The Equal Protection Problem: The Right to Vote, Gerrymandering, and Lessons From Canada

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In the wake of Rucho v. Common Cause*, partisan gerrymandering remains a nonjusticiable political question. This retreat from judicial oversight leaves a significant gap in the protection of democratic governance. The United States Constitution, as currently interpreted, offers little substantive support for voters' rights as such. Courts locate the right to vote in the Equal Protection Clause of the Fourteenth Amendment, but that Clause protects equal access to voting rights—not meaningful participation, representation, or influence; it requires scrutiny only where legislatures rely on unconstitutional criteria to classify voters. Notably, at the time of this writing, California and Texas are in a standoff of mutually assured gerrymandering. Partisan gerrymandering does not rely on impermissible classifications. It involves political intent, which the Court treats as constitutionally permissible. Racial gerrymandering claims proceed under a different logic, one rooted in suspect classifications and heightened scrutiny. That framework cannot carry over to partisan gerrymandering. Without a manageable standard for scrutinizing partisanship, courts cannot adjudicate gerrymandering claims as voting rights violations under the Equal Protection Clause.*

This Note offers a comparative lens. In Canada, courts recognize a constitutional right to vote that includes effective representation. In the voting context, The United States lacks such a rights-based foundation. The Canadian model permits judicial intervention when redistricting threatens democratic structures. To address partisan gerrymandering, United States courts must move beyond formal equality and articulate a substantive right to democratic participation. Only then can the judiciary respond to the deeper harms gerrymandering creates.

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INTRODUCTION

Partisan gerrymandering has devolved into "a power grab on top of a power grab."[1] Since *Rucho v. Common Cause*, where the Supreme Court determined that partisan gerrymandering presented a nonjusticiable political question, political polarization in the United States has continued to surge.[2] Political polarization is an issue beyond the scope of the legal system. However, it is a symptom of Constitutional and jurisprudential deficiencies, which threaten the health of our democracy. Even the majority in *Rucho* recognized that partisan gerrymandering is repugnant to democracy.[3] Yet, not only does gerrymandering persist, it thrives. And as it does, citizens' voting power dwindles.

This Note urges scholars, advocates, and courts in the United States to reconsider whether the right to vote constitutes an independent cause of action that can be used to attack partisan gerrymandering. Traditionally, the right to vote has been viewed as an individual right attached to the constitutional mandate of equal protection.[4] However, no Supreme Court majority has been able to articulate a justiciable, manageable standard to address the harms partisan gerrymandering inflicts upon voters.[5] The tension between democracy and justiciability lies at the heart of gerrymandering jurisprudence.[6]

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1. Alex Tausanovitch & Danielle Root, *How Partisan Gerrymandering Limits Voting Rights*, CAP (July 8, 2020), https://www.americanprogress.org/article/partisan-gerrymandering-limits-voting-rights. Perhaps serendipitously, at the time of this writing, California and Texas seek to advance partisan gerrymandering plans designed to ensure control of the House of Representatives—a standoff that may foreshadow a nationwide redistricting race to the bottom. *See* Eric McGhee, *Do California and Texas Have Gerrymandered Districts?*, PUB. POL'Y INST. CAL. (Aug. 21, 2025), https://www.ppic.org/blog/do-california-and-texas-have-gerrymandered-districts.

2. Cathy Ruffing, *Unpacking Gerrymandering and Its Effect on Polarization in America*, 88 SOC. EDUC. 38, 38–40 (2024); Diego Garzia1 & Frederico Ferreira da Silva, *The Electoral Consequences of Affective Polarization? Negative Voting in the 2020 US Presidential Election*, 50 AM. POL. RSCH. 303, 303–39 (2022); Jaume Ojer, David Cárcamo, Romualdo Pastor-Satorras & Michele Starnini, *Charting Multidimensional Ideological Polarization Across Demographic Groups in the USA*, 9 NATURE HUM. BEHAVIOUR 2027, 2027–28, 2031 (2025); Boxell, Levi, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization*, 106 REV. ECON. STAT. 557, 560 (2024). The partisan redistricting arms race of 2025 exemplifies how gerrymandering affects polarized representation; the party in power can ignore the voters of the opposing party. *See* McGhee, *supra* note 1.

3. *See Rucho*, 139 S. Ct. at 2506 ("Excessive partisanship in districting . . . is 'incompatible with democratic principles.'") (internal citation omitted).

4. *See id.* at 2514 ("The Fourteenth Amendment, we long ago recognized, 'guarantees the opportunity for equal participation by all voters in the election.'") (Kagan J., dissenting) (quoting Reynolds v. Sims, 377 U.S. 533, 566 (1964)); *see also infra* Part.II.

5. As the *Rucho* majority explains, the Court has "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years." *Rucho*, 139 S. Ct. at 2507. Some Justices have argued "that the Equal Protection Clause simply 'does not supply judicially manageable standards for resolving purely political gerrymandering claims.'" *Id.* at 2497 (quoting Davis v. Bandemer, 478 U.S. 109, 147 (1985) (O'Connor, J., concurring)). And historically, there has been "'no Court' for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander.'" *Id.* (quoting *Davis*, 478 U.S. at 185, n. 25 (1985) (Powell, J., concurring)).

6. *See, e.g.*, *id.* at 2506 (acknowledging the harms caused by "excessive partisanship").

This Note argues that the right to vote, though a prominent and fundamental pillar of constitutional jurisprudence[7] and democracy writ large, is both insubstantial and underdeveloped in the United States. Several Constitutional amendments affirmatively restrict state action with respect to voters' rights. The Fifteenth Amendment forbids states from denying the right to vote on the basis of race.[8] The Nineteenth[9] and Twenty-Sixth Amendments,[10] respectively, forbid states from denying voting rights on the basis of gender or to citizens over eighteen years old. The Twenty-Fourth Amendment forbids states from imposing poll taxes in federal elections.[11] The Equal Protection Clause of the Fourteenth Amendment forbids states from denying voters access to these rights in an arbitrary or discriminatory manner.[12] Thus, the Constitution protects individuals' right to vote from undue governmental incursions. But nowhere does the Constitution, nor any amendment therein, set forth the substantive rights which the government *must affirmatively provide* to voters.[13] As a result, modern voting rights jurisprudence is ill-equipped to protect voters from even extreme gerrymandering.

This Note contends that the Equal Protection Clause does not define the right to vote so much as it defines *how* that right must be protected. It explains that although the *Rucho* decision acquiesced to undemocratic practices, it represented the logical extension of gerrymandering jurisprudence under equal protection precedent. Partisan gerrymandering claims present non-justiciable political questions—beyond the scope of the Equal Protection Clause—largely because such claims are equality-based, not rights-based.[14]

In the ballot-casting context, voters have substantive rights; the Constitution requires states to tabulate any one-person's vote in substantially the same manner as any other person's vote.[15] However, in the redistricting context, the Equal Protection Clause imposes few limitations on legislative decisions that

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7. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (reasoning that, in the context of the Equal Protection Clause, the right to vote is "fundamental" because it is "preservative of all rights").

8. U.S. CONST. amend. XV, § 1.

9. U.S. CONST. amend. XIX.

10. U.S. CONST. amend. XXVI, § 1.

11. U.S. CONST. amend. XXIV, § 1.

12. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."); *see also* Shaw v. Reno, 509 U.S. 630, 641 (1993) ("[Legislative] schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength."); Davis v. Bandemer, 478 U.S. 109, 122 (1986) (explaining that election laws violate the Equal Protection Clause when they exhibit "discrimination reflect[ing] *no* policy, but simply arbitrary and capricious action") (internal citation omitted); *infra* Part.II.

13. *See infra* Part.II.

14. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (explaining that a case presents a "[nonjusticiable] political question" when it presents issues "outside the courts' competence and therefore beyond the courts' jurisdiction") (citing Baker v. Carr, 369 U.S. 186, 217 (1962)). Political question cases can be defined as those which cannot be resolved according to "'judicially discoverable and manageable standards.'" *Id.* (citing *Baker*, 369 U.S. at 217).

15. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 109 (2000) (explaining that under the Equal Protection Clause, uniform vote tabulation procedures are "necessary to protect the fundamental right of each voter").

affect a voter's power to express her political will.[16] Accordingly, this Note advocates for a rights-based approach to adjudicate extreme partisan gerrymandering. Simply put, anti-gerrymandering advocates must push the right to vote beyond the scant safeguards of the Equal Protection Clause.

The Constitutional guarantee of equal rights under the law remains illusory so long as the nature and substance of the alleged rights remain intangible. Violations of intangible rights are not justiciable. Surmounting this justiciability problem may require reinterpretation of the Constitutional right to vote under the Due Process Clause of the Fourteenth Amendment, a federal law, or a Constitutional amendment. However, the specific mechanics of the solution are beyond this Note's scope. This Note principally explains that if partisan gerrymandering abridges voters' rights, courts must provide voters with legal relief. Using Canadian Constitutional law as a foil, this Note argues that claims based on substantive voting rights can circumvent the political questions that have defined gerrymandering jurisprudence in the United States thus far. It concludes by arguing that partisan gerrymandering claims would be justiciable if they were grounded in substantive voting rights.

This Note proceeds in four Parts. Part I explains the history of gerrymandering and the right to vote in the United States, discussing the origins of gerrymandering and its modern evolution. Part I concludes that the Supreme Court's decision in *Rucho* exemplifies the problem with anti-gerrymandering arguments that focus on equality rather than the right to vote itself.

Part II introduces the Equal Protection problem and argues that because the right to vote is defined by the Equal Protection Clause, the substantive right to vote exists only under a relatively narrow set of circumstances. Consequently, Part II concludes that voter-plaintiffs must allege violations of concrete, legally-defined voting rights to overcome the initial judicial hurdle of justiciability.

Part III examines the benefits of an affirmative right to vote, using the Canadian legal system as a case study. It emphasizes that because Canada's Constitution enshrines an affirmative, broad right to vote, Canadian courts have developed a manageable framework to address voting rights claims. Accordingly, Part III concludes that courts can adjudicate partisan gerrymandering claims, if such claims are framed as rights-based harms. In short, voting rights claims are justiciable—voter-equality claims are political.

Part IV explains how the Canadian approach to voting rights offers a path towards solving the justiciability problems partisan gerrymandering presents in the United States. Ultimately, Part IV contends that establishing a real right to vote—under the Due Process Clause, via Constitutional Amendment, or through

16. *Rucho*, 139 S. Ct. at 2495–96 ("In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts.").

a federal statute—would force courts to address the substantive harm extreme gerrymandering causes to voters and democracy writ large.[17]

I. BACKGROUND: GERRYMANDERING AND THE RIGHT TO VOTE

A detrimental practice with a cartoonish origin story, the "Gerry-mander" was born on March 26, 1812, in the pages of the Boston Gazette.[18] The Gazette coined the phrase after the governor of Massachusetts, Elbridge Gerry, signed a redistricting bill designed to entrench the Democratic-Republicans in power. According to the Gazette, Gerry's new congressional districts had the shape of a "mythological salamander."[19] In its scathing article, the Gazette published a cartoon depicting the Gerry-Mander: a map of Gerry's congressional districts overlayed with a drawing of a salamander-esque head, w ith fangs and the wings of a dragon.[20] While it is unclear whether anyone at the Gazette had ever seen a salamander, perhaps the Gazette's distorted depiction accurately foreshadowed the bizarre state of redistricting in the twenty-first century.

Gerrymanders manipulate electoral boundaries to secure political advantages. Under the Elections Clause, the individual states are responsible for creating those boundaries in both state-wide and federal (congressional) elections.[21] A successful gerrymander is simply a redistricting plan that allows one party to elect its preferred candidates by causing voters from the adversarial party to "waste[]" more votes.[22] To achieve this result, "the euphonious trio of cracking, stacking, and packing" works in conjunction, leaving voters politically impotent.[23]

In single-member districts, "cracking and packing" are the most often used tactics.[24] Cracking involves dispersing the disfavored party's voters across multiple districts, such that they cannot form a majority in any single district.[25] Packing, on the other hand, involves concentrating the disfavored party's voters into a single district to ensure that the voters elect a candidate by a large margin.[26] In multimember districts, stacking occurs when voters, who in a

17. The mechanics of these solutions are beyond the scope of this Note.

18. Mark Dimunation, *Gerrymandering: The Origin Story*, LIBR. OF CONG. BLOGS (July 18, 2024), https://blogs.loc.gov/loc/2024/07/gerrymandering-the-origin-story/#:~:text=The%20term%2C%20originally%20written%20as,Elbridge%20Gerry.

19. *Id.*

20. *Id.*

21. The Library of Congress defines a "gerrymander" as a redistricting plan seeking an "*unfair* political advantage." *Id.* (emphasis added); *see also Gerrymandering*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("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 . . . .").

22. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 850 (2014); *see* Rucho v. Common Cause, 139 S. Ct. 2484, 2492 (2019).

23. Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249 (1993).

24. Stephanopoulos & McGhee, *supra* note 22, at 849–50.

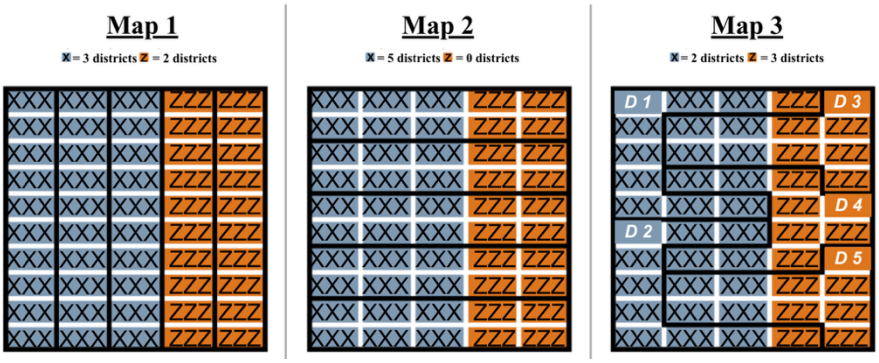
25. *Id.* at 851; *Rucho*, 139 S. Ct. at 2492.

26. Stephanopoulos & McGhee, supra note 22, at 851; *Rucho*, 139 S. Ct. at 2492.

single-member district would constitute a majority, are outnumbered so they cannot elect their preferred candidates.[27] Cracked, packed, or stacked, voters' electoral influence is diluted and votes are wasted.[28]

In this context, "waste[ed]" means that a person's vote does not affect an election's outcome. For example, any votes cast in favor of the losing candidate are wasted.[29] Similarly, in a two-candidate race, any vote for the winning candidate above fifty percent is wasted—the winning candidate did not need those additional votes to secure her seat.[30]

Vote waste is an inevitable byproduct of democracy; in any election, every voter risks either (1) voting for a losing candidate or (2) wasting their votes on



a winning candidate.[31] Thus, "exactly half the votes in each district are wasted in a two-candidate race."[32] But an effective gerrymander manufactures *excess* vote waste across an entire state, such that election outcomes are all but inevitable.[33]

Above, the map on the right (*Map 3*)[34] provides a visual representation of packed and cracked districts—*D1* and *D2* are packed, while *D3*, *D4*, and *D5* are cracked. *Map 3* illustrates a gerrymander targeting the fictitious "X Party" to benefit the equally fictitious "Z Party." The X Party has fifty percent more supporters than the Z Party, yet it does not hold a majority of the districts. Even when an overwhelming majority of voters prefer the disfavored party, gerrymandering serves as a powerful tool of political stagnation.[35] As voters' preferences change, the legislature need not change with them.

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27. Karlan, *supra* note 23, at 250.
28. *See id.*
29. Stephanopoulos & McGhee, *supra* note 22, at 851.
30. *Id.*
31. *Id.*
32. *Id.*
33. *See id.* at 849–51.
34. Liz Kennedy, Billy Corriher & Danielle Root, *Redistricting and Representation: Drawing Fair Election Districts Instead of Manipulated Maps*, CAP (Dec. 5, 2016), https://www.americanprogress.org/article/redistricting-and-representation.
35. In the packed districts, voters for the winning (X) party wasted three votes, while voters for the losing (Z) party wasted one vote. In the cracked districts, voters for the winning (Z) party wasted zero votes, while

In their article *Partisan Gerrymandering and the Efficiency Gap*, Nicholas Stephanopoulos and Eric McGhee explain that the incumbent party's goal is to expand the "efficiency gap" in their party's favor.[36] The efficiency gap is simply the difference between the number of wasted votes for one party compared to the other.[37] All ballots cast by disfavored voters in cracked districts are wasted because those voters have no chance of electing their preferred candidate. Cracking allows mapmakers to distribute preferred voters across as many winnable districts as possible.[38] Conversely, voters in packed districts experience an abundance of vote waste in the opposite direction—surplus votes for the winning candidate.[39] Effective gerrymanders ensure that candidates in packed districts will win by large margins, maximizing the number of wasted votes in favor of that candidate.[40] Packed or cracked, gerrymandered voters cannot vote efficiently.[41]

A. THE RIGHT TO VOTE: FRAMEWORK AND HISTORY

The constitutional right to vote is enigmatic.[42] Rhetorically, the Court has lauded the right to vote as fundamental since the nineteenth century.[43] Colloquially, voting is inexorably linked to democracy. Extreme gerrymandering harms democracy[44] and thus would seemingly harm voters' rights. But constitutionally, "democratic principles" have no bearing on the right to vote in and of itself.[45] This is a puzzling truth. The Constitution and constitutional jurisprudence are indecisive regarding voting rights, which largely explains why federal courts have yet to adjudicate partisan gerrymandering claims as constitutional wrongs.[46] Perhaps obviously, without defining the right to vote, it

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voters for the losing (X) party waste four votes. In total, supporters of the X Party waste eighteen of thirty (18/30) total votes, while supporters of the Z Party wasted only two of twenty (2/20) total votes. Under this redistricting plan, 60% of X-party voters wasted their votes, while only 10% of Z-Party voters wasted their votes.

36. Stephanopoulos & McGhee, *supra* note 22, at 851 n.109.

37. Stephanopoulos & McGhee then divide this number by the total number of votes cast, "thus generating an easily interpretable percentage." *Id.* at 850.

38. "[T]he goal of a partisan gerrymander is to win as many *seats* as possible given a certain number of *votes*. To accomplish this aim, a party must ensure that its votes translate into seats more 'efficiently' than do those of its opponent." *Id.* When preferred voters elect their candidates by narrow margins, fewer votes are wasted and thus the seat is won "efficiently." *See id.*

39. *See id.* at 851.

40. *Id.*

41. *See id.*

42. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (simultaneously explaining that the constitution "does not condone excessive partisan gerrymandering" and refusing to adjudicate the rights of voters in the partisan gerrymandering context).

43. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[Voting is a] fundamental political right"); *see generally* Susan H. Bitensky, *Advancing America's Emblematic Right: Doctrinal Bases for the Fundamental Constitutional Right to Vote Per Se*, 77 U. MIA. L. REV. 613, 625 (2023) (explaining the Courts history of reverence to the right to vote, collecting cases).

44. *See Rucho*, 139 S. Ct. at 2506.

45. *Id.*

46. *Infra* Part.II.

is impossible to thoroughly analyze whether a particular gerrymander violates voters' rights.[47]

1. Voting Rights Framework

Defining the right to vote requires understanding how the Constitution protects the franchise. This Note conceptualizes "the right to vote" as a broad right, comprised of smaller rights. Importantly, the Constitution, as construed by the Court, only prohibits states from abridging the right to vote in certain contexts.[48] Yet, the Court has simultaneously heralded the right to vote as fundamental[49] and acquiesced to legislative actions which are "incompatible with democratic principles."[50] Against this backdrop, parsing the legal and rhetorical contours of the broad right to vote requires an understanding of the various ways that groups of voters exercise their rights to be represented, vote, and shape the government.[51]

In her article, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, Professor Pamela Karlan articulates a three-tier voting rights framework.[52] This paper adopts the view that "the 'right' to vote actually embraces the separate, yet complementary, interests in participation, aggregation, and governance."[53] The first and simplest tier of the right to vote is participation—"the entitlement of individuals to cast ballots and have those ballots counted."[54] In the United States, the participation right has received the most political attention and has earned clear Constitutional protections.[55] Since *Harper v. Virginia State Board of Elections*, the Supreme Court has protected election participation as "fundamental"[56]

The second and third tiers—aggregation and governance, respectively—embody the popular, symbolic understanding that the right to vote is a right "to proclaim an individual's full membership in the political community."[57] The

47. For a detailed analysis of why the "equal" in the phrase "equal rights" is empty, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 538 (1982) (arguing that equality is a derivative concept, because equality cannot be analyzed without first identifying peoples' relationships and access to separate rights).

48. *See* U.S. CONST. amends. XIV, XV, XIX, XXVI, XXIV; *supra* text accompanying notes 8–12.

49. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (explaining that "[t]he right of suffrage is a fundamental matter in a free and democratic society") (citation omitted); *see also* Bitensky, *supra* note 43 (exploring the ambiguities of the constitutional right to vote).

50. *Rucho*, 139 S. Ct. at 2506.

51. Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 215 (2019).

52. Karlan, *supra* note 23, at 247.

53. *Id.* at 248.

54. *Id.* at 247.

55. *See id.* at 250.

56. 383 U.S. 663, 670 (1966); Karlan, *supra* note 23, at 248–49, 249 n.16.

57. Karlan, *supra* note 23, at 248.

concept of full political membership is rhetorically significant but doctrinally underdeveloped.[58]

The aggregation principle reflects the axiom that voters have an interest in aggregating their votes together to elect their preferred candidate.[59] Thus, voters' aggregation rights are necessarily group rights.[60] Collectively, voters have a contextual right to be free from arbitrary election laws that deny groups effective aggregation. The clearest context for aggregation protections is racial gerrymandering[61]—although all gerrymandering results in inefficient aggregation for the targeted group. Under the Equal Protection Clause, if a racial group can show a discriminatory intent and a disproportionate impact, their aggregation claims are subject to strict scrutiny.[62]

The governance principle reflects the idea that voters have an interest in the structure of representative decision-making.[63] The Court has recognized this interest since *Wesberry v. Sanders*[64] and *Reynolds v. Sims,*[65] the Supreme Court's first articulations of the one person, one vote standard.[66] Judicial scrutiny of malapportioned congressional districts is the most tangible example of voters' right to governance.[67] When malapportionment occurs, voters' "voices[s] [are] diluted at the post-election process of official decision making,"[68] denying them governance rights.[69] Accordingly, unequal treatment of voters, based on unequally populated districts, is unconstitutional under the Equal Protection Clause.[70]

Unlike participation rights, aggregation and governance interests are *context-specific* voting rights. They are not protected in and of themselves. Constitutionally, the Equal Protection Clause protects the aggregation right to

58. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); *see generally*, Karlan, *supra* note 23 (describing the Court's tendency to focus on the right to vote as key to political membership while largely ignoring whether that vote ought to have a certain impact on post-election decisionmaking).

59. Karlan, *supra* note 23, at 247; *see, e.g.*, Stephanopoulos & McGhee, *supra* note 22, at 851 (explaining that any individual vote is wasted unless it is combined with other votes for a winning candidate).

60. Wang et al., *supra* note 51.

61. *See id.*

62. Karlan, *supra* note 23, at 250 (citation omitted).

63. *Id.* at 251, 253.

64. 376 U.S. 1, 18 (1964) ("Readers surely could have taken [Federalist No. 57] to mean, 'one person, one vote.'") (internal citation omitted).

65. 377 U.S. 533, 559 (1964) ("[T]he constitutional test for the validity of congressional districting schemes [is] one of substantial equality of population among the various districts established by a state legislature.").

66. Karlan, *supra* note 23, at 253; *see also* Evenwel v. Abbott, 578 U.S. 54, 59 (2016) (locating *Wesberry* and *Reynolds* as the source of malapportionment jurisprudence under the Equal Protection Clause).

67. Karlan, *supra* note 23, at 252.

68. *Id.* at 251.

69. Regardless of which candidate wins a malapportioned district, quantitively, malapportioned voters have less power to shape the legislature, when compared with voters in districts with fewer residents. *Id.* at 251–52.

70. *Reynolds*, 377 U.S. at 559; *see also Evenwel*, 578 U.S. at 71 (2016) (explaining, in a unanimous decision, that states should draw legislative districts by total population, not total number of voters: "[T]he one-person, one-vote guarantee[s] . . . equality of representation, not voter equality").

vote in the context of race; and it protects the governance right to vote in the context of malapportionment, under the "one person, one vote" rule.[71]

Importantly, racial gerrymandering claims also implicate governance—racial gerrymanders dilute minority voices in the legislature.[72] However, in the racial context, the Court addresses aggregation without addressing governance.[73] "[R]ace-based districting by our state legislatures demands close judicial scrutiny" because classifying voters by race poses unique constitutional dangers.[74] Thus, the *classifications* that shape how votes are aggregated are subject to strict scrutiny, not the resulting denial of governance interests.[75]

Gerrymandering writ large offends the principles of both aggregation and governance.[76] Like racial gerrymanders, partisan gerrymanders circumvent voters' governance interests by denying voters' effective aggregation. But, if aggregation and governance are analyzed without reference to one another, partisan gerrymandering does not cause clear constitutional harm.[77]

However, the analysis looks different if aggregation and governance are viewed as sub-parts of a broader right to vote: to the detriment of disfavored voters, supporters of the party in power enjoy a great deal of political influence (governance rights) because their votes are more efficient (aggregation rights).[78] Thus, under Karlan's framework, partisan gerrymandering abridges the governance and aggregation rights that voters have in other contexts.[79] A right as fundamental as suffrage should not be context-specific.

2. Voting Rights History

At this juncture, it should be clear that gerrymandering is antithetical to the foundational ideal of popular sovereignty and democracy. It is not politics, it is math. Once a party comes to power, it can effectively flip the democratic model on its head through careful redistricting. No longer may the people elect their representatives—the representatives may choose their electorate. Political actors, activists, and the Supreme Court itself have criticized partisan

71. Karlan, *supra* note 23, at 250.

72. *See id.* at 252–53.

73. Shaw v. Reno, 509 U.S. 630, 658 (1993) (holding that race-based redistricting plans present constitutional harms in and of themselves).

74. *Id.* at 657.

75. See *id.* at 658 ("If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the [redistricting] plan is narrowly tailored to further a compelling governmental interest.").

76. *See* Wang et al., *supra* note 51, at 217.

77. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2497 (2019) (explaining that under the Equal Protection Clause partisan classifications do not pose the same constitutional harm as racial classifications and thus are not subject to heightened scrutiny).

78. Stephanopoulos and McGhee conclude that because of these practices, "[t]he gerrymandering party enjoys a political advantage not because of its greater popularity, but rather because of the configuration of district lines." Stephanopoulos & McGhee, *supra* note 22, at 853; *see also* Karlan, *supra* note 23, at 252.

79. *See* Karlan, *supra* note 23, at 251–52.

gerrymandering and the harm it causes.[80] Yet, the Supreme Court has not accepted a constitutional rationale to check excessive partisanship and balance the republic.[81]

Confusingly, from an originalist perspective, gerrymandering appears to encourage the very systems of government the United States was founded to admonish. At the time of the Constitution's conception, political leaders and philosophers viewed constitutionalized voting rights as essential.[82] Although the debate regarding *which people* would actually be entitled to vote was heated, our country was founded to fight against the tyranny of the powerful.[83] True, even the most progressive early voting rights advocates assumed that only white men were worthy of the vote. Nonetheless, the idea of universal white-male suffrage was both radical and prevalent.[84] While this version of universal suffrage was not the *most* prevalent philosophy, liberal voting principles carried enough weight that the United States Constitution, as ratified in 1789, does not require voters to own property.[85] Perhaps a small concession, but radical for the time, the Constitution requires that voter eligibility be determined by the states.[86] Thus, since America's inception, voting has been an essential element of the fight against tyranny.

James Sullivan, Elbridge Gerry's successor as the governor of Massachusetts, explained the essential nature of effective suffrage in a letter to Gerry: "Every member of Society has a Right to give his Consent to the Laws of the Community or he owes no Obedience to them."[87] The people cannot consent to the laws if they cannot consent to their own representatives. They cannot consent if the state chooses to pack and crack their votes away. Even John Adams, the most vocal conservative voting rights activist of the revolutionary period, agreed with Sullivan that "the only moral foundation of government is, the consent of the people."[88]

In other words, conservatives were wary of excessive democratic participation and did not want to grant the propertyless suffrage rights; but they

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80. *Rucho*, 139 S. Ct. at 2506 ("Excessive partisanship in districting leads to results that reasonably seem unjust.").

81. *Id.* at 2506–07 ("[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.").

82. *See* Bertrall L. Ross II, *Fundamental: How the Vote Became a Constitutional Right*, 109 IOWA L. REV. 1703, 1737 (2024).

83. *See, e.g.*, THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."); *see also, e.g.*, U.S. CONST. pmbl. ("We the People . . . in Order to form a more perfect union . . . and secure the Blessings of Liberty to ourselves . . . establish this Constitution."); *see generally* Ross II, *supra* note 82 (describing the development of the relationship between republicanism and who may participate in elections).

84. Ross II, *supra* note 82, at 1732–33.

85. *See id.* at 1740.

86. *See id.* at 1741. Only two of the first thirteen states (Pennsylvania and New Hampshire) did not require voters to own property. *Id.* at 1733.

87. *Id.* at 1732 (citing Letter from James Sullivan to Elbridge Gerry (May 6, 1776).

88. *Id.* at 1734 (citing Letter from John Adams to James Sullivan (May 26, 1776).

never argued that once the right to vote is given, it should be manipulated to reduce effective democratic participation.[89] Liberals and conservatives only disagreed in terms of *which* people must consent to the government.[90] True, Gerry signed into law a redistricting plan designed to gain a political advantage but notably, Gerry himself found the redistricting plan "highly disagreeable."[91] Moreover, the gerrymanders of today "are not your grandfather's—let alone the Framers'—gerrymanders."[92]

There is an unequivocal difference between politically advantageous and outcome-determinative redistricting. In a democracy, it is impossible to remove political considerations from the redistricting process.[93] But democracy itself is impossible when political leaders are so entrenched in power that they may govern without the consent of the voters. Today, men and women, black and white, rich and poor, have the right to vote. The several states have given the propertied and the propertyless alike the power to consent to their government.[94] The idea that election results might be predetermined was indefensible to liberal and conservative voting rights advocates.[95]

This Note employs a comparative constitutional analysis to demonstrate how the right to vote advances the fundamental American principle of government of the people, by the people, for the people.[96] Comparative constitutional analysis has long been central to American voting rights.[97] The Federalist Papers criticized the arbitrary and infrequent elections of Ireland and England, decrying those voters' inability to consent to their governments as intolerable.[98] Likewise, Thomas Jefferson, an advocate for universal suffrage, believed the United States had to avoid the pitfalls of the French aristocratic system, where "the[] highest councils . . . [were] in a considerable degree self-

89. *See generally id.* (describing the historical argument against voter suffrage as an issue of reserving power to property owners).

90. The conservatives held that only white property-owning men should have the right to vote, while the liberals would have extended the right to the propertyless. *Id.* at 1733, 1735.

91. Dimunation, *supra* note 18.

92. Rucho v. Common Cause, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting).

93. *Id.* at 2497 (majority opinion) (explaining "[p]olitics and political considerations are inseparable from districting and apportionment") (citation omitted).

94. Ross II, *supra* note 82, at 1708.

95. The people cannot consent when redistricting guarantees that their voices will not be heard. *See id.* at 1730–34 (explaining liberals and conservatives agreed "that the only moral foundation of government is, the consent of the people"); *see* Rucho, 139 S. Ct., at 2513 (Kagan, J., dissenting).

96. *See infra* Part.III.

97. *See, e.g.*, THE FEDERALIST NO. 9 (Alexander Hamilton) ("It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.").

98. *See, e.g.*, THE FEDERALIST NO. 52 (Alexander Hamilton or James Madison) ("The ability also of the Irish parliament to maintain the rights of their constituents . . . was extremely shackled by the control of the crown . . . .").

elected."[99] Presumably to Jefferson's dismay, modern gerrymandering allows for this same self-election.

B. THE MODERN GERRYMANDER LANDSCAPE

The consent of the people to be governed is the foundation of American democracy. The Framers disagreed about who had the right to consent, not about consent's definition.[100] Yet, effective gerrymandering creates an illiberal democracy wherein legislators are not elected; they are coronated. Modern gerrymandering is thus incompatible with even the most conservative original understandings of the right to vote.

Despite the deep historical roots of voting rights in our democracy, today, their fundamental importance appears absent from originalist constitutional jurisprudence. In *Rucho*, the Supreme Court held that all partisan gerrymandering claims present a non-justiciable political question.[101] Considering the Court's *Rucho* opinion, litigating partisan gerrymandering out of the United States' election system seems farfetched.[102] But, as Canadian jurisprudence illustrates, focusing on voting *rights*, not voter *equality*, may depoliticize gerrymandering claims and allow for judicial redress.[103]

1. *Rucho*: Election Equality is Not Justiciable

This Note contends that the principal issue with anti-gerrymandering arguments is their focus on inequality. Adjudicating equality without reference to substantive rights has proved difficult, if not impossible.[104] The lack of substantive voting rights makes adjudicating gerrymandering difficult under the Equal Protection Clause. Hence, gerrymandering has an "Equal Protection problem." Instead of focusing on equality, anti-gerrymandering plaintiffs should focus on the right to vote. *Rucho* exemplifies the problems with anti-gerrymandering arguments focused on voting-adjacent rights, such as equal protection, rather than the right to vote itself. Claims asserting voting rights that are untethered from other Equal Protection rights present non-justiciable political questions. For example, in *Rucho*, the Court held that gerrymandering claims attempt to assert a right to electoral fairness.[105] That right does not exist under the Equal Protection Clause.[106]

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99. *See* Ross II, *supra* note 82, at 1748 (quoting Letter from Thomas Jefferson to P.S. Dupont De Nemours (Apr. 24, 1816)).

100. *See id.* at 1732.

101. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) ("[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.").

102. *See id.* at 2498–99.

103. *See infra* Part.III.

104. *See* Rucho, 139 S. Ct. at 2499; *see also* Westen, *supra* note 47, at 548 (explaining that equality is not a substantive right).

105. *Id.* at 2499.

106. *Id.*

The Court's decision in *Rucho* turned on whether partisan gerrymandering "claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere."[107] *Rucho* presented two of the most egregious partisan gerrymanders of our time. There, plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional.[108] The plaintiffs argued that the challenged maps violated the First Amendment, the Equal Protection Clause, and the Elections Clause.[109] Both District Courts ruled in the plaintiffs' favor, finding that the maps were intentionally drawn to disadvantage voters of the opposing party, in violation of the federal Constitution. Consolidating the cases, the Supreme Court granted certiorari and vacated the decisions below, holding all partisan gerrymandering claims present non-justiciable political questions.[110]

Before addressing substantive legal questions, a federal court must address whether the question presented is a proper subject for judicial redress.[111] Matters are non-justiciable and thus outside a court's judicial jurisdiction if they fail to meet any one of four overarching principles: If (1) a plaintiff lacks standing or (2) a case is unripe, (3) moot, or (4) implicates a political question, a court may not opine on legal issues beyond those related to justiciability.[112] A lawsuit that fails to meet these requirements does not present a justiciable case or controversy.[113] At the heart of the *Rucho* decision is the political question doctrine: a principle of constitutional law, which derives from the separation of powers and limits judicial authority to decide issues whose resolution would require a court to perform a legislative or executive function.[114] The political question doctrine also applies when there is "a lack of judicially discoverable and manageable standards" for resolving a particular controversy.[115]

The lack of a manageable standard for resolving partisan gerrymandering claims would prove fatal for the *Rucho* plaintiffs. The *Rucho* Court found that the Constitution, through the Elections Clause, entrusts districting to political entities (e.g., state legislatures) and offers no objective measure for assessing whether a map treats a political party fairly.[116] The Court held that adjudicating

107. *Id.* at 2494 (emphasis omitted).

108. *Id.* at 2491.

109. *Id.*

110. *Id.* ("The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.").

111. Baker v. Carr, 369 U.S. 186, 197–98 (1962).

112. *Id.* at 198; *cf.* Dred Scott v. Sanford, 60 U.S. 393, 400 (1857) (addressing the merits of a lawsuit despite finding that the claim was not justiciable for lack of standing).

113. *Baker*, 369 U.S. at 198.

114. *Rucho*, 139 S. Ct. at 2494 (citing *Baker*, 369 U.S. at 217); *see also* Zivotofsky v. Clinton, 566 U.S. 189, 197 (2012) (explaining that under the political question doctrine the court may resolve disputes between the three branches of government, but may not exercise the authority of another branch).

115. *Baker*, 369 U.S. at 217; *see Rucho*, 139 S. Ct. at 2494.

116. *Rucho*, 139 S. Ct. at 2506 ("[N]either § 2 nor § 4 of Article I 'provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.'" (citation omitted)).

partisan gerrymandering would require courts to make their own political judgments about what constitutes a "fair" level of representation—a role the Court deemed beyond its authority under the political question doctrine.[117]

The *Rucho* Court made quick work of the anti-gerrymandering arguments rooted in the First Amendment, explaining that if such claims were sustained, it "would render unlawful *all* consideration of political affiliation in districting, contrary to our established precedent."[118] While the First Amendment is a powerful constitutional right, First Amendment jurisprudence almost exclusively scrutinizes governmental suppression of certain messages. [119] Gerrymandering, and the vote dilution it causes, creates a system wherein voters' ability to effectuate their political desires—exercise their governance rights—changes based on party affiliation. But the Court has never read the First Amendment to require the state to protect the relative power of the speaker to effectuate their messages, especially with respect to elections.[120] Thus, the First Amendment does not establish a manageable standard for addressing the alleged rights violations gerrymandering causes.[121]

Next, addressing the equal protection arguments, the *Rucho* majority reasoned that, unlike in cases of racial gerrymandering, where the goal is to eliminate racial classifications, there is no constitutional requirement to eliminate partisanship in districting.[122] While acknowledging the "unfairness" inherent in winner-take-all systems and the apparent injustice of excessive partisan gerrymandering, the Court held that there was no discernible and manageable standard for determining when partisanship in districting had "gone too far."[123] Three factors bolstered the Court's conclusion: first, the doctrinally unmoored "predominant intent" test proposed by the North Carolina district court and adopted by the dissent; second, the inherently predictive role courts would have to play when determining a map's unequal effects on future electoral outcomes; and third, the lack of clarity regarding how much deviation from a "median map" (based on a state's own districting criteria) would be constitutionally permissible under the Equal Protection Clause.[124]

Thus, moving forward, gerrymandering claims cannot be based on rights that are tangential to the right to vote, like the right to free speech or equal protection. Until plaintiffs can articulate the legal harm gerrymandering causes,

117. *Id.* at 2507.

118. *Id.* at 2505 (citation omitted).

119. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("It has been well observed that [the government may regulate] utterances [which] are no essential part of any exposition of ideas, and are of [little] social value.").

120. Buckley v. Valeo, 424 U.S. 1, 30 (1976) (concluding that, even in the election context, the court cannot restrict the speech of some to bolster the speech of others).

121. *Rucho*, 139 S. Ct. at 2501.

122. *Id.* at 2502 ("Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence.").

123. *Id.* at 2497, 2500.

124. *Id.*; *see infra* text accompanying notes 181–187.

the Equal Protection Clause offers no shelter against partisan redistricting decisions.

As infuriating as the *Rucho* decision may be to voting rights advocates, it is the logical extension of the Court's equal protection jurisprudence with respect to the right to vote. Tangential rights do not, and have never, protected voters from the *political* harm gerrymandering causes.[125] Accordingly, the *Rucho* Court declined to defend democracy, but the decision is not radical. It is a relatively unique example of this Court adhering to *stare decisis*. The problem with our voting rights jurisprudence is that it would have been far more radical if the Court had found that the right to vote had a substantive component that prohibited partisan gerrymandering.

II. GERRYMANDERING'S EQUAL PROTECTION PROBLEM

Declining to adopt a manageable voting rights framework, the *Rucho* Court found that partisan gerrymandering presented an insurmountable political question.[126] The Equal Protection Clause has been the accepted basis for voting rights cases for decades.[127] However, *Rucho* shut that door for voters seeking relief from partisan gerrymandering. Accordingly, this Note argues that if voting is indeed a fundamental right, incursions against that right should be litigated head-on. This Part reasons that *Rucho* exemplifies the ambiguous nature of equality and the inadequacy of voting rights under the Equal Protection Clause. It elaborates on the Equal Protection problem facing plaintiffs who seek to challenge partisan gerrymanders. Lastly, it shows how the dissent's test in *Rucho* is untethered from previous voting rights jurisprudence, concluding that the Equal Protection Clause does not protect the right to vote; it protects voters' rights in specific contexts.

The Court's voting rights decisions are primarily based on the Equal Protection Clause of the Fourteenth Amendment,[128] which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[129] Without a clearly defined and firmly grounded right, courts must (1) develop and define that right or (2) borrow adjacent constitutional principles to protect that right; for much of our history, the Supreme Court has taken the second approach to voting rights.[130] Under the Equal Protection Clause, states must afford the same voting rights to all eligible voters, thereby protecting

125. *Rucho*, 139 S. Ct. at 2501.

126. *Id.* at 2507.

127. *Infra* Part.II.

128. *See, e.g.*, *Rucho*, 139 S. Ct. at 2491; Shaw v. Reno, 509 U.S. 630, 658 (1993); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

129. U.S. CONST. amend. XIV, § 1.

130. *See, e.g.*, *Rucho*, 139 S. Ct. at 2494; *Shaw*, 509 U.S. at 658 (finding that race-based redistricting plans are subject to strict scrutiny under the Equal Protection Clause's prohibition on invidious classifications); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (protecting the right to contribute to campaigns under the First Amendment); *Harper*, 383 U.S. at 669 (analyzing voters participation rights under the Equal Protection Clause).

citizens from legislative decisions that result in unconstitutional inequality.[131] But this framework does not *define* voters' rights; it defines the legislature's authority to distinguish between voters. The *Rucho* majority affirmed this equal protection principle by distinguishing partisan and racial gerrymanders.[132]

Elaborating on Professor Karlan's three-tier voting rights framework,[133] this Part begins by exploring precisely what "the right to vote" means in the Equal Protection context. It concludes that under the Equal Protection Clause, the right to vote is largely formal, not substantive; voters' participation rights are well protected, but their rights to aggregation and governance hinge on a contextual analysis of equality. This contextual approach to equality does not protect against the harms of partisan gerrymandering. The Equal Protection right to vote is not a right to vote in itself, but rather a right of equal access to voting. But constitutionally, equality is a fickle and ambiguous concept.[134]

A. THE RIGHT TO VOTE IS AN APPENDAGE TO THE EQUAL PROTECTION CLAUSE

It is widely recognized, and the Supreme Court has consistently found, that the right to vote is central to the American democratic project.[135] In 1886, less than twenty years after the Fourteenth Amendment's ratification, the Court elucidated the essence of the equal protection cause's guarantees in *Yick Wo v. Hopkins*.[136] There, the Court found occasion to "consider the nature and the theory of our institutions of government [and] the principles upon which they are supposed to rest," in the context of Equal Protection.[137] Yick Wo was convicted for failing to comply with a San Francisco ordinance that made it unlawful to operate a laundromat except in a brick or stone building. On appeal, the Court ruled that the ordinance violated the Equal Protection Clause because the City enforced the law almost exclusively against Chinese Americans.[138]

Yick Wo is a seminal case, invalidating a statute for manifesting an unconstitutionally discriminatory purpose.[139] Undergirding the *Yick Wo* opinion is a fundamental Equal Protection principle: The arbitrary enforcement of

131. *Rucho*, 139 S. Ct. at 2496; *Shaw*, 509 U.S. at 658; *Harper*, 383 U.S. at 666.

132. *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.").

133. Karlan, *supra* note 23.

134. *See* Westen, *supra* note 47.

135. *See* Bitensky, *supra* note 43, at 633–40, 657 (detailing the Court's articulations of the connection between voting and democracy, and collecting cases); *see, e.g.*, Reynolds v. Sims, 377 U.S. at 533, 555 (1964) (declaring that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society"); Burson v. Freeman, 504 U.S. 191, 198–99 (1992) (affirming that the right to vote for a preferred candidate is essential to a functional democracy); Shaw v. Reno, 509 U.S. 630, 639 (1993) (stating "[t]he right to vote" is "the essence of a democratic society.").

136. 118 U.S. 356, 369–70 (1886).

137. *Id.*

138. *Id.* at 374.

139. *See id.*

fundamental rights is "intolerable in any country where freedom prevails."[140] The Court illustrated this constitutional mandate by reference to the right to vote. It explained, "the political franchise of voting . . . [is a] fundamental political right, because [it is] preservative of all rights."[141] Accordingly, legislation related to the right to vote may not, under the guise of regulation, "subvert or injuriously restrain, the right itself."[142]

Yick Wo is not a voting rights case. Nonetheless, the Court employed the philosophical underpinnings of the right to vote to define the mandate of the Equal Protection Clause; fundamental rights may not be arbitrarily abridged by "the mere will of another."[143] In the eyes of the Court, the right to vote illustrates the principle that rights conferred by the state to the people must be strictly and equally preserved. This principle underpins an entire body of Equal Protection case law concerning legislation motivated by hostility to a specific group.[144] The Court overturned Wo's conviction because the Equal Protection Clause prohibits enforcement of those laws that are "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights."[145]

1. The Equal Protection Right to Vote Lacks Substance

Yick Wo is an early example in a long line of cases, where the Supreme Court has touted the fundamental character of the right to vote.[146] Under the Equal Protection Clause, voting rights cases consistently address the relative *scope* of the right to vote. However, a clear definition of the right to vote, its substantive guarantees, and restrictions, does not exist under the Equal Protection Clause. And without a clear definition, test, or set of factors, it is difficult to determine whether legislative actions—such as redistricting decisions—unconstitutionally infringe or abridge a substantive fundamental right. In the United States, the right to vote exists only as an appendage to other fundamental rights. Thus, this Note asserts that the right to vote lacks substance and is merely a contextual right.

Consider, for example, *Harper*.[147] There, the Court held that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."[148] Addressing the constitutionality of a $1.50 poll tax in

140. *Id.* at 370.
141. *Id.*
142. *Id.* at 371 (quotation omitted).
143. *Id.* at 370.
144. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996).
145. *Yick Wo*, 118 U.S. at 373–74; *see also* Reynolds v. Sims, 377 U.S. 533, 561 (1964).
146. *Reynolds*, 377 U.S. at 562; Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019); Shaw v. Reno, 509 U.S. 630, 649 (1993); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966).
147. 383 U.S. 663.
148. *Id.* at 667 (quoting *Reynolds*, 377 U. S. at 561–62).

Virginia, the court explained that invidious discrimination against eligible voters constitutes an invalid legislative motivation.[149] Discrimination against voters based on arbitrary, irrelevant distinctions is unconstitutional. Furthermore, "[t]he degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination."[150]

In *Harper*, the Court explained that the right to vote is a fundamental political right.[151] As such, the Equal Protection Clause forbids unnecessary discrimination that affects an individual's ability to exercise that right. A poll tax creates barriers for eligible voters to exercise their rights. It creates inequalities regarding voters' ability to access the polls and cast their votes. However, the Court's analysis makes no mention of the rights voters have after being granted the right of equal access to the polls.[152] Thus, voters' participation rights—access to the polls—are well protected by American courts. But once a court determines that the ballot-casting process is equal, voters' substantive rights to self-governance remain enigmatic and context specific.

Substantively, any person in the United States has the right to be free from state laws that amount to invidious discrimination.[153] This right extends to the context of voting, and thus, eligible voters have the right to cast their ballots free from discrimination.[154]

But the right to be free from discrimination is hardly a voting right. The Court protects the right to vote by enforcing a separate category of equal protection rights, which have been protected since *Yick Wo*.[155] Therefore, racial or otherwise invidious discrimination that impedes voters' ability to cast a vote is unconstitutional.[156] However, discrimination that affects a voter's ability to effectuate their political will is often beyond the reach of the Equal Protection Clause.

Redistricting jurisprudence further supports the conclusion that the Equal Protection Clause does not define the nature of the right to vote itself. For example, in *Gomillion v. Lightfoot*, the Court struck down an Alabama statute that changed the shape of the city of Tuskegee from a square to "an uncouth, twenty-eight-sided figure," which effectively removed nearly all black voters from the district but did not affect a single white voter.[157] The Court had two

149. *Id.* at 664 n.1.

150. *Id.* at 668.

151. *Id.* at 667.

152. *Id.* at 669.

153. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973).

154. *Harper*, 383 U.S. at 670.

155. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886)(declaring discriminatory animus unconstitutional under the equal protection clause).

156. Reynolds v. Sims, 377 U.S. 533, 562 (1964) (citing *Yick Wo*, 118 U.S. at 370); Shaw v. Reno, 509 U.S. 630, 642–43 (1993); *see also* Romer v. Evans, 517 U.S. 620, 631 (1996).

157. 364 U.S. 339, 340 (1960).

primary bases for invalidating the statute. First, the state demonstrated an invidious purpose by discriminating against a protected class of citizens—African Americans. Second, the statute had the effect of infringing on black voters' Fifteenth Amendment rights.[158] Even though the *Gomillion* Court grounded its holding in the Fifteenth Amendment, the Court did not define the substance of the right to vote. Rather, it found that racial classifications are an impermissible criterion for redistricting. The statute was declared unconstitutional because it was enacted with the purpose of disenfranchising the black population. Thus, gerrymandering abridges the right to vote in the racial *context*. This logic mirrors equal protection principles. And notably, Justice Whittaker wrote a concurrence arguing that the Court's *Gomillion* opinion should have been grounded in the Equal Protection Clause.[159] As time has gone on, the judiciary has adopted Whittaker's approach.[160]

Similarly, in *Rogers v. Lodge*, the Court struck down the use of at-large elections in a county in Georgia on the grounds that the system "was being maintained for the invidious purpose of diluting the voting strength of the black population" in violation of the Equal Protection Clause.[161] Once again, as in *Yick Wo* and *Gomillion*, the right to vote is rhetorically significant in *Rogers*, but the right itself is intangible.[162] The right to be free from invidious racial classifications, as guaranteed by the Equal Protection Clause, served as the basis of the Court's logic. That right exists independently of the right to vote.

Like racial classifications, voter dilution based on place of residence impedes "fair and effective representation for all citizens," and such dilution is subject to heightened scrutiny under the Equal Protection Clause.[163] In *Gray v. Sanders*, the Court articulated the constitutional rationale behind the equal population principle, elaborating on the "one person, one vote" rule.[164] The Court concluded that once a state determines a constitutional voter eligibility criterion for an election, "all who participate in the election [must] have an equal vote."[165] One year later, in *Reynolds*, the Court explained that "the Equal Protection Clause guarantees the opportunity for equal *participation* by all voters in the election of state legislators."[166]

The equal population principle, or the "one person, one vote" rule, encapsulates one aspect of the right to vote. Under the Equal Protection Clause,

158. *Id.*; U.S. CONST. amend. XV, § 1 (forbidding states from infringing on citizens' right to vote based on race).

159. *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring).

160. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019).

161. 458 U.S. 613, 622 (1982).

162. Reynolds v. Sims, 377 U.S. 533, 560 (1964); *Gomillion*, 364 U.S. at 346; Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

163. *Reynolds*, 377 U.S. at 565–66.

164. 372 U.S. 368, 379–81 (1963).

165. *Id.* at 379.

166. 377 U.S. 533, 565–66 (1964) (emphasis added).

"[c]laims asserting quantitative vote dilution are actionable."[167] As Professor Grant Hayden articulates, quantitative vote dilution occurs when votes receive unequal weight due to unequally populated districts—such votes are "numerically diluted." [168] Quantitative vote dilution infringes on the fundamental "right to have one's vote counted."[169] And "once [the] Court identifies a 'fundamental' right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others."[170]

Acts that lead to quantitative vote dilution are thus subject to strict scrutiny. The right to cast a ballot, which will be counted equally, is abridged when a person's vote in District "A" counts for more than a person's vote in District "B." Classifying voters in District "B" based on their place of residence, thereby creating unequally populated districts, unconstitutionally dilutes their voices.[171] Thus, in the one person, one vote context, the Equal Protection Clause protects voters' governance interests from dilution because the "Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote]."[172]

2. The Right to Vote Is Contextual

The one person, one vote cases only protect voters' rights with respect to malapportionment. Classifying people based on geography denies equal protection of the law when it results in unequal district sizes.[173] The racial redistricting cases only protect voters' rights with respect to racial classifications. While race-based redistricting and malapportionment cases are inextricably tied to voting rights, they do not define the right. Rather, they expand an equal protection principle—invidious classifications are unconstitutional—to the voting context.[174]

Equal, but not democratic, access to participation, governance, and aggregation appears to be central to the right to vote. A court may only address legislative acts that discriminate against a protected class (e.g., racial gerrymandering) or classifications that affect equal *access* to governance rights in elections (e.g., one person, one vote).[175] In those two contexts, the Equal Protection Clause grants voters rights that protect their governance and

167. Grant M. Hayden, *The False Promise of One Person, One Vote,* 102 MICH. L. REV. 213, 215 n.5 (2003).

168. *Id.* at 214–15.

169. *Gray*, 372 U.S. at 380.

170. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 335 (2022) (Thomas, J., concurring).

171. *See*, *e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964); Reynolds v. Sims, 377 U.S. 533, 560 (1964).

172. *See* Shaw v. Reno, 509 U.S. 630, 649 (1993); *Wesberry*, 376 U.S. at 17–18; *Reynolds*, 377 U.S. at 560;

173. *Reynolds*, 377 U.S. at 560 ("[V]oters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections.").

174. *See*, *e.g.*, *Yick Wo*, 118 U.S. at 373; *Romer*, 517 U.S. at 633. Neither case presents a voting rights issue. However, in both cases, the Supreme Court ruled that the legislature violates the Equal Protection Clause when it unequally distributes rights based on arbitrary and capricious classifications.

175. *Reynolds*, 377 U.S. at 577–79 (explaining the "equal population principle").

aggregation interests. Because aggregation and governance rights are tied to equal protection rights, they only exist contextually—in the face of unnecessary or discriminatory classifications.[176]

Meanwhile, gerrymandering causes qualitative vote dilution, characterized by voters' limited opportunity "to elect a representative of her choice" when compared to other voters with the same rights.[177] A primary concern of Equal Protection Clause jurisprudence is whether "the rights allegedly impaired are *individual* and personal in nature."[178] In the United States, the right to vote is a personal one, and central to the democratic process.[179] But aggregation and governance are *group rights*, not individual rights.[180] Thus, the Equal Protection Clause does not provide a clear framework to attack partisan gerrymandering because partisan gerrymandering abridges voters' group rights.

Even though gerrymandering causes harm to disfavored voters, it has been historically difficult to prove that a state interest is illegitimate, invidious, or that the chosen means of achieving that interest are irrational, under the Equal Protection Clause.[181] Generally, "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[182] However, such desires must be front and center; to warrant heightened scrutiny, a legislature's intent to *harm* a certain group must predominate the challenged action.[183] Otherwise, a court must evaluate an equal protection claim by focusing on the rationality behind the selected means of achieving the desired outcome.[184]

In the context of gerrymandering, securing a partisan advantage is a permissible intent under the Equal Protection Clause; it can hardly be said that members of either major political party are a politically unpopular group.[185] It follows that drawing districts based on party affiliation is a rational means of achieving that goal. The Equal Protection Clause prohibits formal voting inequities such as quantitative vote dilution.[186] But gerrymandering mainly

176. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2496–97 (2019) (distinguishing racial and geographic classifications from partisan classifications). Equal Protection analysis largely concerns whether a policy denies persons equal access to rights or services, and invidious discrimination against politically disempowered groups or classes. *See*, *e.g.*, *Romer*, 517 U.S. at 634; *Yick Wo*, 118 U.S. at 373–74.

177. Hayden, *supra* note 167, at 215.

178. *Reynolds*, 377 U.S. at 561 (emphasis added).

179. *Id.* ("[T]he right to vote is personal." (citation omitted)).

180. *See supra* Subpart.I.A.1.

181. *See, e.g.*, N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979) (applying rational basis scrutiny to a statute prohibited methadone users from obtaining employment in vast swaths of the public sector, even though the statute had a disproportionate impact on people of color and the poor).

182. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

183. *Id.*

184. *Id.* at 533.

185. Rucho v. Common Cause, 139 S. Ct. 2484, 2503 (2019) ("A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'").

186. Gray v. Sanders, 372 U.S. 368, 380 (1963).

concerns election fairness and voting rights writ large.[187] Thus, constitutionally speaking, partisan redistricting does not inherently relate to voters' rights. Redistricting is the state's prerogative, and courts are hesitant to apply a heightened level of review to a legislative judgment without a clear constitutional mandate.[188]

The Equal Protection problem now takes form: Even though racial gerrymandering involves the same basic legislative conduct as partisan gerrymandering—the act of creating new districts—racial gerrymandering claims are justiciable.[189] Racial gerrymandering claims avoid "justiciability conundrums" because the standard of review for race-based claims (strict scrutiny) is clear, manageable, and well-developed.[190] Meanwhile, under *Rucho*, partisan gerrymandering claims do not present "claims of *legal* right," largely because voters' rights depend on tangential equal protection rights.[191]

The claim of legal right at issue in racial gerrymandering cases is not really a voting right. Rather, such claims are based on the right to be free from improper racial classifications, an individual right.[192] Although voters seek redress for violations of their aggregation rights, the Court does not scrutinize racial gerrymandering as voting rights claims. Rather, it adopts the presumptive standard of review for laws that contain racial classifications (strict scrutiny). Voting is merely the context in which the constitutional harm occurs. Voting rights are not the cause of action.

Thus, partisan gerrymandering is a square peg in the round hole of Equal Protection scrutiny. Partisan political entrenchment is not inherently motivated by a desire to harm but by a desire to promote a particular political philosophy.[193] As one of the state officials in *Rucho* put it, "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."[194] This reveals a clear desire to help Republicans win more seats. It is accordingly difficult to argue that the legislator's primary motive was merely to harm Democrats. At the same time, it is equally challenging to claim that a blatant desire to control the will of the people is democratic. Nevertheless, the Equal Protection Clause protects neither democracy nor rights implicit in the concept of ordered liberty. Instead, it forbids states from unequally distributing those rights to individuals.[195]

187. *Rucho*, 139 S. Ct. at 2488.

188. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 480 (2005).

189. *Rucho*, 139 S. Ct. at 2488.

190. *See Rucho*, 139 S. Ct. at 2502.

191. *Id.* at 2494.

192. *See* Westen, *supra* note 47, at 567–68.

193. *Rucho*, 139 S. Ct. at 2496–97.

194. *Id.* at 2491.

195. Reynolds v. Sims, 377 U.S. 533, 565 (1964) (explaining "equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 335 (2022)

Thus, while the Equal Protection Clause is generally well-equipped to address facial discrimination,[196] it is ill-equipped, to tackle questions of discriminatory results.[197] Under the Equal Protection Clause, laws that disproportionately disadvantage a specific group are not scrutinized unless they are passed because of—not in spite of—those disadvantageous results.[198] The process of partisan gerrymandering does not trigger heightened scrutiny under the Equal Protection Clause because partisan classifications are not suspect.[199] Thus, the problematic results of partisan gerrymandering are ill-suited for analysis under the Equal Protection Clause because equal protection rarely requires scrutiny of unfair results.[200] "And it is only after determining how to define [un]fairness that you can even begin to answer the determinative question: 'How much [partisanship] is too much?'"[201] Under *Rucho*, the judiciary mustn't utter this question's answer.

B. THE HARMS PARTISAN GERRYMANDERING CAUSES ARE BEYOND THE SCOPE OF THE EQUAL PROTECTION CLAUSE

Accordingly, the difficulty with adjudicating partisan gerrymandering under the Equal Protection Clause is that "[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'"[202] The *Rucho* Court essentially found that no discernable measure of intent exists to delineate whether partisan redistricting amounts to an invidious classification, which denies voters' rights.

Kagan's dissent exemplifies this Equal Protection problem: The Equal Protection Clause cannot prevent harms that do not result from impermissible classifications.[203] The dissent is eloquent and provides a clear standard under which to evaluate partisan gerrymandering claims, yet it is not firmly grounded in Equal Protection Clause jurisprudence. Instead, it is grounded in the

(Thomas, J., concurring) (explaining that the Equal Protection Clause requires strict scrutiny of statutes that distribute fundamental rights to some but not to others).

196. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635–36 (1996).

197. Even though the Equal Protection Clause requires meticulous scrutiny of race-based classifications, laws which result in disproportionate harm to racial groups often escape stringent judicial review. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 281 (1987) (rejecting an Equal Protection challenge based on statistical evidence of racial disparities because it lacked proof of discriminatory intent); Washington v. Davis, 426 U.S. 229, 230 (1976) (holding that proof of disparate racial impact, absent a discriminatory purpose, is insufficient to establish an Equal Protection violation).

198. *See*, *e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (1979) (requiring heightened scrutiny only if plaintiffs can establish both discriminatory intent and disparate impact).

199. *Rucho*, 139 S. Ct. at 2501–02.

200. *Id*. at 2502.

201. *Id.* at 2501.

202. *Id.* at 2503.

203. Voters have a right to be free from impermissible classifications, but unlike geographic classifications which result in unequally populated districts, partisan classifications do not inherently harm voters; they might, or they might not. Accordingly, they are permissible and not subject to heightened scrutiny. *Id.*

philosophical foundations of democracy. Kagan agrees with the majority that fairness is not the appropriate standard for analyzing partisan gerrymandering.[204] But rejecting the idea that the plaintiffs seek "fairness" or "proportional representation," Kagan focuses on the democratic harms gerrymandering imposes.[205] Adopting the lower court's decisions, Kagan's test has three parts: (1) intent; (2) effects; and (3) causation.[206]

Aside from the blatant disagreement regarding the nature of democracy, Kagan and the majority principally disagree about how to scrutinize legislative intent.[207] Kagan's intent prong fails if "'state officials' 'predominant purpose' in drawing a district's lines was to 'entrench [their party] in power' by diluting the votes of citizens favoring its rival."[208] This formulation suggests a novel constitutional theory: substantive voting rights.

Kagan suggests that securing a political advantage is not always a constitutionally permissible intent. Thus, partisan gerrymandering plans may be subject to a heightened standard of review even when the plans are not based on invidious or impermissible classifications (e.g., racial or geographic). This conclusion contravenes the accepted hierarchy of Equal Protection Clause scrutiny.[209] The Equal Protection Clause does not require the Court to scrutinize a legislature's constitutionally permissible motives in the redistricting context. Yet Kagan's test seems to ask the Court to do so.[210]

Kagan's test makes sense only if voters have substantive rights beyond the established Equal Protection voting rights. Partisan gerrymandering does not result from the legislature's use of impermissible classifications to dilute voters' rights. In fact, Kagan acknowledges that partisan affiliation is a constitutionally permissible means of classifying voters.[211] But the Equal Protection right to vote only protects voters' interests contextually—when the legislature uses impermissible classifications to dilute voters' rights. To rephrase, in the context of racial or geographic classifications, voters have aggregation and governance rights. Kagan's test does not implicate *those* Equal Protection rights; it requires heightened scrutiny to protect voters' aggregation and governance interests in all contexts, without reference to an impermissible classification.

Arguably, the intent prong of Kagan's test is unnecessary altogether. Intent is simply the accepted framework for scrutinizing classifications that abridge

204. *Id.* at 2515 (Kagan, J., dissenting).

205. *Id.* at 2509.

206. *Id.* at 2516.

207. *Id.* at 2516–17.

208. *Id.* at 2516

209. Courts apply heightened Equal Protection scrutiny when an act discriminates against protected groups of individuals. If a law does not discriminate against a protected class, it will be invalid only if it was motivated by a bare desire to harm a group. The intent prong, however, does not require a court to find that a gerrymander was based on a desire to harm. Rather it implies that political self-dealing is subject to heightened scrutiny. *Id.* at 2516.

210. *See id.* at 2517.

211. *Id.*

voting rights analysis in the United States.[212] But by asking whether the legislators sought to entrench *themselves* in power, Justice Kagan does not really perform an Equal Protection analysis; a desire to secure political power does not create impermissible classifications. It does, however, dilute voters' governance and aggregate interests. Thus, unlike previous voting rights cases, Kagan's test does not require scrutiny of impermissible classifications. It scrutinizes the legislative decisions that deny voters effective representation. Effective representation, however, is beyond the scope of the Equal Protection Clause because, until the United States defines the right to vote in those terms, partisan gerrymandering claims are not claims of legal right.[213]

At bottom, American voting rights jurisprudence is underdeveloped. Kagan seems to imply that voters have unenumerated constitutional rights to governance and aggregation, which are not context specific. But those substantive rights have yet to be expressly articulated. Further, Kagan herself does not adopt a rights-based approach to gerrymandering but instead focuses on intent. Meanwhile, the *Rucho* majority held that it could not examine or scrutinize the legislature's intent. The Court explained, securing a partisan advantage is *de facto* permissible under the Equal Protection Clause, even when it leads to undemocratic results.[214]

The *Rucho* logic seems to be a gross dereliction of judicial duty, an acquiescence to tyranny, and ultimately confusing. But considering our equal protection jurisprudence, it makes sense. The Equal Protection Clause simply does not offer a clear framework for scrutinizing the qualitative inequalities of partisan gerrymandering cases. The right to vote is linked to other context-specific equal protection rights; it is not a substantive right, consistently including governance or aggregation.[215] Thus, moving forward, gerrymandering claims cannot be based on rights that are tangential to the right to vote, like the right to free speech or equal protection.

Until plaintiffs can articulate the legal harm gerrymandering causes, the Equal Protection Clause offers no protection against partisan redistricting decisions. *Rucho* illustrates the problem with the right to vote in the United States: It is unclear when that right translates into substantive protections for voters. By looking abroad, the United States may develop those protections and adjudicate violations of the right to vote without delving into the political thicket.

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212. Shaw v. Reno, 509 U.S. 630, 642–43 (1993).

213. *See* Westen, *supra* note 47, at 581 (explaining how equality becomes meaningless when not grounded in principles of legal rights and wrongs); Rucho v. Common Cause, 139 S. Ct. 2484, 2502–03 (2019) (explaining that partisan classifications do not indicate that the redistricting was improper).

214. *Rucho*, 139 S. Ct. at 2502–03.

215. *See*, *e.g.*, Gill v. Whitford, 585 U.S. 48, 72 (2018) (explaining that partisan gerrymandering cases are "about group political interests, not individual legal rights," and the "[c]ourt's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it," not to redress political disputes).

III. THE AFFIRMATIVE, SUBSTANTIVE RIGHT TO VOTE IN CANADA

The *Rucho* court did not hold that partisan gerrymandering was constitutional.[216] Moreover, the Court acknowledged the harms gerrymandering imposes on fundamental democratic processes.[217] Accordingly, the remainder of this Note examines judicial approaches to gerrymandering and voting rights, highlights their shortcomings, and advocates for a doctrinal solution centered on substantial voting rights.

In many developed democracies, voters do not need to seek voting-rights protection from other constitutional principles because their voting rights stand as independent constitutional guarantees.[218] Litigation regarding election-effecting decisions is often rooted in the right to vote. Given a constitutional right to vote, plaintiffs abroad can challenge legislative decisions on the grounds that a decision abridges their substantive right. Conversely, in the United States, while voting rights are fundamental, courts look to principles of equal protection, freedom of speech, states' rights, and the like to determine whether a legislative act – such as partisan gerrymandering – abridges a voter's rights.[219] Put simply, in the United States, plaintiffs do not yet have a cause of action for substantive voting rights violations.

In the United States, the right to vote is vague, underdefined, and often insubstantial.[220] This need not be the case. If voting rights are indeed fundamental, legislative actions abridging those rights should be challenged as constitutional violations of the right to vote. Justiciability is a context-specific analysis, and after *Rucho*, partisan gerrymandering claims present purely political questions because the Equal Protection Clause places voting rights in a constitutional pigeonhole.[221] Gerrymandering claims are justiciable only if aggrieved voters can allege that they suffered a rights-based harm.[222] But gerrymandering does not cause harm, in the constitutional sense, unless it occurs because of the legislature's decision to impermissibly classify voters. Partisan classifications are permissible; racial ones are not.

Rucho's holding is a product of how the right to vote is framed in the United States. The substantive right to vote should be robust, and its guarantees should be well defined by constitutional jurisprudence. Partisan gerrymandering claims do not pass muster under the political question doctrine for failure to state a claim of legal right (despite resulting in undemocratic harms) because

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216. *Rucho*, 139 S. Ct. at 2504, 2507.

217. *Id.* at 2498–99.

218. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, s. 3, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). For a complete list of countries that purportedly have universal voting rights, see *Countries That Have Universal Voting Rights, World*, OUR WORLD IN DATA, https://ourworldindata.org/grapher/countries-that-have-universal-voting-rights (last visited Jan. 28, 2026).

219. *See supra* Part.II.

220. *See supra* Part.II.

221. *See supra* Part.II.

222. Rucho v. Common Cause, 139 S. Ct. 2484, 2487 (2019); *see supra* Part.II.

gerrymandering claims are not currently adjudicated as voting rights violations.[223]

In Canada, the Constitution Act of 1982 enshrines a right to vote: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[224] As a result, Canada's courts have frequently been called upon to adjudicate claims regarding the substantive nature of voting and the democratic process. [225] Correspondingly, those courts have developed a manageable framework to address legislative actions deemed "incompatible with democratic principles." [226] Gerrymandering and democracy are incompatible; an unrepresentative polity is a threat to any democratic republic.[227]

A. THE CANADIAN APPROACH: RIGHTS, REDISTRICTING, POLITICAL QUESTIONS

Some may argue that *Rucho* represents the epitome of judicial abdication. This Note views the Supreme Court's abdication as a silver lining. So long as gerrymandering is *not* affirmatively *constitutional*, it may be litigated. However, to litigate partisan gerrymandering, we must first define the right to vote. To understand why, the United States need only look north. The Canadian Charter, like the Bill of Rights in the United States, "sets out those rights and freedoms that Canadians believe are necessary in a free and democratic society."[228] The Canadian Constitution is a set of laws containing the basic rules regarding how Canada operates. It "states the powers of the federal and provincial and territorial governments in Canada,"[229] while the Canadian Charter sets out the rights of the people.[230] Substantive rights may be adjudicated much like violations of the substantive rights incorporated under the Due Process Clause in the United States.[231]

While the United States Supreme Court has held partisan gerrymandering claims non-justiciable, the Canadian Supreme Court has taken a different approach. In *Reference Re Provincial Electoral Boundaries*, the Canadian Supreme Court rejected the notion that Section 3 guarantees absolute pop parity,

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223. *See supra* Part.II.

224. Canadian Charter of Rights and Freedoms, *supra* note 218.

225. Yasmin Dawood, *The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter*, 100 SUP. CT. L. REV. 105, 106 (2021) (citing Reference re Prov. Electoral Boundaries, [1991] 2 S.C.R. 158 (Can. Sask.); Harvey v. New Brunswick (Att'y Gen.), [1996] 2 S.C.R. 876 (Can.); Figueroa v. Canada (Att'y Gen.), [2003] 1 S.C.R. 912 (Can.)).

226. *Rucho*, 139 S. Ct. at 2506 (internal quotation omitted).

227. *Id.*

228. *Guide to the Canadian Charter of Rights and Freedoms*, GOV'T OF CAN. (Feb. 4, 2026), https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html.

229. *Id.*; *see* Constitution Act, 1867, s. 92, 30 & 31 Vict., c. 3 (U.K.); *Prov. Electoral Boundaries*, 2 S.C.R. at 160.

230. Canadian Charter of Rights and Freedoms, *supra* note 218; *see Prov. Electoral Boundaries*, 2 S.C.R. at 177; *Figueroa*, 1 S.C.R. at 922.

231. *See, e.g.*, *Prov. Electoral Boundaries*, 2 S.C.R. at 168.

instead grounding the right to vote in the concept of "effective representation."[232] This purposive interpretation recognizes that while voter equality is an important concern, other factors like geography and community interests must be considered to ensure that citizens have a meaningful voice in government.[233] Alternatively, in the United States, equality is *the* consideration.[234]

The Canadian approach circumvents the political question doctrine by focusing on the substantive right to effective representation, rather than the procedural aspects of equitable redistricting. Canadian jurisprudence thereby avoids the Equal Protection problem.

1. The Right to Vote Is a Justiciable Claim of Legal Right

In *Provincial*, the Canadian Supreme Court explicitly acknowledged the differences between the Canadian and American legal systems, particularly the greater emphasis placed on effective representation across diverse communities and geographic realities in Canada.[235] There, voter-plaintiffs challenged the redistricting plan of the Saskatchewan territory. The Canadian Court rejected the defendant's argument that the political nature of redistricting was beyond the Court's jurisdiction. The defendant, the Minister of Justice of the Northwest Territories, argued that "the place of voter equality in this determination is a matter of constitutional convention which is impervious to judicial review. The right of the provinces to create electoral boundaries as they see fit 'must be taken as being an inherent limitation on the right to vote in s. 3.'"[236]

For all intents and purposes, the Minister's argument is identical to the political question argument accepted in *Rucho*. Yet, the Canadian Court reached the merits of the redetecting claims by focusing on the Canadian right to vote, guaranteed under Section 3 of the Charter. The Court did not evaluate abstract questions regarding the plan's fairness. The Court reduced the questions of fairness and equality to questions of voters' rights. Plaintiffs claimed that since the Saskatchewan map resulted in malapportionment, it violated their right to vote.

The Court held that while Section 3 guarantees the right to vote, the Canadian Constitution does not dictate a specific process for drawing electoral boundaries.[237] Nor does the United States Constitution—a concern that the United States Supreme Court found tantamount to any potential harm redistricting may cause.[238] In *Provincial*, the Saskatchewan plan gave unequal weight to voters in rural districts.[239] Instead of objecting to the legislature's right

232. *Id.* at 160–61.
233. *Id.* at 162; Dawood, *supra* note 225, at 116.
234. *See supra* Part.II.
235. *Prov. Electoral Boundaries*, 2 S.C.R. at 165–66.
236. *Id.* at 178–79 (citation omitted).
237. *Id.* at 178–79.
238. Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019).
239. *Prov. Electoral Boundaries*, 2 S.C.R. at 192.

to oversee the redistricting process, the plaintiffs claimed the plan impermissibly infringed the voting rights of urban voters because it denied them population parity (one person, one vote).[240]

Although the Court acknowledged that the power to create provincial electoral boundaries is historically granted to provinces, it rejected the argument that this rendered the Charter inapplicable.[241] The Court determined that provincial electoral boundary legislation is subject to Charter scrutiny, meaning that any limitations on the right to vote arising from a districting plan must conform to the Charter's requirements.[242] Next, unlike in the United States, the Canadian Supreme Court found that the Canadian Constitution does not require voter parity (i.e. one person, one vote).[243] Nonetheless, the Court adjudicated the extent to which the unequally populated districts violated the plaintiffs' right to vote.

Redistricting is inherently intertwined with political concerns and legislative prerogatives. But in Canada, if the government fails to justify infringement on the right to vote, a redistricting claim may be adjudicated.[244] This approach recognizes that ensuring substantive equality in the electoral process—and adjudicating whether the legislature violated the principles of equal protection—requires substantive rights. Nonetheless, Canada has emphasized the importance of the political questions of redistricting and the need for the separation of powers: Within the boundaries set by "the primary value of individual participation in fair elections on a basis of relative equality," there exists a space for legislative choices regarding democratic representation.[245] Thus, in the Canadian redistricting context, incursions against the right to vote are justiciable despite the political question doctrine.

The Canadian Court "clearly operates with a political questions doctrine in mind."[246] Yet, the Court has held that a claim is not insulated from judicial review because it is a "'political question' [where] the Court ha[s] a constitutional obligation . . . to decide whether any particular act of the executive violate[s] or threaten[s] to violate any right of the citizen."[247]

240. *Id.* at 169, 182 (the redistricting plan at issue resulted in intentionally unequally populated districts with some margins of difference well above ten percent).

241. *Id* at 178–80.; *see also* Dawood, *supra* note 225, at 118–120 (elaborating on Canada Supreme Court's treatment of political questions); *see generally* D. Geoffrey Cowper & Lorne Sossin, *Does Canada Need a Political Questions Doctrine?*, 16 SUP. CT. L. REV.: OSGOODE'S ANN. CONST. CASES CONF. 344, 345 (2002) (providing a more complete analysis of Canada's political questions doctrine).

242. *Prov. Electoral Boundaries*, 2 S.C.R. at 179.

243. *Id.* at 188; *see also* Reynolds v. Sims, 377 U.S. 533, 551 (1964) (explain the United States' adherence to the one person one vote rule).

244. Figueroa v. Canada (Att'y Gen.), [2003] 1 S.C.R. 912, 944 (Can.) (explaining that although the Canadian Charter allows for reasonable legislative limitations on voting rights, those limitations must be strictly justified and are subject to judicial scrutiny).

245. *Id.* at 993.

246. Cowper & Sossin, *supra* note 241, at 345.

247. *See* Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, 443 (Can.).

More importantly, the Canadian Court has adopted the same rights-based justiciability framework that underpins the political question logic of the *Rucho* holding.[248] Thus, in both Canada and the United States, courts may only address claims which are within their "proper role in the constitutional framework of our democratic form of government."[249] In both countries, it is "emphatically the province and duty of the judicial department to say what the law is" with respect to the rights of the people.[250]

2. Defining the Right To Vote

The redistricting plans in *Provincial* and *Rucho* resulted from constitutionally permissible processes—in *Provincial* from permissible violations of the one person, one vote principle and *Rucho* from permissible deviations from the principle of proportional representation.[251] In *Provincial*, the plaintiffs' claims were justiciable. However, in *Rucho*, their claims were not. The principal judicial difference between these cases was how the courts framed the legal issues. In the United States, the Court focused on broad tautological concepts of fairness and equality.[252] In Canada, the Court focused on voting rights.

Canadian and American courts rhetorically revere the right to vote. In the United States, "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."[253] In Canada, "the free flow of diverse opinions and ideas is of fundamental importance in a free and democratic society."[254] To participate in the electoral process is "to express an opinion about the formation of social policy and the functioning of public institutions."[255] The difference between the courts is that when the Canadian Court speaks about the right to vote, it is often announcing "general principles applicable to defining the right,"

248. *Compare id.* at 456 ("A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights"), *with* Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (explaining that that the court can only address "claims of *legal* right, resolvable according to *legal* principles").

249. Cowper & Sossin, *supra* note 241, at 345, n. 7 (citing Reference re Secession of Quebec, [1998] 2 S.C.R. 217); *see* Baker v. Carr, 369 U.S. 186, 211 (1962).

250. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see Rucho*, 139 S. Ct. at 2487; *Operation Dismantle Inc*., 1 S.C.R. at 472.

251. *Prov. Electoral Boundaries*, 2 S.C.R. at 179; *Rucho*, 139 S. Ct. at 2501 (explaining that the Constitution does not require proportional representation).

252. *Rucho*, 139 S. Ct. at 2501; *see also* Westen, *supra* note 47, at 579 (explaining that "by masquerading as an independent norm, equality conceals the real nature of the substantive rights it incorporates"). Without reference to substantive, external standards, "equality remains meaningless". *Id.* at 547. Thus, the notion that *an unfair redistricting plain is unequal* is a tautology. A circular assertion, it provides no guidance as to the meaning of fairness or equality. Applying this circular framework, the *Rucho* Court could not proffer a test of redistricting fairness based on the Constitution's guarantee of equality. Even the dissent's test is not based on fairness or equality, it is based on the right to be free from invidious, state-imposed classifications.

253. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966).

254. Figueroa v. Canada (Att'y Gen.), [2003] 1 S.C.R. 912, 935 (Can.).

255. *Id.*at 936.

substantively.[256] The right to vote in Canada essentially contains four "democratic rights": the right to (1) "effective representation"; (2) "meaningful participation"; (3) "an informed vote"; and (4) " participate in a fair election."[257] Conversely, in the United States, the judicial rhetoric does not define the right to vote; it defines the applicability of the Equal Protection Clause.[258]

In both countries, the right to vote is individual.[259] However, the Canadian Court recognizes something that the United States does not: Voter aggregation and governance rights are inherently connected to and exercised within a group context.[260] Accordingly, the Section 3 right to "effective representation" in Canada requires more than the formal requirements of a "one person, one vote" standard."[261] While "[r]elative parity of voting power" is considered a "prime condition" for effective representation, the Canadian Court recognizes that deviations from this standard may be justified if they contribute to the broader goal of good government.[262] The Canadian Court engages in a quantitative analysis of redistricting plans, focusing on geography, community interests, and minority representation to ensure that diverse communities were afforded a meaningful voice in the legislative process, according to their voting rights.[263]

The Canadian emphasis on both process and outcome marks a substantive and holistic judicial approach to voting rights. As the United States does with speech,[264] the Canadian court applies a sort of balancing test, analyzing redistricting in terms of quantifiable results, like voter parity, and qualitative factors like regional issues, principles of "good government," and demographics.[265] The Canadian Court has held that qualitative factors, such as historical patterns of representation, might legitimately justify deviations from absolute population parity.[266] This approach defines the right to vote, albeit

256. *Prov. Electoral Boundaries*, 2 S.C.R. at 179–80 (cleaned up) (explaining that the "Charter right [to vote] is to be determined in a broad and purposive way, having regard to historical and social context"); *see also* Figueroa v. Canada (Att'y Gen.), [2003] 1 S.C.R. 912, 931-35 (Can.) (affirming that when defining voting rights, the Court adopts a "broad and purposive approach" based on "principles that embody a free and democratic state").

257. Dawood, *supra* note 225, at 115.

258. *See supra* Part.II; *see generally* Bitensky, *supra* note 43 (recognizing that the United States Supreme Court does not identify a fundamental right to vote per se under the Constitution).

259. *See* Dawood, *supra* note 225, at 116 ("[T]he Court has described [voting] rights as being held by individuals.").

260. *Id.* (finding the Canadian Court recognizes a "broader institutional framework within which these democratic rights are defined, held and exercised").

261. Reference re Prov. Electoral Boundaries, [1991] 2 S.C.R. 158, 188 (Can. Sask.).

262. *Id.* at 160.

263. *See id.*; *see also* Dawood, *supra* note 225, at 116 ("[The Court's] decisions are notable for their attention to the complex nature of democratic rights.").

264. *See, e.g.*, Brandenburg v. Ohio, 395 US 444, 447–48 (1969) (requiring a categorical balancing test to determine whether legislation unconstitutionally restricts protected speech).

265. *Prov. Electoral Boundaries*, 2 S.C.R. at 187–87.

266. *Id.* at 184–85.

broadly, and provides a judicial framework to avoid impermissible incursions on the political branch.[267]

By defining the right to vote in terms of effective representation, meaningful participation, and access to information, Canada can directly adjudicate voters' rights, regardless of the political context.[268] Thus, the *Provincial* Court was able to engage in a nuanced analysis of the Saskatchewan districting plan. Avoiding political questions of fairness, the Court assessed whether the legislature's redistricting guidelines violated the constitutional rights of voters by denying them effective representation.[269] The Court held it did not. But the result of the case is not what matters. Rather, it is the Court's ability to directly adjudicate voters' rights with respect to "what Frankfurter J. calls 'the practical living facts' to which a legislature must respond."[270]

In Canada the voters' right to meaningful participation in the democratic process is not context-specific; the right does not depend on whether the legislature acted to intentionally disenfranchise voters.[271] The rights of the voters may be difficult to *quantify*, but their violation is justiciable because facts indicating that voters have suffered democratic harm create a cause of action under the Charter.[272]

By grounding its analysis in the concrete harm of denying effective representation, the Canadian Court avoids the pitfalls of defining and enforcing abstract notions of fairness and equality that the *Rucho* Court found insurmountable.[273] By avoiding legislative intent, the Court also avoided thorny political questions inherent to adjudicating political redistricting claims: When does a political body, engaged in a legitimate political process, manifest illegitimate political motivations? Canadian Jurisprudence acknowledges that political questions are endemic to the right to vote.[274] But a right's mere proximity to political questions does not require judicial abstinence. At least in Canada, it requires the opposite.

IV. VOTING RIGHTS PROHIBIT PARTISAN GERRYMANDERING

The *Provincial* Court's rejection of the argument that "[t]he right of the provinces to create electoral boundaries as they see fit 'must be taken as being an inherent limitation on the right to vote in s. 3,'" illustrates a path forward for

267. *See* Cowper & Sossin, *supra* note 241, at 356–57 (2002) (explaining how the Canadian Court navigates and balances competing rights and interests in the political arena).

268. Dawood, *supra* note 225, at 116.

269. *See Prov. Electoral Boundaries*, 2 S.C.R. at 198.

270. *Id.* at 181 (citing McGowan v. Md., 366 U.S. 420 (1961)). The Court explains that judicial analysis of how such facts affect individuals' rights is of critical importance when "considering the right to vote, where practical considerations such as social and physical geography may impact on the *value* of the citizen's right to vote." *Id.* (emphasis added).

271. *See generally id.* (discussing citizens' right to vote).

272. *Id.*; *see* Dawood, *supra* note 225, at 115.

273. *Prov. Electoral Boundaries*, 2 S.C.R. at 198.; Rucho v. Common Cause, 139 S. Ct. 2484, 2513 (2019).

274. *See Prov. Electoral Boundaries*, 2 S.C.R. at 177; Cowper & Sossin, *supra* note 241, at 364.

gerrymandering claims.[275] The Canadian Court found that the legislature's intent to create unequally populated districts was constitutionally permissible but nonetheless adjudicated the voters' claims.[276] Why? Because legislative intent is not inherently relevant to judicial review of claims of legal right.[277]

The same is true in the United States.[278] Even though some aspects of redistricting are non-justiciable in Canada, it is the Court's duty to adjudicate claims of legal right.[279] Even though some aspects of redistricting are non-justiciable in the United States, if a gerrymander violates the Constitution or other legal rights, it must be scrutinized. At the very least, if voters could state a claim for relief that plausibly indicated that a gerrymander violated their rights, they would surmount the justiciability hurdle *Rucho* created. Whether the Court would strike down a partisan gerrymandering claim is another matter.

The Supreme Court's adherence to the "one person, one vote" principle, solidified in *Reynolds*[280] and consistently reaffirmed since,[281] limits the comparability of American and Canadian voting jurisprudence. The Canadian courts can undoubtedly take a more holistic approach to voting rights, sometimes even overlooking malapportionment in favor of other principles of effective representation and good government. However, while the United States prioritizes population parity, courts could nonetheless evaluate redistricting decisions based on deviations from the principle of effective representation.

Notably, neither the Canadian Constitution nor the United States Constitution has been interpreted to require proportional representation.[282] Thus, though effective representation may "sound in a desire for proportional representation,"[283] the *Rucho* court need not be concerned. Certainly, anything Canada can do, we can do better, parsing the nuances of voters' rights included.

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275. *Prov. Electoral Boundaries*, 2 S.C.R. at 179.

276. *Id.*

277. *Id.* (holding that although the legislative power to redistrict cannot be removed "and is in this sense above [judicial] scrutiny," incursions against the right to vote are broadly justiciable, regardless of the permissible intent of the legislature).

278. This is quite clear in the First Amendment context. The legislature's permissible, if not noble, intent to restrict harmful or even constitutionally unprotected speech is irrelevant if a given law is speech discrimination (i.e. violates First Amendment Rights). *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 397–98 (1992) (White, J., concurring). Arguably intent is only relevant to equal protection rights because analyzing intent allows the Court to determine whether a law is motivated by a bare desire to harm a certain classification of people. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

279. *See* Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, 472 (Can.); *Prov. Electoral Boundaries*, 2 S.C.R. at 172 (Can.) (explaining that the court cannot interfere with redistricting decisions that do not implicate the legal rights of voters).

280. Reynolds v. Sims, 377 U.S. 533, 558 (1964).

281. *See, e.g.*, Evenwel v. Abbott, 578 U.S. 54, 57–60 (2016) (detailing the Court's history of reaffirming the one person, one vote principle); *see also* Wesberry v. Sanders, 376 U.S. 1, 7–8; (1964); Kirkpatrick v. Preisler, 394 U.S. 526, 530–531 (1969); Gaffney v. Cummings, 412 U.S. 735, 746–747 (1973); Brown v. Thomson, 462 U.S. 835, 842–843 (1983); Bd. of Estimate of City of New York v. Morris, 489 U.S. 688, 693–694 (1989).

282. *Prov. Electoral Boundaries*, 2 S.C.R. at 186.

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

Partisan gerrymanders, which may be justified by legitimate aims, do not result in the denial of equal protection insofar as malapportionment or population parity is concerned. But they may result in a denial of effective representation.

The *Rucho* Court refused to admonish the unjust infringement of voting rights because doing so did not align with their conception of the judicial role.[284] After *Rucho*, voters' rights to self-governance, let alone fair and equitable representation, are more equivocal and tenuous than ever.[285] *Rucho* makes one thing clear: The Equal Protection Clause only requires scrutiny of incursions against voters' aggregation and governance interests in limited contexts. When compared to Canada, the right to vote in the United States is merely a framework that forbids the state from using impermissible classifications to distinguish between voters. Without a right to guide judicial review, party affiliation is a permissible classification impervious to Equal Protection scrutiny. [286] Accordingly, until incursions against the right to vote are uniformly subject to heightened judicial scrutiny, partisan gerrymandering will stay beyond the reach of the federal courts.

A. CLAIMS OF LEGAL RIGHT: JUSTICIABLE IN CANADA AND THE UNITED STATES

The political question doctrine forbids judicial redress if a court cannot articulate "judicially discoverable and manageable standards for resolving" the question.[287] The *Rucho* Court held that the legislative desire to remain in power is a natural part of the political process.[288] Classifications promoting "state officials' intent to entrench their party in power is perfectly 'permissible,' even when it is the predominant factor in drawing district lines."[289] Moreover, the Constitution requires judicial deference towards the legislature's political judgment in the redistricting context, as the Constitution grants state and federal legislatures the power to shape election laws.[290]

Of course, this power is not unlimited. The Equal Protection Clause requires heightened scrutiny of discriminatory decision-making, even in the redistricting context.[291] Comparing partisan and racial gerrymandering thus

284. *Id.* at 2507.

285. *See id.* at 2500–01.

286. *Id.*

287. Baker v. Carr, 369 U.S. 186, 217 (1962). The political question doctrine also requires courts to consider "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* However, partisan gerrymandering does implicate these factors, and their consideration was omitted from *Rucho*'s holding. *Rucho*, 139 S. Ct. at 2496.

288. *Rucho*, 139 S. Ct. at 2498.

289. *Id.* at 2517 (Kagan, J., dissenting).

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

291. *Rucho*, 139 S. Ct. at 2502.

illustrates the connection between rights and scrutiny, limiting rights-based scrutiny of gerrymandering claims. "Unlike partisan gerrymandering claims, a racial gerrymandering claim. . . [asks] for the elimination of a racial classification." [292] Accordingly, racial gerrymandering is presumptively unconstitutional and it is justiciable because strict scrutiny is clearly a manageable standard.[293]

The critical difference between judicial review of racial and partisan gerrymanders is how the Court scrutinizes voters' rights. Because redistricting is inherently political, it concerns legitimate state interests. The *Rucho* Court found partisanship inextricably linked to that interest. [294] Under the Equal Protection Clause, the question then becomes, when does classifying voters based on partisanship become an illegitimate purpose? [295] But without an underlying right requiring heightened scrutiny, this question proves unanswerable. In the racial context under strict scrutiny review, the answer is clear: Almost any race-based decision is illegitimate.[296]

The Equal Protection Clause protects individuals from discrimination affecting their *access* to equal rights. [297] There are two problems with this formulation, leading to a lack of manageable standards under which to scrutinize partisan classifications. First, unlike racial gerrymandering, partisan gerrymandering is not a matter of equal *access* to voting rights protections.[298] Gerrymandering is a *qualitative* attack on the substance of the right to vote because it is "incompatible with democratic principles." [299] The principle underpinning the Equal Protection Clause is that individuals in similar situations are entitled to uniform treatment. [300] Yet even when the state affords every individual voter uniform treatment and the exact *same rights*, partisan gerrymandering creates an election system that denies voters effective representation and meaningful democratic participation.

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292. *Id.* at 2501-02 .

293. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 643 (1993) ("[T]he Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.").

294. *Rucho*, 139 S. Ct. at 2495.

295. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996).

296. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 507 (1980).

297. *Brown v. Board of Education* for example, holds that segregation is inherently unequal. 347 U.S. 483, 495 (1954). It does not establish a right to education. Rather, the Court establishes a right to equal *access* to education. The nature of the right to education is beyond the scope of the Equal Protection Clause. Similarly in *Gill v. Whitford*, the Court explained that the "fundamental problem" with partisan gerrymandering cases is that they are "about group political interests, not individual legal rights." 138 S. Ct. 1916, 1933 (2018). "The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Id.*

298. *Rucho*, 139 S. Ct. at 2503 (holding that the presence of partisanship "does not indicate that the districting was improper").

299. *Id.* at 2506 (citation omitted).

300. Reynolds v. Sims, 377 U.S. 533, 557–58 (1964) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

Second, gerrymandering harms voters (denying them governance and aggregation rights) as a group, structurally.[301] Although racial gerrymandering claims sound like a desire for group voting rights, they are not really voting rights claims at all. Racial gerrymandering claims are claims of legal right, based on the right to be free from invidious classifications.[302] Doctrinally, partisan and racial gerrymandering claims present entirely different issues. Yet partisan and racial gerrymandering abridge voters' governance and aggregation rights in the same manner. With respect to voting rights, the only difference is the criteria that the legislature uses to classify voters.[303] Accordingly, without a clear right at issue, the Court has struggled to rationalize applying heightened scrutiny to partisan gerrymandering claims. The Equal Protection Clause does not require fairness, it forbids arbitrary and invidious classifications.[304] Thus, partisan gerrymandering claims ask the court to scrutinize the wrong question. "[T]oo much" unfairness is a difficult and inscrutable standard; and the same is true of legislative intent.[305]

Canada's voters can seek redress for democratic harms. Their right to vote is not contextually tied to *how* the legislature abridges it. In Canada, any claims related to redistricting may form the basis of a constitutional cause of action based on the right to vote. In Canada, like in the United States, the court has been hesitant to enter the political thicket and decide questions that properly belong to the legislature. The Canadian legislature is responsible for redistricting decisions. And Canada's political question doctrine mirrors the political question framework of the *Rucho* Court.[306] Yet, election results that seem reasonably unjust are justiciable in Canada.

The fact that the unenumerated right to vote is grounded in the Equal Protection Clause alone hinders judicial redressability of partisan gerrymandering claims. Currently, gerrymandering-related harms are not claims of legal right, so there is no constitutional basis for subjecting such claims to a certain standard of review.[307] And because the goal of securing a partisan advantage is not illegitimate, courts must exile partisan gerrymandering to the judicial morass of non-justiciability. Accordingly, this Note concludes that by grounding the right to vote in the Equal Protection Clause, the United States has limited its ability to protect a substantial component of the democratic process:

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301. *See* Dawood, *supra* note 225, at 116 (discussion of structural voting rights).

302. *See* Shaw v. Reno, 509 U.S. 630, 641 (1993) (explaining that racial redistricting is evidence of a discriminatory classification).

303. *Compare id.* at 647 (racial classifications are unconstitutional redistricting criteria, under the Equal Protection Clause), *with Rucho*, 139 S. Ct. at 2506 (partisan classifications are not subject to constitutional scrutiny, under the Equal Protection Clause).

304. *See Rucho*, 139 S. Ct. at 2506; *see e.g.*, *Shaw* 509 U.S. at 641; Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (holding that a law granting preference to veterans was constitutional, despite disproportionate impact on women).

305. *Rucho*, 139 S. Ct. at 2487.

306. *See supra* Part.III.

307. *Rucho*, 139 S. Ct. at 2487.

the right to fair and equitable representation. The following Subpart concludes that partisan gerrymandering would be redressable if the right to vote were substantively defined.

B. SUBSTANTIVE RIGHTS: ATTACKING THE EQUAL PROTECTION PROBLEM

Rucho v. Common Cause exemplifies the Equal Protection problem. In *Rucho,* the Court closed the door on Equal Protection Clause challenges to partisan gerrymandering. However, it did not assert that partisan gerrymandering is constitutionally protected. Therefore, it can be challenged. The Equal Protection Clause alone is insufficient to protect voters and democracy from political entrenchment. But the right to vote is fundamental in character, and therefore, must be protected as such. The form that these rights-based protections take—constitutional amendment,[308] incorporation under the Due Process Clause,[309] or federal and state law[310]—is not yet clear and beyond the scope of this Note. But one thing is evident: The right to vote is not protected under the Equal Protection Clause.[311] True, the Voting Rights Act guarantees that the "right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution."[312] But as this Note shows, the right to cast "meaningful" votes as guaranteed by the Constitution is enigmatic at best and nonexistent at worst.[313]

Under the Equal Protection Clause, the right to vote is formal, not substantive; the Clause only proscribes certain *forms* of vote dilution, in certain *contexts*. But if the United States embraces Canada's approach, then the harms caused by gerrymandering may be justiciable as violations of the right to vote. In Canada, it does not matter whether the legislature had good or bad intentions or whether the court can predict the outcome of future elections. Free from these vague, political considerations, the Canadian Court can adjudicate voting rights claims in the same way it adjudicates other "claims of *legal* right."[314] It resolves them "according to *legal* principles." [315] Existential, indeterminate, unmanageable concepts—like election fairness and voter equality—become

308. *See generally* RICHARD L. HASEN, A REAL RIGHT TO VOTE: HOW A CONSTITUTIONAL AMENDMENT CAN SAFEGUARD AMERICAN DEMOCRACY (2024) (describing how to achieve voting reform through constitutional amendments).

309. Bitensky, *supra* note 43, at 675 (advocating for a due process approach to voting rights).

310. The NAACP urges state legislatures to take this approach. *See Voting Rights Issue Brief*, NAACP, https://naacp.org/resources/voting-rights-issue-brief (last visited Jan. 30, 2026).

311. *See generally* Bitensky, *supra* note 43 (advocating for an expansion of the Equal Protection Clause to establish a right to vote).

312. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2, 120 Stat. 577.

313. *See also* Bitensky, *supra* note 43, at 674 (explaining that there is no substantive, fundamental right to vote in the United States).

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

315. *Id.*

justiciable when reduced to substantive rights which the state may not abridge, and that the court is bound to protect.[316]

While the Court in *Rucho* expressed concerns about making subjective judgments regarding electoral fairness, the Canadian approach highlights how the Court might scrutinize harm to voters' *rights as voters*, without reference to fairness. The Equal Protection Clause does not require such scrutiny. Thus, analyzing the independence and impartiality of the redistricting body, transparency, and failure to consider factors relevant to effective participation, aggregation, and governance requires a new framework.

A right to effective participation would provide a more judicially manageable standard that does not require scrutiny of partisan goals.[317] For instance, conservatives may believe that certain geographic boundaries should be ignored in favor of shaping a district with a certain cultural identity. Focusing on such a cultural identity may be a means of ensuring effective representation *and* securing a partisan advantage (a permissible intent). However, if every district were gerrymandered to enhance the representation or cultural identity of only one political party, it would be difficult to argue that the redistricting plan encapsulated the principle of effective representation. Yet, the court could scrutinize this process without analyzing the political goals behind the gerrymander.

Of course, the partisan goals and intent would be obvious, but those legislative prerogatives would need not be addressed. Instead of focusing on the political considerations of a redistricting plan, the court would analyze whether the plan considered the rights of all the voters. If the mapmakers neglected to consider the constitutional rights of an entire political party, the gerrymandered map would violate the right to effective representation and democratic participation. In this sense, under a rights-based approach, the intent behind a redistricting plan is entirely irrelevant. Like in the racial context, whether a legislature is pursuing a permissible goal is irrelevant to the extent that a law abridges the people's right to be free from discriminatory classifications.

The Court has yet to establish a framework for placing racial and partisan gerrymandering in the same doctrinal bucket. Yet, unconstitutional vote dilution can be motivated by the same (partisan) factors as permissible vote dilution and can lead to equally undemocratic results.[318] The only difference between legal and illegal partisan vote dilution is the chosen method for achieving the desired

316. Westen, *supra* note 47, at 557 (explaining that courts can only protect "equality" when guided by legal rules defining the rights of those who argue that a legislative act is unequal).

317. *See id.* at 548.

318. This is especially true considering that party is often a proxy for race and much has been written about intersections of racial and partisan gerrymandering. *See, e.g.*, Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088, 1107 (2021) ("[R]egardless of whether line-drawers are aware of racial data, 'race and party issues are [often] intractable in parts of the country . . . .'" (quoting Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 U. ALA. L. REV. 365, 384 (2015))).

dilution.[319] If voters in the United States, like those in Canada, advanced a theory of substantive voting rights under the Due Process Clause—not context-specific but universal voting rights—courts could apply a test like Justice Kagan's to determine whether a gerrymander caused a legal injury because the political question doctrine is inapplicable to claims of legal right.[320]

Courts can and do adjudicate gerrymandering claims of legal right—the Supreme Court has said as much.[321] Anti-gerrymandering advocates should take them up on their offer. The Court has already articulated a context-specific equal protection rationale for addressing violations of voters' aggregation and governance interests.[322] Under a rights-based approach to gerrymandering, claims alleging violations of these rights are justiciable, regardless of context.

CONCLUSION

In Canada, the right to vote has substance; it is not contextual. And although the concept of effective representation is vague and conceptual, many justiciable rights share these qualities. Surely the Court would not say that free speech claims, for example, present nonjusticiable questions. Yet the right to free speech in and of itself does not come with pre-made standards of review.[323] Even legal rights stemming from federal law often need judicial elaboration.[324] For example, in the context of securities fraud, the Supreme Court has interpreted S.E.C. Rule 10b-5 to contain a private cause of action, despite the fact that no federal rules compel it to do so.[325] Thus, even if the Court is unwilling to interpret a constitutional right to vote under the Due Process Clause,[326] the Court has a role to play in the elaboration of voting rights. A broad

319. *See id.*

320. Bitensky, *supra* note 43, at 648.

321. Rucho v. Common Cause, 139 S. Ct. 2484, 2516–23 (2019) (Kagan, J., dissenting).

322. *See supra* Part.II.

323. The court has developed categorical and ad hoc balancing tests to adjudicate free speech claims, elaborated standards and adopted new categories of unprotected speech, all without a constitutional mandate. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015) (explaining that the "history and tradition of regulation are important factors in determining whether to recognize 'new categories of unprotected speech'"); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("[F]reedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

324. Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 112 (1989) ("A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute.").

325. Roy L. Brooks, *Rule 10b-5 in the Balance: An Analysis of the Supreme Court's Policy Perspective*, 32 HASTINGS L.J. 403, 413 (1980) ("The Supreme Court itself, in *Mills v. Electric Auto-Lite Co.*, recognized the permissibility of judicial rulemaking . . . ."); *see generally id.* (detailing the judicial creation and elaboration of the private cause of action under Rule 10b-5); *see also* John P. Clayton, *The Two Faces of* Janus*: The Jurisprudential Past and New Beginning of Rule 10b-5*, 47 U. MICH. L.J. REFORM 853, 876 (2014).

326. This is unlikely to occur anytime soon. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 260 (2022) (expressing hesitancy to expand due process rights and calling the future of due process rights into question). Nonetheless, plaintiffs should make the argument that the right to vote is indeed fundamental under the Due Process Clause, for without zealous advocacy, democracy may falter. *See generally* Bitensky,

right is nonetheless a right, and it is the duty of the Court to adjudicate claims alleging rights-based violations. This does not mean that every partisan gerrymander would be struck down. But it does mean that the court will have to develop a rationale and factors to determine when partisan gerrymandering is impermissible, which is more than voters can ask now.

Gerrymandering exemplifies the jurisprudential cognitive dissonance surrounding voting rights cases in the United States. A dissonance which undergirds the Equal Protection problem –The Equal Protection Clause is unable to prevent even the most egregious vote dilution. Extreme partisan gerrymandering is a threat to democracy, and the *Rucho* decision stoked the flames of partisan tyranny. But *Rucho* was as much a judicial abdication as it was an announcement: "Voters, you do not have rights!" The current system allows for a nation where the voters do not choose their representatives; the representatives choose their voters. This can change.

supra note 43, at 675 (reasoning that it is valuable, necessary, and possible for the Supreme "Court to definitely and clearly secure the fundamental constitutional right to vote per se").