

*NOTE*  
A COMPARATIVE STUDY OF THE  
POLITICAL QUESTION DOCTRINE  
IN THE CONTEXT OF POLITICAL  
SYSTEM FAILURES: THE UNITED  
STATES AND THE UNITED  
KINGDOM

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“It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.”†

Inconceivable no more. 2019 was a remarkable year in the world of political system failures. The United States Supreme Court decided *Rucho v. Common Cause*,<sup>1</sup> which challenged partisan gerrymandering in North Carolina and Maryland, and held that all cases—now and forever—involving partisan gerrymandering claims are non-justiciable political questions. Chief Justice Roberts, writing for the majority, relied heavily on the notion that political gerrymandering cases lacked “judicially manageable standards” to determine when a State has gone too far in drawing its districts on partisan lines.<sup>2</sup> These cases even had the proverbial smoking gun: legislators and members of the executive explicitly admitting an intent to draw voting districts in such a way as to deprive members of the opposing political party of any effective

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\* J.D./LL.M., Duke Law School, 2021. B.A., University of Virginia, 2016. I would like to express deep gratitude to my mentors Professor Joan Ames Magat and Professor Guy-Uriel Charles who, on countless occasions, have offered invaluable feedback and support both in law and in life. And as always, words cannot suffice to express my thanks for Kerri Lawrence, my mom, who gives me strength and guidance in times it is needed most.

† *Baker v. Carr*, 369 U.S. 186, 230 (1962) (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)).

1. 139 S. Ct. 2484 (2019).
2. *Id.* at 2491.

voice in the political process. But the Court abdicated its constitutional duty to prevent the State from infringing on the constitutional rights guaranteed to the People, under the guise of avoiding a confrontation with “the political thicket.”<sup>3</sup>

In 2016, the British people voted to withdraw from the European Union (E.U.). Since then, the British Parliament has been attempting to negotiate a “Brexit” trade deal with the E.U. In August 2019, in anticipation of the no-deal Brexit deadline on October 31, Prime Minister Boris Johnson asked Queen Elizabeth II to prorogue<sup>4</sup> Parliament for five weeks. In a normal political climate, prorogation does not provoke much of a reaction. But the length of this prorogation (which is unprecedented in modern history),<sup>5</sup> in the context of an impending no-deal Brexit and a Parliament fraught with political partisanship, Prime Minister Johnson’s recommendation ignited intense backlash from political allies and opposition alike. Gina Miller, a private citizen, and seventy-eight Members of Parliament challenged the prorogation in the U.K. courts.<sup>6</sup> Lower courts were split: one ruled on the merits,<sup>7</sup> and the other ruled that the case presented a non-justiciable political question.<sup>8</sup> Consolidated on appeal, the United Kingdom Supreme Court determined the cases to be within the scope of judicial review.<sup>9</sup> Reaching the merits, the Court pronounced that the prorogation frustrated “the constitutional role of Parliament in holding the Government to account” without reasonable justification.<sup>10</sup> The

3. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (“Courts ought not to enter this political thicket” because it is the proper role of Congress to remedy unfairness in districting.).

4. In exercise of her royal prerogative and on the advice of the Privy Counsel, the Crown may prorogate, or suspend, a session of Parliament. *See R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 [3]. Prorogation is not to be confused with the *dissolution* of parliament, which immediately precedes a general election. *See id.* at [4].

5. From 1999 to 2017, the average length of a single prorogation was eight calendar days. For the full report detailing lengths of prorogations from 1900 to 2017, see Matthew Purvis, *Lengths of Prorogation since 1900*, U.K. PARLIAMENT: HOUSE OF LORDS LIBR. (Oct. 3, 2019), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2019-0111#fullreport>. This is by no means the longest prorogation in British history, however. That title remains with Charles I, who, in 1629, prorogued Parliament *until 1640*. *See* Ajay Sarma, *Political Prorogation: What Are the Implications for British Politics?*, HARV. POL. REV. (Oct. 12, 2019), <https://web.archive.org/web/20200617164131/https://harvardpolitics.com/world/british-prorogation/>.

6. Sarma, *supra* note 5.

7. Joanna Cherry QC MP and Others for Judicial Review [2019] CSOH 70 (Scot.).

8. *R (on the application of Miller) v The Prime Minister* [2019] EWHC 2381 (QB).

9. *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 [52] (“[T]he courts can rule on the extent of prerogative powers.”) (hereinafter *Miller*).

10. *Id.* at [55], [58–61].

Court thus nullified the prorogation.<sup>11</sup>

John Hart Ely’s representation-reinforcement theory of judicial review helps to distinguish the role of courts envisioned in *Rucho* and *Miller*. His theory is thus: the courts should act like referees, intervening when one side gets an unfair advantage, not when the “wrong side” scores.<sup>12</sup> This means that when the political processes are undeserving of trust, either because certain groups are denied access or because representatives are operating in flagrant disregard of constituents’ interests, courts are uniquely competent to intervene.<sup>13</sup>

This note compares the respective political question doctrines of the United States and the United Kingdom to evaluate *Rucho*<sup>14</sup> through Ely’s representation-reinforcement theory of judicial review. *Rucho* and *Miller* present instances of political system failures,<sup>15</sup> involving one branch’s attempt to accrete power and usurp the democratic process. Both cases illustrate why the Court’s duty to protect individual liberties from state infringement is at its zenith when system failures denigrate the political process. That calling is all the more critical when the individual liberty at stake is meaningful participation in the process itself. In *Rucho*, the Court ignored this calling, abdicating its duty to intervene. Examining *Miller* reveals where the Court erred in *Rucho*: (1) *Miller* is an exemplar of the representation-reinforcement theory of judicial review, (2) *Miller* offers critical insights to contrast the Court’s approach in *Rucho*, and (3) *Miller* offers an example of “judicially manageable standards” for determining when a branch has exceeded the constitutional boundaries of its powers—a standard that the majority in *Rucho* so desperately seeks. At bottom, *Rucho* got it wrong and *Miller* can help us see why.

*Rucho* was decided recently, so legal academia has not yet had the opportunity to respond thoroughly. The decision has received some attention from academics thus far,<sup>16</sup> but nearly all of it is confined to commentary in the popular media.<sup>17</sup> *Miller*, however, has received

11. *Id.* at [70].

12. ELY, *infra* note 171, at 102–03.

13. *Id.*

14. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

15. Defined *infra* III.A.

16. See, e.g., Guy-Uriel Charles & Luis E. Fuentes-Rohwer, *Dirty Thinking About Law and Democracy in Rucho v. Common Cause*, AM. CONST. SOC’Y SUP. CT. REV. 2018–19 (Sept. 24, 2019), <https://www.acslaw.org/analysis/acs-supreme-court-review/dirty-thinking-about-law-and-democracy-in-rucho-v-common-cause/>.

17. See, e.g., Erwin Chemerinsky, *Op-Ed: The Supreme Court just abdicated its most important role: enforcing the Constitution*, L.A. TIMES (June 27, 2019),

relatively more attention from academia.<sup>18</sup> Still, the existing literature on either side of the pond has not fully incorporated lessons from the field of comparative law. Only one scholar has undertaken a comparative study of the political question doctrine in the United States and the United Kingdom, but her work focused primarily on the Israeli doctrine as the analytical interlocutor.<sup>19</sup> This paper aims to fill the gap: compare the respective doctrines, draw insights from the U.K. political question doctrine as seen in *Miller*, and use those insights to inform a discussion of the political question doctrine in cases of political system failures, focusing on *Rucho*.

This Note first briefly introduces the origins of the political question doctrine in the United States (I.A.), presents the U.S. Supreme Court’s modern formulation (I.B.), discusses the political gerrymandering caselaw predating *Rucho* (I.C.), and examines the application of the doctrine in *Rucho* (I.D.). It briefly presents the argument for a comparative study (II.A.). It then explains the origins (II.B.) and modern formulation of the United Kingdom’s political question doctrine (II.C.), closing with a thorough discussion of *Miller* (II.D.). The analysis section first explores Ely’s representation-reinforcement theory of judicial review and defines “political-system failures” (III.A). Then, it applies the representation-reinforcement theory to *Rucho* and *Miller*, explaining why each fits the definition of a political system failure (III.B.). Using insights gleaned from *Miller*, the paper proposes judicially manageable standards for evaluating partisan gerrymandering claims and explains why courts are institutionally competent to adjudicate them (III.C.). And finally, it responds to anticipated criticisms (III.D.).

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<https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-supreme-court-gerrymandering-20190627-story.html>; Charles Fried, *A Day of Sorrow in American Democracy*, THE ATLANTIC (July 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/rucho-v-common-cause-occasion-sorrow/593227/>.

18. See generally Sam Shirazi, *The U.K.’s Marbury v. Madison: The Prorogation Case and How Courts Can Protect Democracy*, U. ILL. L. REV. ONLINE 108 (2019) (comparing and contrasting *Miller* with *Marbury v. Madison* and discussing the implications of Prorogation on the U.K.’s attempt to leave the E.U.).

19. See generally Margit Cohn, *Form, Formula, and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems*, 59 AM. J. COMP. L. 675 (2011). Other scholars have undertaken comparative analyses between the political question doctrines of the U.S. and Israel and the U.S. and South Africa, respectively. See generally Elad Gill, *Judicial Answer to Political Question: The Political Question Doctrine in the United States and Israel*, 23 B.U. PUB. INT. L. J. 245 (2014); Mtendeweka Mhango, *Is It Time for a Coherent Political Question Doctrine in South Africa? Lessons from the United States*, 7 AFR. J. LEGAL STUD. 457 (2014).

## I. BACKGROUND ON THE U.S. POLITICAL QUESTION DOCTRINE

### A. *Origins*

The traditional view among scholars<sup>20</sup> is that the American political question doctrine was first proclaimed in *Marbury v. Madison*. In that opinion, Chief Justice Marshall pronounced that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”<sup>21</sup> It remained for the Court to determine whether an issue raised a political question—one that only the political branches were equipped to decide—or one over which the Court could exercise its power of judicial review.<sup>22</sup> Chief Justice Marshall identified some guidelines in determining whether a question was “political in nature”: “The subjects are political. They respect the nation, not individual rights” and arise from those parts of the Constitution which empower the political branches to exercise their discretion.<sup>23</sup> Further, the Court provided examples of what would constitute quintessentially political questions: (1) the President exercising his power of appointment and nominating a candidate for the Senate’s approval, and (2) acts of an officer of the Executive pertaining to foreign affairs and complying with direct orders from the President.<sup>24</sup> Marshall noted, however, that certain actions by an executive officer acting on behalf of the President *would* be reviewable by the courts “when [a government officer] is directed peremptorily to perform certain acts; *when the rights of individuals are dependent on the performance of those acts; he is . . . amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of others.*”<sup>25</sup> In

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20. 5 U.S. (1 Cranch) 137 (1803). For the traditional view, see, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 248–50 (2002) (noting that *Marbury* marked the first pronouncement of the Political Question Doctrine in American jurisprudence); Michelle D. Gouin, *United States v. Alvarez Machain: Waltzing with the Political Question Doctrine*, 26 CONN. L. REV. 759, 763–64 (1994) (noting that the Political Question Doctrine was born from Chief Justice Marshall’s opinion in *Marbury*); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 PENN. L. REV. 97, 102 (1988) (“The political question doctrine stems from Chief Justice Marshall’s opinion in *Marbury v. Madison*.”). *But see generally* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015) (criticizing the traditional understanding of the doctrine’s origins and proposing instead that the current doctrine “was not created until the mid-twentieth century, when it was employed by the Supreme Court to entrench, rather than to undermine, its emerging supremacy over constitutional law.”).

21. *Id.* at 170.

22. *Id.* at 167, 170–71.

23. *Id.* at 166, 170.

24. *Id.* at 166–67.

25. *Id.* at 166 (emphasis added).

short, the Court had no power to review Executive actions that did not implicate individual rights.

*Marbury*'s logic was rooted in separation of powers principles. In accepting the decisions of the political branches as binding, the judiciary exercised deference and respected institutional competencies.<sup>26</sup> Deference precluded courts from substituting their own preferences for those of the political branches—they could exercise only their *judgment* and not their *will*.<sup>27</sup> According to Chief Justice Marshall, the judiciary is empowered only to declare what the law *is*—not decide what the law *should be*.<sup>28</sup>

Finally, the concept of political accountability underpins much of the Court's logic in *Marbury*: “By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.”<sup>29</sup> The Constitution affords the President the authority to make political decisions, and if the people—from whom the Constitution itself derives supreme authority—disagree with the President's choices, they have full recourse to express their discontentment through the political process.<sup>30</sup> Therefore, when the decisions were political and did not infringe on individual rights, judicial review was unnecessary to curtail a rogue Executive. Similarly, the argument goes, Congress is elected by the people and is thus directly accountable to them should it fail to adequately represent their interests. These principle considerations similarly underpin the British political question doctrine.<sup>31</sup>

### B. *The Modern U.S. Political Question Doctrine*

The justifications for the modern political question doctrine remain the same. First, it is predicated on horizontal separation of powers. There are certain judgments that the political branches are both

26. *See id.* at 165–66 (noting that the Constitution entrusted the President with certain powers to be exercised at his discretion).

27. *See id.* at 170–71, 177.

28. *See id.* at 177–78 (“It is emphatically the province and duty of the judicial department to say what the law is.”).

29. *Id.* at 165–66.

30. *Id.* at 166 (“[I]n cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only *politically examinable*.” (emphasis added)).

31. Discussed *infra* Section II.

constitutionally entitled and functionally more competent to make. Second, judicial review is the inappropriate avenue for redress (unless the dispute involves individual rights) because representatives are accountable to their constituents through the traditional political process.

The Court announced the modern formulation of the political question doctrine test in *Baker v. Carr*.<sup>32</sup> In *Baker*, plaintiffs challenged the Tennessee legislature's apportionment of voting districts on Equal Protection<sup>33</sup> grounds, alleging that the current apportionment effectively debased their votes of any value because Tennessee had not reevaluated its voting districts to account for significant demographic changes that had occurred over the past sixty years.<sup>34</sup> The Court held that the case did not present a nonjusticiable political question and ruled on the merits.<sup>35</sup> Writing for the majority, Justice Brennan noted that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."<sup>36</sup> Furthermore, "the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."<sup>37</sup> Although the Court did not find this case to present a nonjusticiable political question, it set forth the contours of the doctrine.<sup>38</sup>

The political question doctrine is a "function of the [horizontal] separation of powers" between the judiciary and the political branches of the federal government.<sup>39</sup> And although it remains the province of the courts to interpret the Constitution and determine when a branch has exceeded its authority, some exercises of constitutional authority fall outside the scope of judicial review.<sup>40</sup> The Court refused to erect categorical barriers to judicial review in certain subject-matter areas, like foreign affairs,<sup>41</sup> and instead opted for case-by-case inquiry.<sup>42</sup> Cases involving *any* of the following elements may present nonjusticiable

32. *Baker v. Carr*, 369 U.S. 186 (1962).

33. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4.

34. *Baker*, 369 U.S. at 193–94.

35. *Id.* at 199–200.

36. *Id.* at 209.

37. *Id.* at 210 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)) (internal quotations omitted).

38. *Id.*

39. *Id.*

40. *Id.* at 211.

41. *See id.* ("Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.")

42. *Id.* at 210–11.

political questions:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>43</sup>

This formulation is a chimera of both textual<sup>44</sup> and prudential<sup>45</sup> considerations. *Baker*, however, provided no guidance as to how these factors would apply to future cases, how the Court should weigh the factors relative to one another, or if and when any of them would be dispositive. It is no surprise, then, that future courts filled in the gaps.

### C. *The U.S. Political Question Doctrine and Gerrymandering Cases*

Gerrymandering refers to “the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”<sup>46</sup> As Chief Justice Roberts noted in *Rucho v. Common Cause*, gerrymandering has a long and sordid history in United States politics.<sup>47</sup> Over the course of the twentieth century, the Court resolved cases involving racial and partisan gerrymandering, paralleling a representation-reinforcing approach to judicial review.<sup>48</sup> For example, the Court held that constitutional challenges to the apportionment of districts based on population were subject to judicial review.<sup>49</sup> In cases

43. *Id.* at 217.

44. *See id.* (For example, “textually demonstrable constitutional commitment of the issue”).

45. *See id.* (For example, “the potentiality of embarrassment from multifarious pronouncements by various departments”).

46. *Gerrymandering*, BLACK’S LAW DICTIONARY 696 (7th ed. 1999).

47. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

48. *See ELY, infra* note 171, at 87.

49. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016) (holding unanimously that in accordance with the Equal Protection Clause’s “one-person, one-vote” principle, the state may design its voting districts based on the state’s total population); *Karcher v. Daggett*, 462 U.S. 725 (1983) (striking down New Jersey’s apportionment plan as violating the Apportionment Clause (U.S. CONST. Art. I § 2) because the State failed to make a good faith effort to achieve as near to population equality as is practicable); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding districts in Connecticut on the grounds that exact mathematical parity for the districts was not

asserting racial gerrymandering claims, the Court has *never once* ruled that the issue presented a nonjusticiable political question.<sup>50</sup> And in the realm of partisan gerrymandering, the Court had previously found these cases to be justiciable, escaping the political question doctrine's kiss of death. But the twenty-first century proved too much for partisan gerrymandering claims, with *Rucho* delivering the fatal blow.

*Baker* held that the parties had standing to challenge the state's districting scheme on equal protection grounds (in addition to laying out the modern Political Question Doctrine test).<sup>51</sup> Although *Baker* did not involve state discrimination on the basis of political affiliation, it laid the groundwork for the cases to come. *Gaffney v. Cummings* was the next important case in the partisan gerrymandering saga.<sup>52</sup> In *Gaffney*, Connecticut adopted a policy of "political fairness," which aimed to apportion the districts to affect "proportional representation of the two major political parties" in the state's House and Senate.<sup>53</sup> Voters challenged that policy as violating the Equal Protection Clause.<sup>54</sup> In other words, the policy aimed to structure voting districts so the resulting composition of both houses would reflect "as closely as possible . . . the actual [statewide] plurality of votes on the House or Senate lines in a given election."<sup>55</sup> The Apportionment Board determined the appropriate ratio of Republican to Democrat seats, based not on party membership within the respective districts, but rather on the party voting results in the past three *statewide* elections.<sup>56</sup> The Court ruled that the "political fairness" plan did not violate the Equal Protection Clause because aiming to provide proportional representation to its constituents based on political party affiliation was

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required); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that because "[l]egislators represent people, not trees or acres," both houses of the state legislature must be apportioned according to population, and the state is required to reevaluate its districts to account for population changes at least every ten years); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (ruling that electoral districts must be drawn so that "as nearly as is practicable one man's vote in a congressional election is worth as much as another's").

50. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 42 (1986) (holding that vote dilution on racial grounds violated the Equal Protection Clause).

51. See *Baker v. Carr*, 369 U.S. 186, 198 (1962) ("the appellants have standing to challenge the Tennessee apportionment statutes."). Apportionment refers to "the allocation of congressional representatives among the states based on population, as required by the 14th Amendment." *Apportionment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

52. 412 U.S. 735 (1973).

53. *Id.* at 738.

54. *Id.*

55. *Id.* (quoting testimony in the record).

56. *Id.*

a legitimate state interest.<sup>57</sup> Underlying the Court’s reasoning is the notion that giving people fair representation in the state legislature is not *depriving* them of anything. Quite the contrary—the plan safeguards the potency of each vote from dilution. Finally, *Gaffney* noted that districting plans “may be vulnerable [to equal protection challenges] if racial or *political groups* have been fenced out of the political process and their voting strength invidiously minimized,”<sup>58</sup> a prescient foreshadowing of the claims presented in *Davis v. Bandemer*.<sup>59</sup>

In *Bandemer*, citizens of Indiana claimed that by diluting the votes of Democrats, the state’s apportionment plan violated the Equal Protection Clause.<sup>60</sup> *Bandemer* held that partisan gerrymandering claims did not present “political questions” and were thus justiciable in federal courts as equal protection claims.<sup>61</sup> Justice White, again writing for the majority, acknowledged several cases in which the Court had summarily affirmed lower rulings that equal protection claims involving partisan gerrymandering were nonjusticiable.<sup>62</sup> But the Court effectively disposed of them as nonbinding precedent, instead reasoning by analogy that because population apportionment and racial gerrymandering claims were justiciable, partisan gerrymandering claims must be too.<sup>63</sup> The Court then applied the *Baker* test, finding none of the factors determinative of a political question.<sup>64</sup> Reaching the merits, the Court refused to distinguish the claims of political groups from those of racial minorities, whose claims the Court regularly held to be justiciable.<sup>65</sup> Acknowledging that members of political parties had not been subject the same stigma over the course of history as racial minorities, nor was affiliation with a political group an immutable characteristic, the Court was unpersuaded that these distinctions warranted a finding of non-justiciability.<sup>66</sup> *Bandemer* established the test for establishing a prima facie equal protection claim in political gerrymandering cases: plaintiffs must show an “intentional

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57. *Id.* at 754.

58. *Id.* (emphasis added).

59. 478 U.S. 109 (1986).

60. *Id.* at 113.

61. *Id.* at 124.

62. *Bandemer*, 478 U.S. at 120 (citing *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965), summarily aff’g 238 F.Supp. 916 (S.D.N.Y. 1965)).

63. *Id.* at 121.

64. *Id.* at 122.

65. *Id.* at 125.

66. *Id.*

discrimination against an identifiable political group and an actual discriminatory effect on that group.”<sup>67</sup> Reiterating, the Court stated, “where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination.”<sup>68</sup> To establish a claim, plaintiffs would have to show that the apportionment would “consistently degrade . . . a group of voters’ influence on the political process as a whole.”<sup>69</sup>

In concurrence, Justice O’Connor advocated that there is no need for judicial intervention, much less a constitutional justification for it, because partisan gerrymandering is a “self-limiting enterprise” and that “[t]here is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves.”<sup>70</sup> Justice O’Connor would have treated the claim as a nonjusticiable political question, not because the subject was political in nature, but because the political processes can adequately curb any constitutional violation.<sup>71</sup> Justice O’Connor’s objections in *Bandemer* would lay the groundwork for the plurality in *Vieth v. Jubelirer*<sup>72</sup> and the majority in *Rucho*.<sup>73</sup>

The plaintiffs in *Vieth* challenged Pennsylvania’s newly drawn electoral districts, alleging that they amounted to unconstitutional political gerrymanders in violation of the Equal Protection Clause.<sup>74</sup> In a 4-1-4 split, the Court held that unless plaintiffs could identify judicially manageable standards for determining when a constitutional violation had occurred, partisan gerrymandering claims presented a nonjusticiable political question.<sup>75</sup> Justice Scalia, writing for a plurality, argued that partisan gerrymandering cases were categorically nonjusticiable political questions.<sup>76</sup> The Scalia plurality justified overturning *Bandemer* on the grounds that in the eighteen years since

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67. *Id.* at 127. For John Hart Ely’s discussion and critique of *Bandemer*, see *Gerrymanders: The Good, The Bad and The Ugly*, 50 STAN. L. REV. 607, 616–23 (1998).

68. *Bandemer*, 478 U.S. at 132.

69. *Id.*

70. *Id.* at 152. (O’Connor, J., concurring in the judgment).

71. *Id.* at 144–46, 155.

72. 541 U.S. 267 (2004).

73. 139 S. Ct. 2484 (2019).

74. *Vieth*, 541 U.S. at 272. Plaintiffs also alleged violations of the one-person-one-vote principle in Article I, § 2 of the U.S. Constitution, but they are not relevant to the discussion here. *Id.*

75. *Id.* at 281.

76. *Id.*

that decision was announced, courts had not successfully identified a consistent, manageable standard for adjudicating partisan gerrymandering claims under the Fourteenth Amendment.<sup>77</sup> In short, the plurality's concerns were prudential ones.

Justice Kennedy concurred in the judgment, providing the fifth vote necessary to resolve the case. He wrote that the Court should not adopt a categorical rule for partisan gerrymandering cases, but should instead rule narrowly that the present case was not justiciable for want of judicially manageable standards.<sup>78</sup> *Vieth* left the door open for future litigants to claim equal protection violations in partisan gerrymandering claims and invited them to propose judicially manageable standards.<sup>79</sup> Therefore, although it has been argued that *Vieth* effectively overturned *Bandemer*, that would not formally occur until *Rucho*.

In bitter dissent, Justice Stevens advocated that “it would be contrary to precedent and profoundly unwise to foreclose all judicial review of [partisan gerrymandering] claims that might be advanced in the future.”<sup>80</sup> Justice Stevens would have affirmed *Bandemer* and its predecessors and held that the same “judicially manageable standard[s]” used in racial gerrymandering cases should apply to “other species of gerrymanders.”<sup>81</sup> For Justice Stevens, discriminating on party lines instead of racial ones would not remedy the district's constitutional deficiency.<sup>82</sup> Instead, Justice Stevens would have adhered to the following standard: “If no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge.”<sup>83</sup>

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77. *Id.* at 279.

78. *Id.* at 309–10 (Kennedy, J., concurring). In accordance with the *Marks* rule, which requires that the holding in a plurality case be limited to the narrowest grounds of agreement between the concurrence and the plurality, Justice Kennedy's concurrence controls. *Marks v. United States*, 430 U.S. 188, 193 (1977).

79. *See Vieth*, 541 U.S. at 317 (“If workable standards do emerge to measure . . . burdens, however, courts should be prepared to order relief.”)

80. *Id.* (Stevens, J., dissenting).

81. *Id.* at 318, 320, 336.

82. *Id.*

83. *Id.* at 339.

*D. The Political Question Doctrine Applied: Rucho v. Common Cause*

And finally, equal protection claims for partisan gerrymandering reached their final resting place in *Rucho*. Voters in Maryland and North Carolina brought equal protection challenges, among others, to the voting districts in their respective state.<sup>84</sup> In North Carolina, the record clearly demonstrated that Republican leadership intended to dilute the voting strength of Democratic constituents in the state.<sup>85</sup> A member of the redistricting committee stated, “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.”<sup>86</sup> The map chosen predicted the election of ten Republicans and three Democrats, and that was the exact result in 2016 and 2018.<sup>87</sup> And in Maryland, Governor O’Malley sought to redraw the districts to flip one Republican stronghold to a Democrat seat, making the tally seven Democrats to one Republican.<sup>88</sup> He later admitted that entrenching Democratic power was his purpose for the redistricting effort.<sup>89</sup> And again, the gerrymander worked exactly as predicted—the election resulted in seven Democrats and one Republican, despite no major population or demographic shifts in the state’s electorate.<sup>90</sup>

Writing for the *Rucho* majority, Chief Justice Roberts concluded that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.”<sup>91</sup> The holding is predicated on three principles: (1) “the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly,”<sup>92</sup> (2) the Founders were well aware of gerrymandering problems but allocated redistricting authority to the political branches anyway, thereby depriving courts of oversight,<sup>93</sup> and (3) that states are the more appropriate fora to deal with the problem.<sup>94</sup> The fundamental holding in *Rucho* is that the Court was unable to find judicially manageable legal standards for determining when an electoral map has gone too

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84. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 2493.

89. *Id.*

90. *Id.*

91. *Id.* at 2506–07.

92. *Id.* at 2501.

93. *Id.* at 2496.

94. *Id.* at 2507–08.

far.<sup>95</sup> The majority expressed concerns that if courts adjudicated partisan gerrymandering claims without such rules, they could impose their own visions of “fairness” on the electoral map.<sup>96</sup> Finally, the Chief Justice stated that securing partisan advantage in drawing electoral maps *is a permissible government objective*.<sup>97</sup> But in a feat of mental gymnastics, he also purported not to condone excessive partisan gerrymandering, while depriving the courts of a voice in the matter altogether.<sup>98</sup>

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, excoriated the majority for abdicating its constitutional obligation to declare the law.<sup>99</sup> The dissent contended that extreme partisan gerrymanders amount to constitutional violations: “districters . . . set out to reduce the weight of certain citizens’ votes . . . thereby depriv[ing] them of their capacity to ‘full[y] and effective[ly] participat[e] in the political process[.]’”<sup>100</sup> At bottom, vote dilution on the basis of someone’s political affiliation frustrates their ability to participate equally and meaningfully in popular elections. The dissent looked to state courts and found, contrary to what the majority would have us believe, that states have successfully crafted “neutral and manageable and strict standards” without “a shred of politics about them” for evaluating partisan gerrymandering claims.<sup>101</sup> Those tests look to (1) *intent* (was the state officials’ “predominant purpose” in drawing the lines to “entrench their party in power” by diluting opposition voters?),<sup>102</sup> (2) *effects* (did the lines, in fact, substantially dilute opponents’ votes?),<sup>103</sup> and (3) *causation* (if plaintiffs make a prima facie case on the first two elements, can the State provide a legitimate, non-partisan justification for the map?).<sup>104</sup> These tests are the sort of thing, the dissent argued, that courts work with *every day*.<sup>105</sup> The dissent naturally posed the question, *If they can do it, why can’t we?*<sup>106</sup> The dissent also rejected the majority’s claim that any findings

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95. *Id.* at 2500–01.

96. *Id.* at 2499–500.

97. *Id.* at 2503.

98. *Id.* at 2507.

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

100. *Id.* at 2514 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

101. *Id.* at 2525.

102. *Id.* at 2516 (quoting *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. \_\_\_ (2015)).

103. *Id.* at 2516.

104. *Id.*

105. *Id.*

106. *Id.* at 2524.

of constitutional violations would be “mere prognostications” about the future, instead declaring that lower courts have grounded their determinations on concrete evidence of past, present, and future constitutional harms in the form of vote dilution.<sup>107</sup> Finally, the dissent argued that partisan gerrymandering threatens the very foundation of representative democracy—it is “anti-democratic in the most profound sense.”<sup>108</sup> The State’s power emanates from the people. Its legitimacy requires that its constituents have a *meaningful choice* in who represents them.<sup>109</sup> Political gerrymandering deprives certain constituents of that choice, allows leaders to entrench themselves in power, and “imperial[s] our system of government.”<sup>110</sup>

## II. THE POLITICAL QUESTION DOCTRINE IN THE UNITED KINGDOM

### A. *The value of comparative analysis and why the U.K. is an appropriate comparison*

Critics of the field of comparative constitutional law regularly object to using foreign sources in interpreting U.S. constitutional law on the grounds that the United States does “not have the same moral and legal framework as the rest of the world, and never ha[s]”<sup>111</sup> and that the notion that “American law should conform to the laws of the rest of the world ought to be rejected out of hand.”<sup>112</sup> But because the U.S. and U.K. political question doctrines share the same basic principles, and both countries are facing similar legal and political

107. *Id.* at 2519.

108. *Id.* at 2525.

109. *Id.* (citing Alexander Hamilton, 2 Debates on the Constitution 257 (J. Elliot ed. 1891)).

110. *Id.* at 2525.

111. Justice Scalia persistently objected to the Court’s citation or reference to foreign caselaw in its own constitutional decision-making. Potent in his reasoning is an element of American exceptionalism: that the United States is distinct in its legal history, philosophy, and identity, and as such, no other legal system in the world is comparable. Justice Scalia’s categorical rejection of using foreign law also relies on two other principles: first, he sees it as an affront to the democratic principle of popular sovereignty: doubting “whether [the American people] would say ‘Yes, we want to be governed by the views of foreigners,’” having not adopted their laws through the traditional democratic process. Second, he challenges the criteria on which judges select foreign law for support: “[w]hen it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn’t agree we don’t use it.” For the full interview, see *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519 (2005).

112. *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting). See also *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“The Court’s discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since “this Court[] . . . should not impose foreign moods, fads, or fashions on Americans.” (citing *Foster v. Florida*, 537 U.S. 990 n.1 (2002) (Thomas, J., concurring in denial of certiorari)).

challenges, that criticism bears limited weight here. The doctrinal similarities between the two provide a sound basis for comparative analysis. And although the structure of their respective constitutional systems may differ, both countries share the concept of judicial review and cordon off certain policy areas as “non-justiciable.”<sup>113</sup> What’s more, both nations’ philosophies about judicial review of political questions are predicated on separation of powers principles and concerns about institutional competence.

### *B. The U.K. Political Question Doctrine: Foundations*

The political question doctrine in the U.K. is simply referred to as non-justiciability. The principle of justiciability is “not one of discretion, but . . . inherent in the very nature of the judicial process,”<sup>114</sup> meaning that by imposing restrictions on themselves, courts recognize “the limits of judicial expertise and . . . the proper demarcation between the role of the courts and the responsibilities of the executive” in the constitutional order.<sup>115</sup> Put simply, courts acknowledge that the political branches may be more competent to make certain decisions, and in those instances, courts bow out, deferring to those decisions. As Lord Sumption declared, “[t]o say that an issue is nonjusticiable is to say that there is a rule of law that the courts may not decide it.”<sup>116</sup> Indeed, U.K. Courts also look for “judicially manageable standards” to guide such a decision.<sup>117</sup> And like the U.S. doctrine, whether a question is justiciable is determined on a case-by-case basis.<sup>118</sup> Before 1984, all cases involving the royal prerogative were categorically exempt from judicial review.<sup>119</sup>

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113. This pattern is particularly notable in cases challenging executive foreign affairs powers—namely, the use of military force and treaty-making power. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (“[I]t is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”); *Blackburn v Attorney General* [1971] 2 All ER 1380 (Lord Denning holding that an exercise of the prerogative power of the Crown in the making of treaties “cannot be challenged or questioned in these courts”).

114. *See Buttes Gas & Oil Co v Hammer* (No.3), [1982] A.C. 888, 932 (Lord Wilberforce).

115. Dominic McGoldrick, *The Boundaries of Justiciability*, 58 INT’L & COMP. L. Q. 981, 984 (2010).

116. Lord Sumption, *Foreign Affairs in the English Courts since 9/11*, Lecture at the Dep’t of Gov’t, LONDON SCH. OF ECON. (May 14, 2012), [https://www.supremecourt.uk/docs/speech\\_120514.pdf](https://www.supremecourt.uk/docs/speech_120514.pdf) [hereinafter Lord Sumption Speech].

117. McGoldrick, *supra* note 119, at 986.

118. *Id.* at 987.

119. Lord Sumption Speech, *supra* note 120. For a full discussion on the history of judicial review in U.K. courts, see T. T. Arvind & Lindsay Stirton, *The Curious Origins of Judicial Review*, 133 SUSSEX L. REV. Q. 91 (2017), <http://sro.sussex.ac.uk/id/eprint/59837/1/paper%20v5-TTA.pdf>.

### C. *The Modern U.K. Political Question Doctrine*

The modern British political question doctrine was pronounced in *Civil Service Unions v Minister for the Civil Service*, commonly referred to as the *GCHQ* case.<sup>120</sup> Prior to that decision, any use of the royal prerogative was non-justiciable. The royal prerogative exists as a matter of historical gloss and common law and refers to powers that only the Crown may exercise.<sup>121</sup> Today, “Government Ministers exercise the majority of the prerogative powers either in their own right or through the advice they provide to the Queen which she is bound constitutionally to follow.”<sup>122</sup> It endows them with various powers—from declaring war to appointing and dismissing ministers.<sup>123</sup> *GCHQ* involved the use of the royal prerogative: Prime Minister Margaret Thatcher and her Government, purportedly acting in the interest of national security, prohibited employees of the Government Communications Headquarters from joining trade unions.<sup>124</sup> Because prerogative powers developed in the common law and are not codified in statute, any changes in the power of review would have to come from the courts.<sup>125</sup> The appellate court held that the use of the royal prerogative in the national security arena precluded judicial review.<sup>126</sup> The House of Lords, the highest court in the United Kingdom at the time, ruled that exercises of the Royal Prerogative were justiciable but carved out several areas as immune from review.<sup>127</sup> Lord Diplock’s opinion in *GCHQ* is widely viewed as the basis for the modern rule.<sup>128</sup> In that opinion, Diplock eschewed the prototypical approach, which distinguished justiciability of prerogative actions based on the “legal nature, boundaries and historical origin of ‘the prerogative . . . .’”<sup>129</sup> Instead, *GCHQ* held that the question of justiciability is determined by

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120. [1985] AC 374 (HL) [hereinafter *GCHQ*].

121. GAIL BARTLETT & MICHAEL EVERETT, U.K. HOUSE OF COMMONS LIBR., BRIEFING PAPER NO. 03861, *THE ROYAL PREROGATIVE* 5 (2017). The Crown refers to both the Sovereign (i.e., the Queen) and Government Ministers.

122. *Id.* at 3.

123. *Q&A: Royal Prerogative*, BBC NEWS (Feb. 15, 2005), [http://news.bbc.co.uk/2/hi/uk\\_news/4267761.stm](http://news.bbc.co.uk/2/hi/uk_news/4267761.stm).

124. *GCHQ*, [1985] AC 374 (HL).

125. *Id.*

126. *Civil Service Unions v Minister for the Civil Service* [1984] I.R.L.R. 353.

127. *GCHQ*, [1985] AC 374 (HL).

128. Syed Hassan, Note, *RE GCHQ Judgment & Prerogative of the Crown* (Aug. 2019), [https://www.researchgate.net/publication/335541031\\_Note\\_RE\\_GCHQ\\_Judgment\\_Prerogative\\_of\\_the\\_Crown?channel=doi&linkId=5d6c12e24585150886064f5a&showFulltext=true](https://www.researchgate.net/publication/335541031_Note_RE_GCHQ_Judgment_Prerogative_of_the_Crown?channel=doi&linkId=5d6c12e24585150886064f5a&showFulltext=true) (DOI: 10.13140/RG.2.2.16328.47366).

129. *Id.*

the case's subject-matter: Cases involving executive functions remained outside the scope of the courts' review.<sup>130</sup> The modern formulation of the British Political Question Doctrine depends on the "subject matter and suitability in the particular case."<sup>131</sup> Outside the scope of judicial review lies "[p]rerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers . . . because their nature and subject matter are such as not to be amenable to the judicial process."<sup>132</sup> *GCHQ* came as quite a surprise and vastly expanded the scope of judicial review. It remains the seminal case on judicial review of prerogative powers.

#### *D. The U.K. Political Question Doctrine in Practice: The Prorogation Case*

In 2019, the United Kingdom Supreme Court decided *Miller*.<sup>133</sup> Understanding the political context surrounding the case is critical. In a 2016 popular referendum, the British people voted to leave the European Union (E.U.).<sup>134</sup> "Brexit," as it has become commonly known, is a highly contentious and partisan issue in the United Kingdom. The U.K. Government and the E.U. had been actively engaged in negotiations for a Brexit deal since the 2016 referendum.<sup>135</sup> The U.K. has since "Brexit" the E.U., but trade talks are ongoing.<sup>136</sup>

Upon the formation of a new government in July 2019, the parties stipulated that if they could not come to an agreement before October

130. *Id.*

131. *R (Abbasi & Anor.) v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ. 1598, [2003] UKHRR 76 [85].

132. *GCHQ* [1985] AC at [417–18].

133. *Miller*, [2019] UKSC 41.

134. Steven Erlanger, *Britain Votes to Leave E.U.; Cameron Plans to Step Down*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/25/world/europe/britain-brexiteuropean-union-referendum.html>.

135. Benjamin Mueller, *What is Brexit? A Simple Guide to Why It Matters and What Happens Next*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/interactive/2019/world/europe/what-is-brexite.html>.

136. *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Feb. 17, 2020), <https://www.bbc.com/news/uk-politics-32810887>. The U.K. formally exited the European Union on January 31, 2020. The European Union and the United Kingdom negotiated and concluded a Trade and Cooperation Agreement, which took force January 1, 2021. For the full agreement, see *The EU-UK Trade and Cooperation Agreement, 2020 O.J. (L 444) 14–1462*, available at [https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement\\_en](https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en). For a brief overview, see Matthias Matthijs, *What's in the EU-UK Brexit Deal?*, COUNCIL ON FOREIGN REL. (Dec. 28, 2020), [https://www.cfr.org/in-brief/whats-eu-uk-brexite-deal?gclid=Cj0KCCQiA0rSABhDIARIsAJtjfcfD6UsZdZgAn-LmZ90JGG0FLOKX4xvsQrHXciYtPG01SC1MMJF9VksaAgKzEALw\\_wcB](https://www.cfr.org/in-brief/whats-eu-uk-brexite-deal?gclid=Cj0KCCQiA0rSABhDIARIsAJtjfcfD6UsZdZgAn-LmZ90JGG0FLOKX4xvsQrHXciYtPG01SC1MMJF9VksaAgKzEALw_wcB).

31, 2019, there would be a “no-deal” Brexit, and the United Kingdom would simply drop out of the E.U.<sup>137</sup> This would have meant that the two entities would automatically “divorce” on this date without any agreements on trade, security and the like.<sup>138</sup> A no-deal Brexit would have posed potentially serious ramifications for the political and economic stability of Europe. Prime Minister Boris Johnson, who took office in July 2019, openly advocated for a no-deal Brexit.<sup>139</sup>

In August 2019, Prime Minister Johnson met with the Queen to request a prorogation of Parliament.<sup>140</sup> Because prorogation of Parliament is a royal prerogative, only the Queen (or reigning monarch) may exercise the power, on advice of Privy Council.<sup>141</sup> Johnson requested that the Queen prorogue Parliament from no earlier than September 9, and no later than September 12, until October 14, leaving Parliament with approximately two weeks to reach an agreement before the no-deal Brexit date.<sup>142</sup> Prorogation usually receives little fanfare—it is an otherwise unexciting parliamentary procedure during which Parliament takes a temporary hiatus from legislating.<sup>143</sup> But it is not usually *five weeks long*.<sup>144</sup> Johnson’s request for prorogation received intense backlash from Parliament and the public.<sup>145</sup> Opponents alleged that by asking for such a long prorogation in critical weeks leading up to the deadline, Johnson had intended to “bypass a sovereign Parliament that opposes his policy on Brexit.”<sup>146</sup>

Challenges to the prorogation were brought in England and Scotland. One court, the High Court of Justice for England and Wales, found in Johnson’s favor, ruling that the case presented a non-justiciable political question.<sup>147</sup> Whereas, the Scottish appeals court rejected the non-justiciability claim and ruled on the merits.<sup>148</sup> The cases were consolidated on “leap-frog” appeal to the U.K. Supreme

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137. Mueller, *supra* note 135.

138. *Id.*

139. *Id.*

140. *Parliament suspension: Queen approves PM’s plan*, BBC NEWS (Aug. 28, 2019), <https://www.bbc.com/news/uk-politics-49493632> [hereinafter *Parliament suspension*].

141. *Miller*, [2019] UKSC 41, [3].

142. *Parliament suspension*, *supra* note 140.

143. *See* Sarma, *supra* note 5.

144. *See Lengths of Prorogation since 1900*, *supra* note 5.

145. *See* Sarma, *supra* note 5.

146. *Parliament suspension*, *supra* note 140 (quoting a statement by Sir John Major, former Prime Minister).

147. *R (on the application of Miller) v The Prime Minister* [2019] EWHC 2381 (QB).

148. *Joanna Cherry QC MP and Others for Judicial Review* [2019] CSIH 49.

Court as “*Miller*.”<sup>149</sup>

The Government argued that the Prime Minister’s prerogative to prorogue Parliament, irrespective of the length of the prorogation, presented a nonjusticiable political question.<sup>150</sup> Because the Prime Minister is politically accountable to Parliament, the Court “should not enter the political arena but should respect the separation of powers.”<sup>151</sup> Relying in part on the Divisional Court’s holding, they argued that the decision to prorogue Parliament was “inherently political in nature” and that “there were no legal standards against which to judge [its] legitimacy.”<sup>152</sup>

The U.K. Supreme Court was entirely unpersuaded by the Government’s argument. In a unanimous decision, the Court repudiated the political question claim and reached the merits, holding that the Prime Minister had exceeded the limits of his power in requesting a five-week-long prorogation.<sup>153</sup> Responding to the political question argument, the Court held that “although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it.”<sup>154</sup> Baroness Hale, writing for the Court, acknowledged the democratic-accountability argument made by the Prime Minister and dismissed it forcefully: “The Prime Minister’s accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play.”<sup>155</sup> Hale justified this conclusion for two reasons. First, by temporarily dismissing Parliament, prorogation necessarily precludes members of Parliament from holding the Prime Minister accountable until Parliament has reconvened.<sup>156</sup> Second, political accountability and judicial review are not mutually exclusive: “[T]he courts have a duty to give effect to the law, irrespective of the minister’s political accountability to Parliament.”<sup>157</sup> A minister’s theoretical political accountability to Parliament does not render his actions *per se* immune from judicial review.<sup>158</sup>

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149. [2019] UKSC 41, [25].

150. *Id.* at [28].

151. *Id.*

152. *Id.* at [29].

153. *Id.* at [33], [36], [38].

154. *Id.* at [31].

155. *Id.* at [33].

156. *Id.*

157. *Id.*

158. *Id.*

Furthermore, according to Hale, contrary to the Government's proposition, the Court *would* be giving effect to the separation of powers by ensuring that the Government did not unlawfully frustrate Parliament's proper role in the constitutional system.<sup>159</sup> Determining whether a prerogative power exists and defining its scope are questions of law—questions that the judiciary is singularly empowered to answer.<sup>160</sup>

Before it could answer the justiciability question, the Court needed to first identify legal standards by which it could evaluate the substantive claims. Although prerogative powers are not “constituted by any document,” they must be “compatible with common law principles.”<sup>161</sup> In short, “every prerogative power has its limits” and it is the Court's duty to determine where they lie.<sup>162</sup> To identify those limits, the Court looked to the constitutional principles of Parliamentary Sovereignty (acts of Parliament are supreme and no one is above the law), and Parliamentary Accountability (Ministers are held accountable to the electorate by MPs who scrutinize ministerial decisions).<sup>163</sup> A prorogation of Parliament would therefore be unlawful if it had “the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.”<sup>164</sup> Upon successfully identifying legal standards by which it could adjudicate the case at bar, the Court determined the case to be justiciable.<sup>165</sup>

On the merits, the Court determined the Prime Minister's request was unlawful because it frustrated or prevented Parliament from exercising its constitutional duty to hold the Government accountable on behalf of the people.<sup>166</sup> The Court also inquired into Johnson's purported intent for requesting the prorogation, but was unconcerned

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159. *Id.* at [34].

160. *Id.* at [36].

161. *Id.* at [38].

162. *Id.*

163. *Id.* at [41], [46].

164. *Id.* at [50].

165. *Id.* at [52].

166. *Id.* at [55–56] (“The first question, therefore, is whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account. The answer is that of course it did. This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October.”).

with his *subjective* motive for doing so.<sup>167</sup> Instead, it sought to answer an *objective* question: whether there was any *reasonable* justification for requesting that prorogation last five weeks.<sup>168</sup> The Government failed to carry this burden, and the Court concluded there was no legitimate reason for the Prime Minister's actions.<sup>169</sup> Accordingly, the Court invalidated the prorogation as unlawful.<sup>170</sup>

### III. APPLYING LESSONS TO THE UNITED STATES POLITICAL QUESTION DOCTRINE

#### A. Representation Reinforcement Theory & Political System Failures

According to John Hart Ely, a “political system failure” exists when “the *process* is undeserving of trust” and

(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simply hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.<sup>171</sup>

The representation-reinforcement theory advocates that the courts are institutionally equipped to—and *should*—intervene when these failures occur.<sup>172</sup> Unlike elected representatives, whose primary goal is to stay in power,<sup>173</sup> federal judges, being appointed for life, do not share this concern.<sup>174</sup> This makes judges uniquely equipped to decide cases where the political branch is incapable of doing so impartially—namely, those cases that “either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.”<sup>175</sup> When the political system malfunctions, judges should operate like referees, stepping in “only when one team is

167. *Id.* at [58].

168. *Id.*

169. *Id.* at [59–60].

170. *Id.* at [69–70].

171. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

172. *Id.* at 102–03.

173. *Id.* at 78.

174. *Id.* at 103.

175. *Id.* at 103.

gaining unfair advantage, not because the ‘wrong team’ has scored.”<sup>176</sup> In practice, this means the courts should adopt an “antitrust” approach and intervene when necessary to break up what functionally amounts to an oligarchy.<sup>177</sup> Whether it is the executive or the legislature accreting power, under the representation-reinforcement theory, the courts owe a duty to protect the legitimacy of the political processes—including the right to participate meaningfully therein. As Ely put it, “unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.”<sup>178</sup>

### *B. Partisan Gerrymandering and Prorogation as Political System Failures*

Partisan gerrymandering is a paradigmatic example of a political system failure. Although gerrymandering does not literally prevent people from voting—people can still cast their votes at the ballot box—it deprives certain votes of any real effect. With partisan gerrymandering, the political party in power draws voting districts to maintain their majority position. “Minority” party voters are either “packed” into a single district, diluting their power in surrounding districts to the advantage of the “majority,” or “cracked” across several districts so that in each one, they will be outnumbered.<sup>179</sup> These methods ensure that the outcome is all but decided before election day. In gerrymandered districts, popular elections are tainted by partisan interference, and thus the political process is undeserving of trust. Because partisan redistricting efforts draw electoral maps to dilute the voting power of partisan opponents, “choking off the channels of political change to ensure that [the incumbents] will stay in and the outs will stay out,” they are a primary example of a political system failure.<sup>180</sup> The majority party, even if it lacks the majority of popular votes in a given jurisdiction, draws the districts to entrench itself in power—

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176. *Id.* at 103.

177. *Id.* at 102–03. Ely does not define oligarchy, so we will assume its ordinary meaning applies. An oligarchy is “a government in which a small group exercises control especially for corrupt or selfish purposes.” *Oligarchy*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/oligarchy> (last visited Mar. 3, 2021).

178. ELY, *supra* note 171, at 117.

179. See Michael Wines, *What is Gerrymandering? And Why Did the Supreme Court Rule on It?*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html>.

180. ELY, *supra* note 171, at 103.

debasement of the political process and detrimentally impacting constituents.

Illegitimate prorogation, too, fits Ely’s definition nicely. Again, the process does not merit the public’s trust. In *Miller*, the Prime Minister sought to circumvent the traditional political process of — Parliamentary deliberation and bicameral approval—by dismissing Parliament in the final weeks before the deadline and forcing their hand into a no-deal Brexit for purely partisan gain.<sup>181</sup> Like partisan gerrymandering, Johnson’s prorogation falls under Ely’s first category. But it differs from gerrymandering because voters are not directly affected. However, as *Miller* concluded, the unlawful prorogation prevented their elected representatives from holding the PM accountable and from exercising Parliamentary checks on executive power.<sup>182</sup> And Prime Minister Johnson called the prorogation to do just that: there was no other *reasonable* explanation for it.<sup>183</sup> And, as the Court found, frustrating the constitutional balance of powers is not a reasonable justification, and contravenes the foundational principles of Britain’s representative democracy.

In both cases, political actors have seriously degraded the proper functioning of the political process so as to deprive of its legitimacy. In both cases, the process itself is undeserving of trust and requires judicial intervention.

### C. *Reenvisioning the U.S. Doctrine: The Search for Manageable Standards*

*Miller* is consistent with the representation-reinforcing theory of judicial review. In *Miller*, the United Kingdom Supreme Court recognized that the political channels had malfunctioned. Prime Minister Johnson’s government had sought to circumvent the political process and amass undue power for itself. As a result, Johnson’s prorogation deprived Parliament of its opportunity to participate in negotiations and express its dissent with a no-deal Brexit. The prorogation also frustrated the public’s opportunity to have its interests meaningfully represented in Parliament. The Court recognized that

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181. See *Parliament suspension*, *supra* note 140 (quoting House of Commons Speaker John Bercow who said, “However it is dressed up, it is blindingly obvious that the purpose of [suspending Parliament] now would be to stop [MPs] debating Brexit and performing its duty in shaping a course for the country.” (alterations in original)).

182. *Miller*, [2019] UKSC 41, [56–57].

183. *Id.* at [58–61].

both of these consequences amounted to political system failures, contravening the U.K.'s constitutional principles of democratic accountability and separation of powers.<sup>184</sup> The Court deemed it necessary to intervene to reset the power balance and ensure that the people's will would be represented in Parliament without undue inhibition by the Executive. And the Court intervened without risking its own legitimacy: if anything, the Court was widely regarded as *more legitimate* for upholding its constitutional duty and protecting individual liberties from government infringement.<sup>185</sup> The sky did not fall; the world did not end. Instead, Parliament and British government returned to functioning normally.<sup>186</sup>

The judicially manageable standards provided in *Miller* could serve as the basis for a test to adjudicate U.S. partisan gerrymandering claims. In determining whether prorogation was unlawful, the *Miller* Court sought to identify (1) the actual effects of prorogation and (2) a legitimate government interest in the prorogation, with the government bearing the burden of proof.<sup>187</sup> Similarly, in partisan gerrymandering claims, the U.S. Supreme Court should ask the following questions: (1) Does the electoral map have the effect of substantially frustrating constituents' participation in the political processes because of their political affiliation? And (2) did the legislature, if acting without a partisan motive, have a legitimate reason to draw the lines in the way it did, with the government bearing the burden of proof? This showing can be rebutted by evidence of subjective intent and facially-neutral evidence (like irregular district shapes and mathematical analysis), but these are *not required* to make a *prima facie* case.

*Miller's* objective-intent standard would remedy challenges with previous U.S. Supreme Court tests, which required proof of *subjective intent*. In all but the most extreme cases, like *Rucho*, collective subjective intent is extraordinarily difficult for challengers to prove. *Miller* was entirely unconcerned with *actual* motive.<sup>188</sup> Likewise, partisan gerrymandering claims should not require a showing of subjective intent. Instead, challengers can more easily prove an

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184. *Id.* at [51].

185. Ian Dunt, *Supreme Court bombshell: Britain is working once again*, POLITICS.CO.UK (Sept. 24, 2019), <https://www.politics.co.uk/blogs/2019/09/24/supreme-court-bombshell-britain-is-working-once-again>.

186. *Id.*

187. See *supra* notes 166–70 and accompanying text.

188. *Miller*, [2019] UKSC 41, [58]; see also *supra* note 166 and accompanying text.

objective standard, thereby ensuring greater protection of the right to participate equally in the political process. The right to vote is the most fundamental exercise of individual liberty. Representation-reinforcement theory demands that courts protect the sanctity and legitimacy of political processes. An objective-intent standard does just that: government motives are subject to more exacting scrutiny.

Furthermore, a burden-shifting framework better protects individual liberties and the sanctity of the political process. Before *Rucho*, plaintiffs bore the entire burden in partisan gerrymandering suits. But under this test, they would need to prove only discriminatory impact—that members of a given party’s votes are substantially deprived of value in popular elections—in order to make a *prima facie* case. Upon this showing, the Court will ask whether it is reasonable to believe the map would have been drawn the same way, absent partisan gamesmanship. It then becomes the government’s burden to put on evidence of legitimate reasons for drawing the electoral map in the way it did.

As in pre-*Rucho* caselaw, challengers can rebut the government’s justification by putting on additional evidence: irregular district shapes, any legislative history to demonstrate subjective intent, and mathematical analysis of the chosen map to demonstrate, for example, how much of an outlier it is and how significantly it dilutes the votes of partisan opponents.<sup>189</sup> In short, the farther away the map is from neutral center, the greater the showing of disparate impact and partisan intent. It is critical that the government bear the burden because this provides greater protections to voters.

This test would have caught the North Carolina and Maryland maps at issue in *Rucho*. First, voters in both states (Democrats in one and Republicans in the other) demonstrated that their votes were systematically deprived of meaningful effect. For example, in 2012, Republicans in North Carolina won nine of the state’s thirteen Congressional districts (that’s nearly 75 percent of the seats), despite only winning *only 49 percent* of the statewide vote.<sup>190</sup> A disparity margin of 25 percent would qualify as a substantial frustration. And second, the states did not claim a non-partisan reason for constructing the districts in the manner they did. Even if they had, it would have been difficult to justify Maryland’s flipping of the First District as

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189. See Brief for Political Science Professors, *infra* note 207.

190. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2510 (2019) (Kagan, J., dissenting).

anything other than sheer partisan gain.<sup>191</sup> Evidence of the map’s mathematical value, the redistricting committees’ flagrantly discriminatory subjective intent, and possibly irregular district shapes would have successfully rebutted this argument. This test would capture the worst cases without overreaching and would be easily administrable.

Finally, the *Miller* court’s judicially manageable standards and those proposed here closely resemble those announced in Justice Kagan’s dissent.<sup>192</sup> There, Kagan and the lower courts had looked for effect, intent, and causation.<sup>193</sup> In *Miller*, the Court looked for effects and objective intent.<sup>194</sup> All of these principles are represented in the test I propose. This reaffirms Justice Kagan’s point that judicially manageable standards *do exist*, and indeed, the lower courts had worked with them all along.<sup>195</sup> Further still, a constitutional system across the pond crafted judicially manageable standards, predicated on democratic accountability and institutional competence, that could apply reasonably well to partisan gerrymandering claims, puts the *Rucho* court’s willful blindness on full display.

#### *D. Responding to Anticipated Critiques*

Critics will likely mount four primary objections. First, proving subjective intent is a Herculean task and objective intent leaves too much room for judicial activism. Second, this proposal does not remedy the “textual hook” problem: it fails to provide a standard tied to constitutional text. Third, the inquiry does not provide a bright line for determining when a state has gone too far. And fourth, allowing partisan gerrymandering claims to be adjudicated will open the floodgates of litigation.

First, objectors may disagree with the decision to include an intent inquiry at all. Subjective intent is challenging to prove in most cases (although it would have been quite easy in *Rucho*).<sup>196</sup> That is why, as

191. *Id.* at 2510–11.

192. *Id.* at 2516.

193. *See id.*; *see also* *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 852 (M.D.N.C. 2018) (“[U]nder the standard on which we rely on to strike down those twelve districts, a state legislative body may engage in some degree of partisan gerrymandering, so long as it was not predominantly motivated by invidious partisan considerations.”); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 524 (D. Md. 2018) (ruling that plaintiffs’ First Amendment Association rights were unduly burdened by Maryland’s gerrymandering scheme).

194. *Miller*, [2019] UKSC at [55–56], [58].

195. *Rucho*, 129 S. Ct. at 2516.

196. *Id.* at 2522 (“Although purpose inquiries carry certain hazards (which courts must attend

seen in *Miller*, an objective standard should be adopted with the government bearing the burden of proof. Dissenters to this approach will likely argue that an objective-intent standard leaves too much room for courts to make policy decisions and impose their own notions of fairness.<sup>197</sup> But courts conduct this type of inquiry *all the time* without being tempted to impose their own values. Rational basis review is functionally an objective intent inquiry: whether the government could have had a rational justification for making the policy choice it did.<sup>198</sup> The objective intent standard proposed here seeks to answer the same question.

Second, *Rucho* relies in part on the argument that there is no textual hook in the Constitution which prescribes judicially manageable standards to adjudicate partisan gerrymandering claims.<sup>199</sup> It is true that the Constitution does not explicitly address proportional representation or gerrymandering, so naturally the objective-intent standard does not seek guidance from text that does not exist. Instead, the Equal Protection Clause provides sufficient guidance: the state shall not “deny to any person within its jurisdiction the equal protection of the laws.”<sup>200</sup> But in any event, this critique is beside the point. The entirety of equal protection jurisprudence is judicially created. The tiers of scrutiny, for example, have no textual grounding in the Constitution. And though some have argued that they are unconstitutional for that reason,<sup>201</sup> their status as accepted constitutional doctrine seems safe for now. Similarly, nowhere in the text of the Constitution is the “one person, one vote” standard prescribed—yet courts regularly adjudicate those claims on the

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to), they are a common form of analysis in constitutional cases.” (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993); *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

197. *See id.* at 2499–500 (Roberts, C.J.) (noting that a “clear, manageable and politically neutral” test is necessary to “meaningfully constrain the discretion of the courts”) (citation omitted).

198. *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

199. *Rucho*, 129 S. Ct. at 2499–500.

200. U.S. CONST. amend. XIV, § 1, cl. 4.

201. *See, e.g.*, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J. dissenting) (“The illegitimacy of using ‘made-up tests’ to ‘displace longstanding national traditions as the primary determinant of what the Constitution means’ has long been apparent. The Constitution does not prescribe tiers of scrutiny. The three basic tiers—‘rational basis,’ ‘intermediate, and strict scrutiny—’are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.”) (quoting *United States v. Virginia*, 518 U.S. 515, 567, 570, (1996) (Scalia, J., dissenting))).

merits.<sup>202</sup> Merely because a standard is not explicitly provided for in the Constitution does not mean that one cannot exist. Otherwise, this line of reasoning would have dire implications for the entire body of equal protection jurisprudence.

Third, critics will argue that the effects and objective intent test is not a bright-line rule. This is true. But in that way, it is consistent with the body of equal protection jurisprudence: equal protection claims are case-by-case, fact-specific inquiries. An analogy is helpful here: apportionment, or “one person, one vote,” claims are justiciable. How is determining whether one vote means less than another any different in the context of partisan gerrymandering? Chief Justice Roberts contends that unlike partisan gerrymandering claims, the “one-person, one-vote rule is relatively easy to administer as a matter of math.”<sup>203</sup> However, as Justice Kagan notes in dissent, these “are not your grandfather’s—let alone the Framers’—gerrymanders.”<sup>204</sup> Improved technology and increased access to data have fundamentally changed the way mapmakers craft districts: powerful computing technology allows mapmakers to craft thousands of options for district maps and to predict the electoral outcome of each with unprecedented precision.<sup>205</sup> Taken together, legislators can choose maps with near certainty of their result.<sup>206</sup> New technology can assign mathematical values to the maps and place them along the spectrum, relative to the other options.<sup>207</sup> Contrary to Chief Justice Roberts’s belief, it is mathematically possible to demonstrate when the state has gone too far.<sup>208</sup> Admittedly, this test does not draw a clear line in the sand, but this does not render the test unadministrable. Because it is possible to quantify a given map’s “score” compared to alternatives, the farther outside the range of standard deviation it is, the more suspicious it will be. Like the entire body of equal protection jurisprudence, these cases must be adjudicated on a case-by-case basis giving great weight to the facts.

And finally, challengers will likely pose the time-immemorial “floodgates of litigation” argument. Of course, it is true that allowing

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202. *Rucho*, 129 S. Ct. at 2501.

203. *Id.*

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

205. *Id.*

206. *Id.*

207. Brief for Political Science Professors as Amici Curiae in Support of Appellees 22–25, *Rucho v. Common Cause*, 129 S. Ct. 2484 (2019) (Nos. 18-422, 18-726).

208. *Id.*

federal courts to adjudicate partisan gerrymandering claims will increase litigation, given the current baseline is *zero*. This of itself should not be viewed as a problem. First, depriving citizens of their right to have an equal impact on an election solely on the basis of political affiliation *is a constitutional violation*.<sup>209</sup> They demand a remedy, and the courts stand well-equipped to provide it. Partisan gerrymandering is a longstanding and widespread problem that denigrates the political process. Merely because gerrymandering existed at the time of the nation's birth does not make it constitutionally permissible. Slavery and racial discrimination were also permitted at the founding, and we rightfully outlawed those practices long ago. In short, the right to equal impact in the political process outweighs concerns of increased litigation. Second, this test still requires challengers to satisfy the elements of the offense—including showing discriminatory impact. It will only undo those districts which *substantially* frustrate citizens' participation in the political process. It is not *carte blanche* to challenge each and every district across the country.

#### CONCLUSION

When a branch of government impinges on individual liberties and obstructs processes necessary for legitimate representative democracy, it is the duty and the province of courts to intervene. Political system failures mean that the political processes cannot themselves return to equilibrium without help. And it is precisely *because* the political branches have no incentive to constrain themselves that the courts must intervene. *Miller* demonstrates that courts can do so without falling victim to the “political thicket,” and that judicially manageable standards exist for adjudicating constitutional claims in political system failures. *Miller* illustrates why *Rucho* got it wrong.

Contrary to Chief Justice Roberts's assertions, partisan gerrymandering is not a legitimate state interest. Something so antithetical to representative democracy is undeserving of the Court's sanction. In *Miller*, the United Kingdom Supreme Court did what the United States Supreme Court is unwilling to do—it recognized that the political process was not working properly. The same plague afflicts both nations: constitutional democracies under siege by the very people who have sworn to protect them. One has diagnosed the

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209. *Rucho*, 129 S. Ct. at 2509 (Kagan, J., dissenting).

problem and administered a cure. The other has left the problem untreated, allowing the virus to continue spreading. In political system failures, the long-term health of democracy becomes uncertain, but intervention substantially increases the likelihood of survival.

The United States Supreme Court in *Rucho* purportedly grounds its blind-eyed position in democratic legitimacy: the Court, as a typically antimajoritarian figure must refrain from intervening in political issues. The irony is that the Court, in tethering itself to its notion of democratic legitimacy, has undermined the very institution it purports to protect. The United States Supreme Court ignores the reality of the problem.

American democracy is predicated on the idea that the government derives its power from the people. Partisan gerrymandering deprives voters of the right to participate meaningfully in our representative democracy. And when the electorate can no longer express its dissent through the normal channel—the political process—only the courts remain as the last line of defense. It is essential to the proper functioning of a democracy that voters are able to voice their dissent through the political process. Without checks on state power through judicial review, democracy itself will succumb to the political thicket.