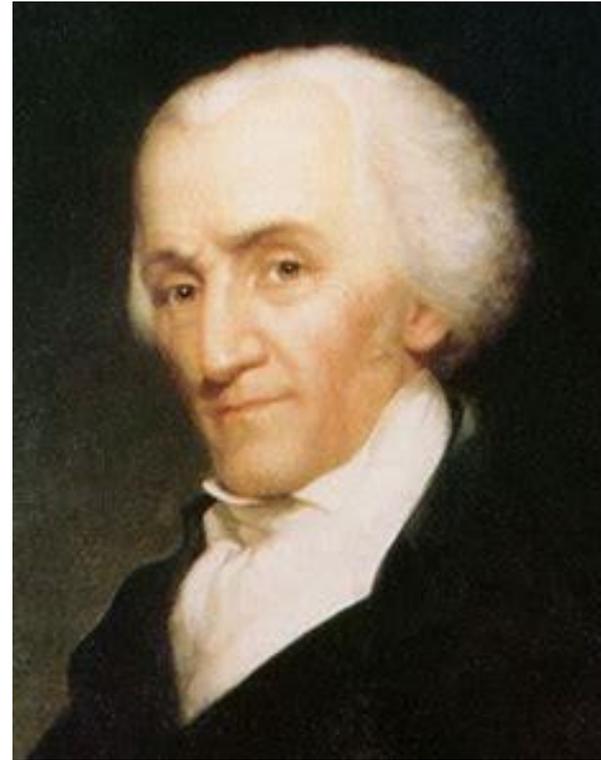


BakerHostetler



*Partisan Gerrymandering and State
Free and Equal Election Clauses*

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Rucho v. Common Cause

“partisan gerrymandering claims present political questions beyond the reach of the federal courts.”

Rucho v. Common Cause, 139 S. Ct. 2484, 2487 (2019)

Rucho v. Common Cause

“The States . . . are actively addressing the issue on a number of fronts,” and “[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”

Id. at 2507.

State Free and Equal Election Clauses

- 30 states have clauses that state elections must be free
- 18 further require they be equal
- 15 state constitutions also include language that explicitly protects a citizen's right to vote from improper influence or interference by "civil or military" powers
- No federal counterpart; states not bound by any federal interpretation

LWV of PA v. Turzai

- Challenge to Pennsylvania's Congressional districts in 2017
- Claims based on PA Constitution's Equal Protection, Free Speech, and Free and Equal Elections Clause
- Decided *before* Supreme Court's decision in *Rucho*
- Trial court found no constitutional violations
- Pennsylvania Supreme Court reversed and found plan unconstitutional under Free and Equal Elections Clause

LWV of PA v. Turzai

“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” - Pa. Const. art. I, § 5 [Free and Equal Elections Clause]

LWV PA v. Turzai

- “In accordance with the plain and expansive sweep of the words “free and equal,” we view them as indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.”
- “Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation.”
- “any legislative scheme which has the effect of impermissibly diluting the potency of an individual’s vote for candidates for elective office relative to that of other voters will violate the guarantee of ‘free and equal’ elections afforded by Article I, Section 5.”

League of Women Voters of Pennsylvania v. Turzai, 645 Pa. 1, 100-01, 109 (2018)

LWV of PA v. Turzai

“partisan gerrymandering dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage. By placing voters preferring one party’s candidates in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their votes are cast for candidates destined to win (packing), the non-favored party’s votes are diluted. It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation.”

Id. at 110.

LWV of PA v. Turzai

- Court looked to traditional redistricting criteria as benchmarks
- Compactness; contiguity; equal population; minimizing political subdivision splits
- “When, however, it is demonstrated that, in the creation of congressional districts, these neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates Article I, Section 5 of the Pennsylvania Constitution.” *Id.* at 122

Common Cause v. Lewis

- Challenge to North Carolina's legislative districts
- Claims under N.C. Constitution
 - Freedom of Speech and Freedom of Assembly
 - Equal Protection
 - Free Elections
- Claims modeled after Pennsylvania congressional case
- Three judge panel found legislative plan violated all three clauses in N.C. Constitution
- Decision not appealed; currently in remedial phase

Common Cause v. Lewis

- “All elections shall be free.” – N.C. Constitution, Article I, § 10
- Construction of “elections shall be free” must be broad
- “Seen in this light, it is clear to the Court that extreme partisan gerrymandering—namely redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.”

Common Cause v. Lewis, 2019 N.C. Super. LEXIS 56, at *339 (Sept. 3, 2019)