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SCORPIONS IN A CORKED BOTTLE: THE DUBIOUS REDISTRICTING JURISPRUDENCE OF THE UNITED STATES SUPREME COURT

STEVEN B. LICHTMAN*

As the state of Maryland embarks on a politically contentious process of drawing the boundaries of its legislative districts, it will be doing so against the backdrop of the Supreme Court's meandering history on gerrymandering. Perhaps more than the caselaw on any other subject, the Court's caselaw on redistricting is affected by political considerations—race and party politics as the two most prominent variables—which demonstrate how constitutional jurisprudence is shaped by institutional concerns. This Article will track the development and evolution of the Supreme Court's work on redistricting, with special attention being paid to these political dynamics.

INTRODUCTION

If nothing else, David Lewis was at least candid.

> I propose that we draw the maps to give a partisan advantage to 10 Republicans and three Democrats . . . because I do not believe it's possible to draw a map with 11 Republicans and two Democrats.[1]

Lewis, representing the 53rd District in the North Carolina House of Representatives, served as the co-chair of the Redistricting Committee from 2011 to 2018, and was one of the people in charge of the state's 2020 redistricting process. Nobody expected North Carolina Republicans to draw a balanced bipartisan map, and nobody could have been surprised that they turned the task into a closely held and impenetrable process. Lewis and State Senator Robert Rucho retained the services of Thomas Hofeller, the former redistricting coordinator of the Republican National Committee, and assigned him the job of drawing up several possible maps. Lewis and Rucho instructed Hofeller that all of his map options should "minimize the number

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1. Adam Liptak, *Partisan Gerrymandering Returns to a Transformed Supreme Court*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/us/politics/gerrymandering-supreme-court.html.

of districts in which Democrats would have an opportunity to elect a Democratic candidate."[2] Although the Committee went through the motions of soliciting public comment on how redistricting should proceed, Hofeller had completed his work before public commenting was opened. The fact that his maps were then presented unchanged to the Committee meant that, in the words of the federal court that assessed the situation, "the 2016 Plan did not reflect any public input."[3] Unsurprisingly, the North Carolina legislature approved the map on a party-line basis.

But it wasn't just the rules and applications in North Carolina that were significant. Lewis' jarringly unapologetic remarks signaled a definitive tonal shift, in which the architects of a gerrymander no longer felt the need to apologize for their actions.

In the not-too-distant past, legislators engaged in gerrymandering would usually attempt to deny the partisan nature of their districting choices. Consider what had played out in Pennsylvania two decades earlier, in *Vieth v. Jubelirer*.[4] Following the 2000 census, Pennsylvania Republicans engineered a pointedly hardball map for Congress in their favor, partially as retribution for a similarly partisan map drawn by Democrats in the previous cycle. In one notorious instance, the Pennsylvania GOP gerrymandered two longtime Democratic incumbents, Jack Murtha and Frank Mascara, into the same new district, crafting a "scorpions in a bottle" scenario guaranteed to knock one of them out of Congress via a primary defeat.[5]

Even though the intentions undergirding their actions were obvious when the Pennsylvania Republicans had to defend the map in the United States Supreme Court, they tried to obscure their motivations. In their brief, they rhetorically asked of their opponents, "[A]re Appellants the Santorum Democrats or the Gore Democrats?"[6]

In referencing a Republican Senator and a Democratic presidential nominee, and the possibility that a registered Democrat might vote for either

2. Common Cause v. Rucho, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018).

3. *Id.* at 807.

4. 541 U.S. 267 (2004).

5. The unlucky scorpion was Mascara, because the new district was drawn mostly along the lines of Murtha's old one, but with one new boundary shot outward, using redistricting software, to collect Mascara. Not long after his primary loss to Murtha hastened his retirement from politics, Mascara commented on the precision that the computers enabled. Once the new map was in place, Mascara noted, were he to move his car into a new parking space across the street for weekly street-cleaning, he would be driving to a new congressional district. "When I came out my door, I was in the 18th [District] and, when I crossed the street to my car, I was in the 20th . . . ." Chris Buckley, *Mascara Recalls Political Career*, PITTSBURGH TRIB.-REV. (Aug. 20, 2007, 12:00 AM), https://archive.triblive.com/news/mascara-recalls-political-career/.

6. *See* Brief of Appellees at 47, *Vieth*, 541 U.S. 267 (No. 02-1580), 2003 WL 22439888, at *47.

(or both) of them, the Pennsylvania Republicans were arguing that they weren't really engaging in partisan gerrymandering because there was no real way to predict how voters would actually vote. The fact that someone is registered to a political party, they insisted, does not guarantee that they will always vote for that party's candidates.[7] And as long as voters, even ones with partisan loyalties, retained freedom of choice—and thus might cross party lines in the voting booth—then what the Pennsylvania Republicans were doing was merely inefficient political guesswork, and not a foolproof scheme to rig an election that might rise to the level of a constitutional problem.[8]

The fact that those sentiments were scarcely believable was beside the point. The point was that those sentiments underscored the Pennsylvania Republicans' awareness, and perhaps even a fear, that were their actions to be seen as "too partisan" they would be in practical legal jeopardy. Their unwillingness to forthrightly admit that they were trying to foreordain the results of an election was more likely canny tactics rather than residual democratic shame, and the gambit paid off when the Court refused to strike down the map.[9] But it is still crucial to note that at that time, the Republicans perceived a need to refrain from a full-throated embrace of their actions.

David Lewis and North Carolina's Republicans, by contrast, perceived no such need. It is possible that Lewis eschewed the obfuscatory language of previous redistricters because he is a man of uncommon professional honesty, but that is an unlikely explanation . . . one made even more unlikely by his subsequent admission of criminal political corruption.[10] It is instead more likely that Lewis and his colleagues no longer felt any compunction about exercising their patently partisan prerogatives, and no longer felt any risk in frankly admitting what they were trying to do. Indeed, Lewis confirmed their intentions with a rhetorical swagger that demonstrated the national programmatic aims of the North Carolina GOP's mapmaking: "I

7. *Id.* at 15–17.

8. *Id.*

9. *Vieth*, 541 U.S. at 291, 305–06.

10. In August 2020, Lewis had to resign his seat upon being indicted for making false statements to a bank, misappropriating campaign funds, and failing to file federal income taxes. *See* Will Doran, *Powerful NC Lawmaker Took Donors' Money for His Own Use, Prosecutors Say*, NEWS & OBSERVER, (Aug. 20, 2020, 8:44 PM) https://www.newsobserver.com/news/politics-government/article245118325.html. Lewis pleaded guilty and was sentenced to two years of supervised release. *See* Will Doran, *No Prison Time for NC Politician who Took Almost $400,000 from Donors for Personal Use*, NEWS & OBSERVER (Aug. 17, 2021, 2:28 PM), https://www.newsobserver.com/news/politics-government/article253547274.html.

think electing Republicans is better than electing Democrats . . . . So I drew this map to help foster what I think is better for the country."[11]

Their fearless instincts were soon vindicated. When their map was challenged in *Rucho v. Common Cause*,[12] the Supreme Court of the United States not only allowed the map to be used, but also declared this challenge and any other challenges to future partisan gerrymanders to be nonjusticiable in federal court.[13] Not only had the North Carolina Republicans won the case, they had secured a blanket assurance for future similar attempts: They were now free to double down on partisan gerrymandering, without any concerns that a federal judge might invalidate their handiwork.

To anyone who had been paying attention to the short-term trends on the Supreme Court in general, and to the long-term caselaw on redistricting in particular, the ruling in *Rucho* could not have been a surprise, even though it was a dramatic new legal principle. The Roberts Court's intense distaste for any regulations of the political process, combined with the disjointedly uncertain jurisprudence on partisan gerrymandering, almost made the draconian locking of the federal courthouse doors seem inevitable.

This Article will serve as a critical history of that jurisprudence. In addition, mindful of an impending new case assessing judicial review of redistricting in state courts,[14] this Article will highlight where the Court might take the issue next.

I. POLITICAL AND OTHER THICKETS

The initial wave of cases about the nature of legislative districts which came before the Supreme Court in the mid-twentieth century was triggered by two phenomena that were not unrelated. The first is that most states had neglected—or consciously refused—to properly redraw their maps for the federal House of Representatives and for their state legislatures for several decades, even though there had been vast population and demographic shifts since the early 1900s. Importantly, the most prominent demographic shift had

11. *See* Liptak, *supra* note 1. In a self-penned defense of the map on the eve of oral argument in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), Lewis and his North Carolina Senate counterpart further explained that they felt that they might actually have had a chance to draw the map with eleven Republican districts after all but charitably opted to demur. *See* Ralph Hise & David Lewis, *We Drew Congressional Maps for Partisan Advantage. That Was the Point.*, ATLANTIC (Mar. 25, 2019), https://www.theatlantic.com/ideas/archive/2019/03/ralph-hise-and-david-lewis-nc-gerrymandering/585619/.

12. 139 S. Ct. 2484 (2019).

13. *Rucho* was decided alongside a companion case from Maryland, *Lamone v. Benisek*, 139 S. Ct. 783 (No. 18-726) (2019), which presented a gerrymander done by Democrats.

14. Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom.*, Moore v. Harper, No. 21-1271 (U.S. June 30, 2022).

been the exponential growth of cities. The state legislatures which refused to reapportion were thus often engaged in a concerted effort to preserve the disproportionate influence of rural areas, which would have lost political power if legislative districts were apportioned accurately.[15]

That dynamic explains the second reason certain states had not reapportioned. Given that a major sector of city growth was the migration of racial minorities into urban areas, the below-the-radar explanation for state legislatures' inaction on reapportionment was that it was a subtle but virulent means of disenfranchising African American voters.

As the first set of cases arrived at the Supreme Court, it soon became clear that these two dynamics were important variables which determined the depth and path of Court action. For multiple iterations of the Court, a districting case with overt racial dimensions was a case they were prepared to decide unambiguously.[16] But if a districting case lacked overt racial dimensions, the Court's instinct was to pull back on the reins.

Thus, in the 1946 case *Colegrove v. Green*,[17] a case which did not present an explicit racial angle, a divided and short-handed Court ruled 4–3 that it lacked the "competence" to review Illinois' congressional map, turning aside a complaint by urban voters that the malapportioned map violated their Fourteenth Amendment right to the equal protection of the laws.[18] For Felix Frankfurter, that lack of institutional competence was grounded in the intimately and unavoidably political nature of drawing legislative boundaries, and his wariness of getting the Court involved in what are deemed political questions. "The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests[,]" Frankfurter wrote.[19] He then continued, "Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[20]

15. For state legislative districts, these states would simply refuse to draw a new map at all, enabling rural interests to remain dominant at the state level. For federal Congressional districts, that option would not be generally feasible, since states would gain or lose seats in Congress based on population changes. In such cases, a new map would be produced but would be badly malapportioned in a way that under-represented urban areas.

16. *See infra* notes 21–23 and accompanying text.

17. 328 U.S. 549 (1946).

18. *Id.* at 552; U.S. CONST. amend. XIV, § 1. *Colegrove* only had seven participating Justices because Chief Justice Harlan Stone had died on April 22, 1946, (suffering a cerebral hemorrhage while reading a dissent from the bench) and had not yet been replaced; and because Robert Jackson had controversially taken an extended leave of absence from the Court to serve as the lead American prosecutor at the Nuremberg war crimes trials in Germany.

19. *Colegrove*, 328 U.S. at 554.

20. *Id.* at 556.

Frankfurter's "political thicket" admonition became a famous slice of Supreme Court prose, but it rested upon an utterly fatuous proposition: That it was in fact possible for voters to "secure State legislatures that will apportion properly" . . . when the whole point of malapportionment was to make it hard, if not impossible, for voters in malapportioned districts to have the voting power sufficient to effectuate the changes Frankfurter suggested as the solution. Indeed, the problem in Illinois was not a product of indifference or neglect, but rather purposively self-entrenching legislative action: The map at issue in *Colegrove* had been drawn under the authority of a 1901 state law that set down the rules and conditions for drawing district boundaries.

While *Colegrove* did not present an overly race-motivated fact pattern, the 1960 case *Gomillion v. Lightfoot*[21] did. That case came from the city of Tuskegee, Alabama, that, in 1957, had transformed its boundaries from what had been a roughly square shape into "a strangely irregular twenty-eight-sided figure."[22] But there was nothing strange about the irregularity. The boundaries had been redrawn to keep Tuskegee's white neighborhoods within the city limits, while the city's African American neighborhoods were now in an unincorporated area that was under the city's extraterritorial jurisdiction. That meant that the African American neighborhoods were still subject to the authority of the Tuskegee police force, but residents no longer "lived in" Tuskegee (or anywhere else) as a matter of political participation, and thus, they had been completely stripped of their ability to vote. As the Court noted, the new boundaries disenfranchised all but a handful of Tuskegee's 400 African American voters, without disenfranchising a single white voter.[23] Discerning that the 1957 boundary re-draw was a blatantly racist attempt to destroy African American voting in the city, the Supreme Court unanimously invalidated the new map . . . in an opinion written by Felix Frankfurter.

How did the same Justice who warned of the "political thicket" in *Colegrove* now position himself as the avenging angel smiting a similar attempt to restrict voter power? *Gomillion* presented an important factual wrinkle not present in *Colegrove*. The plaintiffs in *Colegrove* had their votes diluted, which they claimed was a violation of their Fourteenth Amendment right to equal protection of the laws. The plaintiffs in *Gomillion*, by contrast, had their ability to vote completely destroyed, which they claimed was a violation of their Fifteenth Amendment right to vote. *Colegrove*'s plaintiffs may have had their vote devalued, but they still had the ability to vote. It was

21. 364 U.S. 339 (1960).
22. *Id.* at 341.
23. *Id.*

the total elimination of the vote that swung the case for Frankfurter. The *Colegrove* complaint rested on a somewhat creative and attenuated interpretation of the Fourteenth Amendment, but Tuskegee's actions in *Gomillion* were such an obvious and comprehensive violation of the Fifteenth Amendment's ban on race-based denial of the vote that Supreme Court action was both appropriate and seamless. For Frankfurter, this wasn't judicial intervention into politics, but rather judicial correction of racism.

This distinction is at the center of the rupture on the Court two years later in *Baker v. Carr*.[24] The baseline record in *Baker* was similar to what had been observed—and waved away as nonjusticiable—in *Colegrove*: A state had not redrawn its map for decades. Here, the state was Tennessee, which had not changed its map since 1901, despite a nearly fourfold increase in the state's population. The malapportioned nature of the Tennessee General Assembly was an astounding example of rapidly growing urban areas being systematically underrepresented. Shelby County, which included the city of Memphis, had seven seats in the legislature representing a population of 312,000; a ratio of one seat for every 45,000 people.[25] By contrast, rural Moore County had its own seat, despite having a population of just under 2,500.[26] Had the Moore County ratio of 1 seat for 2,500 people been the statewide standard, Shelby County would have been entitled to 125 seats, instead of the 7 it had. The Assembly had 99 seats, and 63 of them represented districts with a total of less than 40% of Tennessee's voters.[27] The Tennessee Senate was even worse: Of its 33 seats, 23 of them represented districts with only 37% of the state's voters.[28]

Although *Baker* presented the same kind of problem as *Colegrove* had sixteen years earlier, it did not produce the same result. This time, a 6–2 Court declared itself to be competent to hear reapportionment cases after all, and *Colegrove* was overturned.[29]

In the years since *Colegrove*, the Court had been much transformed. In 1946, Frankfurter's sprawling intellect and dominant personality made him arguably the Court's thought leader (especially with Robert Jackson away at Nuremberg). He was, at the very least, a thought leader with enough influence, and ability to corral votes, to offset the similar ambitions of Hugo Black and William O. Douglas. But in 1962, Frankfurter's advancing age,

24. 369 U.S. 186 (1962).

25. *Id.* at 262 tbl. 12 (Clark, J., concurring).

26. *Id.*

27. *Id.* at 253.

28. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 200 (2000).

29. *Baker*, 369 U.S. at 188 (majority opinion). Justice Charles Whittaker did not participate in the decision. *See id.* at 237; *infra* note 38.

combined with the arrival of Earl Warren in 1953 and William Brennan in 1957, left him in eclipse.

In Brennan, the Court had acquired a Justice who was both a cerebral courtroom constitutionalist and a shrewd cloakroom politico. The genial Brennan was an even more skilled vote-procurer than the irascible Frankfurter. Indeed, it was precisely because of that skill that Black and Douglas, noting the central necessity of persuading Potter Stewart to sign onto the whole opinion (so as to avoid the plurality fracture of *Colegrove*), successfully lobbied Warren to assign the opinion to Brennan, whom they felt stood the best chance of bringing the reticent Stewart into the fold.[30]

In Warren, the Court was now led by a figure that the great American legal historian G. Edward White has described as "an antidoctrinal force."[31] While Warren did not write for the Court in *Baker*, his approach to constitutionalism had become the Court's *modus operandi*, and is an ideal means of understanding how and why the Court chose to abandon the approach Frankfurter had urged in *Colegrove*. The Frankfurter vision of judicial self-restraint and punctilious respect for institutional boundaries was forsaken in favor of a "jurisprudence [that] emphasized the practical context and moral implications of decisions and deemphasized doctrinal and institutional constraints on judicial decision making," and under Warren's leadership, most of his colleagues "came to realize, if only implicitly, that doctrinal and institutional constraints on the Court are constructed rather than cast in stone."[32]

30. *See* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 186–90 (2010); *see also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 518 (1994).

31. G. Edward White, *Earl Warren's Influence on the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 44 (Mark Tushnet ed., 1993); *see also id.* at 37–50.

32. *Id.* at 44. In fact, something similar to Warren's equity-based approach had very nearly carried the day in *Colegrove*. The fourth and deciding vote for nonjusticiablity in that 4–3 decision came from Wiley Rutledge, who concurred only with the result. In his separate concurrence, Rutledge emphasized that he felt that, contrary to Frankfurter's general declaration of nonjusticiability, the Court did indeed have the capacity to hear a case about the drawing of legislative district lines, but that in this specific case the Court should "decline to exercise its jurisdiction" because of the short interval before the next election. *See* Colegrove v. Green, 328 U.S. 549, 566 (1946) (Rutledge, J., concurring).

Rutledge's biographer characterizes this approach as "a theory of discretionary, equitable power," essentially arguing that Rutledge's vote in *Colegrove* was a recognition of the potential for unfairness were the Court to suddenly strike down the map without giving Illinois' voters a chance to remedy the problem before the election. JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 390 (2004). Rutledge felt that such a step would force the 1946 election to be conducted as a statewide at-large process with no by-district representation, which would have been manifestly unfair to Illinois voters entitled to that kind of representation. *See id.* at 391.

The "political question" doctrine that controlled in *Colegrove* is perhaps the most salient example of a constructed constraint. There is no constitutional rule barring the Court from hearing such matters, and both the definition of what makes a case a "political question" and the breadth of the Court's reluctance to address such questions is a "rule" entirely of the Court's own making. What happened in *Baker*, then, was a simple matter of the Court using a master key to unlock its own handcuffs.

There was a simple reason why the Court reached for that key. Tennessee's malapportionment was not just a case of a state with multiple large cities being governed, as the mayor of one of those cities acidly noted, "by the hog lot and the cow pasture."[33] It was clearly a situation in which a prime reason for urban underrepresentation was a Southern state's desire to minimize the political power of African Americans. It was precisely because of the nexus to institutional racism that Warren felt *Baker* was "the most important case of my tenure on the Court."[34] For that sentiment to come from the architect and author of *Brown v. Board of Education*[35] is rather remarkable, but it underscores Warren's emphatic conviction that all of America's racial troubles—and especially the knot that *Brown* sought to untie—were rooted in the original sin of denying basic political rights such as citizenship and voting to African Americans.[36]

Brennan, Warren, and the other Justices in the 6–2 majority saw *Baker*'s unmistakable racial context clearly. Felix Frankfurter, however, did not. Whether he was simply blind to the racist overtones of Tennessee's malapportionment or blinded by rage in realizing that one of his most cherished precedents was about to be discarded, Frankfurter dove into the Court's internal deliberations with a fury. In the first of a set of lengthy and at times overwrought internal memoranda, Frankfurter insisted that *Baker* was simply about politics, and not a case in which African Americans, as in

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Rutledge's approach—try to do the right thing, or at least try to avoid doing the wrong thing—seems to foreshadow the ruling in *Baker*, and it is fair to wonder how Rutledge would have approached *Colegrove* had the timetable not been so compressed. Indeed, Rutledge's unsuccessful attempt to get the Court to rehear the case the following year suggests that he saw his vote in *Colegrove* as a limited position with no application beyond that case, and that he was likely unnerved at how the main opinion in *Colegrove* had exploded into an across-the-board standard, courtesy of Frankfurter's sweeping language (and also likely courtesy of Frankfurter's domineering personality). *Id.* That said, the attempted rehearing was the only real countermeasure Rutledge undertook; as Ferren notes, "Rutledge maintained a reluctance for the federal courts to interfere with state election procedures." *Id.* Yet it appears that Rutledge's reluctance was more of a function of equity than doctrine, similar to Warren's methodology.

33. POWE, JR., *supra* note 28, at 200.

34. EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

35. 347 U.S. 483 (1954).

36. *See* JACK HARRISON POLLOCK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 209 (1979).

Gomillion, had seen their right to vote zeroed out. Although characterizing *Baker* as politics was certainly true, Frankfurter's further insistence that African American voting power had not been systematically devalued was not.[37] Alarmed at the prospect of *Colegrove* being overruled, Frankfurter either could not or would not see the racial malevolence at work in Tennessee, a force virtually identical to that which was at work in Tuskegee, Alabama.[38]

As dramatic and sweeping as the *Baker* decision was, its dramatic nature was confined to the disposal of *Colegrove* and the concomitant statement of intent from the Court to be able to hear and decide apportionment disputes. What *Baker* lacked was an announcement of a standard to be used when deciding those disputes. This hole, however, was filled in short order. In a pair of 1964 decisions, *Wesberry v. Sanders*[39] and *Reynolds v. Sims*,[40] the Court announced the general standard now known as "one person one vote,"[41] and specifically declared that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[42]

It is central to note, as Edward White did, that just as "doctrinal and institutional constraints on the Court are constructed," so too are the rules which the Court employs to free themselves—and, crucially, other courts—from those constraints.[43] As Lucas Powe noted, Earl Warren's opinion in *Reynolds* "directly answered the Harlan-Frankfurter claim that there were no judicially manageable standards. There were; any judge can count and determine if the population among districts is equal."[44]

37. *See* NEWMAN, *supra* note 30, at 517–18.

38. Frankfurter's mania to save his opinion in *Colegrove* ultimately turned tragic. Many of his frantic memos were directed at Justice Charles Whittaker, who was already feeling ill at ease in his job, and for whom Frankfurter's persistent pressure proved to be physically destabilizing. In the spring of 1962, Whittaker suffered a nervous breakdown and had to be hospitalized, and shortly had to resign from the Court on orders from his doctor; this is the reason he ultimately took no part in the consideration of the case. But Whittaker was not the only victim of Frankfurter's campaign; another victim turned out to be Frankfurter himself. One month after Whittaker's health-induced retirement, Frankfurter collapsed at his desk from a stroke. Solicitor General Archibald Cox—a longtime friend who had argued as *amicus curiae* on behalf of the plaintiffs in *Baker*—visited Frankfurter immediately following the stroke and came away convinced that his mentor blamed the case for his condition. *See* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 169–70 (1997).

39. 376 U.S. 1 (1964).

40. 377 U.S. 533 (1964).

41. *Id.* at 558 (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

42. *Id.* at 577.

43. White, *supra* note 31, at 44.

44. POWE, JR., *supra* note 28, at 248. John Harlan II was the only other vote in dissent in *Baker*; he also dissented in *Wesberry* and *Reynolds*.

This standard was easy to apply in cases of malapportionment, when districts' populations were so wildly divergent that a denial of Equal Protection was fairly clear. A much more complicated question is whether the Equal Protection Clause—or any other constitutional guarantee—is violated by districts that functionally adhere to the "one person one vote" rule, but which are drawn to functionally marginalize the votes of a particular political party. It is certainly possible to read *Baker v. Carr* as a sweeping statement that American courts can, and perhaps even should, review the process of drawing legislative districts if that process results in a denial of basic democratic fairness. Earl Warren, and the five other Justices in the majority, certainly saw the decision that way.

But it is also possible to view *Baker* as a precedent confined to racial and mathematical inequality. Crucially, it is equally possible for another iteration of the Supreme Court to make the choice to see it this way. Starting in 1986, a Court dominated by conservatives would purposefully opt for that more limited version.

II. THE SEARCH FOR A STANDARD . . . OR, THE SEARCH FOR THE LACK OF A STANDARD

The reapportionment cases from 1946 to 1964 were not centered on districting infested with partisan overtones. That was ascribable to the fact that the southern states which were trying to disenfranchise African Americans were dominated by the same Democratic Party responsible for the New Deal and the Great Society, at least in name. The catch, however, was that the Democratic Party of the south was much different from its northern incarnation. The southern variant was dominated by the very same conservatives who hold sway in the region in the twenty-first century, but back then none of those conservatives would be caught dead aligning with the political party founded by Abraham Lincoln and other 1850s abolitionists. For the first century of its existence, the Republican Party had no presence in the south.

But as the Democratic Party began to speak out strongly in favor of civil rights in the mid-1960s, the partisan loyalty of southern conservatives was now in play. Once they sensed that the Democrats had moved away from them on the issue they deemed foundationally important, southerners increasingly hitched their political fortunes to the other party, which happened to be speaking more expansively to their conservative soul. The result, which took decades to evolve, was that the Democrats and Republicans eventually stood for diametrically opposing ideological positions in a way that had never been true since the Civil War. Southern conservatives left the Democratic Party *en masse*, leaving behind a party that

was almost entirely center-left; those conservatives stormed into the Republican Party, taking control of it and purging the liberal and centrist Republicans that they derided as "RINOs" (Republicans In Name Only). Once that dynamic began to set, partisan gerrymandering became more than just the game of politics; it became a matter of political life-and-death.

As the two parties' transformation was underway, it was inevitable that the Supreme Court would be presented with cases about gerrymanders which were exclusively partisan in nature. Ironically, in their first such foray, the Court was asked to review a map that was designed specifically to *avoid* giving a political party an unfair and disproportionate advantage.

In 1973, in *Gaffney v. Cummings*,[45] the Court scrutinized a map that was "aimed at a rough scheme of proportional representation of the two major political parties."[46] The map for Connecticut's state legislature had been drawn with the express goal of distributing seats among the two major parties in precise proportion to the popular vote share each party received.[47] The problem, as the plaintiffs argued, was that the districts had population variances that did not live up to the one person one vote formula. Nevertheless, the Court upheld the map, noting the good faith effort to generate a map which was congruent with voters' collective will.[48]

Gaffney seemed like a lab experiment in what political scientist Arend Lijphart termed "consociational democracy."[49] The next case, *Davis v. Bandemer*,[50] was decidedly more confrontational.

Following the 1980 census, Indiana's congressional districts seemed to have been gerrymandered for Republican political advantage. Republicans, who commanded a majority in the legislature when the time arrived to draw the new map, occupied all of the seats on the redistricting committee. Democrats were "advisors" to the committee, but had no vote on the plan, nor did they have access to either the computerized data the committee used or to the committee's deliberations. The map that emerged from this one-sided process paid specific and unusual attention to the two counties where the state's largest cities were located—Marion County (Indianapolis) and Allen County (Fort Wayne). Rather than simply create contiguous districts within those two counties which respected established political subdivisions, the new map chopped up those counties' strong Democratic precincts into

45. 412 U.S. 735 (1973).

46. *Id.* at 738.

47. The map-drawers seem to have succeeded; as the Court noted, there was only a 1.9% deviation. *Id.* at 737.

48. *Id.* at 754.

49. *See* Arend Lijphart, *Consociational Democracy*, 21 WORLD POL. 207, 207–25 (1969).

50. 478 U.S. 109 (1986).

smaller shards and attached those shards to larger Republican precincts in outlying areas, thereby rendering what had been seats Democrats could win into outnumbered Democratic boroughs within Republican strongholds.

In the first election held using the new map, Democrats won 52% of the statewide vote for the Indiana House of Representatives, but only secured 43 of the chamber's 100 seats.[51] The effect was especially evident in Marion County and Allen County. In those two counties combined, Democrats won a shade under 47% of the vote, but because the counties had been subdivided into so many small pieces which had then been barnacled onto safe Republican seats, Democrats won only 3 of the 21 seats that covered the two counties.[52] State Democrats filed suit, claiming that the map violated their rights under the Equal Protection Clause.

Bandemer presented two questions. First, were exclusively partisan gerrymanders justiciable? Second, if so, did the Indiana map rise to the level of a constitutional violation?[53] The bifurcated nature of the case, unsurprisingly, produced a decision that was as imprecise as it was fractured, and an opinion which was signed in its entirety by only four Justices: Byron White, William Brennan, Thurgood Marshall, and Harry Blackmun.

Writing for that group of Justices along with Lewis Powell and John Paul Stevens, White first held that political gerrymanders were not nonjusticiable, and that they could be subjected to judicial assessment.[54] By declaring courts to be competent, at least conceptually, to handle these cases, White seemingly shoveled another mound of dirt onto Frankfurter's cast-off counsel that the political thicket should be avoided at all costs.

The Indiana Democrats had scored an important victory by persuading six Justices to leave the courthouse door open, but having won that battle, they immediately lost the war, as White then announced that the map was constitutionally acceptable. Only Stevens and Powell dissented from that holding and argued in favor of upholding the lower court's invalidation of the map. The remaining Justices in White's coalition (along with Warren Burger, William Rehnquist, and Sandra Day O'Connor, who would have declared the matter nonjusticiable), agreed with White that the plaintiffs' Fourteenth Amendment rights had not been violated.

White acknowledged that the Indiana Republicans had set out to disadvantage the Indiana Democrats, and further acknowledged that they had succeeded: The facts in the record, White conceded, "support a finding that an intention to discriminate was present and that districts were drawn in

51. *Id.* at 115 (plurality opinion).
52. *Id.*
53. *Id.* at 118.
54. *Id.* at 118–27 (majority opinion).

accordance with that intention . . . ."[55] But that was not enough to constitute a violation of the Equal Protection Clause, which was so overt that it required judicial intervention. Holding that the lower courts had applied an incongruous and incorrect standard, White declared that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[56] Merely making it "more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm."[57] At its heart, White's decree meant that only an attempt to relegate a party to permanent minority status—rather than an attempt to secure a partisan advantage in a given individual election—would be a Fourteenth Amendment violation.

As a result, the merits portion of White's opinion read like Frankfurter Lite. Although it did not officially declare gerrymandering to be completely off-limits, as Frankfurter certainly would have done, it did set the bar for judicial reversal of a map so high that it might have been functionally impossible for the complainant in a partisan gerrymandering case to actually prevail. White's rule required a pattern of results over several different elections, and even if the requisite amount of evidentiary support could be marshalled, there was still the problem of the criteria to be used to evaluate it. Not only was White maddeningly unclear on this front, but he also questioned the utility of the list of factors that Powell, writing separately, would have set as the governing standard.[58]

Given the murky nature of White's opinion, it might be that the best way to understand it is that the Court did not want to take a step—slamming the courthouse door shut, and reviving Frankfurter's discredited "political thicket" portent—which might have been politically provocative. To declare partisan gerrymanders nonjusticiable on their face would have been to announce that the political parties were perfectly free to try to rig elections in their favor. This statement in turn would have been seen as a major departure from the malapportionment rulings of the 1960s, which embraced Supreme Court intervention in the drawing of legislative districts. By 1986, those rulings were regarded as a key component in a lionized Supreme Court campaign against institutional racism, and the Court was undoubtedly loath to chip off pieces of its own legacy. By leaving the door to the courthouse open, but also by providing no reliable guidance about how to walk through it, the Court was able to dodge withering political blowback while paying lip

55. *Id.* at 140.
56. *Id.* at 132.
57. *Id.* at 131.
58. *Id.* at 138–42 (citing *id.* at 173 (Powell, J., concurring in part and dissenting in part)).

service to the idea of judicial correction of egregious abuses of the political process.

For the next thirty-three years, the Court unsteadily tiptoed along the tightrope it had laid out for itself: Unwilling to estop the judiciary from reviewing partisan gerrymanders, but unable (or so it claimed) to craft a workable standard that would make such cases decidable.

The purported lack of a workable standard made the Court's gerrymandering jurisprudence acutely frustrating, as they confronted fact patterns which were increasingly outrageous. The "scorpions in a bottle" gambit in *Vieth v. Jubelirer*, which was facilitated by a computer program so sophisticated that it was able to gerrymander one incumbent's house into the other incumbent's district, is one example.[59] Yet even this tactic was surpassed by the brazen actions of Texas Republicans in *League of United Latin American Citizens v. Perry*,[60] where the state GOP sought to impose a new Congressional map in the middle of a decade, to replace a map that had been implemented at the customary time, solely because the original map did not generate enough Republican victors.[61] But as they had done in *Vieth*, the Court soberly announced that without a coherent applicable rule, there was no way to determine whether an aggressively partisan gerrymander violated a constitutional norm[62]—even a second effort, in the middle of a decade, outside the norm of drawing a map only after a new census, was apparently not enough to justify judicial intervention. Texas's mid-decade redistricting, like Pennsylvania's scorpions-in-the-bottle map, was allowed to stand.[63]

Over time, it became harder and harder to take seriously the Court's self-professed inability to discern a standard; it instead appeared as though the Court was bending over backwards to avoid certifying a rule, even though sensible options were available. In his *Bandemer* dissent, Lewis Powell had proposed a simple test which would be no harder to operationalize than other

59. *See supra* note 5.

60. 548 U.S. 399 (2006).

61. The driving force behind this effort was the outspoken Texas Republican Congressman Tom DeLay, whose brusquely insistent manner, and habit of applying remorselessly implacable pressure to get what he wanted in politics, were the basis of his nickname, "The Hammer." *League of United Latin American Citizens* ("*LULAC*") was one more brick in DeLay's wall; as one of his lieutenants bluntly admitted about the mid-decade redistricting, "our goal is to elect more Republicans." *See* STEVE BICKERSTAFF, LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY 132 (2007); *see also* Justin Levitt, LULAC v. Perry*: The Frumious Gerry-Mander, Rampant*, *in* ELECTION LAW STORIES 238 (Joshua A. Douglas & Eugene D. Mazo, eds., 2016).

62. *LULAC*, 548 U.S. at 420.

63. The Court in *LULAC* hung its conclusion on the fact that the first map had been drawn by a panel of three federal judges after the Texas legislature had been unable to reach agreement; the mid-decade map was allowed to stand seemingly because it was the legislature's first bite at the apple, as it were. Levitt, *supra* note 61, at 238.

rubrics the Court has employed in other situations: Simply ask if those responsible for drawing the district were "motivated solely by partisan considerations."[64] Eighteen years later, dissenting in *Vieth*, John Paul Stevens wondered aloud why this test had been so casually rejected.[65]

Perhaps out of recognition that this particular horse had been forcibly thrown out of the barn, David Souter, in his own *Vieth* dissent, proposed a new test centered on a set of relatively straightforward questions: (1) Is the plaintiff in an identifiable political group?; (2) Were traditional districting principles such as compactness and contiguousness ignored?; (3) Can the deviation from those principles be linked to partisan reasons?; (4) Can a new district be crafted in accordance with those principles?; and (5) Can the plaintiffs show that the deviation from traditional districting principles was intentional, rather than merely coincidental?[66] Here as well, a Court majority simply elected not to take up this remedy.

The Court's stubborn insistence that no rule existed for evaluating partisan motivations in redistricting stood in stark and dubious contrast to their unrelenting hostility towards racial motivations in redistricting—and their stampeding eagerness to impose an absolute and uncompromising rule governing them. In *Shaw v. Reno* (*Shaw I*),[67] the Court invalidated a North Carolina redistricting plan with a stated goal of creating two majority-minority Congressional districts.[68] Starting with *Davis v. Bandemer* in 1986, the Court had tolerated partisan motivations in districting; *Shaw* both perpetuated that toleration and stood as a dogmatic zero-tolerance policy for racial motivations in districting.[69]

In her opinion for the Court, Sandra Day O'Connor reached for the well-established strict scrutiny test and declared that race-based gerrymanders would have to be necessarily related to a compelling government interest in

64. Davis v. Bandemer, 478 U.S. 109, 177 (1986) (Powell, J., concurring in part).

65. Vieth v. Jubelirer, 541 U.S. 267, 339, 339 n.33 (Stevens, J., dissenting).

66. *Id.* at 347–50 (Souter, J., dissenting).

67. 509 U.S. 630 (1993).

68. *Id.* at 657–58. This presaged O'Connor's majority opinion two years later, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995), declaring that the strict scrutiny test applied to any governmental classifications grounded in racial considerations.

69. The *Shaw* litigation was so convoluted that it returned to the Court three additional times, each time with a different name—*Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996), *Hunt v. Cromartie*, 526 U.S. 541 (1999), and *Easley v. Cromartie*, 532 U.S. 234 (2001)—and took so long to resolve that a new census was held before the proceedings were finished. In the final iteration of the case, the Court concluded that the challenged district (which had been amended multiple times since the original complaint) was constitutionally acceptable, because it had been drawn not to guarantee a victory by a racial minority, but rather to guarantee a victory by the incumbent Congressman, Melvin Watt, who happened to be African American. *Easley*, 532 U.S. at 257.

order to be allowed to stand.[70] However, she also curtly rejected the notion that this demanding methodology would be appropriate for political gerrymanders, and limited its application to racial ones.[71] By doing so, O'Connor fell back on a path of extreme caution, opting to hold the Court out of what she anticipated to be discomforting political controversies.

O'Connor's wary and pragmatic caution, however, stood in stark contrast to the reckless language she deployed to illustrate her antipathy for race-based redistricting, most notably the final word she used:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.[72]

This sentence, written by Sandra Day O'Connor, is the ugliest passage in the history of the Supreme Court.

It is not easy to write something even more repugnant than Roger Taney's racially noxious idea that "the [N]egro might justly and lawfully be reduced to slavery for his benefit,"[73] or Oliver Wendell Holmes's insensitive defense of the forced sterilization of a woman on the grounds that "[t]hree generations of imbeciles are enough."[74] Yet somehow Sandra Day O'Connor managed to exceed those horrors by callously insinuating that an effort to increase the political voice of African Americans was the moral equivalent of South Africa's murderous regime of white supremacy.

Theoretically, we might leaven the disgust by hypothesizing that those words were written by an overheated clerk, and that O'Connor simply let the sentence slide without giving it the careful critical review that ideally would have snuffed it out before it went to print. But even if O'Connor merely committed the sin of poor supervision of her clerks, it is still her name on that opinion, and thus her ownership of a contemptible, obtuse, and utterly vile comparison.

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70. *Shaw I*, 509 U.S. at 649.

71. *Id.* at 650. Of course, by 1993 there was an alternative to strict scrutiny: The so-called "intermediate" or "heightened" scrutiny test, in which governmental action need only "serve important governmental objectives and must be substantially related to achievement of those objectives," as opposed to the strict scrutiny rule that governmental action must be necessary to serve a compelling interest. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). This intermediate language had already been applied to gender discrimination in *Craig*, and it had also been applied to symbolic speech. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968). Presumably, it could also have been applied to partisan gerrymandering, where the Court inclined to seriously address it.

72. *Shaw I*, 509 U.S. at 647.

73. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

74. Buck v. Bell, 274 U.S. 200, 207 (1927).

The Court in the Burger and Rehnquist eras can fairly be described as coexisting uncomfortably with political gerrymandering. Although the Court in those years never struck down a challenged district as so excessively partisan that it violated constitutional dictates, it also pointedly refused to foreclose on the possibility that a workable standard might magically emerge (even as it sometimes seemed as though the Court was searching for such a standard with its hands covering both of its eyes). The arrival of John Roberts would signal the end of the discomfort, in favor of a comfortable and at times cynical embrace of political gerrymandering.

III. ROBERTS'S RULE OF PARTISAN DISORDER

It is more than a little ironic that a strong signal of Roberts's disdain for judicial intervention in the political process came in the isolated case in which Roberts found himself in the minority: *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[75] The Court reviewed the meaning of the Elections Clause of Article 1, Section 4 of the United States Constitution—"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"—and its application to a 2000 amendment to the Arizona Constitution.[76] That year, the state's voters attempted to eliminate partisan gerrymandering by taking the power to draw legislative districts away from self-interested partisan elected officials, and placing it in the hands of a nonpartisan body. This was done via a statewide ballot initiative to amend the state constitution: Proposition 106, which created the Arizona Independent Redistricting Commission ("AIRC").[77] Following the passage of this initiative, the AIRC crafted the maps for both the state legislature and the federal Congress.

However, following the drawing of the 2010 map, Arizona Republicans filed a lawsuit challenging the AIRC's very existence. Ostensibly angered by a map that did not give them enough of an advantage, the Arizona Republicans argued that creation of the AIRC violated the Elections Clause. They claimed that the "*by the Legislature thereof*" language in the Elections Clause means that only a legislature could draw the map.[78] Since the AIRC was an independent body outside of the legislature, it did not have legitimate constitutional authority.

75. 576 U.S. 787 (2015).
76. *Id.* at 792 (quoting U.S. CONST. art. I, § 4, cl. 1).
77. *Id.* at 796.
78. *Id.* at 792–93 (emphasis added).

Although the text of the Elections Clause can plausibly be interpreted along these lines, the problem was the breathtaking scope of the Arizona Republicans' argument, which boiled down to an assertion that they had a constitutional right to gerrymander. It was one thing to suggest that the Constitution does not provide courts with the means of reviewing political districting; the Court had a dalliance with that argument in *Colegrove* and had not entirely put it to one side. But it is another matter entirely to suggest that the Constitution provides political parties an untrammeled right to zero out true political competition and foreordain the results of an election. Even for a Court which had never been willing to articulate and apply a standard for reviewing gerrymanders, this audacious suggestion was a bridge too far, and it was rejected by a 5–4 vote.

In order to do so, Ruth Bader Ginsburg had to get a little creative in her interpretation of Article I, Section 4. Her solution was to perform a deep dive into the meaning of the word "legislature," and conclude that when the Framers placed it in the Elections Clause, the word was simply a shorthand for a body charged with the power of enacting legislation.[79] From there, Ginsburg noted that a different means of enacting legislation—the ballot proposition—was unknown to the Framers, and so they could not possibly have included it in so many words in the Constitution. But once that device was invented in the early twentieth century by western progressives, it was functionally similar to the legislative chambers of the Framers' time—both legislative chambers (via drafting and voting on statutes) and voters (via drafting and voting on initiatives), Ginsburg reasoned, make laws. Consequently, Ginsburg held that the word "legislature" should be construed broadly, and construed to apply to the ballot initiative version of direct democracy.[80]

The failure of the Arizona Republicans' ploy may have been a matter of gerrymandering advocates overplaying their hand. They were, after all, claiming an inalienable right to entrench themselves by limiting the efficacy of voter power. But their failure was also in tune with public distaste for gerrymandering; there is a reason that Arizona voters wanted to eliminate it. But as the 2010s wore on, the Supreme Court was not only unmindful of voter revulsion at gerrymandering, it eventually issued a decision which flew in the face of it. Ironically, the Court's preoccupation with the danger that could be done to its reputation were it to become entangled with the political process may have induced an over-correction that proved just as reputationally corrosive.

79. *Id.* at 804–08.
80. *Id.* at 822–23.

At first, however, it appeared as though the Court might finally take an aggressive step against political gerrymandering, because it likewise appeared that the holy grail of a manageable standard was finally within reach. In a case that resembled the machinations in *Davis v. Bandemer*, Wisconsin Republicans enjoyed a statehouse majority after the 2010 census which enabled them to control the redistricting. Like their Indiana counterparts thirty years earlier, the Wisconsin Republicans completely excluded Democrats from the map-drawing process, which was executed behind closed doors. The map they came up with was a stunning exercise in cabining and even defying the will of voters. In the 2012 election, the first one held using the new map, Democratic candidates for the Wisconsin House of Representatives won a 51.4% majority of the vote statewide—and yet Republicans took a supermajority of 60 of the 99 seats in the chamber.[81] In 2014, the variance continued; Democrats and Republicans split the statewide popular vote evenly, but the Republicans won 65 of the 99 assembly seats.[82]

When this data was presented to the Supreme Court in *Gill v. Whitford*,[83] it was accompanied by the presentation of a standard that had been crafted by election scholars: the "efficiency gap."[84] Proponents of this rule recognize that there is no real way to ensure perfect proportionality between vote share and seats won in a democracy which uses first-past-the-post single-member districts; some variance is inevitable.[85] But the idea behind the efficiency gap is that if that variance is way out of proportion, it could be *prima facie* evidence of a scheme to intentionally "waste" votes. That, it was alleged, is what the Wisconsin Republicans did: By packing traditionally Democratic precincts into a small handful of districts, they ensured that while Democrats would win those districts 80% to 20%, Republicans would be able to win a much larger number of districts by closer margins. In other words, the map was designed to distribute Democrat votes in an intentionally inefficient manner.[86] Since any votes beyond a majority threshold just over 50% were not needed to win the election, purposefully jacking up the margin from 50% to 80% meant that the votes over that 50% line—which could have swung a race in a neighboring district—were rendered functionally meaningless.

The efficiency gap looked like the manageable standard which had previously proved elusive. It would have been a simple task to declare that a

81. Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018).

82. *Id.*

83. 138 S. Ct. 1916 (2018).

84. *Id.* at 1924.

85. This is in contrast to a system of proportional representation, in which seats are allocated *after* an election, using the vote results as the formula to determine how many seats a given political party will receive in the legislature.

86. *Gill*, 138 S. Ct. at 1924.

map producing a number of seats won that was mathematically unbalanced with vote totals, would be considered suspect on its face. As a safeguard against fluke election results, that inquiry could perhaps be made in consecutive elections. However it would be operationalized, the "efficiency gap" appeared to fit the requirement that the Court, ever since *Davis v. Bandemer*, had claimed it was making a good faith effort to satisfy: The need for an objective and easily-applied standard. When oral argument in *Gill* was held in October 2017—scheduled to seemingly produce a decision well in time for it to be applicable for the 2018 elections—there appeared to be reason for optimism among critics of gerrymandering.

But then, months went by with no decision. The entire 2017–2018 Supreme Court term reached its final days . . . and still no decision. A decision delay that lasts for an entire term, with a case argued in the term's first sitting in October and still not yet decided in June, is highly unusual, and it suggested that the Court was beset by internal divisions. Sure enough, on June 18, 2018, the case was unanimously punted back down to the lower courts on the procedural question of whether the plaintiffs had incurred an injury that would give rise to Article III standing, with no ruling either on the merits of the dispute or the feasibility of the efficiency gap as a potential standard.[87]

The petering out of the Wisconsin case could have been only a minor blip; another case, with a less complicated record on standing, might theoretically have put the efficiency gap right back in front of the Court as an open invitation to embrace the standard's utility. However, nine days after the ruling-which-was-not-a-ruling in *Gill* came down, it was followed by a profound judicial earthquake: Anthony Kennedy's announcement that he was retiring from the Court.[88]

On the issue of gerrymandering, there was no news bulletin which could have been any more momentous. Kennedy had been the crucial fifth vote in

87. *Id.* at 1934. By remanding to the lower courts, the Supreme Court left the map in place for 2018, and the pattern of disproportionate representation continued unabated. In fact, it arguably worsened: In the 2018 races for the Wisconsin Assembly, the Republicans won 63 of the 99 seats despite winning less than 45% of the statewide popular vote. *See* WIS. ELECTIONS COMM'N, CANVASS RESULTS FOR 2018 GENERAL ELECTION (2018), https://elections.wi.gov/elections/election-results/results-all#accordion-859 [https://web.archive.org/web/20181220230727/https://elections.wi.gov/sites/default/files/Canvass%20Results%20(2).pdf]; *see also 2018 Wisconsin State Assembly Election*, WIKIPEDIA, https://en.wikipedia.org/wiki/2018_Wisconsin_State_Assembly_election (last visited Sept. 8, 2022).

88. Jacob Pramuk & Marty Steinberg, *Anthony Kennedy Retiring from Supreme Court*, CNBC (June 28, 2018, 10:09 AM), https://www.cnbc.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html; Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html.

Vieth to keep the courthouse door propped open for partisan gerrymandering cases. Moreover, the effort to develop a workable rule seemed targeted at him specifically, based on his statement in *Vieth* of how central such a "clear, manageable, and politically neutral" standard would be to future dispositions of the issue.[89] Were Kennedy to be replaced by a new Justice who was more skeptical of the justiciability of political gerrymanders, it could be game-changing.

Yet, during oral argument the following year in *Rucho v. Common Cause*, it sounded like that had not happened. Kennedy's replacement, Brett Kavanaugh, was described by *The New York Times* Supreme Court correspondent Adam Liptak as "an exceptionally active participant in Tuesday's arguments, asking probing questions of both sides."[90] But at one point Kavanaugh prefaced a question to the plaintiffs' counsel with what sounded like a telegraphed concession: "I took some of your argument in the briefs and the amicus briefs to be that extreme partisan gerrymandering is a real problem for our democracy—and I'm not going to dispute that . . . ."[91]

Political scientists and legal scholars have determined that the questions a Justice asks during oral argument are usually a good predictor of how that Justice will eventually vote. Researchers have found that a Justice who signals support for an attorney's position during oral argument invariably votes in favor of that side of the case; similarly, if a Justice directs tough questions towards only one side's attorneys, that is a reliable indicator that the Justice is going to vote against that side of the case.[92]

The remarkable statement Kavanaugh made, in which he agreed with the proposition that partisan gerrymandering was deeply problematic, thus seemed to portend good news for the petitioners. But it did not necessarily guarantee that Kavanaugh was prepared to embrace the efficiency gap standard and throw open the courthouse door to partisan gerrymandering

89. Vieth v. Jubelirer, 541 U.S. 267, 307–08 (2004); *see also* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 236 (2018).

90. Adam Liptak, *Justices Display Divisions in New Cases on Voting Maps Warped by Politics*, N.Y. TIMES (Mar. 26, 2019), https://www.nytimes.com/2019/03/26/us/politics/gerrymandering-supreme-court.html.

91. Transcript of Oral Argument at 68, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (No. 18-422) [hereinafter *Rucho* Transcript of Oral Argument], https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-422_5hd5.pdf.

92. *See* Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 573–74 (2011). Note, however, that other researchers have determined that the most significant variable in predicting how a Justice will vote based on oral argument behavior is the number of questions directed at a given attorney (along with the number of words in those questions). The more questions a Justice asks of an attorney, the less likely that Justice will vote for that attorney's position. *See* Lee Epstein, William M. Landes & Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433, 433 (2010).

lawsuits. Indeed, Kavanaugh also wondered aloud if the best approach might be for the Court to remain on the sidelines while the issue was thrashed out in the political arena, a suggestion which was also made by Stephen Breyer[93] and Neil Gorsuch.[94] But Kavanaugh's statement certainly made it sound like he was not at all prepared to resurrect the bogeyman of the political thicket and bolt the courthouse door shut.

And yet, that's exactly what he voted to do. When *Rucho* was ultimately decided, Kavanaugh was the fifth and decisive vote for nonjusticiability, the vote Anthony Kennedy had always resisted casting. Fifty-seven years after *Colegrove v. Green* had been killed off, the Court reanimated it. Fifty-four years after he died, Felix Frankfurter got the win.

Roberts' opinion for a 5–4 Court arrayed along ideological lines was premised on two observations. Each observation, however, rested on an unstable foundation.

The first observation was an accounting of history. The term "gerrymander," Roberts noted, comes from a member of the founding generation: Massachusetts' Elbridge Gerry, who was evidently the first person to hit on the idea that legislative boundaries could be drawn for partisan advantage.[95] To Roberts, this signified that the Founders knew that districts could be engineered for political gain—and thus could have acted against it—but chose instead to tolerate it. "To hold that legislators cannot take partisan interests into account when drawing district lines," Roberts wrote, "would essentially countermand the Framers' decision to entrust districting to political entities."[96]

In so writing, however, Roberts blithely (and probably intentionally) left something out: The incontrovertible fact that those political entities trusted by the Framers existed *in a system that lacked strong political parties*. The Framers were pointedly hostile to political parties,[97] an attitude most famously manifested in James Madison's classic warning about the dangers

93. *Rucho* Transcript of Oral Argument, *supra* note 91, at 51–52.

94. *Id.* at 47.

95. *Id.* at 791 n.1 (citing ELMER CUMMINGS GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 16–19 (Arno Press 1974)); Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019). Gerry was a delegate to the Constitutional Convention, but ultimately was one of only three attendees in Philadelphia who refused to sign the final document. George Mason and Edmund Randolph, both of Virginia, were the other two. *Delegates of the Continental and Confederation Congresses Who Signed the United States Constitution*, U.S. HOUSE OF REPRESENTATIVES, OFF. OF THE HISTORIAN, https://history.house.gov/People/Continental-Congress/Signatories/ (last visited Oct. 17, 2022).

96. *Rucho*, 139 S. Ct. at 2497.

97. This was a point emphasized by Elena Kagan in her caustic dissent. *See id.* at 2512 (Kagan, J., dissenting) (citing GORDON WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 1789-1815, at 140 (2009)).

of "faction" in *The Federalist No. 10*.[98] That philosophical antipathy was backstopped by numerous affirmative steps that the Framers took in an effort to prevent parties from emerging in the new American system. They intentionally refused to mention political parties in the Constitution, and they structured the Constitution as a device which would control their excesses in the unlikely event that they did emerge.[99] The brutal partisanship of twenty-first century actors such as David Lewis and the Arizona Republicans was simply not possible in an eighteenth-century America where political parties' reach was severely limited, both in fact and in theory. Roberts's highly selective reading of history was a careless, perhaps even deceitful, transformation of the Framers' definitive wish to control political parties into a modern-day justification for empowering political parties.

Roberts' second observation stressed the danger of the Court keeping the courthouse door open. Even though partisan gerrymandering is "incompatible with democratic principles,"[100] Roberts nevertheless cautioned that absent a once-and-for-all declaration of nonjusticiability, the Court would find itself unavoidably dragged into the bog of every close districted election. A losing candidate or party would always try to claim that the map had been unconstitutionally rigged against them and would always go to court to get the election invalidated. "[Judicial] intervention would be unlimited in scope and duration," Roberts warned.[101] "[I]t would recur over and over again around the country with each new round of districting, for state as well as federal representatives."[102] Making an argument that resembled Alexander Bickel's 1962 embrace of "the passive virtues,"[103] Roberts insisted that the Court must refrain from what he termed "an unprecedented expansion of judicial power."[104]

That pious claim to institutional modesty, however, was belied by Roberts' own history, which reveals that his sentiment was suffused with a staggering degree of rank hypocrisy.

Roberts did not seem to see "an unprecedented expansion of judicial power" when he personally gutted the Voting Rights Act, which had been

98. THE FEDERALIST NO. 10 (James Madison).

99. For more on this idea of a "Constitution against parties," see generally SIDNEY M. MILKIS, THE PRESIDENT AND THE PARTIES (1993).

100. *Rucho*, 139 S. Ct. at 2506 (majority opinion) (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

101. *Id.* at 2507.

102. *Id.*

103. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

104. *Rucho*, 139 S. Ct. at 2507.

renewed by Congress five times since its 1965 enactment.[105] Nor would Roberts have seen "an unprecedented expansion of judicial power" had the Court nullified the directly-communicated will of Arizona's voters and voided the state's redistricting commission, which as we have already seen is precisely what Roberts wanted to do.[106] Nor did Roberts see "an unprecedented expansion of judicial power" when the Court, in an opinion he joined, struck down campaign finance regulations which had been enacted and amended by Congress, and which were based on an established principle of limiting corporate influence on elections that dated back for over a century.[107]

Indeed, Roberts' disingenuous description of what the majority was (and was not) doing in *Rucho* is best understood in tandem with his Court's dedicated all-out war on any form of restrictions on money in politics.

In its landmark 1976 decision in *Buckley v. Valeo*,[108] the Court held that a regulation which "necessarily reduces the quantity of expression" is constitutionally impermissible.[109] The danger of campaign finance rules, the Court argued, is their potential to reduce the amount of the political speech which serves as democracy's lifeblood. As Alexander Meiklejohn argued in his classic exploration of free speech: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[110] The corollary, then, to the *Buckley* principle is not only that a law which does not reduce the amount of political speech can avoid constitutional infirmity, but also that a law that *increases* the amount of political speech is a welcome development.

That should have been good news for the so-called "millionaire's amendment" to the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[111] which addressed the unbalanced playing field created when a wealthy self-funded candidate shovels boatloads of their own money into their campaign. In such situations, BCRA delineates a new set of rules for the underfunded opponent of the wealthy candidate. The opponent would have their contribution limits increased (via a sliding scale of thresholds), thereby enabling them to raise more money . . . which in turn (as the Court had stated in *Buckley*) would allow them to pay for and thus generate more campaign speech. By increasing the amount of available speech, the "millionaire's amendment" was a resounding reaffirmation of *Buckley*'s core holding.

105. Shelby County v. Holder, 570 U.S. 529, 557 (2013).

106. *See supra* notes 95–96 and accompanying text.

107. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 385 (2010).

108. 424 U.S. 1 (1976) (per curiam).

109. *Id.* at 19.

110. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

111. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 52 U.S.C. § 30101 *et seq.*).

However, the Roberts Court found constitutional fault with it anyway. In *Davis v. Federal Election Commission*,[112] the millionaire's amendment was struck down not because it lowered the quantity of political speech—since, as we have seen, it did the exact opposite—but instead because it lowered the buying power of the wealthy candidate whose actions would trigger its application. As Samuel Alito saw it, the problem with this provision was that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics."[113] Given *Davis*' wholesale inconsistency with the Court's long-settled Meiklejohnian-goal of ensuring that a maximum quantity of political speech be available to voters, the case looked less like a principled statement on the meaning of the First Amendment, and more like a purposive attempt to maximize the political advantages enjoyed by wealthy interests . . . who, it must be pointed out, tend to be found more on one particular side of the political aisle.

When *Rucho* is examined in this broader context, it leads to an uncomfortable hypothesis. It cannot be gainsaid that the Republican Party has been the primary beneficiary of the Roberts Court's general crusade against regulations in the political process, and thus the cases on partisan gerrymandering are of a piece with the cases on campaign finance. As the party more aligned with the corporate sector, the Republicans have been eager to see the restraints removed from their corporate patrons' ability to press their massive financial advantages. It was not an accident that the plaintiff in one key campaign finance case was the Republican Senate Majority Leader;[114] nor was it an accident that the plaintiff in the case that took down the major regulatory precedents was an interest group founded in 1988 to advance conservative causes and boost the campaigns of Republican candidates (and which was also known for its capacious and unyielding hostility towards Hillary Clinton).[115]

The cases on partisan gerrymandering fit into this pattern. Although Democrats are certainly not immune from the practice—the companion case to *Rucho* was a Democratic Party gerrymander in Maryland[116]—for decades it has been overwhelmingly Republicans who have engaged in gerrymandering, who have gained advantages from engaging in gerrymandering, and who have aggressively asserted the prerogative to

112. 554 U.S. 724 (2008).

113. *Id.* at 739 (citing Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 14 (1986) (plurality opinion)).

114. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 111 (2003).

115. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010).

116. Lamone v. Benisek, 139 S. Ct. 783 (2019).

engage in gerrymandering. *Rucho* should thus be seen as the capstone of a systematic and coordinated effort by Republican candidates, officeholders, and affiliated interest groups to defend and expand the party's ability to rig elections in its favor . . . an effort aimed at a Supreme Court that was both majority conservative and had a majority of Justices appointed by Republican presidents.[117] The Supreme Court of course makes a habit of denying that its decisions are premised on the political leanings of its members—and the Roberts Court seems to have an inflated tendency to do this. But a case like *Rucho*, in which the Court not only lends institutional support to the political party responsible for the Court's majority when it demands constitutional support for its efforts at self-entrenchment, but also slams the door in the face of anyone who would suggest that such entrenchment is toxic for democracy, makes it hard to give the Court the benefit of the doubt.

Roberts' door-slam was especially infuriating to the four dissenters, led by Elena Kagan, who emphatically pointed out that state courts had recently made considerable headway in devising the exact kind of "clear, manageable, and politically neutral"[118] rule that Anthony Kennedy had insisted upon.[119] If such a rule can be devised by state judges, Kagan noted, then it made absolutely no sense for the Supreme Court to proclaim defeat by claiming that it was impossible to devise a Kennedy-esque rule for federal judges. "[I]n throwing up its hands," Kagan wrote, "the majority misses something under its nose: What it says can't be done *has* been done."[120]

IV. THE NEXT STEP?

On June 30, 2022, the Court granted certiorari in *Moore v. Harper*,[121] in which they were asked to affix a second set of locks on the doors to state courthouses that matches the set of locks that they placed on the federal courts in *Rucho*. As the subsequent article by Steven Shapiro will detail,[122]

117. Indeed, the Court has not had a majority of Justices appointed by a Democratic president since 1971.

118. Vieth v. Jubelirer, 541 U.S. 267, 307–08 (2004).

119. Rucho v. Common Cause, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting).

120. *Id.* Given the emphatic nature of Roberts' opinion, and the sentiment Kavanaugh expressed during oral argument, it is tempting to speculate that behind the scenes, the Chief Justice lobbied the newest member of the Court to see the case his way, and was able to overcome a possible instinct Kavanaugh may have had to say yes to justiciability. Then again, given Roberts' equally emphatic belief that the Court should not take the drastic step of overruling *Roe v. Wade*, 410 U.S. 113 (1973), and his documented absolute failure to dissuade Kavanaugh (and four other Justices) from crossing that Rubicon in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), it does seem as though the Chief Justice's powers of persuasion are highly attenuated.

121. No. 21-1271 (U.S. cert. granted June 30, 2022).

122. Stephen M. Shapiro, Szeliga v. Lamone: *An End to Gerrymandering in Maryland—Or Just a Pause?*, 82 MD. L. REV. ONLINE 33 (2022).

the petitioners in *Moore* formally asked for a declaration that the Elections Clause of Article I does not merely assign the task to drawing legislative maps to state legislatures, but it also makes that assignment exclusive, meaning that state courts have no legitimate authority to intervene. Arguing that "[t]he Elections Clause [d]oes [n]ot [a]llow [s]tate [c]ourts [t]o [*u*]*surp* the [a]uthority [i]t [a]ssigns to [s]tate [l]egislatures,"[123] the petitioners are asking for constitutional recognition of what is termed the "independent state legislature" theory.[124]

On the surface, it might seem like a reasonable bet to ask a Supreme Court which has already declared partisan gerrymandering to be a nonjusticiable political question beyond the scope of federal judicial power to make a similar declaration about state judicial power. Yet the trail of crumbs the Court has left behind does suggest that they might not be willing to extend their *Rucho* argument in this fashion.

One of the major factors Roberts invoked in his *Rucho* opinion to justify barring federal courts from hearing cases about partisan gerrymandering is that doing so did not in any way prevent the matter from being adjudicated in state court. It is important to note that he embraced this dynamic, and did not merely confirm that it was happening:

> The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.[125]

In addition, Neil Gorsuch made a similar observation, with a similarly approving tone, during *Rucho*'s oral argument: "you also have the state supreme court option."[126]

In light of these statements, it might be hard to envision the Court declaring partisan gerrymanders off-limits to state judges. For Roberts and Gorsuch to initially embrace the role state courts can play in such cases and rely on it as a justification for a landmark ruling, only to disavow that position a scant three years later, would be a course correction so dramatic—and so transparently political—that it could do permanent damage to the institutional reputation of the Court that Roberts has strained so hard to protect.

123. Brief for Petitioners at 17, *Moore*, No. 21-1271 (emphasis added).

124. *See* Shapiro, *supra* note 122, at 60–61.

125. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) (citing League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015)).

126. *Rucho* Transcript of Oral Argument, *supra* note 91, at 70.

And yet it might be the case that this resolute effort to keep the Court free from accusations that it is a partisan body has already failed. The specter of the perception of politicization was the very thing that motivated Roberts to declare partisan gerrymandering a constitutional no-fly zone for the federal courts in *Rucho*. But as one eminent analyst of the Court and elections law suggested, the effort may have backfired. Declaring political gerrymanders nonjusticiable may end up *increasing*, and not decreasing, the amount of cases that the Court gets dragged into.

Noting that the Court has made two blanket statements—racial gerrymanders are constitutionally barred, but partisan gerrymanders are nonjusticiable—Richard Hasen concluded that the second statement will lead to more challenges based on the first statement, and Hansen used David Lewis' brazen admission about his tactics as the illustrative example. "By so openly declaring he was engaged in partisan politics," Hasen reasoned, "Mr. Lewis was trying to prove that race did not drive the North Carolina General Assembly's decisions."[127] Based on this, Hasen speculated:

> [W]e know what we can expect in North Carolina . . . . Republicans will use sophisticated technology to draw a very effective partisan gerrymander. They might even keep redrawing lines every few years to keep their advantage. They will proclaim loudly and often that their purpose is to help the Republican Party. They will all be instructed not to talk about race.[128]

Democrats and minority voting advocates will sue in federal court and claim that this is a racial gerrymander in disguise. And federal courts will have to figure out whether it was race or party that motivated the decision of the state's legislature.[129]

V. IS THE PROBLEM REALLY A PROBLEM?

It is assumed that partisan gerrymandering has a corrosive effect on American politics by increasing polarization, entrenching minority power, and reducing public trust in governance. However, it should be pointed out

127. Richard L. Hasen, *The Gerrymandering Decision Drags the Supreme Court Further into the Mud*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html.

128. *Id.*

129. *Id.*

that there are analysts who question this conventional wisdom,[130] and even analysts who argue that partisan gerrymandering is an affirmative good.

Nathaniel Persily observed that partisan gerrymandering is often deployed to protect a party's incumbents by rendering their seats safe, and further reasoned that this provides important structural benefits to the American political system, in two ways.[131] First, it minimizes the misleading and disproportionate effects of maximum political competition. If no seats are safe, and if every seat is "in play," then a political party which wins a solid but not overwhelming victory by a couple of percentage points would end up winning *nearly every seat* by that margin. As a result, an election that was actually close in terms of vote share could result in a landslide in terms of the number of seats won; a maximally competitive election would produce a wildly unrepresentative legislature. Second, entrenching incumbents preserves policymaking expertise, which is often accumulated over a period of years. A maximally competitive election would inevitably result in the ejection of some experienced legislators in favor of new ones who will not have as developed an understanding of the issues; consequently, the legislature would produce inferior-quality policies.

Relatedly, Thomas Brunell has speculated that entrenching incumbents engenders more positive public attitudes about Congress, and about governing in general.[132] By cramming districts via gerrymandering with like-minded partisans, a key effect of partisan entrenchment is that a broad majority of voters will always be happy with their representative, which theoretically would translate into good opinions of Congress as a whole. Refraining from drawing districts with this in mind, however, could produce a widening gyre of voter anger. "[D]rawing districts with relatively equal numbers of Democrats and Republicans maximizes the number of losing voters (also known as wasted votes)," Brunell explained. "A voter on the losing side of an election is systematically more likely to be unhappy with

130. For rebuttals to the assumption that gerrymandering increases polarization, see Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 666 (2009); John Sides, *Gerrymandering Is Not What's Wrong with American Politics*, WASH. POST (Feb. 3, 2013, 12:29 PM), https://www.washingtonpost.com/news/wonk/wp/2013/02/03/gerrymandering-is-not-whats-wrong-with-american-politics/; Fred Dews, *A Primer on Gerrymandering and Political Polarization*, BROOKINGS NOW (July 6, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/.

131. Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 667–71 (2002).

132. Thomas L. Brunell, *Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes Toward Congress*, 39 POL. SCI. & POL. 77, 77 (2006).

his representative and with Congress as an institution."[133] Moreover, by entrenching incumbents, a legislature will be filled with veteran representatives who will always be attuned to what their constituents want, as opposed to less-experienced representatives who might face a steep learning curve on that front.

None of this means, however, that *Rucho* can be described as an effort to perfect democracy. Indeed, depending on the decision in *Moore v. Harper*, if *Rucho*-plus-*Moore* turns out to stand for the proposition that federal courts may not intervene in political gerrymandering, but state courts can, this would have the effect of leaving the issue in the hand of mostly-elected state judicial systems which are less reliably free of political bias than their federal counterparts. Oddly, the effect of leaving state courts free to review political gerrymanders conceivably could be a net increase in partisanship and hyperpolarization, if politically-interested courts take such cases but then uphold politically-motivated maps.

CONCLUSION

In one of the most-cited works of legal scholarship, John Hart Ely in 1980 tied judicial review to the preservation of democracy.[134] Seeking an alternative to the wide-ranging and frequently untethered rationale for judicial review as a means of protecting individual rights, Ely argued that the potent weapon of judicial review was an ideal device to ensure that everyone has an equal right to participate in the political process. Observing that partisan interests will always seek to entrench themselves, even by undemocratic means, Ely emphasized the absolute need to prevent the political process from being captured in this fashion. The constant danger in a democracy, Ely maintained, is that whoever holds power will want to keep it: "Malfunction occurs when the *process* is undeserving of trust, when . . . the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out . . . ."[135]

Ely's formulation not only depended upon the existence of an independent judiciary safeguarding democracy, but it also served to reinforce that judiciary's credibility. In Ely's mind, when independent courts, using the power of judicial review, intervene in disputes about the political process, their nonpartisan nature will give their decision a sheen of trustworthiness: People will sense that the judges are doing the right thing for the right reason, rather than operationalizing their partisan loyalties, or deciding a case a

133. *Id.* at 83.

134. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

135. *Id.* at 103 (emphasis in original).

certain way because they have a stake in the outcome.[136] Meanwhile, an opinion by an independent and reliable court will stand in stark contrast to the self-dealing and opportunistic behavior of political actors; that contrast will in turn further emphasize the virtues of independent courts, and further highlight the elevated quality of the work they produce.

Partisan gerrymanders are the classic example of "choking off the channels of political change," and thus both an opportunity to put Ely's theory into action, and an opportunity for the Supreme Court and the lower federal courts to enhance their institutional standing. However, the Roberts Court saw the situation in the exact opposite fashion and endeavored to firewall the issue of partisan gerrymandering from the federal judicial system. If the point of that decision was to protect the Supreme Court's reputation from a belief that they have been politicized, then ignoring Ely's counsel has proven to be a spectacularly misguided strategy. In the aftermath of *Rucho*, the Court's standing in opinion polls has nosedived to unprecedented historic lows.[137] While there are likely a number of reasons for that, especially in the immediate aftermath of *Dobbs v. Jackson Womens' Health Organization*,[138] it seems clear that one reason is that the public was paying attention to the Court's decision in *Rucho* to immunize the election-rigging that the public despises, and is holding the Court accountable for that decision. In *Moore v. Harper*, the Court theoretically has a chance to undo the damage. Whether they will utilize that chance, however, is an open question.

136. This explains the argument by some scholars that even though the public was aware that in *Bush v. Gore*, 531 U.S. 98 (2000), a majority-conservative and majority-Republican Supreme Court had effectively decided a disputed presidential election in favor of the Republican candidate, polling done in the aftermath of the case revealed that the public accepted the decision (and did not see it as illegitimately partisan), and also that the Court's institutional reputation was not diminished. *See* James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?* 33 BRIT. J. POL. SCI. 535, 535 (2003).

137. Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022) https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx.

138. 142 S. Ct. 2228 (2022).