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# Partisan Gerrymandering according to the U.S Supreme Court

## What is the problem represented to be?

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# Abstract

A verdict in 2019 from the U.S Supreme Court that resulted in the withdrawal of the power of lower federal courts to judge in cases of partisan gerrymandering was a contested and debated one, both inside and outside the courtroom. Two different blocs out of the nine judges could be seen in the vote, one that voted for and one that voted against this decision, with the former bloc winning five to four. Through the theoretical framework of Max Weber and legitimacy, and the methodological discourse approach given by Carol Bacchi's 'What is the problem represented to be?', the two most recent cases of partisan gerrymandering brought before the court, *Rucho v. Common Cause* and *Gill v. Whitford*, gets analyzed as to reveal potential differences between the judges representation of the problem with partisan gerrymandering. The results show that although the different blocs both conceive partisan gerrymandering as problematic, they differ too what degree and how the potential solution best manifest itself. The language used frames the problem in different context within the two blocs, and in different levels of the practice as a democratic threat.

*Key Words*: Partisan Gerrymandering; U.S Supreme Court, Bacchi, Gill v. Whitford, Rucho v. Common Cause

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# 1 Introduction: Partisan Gerrymandering

In 2019, a verdict from the U.S Supreme Court regarding the practice of partisan gerrymandering shook the public and political debate. Not only did the verdict cause upset from one part of the U.S Supreme Court since they were of the opinion that the cases in *Rucho v. Common Cause* constituted of serious gerrymandering, it also caused upset because the verdict meant the stop for the lower federal courts to judge instances of partisan gerrymandering. Although the Supreme Court with this judgment exercised a prerogative perfectly within their rights, this is somewhat of a landmark verdict. Previously, the court has never judged against the cases of partisan gerrymandering that has been brought before them. From that perspective, the recent verdict provided nothing new since they did not vote in favor of the plaintiffs in this instance either. What however becomes interesting is the fact that the Supreme Court took the decision that lower federal courts ability to handle cases of this nature no longer can be deemed to be appropriate. The potential effects of this verdict can be seen in that lower federal courts previously had a role in dismissing and throwing out drawn maps labeled unconstitutional (Wines, 2019).This has previously made them an important part of the system of partisan gerrymandering claims. In light of this recent development, it becomes relevant to study how the Supreme Court perceive the problem of partisan gerrymandering as to understand why they voted the way they did when taking away the lower federal courts jurisdiction on the matter. This thesis aims to shed light on that precise matter, by analyzing the different opinions of the judges in the 2019 verdict.

Gerrymandering can be understood as a political strategy among governing parties in legislative power that tries to cement their position through re-writing the districting maps and tilting the structure of voters in their own favor (Wines, 2019). Gerrymandering is mainly known through two versions, either racial or partisan, and becomes accomplished when a party successfully disperses voters of the other party. Partisan gerrymandering happens either through establishing districts where the

opposing voters constitute minorities or through establishing districts where these voters almost become an absolute majority (Engstrom, 2020, p. 23). These two different strategies are known as ‘cracking’ and ‘packing’ respectively. The logic behind the former strategy is that it enables the governing party to split up large clusters of voters of the opposing party into two or several more districts, which leads to them becoming the minorities in these districts (Wines, 2019). The end-goal of the latter strategy is to cluster as many voters of the opposing party as possible into one district, thus enabling the governing party to strengthen their position in the surrounding districts that have become more empty as a result (Ibid).

The use of gerrymandering as a political tool has long been met by protesters who are calling for reform, some believe that congress could and should take action against partisan gerrymandering by releasing the responsibility of drawing election districts to impartial commissions (Lijphart, 2013, p. 6).

What defines partisan gerrymandering is its complex nature, and the entangled web of different structures that in the end determines the legality of the practice. Throughout the years, the legality of gerrymandering has always been hotly contested as a threat to the voting rights of the citizens. The strongest critics have long claimed that the practice of gerrymandering should be illegal, and although this is not the case some states have taken action to make sure that the responsibility of drawing new lines lies with impartial commissions instead of the state legislatures that are either ruled through republicans or democrats (Tausanovitch, 2019).

The practice of gerrymandering, whether one belongs to the proponents or the critics of it, has long been one of the main characterizing traits of the electoral cartography of the U.S (Johnston, 2018, p. 667). The long history of gerrymandering in the United States and its position as a highly relevant topic in a modern-day context makes it an intriguing subject.

## 1.1 Disposition

The thesis starts out with a presentation of the purpose and research question of the paper, and a motivation of the relevance to research the subject of partisan gerrymandering.

Some space is given for contemplating the limitations of the paper, before establishing the framework of Max Weber's thoughts on legitimacy that will set the theoretical framework for the paper. The discourse analysis as a method and subsequently the WPR-approach of Carol Bacchi is then introduced, and its relevance for the material and purpose of the paper is motivated. To strengthen the methodology, some time is spent to put the WPR-approach in a wider context of critical discourse analysis. The material is then presented, which highlights the two cases that are the foundation that the following analysis are based on. A concluding chapter including discussion follows, based on the results of the analysis.

## 1.2 Previous Research

Political scientists have a long-standing tradition and interest in mainly the effects produced by gerrymandering. Erik J. Engstrom, in his book about the future of partisan gerrymandering, writes that the historical tendency of focusing on individual-level behavior has led to radical underestimations of electoral institutions and gerrymandering (2016, p. 192) He adds that the importance of

highlighting electoral districts as shapers of political power has long been ignored, as a consequence of this (Ibid).

Richard Holden claims in his paper *Voting and Elections: New Social Science Perspective* that legal rules are important for the outcome of elections since they are fundamental for determining how effective voting power are distributed among voters and how the strategic interactions between voters and other interested parties take place (2016, p. 256). This strengthen the argument of the importance of studying the institutions that creates these legal playing fields in which partisan gerrymandering gets enabled.

These are just a few examples that serves to form an idea of the importance of studying partisan gerrymandering and the Supreme Court together. To get a more general view on how the literature on the field of the U.S Supreme Court has been taken shape so far, it is important to divide the literature into those written from the perspective of political science and those written from the perspective of law.

From the legal perspective, the study of the U.S Supreme Court and their decision making usually takes shape by directing significant attention to the internal content of the Court's opinions in any given area (Ruger et.al, 2004, p. 1152).

In contrast to this, political scientists often tend to focus more heavily and often exclusively on the basic results derived from the Court and the individual judges votes in either support or dissent (Ibid). As such, this study offers a combination of these distinctions: legal and internal documents will be analyzed but the greater framework will be that of individual judges' opinions, dissent, and concurrence.

# 2 Purpose and Question

The main framework around this thesis is as previously mentioned to examine in what way and context gerrymandering becomes legitimized in the context of the U.S Supreme Court. To specifically put this in a context of what is going to be examined, the aim of the thesis is to in detail go into the U.S Supreme Court's decision in 2019 to withdraw the power of lower, federal courts to decide what constitutes partisan gerrymandering. This was done in the case of *Rucho v. Common Cause*.
What the verdict in practice could mean is that it allows the legal surroundings to become more pro-partisan gerrymandering since political actors in settings such as state legislatures still enjoy a wide range of passing laws that could, as an example, protect politicians already in power from competition (Hansen, 2020, p.1). That is, regional lawmakers that oversee redrawing electoral maps may now become emboldened since the eventual legal ramifications from partisan gerrymandering no longer can be applied by the federal courts (BBC, 2019).

What becomes strikingly interesting about the verdict is the way the U.S Supreme Court very narrowly voted to limit the federal courts power perhaps reflects in a way something telling about individual judge's beliefs about partisan gerrymandering. The five judges that voted in favor are all in the bloc that is commonly referred to as the conservative while the four that voted against belongs to the one that is labeled the liberal bloc (Liptak, 2019). From this apparent and obvious "conflict" between two blocks stems the purpose and research question.
The purpose becomes to develop an understanding of the reasoning behind the blocs different perceptions of the problem, as a background to why they voted the way they did. Together with a theoretical framework developed from ideas about political legitimization and a methodological body allowing for a discourse analysis of the collected material, the question this paper aims to answer is:

*Do the conservative and liberal blocs different judgments on the recent verdict reflect different representations of the problems with partisan gerrymandering?*

The idea being that since the dividing in the two blocs in this verdict is so distinctive, and that the dissent from the liberal bloc led by Justice Elana Kagan were so outspoken (Cummings & Wolf, 2019), the hypothesis is that the court's final decision and verdict reveals fundamentally different views on the problem representation of gerrymandering, a hypothesis that gathers its strength and potency from the fact that the different stances on the verdict so easily can be divided into two camps. This allows one to go a step beyond simply the language of law, and to decipher eventual language of political ideas, definitions of democracy and the democracy of the electoral systems.
As such, it is not the verdict and its consequences itself that provides the chosen perspective of this paper. What is going to be examined is the way the different blocs speak of gerrymandering and the legality of it in the context of the verdicts.

## 2.1 Limitations

The body of literature on partisan gerrymandering is big, mostly from the viewpoint of gerrymandering as a study object of law. Since the political use of the practice have been challenged basically ever since it's conception, it is not within the ambition of this paper to give a full account of all the cases that have been brought up to the U.S Supreme Court. Nor is it within the ambition to speak or draw conclusions about partisan gerrymandering outside what has being said by the U.S Supreme Court.

Since the verdict in 2019 that meant a clampdown on the federal courts have changed the juridical territory regarding partisan gerrymandering, the choice of focusing on this decision becomes highly relevant and well-motivated. It is a verdict that have sent a big echo, and the basis for handling cases with a nature of partisan gerrymandering has fundamentally been changed. Thus, the academical choice of focusing on two cases that has led up to this verdict, and to examine the discursive language of the decision itself, will give a new addition to the literature of the subject. In addition, another case of

partisan gerrymandering that have been taken place in tandem with *Rucho v. Common Cause* will be added to shed a comparative light on if the language regarding partisan gerrymandering are the same from the two blocs in another case.

# 3 Theory

Since the basis for this thesis revolves around how gerrymandering in the modern day gains legitimacy through the actions of the courts, or becomes defended through these, it becomes natural for the theoretical approach to grow out from theories of legitimization. In other words, in order to answer the question as to how a political strategy that at least to the eye produces undemocratic results remain legitimate in the 21th century, you need to have a firmly established grasp surrounding relevant theories that ought to explain why; or at least enough to give you the analytical tools necessary to try to develop an understanding of the issue.

The political scientist Max Weber developed during his lifetime a theory that was centered around three different aspects of political legitimacy. One of these three will not be brought up in further detail since it revolves around the individual charisma of an individual leader and thus is not suitable to use in the context of democracy. The first one draws it's explanation from a legal perspective, meaning that the obedience and respect for the authority from the population comes from an established legal framework, that has been produced through correct and formal procedures thus forming its legitimacy through its impersonal nature (Beetham, 1991, p. 36).

The second aspect regarding political legitimacy focuses on the traditional side, which means that legitimization comes from a belief that tradition is something that must be regarded as sacred - thus the authority of rule becomes legitimized and manifested through a strong belief and respect for the sanctity of tradition (Ibid).

Weber highlighted the fact that the three types of processes of gaining legitimacy should be seen as ideal types only; he was well aware of the fact that in the real world the three of them often mixed together instead of existing solely alone on their individual terms (Ibid). It is already now evident that the model by themselves might not be that relevant in an immediate regard to this paper. However, when combining them together to provide the toolbox for analyzing gerrymandering and legitimacy, the foundation of

drawing a concluding analysis becomes stronger. Therefore, it is of relevance to present at least two of the aspects of the model.

## 3.1 Legitimization in the context of the Court

Some clarification of the term legitimacy according to Max Weber is due. Drawing on an example from a study about the legitimization of international governance, Steffek analyzes the following quote:

> "'Here it [legitimacy] is "value–free" and a purely descriptive label. Thus the relationship in which a Mafios[o] is able to maintain control of a peasant village through threats and violence is a legitimate one as long as the peasantry do not challenge it, even if the lack of challenge is simply the result of fear'"
>
> (Williams, 1996 in Steffek, 2003, p. 255)

Here, Steffen points out one common misconception about the theory of legitimacy through the eyes of Max Weber. This example above is merely a showing of an acceptance of domination, since legitimization would only be relevant here if the peasants in fact held a belief that the mafioso are in fact entitled to handle the affairs of the village (2003, p. 255). The example shows that it is not feasible to conclude that actions such as compliance with norms, rules and demands by a population reflects beliefs of legitimacy, since such prudence might make them follow them even if they in fact hold the practices as illegitimate (Ibid).

This raises some relevant question with regards to the meaning of Weber's theories of legitimization in the context of this thesis. The example mentioned above clearly indicates that Weber's ideas of legitimization as a concept derives from the people, and their perception of the rulers. How, then, can we speak about legitimacy when the intended subject of study in this paper revolves around merely a few people and their decision making in form of making verdicts and judgments? Especially since the

practice of gerrymandering is under heavy scrutiny from all walks of life in the U.S, and thus not provide any legitimacy through this definition, that it comes through the people.

I would argue that the framework established by the two ideal types here given by the research of Max Weber will still anchor a solid foundation for theoretical guidelines of the thesis. The methodology of a discourse analysis, and the language used by the actors in the U.S Supreme Court when taking a standing on gerrymandering through *Rucho v. Common Cause* and *Gill v. Whitford* will still potentially reveal thoughts of legitimacy that might be applicable to the understandings of the term provided by Max Weber.

# 4 Method - Discourse Analysis

The task at hand becomes to investigate how and if the different blocs and their apparent different stances in the U.S Supreme Court reflect different views and perceptions of the problem with gerrymandering. To have the foundations in place to be able to try and answer a question of this nature, the use of discourse analysis will provide the toolbox for discover not only what is being said and lifted by the different blocs, but also what is being left out from their perspective of the problem. Indeed, the hope is that a discourse analysis of the written material of the verdict that shows both sides of the coin will unveil a broader spectrum of opinions on gerrymandering on a level that goes beyond strictly juridical terms and references. As such, the theoretical frame and methodological approach as presented is in part what pushes the perspective of the thesis to a distinctive political science point of view, which is important since the subject and material in itself derives a bigger context from the standpoint of law. Through the purpose, question, theory, and method however, I'd argue that this problem becomes solved.

What ties all form of discourse analysis methods together is that they all share a concrete interest in the constructive effects of language, that is they are both a reflective and interpretive style of analysis (Phillips & Hardy, 2002, p. 5). One can say that what separates discourse analysis from other forms of traditional and qualitative methodological approaches is that they seek to uncover how social reality is produced, rather than how it exists (Ibid). Since the thesis revolves around what can be described as decision making at the highest instance of power, the nature of the discourse analysis might prove to be fruitful and prudent in how the perception of gerrymandering is produced.

## 4.1 Carol Bacchi and WPR-analysis

The main starting point and premise for the methodological approach of Carol Bacchi's "Whats the problem represented to be?" (WPR from now on) is the simple acceptance that what one person, group or instance etc. proposes to do about something reveals what one perceives to be problematic. This means that for example policy and suggestions of new policies contains implicit understanding and representation of what is to be considered as the 'problem' (Bacchi, 2012, p. 21). Through the analytical glasses of the WPR-approach, policy is not necessarily seen as the government's best efforts to solve 'problems' per se, rather policies becomes producers of problems in the way they create meaning through their problem representation that in turn affect what and what doesn't get done (Bacchi 2020, p. 22). This does not mean, however, that one should direct the focus towards naming these problem representations as intentional manipulation of issues or within a frame of certain strategies. Rather the aim is to understand policy better than policy makers through thoroughly probing the unexamined assumptions and what deep-rooted logics are unveiled within implicit problem representations (Ibid).

What the WPR-approach allows one to do is to give you the tools necessary for reading policies and such in a critically way, as a means to develop how the 'problem' is represented within them and to subject this problem representation with critical scrutiny (Ibid). What this means more concretely is that the method gives you sex questions that are put in place for one to truly be able to analyze how different actors perceives specific problems:

1. What is the problem represented to be in a specific policy or policy proposal?
2. What presuppositions or assumptions underpin this representation of the problem?
3. How has this representation of the problem come about?
4. What is left unproblematic in this problem representation? Where are the silences? Can the problem be thought about differently?
5. What effects are produced by this representation of the problem?

6. How/where has this representation of the problem been produced, disseminated, and defended? How has it been (or could it be) questioned, disrupted, and replaced?

(Bacchi, 2012, p. 21)

### 4.1.1 Questions & Application

Now when the method and the questions attached to WPR has been presented, it is time to reflect over the possibilities of applying them to the chosen material. As previously described, the cases that are going to be examined are that of *Rucho v. Common Cause* and *Gill v. Whitford*. Because of the choice of solely focusing attention to what is being spoken about gerrymandering in these few cases, it is reasonable to think that some of the question posed by Carol Bacchi will require a context that expands beyond the realm of what is probable or possible to extract from the legal texts. As such, a methodological restriction seems to be required. The questions will be halved, to from six to three. A brief motivation on why these questions gets left out will be provided:

*Question III: How has this representation come about?*
The goal with this question is twofold in nature. First, it aims to reflect on the non-discursive practices that contribute to the formation of identified problem representation and second to recognize that competing problem representations does indeed exist across both time and space (Bacchi, 2009, p. 10). The focus on non-discursive practice and the fact that the question implies a tracing of the problem representation over time and space makes it ill-suited for this thesis.

*Question V: What effects are produced by this representation of the problem?*
The goal of this question is simply to identify the effects of the problem representation so that they can be assessed in a critical manner (Bacchi, 2009, p.

15). Now, this would indeed be an interesting aspect to include in the thesis, but since the verdict that the paper draws it's interest from is so recent and the fact that the concrete effects will not be possible to conclude from the legal documents of the court, this question is not well-suited for the paper. However, it could be possible that the application of the three chosen question on the material will reveal dimensions of projection of effects of the problem representation (if they differ from one another) so it is foolish to rule out that it could be relevant to highlight in the concluding discussion. But it will not be a part of the framework of the analysis.

*Question VI: How/where has this representation of the problem been produced, disseminated, and defended? How has it been (or could it be) questioned, disrupted, and replaced?*

As Carol Bacchi explicitly describes it, this question in nature directly builds on question III in the way that it directs attention towards the practices and processes that has enabled certain problem representations to dominate (2009, p. 19). Since the goal of the question then is to examine the means through which certain representations of the problem have become dominant, it is also a question that is deemed to be without the reach of the structure of the methodology of this thesis.

A question that needs to be asked and answered is whether or not the methodological framework established by Carol Bacchi can be applied unto a legal material, since a main point of the method is that it is meant for analyzing policy, as explicitly stated in her description of the method. First, there is a place for the method of discourse analysis as such in a legal context. This is because one of the most defining characteristics of the discourse analysis as a tool is that it is capable and applicable to take on a wide variety of text in all kinds of settings (Shuy, 2001, p. 822) From this perspective, the area of law provides a fruitful context for the application of discourse analysis, since it is well regarded as a field containing a lot of written discourse (Ibid). Having established this, however, is it enough to warrant academic freedom to use the specific method of Carol Bacchi's questions? Clearly, it is not wise nor true to the fields political science and law to lump the legal work of judges to be the same or equivalent to policy. Because of this, it is important to argue for the suitability of

the method within the context of the verdicts submitted by the U.S Supreme Court.

The work of Carol Bacchi and the WPR-analysis is part of the bigger context of critical discourse analysis. Fairclough argues that CDA contributes to critical social analysis by focusing on discourse and the relations between discourse and other social elements, including such items as power, ideologies, and institutions (Fairclough, 2013 in FitzGerald & McGarry, 2016, p. 294). Expanding on this, the U.S Supreme Court through the years has often been described as an institution, indeed, sometimes even a “political one”, a political institution in the sense of a being a principal holder of power without responsibility to any constituency (Latham, 1947, p. 207)
Returning to the research of FitzGerald & McGarry, through the WPR-model they set out to answer the question how prostitution becomes problematized in Irish law and policy (2016, p. 289) The inclusion of both law and policy for their research and application of the WPR-method indicates that the questions are indeed applicable on material outside the realms of policy.

Arguing from this, the problem of applying Bacchi’s methodology on the chosen material becomes solved, partly from the perspective of the method being part of a bigger context of the critical discourse analysis and also through the methodological approach of the above-mentioned study that successfully incorporated the field of law into the framework of Bacchi.

# 5 Material

The main material that will be used in this paper is the final verdict from the U.S Supreme Court in 2019, that rendered in the decision that lower, federal courts now becomes toothless in judging partisan gerrymandering. The reasons for this material being the essence for the paper are twofold. First, the decision to withdraw the power of federal courts stems from the cases Rucho *v. Common Cause and Lamone v. Benisek.* This means that the court's decision was somewhat born under circumstances regarding these specific cases, meaning that they hold specific interest with regards to the purpose of this thesis. Secondly, the material extracted from this verdict will show in a clear manner the opinion of the majority's decision and the dissenting opinion from the judges disagreeing with the decision. As such, the basis for being able to make an analysis through the methodological framework gets created through these readings. Since the material give equal room for both the opinion of the court and the dissent, it is my view that the sources from the final verdict will be more than plenty within the scope of the thesis.

Another recent case of partisan gerrymandering will also be used to add a comparative dimension to the paper, namely the case of *Gill v. Whitford*. The idea behind choosing this case to be examined on two aspects. Firstly, since the case is in proximity in time with *Rucho,* it becomes relevant to analyze how and why the judge's verdict differ between the two cases. Secondly, since the sum of the individual judges verdict in the case of *Gill v. Whitford* were unanimous, the addition of the case will fit nicely in with the WPR-method to see whether or not the problem representation differs between the two. Both cases are available online through the database of the U.S Supreme Court, and thus the analysis will mainly constitute of these primary sources.

Seeing that the available material on the U.S Supreme Court and their verdicts in cases of partisan gerrymandering is vast, it is relevant to motivate clearly why these cases has been chosen. For example, a case brought before the Supreme Court goes through several phases, such as oral hearings, before a final verdict is rendered. However, the

purpose of this paper is not to give a full account for the processes behind the final verdicts, nor is it to give a comprehensive comparative study of all the cases of partisan gerrymandering brought before the court. The purpose is instead to examine what is being said between the different judges in the U.S Supreme Court, and to see if the problem is being represented differently and, in that case, how. To that end, *Rucho v. Common Cause* and *Gill v. Whitford* will provide good material, since combined they present opinions of the court, dissent, and concurrence. Their proximity in time makes them relevant since it presents the opinions on the verdict from a recent perspective.

### 5.1.1 Rucho v. Common Cause

Since the cases that makes up the content of *Rucho v. Common Cause* (North Carolina) and *Lamone v. Benisek* (Maryland) are part of the foundation of the analysis to come, a brief introduction about the characteristics of the case and some background is clearly warranted. Since the court issued a joint ruling for both these cases, it will hereby be referred to as simply *Rucho v. Common Cause*. What has been the common theme by the U.S Supreme Court in every case regarding partisan gerrymandering is that they systematically have declined any opportunity and invitation to invalidate the practice (Harvard Law Review, 2019, p. 252). What happened through the process of Rucho v. Common Cause is that the court effectively closed the door on present and future claims of partisan gerrymandering, arguing that claims of this nature involves nonjusticiable political questions that are best left for the political branches to resolve (Ibid).

The case itself is made up of two instances when voters in North Carolina and Maryland proposed that the redistricting maps in their respective state were prime examples of partisan gerrymandering, and thus unconstitutional (Supreme Court Debates, 2019, p. 43). In North Carolina, the plaintiffs argued that the State's redistricting was

discriminating towards democrats and in Maryland they argued that it was discriminating towards republicans (Ibid).

### 5.1.2 Gill v. Whitford

In this case, the plaintiffs filed suit against a redistricting plan constructed by the State of Wisconsin that they meant clearly constituted a case of partisan gerrymander because of the in their view successful attempt by the Republican party to minimize the Democratic party to translate their votes into legislative seats (Guy-Uriel & Fuentes-Rohwer, 2018, p. 236). The plaintiffs argued that Act 43, as is the name of this specific redistricting plan, used the strategy of ‘cracking’ certain democratic voters in certain districts in which these voters fail to achieve electoral majority and the strategy of ‘packing’ other democratic voters in certain districts where the democrats win by large margins (Gill v. Whitford, 585, U.S, 1, 2018).

As many observers saw it, this case looked like the perfect opportunity for the Supreme Court to firmly address the question of partisan gerrymandering once and for all, and make true of what people thought was their attention to strike down on the practice (Guy-Uriel & Fuentes-Rohwer, 2018, p. 237). To the surprise of many the Court opted not to provide any insight or judgment to whether or not the State redistricting plan was fair or if it infringed voter’s right, instead it chose in an unanimous matter to resolve the case on the grounds that the plaintiffs did not manage to provide evidence to prove that individual voters suffered harm at the hands of this particular State redistricting (Rush, 2020, p. 53).

# 6 Analysis

## 6.1 Question I: What is the problem represented to be?

Having established that the intent is to apply the WPR-approach on the conservative and liberal bloc of the U.S Supreme Court, the natural progression is to start with the first question from Carol Bacchi's methodology, namely to state the question of how the problem is represented through the different actors. According to Bacchi, this question in a WPR-frame of mind encourages to analyze concrete proposals to reveal what is represented to be the problem hidden within these proposals (2009, p. 3). In short, the goal with the first question of the approach is identify what is being implied to be the problem (Bacchi, 2009, p. 4)

### 6.1.1 Rucho v. Common Cause

When Chief Judge Roberts after the verdict gave the opinion of the court in Rucho v. Common Cause, he writes that the districting plans that has been brought forward to the court are indeed of a partisan nature, by all measures possible (18-422, U.S, 2, 2019). This is important to highlight, since this clearly indicates that the opinion of the court regarding partisan gerrymandering is not that the practice itself is legitimate per se, in these cases. Thus, the framing of the problem representation from the opinion of the court is not centered around whether partisan gerrymandering has taken place or not: they are clear on that this is the case. Further down in the opinion the Chief Judge states that the central problem is not to determine whether or not a certain jurisdiction

has been engaging with partisan gerrymandering or not, the central problem is rather to determine when partisan gerrymandering has gone too far (*Rucho v. Common Cause*, 18-422, U.S, 12-13, 2019).

The language used here is framing the problem representation from the opinion of the court within a context where certain problematizations of partisan gerrymandering can be clustered into a 'central problem'. The wording 'too far' implies that the practice can be measured in terms of being acceptable and non-acceptable, which gives a sense of the view consisting of some degree of acceptance for the practice. This gets strengthen by the fact that the opinion of the court previously acknowledges the cases in *Rucho v. Common Cause* as highly partisan by any measure (588, U.S, 2019, 2), which raises question about how they are viewing the scale on when partisan gerrymandering has been taken too far since they in the end voted against the plaintiffs.

The dissent in reply to the opinion of the court, led by Justice Elana Kagan, argues that the verdict in the partisan gerrymanders that have been presented to the U.S Supreme Court in Rucho v. Common Cause dishonors the democracy of the country since these cases deprive the citizens of their rights as given to them by the constitution: the rights to participate in the equally in the political process, to join in with others to advance political beliefs and to choose their political representatives (Ruccho v. Common Cause, 588 U.S 1, 2019). The language used in general in this dissent towards the majority's verdict is often gravitating towards presenting the problem with the partisan gerrymandering in these cases as a threat to democratic values, as when Justice Kagan writes that they in the end encourage a politics of polarization and dysfunction while they at the same time can cause irreparable damage to the system of government (Rucho v. Common Cause, 588 U.S 2, 2019). As such, while the opinion of the court in their representation of the problem are thinking in terms of non-acceptable and acceptable partisan gerrymandering, the general theme of the dissent is pushing harder on portraying the practices presented in these cases as a threat towards democratic values, and they are not ranking the practice in terms of when it has gone too far to the same extent.

With regards to the core reasons for the verdict becoming what it is, the problem representation between the majority and the dissent differs clearly. The dissent does not agree with the problem representation of the court that states that the lack of manageable judicial standard is a reason for withdrawing jurisdiction from the lower courts. The dissent argues that the federal courts in fact have agreed to a manageable standard as the way forward to resolve partisan gerrymandering, a manageable standard that is fulfilling the majority's own criteria (Ibid).The dissent argues that since the manageable standards available today  for the lower federal courts in these does not permit them to rely on own ideas of electoral fairness, and since the courts are only allowed to intervene in cases egregious gerrymandering, there is no risk of  these judges to be players of a more political process (Ibid).  The word 'egregious' in this context imply that it is defining in the eyes of the dissent on when the lower federal courts ought to have authority or not, thus establishing a limitation for them. This is interesting because it implies that beyond the seemingly different views between the majority and the dissent regarding the democratic implications of partisan gerrymandering, they differ in their views on the lower federal courts ability to handle cases of this sort. An extra potent point since the dissent argues that the federal courts fulfill the prerequisites applied by the majority.

### 6.1.2 Gill v. Whitford

In the opinion of the court delivered by Chief Justice Roberts in the case of *Gill v. Whitford*, they dismiss the standing of the plaintiffs when they argue that the case being brought before them is not of relevance to individual harm, but rather one of generalized harm, and thus without the reach of the Supreme Court since they constitutionally only vindicate individual rights (585, U.S, 2018, 21). The opinion of the court are also mentioning the role of lower federal courts in cases of gerrymandering:

"To ensure that the Federal Judiciary respects "the proper—and properly limited—role of the courts in a democratic society," *Allen* v. *Wright*, 468 U. S. 737, 750 (1984), a plaintiff

may not invoke federal-court jurisdiction unless he can show “a personal stake in the outcome of the controversy.”

Chief Judge Roberts et al., *Gill v. Whitford*, p. 13

The presented quote is worded in a way that highlights the way in which the lower federal courts should be applicable under restrictions and take a limited role. The language used is a natural development from this case through to Rucho v. Common Cause, where the tone and phrasing regarding the involvement of lower federal courts goes from skeptical to downright dismissive of their ability.

In the concurring remarks in *Gill v. Whitford*, Justice Kagan and the liberal bloc agrees with the judgement stated in the opinion of the court. Yet again they are framing their problem representation within the context of partisan gerrymandering being incompatible with democratic values, and highlighting the belief that the court has a central place in these matters since they are the only remedy partisan gerrymandering since those who benefit from them control the political branches (Gill v. Whitford, 585, U.S, 2018, 2). This means that they are in these two cases consistent in their view of the central role that lower federal courts have, even if they agree in the case of Gill v. Whitford that the plaintiffs does not provide enough evidence of being harmed. This idea becomes further strengthen here:

“…partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one”

Justice Kagan et al., *Gill v. Whitford*, p. 2

This quote serves to reaffirm and further indicate the firm belief held by the liberal bloc that the jurisdiction and ability of the lower courts is not a part of the problem in any of the cases, but rather part of the solution of the problem. This is interesting because it reinforces the fact that the tendency of the liberal bloc to highlight the need of lower federal courts, just as they do in *Rucho v. Common Cause*.

## 6.2 Question II: What presumptions or assumptions underlie the representation of the problem?

Once the implied problem representations have been identified, the task becomes to identify and clarify the understandings that are in place in order for the problem representations in order for them to be what they are: that is, what assumptions must be in place for the problem representations being shaped in the specific way and how are they taken for granted? (Bacchi, 2009, p. 5). It is important to take notice of this question not centering around *why* something is happening but rather *how* it is possible for something to happen, meaning that the end goal of question II is to analyze the conceptual logics that underpin the problem representations (Ibid). Simply stated, the goals are to reveal the chain of the conceptual logics that may act or restrain our ability to understand an issue (Bacchi, 2009, p. 7).

### 6.2.1 Rucho v. Common Cause

Chief Justice Roberts refer in his delivery of the opinion of the court to Article III of the constitution that states that federal courts shall be limited only to decide "Cases" and "Controversies" (Rucho v. Common Cause, 588 U.S, 6, 2019). That has led to the court's understanding of the definition is that federal courts are only suited to address questions "historically viewed as capable of resolution through the juridical process" (Rucho v. Common Cause, 588 U.S, 6-7, 2019). Expanding on this, the argument continues with stating that sometimes the judicial department has no business in entertaining claims of unlawfulness because the claims itself belongs to the political branches or involves no enforceable rights through the juridical system, meaning that some claims poses political questions beyond the reach and abilities of the federal

courts and are therefore nonjusticiable (Ibid). Breaking this down in terms of Question II, the underlying assumption here seems to be that it is legitimate to separate between political and non-political claims and questions, and depending on the nature of the claim the case finds itself outside or inside the realm of authority and competence of the federal courts. Thus, the majority decision to withdraw the legislative power of lower federal courts in questions of partisan gerrymandering rests on the assumption/interpretation of what constitutes political questions or not. When speaking of the second question in the WPR-analysis, Carol Bacchi mentions *binaries* and *dichotomies* as commonly found themes. Binaries represent A/ not-A relationship, which means in clear terms that what is on one side of the binary is excluded from the other side (Bacchi, 2009, p. 7). Building on this, binaries are naturally inhabited by hierarchies which present one side as the more privileged and important than the other. If that is the case with the opinion of the court and partisan gerrymandering is questionable, since there seems to be an area in between. To expand on this, Chief Justice Roberts states that the question in Rucho v. Common Cause is whether or not it is appropriate for the Federal Judiciary to remedy problems of gerrymandering whether such claims are of legal right, *resolvable around legal principles* or questions of political nature that must be resolved elsewhere (588, U.S, 7, 2019). The underlined phrase offers leeway between the apparent binary of political and judicial questions/cases, implying that the two are not necessarily dichotomous and mutually exclusive. However, as the verdict is given at the end of the opinion of the court, the majority conclusion is simply that partisan gerrymandering claims are beyond the reach and authority of the federal courts (Rucho v. Common Cause, 588, U.S, 30, 2019).

Having established that the liberal bloc tends to frame their problem representation in terms of partisan gerrymandering being a legit threat towards the American democratic system, what assumptions can be seen being underpinned in this framing? Justice Kagan refers and quotes the dissent to former president James Madison, when she writes that republican liberty demands that all power derives from its people and those entrusted with the power should be kept in dependence with the people (Rucho v. Common Cause, 588, U.S, 7). Building on this language of democratic power rightfully belonging to the people, she asks in the dissent in the context of the gerrymandering in Maryland and North Carolina, if this is how American democracy ought to work (Rucho v.

Common Cause, 588, U.S, 3, 2019). Later on, she answer her own question by simply stating that she has not yet met the person who thinks it ought to work that way (Rucho v. Common Cause, 588, U.S, 7, 2019). The language this is an example of can be related to where the dissent is pushing the obvious clash between the partisan gerrymandering presented in these cases and the people's loss to exercise their democratic rights. Therefore, the conceptual logic presented by Justice Kagan and the dissent are rooted in what can be acknowledged as a deep belief in this obvious clash. The language used when she asks the rhetorical question mentioned above and then answer it herself later on implies that these deep seated opinions of the values of a free and fair electoral system is something *obvious*, a conceptual logic that is becoming framed within something that should be obvious for everyone and thus triumph over concerns and questions about the legal boundaries of lower federal courts.

### 6.2.2 Gill v. Whitford

Having made clear that both blocs agreed about the verdict in the case of *Gill v. Whitford,* the biggest difference in the way the frame the problem of partisan gerrymandering revolves around the role of the federal courts. Even though the final verdict meant that the case went back to the district court of Wisconsin, there is a sense of the conservative bloc's skepticism towards the relevance of these courts and an optimism stemming from the liberal bloc. It becomes clearer in this case that the major difference in problem representation stems from the jurisdiction of lower federal courts, since it is the major point of difference between the two blocs compared to the many differences that constitutes *Rucho v. Common Cause*.
Since it has been argued here that the power of the federal courts and their ability to resolve matters of partisan gerrymandering is framed as being limited and giving opportunities respectively, what assumptions are in place for the respective bloc's understanding?

As stated in the first question, the opinion of the court frames the role of the lower federal courts to be highly limited and are skeptical towards their suitability while the liberal bloc led by justice Kagan tends to see the lower federal courts as an important solution to solve matters of gerrymandering. To answer the second question from the standpoint of what is being said by the two blocs in *Gill v. Whitford* is difficult, mainly because they are in much more of an agreement in this case than *in Rucho v. Common Cause*. But it is interesting to find that the difference between how they speak about the lower federal courts in relation to partisan gerrymandering can be seen in this case as well, something that become developed further in *Rucho v. Common Cause.*

## 6.3 What is left unproblematic in this problem representation? Where are the silences? Can the problem be thought about differently?

Central to the theme of WPR-analysis is to problematize problem representations and to put them under critical scrutiny, one way to achieve this goal is to consider the limits in the given problem representations (Bacchi, 2009, p. 12). To accomplish this, the key becomes to ask and examine what fails to be problematized, and to raise awareness about issues and perspectives that becomes silenced through the way the current representation of the problem is articulated (Bacchi, 2009, p. 12-13).

### 6.3.1 Rucho v Common Cause

As has been revealed in the first question of the analysis, the opinion of the court framed the problem with partisan gerrymandering within the context of the necessity to judge when the practice has gone 'too far'. They also framed their representation of the problem such as some aspects can be considered as 'central problems'. The central

problem in their view is exactly the need to determine when the practice have been taken too far. A point can be made here that the opinion of the court in a way divides partisan gerrymandering as consisting of central/non-central problems, a dichotomy that leads to everything being judged as being outside the realm of 'too far' does not constitute a central problem. The tendency to word it in this way is recurrent through the case of *Rucho v. Common Cause*:

*"As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much."*

Opinion of the Court, *Rucho v. Common Cause*, p. 15

What does this apparent acceptance of some degree of partisan gerrymandering, albeit worded here as partisan dominance, mean for the understanding of what is being left unproblematic or silenced? First, the interpretation of the opinion of the court when they are describing partisan gerrymandering in terms of 'too much' indicates that the practice itself is not problematic, if it is not crossing some limit given by the phrasing of 'too far'. From this perspective it seems that the opinion of the court give legitimacy to the practice of gerrymandering in the way that they deem the practice acceptable to an extent. What is left unproblematic from this reasoning is simply the idea that the practice itself, no matter the extent, constitutes a problem in terms of electoral fairness and citizens' rights to fair representation.
Part of the problem representation of the conservative bloc in *Rucho v. Common Cause surrounds* the ability, or lack of it, of the lower federal court to judge in these types of cases.

*"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"*

Opinion of the Court, *Rucho v. Common Cause*, p. 17

This quote is continuing from when the opinion of the court reflects over that plaintiffs often ask the courts to make their own political judgment of how much representation particular parties deserve and then do rearrange the district to that end (Ibid). In the final pages of the opinion they state that even though excessive

partisanship in districting seems unjust and not compatible with democratic values, it is not within the federal authority to resolve questions surrounding them (Rucho v. Common Cause, 585, U.S, 2019, 30). What then fails to be problematized, or left in silence, is what will happen with the practice of partisan gerrymandering when the lower federal courts no longer can act as a way for people experiencing what they think is partisan gerrymandering to get justice. They are raising the point that some states have chosen to give over the power of redistricting to independent commissions, and some states have outright prohibited the use of partisan favoritism in the creation of maps (Ruccho v. Common Cause, 585, U.S, 2019, 32). Despite this, the main silence that exists as a consequence of the conservative bloc and their representation of the problem is the states that are now at the mercy of potential partisan gerrymandering stemming from state legislatures: the states without independent commissions and prohibitions.

Central to Justice Kagan and the liberal bloc's representation of the problem regarding partisan gerrymandering is the belief in the lower federal courts part as the solution to claims and practices of the sorts. In *Rucho v Common Cause*, the general theme is also surrounding partisan gerrymandering as it is presented as a threat to democracy, in a way that is far more pushing in this regard than how it is presented by the opinion of the court.

What fails to be problematized however can be said to be similar as the opinion of the court in some ways, namely what constitutes extreme gerrymandering. This can be seen when Justice Kagan points out that lower federal courts only intervene in cases of egregious gerrymanders (Rucho v. Common Cause, 585, U.S, 2019, p. 2). The term egregious here and how it is used reveals, much as the problem representation of the conservative bloc, that the practice can indeed be measured. This has consequences since the term is part of the major argument for the dissent when highlighting the relevance and ability of the lower federal courts. Egregious in the context the word is being used can compared with the problem representation of 'too far' that is being used by the opinion of the court, but the main difference being that it is being left unproblematized in the dissent rather then being part of the problem representation. An interesting find, since it shows that vaguely described terms referring to some sort of measurement is are found in both blocs, albeit in different contexts.

### 6.3.2 Gill v. Whitford

As established in the problem representation of the opinion of the court in the case of Gill v. Whitford, Chief Judge Roberts makes a point of separating between individual and generalized harm. This is reoccurring through the verdict, and the way this separation gets worded gives indication to how they contextualize the two terms individual and generalized.

"*It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences*."

Chief Judge Roberts et al., *Gill v. Whitford*, p. 21

By phrasing it in a way that shows generalized harm as partisan references rather than framing it within a language of legal rights, the opinion of the court creates a clear distinction between the difference in nature of the individual and the mass when it comes to what judicial protection they can expect from the court. This is not to say that the opinion of the court does not argue that the plaintiffs get dismissed based on lacking evidence of harm being done to them, quite the opposite.
But what is getting left unproblematic by creating this distinction between the individual and the mass, and their subsequent role in cases being brought before the court, is that the rights of the masses gets valued less than the rights of the individual in terms of the masses being labeled as 'generalized partisan preferences' rather than 'generalized legal rights'.

Since the main difference in problem representation between the blocs in the case of *Gill v. Whitford* stems from the different views on the lower federal courts, it is not surprising to see that the same lack of problematizing the generalized being subordinate to the individual.

"The harm of vote dilution, as this Court has long stated, is "individual and personal in nature."

Justice Kagan et al, *Gill v. Whitford*, p. 3

This quote indicates that the natural harm coming from partisan gerrymandering takes shape of being something individual and personal rather than being elevated to be something general relevant for a broader population. As such, both blocs in this case fails to problematize partisan gerrymandering in the context of the practice possibility to create and constitute generalized harm.

# 7 Discussion and Conclusion

The application of Bacchi's framework of WPR has in this paper led to some insights into how the different judges of the court perceive the phenomenon of partisan gerrymandering. The first question used showed that in *Rucho v. Common Cause*, the opinion of the courts framing of the problem differs from the dissent to a greater extent than in *Gill v. Whitford*. In the former, the opinion of the court frames the problem representation within a context of the practice of partisan gerrymandering being measurable, in terms of whether it can be considered to have gone 'too far'. The dissent, on the other hand, primarily focus on framing the whole practice as a threat to democracy. In the latter, their problem representation does not differ to such an extent, although their different perceptions of the lower federal court's abilities, thus creating a division of the courts being a problem/solution.

The second question reveals that the liberal bloc builds their underlying assumptions upon the constitutional writings of the Framers, that allows them to further develop the standpoint that partisan gerrymandering is a threat. As such, their references to selected constitutional writings reflects their will to contrast partisan gerrymandering in with its unconstitutional nature, in terms, since they mean that the consequences become a withdrawal of power from the people to politicians. To compare this with Max Weber's theory about legitimization, one can argue that the dissent in the case of *Rucho v. Common Cause* invokes a traditional viewpoint, with the writings of the Framers becoming highlighted as a guiding light to fully understand the undermining of democratic principles that is resulting from partisan gerrymandering.

The viewpoint of the conservative bloc, in contrast, seems to be more in line with the need to separate between political and non-political claims, connecting to Bacchi's theory about binaries. An underlying assumption here becomes the dichotomy between what constitutes a political question or not, and it is not an

assumption or a distinction that the liberal bloc makes. Returning to the theories of Weber, one can here trace the logic of the conservative bloc to the respect for the established legal frameworks when making the separation between political and judiciary questions, and that the arena of the U.S Supreme Court only contains room for one. The question was difficult to answer from the readings of *Gill v. Whitford,* but with the main finding being that they frame the lower federal court as something limited vs. something that should be used it becomes a relevant backstory to how they further develop their reasoning on this different view in *Rucho v. Common Cause* and their underlying assumptions that create their representations of the problem.

Interestingly enough, what is being left unproblematic in their respective problem representation is their vague use of how partisan gerrymandering can be measured, even if that is more prominent in the way the opinion of the court on several occasions mentions terms such as 'too far' and 'too much dominance'. But since the dissent refers in *Rucho v. Common Cause* to 'egregious' gerrymandering, this implies that they are also working in terms of the practice being acceptable at some level as long as it is not taken too far or too extreme. Since their framing of the problems differ in ways, it is an interesting find to see that the same use of the need for a measurement that can determine when partisan gerrymandering has gone too far occur, albeit they use it in different context. The liberal bloc uses it in their defending of the lower federal courts while the conservative bloc uses it as a more general theme to their approach to the problem with partisan gerrymandering.

To conclude neither of the blocs in the discussion about partisan gerrymandering denies its ill-suited nature with democracy. From a Weberian perspective, both sides invoke the respect of the law in their arguments, although from different perspectives. To return to the question asked in the beginning of the thesis, there is no doubt that both sides view partisan gerrymandering as a problem as it is not compatible with democracy. Some of the main differences of how to best solve include it how they view the roles of the lower federal courts. As such, it is more fitting to conclude that it is the solutions to the practice of gerrymandering that differs between the two, where the conservative sees the

limitations of the lower federal courts through the lenses of what constitutes political questions or not and the liberal bloc sees opportunity for the lower federal courts to be producers of justice in claims of partisan gerrymandering.

The aim of the thesis was to shed light on how the problem representation potentially differed between the two blocs that voted so differently on the matter. It contributes to the growing literature about partisan gerrymandering and by using the discourse method of Carol Bacchi it adds to a dimension that analyze the language used in verdicts. A suggestion on further research would be to apply this type of analysis to states that has chosen to pass on the responsibility of redistricting to impartial commission and compare them to states that still lets state legislatives handle the matter, to broaden the perspective on how different actors involved view the problem and solution to partisan gerrymandering.

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