*Minor v. Happersett*, the Court ruled on the merits that denying women's suffrage was not inconsistent with a republican form of government.[108] In *Coyle v. Smith*, the Court declined to apply its rule in *Luther* that it must defer to the judgment of the political branches and refused to enforce conditions upon the State of Oklahoma's admission into the Union.[109] The justiciability of the Clause was also assumed in Justice Harlan's dissent in *Plessy v. Ferguson*, which argued that racial segregation violated the Constitution's guarantee of a republican form of government.[110]

Many later decisions cited Chief Justice Taney's dicta in *Luther* as controlling despite the extraordinary facts underlying the case. This occurred in *Pacific States Telephone & Telegraph Co. v. Oregon*, where the Court interpreted *Luther* as holding the Guarantee Clause nonjusticiable in all cases.[111] After *Pacific States*, many cases simply reject Guarantee Clause challenges with a single sentence stating the Clause is nonjusticiable or is textually committed to Congress and the President.[112] However, there are notable exceptions. The Court in *Baker* and *Reynolds* refused to say the Guarantee Clause was per se nonjusticiable and discussed the Clause at length before reaching decisions using equal protection.[113]

More recently, Justice O'Connor's opinion in *New York v. United States* questioned whether cases under the Guarantee Clause were per se nonjusticiable.[114] The Justice noted that the holding in *Luther* has not

108. Minor v. Happersett, 88 U.S. (21 Wall.). e 162, 176–78 (1875).

109. Coyle v. Smith, 221 U.S. 559, 562–63 (1911).

110. Plessy v. Ferguson, 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting) ("Such a system is inconsistent with the guaranty given by the constitution to each state of republican form of government, and may be stricken down by congressional action, *or by the courts* in the discharge of their solemn duty to maintain the supreme law of the land . . . ." (emphasis added)), *overruled by* Brown v. Bd. of Educ, 347 U.S. 483 (1952). Justice Harlan believed segregation was unrepublican because it "place[d] in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the People of the United States, for whom, and by whom through representatives, our government is administered." *Id.*

111. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 147 (1912).

112. *See, e.g.*, Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79–80 (1930) (stating without analysis that the Guarantee Clause presents political—not judicial—questions); Mountain Timber Co. v. Washington, 243 U.S. 219, 234–35 (1917) (finding that the plaintiff's Guarantee Clause claim "may be disposed of briefly"); O'Neill v. Leamer, 239 U.S. 244, 248 (1915) (describing the attempt to invoke the Guarantee Clause as "obviously futile").

113. Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("As we stated in *Baker v. Carr*, some questions raised under the Guaranty Clause are nonjusticiable . . . ."); Baker v. Carr, 369 U.S. 186, 210–11 (1962) (discussing the Guarantee Clause and the need to perform a case-by-case analysis before invoking political question doctrine). Another example is Justice Cardozo's opinion in *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (reaching the merits of the claim to find plaintiffs were not denied a republican form of government).

114. New York v. United States, 505 U.S. 144, 184–85 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.").

always been treated as a general rule and that the Supreme Court has reached the merits of cases brought under the Guarantee Clause without treating them as nonjusticiable.[115] The most remarkable part of Justice O'Connor's opinion is that it assumed justiciability to decide the merits of the Guarantee Clause issue.[116] Since *New York*, several lower federal courts have questioned the nonjusticiability of the Clause.[117] The most significant decision came from a challenge to Colorado's Taxpayer's Bill of Rights, which was passed by voter initiative and limits state and local government ability to increase taxes without prior voter approval. The Tenth Circuit held that the Guarantee Clause claims brought by state legislators were not barred by the political question doctrine, effectively holding that the Guarantee Clause claim was justiciable.[118]

### B. *Analysis of the Structure and Text of Article IV, Section 4*

The structure and text of the Guarantee Clause indicate that it protects individual political rights and that protection of these rights is not exclusive to the political branches. The Court has interpreted the Clause as providing a guarantee to state governments that only Congress and the President may fulfill.[119] It has also asserted that the Clause provides no standards by which a court may determine whether the Clause is satisfied.[120] This reading unnecessarily limits the application of the Clause and renders it a constitutional nullity that is not consistent with its place in the Constitution.[121]

115. *Id.* at 185.

116. *Id.* at 185–86 ("Even if we assume that petitioners' claim is justiciable, neither [the statute nor the harm complained of] can reasonably be said to deny any State a republican form of government.").

117. Largess v. Supreme Jud. Ct., 373 F.3d 219, 225 (1st Cir. 2004) (noting that "resolving the issue of justiciability in the Guarantee Clause context may also turn on the resolution of the merits of the underlying claim"); Kidwell v. City of Union, 462 F.3d 620, 635 n.5 (6th Cir. 2006) (Martin, J., dissenting) ("Perhaps it is time for the Supreme Court to reconsider its Guarantee Clause jurisprudence."); Padavan v. United States, 82 F.3d 23 (2d Cir. 1996) (stating that it was possible that not all Guarantee Clause claims are nonjusticiable but that plaintiffs failed to demonstrate justiciability); R.J. Reynolds Tobacco Co. v. Bonta, 272 F. Supp.2d 1085, 1007 n.27 (E.D. Cal. 2003) (discussing the Supreme Court's pivot from per se nonjusticiability in *Colegrove* to case-by-case analysis in *Reynolds* and *New York*), *aff'd*, 384 F.3d 1126 (9th Cir. 2004).

118. Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014), *vacated and remanded*, 576 U.S. 1079 (2015) (remanding in light of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), a case which dealt with legislative standing rather than political question doctrine).

119. *See supra* Section II.A.

120. *See supra* Section II.A.

121. Chemerinsky, *supra* note 11, at 873–74 ("This is inconsistent with 200 years of precedent establishing the importance of Supreme Court review to assure that state courts properly interpret and apply the United States Constitution."). As a consequence, only state courts may adjudicate Guarantee Clause claims. *E.g.*, People v. Horan, 556 P.2d 1217, 1220

The Court has defined voting as a "fundamental" right;[122] however, the Constitution does not explicitly guarantee the right to vote and provides no clear rules for how elections are to be held.[123] Instead, these determinations are delegated to the states. Article I, Section 2 provides that the House of Representatives shall be chosen by "the People" but only requires that these electors have the same qualifications as those for "the most numerous Branch of the State Legislature."[124] The Elections Clause confers upon state legislatures the power to determine the "Times, Places and Manner of holding Elections for Senators and Representatives."[125] The Presidential Electors Clause provides that the states "shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to select a president.[126] The Fifteenth, Nineteenth, and Twenty-Sixth Amendments merely forbid denial of voting rights on the basis of race, sex, or age over eighteen, respectively, but do not affirmatively grant the right to vote.[127] The Seventeenth Amendment requires that Senators from each state be elected "by the people thereof," again meaning those "electors of the most numerous branch of the State legislatures."[128] Taken together, these constitutional provisions place an enormous responsibility on state legislatures for regulating the democratic process. There are only two explicit federal checks on these powers: "Congress may at any time by Law make or alter such Regulations,"[129] and each House of Congress "shall be the Judge of the Elections, Returns and Qualifications of its own

(Colo. 1976) (finding that separation of powers is not required by the Guarantee Clause); *In re* Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308, 315 (Colo. 1975) (same); Van Sickle v. Shanahan, 511 P.2d 223, 234 (Kan. 1973) (finding that separation of powers is required); Heimerl v. Ozaukee Cty., 40 N.W.2d 564, 567 (Wis. 1949) (finding that taxation for private purposes is not allowed).

122. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 561 (1964).

123. Pope v. Williams, 193 U.S. 621, 632 (1904) ("The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments."); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 170 (1874) ("The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters.").

124. U.S. CONST. art. I, § 2, cl. 1.

125. *Id.* art. I, § 4, cl. 1.

126. *Id.* art. II, § 1, cl. 2; *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (stating that there is "no federal constitutional right to vote" in a presidential election "unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college").

127. U.S. CONST. amend. XV, § 1 (providing that voting rights "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude"); *id.* amend. XIX, § 1 (providing that voting rights "shall not be denied or abridged . . . on account of sex"); *id.* amend. XXVI, § 1 (providing that voting rights of those of the age of eighteen or older "shall not be denied or abridged . . . on account of age").

128. *Id.* amend. XVII.

129. *Id.* art. I, § 4, cl. 1.

Members."[130] The Equal Protection Clause also provides a safeguard against arbitrary or disparate treatment once the right to vote has been granted, but only applies when the franchise has in fact been granted.[131] Outside of these basic limits, the Constitution provides a broad delegation of authority to state legislatures to regulate federal elections.[132]

There is an inherent problem with allowing states to regulate federal elections subject only to regulations that Congress may or may not enact. States can have a significant impact on the composition of Congress as well as the election of the President.[133] It is unlikely that members of Congress benefiting from unfair election regulations would vote to alter such regulations. This is especially apparent in the context of gerrymandering. State legislatures are responsible for drawing the boundaries of both state legislative and congressional districts. Not only may a party entrench itself in power on a state level, it may also play a role in permanently entrenching itself on a federal level, thereby frustrating any congressional attempt to regulate its own efforts to undermine the democratic process. The guarantee of a republican form of government acts as a democratic safeguard against these dangers of minority-party entrenchment.

Beginning with *Luther* and followed by its progeny, courts have construed the Guarantee Clause narrowly and thus deprived litigants of the individual rights it protects. As the Supreme Court has stated, "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[134] It is important to carefully review the text and structure of the Guarantee Clause to understand how the conventional

130. *Id.* art. I, § 5, cl. 1.

131. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

132. Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 28–29 (2020). However, this is not a "reserved" power but instead is an express delegation. As such, the Court has found implicit limitations on the authority granted to state legislatures. *E.g.*, Cook v. Gralike, 531 U.S. 510, 523 (2001) ("States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause."); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995) ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.").

133. There are two ways state legislatures may have a direct influence on presidential elections. First, states may deny their citizens an opportunity to vote for president and choose their own slate of electors. Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam). Second, if no presidential candidate receives a majority of electoral votes, a president must be selected by Congress where each state's congressional delegation has one vote. U.S. CONST. amend. XII.

134. United States v. Sprague, 282 U.S. 716, 731 (1931).

reading of the Clause does not reflect its original public meaning.[135] This analysis breaks down the Clause into its four most natural parts to determine what they should fairly be construed to mean.

1. "The United States . . . ."

The Supreme Court has held that enforcement of the Guarantee Clause is committed to Congress or the President. This interpretation is peculiar because the text of the Clause does not limit enforcement to either branch, and its placement in Article IV suggests it is in fact intended to be enforceable by all three branches.[136]

Articles I, II, III, and IV consistently use "United States" to refer to the whole of the federal government. In no circumstance does the Constitution limit "United States" to mean a single branch without making such a limitation explicit. It vests all legislative power "in a Congress *of the United States*,"[137] provides that executive power "shall be vested in a President *of the United States*,"[138] and vests the Supreme Court and inferior courts with the "judicial Power *of the United States*."[139] Whenever certain powers and duties are limited to a specific branch, the Constitution says so: "*Congress* may at any time by Law make or alter such Regulations" regarding federal elections;[140] "*The President* shall be Commander in Chief";[141] and "*The judicial Power* shall extend to all Cases [and] Controversies."[142] Even in Article IV, there is a clear delineation of authority: "New States may be admitted *by the Congress* into this Union" and "*[t]he Congress* shall have Power to dispose of and

135. Any successful argument to revive the Guarantee Clause will likely have to be made using the Clause's original public meaning. Regardless of its merits, this mode of constitutional interpretation has become a strong force within the federal judiciary. Indeed, even the more liberal members of the Court have embraced varying degrees of this judicial philosophy and gained the votes of their more conservative colleagues. *See, e.g.*, Chiafalo v. Washington, 140 S. Ct. 2316, 2326–27 (2020) (unanimous opinion by Kagan, J.) (discussing the original understanding of the role of presidential electors); Evenwel v. Abbott, 136 S. Ct. 1120, 1127–28 (2016) (unanimous opinion by Ginsburg, J.) (finding that state use of total population for redistricting is consistent with the understanding of the apportionment process during the founding era). Arguments based on original public meaning may also be more likely to result in a rejection of long-standing precedent. *See generally* Jeffrey Rosen, *Originalism, Precedent, and Judicial Restraint*, 34 HARV. J. L. & PUB. POL'Y 129 (2011) (discussing originalist approaches to dealing with precedent that conflicts with the text of the Constitution).

136. McConnell, *supra* note 27, at 106 n.15 ("It may well be that enforcement is not confined to any one branch of the federal government, in contrast to provisions explicitly vesting enforcement in Congress, or implicitly in the courts. But it is hard to see why it should be interpreted as precluding a role for the courts.").

137. U.S. CONST. art. I, § 1 (emphasis added).

138. *Id.* art. II, § 1, cl. 1 (emphasis added).

139. *Id.* art. III, § 1 (emphasis added).

140. *Id.* art. I, § 4, cl. 1 (emphasis added).

141. *Id.* art. II, § 2, cl. 1 (emphasis added).

142. *Id.* art. III, § 2, cl. 1 (emphasis added).

make all needful Rules and Regulations" regarding property or territory of the United States.[143] Thus, when the Framers intended to limit the delegation of certain powers or duties to Congress, the President, or the courts, they stated so unambiguously. When they referred to the whole of the federal government—including Article III courts—they used the term "United States."[144]

This broader interpretation of "United States" is supported by the similar interpretation of the word "State" in other contexts. For purposes of equal protection, for example, it has long been understood that a "State" includes "its legislative, its executive, or its judicial authorities"[145] The Fourteenth Amendment provides that "nor shall any *State* . . . deny to any person . . . the equal protection of the laws."[146] This has been read to include all branches of state government, including courts.[147] Only in the Guarantee Clause has the subject of a provision in the Constitution been so severely constrained by judicial interpretation.

2. "[S]hall guarantee . . . ."

The words from which the Clause derives its common name are perhaps the easiest to understand. The Clause strangely uses the noun *guarantee* rather than the verb *guaranty*, which would have been the proper form at the time.[148] Regardless, its use as a verb indicates that the word meant "to undertake to secure the performance of any articles."[149] These definitions combined with the mandatory *shall* suggest that the United States was to have an active role in enforcing the Clause to prevent any state from rejecting the republican form. Indeed, this is consistent with the Clause's drafting history and the inferences that may be drawn

143. *Id.* art. IV, § 3, cl. 1 (emphasis added).

144. There is also evidence that the public understood the "United States" to include the judicial power. Using the pseudonym Cassius, James Sullivan suggested the judiciary would have a role if the guarantee of a republican government was unenforced. Cassius, XI, *To the Inhabitants of this State*, MASS. GAZETTE, Dec. 25, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 43, 44 (Paul Leicester Ford ed., 1892). Another commentator discussed the role of both the judicial and executive branches to act as a revisory power to preserve republican government. *See* Americanus I, N.Y. DAILY ADVERTISER, Nov. 2, 1787, *reprinted in* XIX RATIFICATION BY THE STATES: NEW YORK 171 (John P. Kaminski. et al. eds., 2003).

145. *See* Virginia v. Rives, 100 U.S. 313, 318 (1880).

146. U.S. CONST. amend. XIV, § 1 (emphasis added).

147. Shelly v. Kraemer, 334 U.S. 1, 14–15 (1948).

148. *Compare Guarantee*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 6th ed. 1785) ("Guarantee. *n.s.* [*guarant.* French.] A power who undertakes to see stipulations performed."), *with id.* at *Guaranty* ("Guaranty. *v.a.* [*garantir*. French.] To undertake to secure the performance of any articles.").

149. *Id.* at *Guaranty*. Other founding-era dictionaries provided similar definitions. *See, e.g.*, *Guaranty*, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (Thomas Sheridan ed., 1780) ("To undertake to secure the performance of a treaty or stipulation between contending parties.").

from its early drafts. For example, one version of the Clause included "the territory of each State."[150] Such a federal guarantee of state territory almost certainly would have been enforced if a state threatened its neighboring state's property rights. It was also proposed that the Clause should guarantee existing state laws, which sparked concerns that states would not even be allowed to amend their constitutions.[151] Thus, the word *guarantee* was understood as requiring the federal government to actively enforce the Clause's guarantee of a republican form of government.

3. "[T]o every State in this Union . . . ."

The next matter of interpretation in the Guarantee Clause is the meaning of the phrase "State in this Union." Normally, such a phrase would not be ambiguous. However, the Constitution uses the word "State" in four different ways, though only two are relevant to Article IV.[152] "State" could either refer to particular state governments—that is, organized political institutions—or it may refer to the people subject to those organized political institutions.[153] If it refers to states in their organized institutional capacity, the Clause could reasonably be read as concerning the structure of government and state autonomy.[154] In this sense, the Clause protects states from excessive federal control. On the other hand, if it refers instead to the people comprising each state and subject to state government control, the Clause clearly involves individual rights which warrant judicial protection.

Interpreting "State" to mean anything but the state as a whole—its individual residents and its organized institutions—undermines the meaning of Article IV, Section 4. The argument for the latter interpretation is strong for two reasons. First, construing "State" to mean state government leads to an absurd result where the Clause guarantees a form of government to the government institution in charge of preserving that government's form. If a state's legislature decided to strip itself of all authority and cede power to its executive—thereby establishing a quasi-monarchy—it would be absurd to claim it is incumbent upon that

150. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (Max Farrand ed., 1911).

151. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 48 (Max Farrand ed., 1911).

152. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 441 (1833) ("It sometimes means, the separate sections of territory occupied by the political societies within each; sometimes the particular governments established by these societies; sometimes these societies as organized into these particular governments; and lastly, sometimes the people composing these political societies in their highest sovereign capacity.").

153. *Id.*; WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES 603 (1904) ("The 'state' here referred to is a member of the Union, an organized people, or a community of free citizens occupying a definite territory." (footnotes omitted)).

154. *See generally* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

legislature to seek enforcement of the republican guarantee. As will be seen below, the republican guarantee is a safeguard for political rights and popular sovereignty. Therefore, if it has meaning at all, "State" must be interpreted to include residents in addition to political institutions.

This broader interpretation is further supported by the manner in which founding-era commentators referred to the republican guarantee. One commentator, using the pseudonym Curtius, wrote that "should ever the liberties *of the people* be violated . . . from this constitution they must experience a peculiar advantage."[155] One of those advantages was that "the union is bound to guard the rights of the injured, and to guarantee to each state a republican form of government."[156] James Sullivan, under the pseudonym Cassius, went as far to say that the Bill of Rights was unnecessary because the Guarantee Clause "secures *to us* the full enjoyment of every thing which freemen hold dear, and provides for protecting us against every thing which they can dread."[157] The guarantee is spoken of in personal terms where the object of the Clause—"every State"—is interpreted to include individual citizens of the states.

Second, reading the Guarantee Clause together with the rest of Section 4 makes clear that "State" is intended to be construed broadly. The Invasion and Domestic Violence Clauses provide that the United States "shall protect each of [the States] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[158] It is noteworthy that the Domestic Violence Clause singles out the legislature and the executive in a way that the Guarantee Clause does not. The Invasion Clause similarly contains no such restriction. While it could be claimed these word choices indicate that the Clauses vest no personal rights, it makes more sense to think of them as a reflection of the intended purpose of each Clause. If "United States" includes Article III courts in addition to Congress and the President, the reasonableness of the word choice is evident. Section 4 begins by using broad language for the right most amenable to enforcement by all federal branches: the guarantee of a republican form of government. The Invasion Clause provides that those same federal branches shall protect the states—and by extension, their residents—from invasion. Importantly, this Clause is not limited to foreign hostilities but was also understood as protecting against the "ambitious or vindictive enterprises" of other states.[159] Supreme Court precedent notwithstanding, it is not inconceivable to imagine a federal

155. Curtius III, *An Address to Federalists*, N.Y. DAILY ADVERTISER, Nov. 3, 1787, *reprinted in* XIX RATIFICATION BY THE STATES: NEW YORK 174 (John P. Kaminski et al. eds., 2003) (emphasis added).

156. *Id.*

157. Cassius, XI, *supra* note 144, at 44 (emphasis added).

158. U.S. CONST. art. IV, § 4.

159. THE FEDERALIST NO. 43, at 275–76 (James Madison) (Clinton Rossiter ed., 1961).

court ordering a remedy for either of the ills these Clauses intended to cure or prevent.

The Domestic Violence Clause then introduces the only limiting words present in Section 4. It specifies that a state legislature, or the executive if the legislature cannot convene, may apply for federal assistance in cases of domestic violence.[160] This specification is significant as it presupposes that "State" in the Guarantee Clause means more than the organized political institutions enumerated in the Domestic Violence Clause. Construed together, the Clauses provide a mechanism for enforcing rights while also preserving state autonomy. Where the self-interest of the state must be balanced against individual rights, the language is broad and allows enforcement by any federal branch. But where state autonomy must be preserved, the language is narrow to provide greater protection against federal intervention.

4. "[A] Republican Form of Government . . . ."

The root of the republican form, as understood by those who drafted and ratified the Constitution, is popular sovereignty and majority rule.[161] The original public meaning of the term at the time of the founding included connotations of majority rule and "the right of the people to alter or abolish" state government.[162] Though it has been argued that republican government refers only to a system of representation as opposed to direct democracy, this misunderstanding ignores the common usage of the words at the time the Constitution was drafted and ratified. This is due in part because the common meaning of *republic*—and by extension, *republican*—has changed throughout history. Determining the meaning of republican government is complicated by the fact that the word's usage has varied, from that of a literal adjective to an expression of ideology and culture.[163]

*Republic* derives from the Latin word *res publica*, meaning "the public thing," "the people's property," or "public affairs."[164] Taken literally, any government in which power is not concentrated in one person could be considered a republic. Even Augustus was said to have

160. U.S. CONST. art. IV, § 4.

161. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749–50 (1994).

162. *Id.* at 762 (quoting THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

163. ROBERT A. DIVINE ET AL., THE AMERICAN STORY, 185–86 (5th ed., combined vol. 2013) ("For [the founding generation], republicanism represented more than a particular form of government. It was a way of life, a core ideology, an uncompromising commitment to liberty and equality.").

164. MORTIMER N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 217 (1994).

possession over the *res publica* according to the Roman jurist Capito, despite the Roman Senate's wide grant of authority to the Emperor.[165] Indeed, the governments of England, Holland, Poland, and Venice were also said to be republican in form despite the presence of a monarch and aristocracy.[166] "These examples," as James Madison remarked, "which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions."[167] Because the Framers of the Constitution explicitly sought to reject this style of government, it is safe to assume they did not have the technical meaning of the word in mind when drafting the Constitution.

Dictionaries from 1755 to 1790 define *republican* broadly as "[p]lacing the government in the people."[168] A political dictionary states that the word *republic* was "applicable to a society having a popular government."[169] It also notes that a republic was "sometimes understood to be equivalent to *democracy*, and the word *republican* is considered equivalent to *democrat*."[170] While the meaning of democracy clearly varied from that of republic,[171] it is significant that democratic principles and majority rule had become embedded in the public's understanding of the republican form of government.

The manner in which both the Framers and commentators spoke about the republican form confirms this popular understanding. During his first inaugural address, Thomas Jefferson described "the essential principles of our Government" and "the surest bulwarks against antirepublican tendencies."[172] These include, among others, "a jealous care of the right of election by the people" and "absolute acquiescence in the decisions of the majority, the vital principle of republics."[173] The Guarantee Clause has been attributed to James Wilson, who was a major

165. 3 THE ATTIC NIGHTS OF AULUS GELLIUS 31–34 (W. Beloe trans., 1795) (ca. 177 A.D.); *see also* William Turpin, *Res Gestae 34.1 and the Settlement of 27 B.C.*, 44 CLASSICAL Q. 427, 435–36 (1994) (discussing the ways in which Romans, including Capito, spoke about the *res publica* after Augustus took possession of it).

166. THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961).

167. *Id.* at 241.

168. *Republican*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 1755); *Republican*, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (Thomas Sheridan ed., 3d ed. 1790).

169. *Republic*, POLITICAL DICTIONARY (Charles Knight & Co., 1846).

170. *Id.*

171. *See Democracy*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 1755) ("One of the three forms of government; that in which the sovereign power is neither lodged in one man, nor in the nobles, but in the collective body of the people.").

172. *Thomas Jefferson's First Inaugural Address* (1801), *in* THE EVOLVING PRESIDENCY: LANDMARK DOCUMENTS, 1787–2010, 68, 71–72 (Michael Nelson ed., 4th ed. 2012).

173. *Id.* at 72.

influence in the framing of the Constitution and became one of the first six Justices appointed by George Washington.[174] In *Chisholm v. Georgia*, Justice Wilson defined a republican government as "one constructed on this principle, that the Supreme Power resides in the body of the people."[175] In *The Federalist No. 39*, James Madison argued that "[i]t is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it."[176] Otherwise, it "would be degraded from the republican character."[177] He continues by saying that the "House of Representatives will derive its power from the people" which will be "represented in the same proportion and on the same principle as they are in the legislature . . . ."[178] He also explained in *The Federalist No. 10* that "[i]f a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."[179] Here, Madison expressed a clear concern for minority rule and believed the republican form—meaning majority rule—was the solution to this problem.

A similar sentiment was expressed in *The Federalist No. 63*, where Madison contemplated that the "sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the view of its rulers."[180] This is a clear expression of the notion that a free, *republican* government is one in which the views of the majority are respected. Even Alexander Hamilton—not particularly known for having favorable views of democracy[181]—wrote in *The Federalist No. 78* that a "fundamental principle of republican government" is one "which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness."[182]

174. DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES 1282 (1910); William Ewald, *James Wilson and the Drafting of the Constitution*, 10 J. CONST. L. 901, 913–16 (2008) (discussing Wilson's role at the Constitutional Convention and his appointment to the Supreme Court).

175. Chisholm v. Georgia, 2 U.S. 419, 457 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

176. THE FEDERALIST NO. 39, *supra* note 166, at 241 (James Madison); *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 67–68 (1833).

> It may, therefore, be safely laid down, as a fundamental axiom of republican governments, that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents.

*Id.*

177. THE FEDERALIST NO. 39, *supra* note 166, at 241 (James Madison).

178. *Id.* at 244.

179. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

180. THE FEDERALIST NO. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961).

181. *See generally* BRUCE MIROFF, ICONS OF DEMOCRACY 12–49 (2000) (discussing Hamilton's unique view of American aristocracy and its place in a democratic republic).

182. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Publications from lesser-known authors are also illustrative. For example, a writer using the pseudonym Centinel understood a republican government to be "such a government [where] the people are the sovereign and their sense or opinion is the criterion of every public measure."[183] Further, he wrote that "when this ceases to be the case, the nature of the government is changed, and an aristocracy, monarchy or despotism will rise on its ruin."[184] The implication here is that republican government was synonymous with majority consent of those subject to its control.

The words of Madison, Hamilton, or any other founding-era writers are admittedly not indicative of the "pure" or "technical" definition of republicanism. However, the unique context of *The Federalist Papers* and similar publications give their use and understanding of the term special significance. These writings were used to persuade each state to ratify the Constitution and thus illustrate the original public meaning of each term at the time of ratification.[185] Regardless of whether *republican* includes notions of popular sovereignty and majority rule in a technical sense, that is how the word was used and understood by the public at the time the Constitution was ratified.

## III. APPLYING THE GUARANTEE CLAUSE TO PARTISAN GERRYMANDERING

The case law concerning the Guarantee Clause was settled several decades before the Supreme Court began to seriously consider challenges to legislative and congressional apportionment and redistricting plans. Multiple decisions left the Guarantee Clause without any judicially cognizable standards by which the Court could distinguish a benign redistricting plan from an unconstitutional gerrymander.[186] Though the Court in *Baker* and *Reynolds v. Sims* acknowledged that not all claims under the Guarantee Clause are nonjusticiable, it still turned to its "familiar" equal protection jurisprudence.[187] The Equal Protection Clause was a peculiar choice in some respects. The one-person, one-vote standard derived from equal protection ignores that population equality

183. Centinel I, *To the Freemen of Pennsylvania*, PHILA. INDEP. GAZETTEER DAILY ADVERTISER, Oct. 5, 1787, *reprinted in* XIII COMMENTARIES ON THE CONSTITUTION, NO. 1. 326–37 (John P. Kaminski et al. eds., 1981).

184. *Id.*

185. ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) (discussing how the writings of Alexander Hamilton, James Madison, and John Jay, "like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood").

186. Colegrove v. Green, 328 U.S. 549, 556 (1946); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 140 (1912); Luther v. Borden, 48 U.S. 1, 43 (1849).

187. Baker v. Carr, 369 U.S. 186, 226 (1962) ("Judicial standards under the Equal Protection Clause are well developed and familiar . . . .").

among districts does not guarantee votes will be weighted equally. For example, it does not account for noncitizen residents, children, or citizens that have been disenfranchised.[188] Therefore, voters in districts with substantial non-voting populations will still have their votes weighted more heavily than those with smaller non-voting populations.

Equal protection works well in cases where minority interests are at stake. Much of the Court's equal protection doctrine is in fact rooted in the idea that certain state actions require additional scrutiny when minority interests or political processes are harmed.[189] This explains why the Court has had little trouble judging redistricting plans where race discrimination[190] or population inequality[191] are present. In both situations, a minority interest is at stake and the Equal Protection Clause generally provides adequate standards and protection. Despite its success, the Equal Protection Clause is not suitable for protecting majority interests.[192] Indeed, it is worth asking exactly what is unequal about partisan gerrymandering under the one person, one vote standard.[193] The inequality complained of does not arise solely from the fact one party may

188. CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 41–42 (2010); McConnell, *supra* note 27, at 110–11 (arguing that "it is literally impossible for voters to have equal voting power" because of population variations); *see also* Karcher v. Daggett, 462 U.S. 725, 752 (1983) (Stevens, J., concurring) (observing that births, deaths, population shifts, and census errors make population equality "impossible").

189. Korematsu v. United States, 323 U.S. 214, 216 (1944) (stating that laws burdening minorities must be subject "to the most rigid scrutiny"), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (requiring courts to apply "strict scrutiny" to fundamental rights protected by the Equal Protection Clause).

190. Hunt v. Cromartie, 526 U.S. 541 (1999); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

191. Karcher v. Daggett, 462 U.S. 725 (1983); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

192. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (discussing "whether prejudice against discrete and insular *minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect *minorities*, and which may call for a correspondingly more searching judicial inquiry" (emphasis added)); *see also* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718–19 (1985) ("*Carolene* casually disregards the easiest case for finding a substantive defect in a formally fair electoral process: the case in which organizational difficulties have prevented a commanding majority of the population from influencing the ongoing flow of legislative decisions."); Amar, *supra* note 161, at 754 (mentioning that the Equal Protection Clause was intended to protect minority rights rather than majority rights).

193. Rucho v. Common Cause, 139 S. Ct. 2484, 2489 (2019) ("This Court's one-person, one-vote cases recognize that each person is entitled to an equal say in the election of representatives. It hardly follows from that principle that a person is entitled to have his political party achieve representation commensurate to its share of statewide support."). *But see* Reynolds v. Sims, 377 U.S. 533, 555 n.29 (1964) ("The right to vote includes . . . the right to have the vote counted at full value without dilution or discount."); Gerken, *supra* note 49, at 1677 ("The notion of dilution, however, 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.").

at times hold a disproportionate number of seats.[194] The true inequality is when one party is able to systematically frustrate the will of the majority by placing a certain class of voters in an inferior position.

### A. *Party Entrenchment and the Right to Alter or Abolish*

The Framers of the Constitution were aware that redistricting could be used for political gain.[195] However, this does not mean the guarantee of a republican government cannot bar *excessive* partisan gerrymandering that violates core political rights. Like other principles embodied in the Constitution, republicanism had a generally accepted public meaning during the founding era but is capable of being applied to new circumstances that may have not been foreseen at the time of ratification. Unlike gerrymanders of the founding era, today's partisan gerrymandering often goes beyond providing a mere political advantage to the point that it interferes with the republican principle: the right of the majority to alter or abolish its elected government. This fundamentally transforms the relationship between voters and their government. As Hamilton explained in *The Federalist No. 78*, "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void . . . . To deny this would be to affirm that the deputy is greater than his principal" and "that the representatives of the people are superior to the people themselves . . . ."[196] The political process cannot function properly where one party, despite garnering a minority share of votes, is able to entrench itself into power through a manipulative process such as gerrymandering.

It is often useful to think of the democratic process as a political market.[197] In a functioning political market, politicians seek to maximize

194. As others have noted, it is also entirely possible to craft an excessive partisan gerrymander while complying with the one person, one vote requirement. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 750 n.12 (1964) (Stewart, J., dissenting)

> Even with legislative districts of exactly equal voter population, [twenty-six percent] of the electorate (a bare majority of the voters in a bare majority of the districts) can, as a matter of the kind of theoretical mathematics embraced by the Court, elect a majority of the legislature under our simple majority electoral system. Thus, the Court's constitutional rule permits minority rule.

*Id.*; Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 666–67 (2017) (noting this conceptual problem with reviewing partisan gerrymandering under the Equal Protection Clause).

195. BULLOCK III, *supra* note 188, at 107–08.

196. THE FEDERALIST NO. 78, *supra* note 182, at 467 (Alexander Hamilton); *see also* THE FEDERALIST NO. 14, at 101–02 (James Madison) (Clinton Rossiter ed., 1961) (discussing republicanism in terms of principal–agent theory); Amar, *supra* note 161, at 762–63 (linking the founding era understanding of republicanism with majority rule).

197. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

their reelection chances by responding to the demands of a majority of their constituents.[198] This method is somewhat risky. Events outside the politicians' control may prevent them from achieving their goals and cost them reelection. However, they can also directly influence the electoral process to insulate themselves from challengers.[199] Partisan gerrymandering distorts the electoral process by reducing competition. In this instance, the political market has failed when majority rule no longer controls.[200] The general focus on mathematical voting equality and a refusal to consider the anticompetitive effects of partisan gerrymandering has allowed this political lockup to continue.[201] Even those who do consider the broader distortive effects of the practice still attempt to fit these structural concerns into the established equal protection doctrine. The Guarantee Clause, on the other hand, is premised on the concept of majority rule and popular sovereignty.

The threat of party entrenchment has grown significantly. The introduction of GIS, enhanced computing power, and rise of big data have given mapmakers greater gerrymandering capabilities.[202] The problem with partisan gerrymandering today is not just a lack of logical boundaries and resulting effects on electoral trust or participation.[203] Rather, the true problem from a constitutional perspective is the risk of party entrenchment and permanent minority rule. Party entrenchment occurs when one political party reliably wins a majority of the legislative seats with a minority share of the statewide vote.[204] If the party continues to maintain control until the decennial redistricting cycle, that party can further solidify its permanent majority status for the foreseeable future regardless of which party wins the statewide vote. Following the Supreme Court's decision in *Rucho*, these partisan tactics are likely to grow more brazen and become more efficient as technology progresses. State legislatures

198. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 54–55 (1957) (explaining how parties propose platforms catering to a majority of voters).

199. Issacharoff & Pildes, *supra* note 197, at 709.

200. Indeed, Downs's theory of democracy only holds under certain conditions, such as when voters are able to determine that the marginal utility of voting outweighs its cost. DOWNS, *supra* note 198, at 38–39, 260. If voters cannot expect their vote to matter because their district has been gerrymandered, a rational voter (as defined by Downs) may abstain. *Id.* at 260 (explaining why rational voters may choose to abstain).

201. Issacharoff & Pildes, *supra* note 197, at 708–09 (discussing politicians' self-interest and manipulation of the electoral process in general).

202. *See generally* DALEY, *supra* note 88.

203. Jeffrey W. Ladewig, *"Appearances Do Matter": Congressional District Compactness and Electoral Turnout*, 17 ELECTION L.J. 137, 144 (2018).

204. A standard often used for entrenchment is Justice Breyer's definition. *See* Vieth v. Jubelirer, 541 U.S. 267, 360 (Breyer, J., dissenting) ("By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power. By *unjustified* entrenchment I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors.").

may even feel emboldened to pursue more aggressive gerrymanders knowing that federal courts will not intervene.

In the past, gerrymandering simply gave the party in control of redistricting an advantage. It might make it easier to win elections but would not guarantee victory. It might increase the proportion of seats the majority party could gain—a kind of winner's advantage—but would not force the losing party into permanent minority status. This is in contrast to the partisan gerrymanders that have arisen in the last two decades.[205] Thanks to technological advances and the use of increasingly detailed data, mapmakers now draw maps with surgical precision.[206] Most significantly, this data can be used to project future electoral outcomes in order to ensure a partisan gerrymander will deliver results for the entirety of the redistricting plan.[207]

The result will be this: more states being perpetually governed by parties receiving less than a majority of the statewide vote. The people's voice will no longer be heard at the ballot box and their concerns will be ignored without consequence. Justice Kagan made this exact observation in her dissenting opinion in *Rucho*:

> [G]errymanders will only get worse . . . as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, "we the people" become sovereign no longer.[208]

Justice Kagan provides an excellent diagnosis of the problem. Unfortunately, she applies an incorrect framework which leaves the opinion without standards or textual support. Her retort to Chief Justice Roberts's "[h]ow much is too much"[209] inquiry is simply "[t]his much is too much."[210] She then proceeds to discuss the widely recognized harms of severe partisan gerrymandering.[211] The Justice does an admirable job of explaining the many ways in which the majority may have misunderstood the case, but she also proves the majority's point: the Equal Protection Clause provides no standards or clear textual basis for

205. DALEY, *supra* note 88, at 50; Rucho v. Common Cause, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting) ("These are not your grandfather's—let alone the Framers'—gerrymanders.").

206. *See supra* Section I.B.

207. DALEY, *supra* note 88, at 59; *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting) ("The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides.").

208. *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

209. *Id.* at 2501 (majority opinion).

210. *Id.* at 2521 (Kagan, J., dissenting).

211. *Id.*

adjudicating partisan gerrymandering claims. Equality per se is not the fundamental issue. Assuming population equality has been satisfied, one citizen's vote does not "weigh" any more or less heavily than another's.[212]

This can be demonstrated with a simple example. First, imagine a voter from Party A is in a "packed" but equally populated district which reliably elects a legislator from Party A. Then compare that scenario to a racial gerrymander—where the voter seeks to be free from racial discrimination—or a case involving malapportionment—where a voter seeks to have their vote weighed equally. Unlike those situations, the Party A voter in the first example cannot request the removal of partisanship nor can they claim their vote was weighed differently. Yet this voter would clearly have a demonstrable injury if Party B was nonetheless entrenched in power over the objection of the majority of the electorate. The Party A voter's injury is not a denial of equal protection but rather a denial of a republican form of government.

Justice Kagan acknowledges these issues by focusing more on the structure of government and voters' right to choose their own representatives. The majority opinion is even more direct and correctly points out that such an argument "seems like an objection more properly grounded in the Guarantee Clause."[213] That is where Justice Kagan's dissent falls short: it attempts to solve a structural problem involving majority rights with a doctrine that is more focused on protecting the rights of individuals within a minority.

### B. *The Guarantee Clause and Standing Issues in Light of* Gill v. Whitford

The Supreme Court unanimously held in *Gill v. Whitford* that the plaintiffs failed to show standing to pursue their claim of a statewide harm.[214] Because the issue of standing goes to the power of the Court under Article III, it is worth discussing how the standing requirements could be satisfied in a Guarantee Clause claim where the harm is similarly statewide. As summarized in *Lujan v. Defenders of Wildlife*, in order to prove standing a plaintiff must satisfy three elements.[215] First, there must be an "injury in fact" that is "concrete and particularized" and not "conjectural."[216] Second, there must be a "causal connection between the injury and the conduct complained of."[217] Third, the injury must be able to be "redressed by a favorable decision."[218] The *Gill* plaintiffs attempted

212. *Id.* at 2514.
213. *Id.* at 2506.
214. Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018).
215. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
216. *Id.*
217. *Id.* (citing Simon v. E. Ky. Welfare Rits. Org., 426 U.S. 26, 41–42 (1976)).
218. *Id.* at 560–61 (citing *Simon*, 426 U.S. at 43).

to prove their case by using statewide theories of injury. As discussed above, this is incompatible with equal protection, which only recognizes vote dilution on an individual basis. The claim thus resembled a statewide generalized grievance due to the plaintiffs' inability to show an individual harm. Challenging a partisan gerrymander as unrepublican would require a similar statewide theory because plaintiffs would have to show party entrenchment using statewide election results. The crucial difference, however, between *Gill* and a claim under the Guarantee Clause is that the latter would recognize the injury presented by the *Gill* plaintiffs.

The three standing requirements in *Lujan* applied in *Gill* are based on *Sierra Club v. Morton*,[219] *City of Los Angeles v. Lyons*,[220] and *Simon v. Eastern Kentucky Welfare Rights Organization.*[221] The Court in *Sierra Club* held that harm to the public interest—the building of a Disney resort in the Sequoia National Forest—was insufficient to confer standing since the organization failed to state that either it or its members would suffer a "concrete" or "individualized" harm.[222] *Lyons* involved a challenge to the city police department's chokehold policy.[223] The Court found the risk of harm was too "conjectural" and "hypothetical" because the plaintiff's past exposure to chokeholds did not mean his threat of a future chokehold was "real or immediate."[224] Finally, in *Simon*, plaintiffs challenged an Internal Revenue Service rule allowing certain hospitals to adopt charitable status even if they refused to accept indigent patients.[225] The Court decided that the plaintiffs lacked standing because the injury was not traceable to the action in question and therefore could not be remedied by the Court.[226]

Importantly, the holding in *Gill* is specific to a vote dilution theory under the Equal Protection Clause.[227] Because the plaintiffs chose not to demonstrate that their individual districts had been "cracked" or "packed," none of the evidence supported a personal harm. At least part of the *Gill* plaintiffs' standing problem could have been solved by finding a plaintiff in every legislative district,[228] though this would not have changed the

219. Sierra Club v. Morton, 405 U.S. 727, 740–41 n.16 (1972).

220. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

221. *Simon*, 426 U.S. at 38.

222. *Sierra Club*, 405 U.S. at 739–41.

223. *Lyons*, 461 U.S. at 97–98.

224. *Id.* at 102, 105–06.

225. *Simon*, 426 U.S. at 28–29.

226. *Id.* at 43.

227. Gill v. Whitford, 138 S. Ct. 1916, 1930 (2018).

228. *See* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 262 (2015) (holding that challenges to redistricting plans must proceed district-by-district but that plaintiffs may present statewide evidence to prove a district-specific injury); United States v. Hays, 515 U.S. 737, 744–45 (1995) (holding that a plaintiff only has standing to assert that his own district has been gerrymandered).

underlying conceptual problem.[229] The standing requirements under a Guarantee Clause analysis, however, would be easier to satisfy because it provides a new "injury in fact": violation of the right to be in the political majority.[230] Under an equal protection vote dilution theory, the injury complained of is the violation of the individual's right to have their vote to carry equal weight. Analyzing the issue under the Guarantee Clause pulls the injury out of the established one person, one vote framework. Plaintiffs must still show a personal stake in the action; however, that personal stake would no longer have to be district specific or rely on the weight of their vote.

The first element of *Lujan*[231] is most significant in terms of the Guarantee Clause; however, it is worth dispensing with the second and third elements from the outset—causal connection and redressability.[232] Proving a causal connection between the gerrymandered plan and the harm complained of is much easier than proving the harm itself. When a state legislature draws district boundaries to harm a group of voters, there is no question that such conduct is the cause of their alleged injury. It is also not disputed that federal courts may provide redress by invalidating redistricting plans, drawing new plans, or requiring at-large elections as a last resort.[233]

At first glance, a claim that one was deprived of a republican form of government may appear to be too generalized to satisfy the first element under *Lujan*. A look at the Court's standing jurisprudence reveals that would not be the case. A classic case on generalized grievances is *United States v. Richardson*, which involved a taxpayer suit challenging a statute permitting the Central Intelligence Agency to account for expenses without providing a regular statement and account of funds.[234] The Court held the plaintiff lacked standing because the impact on the plaintiff was "undifferentiated and 'common to all members of the public.'"[235] *Lujan* involved a challenge to the Department of Interior's regulations exempting agency-funded overseas activities from certain provisions of

229. *See supra* Sections I.A, III.A.

230. It has been argued that the right to be in the political majority is the basis of injury in the equal protection context as well. *See, e.g.*, Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 1000 (2020). However, the one person, one vote framework recognizes no such right.

231. First, there must be an "injury in fact" that is "concrete and particularized" and not "conjectural." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

232. *Id.* at 561.

233. Branch v. Smith, 538 U.S. 254, 274–75 (2003) (discussing federal courts' ability to redraw congressional redistricting plans or order at-large elections if no plan can be drawn before the election); Colegrove v. Green, 328 U.S. 549, 574 (1946) (Black, J., dissenting) (noting that at-large state legislative elections would be constitutional).

234. United States v. Richardson, 418 U.S. 166, 167 (1974).

235. *Id.* at 176 (quoting *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam)).

the Endangered Species Act.[236] Justice Scalia, writing for a plurality, noted that claims challenging government actions or inactions require the plaintiff to show he or she is "an object of the action (or forgone action) at issue" and, if so, "there is ordinarily little question that the action or inaction has caused him injury."[237] Aside from the plaintiff's failure to allege an injury, Justice Scalia found that redressability was the "most obvious problem" in the case because the agencies funding the projects were not parties to the action.[238] Two issues to note about *Lujan* are that the Court accepted the general "aesthetic injury" theory[239] and that standing could have been demonstrated simply by purchasing a plane ticket to the affected areas.[240] The harm to aesthetic interest was common to the public since the regulation impacted every citizen's ability to view the affected area, but demonstrating a personal stake despite the common nature of the harm would have been sufficient for standing purposes.

The above framework provides important insight into how a claim under the Guarantee Clause could avoid a *Gill*-like standing problem. First, the harm is not a generalized grievance concerning the conduct of government such that any injury is only of "general interest common to all members of the public."[241] Partisan gerrymandering, by definition, always involves winners and losers because the lines are drawn to benefit one party at the expense of another.[242] Though it is true that all citizens of a state have an interest in maintaining a republican government, only a subset of those citizens are harmed in a particular gerrymandered plan.

Such a claim may also appear hypothetical or "conjectural" since it assumes that the electoral situation will not change over the life of a redistricting plan. This may have been persuasive in the days of paper maps and colored pencils; however, many of today's gerrymanders are designed to preserve partisan entrenchment using vast amounts of data, statistical analysis, and simulations.[243] Mapmakers can predict with a high degree of accuracy how a proposed plan will impact future elections. At the extreme, a plaintiff's demonstration that it was virtually impossible to win a majority of legislative seats despite winning a majority of votes would surely move the needle from "conjectural" to actual and immediate.

236. *Lujan*, 504 U.S. at 558.

237. *Id.* at 561–62.

238. *Id.* at 568.

239. *Id.* at 562–63.

240. *Id.* at 592 (Blackmun, J., dissenting).

241. Gill v. Whitford, 138 S. Ct. 1931, 1931 (quoting *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam)).

242. Bullock, *supra* note 14, at 243–45 (discussing the ways majority parties can use gerrymandering "to take advantage of the opposition"); BULLOCK, *supra* note 188, at 109 (explaining that majority parties work to develop redistricting plans that will benefit themselves at the expense of the minority party).

243. *See supra* Section I.B.

Even without resorting to mathematical impossibilities, a plaintiff could still demonstrate actual harm once elections began confirming the mapmaker's expectations.

The gerrymandering context may be contrasted with cases such as *Lyons*. There, one prior incident where any future risk of injury depends on the plaintiff's own conduct was deemed insufficient.[244] It may also be contrasted with cases where the alleged harm requires speculation regarding a third party's conduct.[245] Party entrenchment, on the other hand, could be proved with past results, evidence of intent, and statistical prognostications demonstrating the unlikelihood that the plaintiffs could ever achieve fair representation. That the plaintiffs are denied the chance to compete from the outset, regardless of whether they would actually succeed in winning a majority of seats in a future election, should be enough to show standing.[246] This moves the injury from the future to the present and from the conjectural to the immediate.

### C. *Crafting Manageable Standards Under the Guarantee Clause*

The Supreme Court has never found a judicially manageable standard for adjudicating claims under the Guarantee Clause. It could be said that this was once true for all constitutional provisions. Broad concepts like due process[247] and equal protection[248] contain no inherent standards and had to be developed over time. As stated in *Marbury v. Madison*, "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule."[249] Just as it has been with other clauses in the Constitution, the Court is capable of discerning what constitutes a republican form of government.[250] If it can review cases brought under

244. City of Los Angeles v. Lyons, 461 U.S. 95, 106 (1983).

245. Simon v. E. Ky. Welfare Rits. Org., 426 U.S. 26, 40–42 (1976).

246. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also* Ne. Fla. Chapter of the Associated Gen. Contractors v. Jacksonville, 508 U.S. 656, 666 (1993) (holding that loss of mere opportunity to compete on equal terms, without any guarantee of concrete gain, suffices for standing).

247. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856) (looking to the Magna Carta to determine the meaning of "due process of law").

248. Strauder v. West Virginia, 100 U.S. 303, 310 (1880) ("The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible.").

249. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

250. Duncan v. McCall, 139 U.S. 449, 461–62 (1891).

> [T]he distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves . . . .

*Id.* at 461.

the Elections Clause,[251] Commerce Clause,[252] or the First Amendment[253]—all of which required judicial interpretation of ill-defined concepts—the Court should be able to devise a standard for the Guarantee Clause.

The development of a standard for deciding whether a state government violates the republican guarantee would look no different than the development of other judicially manageable standards. Some justices and many scholars have strived for a standard that can distinguish between benign and unconstitutional gerrymanders under equal protection with near mathematical exactitude to limit judicial discretion.[254] This sets the bar unnecessarily high. While judicial discretion may be fairly criticized,[255] some level of it is required to make a decision.[256] The fact the phrase "republican form of government" may contain shades of grey does not mean it is without meaning.[257] Due process and equal protection are similarly ambiguous, both requiring the Court to look at the drafters' intent and the original public meaning.[258] In fact, the Court's essential function is to interpret the Constitution and "ascertain its meaning."[259]

251. *See, e.g.*, U. S. Term Limits, Inc. v. Thornton, 514 U. S. 779 (1995) (invalidating state constitutional amendment placing term limits on its congressional delegation).

252. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (finding the Affordable Care Act's expansion of Medicaid was an impermissible exercise of Congress's power under the Commerce Clause while declining to draw a line between what is permissible and impermissible); City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (holding that state discrimination against articles of commerce violates the Dormant Commerce Clause).

253. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 410 (2007) (deciding that certain forms of speech by minors in public school is not protected by the First Amendment); Miller v. California, 413 U.S. 15, 26 (1973) (finding that "patently offensive" speech is not protected by the First Amendment without defining the line between offensive and artistic or scientific material).

254. The reason for this is the Court's application of equal protection and the one person, one vote standard. Reducing the issue to one of equality and numbers necessitates a more mathematical approach.

255. Justices from both sides of the ideological spectrum have expressed concerns over judicial discretion. *See* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 35 (1994) (discussing the views of the "liberal" Justice Hugo Black and "conservative" Justice Antonin Scalia regarding the need for clear judicial standards and tests).

256. *See id.* at 53–55 (discussing how even decisions by Justices Black or Scalia relied on some degree of subjectivity, especially Scalia's notions of tradition).

257. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 19 (1971) ("The guarantee clause, along with the provisions and structure of the Constitution and our political history, at least provides some guidance for a Court. The concept of the primary right of the individual in this area provides none.").

258. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856); Strauder v. West Virginia, 100 U.S. 303, 310 (1880).

259. THE FEDERALIST NO. 78, *supra* note 182, at 467 (Alexander Hamilton) ("A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning . . . .").

The meaning of the republican form can be defined well enough to avoid arbitrary decision-making.

Finding a standard under the Guarantee Clause may in fact come much easier than under other constitutional provisions because standards employed in other redistricting cases could be adopted. Several proposed partisan gerrymandering standards have been rejected because they involve the structure of government, proportional representation, or other broad-based violations of democratic principles. It is easy to see why any of these would be rejected under a theory of equal protection because, as the Court noted in *Rucho*, these standards are better suited for a claim under the Guarantee Clause.[260]

Determining whether a state government is sufficiently republican could therefore be aided by existing standards. As many commentators have also argued, even *Baker* and *Reynolds* were Guarantee Clause claims transformed into equal protection issues.[261] The problem is when these standards run into the limitations of existing equal protection doctrine—a doctrine that was arguably not intended to protect voting rights or majority interests.[262] Standards protecting these interests could arise under a new doctrine not based on the mechanical one person, one vote standard. Plaintiffs, justices, and scholars have almost invariably argued for metrics and standards that reflect principles of proportional representation or majority rule. Since *Davis v. Bandemer*, courts have been asked to consider statistical evidence to prove unfairness.[263] Older metrics such as partisan bias and partisan asymmetry essentially measure the ability of a party to translate votes to seats where a lack of proportionality is considered indicative of unfairness.[264] Despite several Justices indicating that asymmetry will be a necessary part of any standard, these metrics are conceptually incompatible with equal protection doctrine because the

260. Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019).

261. *E.g.*, McConnell, *supra* note 27, at 105–106 (stating that *Baker* appeared "to raise a constitutional question under Article IV, Section 4"); Amar, *supra* note 161, at 753–54 ("The majoritarian rhetoric of *Reynolds* harmonizes nicely with the spirit of Republican Government, but much less well with the text and history of the Equal Protection Clause itself . . . ." (footnote omitted)); Bork, *supra* note 257, at 18 (arguing that *Baker* and other redistricting cases "were unsatisfactory precisely because the Court attempted to apply a substantive equal protection approach" even though they actually involved the Guarantee Clause).

262. McConnell, *supra* note 27, at 110 ("[T]he Fourteenth Amendment was deliberately crafted so as to leave the allocation of political and voting power undisturbed.").

263. *E.g.*, Common Cause v. Rucho, 318 F. Supp. 3d 777, 812 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019); Whitford v. Gill, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018); Henderson v. Perry, 399 F. Supp. 2d 756, 776 (E.D. Tex. 2005), *aff'd in part, rev'd in part, vacated in part sub nom*. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

264. Gary King & Robert X Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1251–52 (1987).

doctrine does not recognize a right to proportional representation.[265]

Newer metrics such as the Efficiency Gap, Declination, and Ensemble analysis take a different approach by looking at district-specific votes. The Efficiency Gap compares the number of "wasted" votes cast for each party, and any amount over a certain percentage threshold is said to indicate gerrymandering via "cracking" and "packing."[266] This theory was advanced in *Gill* but has since received criticism due to its lack of reliability as well as disputes over whether "wasted" votes indicate anything meaningful.[267] Declination is a metric based on the number of seats a party wins compared to the average vote share in districts that it wins and districts that it loses.[268] Using Declination, packing is indicated by an abnormally high average vote share in districts the party won, while cracking should result in an average vote share just below fifty percent in districts the party loses.[269] Because Declination and the Efficiency Gap rely on the relationship between vote share and seats, they both reduce to an expression of a plan's degree of proportional representation.[270]

Ensemble analysis involves creating a baseline of possible redistricting plans and comparing the challenged plan against the range of alternatives to determine if the plan in question is an "outlier."[271] This approach, which was used by plaintiffs in *Rucho*, provides a range of neutral maps to use as a baseline.[272] It therefore has the benefit of accounting for the natural distribution of partisans in a given state because the "neutral" maps will similarly reflect such a distribution.[273] It also provides a court with a basis for judging intent: if a challenged redistricting plan treats a party worse than nearly every other conceivable map, it is more likely that unfair treatment was intentional.[274]

265. Vieth v. Jubelirer, 541 U.S. 267, 288 (2004) (plurality opinion).

266. Stephanopoulos & McGhee, *supra* note 48, at 834 ("The efficiency gap essentially aggregates all of a district plan's cracking and packing choices into a single, tidy number.").

267. Ellen Veomett, *Efficiency Gap, Voter Turnout, and the Efficiency Principle*, 17 ELECTION L.J. 249, 253–55 (2018) (finding that variations in turnout have an adverse effect on the efficiency gap's reliability).

268. Gregory S. Warrington, *Quantifying Gerrymandering Using the Vote Distribution*, 17 ELECTION L.J. 39, 41–43 (2018).

269. *Id.*

270. Jonathan N. Katz et al., *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, 114 AM. POL. SCI. REV. 164, 175–76 (2020) (examining the mathematical foundations of Declination and the Efficiency Gap to find that both reduce to a measure of proportionality).

271. Andrew Chin et al., *The Signature of Gerrymandering in* Rucho v. Common Cause, 70 S.C. L. REV. 1241, 1257–60 (2019).

272. *Id.* at 1276 ("Ensemble approaches make no *a priori* assumptions about votes-seats relationships, and, in particular, do not assume proportionality.").

273. *Id.* at 1257 ("[E]nsemble analysis serves to separate out the effects of political geography from the specific partisan features of the challenged plan.").

274. Common Cause v. Rucho, 318 F. Supp. 3d 777, 872–74 (M.D.N.C. 2018) (accepting

The above metrics may successfully detect and measure partisan gerrymandering, but none of them demonstrate concretely how an individual vote is weighted differently. Such standards are therefore ill-suited for a one person, one vote analysis under equal protection. A severe lack of proportionality, however, could implicate the guarantee of a republican government if the majority is systematically prevented from exercising its right to alter or abolish. While the purpose of this Article is not to advocate for any particular metric, it is worth noting that Ensemble analysis does give a court the ability to determine with reasonable accuracy whether the will of the majority has been intentionally frustrated.[275] If combined with a burden-shifting mechanism and a measure of partisan asymmetry, it would allow plaintiffs to create a rebuttable presumption of minority-party entrenchment.[276] That is, that not only has the plan resulted in minority rule but that it will continue to do so for the life of the plan. The State could then rebut that presumption by showing the result was due to a legally acceptable goal.

The process might follow these basic steps.[277] First, after satisfying standing requirements and demonstrating they belong to the burdened political party, the plaintiffs must provide evidence of minority-party entrenchment. This should include actual election results where the party receiving the majority of votes nonetheless failed to gain a majority of seats and an ensemble of alternative maps showing the result was not coincidental, was not caused by the natural distribution of voters, and is likely to endure for most if not all of the duration of the plan.[278] If the plaintiffs succeed, the plan will be presumptively unrepublican and thus unconstitutional.

Second, the State may be able to rebut the presumption by offering evidence that the disproportionate election results were due solely to a

Ensemble analysis results as evidence of intentional entrenchment because such extreme partisan effects were unlikely to have been produced unintentionally), *vacated*, 139 S. Ct. 2484 (2019).

275. As Justice Kagan discussed in her dissent in *Rucho*, 139 S. Ct. at 2484, 2521, (emphasis in original), the congressional map was "[t]he absolute worst of 3,001 possible maps" and "[t]he *only one* that could produce a 10-3 partisan split." The underlying assumption is that one must intend to reach such a result.

276. This is similar to the burden-shifting frameworks used by plaintiffs in *Rucho* and *Gill* minus a focus on the vote-equality principle. *See Common Cause*, 318 F. Supp. 3d 777, 868 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019); Whitford v. Gill, 218 F. Supp. 3d 837, 910 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018). Justice Souter also called for a burden-shifting test in his dissent in *Vieth v. Jubelirer*, 541 U.S. 267, 346 (2004) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

277. This is based loosely on the three-part burden-shifting test for Title VII cases set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

278. *See* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC v. Perry, 6 ELECTION L.J. 2, 13–14 (2007) (discussing plan durability and the Court's preference for having evidence of actual election results).

non-intentional and non-discriminatory reason. For example, the State could demonstrate that its partisan geography and an adherence to neutral redistricting principles resulted in a form of unintentional gerrymandering.[279] The State could also present evidence that substantial inter-district variations in turnout led to disproportionate results, such as when incumbents run unopposed or where turnout was abnormally high in particular races, and that under normal circumstances there would be no minority rule.[280]

Finally, the plaintiffs could prevail if they could prove the State's explanation is pretextual. Under this framework, if plaintiffs can prove that majority rule has been intentionally frustrated and that one party is permanently entrenched into power despite receiving a minority share of votes, the redistricting plan will violate the Guarantee Clause and must be invalidated.

This Article will not attempt to envision the many combinations of tests and metrics that could arise in the future. Regardless of the exact framework used, the principal takeaway is that existing proposals detect and prove violations of rights protected by the Guarantee Clause, not the Equal Protection Clause. The standards fail to demonstrate that an individual's vote was weighted differently but may prove a redistricting plan consistently frustrates the right of a majority of voters to elect its chosen representatives. This frustration of majority rule, of course, should be properly adjudicated under the Guarantee Clause.

## IV. ASSESSING THE ROLE OF FEDERAL COURTS

The Supreme Court has recognized that extreme partisan gerrymandering may be unconstitutional even if it is does present a political question.[281] It has conceded that not all claims under the Guarantee Clause are categorically nonjusticiable.[282] However, it has never made the connection between the problem of partisan gerrymandering and the solution found in the Guarantee Clause.[283] A review of the reasons for holding the Guarantee Clause beyond the reach of federal courts reveals none of those justifications apply to partisan gerrymandering. Further, the Guarantee Clause limits judicial

279. *See generally* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239 (2013) (explaining how the distribution of partisans can result in unintentional gerrymandering even where neutral line-drawing criteria are used).

280. *See generally* Veomett, *supra* note 267 (discussing the impact of turnout variations when assessing redistricting plans).

281. *Vieth*, 541 U.S. at 293 (plurality opinion).

282. New York v. United States, 505 U.S. 144, 184 (1992).

283. The Court has mentioned in passing that some partisan gerrymandering claims seem rooted in the Guarantee Clause but it has never suggested applying that Clause. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019).

intervention to the most serious cases of partisan gerrymandering. In doing so, it helps preserve the legitimacy of the Court.

### A. *Judicial Review of Partisan Gerrymandering Under the Guarantee Clause*

There are many reasons why the Supreme Court has refused to consider cases arising under the Guarantee Clause. These justifications for declining to enforce this constitutional provision generally revolve around the argument that it presents political questions that are better left up to the political branches. While these issues may have been troublesome in some of the Court's prior cases, none are present in the context of gerrymandering and do not justify leaving enforcement of the Guarantee Clause up to Congress or state supreme courts.[284]

One reason is the Court's desire to avoid disputes with coordinate branches of government. In *Luther*, for example, there was a strong argument for the Court to avoid getting involved where the President had already recognized the charter government as legitimate and was prepared to support it with military force if necessary.[285] In less serious contexts, the Court has since ruled on numerous issues involving the authority of coordinate branches. It has decided cases involving the veto powers of the executive and legislative branches,[286] how the House of Representatives may judge the qualifications of its own members,[287] Congress's ability to delegate lawmaking authority,[288] and whether Congress may prescribe a rule of decision.[289] All of these cases involved separation of powers issues to varying degrees, yet the Court did not simply defer to the judgment of the political branches.

Another reason is when the only available remedy would invalidate all actions taken via the unconstitutional process. This issue—as dubious

284. It has also been argued that political question doctrine should not apply to any Guarantee Clause case. *See* Chemerinsky, *supra* note 11, at 870 (arguing there are no reasons to invoke the political question doctrine in Guarantee Clause cases generally).

285. Luther v. Borden, 48 U.S. 1, 44–47 (1949) (explaining that the President had already recognized the governor of the charter government of Rhode Island as the executive of the state and that no court "would have been justified in recognizing the opposing party as the lawful government").

286. *E.g.*, Clinton v. City of New York, 524 U.S. 417, 421 (1998) (holding that the line-item veto was unconstitutional); INS v. Chadha, 462 U.S. 919, 959 (1983) (finding the legislative veto violates the Presentment Clause).

287. *E.g.*, Powell v. McCormack, 395 U.S. 486, 550 (1969) (deciding that Congress did not have complete authority to decide qualifications of House members).

288. *E.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935) (holding that Congress may not delegate its legislative authority in violation of the nondelegation doctrine).

289. *E.g.*, United States v. Klein, 80 U.S. 128, 147–48 (1872) (holding that Congress may not prescribe a rule of decision for particular cases because doing so invades the authority of the judicial branch).

as it may be in some cases[290]—was present in both *Luther* and *Pacific States*. The Court feared that declaring the Rhode Island government in *Luther* or the voter initiative in *Pacific States* unconstitutional would also invalidate all laws passed by the Rhode Island government or approved by voter initiative.[291] The concerns in *Luther* and *Pacific States* are not present in redistricting litigation where the named defendants are state officials and the remedy sought would not indicate a lack of respect for coordinate branches or invalidate large bodies of state law.[292] The Court has not resisted reviewing state actions that violate the Constitution,[293] including redistricting plans found unconstitutional on other grounds.[294] It has on many occasions reached decisions that affect the innerworkings of state government, state court systems, local boards, and political parties.[295] Where a right has been violated, the Court typically does not hesitate to provide a remedy. This is true even where states may be reluctant to follow the Court's decision. Following *Brown v. Board of Education*,[296] for example, initial resistance to desegregation did not stop the Court from later ordering states to integrate immediately.[297] In the gerrymandering context, failure to redistrict would be much less of a concern. The Court already has a long history of invalidating redistricting plans. Even if a state refused to redraw its map, elections could easily proceed without district boundaries at all.[298] In fact, when the majority of the Court invoked political question doctrine in *Colegrove v. Green*, Justices Rutledge and Black argued that state compliance was not an issue

290. Chemerinsky, *supra* note 11, at 872 (mentioning the "obvious flaws" with that argument). For example, when the Court declared the federal bankruptcy courts unconstitutional, it did not invalidate all the courts' previous decisions. *Id.* (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 11 U.S.C. and 28 U.S.C.)).

291. Luther v. Borden, 48 U.S. 1, 13 (1849); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 141 (1912).

292. *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("[I]t is the relationship between the judiciary and the coordinate branches . . . and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'").

293. Ware v. Hylton, 3 U.S. 199, 223 (1796) (establishing the Court's authority to invalidate state law).

294. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1463, 1482 (2017); Shaw v. Reno, 509 U.S. 630, 638, 658 (1993).

295. *See, e.g.*, Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 233–34 (1964) (holding that a local school board's decision to close all schools and provide vouchers to private schools—none of which accepted African American students—violated the Equal Protection Clause); Terry v. Adams, 345 U.S. 461, 470 (1953) (holding that white-only, pre-primary elections held by state political parties violated the Fifteenth Amendment).

296. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

297. Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19, 20 (1969).

298. *See* Smiley v. Holm, 285 U.S. 355, 374–75 (1932) (holding that at-large elections are appropriate where new districts have not been created).

because elections at large are constitutionally permissible and even provide a greater degree of equality.[299]

The Supreme Court should also not leave interpretation of the Guarantee Clause to the political branches or leave state supreme courts as the final arbiters of federal law. Congress itself has an interest in preserving non-republican state election schemes. Politicians are self-interested and this extends to the manipulation of the electoral process.[300] State legislatures decide how to draw congressional districts, and members of the House of Representatives elected under gerrymandered district plans have an incentive to prevent congressional regulation of the redistricting process. Using its authority under Article I, Section 4, the House of Representatives may regulate congressional elections, and Section 5 may give it authority to deny seats to members elected under unfairly drawn redistricting plans.[301] However, the Constitution cannot be read as leaving such an important democratic check solely to an interested political body.

As James Madison noted in *The Federalist No. 48*, multiple founding-era state constitutions failed to provide their judicial departments with sufficient "constitutional control" over their legislatures.[302] Quoting Thomas Jefferson's *Notes on the State of Virginia*, Madison agreed that "[o]ne hundred and seventy-three despots would surely be as oppressive as one."[303] This is further supported by Hamilton's belief that the judiciary was "designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."[304] Justice Story later stated that the Supreme Court's "paramount obligation" to interpret the Constitution is in fact a duty that "results from the very theory of a republican constitution

299. Colegrove v. Green, 328 U.S. 549, 565–66 (1946) (Rutledge, J., concurring) ("To force them to share in an election at large might bring greater equality of voting right."); *id.* at 574 (Black, J., dissenting) ("[An election at large] does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives as is essential under a free government, and it is constitutional.").

300. Issacharoff & Pildes, *supra* note 197, at 709.

301. U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); Lee Hamilton et al., *How Congress Can Stop Gerrymandering: Deny Seats to States that Do It*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/outlook/gerrymandering-redistricting-census-congress/2020/07/17/d1002146-c6f5-11ea-8ffe-372be8d82298_story.html [https://perma.cc/9TFY-E97Z] (arguing that the House of Representatives may deny seats to members elected under severely gerrymandered redistricting plans). *But see* Powell v. McCormack, 395 U.S. 486, 540 (1969) (holding that Congress may not impose qualifications that add to or alter the age, citizenship, and residency requirements set forth in art. I, § 2, cl. 2).

302. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

303. *Id.* at 311 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 126 (1785)).

304. THE FEDERALIST NO. 78, *supra* note 182, at 467 (Alexander Hamilton).

of government."[305] If the Court fails to carry out its obligation, "the acts of the legislature and executive would in effect become supreme and uncontrollable, notwithstanding any prohibitions or limitations" in the Constitution.[306]

Even if Congress were to take action to prohibit excessive partisan gerrymandering, it would have to avoid violating the anticommandeering doctrine, which prohibits the federal government from commandeering state officers to enforce federal policy.[307] The Elections Clause arguably allows Congress to commandeer the states in the context of federal elections,[308] but no such authority exists to regulate state legislative redistricting.[309] Thus, the structure of the Constitution as well as the belief among those who helped write and ratify it confirms that the judicial branch is fully capable of intervening when the political process has broken down.

Nor should the Court leave state supreme courts in charge of enforcing fundamental rights protected by the federal Constitution. Aside from the need for uniformity on questions of federal constitutional law, the primary concern with allowing state courts to decide these cases is the lack of independence and the potential for political influence.[310] In some states, legislators have proposed creating gerrymandered judicial districts,[311] changing state court rules for redistricting challenges to bypass

305. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 428 (1833).

306. *Id.*

307. Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); New York v. United States, 505 U.S. 144, 175 (1992) (finding that federal actions that "commandeer" state governments to carryout federal regulatory policy are "inconsistent with the Constitution's division of authority").

308. *See* Branch v. Smith, 538 U.S. 254, 279–80 (2003) (rejecting the argument that the anti-commandeering doctrine barred congressional regulation of redistricting because the Elections Clause, art. I, § 4, cl. 1, explicitly gives Congress that authority). Justice Scalia's majority opinion also noted that federal regulation of congressional redistricting does not impose additional burdens on states but rather regulates the way in which states carry out their existing obligations. *Id.* at 280.

309. *But see* Nicholas Stephanopoulos, *H.R. 1 and Redistricting Commissions*, ELECTION L. BLOG (Jan. 9, 2019, 7:30 PM), https://electionlawblog.org/?p=103123 [https://perma.cc/6764-EVGB] (suggesting that Congress could regulate both congressional and state legislative redistricting using its enforcement power under Section Five of the Fourteenth Amendment).

310. *See* Matthew J. Streb, *Judicial Elections: Just Like Any Other Election?*, *in* LAW AND ELECTION POLITICS 252, 254–59 (Matthew J. Streb ed., 2d ed. 2013) (discussing the selection processes and the politicization of state judicial elections); AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2013) (showing the selection and retention processes for state judges).

311. Nick Corasaniti, *Pennsylvania G.O.P.'s Push for More Power over Judiciary Raises Alarms*, N.Y. TIMES (Feb. 15, 2021), https://www.nytimes.com/2021

fact-finding,[312] embedding gerrymandering into their state constitution,[313] and even impeaching justices who vote to strike down partisan maps.[314] Normally, these problems might be resolved through the regular political process where passing unpopular legislative acts will lead to voter backlash. In these situations, however, the voters no longer have control due to excessive partisan gerrymandering. The result is a breakdown in the political process frustrating the will of the people—an area where the justification for judicial review is at its highest.[315]

### B. *Limits of Judicial Review and Preserving Legitimacy*

*Rucho* is as much about the role of the federal judiciary as it is about partisan gerrymandering. Indeed, redistricting cases have always been a cause of concern for the members of the Court. The stress of deciding *Baker* likely contributed to Justice Whittaker's retirement after suffering a nervous breakdown.[316] Justice O'Connor—one of the few Justices to have served as a legislator—expressed deep concerns about the Court getting involved in partisan politics in *Davis v. Bandemer*.[317] Chief Justice Roberts argued in *Rucho* that this "expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life."[318] Justice Kagan, after a strong rebuke of the *Rucho* majority's decision, notably dissented with

/02/15/us/politics/pennsylvania-republicans.html [https://perma.cc/HW6C-PBER] (describing a proposal by Pennsylvania Republicans to replace statewide elections for judges—including state supreme court justices—with judicial districts drawn by the Republican-controlled legislature).

312. Scott Bauer, *Wisconsin Supreme Court Focuses on Redistricting*, WIS. L.J. (Jan. 13, 2021, 1:03 PM), https://wislawjournal.com/2021/01/13/wisconsin-supreme-court-focuses-on-redistricting/ [https://perma.cc/RT82-243C] (reporting on a petition to the Wisconsin Supreme Court for a rule requiring redistricting challenges to be heard directly by the conservative-leaning supreme court).

313. The Editorial Board, Editorial, *Gerrymandering a State Constitution*, WALL. ST. J. (Dec. 3, 2018, 6:42 PM), https://www.wsj.com/articles/gerrymandering-a-state-constitution-1543880540 [https://perma.cc/A642-FW59] (arguing that a proposed amendment to the New Jersey Constitution would lead to Democratic entrenchment by changing the baseline data used by mapmakers).

314. Michael Wines, *Judges Say Throw Out the Map. Lawmakers Say Throw Out the Judges*, N.Y. TIMES (Feb. 14, 2018), https:// www.nytimes.com/2018/02/14/us/pennsylvania-gerrymandering-courts.html [https://perma.cc/P3FK-9QQK] (describing efforts by Republicans in Pennsylvania to impeach Democratic justices for ruling against a pro-Republican gerrymander).

315. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (discussing the need for additional judicial scrutiny of legislation affecting the political process).

316. CRAIG ALAN SMITH, FAILING JUSTICE: CHARLES EVANS WHITTAKER ON THE SUPREME COURT 205 (2005).

317. Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring). 318. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

"deep sadness."[319]

The Guarantee Clause has the benefit of limiting judicial review to the most egregious cases of partisan gerrymandering. Admittedly, it will not allow for judicial correction in every instance of invidious partisan gerrymandering. However, what may appear to be a shortcoming of the republican guarantee is also a virtue. Courts cannot eliminate partisanship from the redistricting process, and without clear guidance as to what is unconstitutional and what is merely unfair, judges will feel invited to impose their own views as to what a reasonable plan should be. Cases arising under the Equal Protection Clause have thus far failed to determine where the line is crossed between permissible and unconstitutional gerrymandering.[320] The line will be crossed under the Guarantee Clause whenever a state's redistricting plan is determined to deny its citizens a republican form of government. Based on the ordinary usage of the word during ratification, this occurs when a majority of citizens is unable to elect a majority of legislators due to state action. The Guarantee Clause would not require invalidation of a map where a party receiving only a slight majority of votes was nonetheless able to capture a supermajority of seats. Nor would it *necessarily* require invalidation of a plan that resulted in a minority party receiving nearly zero representation.[321] Perhaps a more robust level of protection is desirable or even necessary, but no such protection is present in the Constitution. What the Clause *must* prohibit, however, is a map that entrenches a party into power regardless of whether it wins a majority of votes or not.[322] A redistricting scheme that regularly gave a party sixty percent of the seats with less than half of the votes clearly violates the republican principle. The Guarantee Clause is therefore self-limiting in the sense that it only allows courts to step in when "'we the people' become sovereign no longer."[323]

As a practical matter, judicial review under the Guarantee Clause could first be limited to state legislative redistricting plans. Restricting its application to state legislative districts would allow the Court to avoid the question posed by the Elections Clause and the potential conflict with

319. *Id.* at 2525 (Kagan, J., dissenting).

320. *See supra* Section I.A.

321. As discussed *supra* Part II, republicanism was closely related to majority rule but less so to proportional representation. Although single-slate elections may violate the Equal Protection Clause under *White v. Regester*, 412 U.S. 755 (1973), no constitutional provision would prohibit a competitive district plan where large electoral shifts result in one party controlling the vast majority of seats. Presumably, such a plan would not entrench one party over another and thus not implicate the Guarantee Clause.

322. The exact contours need not be perfectly clear. In other contexts where standards are no clearer, even the Chief Justice himself has stated that line-drawing is not a necessity. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) ("We have no need to fix a line . . . . It is enough for today that wherever that line may be, this statute is surely beyond it.").

323. *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

Congress if it attempts to exercise its regulatory powers under that provision.[324] This alone would provide a significant safeguard for congressional redistricting given that most state legislatures are tasked with redrawing congressional district boundaries and the most offensive congressional maps tend to originate from states where an entrenched minority party controls the legislature.[325] Whether the Clause could apply directly to congressional redistricting as well is beyond the scope of this Article. However, it is worth noting that such a possibility is not inconceivable. The Guarantee Clause could apply to congressional redistricting as well if read broadly or in conjunction with other constitutional provisions. Even then, judicial review would be limited to the most severe cases of partisan gerrymandering where the majority of voters no longer controls the composition of the state's congressional delegation.

Limiting review to cases where states cease to be republican in form acts as a sensible middle ground between those who believe federal courts should stay out of such "political questions" and those who would prefer courts engage in protecting political rights.[326] Indeed, avoiding the politicization of the judiciary is a worthy goal; however, there are occasions when that goal must yield to the protection of fundamental constitutional rights. Excessive partisan gerrymandering eviscerates the only democratic check voters have on their elected officials and gives them no manner of having their preferences known or their voices heard at the only place it matters in an election—the ballot box.

Some justices show great concern for preserving democracy while others show more interest in preserving the legitimacy of the Court.[327]

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324. *See* U.S. CONST. art. I, § 4, cl. 1; *see* Morley, *supra* note 132, at 28.

325. *See generally* Christian R. Grose et al., *The Worst Partisan Gerrymanders in U.S. State Legislatures*, USC SCHWARZENEGGER INST. (showing five states under minority rule). These states include Wisconsin—whose state map was challenged in *Gill*, and North Carolina—whose congressional map was challenged in *Rucho*.

326. *E.g.*, *Rucho*, 139 S. Ct. at 2525 (Kagan, J., dissenting) ("Of all times to abandon the Court's duty to declare the law, this was not the one."); Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring) ("To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues.").

327. *Compare* Rucho 139 S. Ct. at 2507 (Roberts, C.J., majority opinion) ("Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role."), *and* Vieth v. Jubelirer, 541 U.S. 267, 304 (2004) (Scalia, J., plurality opinion) ("[I]t is the function of the courts to provide relief, not hope. What we think would erode confidence is the Court's refusal to do its job—announcing that there may well be a valid claim here, but we are not yet prepared to figure it out."), *with Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting) ("[T]he partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. . . . If left unchecked, gerrymanders like the ones here may irreparably damage our system of government."), *and Vieth*, 541 U.S. at 356 (Breyer, J., dissenting) ("[T]he workable democracy that the Constitution foresees must mean more than a guaranteed

Adjudicating partisan gerrymandering under the Guarantee Clause would allow the Court to achieve both goals. The limited role of the republican guarantee ensures the Court does not step beyond its Article III duties while also preserving Americans' fundamental political rights. The threat to the Court's legitimacy arises not from acting to protect the rights of voters but rather from a refusal to do anything. Holding the Guarantee Clause justiciable for the narrow purpose of forbidding the most extreme forms of partisan gerrymandering would allow the Court to not just preserve its legitimacy but also to enhance it. Chief Justice Marshall's declaration in *Marbury v. Madison* that the Court's role is to "say what the law is"[328] cannot be ignored. As Alexander Hamilton stated while discussing the powers of the judiciary, "there ought always to be a constitutional method of giving efficacy to constitutional provisions."[329] James Madison similarly argued that "a right implies a remedy."[330] The Guarantee Clause explicitly provides a right to a republican form of government, and when fundamental rights lie within the political thicket, the Court must not refuse to enter it.

## CONCLUSION

Partisan gerrymandering in the modern era seeks to entrench minority political parties in power. Advancements in technology and data collection ensure that this problem will only intensify. The Supreme Court's decision in *Rucho* was a result of the Court's attempted application of the one person, one vote standard developed under the Equal Protection Clause. This doctrine does not recognize the harms that modern partisan gerrymandering produces. The threat to majority rule and popular sovereignty—key elements of a republican form of government—involve political rights protected under the Guarantee Clause. In light of *Rucho* and the growing danger that excessive partisan gerrymandering poses to American democracy, the Court should revisit the Guarantee Clause and hold it justiciable for the purpose of adjudicating partisan gerrymandering claims.

opportunity to elect legislators representing equally populous electoral districts. There must also be a method for transforming the will of the majority into effective government.") (citations omitted).

328. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

329. THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

330. THE FEDERALIST NO. 43, *supra* note 159, at 274 (James Madison).