2019 SUPPLEMENT TO

CONSTITUTIONAL LAW

CASES, COMMENTS, AND QUESTIONS

Thirteenth Edition

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CONSTITUTIONAL LAW

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CHAPTER 1

NATURE AND SCOPE OF JUDICIAL REVIEW

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2. POLITICAL QUESTIONS

P. 41, after *Nixon v. United States*:

RUCHO V. COMMON CAUSE

___ U.S. ___, 139 S.Ct. 2484, ___ L.Ed.2d ___ (2019).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution.

[All agree that the partisan gerrymanders at issue in the two cases were deliberate and at least initially highly effective. In *Rucho*, the North Carolina case] one of the two Republicans chairing the redistricting committee [explained] that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates." [In] November 2016, North Carolina conducted congressional elections using the 2016 Plan [at issue in the litigation], and Republican candidates won 10 of the 13 congressional districts.

[The] second case before us is *Lamone v. Benisek*. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, [appointed] a redistricting committee to help redraw the map. [The] Governor later testified that his aim was to "use the redistricting process to change the overall composition of

Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. [The] 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. The map was adopted by a party-line vote. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

[In] these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.' " *DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)). [The] question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere.

Partisan gerrymandering is nothing new. Nor is frustration with it. [The] Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. [The Court here cited historical examples of congressional regulation before recognizing that only a requirement that states use single-member districts remains in place today.]

[Appellants] suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. 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. See *Wesberry v. Sanders*, 376 U. S. 1 (1964); *Shaw v. Reno*, 509 U. S. 630 (1993).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. [At] no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

[Partisan] gerrymandering claims have proved far more difficult to adjudicate [than one-person, one-vote cases and cases involving racial discrimination]. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial

discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U. S. 541, 551 (1999) (citing *Bush v. Vera*, 517 U. S. 952, 968 (1996).

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth* [*v. Jubelirer*, 541 U. S. 267, 296 (2004) (plurality opinion). The Court here recounted its prior confrontations will challenges to political gerrymandering. In *Davis v. Bandemer*, 478 U. S. 109 (1986)), a majority thought the case was justiciable but splintered over the proper standard to apply. Four Justices (White, Brennan, Marshall, and Blackmun, JJ.) would have required proof of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." Two Justices (Powell and Stevens, JJ.) would have focused on "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." But O'Connor, J., joined by Burger, C.J., and Rehnquist, J., would have held that partisan gerrymandering claims pose political questions because the Equal Protection Clause simply "does not supply judicially manageable standards for resolving" them.]

[Eighteen years later, in *Vieth*, Justice Scalia's plurality opinion also would have held challenges to gerrymanders nonjusticiable due to an absence of judicially manageable standards.] Kennedy, J., concurring in the judgment, noted "the lack of comprehensive and neutral principles for drawing electoral boundaries [and] the absence of rules to limit and confine judicial intervention." He nonetheless left open the possibility that "in another case a standard might emerge." Four Justices dissented.

[The] question [in appraising political gerrymandering claims] is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *League of United Latin American Citizens v. Perry*, 548 U. S. 399, 420 (2006) (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U. S., at 307 (opinion of Kennedy, J.).

[Partisan] gerrymandering claims invariably sound in a desire for proportional representation. * * * "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation." [Unable] to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their

own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.

[The] initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. [Fairness] may mean a greater number of competitive districts. [On] the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. [Or] perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents.

[Deciding] among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.

[Even] assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. [Appellees] contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. [But] "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. [That] requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters.

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

[The District Court in the North Carolina case used a test that involved a "predominant" legislative purpose coupled with a demand for] a showing "that the dilution of the votes of supporters of a disfavored party in a particular district [is] likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party."

[The] District Court's "predominant intent" prong is borrowed from the racial gerrymandering context. [If] district lines were drawn for the

purpose of separating racial groups, then they are subject to strict scrutiny because "race-based decisionmaking is inherently suspect." But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U. S., at 160 (opinion of O'Connor, J.).

[The] District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. [To] begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. [The] plaintiffs' argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. [It] provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. [How] much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent.

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of

partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves.

[Even] if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." *Vieth*, 541 U. S., at 296–297 (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not?

[The] dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. [Here], on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. [The] only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1. [The Court next dismissed arguments based on the Elections Clause and Article I, § 2.]

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," does not mean that the solution lies with the federal judiciary. [Federal] judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.

[Our] conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. [The Court here described state legislation, state ballot initiatives, and state constitutional amendments to limit partisan gerrymandering.]

[As] noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. [The Court here described several bills introduced in Congress.] We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

JUSTICE KAGAN, with whom JUSTICES GINSBURG, BREYER, and SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities. [The] partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally

in the political process, to join with others to advance political beliefs, and to choose their political representatives. [If] left unchecked, gerrymanders like the ones here may irreparably damage our system of government. And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims.

[The] majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." [That] recognition would seem to demand a response. The majority offers two ideas * * *. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. The other is that political gerrymanders have always been with us. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. [While] bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides.

[Partisan] gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. [That] practice implicates the Fourteenth Amendment's Equal Protection Clause. [And] partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U. S., at 314 (opinion of Kennedy, J.).

[The] majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant

infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. [I'll] give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process).

[Start] with the standard the lower courts used. [B]oth courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that 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. [Justice Kagan here cited *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 805–806 (M.D.N.C. 2018).] Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. [Justice Kagan here cited *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (Md. 2018).] And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

[The] majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. But that is wrong. [W]hen political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far.

[On] to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. [Consider] the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might

be called the "extreme outlier approach." [The] approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for* partisan gain. [The] further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that [a North Carolina expert] had employed when devising the North Carolina plan in the first instance. [Every] single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. [Based] on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.

Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. [In] the old Sixth [District], 47% of registered voters were Republicans and only 36% Democrats. But in the new Sixth, 44% of registered voters were Democrats and only 33% Republicans. That reversal of the district's partisan composition translated into four consecutive Democratic victories, including in a wave election year for Republicans (2014). In what was once a party stronghold, Republicans now have little or no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans' votes.

[By] substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or "manageable." [Consider] neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. Or put differently, the comparator (or baseline or

touchstone) is the result not of a judge's philosophizing but of the State's own characteristics and judgments.

[The] majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." But that is a virtue, not a vice—a feature, not a bug.

[The] majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country.

And if the majority thought that approach too case-specific, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage.

[Nor] is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. [As] this Court recently noted, "the law is full of instances" where a judge's decision rests on "estimating rightly . . . some matter of degree"—including the "substantial[ity]" of risk or harm.

[This] Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. [The] need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." [*Gill v. Whitford*, 138 S.Ct. 1916, 1941 (2018),] (Kagan, J., concurring). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

[Here Kagan, J., argued that Congress and state political processes were unlikely to provide an effective remedy After noting that the majority had also recognized state courts as a possible source of relief—since the

political question doctrine does not apply to them—she asked:] But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?

[The] practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

P. 44, substitute for note 3:

The topic of "judicially manageable standards" is extensively discussed and debated in *Rucho v. Common Cause*, which appears immediately above in this Supplement.

CHAPTER 3

DISTRIBUTION OF FEDERAL POWERS: SEPARATION OF POWERS

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2. CONGRESSIONAL ACTION AFFECTING "PRESIDENTIAL" POWERS

I. DELEGATION OF RULEMAKING POWER

P. 221, before note 2:

(e) ***Future of the "intelligible principle" test.*** Congress enacted the Sex Offender Registration and Notification Act (SORNA), in order to provide for greater uniformity among state sex-offender registration systems, delegating to the Attorney General "the authority to specify the applicability of [its] requirements" to "offenders convicted before the enactment of" SORNA. In GUNDY v. UNITED STATES, 139 S.Ct. 2116 (2019), the Court rejected a nondelegation challenge to SORNA. KAGAN, J., announced the judgment of the Court and authored an opinion joined by three colleagues rejecting petitioner's contention that the Act "grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders. [If] that were so, we would face a nondelegation question. But [the] Attorney General's discretion extends only to considering and addressing feasibility issues," thus satisfying the intelligible principle requirement.

Concurring only in the judgment, ALITO, J., agreed with that conclusion, adding that he would be willing to reconsider the post-*Schechter* nondelegation case law if a majority of the Court were to do so. GORSUCH, J., joined by Roberts, C.J., and Thomas, J., did not wish to wait. He dissented and would have reformed the doctrine by relying on a test that focuses on three questions: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands." KAVANAUGH, J., did not participate in *Gundy*.

CHAPTER 4

STATE POWER TO REGULATE

■ ■ ■

2. BASIC DOCTRINAL PRINCIPLES AND THEIR APPLICATION

I. STATUTES THAT DISCRIMINATE ON THEIR FACES AGAINST INTERSTATE COMMERCE

P. 289, before *Maine v. Taylor*:

TENNESSEE WINE AND SPIRITS RETAILERS ASS'N v. TENNESSEE ALCOHOLIC BEVERAGE COMM'N, 139 S.Ct. 2449 (2019), invalidated a Tennessee statute that imposed a two-year duration-of-residency requirement for licenses to own and operate liquor stores. Writing for a 7–2 majority, ALITO, J., began by noting recent criticisms of dormant Commerce Clause doctrine, but he responded by citing original historical expectations that the Constitution would provide "protection against a broad swathe of state protectionist measures." Within the existing doctrinal framework, Tennessee's principal defense of its discriminatory residency test rested on § 2 of the Twenty-first Amendment, which provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Despite some early judicial suggestions that § 2 gave the states plenary control over all matters involving alcohol, the Court had subsequently recognized that it must "scrutinize state alcohol laws for compliance with many constitutional provisions," including the First and Fourteenth Amendments. With respect to the dormant Commerce Clause, examination of relevant history "convince[s] us that the aim of § 2 was not to give states a free hand to restrict the importation of alcohol." GORSUCH, J., joined by Thomas, J., dissented: "[T]hose who ratified the [Twenty-first] Amendment wanted the States to be able to regulate the sale of liquor free of judicial meddling under the dormant Commerce Clause."

CHAPTER 6

PROTECTION OF INDIVIDUAL RIGHTS: DUE PROCESS, THE BILL OF RIGHTS, AND UNENUMERATED RIGHTS

■ ■ ■

1. APPLICABILITY OF THE BILL OF RIGHTS TO THE STATES; NATURE AND SCOPE OF FOURTEENTH AMENDMENT DUE PROCESS

III. IN *MCDONALD V. CITY OF CHICAGO*, THE COURT LOOKS BACK ON ITS "INCORPORATION" OF BILL OF RIGHTS GUARANTEES

P. 421, immediately before IV:

In TIMBS v. INDIANA, 139 S.Ct. 682 (2019), GINSBURG, J., wrote for the Court that "the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming." The Court rejected the State's contention that the Fourteenth Amendment did not incorporate the Clause's application to civil *in rem* forfeitures that are at least partly punitive. The decision was unanimous in result, but THOMAS, J., concurred only in the judgment. Adhering to a view he expressed in *McDonald* (Sec. 7 infra), he would have relied on the Fourteenth Amendment's Privileges or Immunities Clause as the basis for incorporation. Concurring in the majority opinion, GORSUCH, J., "acknowledge[d]" that "[a]s an original matter . . . the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause." However, he continued, "nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment."

2. REPRODUCTIVE FREEDOM

The Court Reaffirms "the Essential Holding of *Roe*"

P. 472, add a new note after 7:

8. ***Discriminatory abortion and fetal remains.*** The Pennsylvania law at issue in *Casey* contained a provision forbidding any abortion "sought solely because of the sex of the unborn child," but the plaintiffs did not challenge it. A provision of an Indiana statute enacted in 2016 forbids abortions solely based on the race, color, national origin, ancestry, sex, or disability of the fetus. In BOX v. PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, 139 S.Ct. 1780 (2019), the Supreme Court, in a per curiam opinion, explained that it was denying review of a decision by the U.S. Court of Appeals for the Seventh Circuit invalidating the Indiana measure. The Court "expresse[d] no view on the merits . . . . Only the Seventh Circuit has thus far addressed this kind of law. We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." In a concurrence, THOMAS, J., indicated that he will likely vote to uphold such a law if and when the issue returns to the Court, because, he contended, "this law and other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."

Another provision of the Indiana law challenged in *Box* forbids abortion providers from disposing of fetal remains after an abortion by incinerating them as surgical waste. The court of appeals held that the provision failed even rational-basis scrutiny. It found that the state lacked a legitimate interest in what the state called the "humane and dignified disposal" of an aborted fetus and that, furthermore, the law does not rationally advance such an interest, even if legitimate, because it permits a woman to dispose of fetal remains by any means she chooses. The Supreme Court *per curiam* reversed the appeals court's holding regarding the fetal remains provision, but notably, the Court said only that it passed rational-basis scrutiny: the plaintiffs "never argued that Indiana's law imposes an undue burden on a woman's right to obtain an abortion. This case, as litigated, therefore does not implicate our cases applying the undue burden test to abortion regulations." GINSBURG, J., dissented from this portion of the Court's opinion, on the ground that the Court ought not summarily "reverse a judgment when application of the proper standard would likely yield restoration of the judgment." SOTOMAYOR, J., also dissented from the decision to grant review of the fetal remains ruling.

8. THE DEATH PENALTY AND RELATED PROBLEMS: CRUEL AND UNUSUAL PUNISHMENT

IV. ADDITIONAL CONSTITUTIONAL LIMITS ON IMPOSING SEVERE PUNISHMENT

P. 608, after the final paragraph:

In FORD v. WAINSRIGHT, 477 U.S. 399 (1986), the Supreme Court, per MARSHALL, J., held that the Eighth Amendment forbids executing a prisoner who has "lost his sanity" after sentencing. In MADISON v. ALABAMA, 139 S.Ct. 718 (2019), a 5–3 majority of the Court, per KAGAN, J., applied *Ford* in holding that a prisoner's mere failure to remember committing his crime does not preclude execution but dementia that renders him "unable to rationally understand the reasons for his sentence" does. The Court remanded for application of this standard. ALITO, J., joined by Thomas and Gorsuch, JJ., dissented on the grounds that only the memory question was properly before the Court and that, in any event, the state court had applied the correct standard to the dementia question.

P. 614, before Section 9:

In BUCKLEW v. PRECYTHE, 139 S.Ct. 1112 (2019), a prisoner argued that Missouri's one-drug protocol would be unconstitutional as applied to him because vascular tumors in his head, neck, and throat posed a substantial risk of excruciating pain during the execution. GORSUCH, J., writing for a 5–4 Court, rejected the claim on the ground that in as-applied no less than facial challenges to a method of execution the challenger bears the burden of identifying a " 'feasible, readily implemented' alternative procedure that would 'significantly reduce a substantial risk of severe pain' " (quoting *Glossip* plurality opinion). According to the majority, execution by nitrogen hypoxia, the alternative method to which the prisoner eventually pointed, did not satisfy this standard. BREYER, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissented on multiple grounds, including the contention that as-applied challenges should be treated differently from facial ones because the former do not undercut any legislative judgment: "It is impossible to believe that Missouri's legislature, when adopting lethal injection, considered the possibility that it would cause prisoners to choke on their own blood for up to several minutes before they die."

CHAPTER 7

FREEDOM OF EXPRESSION AND ASSOCIATION

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1. THE SCOPE AND STRENGTH OF THE FIRST AMENDMENT

I. ADVOCACY OF ILLEGAL ACTION

D. A Modern "Restatement"

P. 680, at end of note 8:

In NIEVES v. BARTLETT, 139 S.Ct. 1715 (2019), the Court seemingly narrowed its conclusion in *Lozman*. In *Nieves*, Russell Bartlett had been arrested for disorderly conduct and resisting arrest in the context of an altercation that took place during an Alaska sports festival "known for both extreme sports and extreme alcohol consumption." The criminal charges against Bartlett were ultimately dismissed, whereupon he sued the arresting officers, including Nieves, under 42 U.S.C. § 1983, claiming that his arrest was in retaliation for his speech, in particular his comments during the altercation about the behavior of the arresting officers. The district court having determined that the officers had probable cause to arrest Bartlett, the issue then turned on the question of the burden of proof in a retaliatory arrest claim based on an allegation that the arrest was in retaliation for engaging in otherwise protected speech.

Writing for the Court, ROBERTS, C.J., noted that *Lozman* was based on "unusual circumstances" and that *Nieves v. Bartlett* presented a "more representative case." And in this more representative case, the Court concluded that the plaintiff must establish a causal connection between the impermissible retaliatory motive and the subsequent arrest, and that the causal connection must be of the "but for" variety. Noting that "protected speech is often a legitimate consideration when deciding whether to make an arrest," the Court concluded that the presence of probable cause would generally (*Lozman* presenting the narrow exception of the presence of probable cause under circumstances in which it could objectively be shown that otherwise similarly situated individuals not engaged in protected speech would not have been arrested) defeat a retaliatory arrest claim. When there was no probable cause for the arrest, it would still be necessary for the plaintiff to show that the retaliation was a "substantial or motivating factor behind the

arrest." If a plaintiff were able to make such a showing, then the burden of proof would shift to the defendant to show that the arrest would have been initiated without respect to the retaliation.

THOMAS, J., concurring in part and concurring in the judgment, would have rejected even the *Lozman* exception. GORSUCH, J., concurring in part and dissenting in part, stressed that for him the presence of probable cause was relevant to a retaliatory arrest claim, but that it was not nearly as conclusive as it appeared to be for the majority. GINSBURG, J., concurring in part and dissenting in part, also objected to the weight given by the majority to the presence of probable cause. And SOTOMAYOR, J., dissenting, also took issue with the almost conclusive role the majority gave to the presence of probable cause, believing, with Ginsburg, J., that the proper approach was one drawn from *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), in which "the plaintiff bears the burden of demonstrating that unconstitutional animus was a motivating factor for an adverse action; the burden then shifts to the defendant to demonstrate that, even without any impetus to retaliate, the defendant would have taken the action complained of."

2. THE PROBLEM OF CONTENT REGULATION

P. 833, at end of note 3:

Two Terms after *Matal v. Tam*, the Court revisited the issue of offensive trademarks in IANCU v. BRUNETTI, 139 S.Ct. 2294 (2019), where the Court held that the Lanham Act's prohibition on registration for "immoral or scandalous" trademarks constituted impermissible viewpoint-based discrimination. At issue was an attempted registration of the trademark FUCT by the clothing manufacturer who used these four letters, allegedly pronounced as four separate letters, as the brand name for its clothing line. Relying substantially on *Matal*, the Court, with KAGAN, J., writing the majority opinion, rejected the argument that the "immoral or scandalous" standard was merely a viewpoint-neutral restriction on the manner in which a point of view could be expressed but was not itself a viewpoint-based standard. The Court also rejected the government's argument that the statutory criteria were not facially invalid but only that there had been errors in application by trademark examiners in applying the criteria, and rejected as well the argument that the statute could be subject to a saving narrowing construction.

Concurring, ALITO, J., noted that a redrafted statute precluding registration of "vulgar terms" could likely be valid, but that "[v]iewpoint discrimination is poison to a free society. But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination."

ROBERTS, C.J., BREYER, J., and SOTOMAYOR, J., each wrote opinions concurring in part and dissenting in part. All three agreed with the majority that the "immoral" component in the statutory standard was impermissibly viewpoint-based, but that it could be excised by the Court, leaving the "scandalous" element in place, an element that for all three of these concurring justices was sufficiently close a restriction on only the lewd or the profane that it could be understood as not being viewpoint-based. Justice Breyer's opinion also objected to the Court's continuing reliance on rigid First Amendment categories, believing that the Court should focus on the "more basic proportionality question" whether the harm to the First Amendment's interests was disproportionate to the government's regulatory objectives.

CHAPTER 8

FREEDOM OF RELIGION

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1. THE ESTABLISHMENT CLAUSE

IV. OFFICIAL ACKNOWLEDGMENT OF RELIGION

P. 1270, at end of note 1:

AMERICAN LEGION v. AMERICAN HUMANIST ASS'N, 139 S.Ct. 2067 (2019), again addressed the issue of public monuments with religious origins and connotations. At issue was the so-called Peace Cross in Bladensburg, Maryland. The cross was planned in 1918 as a memorial to the forty-nine Prince George's County solders who had been killed during the First World War. Finally constructed in 1925, the cross was a 32-foot tall "plain Latin cross" on a stone pedestal located on a traffic island at one end of one of the major highways connecting Washington, D.C., with Annapolis, Maryland. The cross, located on state-owned land and maintained by a state agency, was challenged as a violation of the Establishment Clause, but the Court, in a complex series of opinions, rejected the challenge, and in the process put what appears to be virtually the final nail in the coffin of the *Lemon* test.

ALITO, J., in an opinion that was mostly the opinion of the Court, noted that the *Lemon* test was especially unsuitable for "cases . . . that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations," and that there should be a "presumption of constitutionality for longstanding monuments, symbols, and practices." More particularly, and as in *Salazar v. Buono*, infra, "[many] years after the fact . . . [there is] no way to be certain about the motivations of the men who were responsible for the creation of the monument." And as in *Van Orden*, supra, and *McCreary*, supra, "the purposes associated with an established monument, symbol, or practice often multiply." Moreover, "just as the purpose for maintaining a monument, symbol, or practice may evolve," so too may the message it conveys. And as a result, he said, the very act of removal may be understood as "aggressively hostile to removal."

Applying these concerns to the case at hand, Alito documented the way in which crosses in general, and not just this cross, had come to represent memorials to soldiers and to bravery. This was similar, he said, to the names of places, and "few would say that the State of California is attempting to convey a religious message by retaining the names given . . . by [the] original Spanish settlers [to] San Diego, Los Angeles, Santa Barbara, San Jose, San

Francisco, etc." "The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying [the] Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. [This] Cross does not offend the Constitution."

BREYER, J., joined by Kagan, J., concurred, observing that different considerations might apply to newer monuments in different contexts. KAVANAUGH, J, also concurred, explicitly emphasizing the way in which the *Lemon* test could not explain the Court's Establishment Clause jurisprudence for the 48 years since it was decided. But KAGAN, J., also concurring with most of Alito's opinion, remained of the belief that although "the *Lemon* test does not solve every Establishment Clause problem, [its] focus on purposes and effects [remains] crucial in evaluating government action in this sphere." THOMAS, J., concurring in the judgment, and describing the *Lemon* test as "long-discredited," reiterated his longstanding resistance to the incorporation of the Establishment Clause and thus its application to the states. "And even if [the Establishment Clause did apply to the states,] this religious display does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion." GORSUCH, J., in an opinion joined by Thomas, J., concurred only in the judgment, insisting that merely being offended by the memorial's presence—"offended observer standing"—was insufficient to confer standing to sue in the first place, but also describing *Lemon* as a "misadventure." GINSBURG, J., joined by Sotomayor, J., dissented, documenting that most war memorials, including most of the World War I memorials, do not contain crosses or other religious symbols, and arguing that "[j]ust as a Star of David is not suitable to honor Christians who died serving their country, so is a cross not suitable to honor those of other faiths who died defending their nation. [By] maintaining the Peace Cross on a public highway, [Maryland] elevates Christianity over other faiths, and religion over nonreligion. [When] a cross is displayed on public property, the government may be presumed to endorse its religious content."

CHAPTER 9

EQUAL PROTECTION

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5. FUNDAMENTAL RIGHTS

I. VOTING

D. "Dilution" of the Right: Partisan Gerrymanders

P. 1608, after the first full paragraph, substitute the following paragraph for *Davis v. Bandemer*, *Vieth v. Jubelirer*, and the Notes and Questions that follow on pages 1616–19:

In DAVIS v. BANDEMER, 478 U.S. 109 (1986), the Court divided over the test to apply to identify constitutionally forbidden partisan gerrymanders under the Equal Protection Clause. WHITE, J., joined by Brennan, Marshall, and Blackmun, JJ., would have required proof of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." POWELL, J., joined by Stevens, J., would have focused on "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." A dissenting opinion, by O'CONNOR, J., joined by Burger, C.J., and Rehnquist, J., would have held that challenges to partisan gerrymanders pose nonjusticiable political questions because the Equal Protection Clause simply "does not supply judicially manageable standards for resolving" them.

The view that challenges to partisan gerrymanders present political questions, which gained the support of a plurality of the Justices in *Vieth v. Jubelier*, 541 U.S. 267 (2004), prevailed, by a vote of 5 to 4, in *Rucho v. Common Cause*, p. 1 of this Supplement. *Rucho*, which you should re-read at this time, states the governing law on the constitutional permissibility of partisan gerrymanders. As you re-read Roberts, C.J.'s, majority opinion, consider what practical difference there is, if any, between its ruling that challengers to political gerrymanders pose nonjusticiable political questions and an "on the merits" conclusion that partisan gerrymanders do not violate the Equal Protection Clause or any other provision of the Constitution.

CHAPTER 10

THE CONCEPT OF STATE ACTION

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2. "GOVERNMENT FUNCTION"

III. REFUSALS TO FIND "GOVERNMENTAL FUNCTION"

P. 1674, after *Jackson v. Metropolitan Edison Co.*:

MANHATTAN COMMUNITY ACCESS CORP. v. HALLECK, 139 S.Ct. 1921 (2019), held that a private entity administering the public access channels on a New York cable system was not a state actor despite having been designated to perform that function by the City of New York. New York state law "requires cable operators in the State to set aside channels on their cable systems for public access" and further "requires that use of the public access channels be free of charge and first-come, first-served. Under state law, the cable operator operates the public access channels unless the local government in the area chooses to itself operate the channels or designates a private entity to operate the channels." For the Time-Warner cable system in Manhattan, New York City designated a private nonprofit corporation, Manhattan Neighborhood Network (MNN), to operate the legally mandated public access channels. After the respondents produced a film critical of MNN and MNN televised it, MNN suspended the respondents from further access to MNN facilities. Respondents then sued, alleging that the public access channels were a public forum and that MNN's actions violated their First Amendment rights.

Per KAVANAUGH, J., the Court, by 5–4, ordered dismissal on the ground that MNN is not a state actor. Although "a private entity may qualify as a state actor when it exercises 'powers traditionally exclusively reserved to the State,' " *Jackson v. Metropolitan Edison Co.*, the function of operating "public access channels on a cable system [h]as not traditionally and exclusively been performed by government. Since the 1970s, when public access channels became a regular feature on cable systems, a variety of private and public actors have operated public access channels, including: private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations such as churches, schools, and libraries." As the Court ruled in *Hudgens* v.

NLRB, "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor. [G]rocery stores put up community bulletin boards. Comedy clubs host open mic nights."

Nor did it matter that New York City had "designated MNN to operate the public access channels" or that "New York State heavily regulates MNN with respect to the public access channels. [That] the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function."

Kavanaugh, J., dismissed an alternative contention that MNN was a state actor because it acted in the stead of New York City, which should be regarded as the owner or lessor of the public access channels under applicable New York law. "It does not matter that a provision in the franchise agreements between the City and Time Warner allowed the City to designate a private entity to operate the public access channels on Time Warner's cable system. [N]othing in the franchise agreements suggests that the City possesses any property interest in Time Warner's cable system, or in the public access channels on that system."

SOTOMAYOR, J., dissented: "New York City secured a property interest in public-access television channels when it granted a cable franchise to a cable company. State regulations require those public-access channels to be made open to the public on terms that render them a public forum. The City contracted out the administration of that forum to a private organization. [By] accepting that agency relationship, MNN stepped into the City's shoes and thus qualifies as a state actor.

"[The majority] is wrong in two ways. First, the majority erroneously decides the property question against the plaintiffs as a matter of law. [S]econd, and more fundamentally, the majority mistakes a case about the government choosing to hand off responsibility to an agent for a case about a private entity that simply enters a marketplace. [The] majority's opinion erroneously fixates on a type of case that is not before us: one [such as *Jackson*] in which a private entity simply enters the marketplace and is then subject to government regulation. [But] MNN is not a private entity that simply ventured into the marketplace. It occupies its role because it was asked to do so by the City, which secured the public-access channels in exchange for giving up public rights of way, opened those channels up (as required by the State) as a public forum, and then deputized MNN to administer them." The Court's reliance on prior public function cases was therefore misguided. "[When] the government hires an agent, [that agent is a state actor, regardless of whether the government] hired the agent to do something that can be done in the private marketplace too."