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Rucho in the States: Districting Cases and the Nature of State Judicial Power

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ESSAYS

RUCHO IN THE STATES: DISTRICTING CASES AND THE NATURE OF STATE JUDICIAL POWER

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In *Rucho v. Common Cause*,[1] the United States Supreme Court made clear that federal courts are out of the business of entertaining constitutional challenges to electoral maps rooted in claims of excessive partisan gerrymandering. Such claims raise nonjusticiable political questions, the Court concluded, because despite its efforts over a series of cases, it could not discern any "judicially discoverable and manageable standards" by which to decide them.[2] Judicial intervention would accordingly appear to be ad hoc at best, arbitrary at worst, and, in all cases, potentially itself a product of partisan motivation.

But, the Court noted, all was not lost. Congress has the authority to impose constraints on excessive partisan gerrymandering. And the states themselves may act. They can place responsibility for redistricting in the hands of nonpolitical actors, they can adopt restrictions via statute or constitutional amendment, and their courts may have their own authority to intervene.

This Essay concerns the role of state courts. Its goal is not to provide a comprehensive assessment of the state judicial role in addressing the problems presented by partisan gerrymandering.[3] Its focus is instead on the narrower question of how state courts have used *Rucho* itself as authority. As Part II details, *Rucho* presents as something of a Rorschach test.[4] Some see its reasoning as applying to the American judicial power in a deep and comprehensive sense, such that its logic and conclusions apply to all courts.[5] On that view,

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

[2] *Id.* at 2494 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

[3] For an overview of those efforts in the context of congressional district maps, see Jonathan Cervas et al., *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections*, 21 U.N.H. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4287305 [https://perma.cc/UNV3-X42T].

[4] The Rorschach test is a projective method used by psychologists where individuals are asked to describe what they see in inkblots. Some legal scholars have compared the test to gerrymandered districts. *See* Laurence H. Tribe & Dennis Aftergut, Opinion, *Supreme Court Shows Its True Colors by Greenlighting Alabama's Racial Gerrymander*, BOS. GLOBE (Feb. 11, 2022, 9:32 AM), https://www.bostonglobe.com/2022/02/09/opinion/supreme-court-shows-its-true-colors-by-greenlighting-alabamas-racial-gerrymander [https://perma.cc/YU79-WCJX].

[5] *See infra* Parts II.A, B.

the message is that courts and electoral maps simply do not mix. Others see in *Rucho* a case about the *federal* judicial power, which leaves space for state courts to determine for themselves whether the legal and institutional frameworks within which they operate empower or even compel them to intervene.[6] This latter view, or so this Essay contends, is surely correct.

Whatever its precise implications, *Rucho* underscores the importance of recognizing that state judicial power—like state legislative and executive power—is distinct in that not only does it differ from the federal judicial power, but also its contours can and should vary from one state to the next. Thus far, however, courts have been reluctant to engage deeply with such questions and, indeed, largely unwilling to acknowledge that they exist.

I. *RUCHO V. COMMON CAUSE*: AN OVERVIEW

In *Rucho*, the Supreme Court confronted an issue that had vexed it for some time: whether extreme partisanship in the drawing of electoral district lines can amount to a constitutional violation and, if so, whether there is a judicially administrable way to determine whether a given map has crossed the line into unconstitutionality.[7] The Court considered legislative maps from two states, Maryland and North Carolina.[8] Both maps were obviously the product of efforts to maximize partisan advantage, a fact that was apparent not only from the maps themselves, as evidenced by the unnatural-seeming contours of the districts, but also from the fact that the mapmakers themselves openly acknowledged having such goals.[9]

Chief Justice Roberts wrote for the majority, and his opinion goes out of its way to express its deep distaste for the maps and the processes leading up to them.[10] The majority nonetheless disclaimed authority to remedy the maps' shortcomings. The Court's reasoning is rooted in justiciability and, more specifically, the "judicially discoverable and manageable standards" component of the political question doctrine.[11] This doctrine purports to

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[6] *See infra* Part II.C.

[7] *Rucho*, 139 S. Ct at 2491.

[8] *See id.*

[9] In the majority's characterization: "The districting plans at issue here are highly partisan, by any measure." *Id*.

[10] For example, Chief Justice Roberts stated that while "[e]xcessive partisanship in districting leads to results that reasonably seem unjust . . . [the Court's] conclusion does not condone excessive partisan gerrymandering." *Id.* at 2506–07. Indeed, Justice Kagan's dissent reads the majority as having recognized the unconstitutionality of the maps under review: "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities." *Id.* at 2509 (Kagan, J., dissenting).

[11] *Id.* at 2506–07.

establish a "narrow exception" to the judiciary's duty "to decide cases properly before it, even those it 'would gladly avoid.'"[12] In other words, the doctrine recognizes that some types of otherwise justiciable claims are inappropriate or imprudent for review.[13]

Because partisan interests have always played a role in drawing electoral lines, the majority reasoned, the presence of partisan motivation cannot alone be enough to render a map unconstitutional.[14] The question accordingly becomes one of degree, of drawing the line marking the place where partisanship's role is excessive.[15] For courts to do so by implementing anything but "especially clear standards" would be to risk the perception that the resulting decisions were political rather than legal in nature.[16] And such standards, the majority continued, are unavailable.[17] Their development would first require settling on some baseline conception of fairness against which maps could be assessed, and following that, formulating criteria based on which to determine how much of a departure from that conception of fairness is too much. Neither, the majority concluded, is within the proper scope of the federal judicial role, because neither can be reduced to a standard or rule that is "principled, rational, and based upon reasoned distinctions,"[18] and that is "grounded in a 'limited and precise rationale' and . . . 'clear, manageable, and politically neutral.'"[19] The federal judicial power extends only to "claims of *legal* right, resolvable according to *legal* principles,"[20] and therefore assessing maps is not amenable to discipline by such a framework.

A court's intervention in such circumstances would trigger two underlying concerns. First, the lack of a bright line creates the danger that any court resolving a dispute about partisanship in districting will be unable to escape creating the impression of acting in a partisan way—especially given that deciding such a case would inevitably involve delivering a win to one political party and a loss

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[12] Zivotofsky v. Clinton, 566 U.S. 189, 194–95 (2012) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

[13] *See* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. Rev. 1203, 1204 (2002); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1037 (1985).

[14] *Rucho*, 139 S. Ct. at 2500.

[15] *Id.* at 2498.

[16] *Id.*

[17] *Id.* at 2506–07.

[18] *Id.* at 2507 (citation omitted).

[19] *Id.* at 2498 (quoting Vieth v. Jubelirer, 541 U.S. 267, 306–08 (Kennedy, J., concurring)). Elsewhere I have noted that the Chief Justice's devotion to principle seems episodic when considered in light of some of his other decisions. *See* Chad M. Oldfather & Sydney Star, *Roberts, Rules, and* Rucho, 53 CONN. L. REV. 705 (2022).

[20] *Rucho*, 139 S. Ct. at 2494.

to the other. Second, unclear standards will invite disputes because disadvantaged parties will perceive enough of a chance of succeeding that bringing a challenge will often seem worth it. A large number of challenges adjudicated under an unclear set of standards would almost inevitably lead to a pattern of results that would appear inconsistent and, in turn, foster a perception of judicial partisanship.

The *Rucho* Court's analysis is quite explicit about the fact that it is concerned only with the contours of federal judicial power.[21] Indeed, the potential availability of relief in state courts is part of the majority's justification for not intervening.[22] That raises two possibilities for what state courts' role might be. The first possibility, which is probably best viewed as logically possible but unrealistic,[23] is that a state court could conclude that its justiciability doctrines allow it to act, such that it could extract from the federal Constitution the sorts of standards that *Rucho* concluded are beyond the reach of Article III. The second is that a state court could conclude that either state constitutional provisions or a different and more robust conception of state judicial power, or some combination of both, empower it to review gerrymandered maps. *Rucho* expressly recognized the possibility that state constitutions might be the source of standards.[24] Therefore, the possibility that state judicial power might be broader in a more general sense also merits consideration.

The idea that state judicial power is distinct from and more expansive than federal judicial power is hardly novel or controversial in legal scholarship, though courts themselves less often acknowledge it. As Professor Helen Hershkoff has comprehensively demonstrated, there is no single, correct definition of the proper bounds of judicial authority: "Where a regime draws the law/politics boundary depends on a complex set of assumptions about the capacities and legitimacies of different institutional actors to behave in particular ways and to promote particular normative

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[21] Specifically, Chief Justice Roberts stated that "[t]hese cases require us to consider once again whether claims of excessive partisanship in districting are 'justiciable'—that is, property suited for resolution by *federal* courts." *Rucho*, 139 S. Ct. at 2491 (emphasis added). The Court analyzed whether there was "an 'appropriate role for the Federal Judiciary.'" *Id.* at 2494 (quoting Gill v. Whitford, 138 S. Ct. 1916, 1926 (2018)). This makes sense, of course. It would be an extraordinary assertion of federal power if the Court were to conclude that an implied limitation on the judicial power as embodied in Article III of the Constitution also places an implied limitation on state judicial power.

[22] *See id.* at 2507–08.

[23] *See, e.g.*, Vikram David Amar, *Advice for State Courts in the Aftermath of* Rucho, JUSTIA (July 18, 2019), https://verdict.justia.com/2019/07/18/advice-for-state-courts-in-the-aftermath-of-rucho [https://perma.cc/EDP7-BQ6A].

[24] "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507.

goals."[25] The political question doctrine is among the places where state and federal practice often diverge,[26] and "state common law courts do tend to hear an array of questions that would be nonjusticiable under federal law."[27]

That this should be so is apparent even from a cursory comparison of state and federal courts. Many state supreme court justices are elected, which provides them with a democratic pedigree their federal counterparts do not possess.[28] What is more, one of the primary historical justifications for judicial elections is that they support judicial independence vis-à-vis legislatures.[29] The nature of the power state judges wield differs as well. Just as state legislatures have the police power, in contrast to Congress's enumerated powers, state courts' general jurisdiction involves them in a greater range of disputes than their federal counterparts, and state courts continue to wield authority to develop the common law.[30] Consider, as just one pertinent example, state court adjudication of disputes relating to municipal boundaries, which require the assessment of maps. As Hershkoff puts it, "[a]nnexation, which requires definition of a geographic community, is in some sense the ultimate political question; it resists resolution by any determinate set of criteria."[31] Yet state courts regularly resolve such disputes.[32]

None of this is to suggest that state courts are not courts in the same way that federal courts are, nor that they are not ultimately tethered to some version of the same root concept of the judicial power. Rather, their range of legitimate action is different and, by most measures, undoubtedly greater.

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[25] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1840 (2001).
[26] *See id.* at 1861–68.
[27] *Id.* at 1863.
[28] *See generally* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).
[29] *See id.* at 1067 (noting that the initial rise of judicial elections resulted from a desire to "empower courts to limit legislative excess by making judges independent and more powerful.").
[30] *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 283–301 (2009).
[31] Hershkoff, *supra* note 25, at 1865.
[32] For a recent example, see *Town of Wilson v. City of Sheboygan*, 938 N.W.2d 493 (Wis. 2020), which applies a contiguity requirement rooted in *Town of Mt. Pleasant v. City of Racine*, 127 N.W.2d 757, 760 (Wis. 1964), in which the court employed "the test of reason" to evaluate what it characterized as "[s]hoestring or gerrymander annexation."

II. *RUCHO* IN THE STATES

As of this writing, state courts have cited *Rucho* thirty-six times.[33] Most of those are incidental, passing references as part of providing an overall summary of the political question doctrine,[34] making a general argument about the importance of politically neutral criteria,[35] or the like. Many of the opinions that place more substantial weight on *Rucho* use it as if the arguments the Court made simply operated in parallel in state courts. That is, the state judges using *Rucho* appear to assume that the judicial power takes the same form at both the state and federal levels, such that what's improper for federal courts will likewise be improper for state courts. A few opinions have noted *Rucho*'s express acknowledgment of state courts as potentially viable forums but have left the idea relatively undeveloped.[36] Three states' courts, however, have engaged with *Rucho* in a more sustained way. Each is discussed in turn.

A. Wisconsin: Ignoring Rucho's *Invitation*

In *Johnson v. Wisconsin Elections Commission*,[37] the Wisconsin Supreme Court issued the first in a series of opinions concerning the redrawing of legislative maps in the wake of the 2020 census.[38] Notably, and in contrast to *Rucho*, this was not a situation in which the court was reviewing maps drawn elsewhere. Instead, because the governor and legislature failed to agree on maps, the court itself assumed responsibility for creating them.[39] On its way to holding that it would exercise its authority to require the "least

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[33] Most recently, in December 2022, the North Carolina Supreme Court cited Rucho. *See* Harper v. Hall, 868 S.E.2d 499 (N.C. 2022). *See infra* Part II.C.

[34] *See, e.g.*, State *ex rel.* Dickey v. Besler, 954 N.W.2d 425, 443–44 (Iowa 2021) (Appel, J., dissenting).

[35] *See, e.g.*, Carter v. Chapman, 270 A.3d 444, 495 (Pa. 2022) (Mundy, J., dissenting).

[36] *See, e.g.*, League of Women Voters v. Ohio Redistricting Comm'n, 192 N.E.3d 379, ¶¶ 10–53 (Ohio 2022) (concurring and dissenting opinions); Adams v. DeWine, 195 N.E.3d 74, ¶¶ 32–33 (Ohio 2022); Hicks v. 2021 Hawai'i Reapportionment Comm'n, 511 P.3d 216, 236–37 (Haw. 2022) (Wilson, J., dissenting); *In re* 2022 Legislative Districting of the State, 282 A.3d 187 (Md. 2022) (Getty, C.J., dissenting).

[37] 967 N.W.2d 469 (Wis. 2021).

[38] *See generally* 967 N.W.2d 469 (Wis. 2021); Johnson v. Wis. Elections Comm'n, 971 N.W.2d 402 (Wis. 2022); Johnson v. Wis. Elections Comm'n, 972 N.W.2d 559 (Wis. 2022).

[39] The state constitution assigns redistricting to the state legislature, which, in turn becomes law unless vetoed by the governor. *Johnson*, 967 N.W.2d at 473–74 (citing WIS. CONST. art. IV, § 3). Here, the Republican-controlled legislature and Democratic governor disagreed on the updated maps, leading to litigation in state court. *Id.*

change" from the prior set of maps necessary to engender compliance with law,[40] the court also concluded that it would not consider the partisan makeup of districts as part of that process.[41]

Its analysis leaned heavily on *Rucho*: partisan fairness is difficult to assess, requiring proportional representation would go too far, nothing in the federal or state constitutions requires proportionality among groups in terms of political strength, gerrymandering has always been around, the state constitution places responsibility for redistricting with the legislature, and so on.[42] The court cited very little Wisconsin authority in its analysis, leaning almost entirely on *Rucho* coupled with a mix of federal cases and secondary sources. While it surveyed the state constitution for provisions that might relate to gerrymandering, it did not meaningfully entertain the possibility that the nature of the judicial role in Wisconsin might differ from that under Article III.[43] The judicial power, one would infer from the majority's analysis, simply exists as a single, unchanging thing, and does not differ whether exercised by a state or federal court.

The dissenting opinion, meanwhile, identified what it regarded as a curious irony: the majority's conclusion that extreme partisan gerrymandering does not present a question fit for judicial resolution—which is to say, its insistence on a constrained, traditional role for the judiciary—came by way of judicial overreach, "by answering a constitutional question that we never asked, that the parties did not brief, and that is immaterial to this case."[44] Because the court itself was to draw the maps, the dissent pointed out, the question before it was distinct from the question in *Rucho*.[45] In other words, the court was already committed to acting in a way that substantially departed from traditional conceptions of the judicial role. Moreover, the dissent continued, prior iterations of the Wisconsin Supreme Court had factored partisanship into their map drawing, understanding, in the dissent's characterization, that "although it sounds contradictory, the only way for the court to avoid unintentionally selecting maps designed to benefit one political party over others is by considering the maps' likely partisan effects."[46]

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[40] *Id.* at 490–91.
[41] *See id.* at 482.
[42] *See id.* at 482–88.
[43] *See* U.S. CONST. art. III (establishing and empowering the judicial branch of the federal government).
[44] *Johnson*, 967 N.W.2d at 500 (Dallet, J., dissenting).
[45] *See id.* at 502–03.
[46] *Id.* at 503.

B. Kansas: Declining Rucho's *Invitation*

In *Rivera v. Schwab*,[47] the Kansas Supreme Court considered a challenge to the state's election maps based in part on a claim tied to "excessive partisan gerrymandering."[48] In doing so, it concluded that such allegations present nonjusticiable political questions.[49] The court recognized that "*Rucho* expressly contemplates state court review of congressional reapportionment schemes for compliance with state law,"[50] and rejected the suggestion that scattered assertions of skepticism in separate opinions provide any basis for concluding otherwise.[51] And it acknowledged, in a general way, that the question of justiciability under the state constitution is distinct from under the federal Constitution, and that the judicial power in Kansas is not necessarily the same as under Article III.[52]

Yet its analysis largely tracked *Rucho*'s template. First, the state supreme court discussed the political question doctrine in general terms and rejected the argument that any partisan motivation in districting is improper.[53] Then, the court expressly adopted *Rucho*'s reasoning that what is accordingly required, and cannot be discerned through legal reasoning, is some benchmark notion of fairness by which to assess whether a map goes too far.[54] Given that, coupled with the lack of any statutory or state constitutional provisions expressly addressing gerrymandering, and the lack of any precedent providing standards, the court followed *Rucho* in concluding that claims relating to partisan gerrymandering are nonjusticiable.[55]

In an opinion concurring in part and dissenting in part, Justice Daniel Biles offered the possibility of a different conception of the judicial role. Specifically, Justice Biles characterized the outcome as a "judicial bait-and-switch" and the product of "judicial passivity at precisely the moment when a Kansas court has held the rights of Kansans guaranteed by" the state constitution "are in the balance."[56] In his view, "naked partisan discrimination" is not a legitimate governmental interest, and the judicial role is not

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[47] 512 P.3d 168 (Kan. 2022).
[48] *Id.* at 183.
[49] *See id.*
[50] *Id.* at 178 (citing Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019)).
[51] *See id.* ("But these statements are not controlling law—the justices do not even purport to make this claim. And we cannot accept the Attorney General's invitation to ground our rulings on speculation concerning the future direction of Supreme Court jurisprudence.").
[52] *See id.* at 184–85.
[53] *See id.* at 180–83.
[54] *See id.* at 180–84.
[55] *See id.* at 187.
[56] *Id.* at 203 (Biles, J., concurring in part and dissenting in part).

confined to "determining the best policy."[57] Rather, the judicial role is to decide whether "a lawful government aim" can explain "the Legislature's discretionary decisions."[58]

C. North Carolina: Partially Accepting Rucho's *Invitation*

The opinion that has come closest to fully accepting *Rucho*'s invitation to reflect on the state judicial power came in *Harper v. Hall*.[59] In *Harper*, the North Carolina Supreme Court concluded that claims of extreme partisan gerrymandering are justiciable and that the practice violates the state constitution when "it deprives a voter of his or her right to substantially equal voting power, as established by the free elections clause and the equal protection clause in our Declaration of Rights."[60] To a greater degree than any other court thus far, the North Carolina Supreme Court grappled with the idea that the state and federal judicial powers are not necessarily coextensive, including with respect to the political question doctrine. Its conclusion was primarily grounded on the existence of a more robust legal framework that it could draw on, rooted in both state constitutional rights and law more generally.[61] Unlike the Wisconsin and Kansas high courts, it offers a critical distinction:

> *Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level. *The role of state courts in our constitutional system differs in important respects from the role of federal courts*.[62]

As the court later expanded on the idea, what it had in mind was a role for the courts not just in securing the rights afforded by the state constitution, but also in "ensuring the effective functioning of the democratic system of government."[63] Drawing on both its own past cases and John Hart Ely's *Democracy and Distrust*, the court outlined "an even greater justification for judicial review of acts that restrict the democratic processes through which the 'political power' is channeled to the people's representatives, and

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[57] *Id.* at 208-09.
[58] *Id.*
[59] 868 S.E.2d 499 (N.C. 2022).
[60] *Id.* at 559.
[61] *See id.* at 533.
[62] *Id.* (emphasis added).
[63] *Id.* at 550.

which undermines the very democratic system created by our constitution."[64]

The dissent in *Harper* likewise engaged from a position in which it did not simply assume that state government arrangements parallel those in the federal government. The structure of the dissent's argument was that political power ultimately resides in the people, who act through the state legislature.[65] In contrast to the federal Constitution, the North Carolina constitution is not a grant of power, but rather a source of limitations on the otherwise plenary power of the state legislature. That in turn, the dissent reasoned, means that the judicial role in constraining the state legislature is limited to the application of express constitutional provisions.[66] Leaning heavily on *Rucho*, the dissent concluded that no such express provisions apply to partisanship in gerrymandering.[67]

The differences between the majority and dissenting opinions in *Harper* largely came down to differing conceptions of the judicial role. Whereas the dissent implicitly conceived of its role as equivalent to that of a federal court, the majority envisioned greater space to address questions that, depending on how disposed one is to accept *Rucho*'s reasoning, federal courts either cannot or will not address.[68] For the most part, however, these differing conceptions operated under the surface—indirectly acknowledged through the suggestion that the nature of the state constitution and its declaration of rights require more from the judiciary without engaging with the more profound questions of why that might be so. In other words, it could be the case that the nature of the North Carolina constitution is such that fidelity to it asks more from the court in a substantive sense, in which case one would conclude that the Constitution would demand the same thing no matter what the precise nature of the judiciary charged with interpreting and applying it. For example, perhaps the best reading of the North Carolina constitution is that it empowers the judiciary to police for impairments of the political process. But there is another possibility, which is that something about the nature of the judiciary brought into being by the North Carolina constitution—the fact that the justices are elected, say—makes it more appropriate for that judiciary to wield power in that fashion or under that specific set of circumstances.

The battle in North Carolina is not over. The Supreme Court took the case as a potential vehicle for addressing the "independent

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[64] *Id.* at 551 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 103 (1980)).
[65] *See id.* at 565 (Newby, C.J., dissenting).
[66] *See id.*
[67] *Id.* at 566–72.
[68] *See supra* text accompanying notes 59–67.

state legislature" theory,[69] and its resolution could impact the ability of state courts to consider claims related to congressional districting. The North Carolina Supreme Court has also granted a petition for rehearing in *Harper*,[70] which may signal that the court will reverse itself, and also calls into question the U.S. Supreme Court's jurisdiction over the case.[71] Whatever the ultimate fate of *Harper*, its example still stands as an approach available to state courts in their consideration of state legislative maps, and as a call for deeper consideration of state judicial power.

III. THE POSSIBILITIES OF STATE JUDICIAL POWER

Rucho serves as an invitation for state courts to engage more deeply with questions concerning the nature of the judicial power they possess. With respect to the specific question of partisan gerrymandering, *Rucho* engaged in a perfect-as-the-enemy-of-the-good analysis pursuant to which an inability to provide a full definition of electoral fairness doomed the entire enterprise. But the claim that it is necessary to formulate a precise definition of fairness to make judgments about unfairness seems, at best, overstated. And whatever its applicability elsewhere,[72] it certainly does not fit with the practice of state judicial systems. State courts make and facilitate such determinations all the time—to take just one example, a defendant will certainly get nowhere arguing the invalidity of a disorderly conduct charge based on the contention that it is impossible to formulate a precise and comprehensive definition of orderly conduct against which to measure disorderliness.[73] And, as

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[69] In the words of the petition for certiorari, the question presented is:

> Whether a State's judicial branch may nullify the regulations governing the 'Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,' U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a 'fair' or 'free' election.

Petition for Writ of Certiorari, Moore v. Harper, 142 S. Ct. 2901 (2022) (No. 21-1271).

[70] 882 S.E.2d 548 (N.C. 2023).

[71] The Court requested supplemental briefing on this question. *See* Order in Pending Case, 142 S. Ct. 2901 (No. 21-1271).

[72] As noted above, the Chief Justice's own commitment to the idea is not unwavering. *See supra* note 19.

[73] As Rachel Moran points out, every state has a disorderly conduct law, and "[t]he laws are so broad that it is often difficult to decipher exactly what speech or behaviors they prohibit." Rachel Moran, *Doing Away with Disorderly Conduct*, 63 B.C. L. REV. 65, 71–72 (2022). Some of the arguments made in the gerrymandering case law suggest a response to this point, which is that disorderliness is a legislatively provided standard. But the fact that it is

noted above, many state courts have long adjudicated disputes in annexation cases in which the evaluation of maps is central to their resolution.[74]

Indeed, even one of the great skeptics of judicial review of electoral maps, Justice Frankfurter, acknowledged that an inability to settle on a perfect middle does not preclude conclusions about the extremes. When situations fall on a continuum, most cases will present differences of degree such that "no standard of distinction can be found to tell between them, [and] other cases will fall above or below the range" to such an extent as to make for a difference in kind.[75] "The doctrine of political questions," he continued, "like any other, is not to be applied beyond the limits of its own logic, with all the quiddities and abstract disharmonies it may manifest."[76] Notably, Justice Frankfurter also did not renounce the possibility that state courts could have a role to play in adjudicating the appropriateness of legislative districts.[77] He, too, contended not that the required assessment is outside the bounds of *adjudication* in some absolute sense, but instead that it is beyond the proper limits of the *federal judicial power*.[78]

Of course, a court resolving a dispute relating to electoral maps risks being perceived as just another partisan actor and thus undermining its own legitimacy. This is certainly a factor to be accounted for in fashioning both the requirements for the successful assertion of a challenge as well as the remedies that follow. Whether it is better to attempt to fashion a comprehensive rule, as the Court in *Rucho* and the cases leading up to it conceived of their mission, or to proceed in a more case-by-case manner, as Justice Kagan advocated for in her dissent,[79] may well be a question best answered with reference to the specifics of a given state. And as both *Rucho* and recent experience in the states suggest, the potential hit to legitimacy may be unavoidable: a court's conclusion that partisan gerrymandering claims are nonjusticiable may itself be perceived as the product of partisan motivation.

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legislatively provided does not, without more, compel the conclusion that it provides a judicially manageable standard. There are plenty of provisions in state constitutional declarations of rights that courts do not enforce based on the conclusion that the language does not provide sufficient guidance.

[74] *See supra* notes 25–26 and accompanying text.

[75] Baker v. Carr, 369 U.S. 186, 283–84 (1962) (Frankfurter, J., dissenting).

[76] *Id.*

[77] "In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. *If state courts should for one reason or another find themselves unable to discharge this task*, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting." *Id.* at 269 (Frankfurter, J., dissenting) (emphasis added).

[78] *See id.* at 269–70.

[79] *See supra* note 10.

Quite apart from whether state courts have thus far made appropriate use of *Rucho*, these cases confirm that the nature of state judicial power is underdeveloped. It is a mistake to imagine that there is such a thing as "the judicial power" or even "the judicial power of courts in the United States." There are, undoubtedly, substantial similarities in the way such power is conceived and exercised across American jurisdictions, and the individuals who constitute and act within the various judicial systems are products of a system of legal education that ensures a rough uniformity of understanding. At a first cut, at least, it is entirely appropriate to draw inferences about the contours of state judicial power from the nature of federal judicial power. Both are instances of the umbrella category of American judicial power, and that a thing is done a certain way in one context supports a presumption that it ought to be done that way in the other as well.

But it remains the case that the judicial power as it exists at the federal level or within any specific state government will be a product of that government's structure, and accordingly any such presumption is surely rebuttable. Federal judges operate with life tenure under a difficult-to-amend Constitution that is the supreme law of the land and that divides power among its branches in a certain way, including by limiting the judicial power to "cases and controversies."[80] Most state judges must stand for periodic reelection and operate under constitutions that are sometimes very easy to amend and arguably a categorically different sort of thing than the federal Constitution, divide power among their branches in a range of ways, and include courts of general jurisdiction that often operate in ways that would be unthinkable in federal court.

Questions relating to state courts' ability to adjudicate the constitutionality of electoral maps should accordingly be assessed in light of and in a manner that is attentive to these contextual differences. To date, that component of the analysis is largely lacking.

[80] U.S. CONST. art. III, § 2, cl. 1.