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Revisiting *Rucho's* Dissent: Percolation and Federalization

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REVISITING *RUCHO*'S DISSENT: PERCOLATION AND FEDERALIZATION

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It has been five years since the U.S. Supreme Court's ruling in Rucho v. Common Cause closed the door on federal claims challenging partisan gerrymandering, declaring them nonjusticiable political questions. Scholarly literature, since then, has focused primarily on where the Court went wrong in abdicating its responsibility and, to a lesser extent, how the Court got Rucho right. However, an under-addressed feature of Rucho is what Justice Elena Kagan explicitly and implicitly stated in her dissent; that is, the role of judicial federalism before and after Rucho and the influence of state courts in developing partisan gerrymandering doctrine as a matter of state constitutional law.

Justice Kagan's dissent explicitly reminded the majority that if the state courts were capable of crafting appropriate standards to address partisan gerrymandering, so too was the Court. The problem, of course, was that the number of state court rulings addressing partisan gerrymandering at the time were in short supply. Implicitly, Justice Kagan then suggested that the Court could and should have consulted, borrowed, and adopted the state versions of neutral and objective standards as a source to guide the Court towards crafting a workable federal version. She, however, failed to identify or reference prior instances when the Court looked to the state courts to educate federal constitutional law. This Essay draws attention to how Justice Kagan's dissent should be understood as foundational support for both the process of percolation and practice of federalization.

The percolation of state constitutional doctrines on partisan gerrymandering offers the Court a rich source of doctrine that will clarify the neutral and objective principles necessary to effectively adjudicate such sensitive political questions in the future. As such, the Court will be positioned to federalize those state doctrines, if it chooses to do so, in order to inform, guide, and support the creation of a federal partisan gerrymandering jurisprudence.

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INTRODUCTION

This Essay revisits the U.S. Supreme Court's ruling in *Rucho v. Common Cause* barring federal courts from reviewing partisan gerrymandering claims as presenting political questions.[1] The Court, relying upon an element of political question doctrine, explained that it lacked the "judicially discoverable and manageable standards" or principles to adequately and objectively decide whether a partisan gerrymander was unconstitutional. The unavailability of such principles, due to a lack of federal precedent on the question of partisan gerrymandering, meant that the Court was unable to address the question. Indeed, the Court believed it lacked a neutral, clear, and manageable legal tool to dig into the morass of partisan gerrymandering without being mired in the untenable perception of looking political.

The Essay, however, focuses its attention on Justice Elena Kagan's dissenting opinion and the dual sovereign nature of judicial review over partisan gerrymandering. Both the majority and dissenting opinions acknowledge that state courts may interpret their state constitutions to provide greater protections to the right to vote than the federal Constitution. This structural feature encourages, if not anticipates, that state courts will derive the tests and principles from specific constitutional provisions that will guide the Court's decision-making process when reviewing a partisan gerrymander. However, Justice Kagan's dissent fundamentally departs from Chief Justice Roberts's majority opinion on the nature of the relationship between the state and federal courts in the absence of a discoverable, neutral, and manageable principle to guide a court's review of a partisan gerrymander.

Justice Roberts's opinion rests on a conception of judicial dual sovereignty and the separate roles and responsibilities that federal and state courts enjoy (or do not enjoy) over partisan gerrymandering. State courts will police the problem; federal courts will not. On the other hand, Justice Kagan envisions a mutual and consultative relationship where the state courts' experiences testing judicially created principles under state constitutional provisions should serve as a framework for the Supreme Court to adopt its own workable and manageable doctrine to review federal partisan gerrymandering claims.

In essence, Justice Kagan's dissent is an implicit call for the Supreme Court to engage in the practice of judicial federalization—to consult and borrow state court doctrines establishing neutral and manageable principles

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

to guide and inform the creation of a federally-recognizable test.[2] The percolation of state court rulings that further clarify and entrench such neutral and manageable principles may have the effect of influencing the Court's approach to partisan gerrymandering when or if the Court revisits the question.[3] This Essay concludes with some musings about what the future portends for partisan gerrymandering, the role that state court doctrines will likely play, and the influence they will likely impart on the Court if, or when, the Court revisits the justiciability question of partisan gerrymandering under the federal Constitution.

I
RUCHO'S ABDICATION

The Supreme Court's ruling in *Rucho v. Common Cause* removed the federal courts from reviewing challenges to partisan gerrymandering.[4] There, voters challenged the constitutionality of congressional maps. The Court grappled with the vexing question as to whether federal courts were the appropriate venues for deciding issues of partisan gerrymandering as legal rights, resolvable through articulable legal principles, or whether partisan gerrymandering was a political question answerable only through political processes. Specifically, the Court drilled down on whether the Court could fashion a discoverable and manageable standard of judicial review in accordance with the justiciability considerations laid out in *Baker v. Carr*.[5]

The Court concluded that partisan gerrymandered maps are more akin to politically sensitive, rather than legally justiciable, issues that federal courts should avoid. While the "one-person, one-vote" rule born from *Baker* is justiciable, Chief Justice Roberts went on to explain that the rule did not "carry equal weight" in the partisan gerrymandering context where political parties are imposing disproportionate representation based on partisanship, rather than, say, racial classification.[6] The ruling eliminated future pathways

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2 *See* Gerald S. Dickinson, *A Theory of Federalization Doctrine*, 128 DICK. L. REV. 75, 152 (2023) (defining the doctrine of federalization as "the practice of the U.S. Supreme Court consulting state laws or adopting state court doctrines to guide and inform federal constitutional law").

3 *See* Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1323 (2019) (reviewing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)) (explaining that "[p]ercolation of an issue through various state courts can provide valuable insights and options for the federal high court to draw on when it chooses to decide the issue").

4 *Rucho*, 139 S. Ct. at 2506–07 (determining that no constitutional hook justified federal judicial review of partisan gerrymandering claims).

5 *See* 369 U.S. 186, 217 (1962) (holding that redistricting and the apportionment of representatives were justiciable issues, while also laying out in clearer terms the scope of the political question doctrine).

6 *See Rucho*, 139 S. Ct. at 2489 (discussing how the rule, if applied, would require a political party to have more influence in accordance with status, which is not what vote dilution cases are about).

for challenges in federal court on First Amendment, Fourteenth Amendment, Elections Clause, and Article I grounds. *Rucho*, therefore, foreclosed the justiciability of partisan gerrymandering in federal court. Chief Justice Roberts explained that "[f]ederal judges have no license to reallocate political power between the two major political parties . . . [without] legal standards to limit and direct their decisions."[7]

After setting forth reasons why federal courts should not enter the political thicket of reviewing partisan gerrymandering challenges, Justice Roberts turned, if only briefly, to how the States were already "actively addressing" partisan efforts to draw congressional maps.[8] For example, Justice Roberts noted that dozens of state legislatures were enacting districting legislation, creating "independent commissions," or passing constitutional amendments to prohibit partisan efforts to skew congressional districts.[9] Further, those very same state laws and state constitutional provisions articulated standards that state courts could apply to partisan gerrymandering challenges. He concluded that these efforts to curtail partisan gerrymandering at the state level, along with the possibility for congressional action, were evidence that "the avenue for reform remain[ed] open."[10]

II
REVISITING KAGAN'S DISSENT

Justice Kagan's dissent focused on what she believed was Justice Roberts's "most perplexing" solution of deferring the problem of policing partisan gerrymandering solely to the States and not federal courts.[11] Justice Roberts's invocation of the States, according to Justice Kagan, read like a consolation prize after stripping litigants of access to federal courts over partisan maps.[12] She emphasized that partisan legal questions were not, contrary to the majority's conclusion, "beyond [federal] judicial capabilities," precisely because some state supreme courts had already carved out a doctrinal roadmap for federal courts to follow.[13] Where Justice Roberts argued that adjudicating partisan gerrymandering is "far more difficult," Justice Kagan responded that state courts have already shown it is not.[14] Where Justice Roberts's opinion placed a premium on the importance

7 *Id.* at 2507.

8 *Id.*

9 *Id.* at 2507–08.

10 *Id.* at 2508.

11 *Id.* at 2524 (Kagan, J., dissenting).

12 *Rucho*, 139 S. Ct. at 2524–25 (Kagan, J., dissenting) ("Of all times to abandon the Court's duty to declare the law, this was not the one.").

13 *Id.* at 2509 (Kagan, J., dissenting).

14 *Id.* at 2488.

of judicial sovereignty, Justice Kagan's dissent was a call for a more consultative and mutually reinforcing relationship between the state courts and Supreme Court.[15] Instead of abandoning the responsibility of policing partisan gerrymanders and leaving the issue to the state courts, Justice Kagan argued for the Court to join—and to follow the lead of—the state courts in patrolling the issue.[16]

She reminded the majority that some of the most powerful rulings invalidating partisan gerrymandering were not the result of state legislation codifying the standards that state supreme courts were to apply when reviewing challenges. Instead, Justice Kagan pointed out that state supreme courts in Florida and Pennsylvania had struck down congressional maps as violations of the state constitutions and that those same courts were creatively deriving protections to the right to vote from "free and equal election" provisions or "fair elections" amendments under state constitutions.[17] Further, the state supreme courts were reading constitutional provisions and amendments broadly enough to craft neutral and manageable principles and standards to guide their review of partisan maps.

For example, the Pennsylvania Supreme Court experienced several vacancies in 2014 and 2015. The election to fill the seats was, at the time, the most expensive state supreme court race in U.S. history.[18] The electoral results handed Democrats a 5–2 majority over Republicans. At the same time, the state's congressional maps, drawn in 2011, were widely regarded as among the "most egregious" partisan gerrymanders in the country at the time.[19] Three years later, after winning control of the bench, the liberal majority handed down a groundbreaking decision in *League of Women Voters of Pennsylvania v. Commonwealth* that served as a trailblazing example of how state courts could address partisan gerrymandering.[20]

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15 *Cf.* Gerald S. Dickinson, *Judicial Federalization Doctrine*, 75 BAYLOR L. REV. 85, 85 (2023) [hereinafter Dickinson, *Judicial Federalization*] (noting that the Supreme Court has "on rare occasions, heavily consulted with or borrowed from state court doctrines to create a new federal jurisprudence"); Gerald S. Dickinson, *Takings Federalization*, 100 DENV. L. REV. 679, 681 (2023) [hereinafter Dickinson, *Takings Federalization*] (explaining that the Supreme Court does not always lead and state courts do not always follow, but that sometimes the Court consults, borrows, and adopts state court doctrine as a primary source to interpret the federal Constitution).

16 *Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting).

17 *Id.* at 2524 (Kagan, J., dissenting) (explaining that if state courts "can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders," then so could the Court).

18 *See* Tyler Bishop, *The Most Expensive Judicial Election in U.S. History*, ATLANTIC (Nov. 10, 2015), https://www.theatlantic.com/politics/archive/2015/11/the-most-expensive-judicial-election-in-us-history/415140 [https://perma.cc/ZJ38-BC7C].

19 LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUST., EXTREME MAPS REPORT 1, 9 (2017), https://www.brennancenter.org/publication/extreme-maps [https://perma.cc/C6DK-YYQX].

20 178 A.3d 737 (Pa. 2018).

The court invalidated the state legislature's 2011 congressional map as an unconstitutional partisan gerrymander.[21] The majority invoked the adequate and independent state grounds doctrine to shield its landmark decision from federal judicial review.[22] The court relied upon the Pennsylvania Constitution's "free and equal" elections clause as a rich source of authority to address partisan gerrymandering where the federal courts, especially the Supreme Court, lacked any identifiable or workable standards to review partisan-designed maps.[23] After concluding that the state's gerrymandered 2011 congressional district map was unconstitutional on state grounds, the court mandated the legislature produce a constitutionally appropriate map.[24]

Because neither the Pennsylvania Constitution nor state law expressly articulated standards for courts to evaluate the constitutionality of partisan-drawn districts, the Pennsylvania Supreme Court crafted its own three prong test. It fashioned the standards as implicitly derived from the "free and equal" elections clause. That standard included whether the population of the districts were equal, to the extent possible; whether the district was comprised of compact and contiguous geographical territory; and whether the district respected the boundaries of existing political subdivisions, such that the district divided as few of those subdivisions as possible.[25] This was a bona fide "judicially-created" standard that sought to impose on the court and state legislature a legal, as opposed to political, guardrail and a doctrinal manual for how congressional districts must be drawn subject to and bounded by the state, rather than federal, constitution.

Indeed, the state supreme court's experiment with "state judicial supervision in redistricting" was based on the "bedrock foundation . . . to formulate a valid" anti-partisan gerrymandering scheme.[26] But it also served as a "potential sea change in how [other] state courts could address partisan gerrymandering."[27] The court was aware that it was leading a trailblazing experiment.[28] The court noted that there were other states whose constitutions offered greater protections to the right to vote than the Pennsylvania Constitution, and those state courts could, if they wanted to, "breathe[] meaning into [] unique constitutional provisions" to find similar

21 *Id.* at 741.

22 *See id.* at 812.

23 *Id.* at 802–14.

24 *Id.* at 821 (setting forth the remedy).

25 *Id.* at 815.

26 *League of Women Voters of Pa.*, 178 A.3d at 824.

27 Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 ELECTION L.J. 264, 265 (2018).

28 *League of Women Voters of Pa.*, 178 A.3d at 821–24.

ways to protect the right to vote.[29]

Justice Kagan's *Rucho* dissent turned Justice Roberts's invocation of *Marbury v. Madison* on its head, arguing that the approach taken by the high courts in states like Pennsylvania correctly followed Justice Marshall's *Marbury* dictum that "[it] is emphatically the province and duty of the [courts] to say what the law is."[30] She urged the majority to read the state supreme court decisions invalidating partisan gerrymandering because those rulings were "detailed, thorough, painstaking," and worthy of the Court's attention.[31] Those state supreme court rulings, she argued, used "neutral and manageable and strict standards" that could have been replicated and adopted by the Court.[32]

Indeed, while the *Rucho* majority opinion was "an invitation for state courts to engage more deeply with the questions concerning the nature of judicial power they possess,"[33] Justice Kagan's dissent was an invitation—or, rather, a forceful summoning—for the Court to engage more deeply with the experiences of several state supreme courts in developing a federal principle. Justice Kagan was onto something. There were, indeed, "historical and recent decisions [that] show the Court's willingness to apply state supreme courts' reasoning to interpret the Constitution."[34]

III
FEDERALIZATION

Aided by an air of sarcasm, Justice Kagan asked in her dissent: "[W]hat do those [state] courts know that this Court does not? If [state courts] can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't [the Supreme Court]?"[35] Here, Justice Kagan appears to be summoning the Court to follow the lead of state supreme courts by consulting, and perhaps borrowing, their identified standards."[36] This is what I call "judicial federalization."[37] It is the practice of consulting and adopting state court doctrine to inform questions of federal constitutional law. The nature of Justice Kagan's dissenting inquiry and

29 *Id.* at 813 n.71.

30 Rucho v. Common Cause, 139 S. Ct. 2484, 2525 (2019) (Kagan, J., dissenting) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

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

32 *Id.*

33 Chad M. Oldfather, Rucho *in the States: Districting Cases and the Nature of State Judicial Power*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 111, 121 (2023).

34 *See* Jerry Dickinson, *The U.S. Supreme Court's History of Adopting State Supreme Court Guidance*, STATE CT. REP. (Feb. 12, 2024), https://statecourtreport.org/our-work/analysis-opinion/us-supreme-courts-history-adopting-state-supreme-court-guidance [https://perma.cc/5DQV-SQD8].

35 *Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting).

36 *Id.*

37 Dickinson, *supra* note 2, at 150.

proposal have all the hallmarks of a proposed exercise in federalization.

Justice Kagan looked to what the state supreme courts had accomplished on a constitutional question of federal import and argued that the Supreme Court could and should have followed suit. There were already two state supreme courts that offered a doctrinal roadmap for how to appropriately apply a workable standard to challenges against partisan maps. But two courts out of fifty is a very limited minority of courts. One weakness in Justice Kagan's dissent is her failure to pinpoint examples from other constitutional contexts where the Court created new federal doctrine by borrowing from or consulting the foundational work of state supreme courts. Whether Justice Kagan recognized this or not, her implicit invitation for the Court to federalize state doctrines, principles, tests, or standards was not without precedent. The question that could have been raised in dissent, but was not, was whether the Court had any precedent of following the lead of state courts in articulating and crafting a brand new federal constitutional doctrine based primarily on the experiences of several state courts. The answer is yes.

The Court has, in a variety of contexts, "turn[ed] to state supreme courts for guidance"[38] when adopting new or modifying existing federal constitutional doctrines. For example, in *Mapp v. Ohio*, the Court held that there existed an exclusionary rule under the Fourth Amendment, and the doctrine of incorporation required that the rule be applied against the States pursuant to the Fourteenth Amendment.[39] Justice Tom Clark noted that the "experience of the [state courts] is impressive [and] movement towards the [exclusionary rule] has been halting but seemingly inexorable."[40] In particular, the Court was attracted to the California Supreme Court's conclusion that it was compelled to judicially-create the rule under its state constitution "because other remedies [had] completely failed to secure" constitutional rights.[41] The Court, likewise, recognized and paid homage to the fact that California was the trailblazing state court that paved the path for other courts to follow, noting that the "experience of California . . . is buttressed by the experience of other [state courts]."[42]

Several years later, in 1964, the Court repeated its practice of federalization, this time in the context of the First Amendment in *New York*

38 *Id.*

39 367 U.S. 643, 655 (1961) (noting that the exclusionary rule prohibits the state from admitting into court improperly obtained evidence).

40 *Id.* at 660 (discussing the need for the Supreme Court to use the incorporation doctrine in this context).

41 *Id.* at 651 (quoting People v. Cahan, 282 P.2d 905, 911–12 (Cal. 1955) (holding evidence obtained by law enforcement without search warrants in violation of constitutional guarantees against unreasonable searches and seizures were inadmissible)).

42 *Id.* at 651–52.

Times v. Sullivan.[43] There, the Court lacked a federal rule that addressed whether a public official was prohibited from recovering damages for defamation in his official role unless he could show actual malice.[44] And with very little, if any, federal precedent available to decide the question, the Court turned yet again to state high courts for guidance.[45] Like *Rucho*, the *New York Times* Court could rely on only a few state supreme courts that had addressed the question on state constitutional grounds. The Court was, however, persuaded by the "oft-cited statement of a like rule" also known as the "actual malice test" created by the Kansas Supreme Court that was also later" adopted by a number of [other] state courts."[46] The Court concluded that such a test, and the privileges and protections it bestows, would be similarly applied to the federal Constitution.[47]

The Court's Fifth Amendment takings jurisprudence has also benefitted from the Court's willingness to follow the lead of the state courts when adequate federal precedent is in short supply or woefully under-developed. For example, the Court's federal exactions doctrine was crafted by consulting over 30 years' worth of state supreme court precedent developing state exactions standards.[48] In creating its own federal exactions version called the "essential nexus" test, Justice Antonin Scalia consulted dozens of state high court decisions to conclude that the Court would adopt "the approach taken by every other [state] court that . . . considered the question."[49] In the Court's sequential ruling on exactions, Chief Justice Rehnquist explained that its newly minted "rough proportionality" exactions standard derives from the experiences of the state supreme courts.[50] He concluded, "Since state courts have been dealing with these questions a good deal longer than we have, we turn to representative [exactions] decisions made by them."[51] Because of the absence of a federal standard or principle, like in *Rucho*, Justice Rehnquist justified his decision to adopt a new federal exactions standard on the grounds that the majority states' standard was "closer to the federal constitutional norm than" the minority of state courts.[52] Even in early rulings on takings, the Court consulted "the overwhelming number of decisions in the courts of [] several states" and studied the "careful

43 *See* 376 U.S. 254, 283 (1964) (defining the scope of First Amendment protections for members of the press facing defamation liability).

44 *See id.* at 279–80.

45 *Id.* at 280–82.

46 *Id.* at 280.

47 *Id.* at 283.

48 *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987); Dolan v. City of Tigard, 512 U.S. 374, 389 (1994).

49 *Nollan*, 483 U.S. at 839.

50 *Dolan*, 512 U.S. at 389–91.

51 *Id.* at 389.

52 *Id.* at 391.

collection and classification of [those] cases "before concluding that" in the greater number of states . . . special benefits are allowed to be [offset], both against the value of the part taken, and against damages to the remainder."[53]

Likewise, in *Batson v. Kentucky*, the Court ruled that the Fourteenth Amendment prohibited prosecutors to employ racially motivated tactics to strike Black jurors.[54] But its decision was based primarily on the state supreme court doctrines carved out by California and Massachusetts.[55] The Court concluded that it would, like other recent federal courts, "follow the lead of the [state courts] in writing the *Batson* opinion."[56] The Court's landmark decisions in *Lawrence v. Texas* and *Obergefell v. Hodges* also practiced federalization. In *Lawrence*, the Court explained that it was persuaded by state court interpretations of "provisions in . . . state constitutions parallel to the Due Process Clause of the Fourteenth Amendment."[57] Similarly, Justice Kennedy's opinion in *Obergefell* explained that "the highest courts of many States have contributed to [] ongoing dialogue [regarding protections to same-sex marriage] in decisions interpreting their own State Constitutions."[58] Even the Court's most recent decision involving partisan gerrymandering in *Moore v. Harper*, issued just four years after *Rucho*, offers a rare glimpse of how the Court could, and arguably should, look to the state courts for guidance over major questions concerning federal and state election law.[59]

In *Moore,* voters in North Carolina challenged partisan gerrymandering of the state's congressional maps in response to the reapportionment process following the 2020 decennial census.[60] Reversing a lower court ruling that found the issue to be a nonjusticiable political question unreviewable under the state constitution, the North Carolina Supreme Court invalidated the congressional maps on state constitutional grounds, as violating the equal voting powers, equal protection, free speech, and free assembly clauses.[61] However, after changes in the composition of the state supreme court,[62] the court overruled itself, finding that partisan gerrymandering was, indeed, an unreviewable matter by courts due to the political nature of the issue of

53 Bauman v. Ross, 167 U.S. 548, 575, 583 (1897).

54 476 U.S. 79, 88–89 (1986).

55 *Id.* at 83–84.

56 Dickinson, *Judicial Federalization*, *supra* note 15, at 119.

57 539 U.S. 558, 576 (2003).

58 576 U.S. 644, 663 (2015).

59 Moore v. Harper, 143 S. Ct. 2065 (2023).

60 *Id.* at 2074–75.

61 *Id.*

62 Douglas Keith, *The Politics of Judicial Elections, 2021–2022*, BRENNAN CTR. FOR JUST. (Jan. 29, 2024), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022 [https://perma.cc/55XM-C8HH] (noting the North Carolina Supreme Court's "new conservative majority" in the wake of the 2021–2022 judicial election cycle).

partisan gerrymandering.[63]

The Supreme Court, however, took up review of the case on slightly different grounds. There, the Court ruled that the federal Constitution's Elections Clause does not immunize state legislatures from judicial review of violations of state constitutional provisions that regulate federal or state election lawmaking.[64] Importantly, in reaching its decision, the Court exercised a healthy dose of federalization by looking to pre-Republic state court rulings that evidenced acts of judicial invalidation of state legislative enactments prior to the seminal judicial review case, *Marbury v. Madison*. Chief Justice Roberts explained, "The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review."[65] He explained that *Marbury* "did not fashion [judicial review] out of whole cloth," but that at least seven states courts actively invalidated state laws under state constitutions before 1787.[66] Those cases help illuminate and bring clarity to a major question of federal constitutional law, the emergence of judicial review.

In *Bayard v. Singleton*, the North Carolina Supreme Court invalidated a state legislative enactment, because the body was barred from passing a law that repealed or altered the state constitution.[67] In *Commonwealth v. Caton*, the Virginia Supreme Court announced its power to strike down statutes inconsistent with the state constitution.[68] In *Holmes v. Walton*, the New Jersey Supreme Court struck down a state law allowing trial by a jury of six individuals as unconstitutional under the state constitution.[69] The Connecticut Superior Court also invalidated legislation that allowed the state to alter land grants without the grantees' consent.[70] In the *Ten-Pound Act Cases*, the New Hampshire Supreme Court invalidated a state law that gave justices of the peace jurisdiction over small debt claims as violative of the state constitution.[71]

These rulings, Chief Justice Roberts noted, were indicative of how the concept of judicial review "emerged cautiously [and] matured throughout

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63 *Moore*, 143 S. Ct. at 2076.

64 *Id.* at 2079–85.

65 *Id.* at 2081.

66 *Id.* at 2080.

67 1 N.C. (Mart.) 48, 50 (1787).

68 Commonwealth v. Caton, 8 Va. (4 Call) 5, 8 (1782) ("[I]f the whole legislature . . . should attempt to overleap the bounds, prescribed to them by the people, I . . . at my seat in this tribunal . . . pointing to the constitution, will say, to them, here is the limit of your authority.").

69 Austin Scott, Holmes v. Walton*: The New Jersey Precedent*, 4 AM. HIST. REV. 456, 456–60 (1899).

70 Symsbury Case, 1 Kirby 444, 452 (Conn. Super. Ct. 1785).

71 *See* SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787, at 115–20 (2011).

the founding era."[72] And he acknowledged that the "[s]tate cases . . . advanced the concept of judicial review."[73] The import of those rulings were clear to the ultimate result in *Moore*: The Founding generation intended state courts to enjoy the judicial power of review over state legislative enactments, and state legislatures were not to be immune from the review when matters related to federal elections under the Elections Clause of the Constitution were in question.[74] Chief Justice Roberts made clever use of those prior state court rulings to provide support for the Court's ruling.

Indeed, Justice Kagan's dissenting opinion in *Rucho*—calling for the Court to replicate a version of the neutral and manageable principles created by a few state supreme courts—could have been strengthened with a reference to the Court's periodic, but inquisitive, study of how state courts have addressed adjacent constitutional questions under state constitutional law. So, what now?

IV
PERCOLATION

Recall Justice Kagan's probing question in dissent: "If [state courts] can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't [the Supreme Court]?"[75] She recognized that state courts were the leading voices over partisan gerrymandering. Indeed, while "[f]ederal law [has become] the new leader" in many aspects of American constitutional law, there are instances where "state innovations are followed by federal rulemakers and courts."[76] Justice Kagan's dissent pays homage to the idea that "the traditional state court follower becomes the unexpected federal leader who educates—rather than learns from—the Supreme Court."[77] And, if Justice Kagan's crystal ball is correctly predictive, she may be foreshadowing a time when the Court has second-thoughts on the justiciability question. Thus, state courts, like Pennsylvania and Florida, may be blazing new doctrinal paths "without the slightest idea that those very same [discoverable, neutral, and manageable] standards could someday be appropriated by the Supreme Court" to police partisan gerrymandering at the federal level.[78]

At the time of the *Rucho* ruling, the Court could point to only Pennsylvania and Florida, where there existed "[p]rovisions in . . . state

72 Moore v. Harper, 143 S. Ct. 2065, 2080 (2023).

73 *Id.* at 2081.

74 *Id.* at 2084.

75 Rucho v. Common Cause, 139 S. Ct. 2484, 2524 (2019) (Kagan, J., dissenting).

76 Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 710 n.24, 744 (2016).

77 Dickinson, *Takings Federalization*, *supra* note 15, at 693.

78 *Id.* at 693–94.

constitutions [to] provide standards and guidance for state courts to apply."[79] These were only a few state court rulings that reviewed partisan gerrymandering claims under state constitutional provisions. Thus, Justice Kagan's call for the Court to pay greater attention to the state partisan gerrymandering doctrines may have been somewhat premature, since state court decisions were in short supply and appeared to be at a nascent stage of development. However, those rulings and subsequent cases since *Rucho* also suggest that there may be an emerging trend towards state courts grappling with and identifying "neutral and manageable" principles to address partisan gerrymandering. Indeed, since *Rucho*, there have been several high-profile state supreme court rulings that have followed the playbook of the high courts in Pennsylvania and Florida, such as Kansas, Wisconsin, and North Carolina.

In 2022, the Kansas Supreme Court reviewed a challenge to the electoral maps of the state in *Rivera v. Schwab*.[80] The court ruled that the matter was a nonjusticiable political question, and focusing its reasoning on the fact that the state constitution lacked any language regarding gerrymandering and that the lack of judicial precedent in Kansas courts made the task of reviewing such a challenge untenable.[81]

In *Clarke v. Wisconsin Elections Commission*, the Wisconsin Supreme Court invalidated the state's non-contiguous legislative maps as unconstitutional under the Wisconsin Constitution.[82] The court adopted "redistricting principles" that would "guide the court's process in adopting remedial maps," including compliance with population equality requirements and federal law; meeting basic requirements under the constitution; reducing municipal splits and preserving communities of interest; and consideration of the partisan impact when evaluating remedial maps.[83]

Although overruled shortly after the composition of the court shifted, the North Carolina Supreme Court, in *Harper v. Hall*, concluded that the state's partisan gerrymandered congressional maps violated the state constitution's "right to vote on equal terms" clause that guaranteed, among other things, free elections.[84] The state constitutional standard adopted by the court—prior to its swift reversal—was that courts reviewing partisan maps "must assess whether [the] plan upholds the fundamental right of the people to vote on equal terms and to substantially equal voting power" and that voters from all political parties have substantially equal opportunity to

79 *Rucho*, 139 S.Ct. at 2507.
80 512 P.3d 168, 173 (Kan. 2022).
81 *Id.* at 187.
82 998 N.W.2d 370, 386 (Wis. 2023).
83 *Id.* at 397–98.
84 *See* 383 S.E.2d 156, 161 (N.C. 2022).

translate votes into seats.[85] The court conceded that "applying the standard [would be] imperfect" but "not impossible."[86] It *was* possible, the court said, because "[the state] constitution speaks in broad foundational principles."[87]

Indeed, those same broad foundational principles are arguably available to be judicially created under the Court's current Equal Protection and Elections Clause precedents, which similarly track the principles established by some state supreme courts. For example, one approach raised in the *Rucho* litigation was whether a partisan gerrymander constituted invidious discriminatory intent and extreme discriminatory effect.[88] If the Court adopted invidious intent as one part of a manageable principle, per its Equal Protection doctrine, then the experiences of the state courts are relevant to, if not probative of, how the Court could craft such a principle. The Pennsylvania Supreme Court, for example, applied a principled legal approach to a partisan gerrymander by invoking an inquiry examining invidious partisan intent pursuant to its free and equal elections clause.[89]

This all may lead to a percolation phenomenon, where the layering of state court rulings on partisan gerrymandering overtime "provide valuable insights and options for the federal high court to draw on when it chooses to decide the issue" again.[90] The amassing of state rulings leads to an "accumulation of state decisions [that] can provide an indication of 'changing norms objectively provable beyond'" the U.S. Supreme Court.[91] Those changing norms could then serve as a "key mechanism for prospectively shaping federal constitutional law and regulating the pace and timing of doctrinal change."[92] The "percolation of state constitutional issues" such as partisan gerrymandering, across the states would offer the Court the kind of rich source of doctrine clarifying the neutral and objective principles necessary to effectively adjudicate such sensitive political questions and, when the time is right, federalize the state doctrines to inform and support the creation of a federal partisan gerrymandering jurisprudence.[93] And if or when the Court does revisit partisan gerrymandering, "it can benefit from the views expressed and the experiences gained in the various [state] court

85 *Id.* at 174.

86 *Id.*

87 *Id.*

88 Brief for Common Cause Appellees at 40–43, 57–59, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (No. 18-422), 2019 WL 1077302.

89 *See* League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 770–73, 818–21 (Pa. 2018).

90 Liu, *supra* note 3, at 1323.

91 *Id.*

92 *Id.*

93 Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT L. REV. 861 (1993).

systems" across the country.[94]

Ultimately, the Court will have the opportunity to "profit from the contest of [state justiciability] ideas [and] choose whether to federalize the issue *after* learning the strengths and weaknesses of the competing ways of addressing the problem."[95] In essence, Justice Kagan's *Rucho* dissent builds a floor to encourage a "ground-up approach to developing constitutional doctrine [that] allows the Court to learn from the [state courts']" experiences over partisan gerrymandering.[96] The "changing norms"[97] of state court rulings on partisan gerrymandering may develop into a "dominant majority position," which may make it more palatable for the Court to later nationalize a justiciable principle that is discoverable, manageable, and neutral to apply to gerrymandering challenges.[98] Because there were so few justiciability cases over partisan gerrymandering at the state level at the time of the *Rucho* ruling—and because those limited cases had been decided only a few years prior—Justice Kagan's plea for the Court to federalize the state courts' justiciable principles arguably didn't have the kind of bite required to forcefully make the case for the Court to consult and borrow from the states in *Rucho*, notwithstanding the other political question barriers that the Court was unwilling to see passed.

In the absence of any federal role addressing partisan gerrymandering, scholars can—in the meantime—track and make sense of the state developments on anti-gerrymandering judicial doctrines. Indeed, while the federal doors may be shut at the moment, it is plausible, if not likely, that the Court will face future partisan gerrymandering challenges with a different composition of Justices who may be inclined to revisit the question. If or when the Court's composition is ripe for reviewing partisan gerrymandering, the experiences of the state courts may play a major role in determining whether and how the Court fashions a federal principle to review partisan gerrymanders.

While litigants and legal observers await a change of heart—or personnel—on the Supreme Court over partisan gerrymandering, state courts will continue to develop new and modify existing neutral and manageable principles derived from the text of state constitutions. Overtime, the layering of state court precedent addressing political gerrymandering will accrete and build a reserve of rulings and dicta that will help guide and inform the question. All the while, the sister state supreme courts across the country will

94 Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1444 (1999).

95 *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 20 (2018).

96 *Id.* at 216.

97 *Id.* at 69.

98 *Id.* at 216.

likely work their way through patchworks of doctrines. Some states may choose to address the issue through judicial intervention, while other state courts may favor cabining the issue as a political question that must be resolved through the political process. It is also quite possible that the evolution of judicial oversight of partisan gerrymandering yields the opposite result. A trend may emerge where most states either find the issue to be a political question unreviewable by courts or a justiciable claim with manageable standards for adjudication.

CONCLUSION

The anticipated growth of state court doctrines addressing partisan gerrymandering in the post-*Rucho* era should be understood as a valuable national laboratory experiment to test a variety of principles and approaches and for scholars to track how the state courts are responding to the issue. While it may take years, if not decades, for the evolution of the justiciability of partisan gerrymandering to ripen across the states, that gradual and incremental exercise throughout the states may become a welcome substantive data piece for the Supreme Court if it returns to the partisan gerrymandering question in the future.