SELF-RESTRAINT OR JUDICIAL DISREGARD: REVIEWING THE SUPREME COURT'S ANSWER TO THE POLITICAL QUESTION OF PARTISAN GERRYMANDERING

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In 2019, the U.S. Supreme Court issued its judgment in Rucho v. Common Cause*, the Court's latest foray into the decisive issue of partisan gerrymandering. As a tool for politicians and elected officials to manipulate the construction of state legislative and federal congressional districts, partisan gerrymandering has drawn the ire of the public for years. Nonetheless, five Justices in* Rucho *determined that because the authority to redraw districts is commonly the province of those closest to the political process, any inquiry by federal courts would present the political question of whether the partisan gerrymander went too far. The Court noted that because such a finding is assessed by only political standards and not judicially manageable standards, partisan gerrymandering claims constitute a political question and thus are nonjusticiable in federal court. In other words, the Court asserted judicial restraint to prevent any federal court from adjudicating claims of unlawful partisan gerrymandering in the future. However, the Court's decision was instead judicial disregard of the judiciary's duty to protect individual rights from government intrusion—namely, the right to vote. Because extreme partisan gerrymandering distorts the essence of American democracy, and in light of the substantial obstacles resting with the alternatives to federal court, the* Rucho *decision was premature and undermines the public's faith in both elections and the judiciary moving forward. Therefore, the Court should reexamine its decision in* Rucho *and again hold that partisan gerrymandering is justiciable in federal court.*

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INTRODUCTION

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. *Other rights*, even the most basic, *are illusory if the right to vote is undermined*. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[1]

A fundamental feature of the U.S. Constitution's separation-of-powers structure is that federal judges are not elected and, therefore, are intended to act as independent decision-makers.[2] To secure this promise, federal judges are expected to "refrain from directing . . . substantial intrusion into the Nation's political life" if the controversy is deemed to be a nonjusticiable "political question,"[3] even if a

1. Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964) (emphasis added).

2. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in . . . . a republic . . . . to secure a steady, upright, and impartial administration of the laws."). This ardent assurance of impartiality initially yielded some hostile reactions over the judiciary's lack of political accountability. *See, e.g.*, Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 12 THE WRITINGS OF THOMAS JEFFERSON, at 163 (Paul Leicester Ford ed., 1899) ("When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know of no safe depository of the ultimate powers of the society, but the people themselves.").

3. Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring); *see* Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 346 (1977) (defining a political question as precluding topics that are so inherently political to be "out of bounds" for the judiciary and deemed "non-justiciable in the federal courts").

constitutional defect is alleged. In carefully avoiding these so-called political thickets,[4] federal courts preserve the appearance of impartiality by deferring overtly political matters to those closest to the political process: elected representatives.[5] Nominated by the President with the "advice and consent"[6] of the Senate—and not chosen directly by a constituency—federal judges were insulated from the political process by the Framers, requiring neither an election to be placed on the bench nor subsequent elections to retain their seat.[7] In pursuit of impartiality through "judicial restraint,"[8] however, definitional complexities arise: when is a matter too political, such that federal judges must refrain from examining an asserted constitutional defect?

This question rests at the forefront of "right-to-vote" cases in which a state government is alleged to have infringed on the citizenry's ability to fairly participate in the democratic process.[9] In such cases, the balancing of judicial restraint and the right to vote has yielded disparate, and oftentimes baffling, results. Sometimes the Supreme Court has ruled in favor of protecting the constitutional right over objections that the Court is stepping too far into political territory.[10] Other times, the Court has refused to traverse the barrier that separates an independent judiciary from nonjusticiable political questions.[11] And while these competing sets of cases may appear cherry-picked, the reality is they do accurately reflect the jurisprudences of

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4. *See* Reynolds v. Sims, 377 U.S. 533, 566 (1964) ("We are cautioned about the dangers of entering into political thickets and mathematical quagmires."); Leventhal, *supra* note 3, at 346 (defining political thickets as "a caution to walk carefully in the work of interpreting and determining the validity of the legislature's efforts to structure the political process"). Therefore, while a political thicket is a mere heads-up, a political question is a roadblock that precludes federal courts from proceeding altogether.

5. *See Vieth*, 541 U.S. at 277 (plurality opinion) ("Sometimes . . . the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches . . . .").

6. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . Judges of the supreme Court, and all other [inferior judges] of the United States . . . .").

7. *See* THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* U.S. CONST. art. III, § 1 (stating the only express limitation on tenure is that "Judges . . . shall hold their Offices during good Behaviour").

8. "Judicial restraint" refers to when judges self-impose restrictions on their own power of judicial review. *See* Joseph S. Diedrich, *Article III, Judicial Restraint, and This Supreme Court*, 72 SMU L. REV. 235, 255 (2019) (collecting sources discussing judicial restraint and its different variations available in the judicial toolkit).

9. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Baker v. Carr, 369 U.S. 186 (1962).

10. *See* Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) (stressing that the Constitution "protects the right of all qualified citizens to vote . . . . The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government"); *see also Baker*, 369 U.S. at 209, 237.

11. *See Rucho*, 139 S. Ct. at 2507 ("Federal judges have no license to reallocate political power between the two major parties . . . . The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life.").

two different Courts: one in favor of expansive authority to invalidate impermissible government intrusions on the right to vote; the other restraining such authority, even if the right to vote is incidentally curtailed.[12]

Rucho v. Common Cause[13] is a prototypical example of the judicial restraint philosophy prevailing in a right-to-vote case. The 2019 decision ended a series of cases concerning whether partisan gerrymanders—the strategic manipulation of voter demographics and electoral districts to benefit one political party at the expense of the other[14]—are justiciable in federal court.[15] In earlier cases, a closely divided Court stated that extreme partisan gerrymanders might, in an appropriate case, be a justiciable question for federal courts.[16] In *Rucho*, however, a bare majority of the Court definitively ruled that partisan gerrymanders are a nonjusticiable political question beyond the authority of federal judges.[17] Although the Court noted the electorate may harbor ill feelings towards the practice of partisan gerrymandering, the majority nonetheless sought to first and foremost protect the appearance of judicial impartiality and assigned the authority to develop a remedy to the other branches of government more engaged in the political process.[18]

However, the majority's rationale in *Rucho*—to preserve judicial integrity—was perceived quite differently by the four dissenting Justices and the general public. Justice Kagan, writing for the dissent, critiqued the majority's willingness to close the door to partisan gerrymanders for good.[19] She condemned

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12. The Warren Court (1953–1969) and the Roberts Court (2005–present), respectively. *See* Robert A. Schapiro, *SCOTUS Analysis:* Rucho v. Common Cause, EMORY L. NEWS CTR. (July 17, 2019), https://law.emory.edu/news-and-events/releases/2019/07/2019-07-17-scotus-schapiro-rucho-v-common-cause.html [https://perma.cc/X8HX-A4BZ] ("Throughout the 1960s . . . federal courts often broadly construed constitutional and statutory provisions to advance ideals of equality and democracy . . . . *Rucho* represented a recognition of the limited role for federal judges in a system that grants broad electoral authority to states legislatures.").

13. 139 S. Ct. 2484 (2019).

14. *See generally* Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats*, *in* REDISTRICTING IN THE NEW MILLENNIUM 183, 183 (Peter F. Galderisi ed., 2005) (discussing the delicate balancing act of trying to gerrymander districts).

15. *Rucho*, 139 S. Ct. at 2506–07; *see, e.g.*, Vieth v. Jubelirer, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986); *see also* Amy Howe, *Opinion Analysis: No Role for Courts in Partisan Gerrymandering (Updated)*, SCOTUSBLOG (June 27, 2019, 8:50 PM), https://www.scotusblog.com/2019/06/opinion-analysis-no-role-for-courts-in-partisan-gerrymandering/ [https://perma.cc/CW7P-LWHY].

16. See *Davis v. Bandemer*, 478 U.S. 109 (1986), where the Court refrained from holding partisan gerrymandering claims to be nonjusticiable despite the lack of a judicial standard for analysis. *Id.* at 123. This cautious openness for a guiding standard to someday materialize is echoed in subsequent cases taken by the Court. *See, e.g.*, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). However, this "appropriate case" of an unconstitutional partisan gerrymander never materialized at the Supreme Court.

17. *Rucho*, 139 S. Ct. at 2506–07 (2019).

18. *Id.* at 2506–08 (identifying other potential means of limiting partisan gerrymanders while "express[ing] no view on any of these pending proposals"); s*ee infra* Part III.

19. *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

the majority for using its power of judicial review to "[throw] up its hands" and "abandon the Court's duty to declare the law" by declining to "defend [our system of government's] foundations . . . . [of] free and fair elections."[20] Negative reactions from the public also sprouted instantly as political figures on both sides of the aisle[21] and news outlets decried the decision as throwing more fuel on the "hyper partisan" fire raging in the United States.[22] Observers noted that the "conservative justices" (nominated by Republican presidents) comprised the majority, while the dissent was exclusively "liberal justices" (nominated by Democratic presidents).[23] This perceived ideological split between the two "wings" of the Supreme Court undermined the appearance of judicial impartiality and independence intended by the author of *Rucho*, Chief Justice John Roberts. Therefore, although several lower courts had rejected the notion that partisan gerrymanders were categorically beyond Article III judicial review,[24] *Rucho* effectively overruled those cases but failed to extinguish the very real concerns that political officials will take advantage of the Court's new position of leniency and deference to map makers.

Because of this deference, the problem of extreme partisan gerrymandering that distorts the essence of American democracy will only continue to get worse.[25] Justice Kagan soberingly warns in her *Rucho* dissent that as technology continues to advance—enhancing mapmakers' ability to successfully craft the most politically disproportionate districts—elected officials threaten to make "'we the people' . . .

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20. *Id.* at 2516, 2525 (Kagan, J., dissenting).

21. *See, e.g.*, Governor Larry Hogan (@GovLarryHogan), TWITTER (June 27, 2019, 8:20 AM), https://twitter.com/GovLarryHogan/status/1144264361684287489?s=20 [https://perma.cc/3WLN-XFEN]; Nancy Pelosi (@SpeakerPelosi), TWITTER (June 27, 2019, 3:29 PM), https://twitter.com/SpeakerPelosi/status/1144372291800915968?s=20 [https://perma.cc/DZ8H-5SBH].

22. *See, e.g.*, 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 [https://perma.cc/93KP-KSSD].

23. *See, e.g.*, Jonathan Rauch, *The Gerrymandering Ruling Was Bad, but the Alternatives Were Worse*, ATLANTIC (June 28, 2019), https://www.theatlantic.com/ideas/archive/2019/06/gerrymandering-ruling-could-have-been-worse/592879/ [https://perma.cc/PH57-Q7GS]; Nina Totenberg et al., *Supreme Court Rules Partisan Gerrymandering Is Beyond the Reach of Federal Courts*, NPR (June 27, 2019, 10:17 AM), https://www.npr.org/2019/06/27/731847977/supreme-court-rules-partisan-gerrymandering-is-beyond-the-reach-of-federal-court [https://perma.cc/WZ8Q-E5BZ].

24. *See, e.g.*, Benisek v. Lamone, 348 F. Supp. 3d 493, 517–19 (D. Md. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); Common Cause v. Rucho, 318 F. Supp. 3d 777, 937–41 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019). A key point of contention for the Supreme Court in *Rucho* was whether the proposed test was sufficient guidance to determine whether a partisan gerrymander went too far. *See Rucho*, 139 S. Ct. at 2502–07.

25. *See, e.g.*, *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting) (noting that improved access to advanced technology fosters more effective, and unfair, plans; modern abuse of the redistricting process is "not your grandfather's—let alone the Framers'—gerrymanders"); Toni Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1662 (2021) (noting that extreme forms of partisan gerrymandering "grossly distorts democratic processes").

sovereign no longer."[26] As a result of this new (and deeply concerning) path that the United States finds itself on, elected officials are able to freely manipulate the right to vote to their own political advantage—now without the safeguard of federal-court review.[27] Further, the 2020-decennial redistricting cycle and deepening political polarization will likely compound this distortion to make its negative effects more profound.[28] With the implicit "green-light" from the Court, the political party in control of a state's redistricting process may manipulate the process and capture power for years to come—with no threat of federal-court oversight.[29] Therefore, *Rucho* insulates practices that invigorate deep public distrust in the fairness and integrity of our democratic elections. Although the Court mentioned other means of redressing partisan gerrymandering,[30] all of these other avenues will (and currently do) face substantial obstacles that limit expedient corrective action.[31]

This Note critiques *Rucho* and explains why the Court's proposed alternatives to federal court are not adequate responses to the pathologies of extreme partisan gerrymandering. Part I highlights both insights from the Framers about the role of the federal judiciary and how courts have protected the right to vote in prior redistricting cases. Part II analyzes the rationale of *Rucho* and notes its application to subsequent cases. This Note rejects *Rucho*'s claim that there are no judicially

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26. *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting) ("And gerrymanders will only get worse . . . as time goes on . . . . What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning.").

27. *See id*. at 2519 (Kagan, J., dissenting) (lamenting that after *Rucho*, elected officials "had beat democracy" and can entrench themselves in power while burdening voters based on political affiliation).

28. Additional legal questions may also pose legitimate concerns to the fairness of the 2020-decennial-redistricting cycle. *See* Ross v. Nat'l Urban League, 141 S. Ct. 18 (2020) (granting stay of a preliminary injunction that allowed the decennial census count to stop early); *see also* Nicholas Bogel-Burroughs et al., *The Census, the Supreme Court and Why the Count Is Stopping Early*, N.Y. TIMES (Nov. 19, 2020), https://www.nytimes.com/article/census-supreme-court-ruling.html [https://perma.cc/LFM8-DYVL]. These unrelated—but equally important—matters are beyond the purview of this Note, which will only focus on the justiciability of partisan gerrymanders.

29. *See* Brief for Common Cause Appellees, at 6–8, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (No. 18-422) (noting the head of the North Carolina redistricting committee frankly stated: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country"); *see also* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 411–18 (2017) (detailing that since the 1960s ideological realignment, "hyperpolarized parties" and "partisan teamsmanship" has become a mainstay in the American political process, creating a modern "partisan rivalry between Republicans and Democrats [a]s the singular axis around which all American politics revolve"); Robert McCartney, *Virginia Democrats Face Choice Between Idealism and Revenge in Vote on Gerrymandering*, WASH. POST (Oct. 5, 2020, 2:00 AM), https://www.washingtonpost.com/local/virginia-ballot-amendent-one/2020/10/04/b7f097c0-04c2-11eb-897d-3a6201d6643f_story.html [https://perma.cc/2KXY-4HVH] (highlighting the dilemma for political parties to either stand by their purported beliefs or choose to firmly entrench themselves in political power).

30. *Rucho*, 139 S. Ct. at 2506–08.

31. *See infra* Part III.

manageable standards to guide federal courts in adjudicating partisan gerrymander claims. Part III examines three bodies that might instead limit partisan gerrymanders: Congress, the states, and "the People." It explains why each alternative suffers from significant defects rendering each respective body incapable of rising to the challenge of fixing a broken system. This Note finally concludes that the Supreme Court's categorical assertion that partisan gerrymandering lies beyond Article III judicial review was premature—and, as such, should be overruled. The right to vote is fundamental and must be protected by the judiciary[32] despite the inherently political aspects of drawing district lines.[33]

I. THE TRADITION OF GERRYMANDERING

The legal debate concerning partisan gerrymandering often centers around the issue of whether it is the prerogative of federal courts to adjudicate claims of unlawful redistricting when the constitutional defect is rooted in politics.[34] A common precept of constitutional interpretation is that analysis begins with the "living, breathing document" of the Constitution itself.[35] If the Constitution's broad language fails to deliver a decision, analysis often turns to the original public meaning intended by the Framers when the document was first drafted,[36] as well as its subsequent historical treatment.[37] It is important to note the need for caution when examining Framer intent because, as exemplified quite frequently, great minds can differ regarding what thoughts and beliefs the Framers held.[38] Mindful of this cautionary notion, it is useful to gain insight into the intentions of the Framers, understand the resulting precedent of redistricting, and delve into the cases of

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32. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation . . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . . [such as] restrictions upon the right to vote . . . .").

33. *See* Baker v. Carr, 369 U.S. 186, 209 (1962).

34. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (warning that it is the Court's province to only "decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. *Questions, in their nature political*, or which are, by the constitution and laws, submitted to the executive, *can never be made in this court*" (emphasis added)).

35. *See id.* at 180 ("It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned . . . ."); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 682 (1952) (Vinson, C.J., dissenting) ("Cases do arise presenting questions which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situations.").

36. *See* Dist. of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) (reasoning that, when interpreting constitutional text, the Court is primarily guided by how the text was normally understood by "ordinary citizens in the founding generation," and also by "exclud[ing] secret or technical meanings" not widely understood at the time).

37. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 788–93 (1995) (analyzing whether a state can fix term limits on U.S. Congress members, the Court focused its "review of the history and meaning of the relevant constitutional text" to determine that "the Framers intended the Constitution to establish fixed qualifications").

38. See, for example, the seminal example of this type of judicial jousting among the Justices in *District of Columbia v. Heller*, 554 U.S. 570 (2008), where the Court examined the Second Amendment's text to determine if it protects a person's right to bear arms.

partisan gerrymanders that preceded *Rucho* to develop foundational guidance for the debate over the political question doctrine and justiciability.[39]

A. Founding Guidance and Early U.S. History

At the heart of partisan gerrymandering cases are significant concerns first raised at the time of the Constitution's drafting and ratification: (1) how likely is the potential for abuse of power by elected officials; (2) what should be the role of the judiciary; and (3) how should the authority over elections be allocated between the states and the national government?[40]

First, because early colonists became increasingly frustrated with their lack of a voice as the British monarchy continued to impose unfair laws,[41] the Framers firmly sought to rectify this problem by granting the ability to vote to white male property owners and giving authority to elected officials to prescribe election regulations.[42] In establishing a republic, however, the Framers also recognized a potential problem: will those elected by the people be so driven by self-interest that such "pride and vanity attach him to a form of government which favors his pretensions"?[43] To prevent incumbents from abusing such power at the expense of the electorate, and to preserve the fundamental promise that a government "be derived from the great body of the society,"[44] the Framers sought to combat these temptations by discouraging "the restraint of frequent elections."[45] The constitutional requirement of frequent elections was therefore conceived as a wall of security for the public's right to vote while simultaneously limiting elected representatives from wandering astray from the will of the people in the pursuit of personal political power.[46]

Second, another prominent consideration for the Framers was the "fuzzy line" that should separate the permissible scope of judicial review from when discretion should restrain judicial involvement.[47] Alexander Hamilton noted the

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39. *See infra* Sections I.A–C.

40. Until the crucially pervasive landmark decision of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the power of judicial review entrusted to federal courts was vaguely expressed. Furthermore, the Constitution only explicitly created the Supreme Court, leaving any and all inferior courts to be created later (setting up the constitutional dilemma explored in *Marbury*). U.S. CONST. art. III, § 1. For purposes of this Note, attention will be given to what the Framers said about the "judicial power," and not necessarily its development.

41. *See* BRIAN P. JANISKEE, LOCAL GOVERNMENT IN EARLY AMERICA: THE COLONIAL EXPERIENCE AND LESSONS FROM THE FOUNDERS 65 (2010) (noting that after the Stamp Act was imposed, John Adams wrote that the public's lack of a voice resulted in great resentment and "[t]he People, even the lowest Ranks, have become more attentive to their liberties, more inquisitive about them, and more determined to defend them").

42. U.S. CONST. art. I, § 4, cl. 1.

43. THE FEDERALIST NO. 57 (James Madison).

44. THE FEDERALIST NO. 39 (James Madison).

45. THE FEDERALIST NO. 57 (James Madison).

46. U.S. CONST. art. I, § 2, cl. 1 (the House of Representatives); *id.* art. I, § 3, cl. 1 (the Senate).

47. Attempting to discover where this line exists is the impetus behind the cautionary notion of a political thicket and the mandatory recusal of a political question. *See*

difficult and "peculiar province of the courts" to void laws running counter to the Constitution while, at the same time, being careful to not "suppose a superiority of the judicial to the legislative power."[48] However, when "the power of the people is superior to both" and the "will of the legislature" cannot be consistent with the Constitution's protections of individual liberty and freedom, then federal courts, "as the bulwarks of a limited Constitution," may intervene "against legislative encroachments."[49] As such, while remaining vigilant not to exceed their boundaries and step on the toes of their sister branches, federal courts have superior power to review actions that may violate the Constitution.

Finally, competing camps of Framers found themselves at odds regarding electoral regulations. One group—the Federalists—argued that the federal government should retain the power to control the administration of elections; if the authority was exclusive among the numerous states, the pursuit of divergent practices would result in a "delicate crisis in the national situation, which might issue in a dissolution of the Union."[50] Another group—the Anti-Federalists—pushed back against this notion by seeking to entrust the states with plentiful powers, while the federal government's powers would be "few and defined."[51] In the end, the compromise was the Elections Clause, which bestowed onto the states broad power over elections while reserving for Congress the potentially vast power to enact unilateral regulations and preempt certain state laws.[52] Like the Great Compromise of 1787,[53] the crux of federalism was to permit the states to retain a fair amount of

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supra notes 3–4 and accompanying text. Matters not rising to the level of a political thicket are reviewable in federal court as long as it meets others procedural requirements. *See, e.g.*, 28 U.S.C. §§ 1331, 1332 (setting forth the requirements for subject-matter jurisdiction); Ford Motor Co. v. Mont. Eighth Jud. Dist. Court, 141 S. Ct. 1017, 1024–25 (2021) (detailing that personal jurisdiction comes from the Fourteenth Amendment's Due Process Clause and subsequent caselaw development); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (setting forth the requirements for Article III standing).

48. THE FEDERALIST NO. 78 (Alexander Hamilton).

49. *Id.*

50. THE FEDERALIST NO. 59 (Alexander Hamilton).

51. THE FEDERALIST NO. 45 (James Madison).

52. U.S. CONST. art. I, § 4, cl. 1; *see, e.g.*, Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 8–9, 14–15 (2013) (noting the power conferred by the Elections Clause is the inherent power to preempt state law).

53. Also known as the Connecticut Compromise, the adopted plan created a bicameral legislature where the lower chamber (the House) better represented the interests of more populous states, while the upper chamber (the Senate) better secured the concerns of the lesser populated states. *See* Aaron T. Knapp, *The New Jersey Plan and the Structure of the American Union*, 15 GEO. J.L. & PUB. POL'Y 615, 626–29 (2017).

sovereignty in enacting laws as they see fit[54] while also allowing a national government to retain control over expressly enumerated matters.[55]

These significant concerns emphasized by the Framers most closely involved with drafting the Constitution can also be seen in the pervasive debate over partisan gerrymanders.[56] First, the Framers worried that elected officials may become more interested in what is best for themselves rather than what is best for their constituencies—who originally selected the officials to serve the people's interests. This concern is present in the modern partisan gerrymandering debate, as elected officials that oversee the drawing of districts can abuse their power for their own best interests, even if it burdens the interests of their constituencies by diminishing their right to vote.[57] Second, the Framers declined to expressly define when federal judges should "hit the brakes" and assert judicial restraint over the ability to exercise judicial review.[58] Today, this concern manifests itself in the debate over partisan gerrymandering and justiciability by leaving such a determination to the judgment of the judges sitting on the federal bench. Third and finally, the delicate balancing of federalism originally divided the Framers until compromise was achieved between the two factions.[59] These concerns were front and center in the majority opinion in *Rucho*, which deemed questions of partisan gerrymandering to be reconcilable not by federal courts, but instead by the other branches with more of a stake in the political process.[60] At the center of this reasoning is judicial deference not only to the U.S. Congress, but to the states as well—namely, respecting the sovereignty of each state to redistrict as it generally sees fit without federal oversight from the politically unaccountable judiciary. In summary, these three concerns all were visible when the Constitution was written and have resurfaced in modern partisan gerrymandering cases.

Guided by balancing the Framers' various considerations, the fledgling American republic underwent a dramatic transformation resulting from the rise of political parties.[61] Just as James Madison feared, early elected officials sought to

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54. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasizing the "grave responsibility" that federal courts do not impinge on the ability of a "courageous state . . . [to] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" because, although the court has the "power to do this . . . . we must be ever on guard, lest we erect our prejudices into legal principles").

55. *See* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803))).

56. *See infra* Section II.B.

57. *See* THE FEDERALIST NO. 57 (James Madison).

58. *Compare* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (asserting judicial restraint), *with* Baker v. Carr, 369 U.S. 186, 209 (1962) (asserting judicial review).

59. *See* Knapp, *supra* note 53, at 626–29.

60. *See Rucho*, 139 S. Ct. at 2506–08.

61. *See* JOHN FERLING, ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800, at 63 (2004) (noting that within ten years since the Constitution was ratified, Federalists

entrench their political party by controlling, and abusing, the redistricting process.[62] In response, Congress, pursuant to its power under the Constitution's Elections Clause, passed laws to counter misshaped districts and generally promote fairer congressional races.[63] When challenges were raised, the Constitution's Guarantee Clause was often asserted by the Supreme Court as a restraint on judicial power from engaging in political matters.[64] Additionally, the Court narrowly construed the newly ratified Fourteenth and Fifteenth Amendments[65] while not "reading into" new congressional acts' prior provisions that were poised to protect the people's right to vote.[66] This ultimately culminated in *Colegrove v. Green*, where the Supreme Court determined "from a study of Congressional apportionment [and] its embroilment in politics . . . . [c]ourts ought not to enter this political thicket."[67] In finding apportionment claims to be a political question, Congress was still required to reapportion House seats among the states following each decennial census,[68] while

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and Jeffersonian-Republicans wasted no time duking it out for control of state legislatures, the U.S. Congress, and, eventually, the White House).

62. A famous example was in 1812, when Massachusetts Governor Elbridge Gerry signed a plan creating remarkably incongruent districts, with one resembling a salamander—thus the felicitous name: "gerry-mander." *See* Cliff Sloan & Michael Waldman, *History Frowns on Partisan Gerrymandering*, WASH. POST. (Oct. 1, 2017), https://www.washingtonpost.com/opinions/history-frowns-on-partisan-gerrymandering/2017/10/01/a6795fca-a491-11e7-ade1-76d061d56efa_story.html [https://perma.cc/4UBN-KSGS]. *See generally* ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 38–41 (2013) (detailing gerrymander use in the first 50 years of the United States).

63. *See* Lillian V. Smith, Note, *Recreating the "Ritual Carving": Why Congress Should Fund Independent Redistricting Commissions and End Partisan Gerrymandering*, 80 BROOK. L. REV. 1641, 1649 (2015) (collecting various congressional acts from 1842 to 1901 requiring districts "be contiguous, compact, and equal in population").

64. U.S. CONST. art. IV, § 4; *see, e.g.*, Taylor v. Beckham, 178 U.S. 548, 580 (1900) (denying jurisdiction for a claim of deprivation of rights under due process and the Guarantee Clause because absent an "exigency, ... [in] judgements on the conduct of public functionaries the courts exercise no control"); Luther v. Borden, 48 U.S. (7 How.) 1, 41 (1849) ("It is the province of a court to expound the law, not to make it.").

65. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 13–14 (1883) (noting that the Fourteenth Amendment only grants Congress the authority to enact "corrective legislation" to remedy the misconduct of the states, and not "general legislation" to protect the "rights of the citizen[s]"); United States v. Reese, 92 U.S. (2 Otto) 214, 217 (1875) (striking down an act of Congress seeking to protect the right to vote because the Fifteenth Amendment "does not confer the right of suffrage" and instead only "prevents the States, or the United States . . . from giving preference . . . to one citizen . . . over another on account of race, color, or previous condition of servitude").

66. *See, e.g.*, Wood v. Broom, 287 U.S. 1, 6–8 (1932) (identifying that although the elements of compact, contiguous, and proportionally equal districts were used previously in congressional acts, the omission of such words in current congressional acts constituted an implicit repeal and were no longer required).

67. Colegrove v. Green, 328 U.S. 549, 554–56 (1946) (plurality opinion) (finding malapportioned-districting claims to be nonjusticiable because "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action").

68. U.S. CONST. art. I, § 2, cl. 3; *see also* 2 U.S.C. § 2a(a)–(b) (2018).

each state had no constitutional obligation, nor any threat from the judiciary, to update its congressional districts to make each district roughly equal in population.

B. The Reapportionment Revolution

The Supreme Court's application of the political question doctrine to malapportioned-districting claims, however, would prove to be short-lived. Upon being appointed as Chief Justice of the United States by President Eisenhower, former California Governor Earl Warren led the Supreme Court to a "liberalized" use of judicial review—expanding the Court's power to invalidate state intrusions on an individual's constitutional rights.[69] Included with this judicial expansion was the "Reapportionment Revolution," or a series of decisions in the 1960s requiring that congressional- and state-legislative districts be equally weighted in population by establishing the "one person, one vote" standard.[70] With these cases, the Supreme Court overturned its own legal fiction set forth in *Colegrove* that prevented federal courts from presiding over malapportioned-districting claims and instead reasserted judicial review over a matter that the political process failed to remedy.[71]

While the other branches of the U.S. government would go on to pursue fairness and equality by venturing to a New Frontier[72] in furtherance of a Great Society[73] over the course of the 1960s, it would be the Warren Court that set the tone early at the decade's outset. The first chink in the formalistic armor of *Colegrove* came with *Gomillion v. Lightfoot*, where a unanimous Court held that a group of plaintiffs sufficiently stated a claim for relief in arguing that Alabama enacted an unconstitutional racial gerrymander.[74] In its reasoning, the Court noted that although

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69. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment's exclusionary rule to states under the Fourteenth Amendment's Due Process Clause); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that state laws creating racially segregated schools are unconstitutional under the Fourteenth Amendment's Equal Protection Clause).

70. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962); Gomillion v. Lightfoot, 364 U.S. 339 (1960); *see also* Gary W. Cox & Jonathan N. Katz, *The Reapportionment Revolution and Bias in U.S. Congressional Elections*, 43 AM. J. POL. SCI. 812 (1999); Ashira Pelman Ostrow, *The Next Reapportionment Revolution*, 93 IND. L.J. 1033 (2018).

71. *See* Ostrow, *supra* note 70, at 1041 (noting that since *Colegrove*, elected state officials, interested in preserving political power, kept districts inequal in population).

72. The set of domestic policies advanced by the Kennedy Administration (1961–1963) to, in part, resuscitate an economy dealing with a recession. *See generally* DAVID L. SNEAD ET AL., JOHN F. KENNEDY: THE NEW FRONTIER PRESIDENT 109–32 (2010) (noting the key policies of the Administration were "increasing the minimum wage, making housing more affordable," expanding Social Security, and providing more aid to impoverished communities).

73. The policies of the Johnson Administration (1963–1969) to combat racial inequality and injustice, among other matters. *See generally* Sar A. Levitan & Robert Taggart, *The Great Society Did Succeed*, 91 POL. SCI. Q. 601, 609–11 (1976) (noting that in addition to legislative victories, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the Administration "exerted its leverage in the marketplace" to help minority groups make substantial gains in both the social and economic spheres of society).

74. 364 U.S. 339, 340, 347–48 (1960).

the states are generally insulated from "federal judicial review" when they act pursuant to their authority,[75] this standard of deference falls away when the "state power is used as an instrument for circumventing a *federally protected right*."[76] With an eye towards the Fourteenth and Fifteenth Amendments as the basis for its rationale, the Court flashed a newfound interest in protecting an individual's right to vote when the government intrudes too far.[77]

However, the full repudiation of *Colegrove* would not arrive until two years later in *Baker v. Carr*, where the Court dismissed the political question doctrine that previously blocked claims of unconstitutionally malapportioned districts.[78] In reversing precedent, Justice Brennan, writing for the 7–2 majority, emphasized that when dealing with such a fundamental right as that to vote, federal courts "risk [no] embarrassment of our government abroad, or grave disturbance at home" by adjudicating questions regarding "the consistency of state action with the Federal Constitution."[79] As the "ultimate interpreter of the Constitution," the Court found it erroneous to categorically prohibit the "delicate exercise in constitutional interpretation" for matters involving the right to vote.[80] Despite not promulgating any identifiable judicial standard to analyze an alleged constitutional defect of malapportioned districting, the Court shed the formalistic constraints of *Colegrove* and sparked the beginning of the "Reapportionment Revolution."[81] Only two Justices dissented from the majority opinion in *Baker*, with Justice Frankfurter retorting that the majority's ruling threatened judicial restraint by exceeding the limits of judicial power and encroaching on the duties reserved to the other governmental branches more politically accountable to the public.[82]

Not long after came another Supreme Court case concerning the right to vote, a decision that expanded the central holding of *Baker* while formulating the judicial standard for adjudicating malapportioned-districting claims. In *Gray v. Sanders*, the Court opined that the states may regulate elections "within limits" prescribed by the Constitution or Congress, and these limits are exemplified by the notion that "every voter is equal to every other voter . . . when he casts his ballot"

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75. A state has broad authority to regulate elections as it sees fit. U.S. CONST. art I. § 4, cl. 1; *see supra* note 52 and accompanying text.

76. *Gomillion*, 364 U.S. at 340, 347 (emphasis added).

77. *Id.* at 340, 341, 343, 345.

78. 369 U.S. 186, 209 (1962) ("Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.'" (quoting Nixon v. Herndon, 273 U.S. 536, 540 (1927))).

79. *Id.* at 225–26.

80. *Id.* at 210–11.

81. *See, e.g.*, Luis Fuentes-Rohwer, Baker*'s Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. Rev. 1353, 1356 n.8 (2002) (noting the "one-person, one-vote revolution post-*Baker*"); *id.* at 1357–58 (describing the judicial authority allocated to federal courts to review redistricting questions post-*Baker*).

82. *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting) ("The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, ... relief must come through an aroused popular conscience that sears the conscience of the people's representatives.").

for the preferred candidate of choice.[83] With this constitutional assurance of "voting equality," the Court established the standard for right-to-vote cases: "one person, one vote."[84]

With the combined precedent of *Gomillion*, *Baker*, and *Gray*, the Warren Court scratched the surface of the "one person, one vote" standard by espousing a much more "liberalized" view of protecting an individual's right to vote.[85] However, two further decisions in 1964 would prove monumental in applying—and enforcing—this standard for state redistricting plans. In the first decision, *Wesberry v. Sanders*, the Court began by affirming *Baker* and reiterating that claims of unconstitutional malapportioned districting are justiciable in federal court.[86] Next, the Court applied *Gray*'s "one person, one vote" standard to hold that it is unconstitutional for a state to draw U.S. congressional districts of numerically disparate populations.[87] Referencing the words of Madison,[88] the Court emphasized the "high standard of justice and common sense which the Founders set" for the right to vote.[89] Therefore, in light of *Baker*, the Court required that states draw their congressional maps to have federal districts be practicably equal in population.[90]

The Court did not stop there. Only months later it decided *Reynolds v. Sims*, which applied the "one person, one vote" principle to require that states draw their own legislative districts (as opposed to federal congressional districts) to be roughly equal in population.[91] This time, the Court reasoned that the Fourteenth Amendment's Equal Protection Clause[92] protects individuals from a state's attempt to dilute the weight of or debase the right to vote by drawing districts unequal in population.[93] As a result, the Supreme Court established constitutional limits on the ability of the state to reapportion its own legislative districts and stressed that an individual's right to vote is far too important to be jeopardized by unequally populated districts.[94]

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83. 372 U.S. 368, 379–80 (1963) (emphasizing that "'we the people' under the Constitution visualizes no preferred class of voters, but equality among those who meet the basic qualifications").

84. *Id.* at 381 ("The conception of political equality [comes] from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments . . . .").

85. *See supra* notes 74–80, 82–84 and accompanying text.

86. 376 U.S. 1, 6–7 (1964).

87. *Id.* at 3, 18 (invalidating a Georgia districting plan that had some congressional districts of about 270,000 people, while others were around 395,000 people).

88. *Id.* at 18; *see also* THE FEDERALIST NO. 57 (James Madison).

89. *Wesberry*, 376 U.S. at 17–18.

90. *Id.* at 7–8, 18 (citing U.S. CONST. art. I, § 2).

91. 377 U.S. 533, 558, 577 (1964). While *Wesberry* required congressional districts be as equal as possible, the requirement set forth in *Reynolds* was more relaxed by permitting some leeway based on "an honest and good faith effort." *Id.* at 577.

92. U.S. CONST. amend. XIV, § 1.

93. *Reynolds*, 377 U.S. at 556–57.

94. *See, e.g.*, *Wesberry*, 376 U.S. at 6–7 (proclaiming that nothing in the Constitution supports an interpretation that "immunize[s] state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the

The importance of the cases comprising the "Reapportionment Revolution" (or simply just *Baker* and its progeny) is not necessarily the Warren Court's liberalization of the individual's right of suffrage—although that was certainly an important aspect of it. Instead, these cases contain the same considerations the Framers once contemplated: concerns over elected officials abusing their political authority, the power of judicial review versus self-restraint, and the intended dynamic of giving the states broad power to regulate elections subject to federal input.[95] Hitting on all three points, *Baker* and its progeny expanded the use of judicial review to combat the ills of state representatives entrenching themselves where Congress failed to act. The Supreme Court felt compelled to rule this way when political breakdown occurred, where the absence of judicial action would leave the public dissatisfied with the electoral process.[96] In juggling its duty to protect constitutional rights from governmental intrusion—while remaining mindful of judicial restraint—the Court ruled decisively that federal courts should intervene in malapportioned-districting cases.

C. The Erratic Arrival (and Treatment) of Partisan Gerrymandering

After breathing life into the "one person, one vote" standard by placing restrictions on a state's ability to debase any voter from participating equally in the democratic process, this same judicial philosophy would quickly be tested against claims of unconstitutional partisan gerrymandering. In *Gaffney v. Cummings*, the Supreme Court—now beyond the days of the Warren Court—noted that because politics are indeed "inseparable from districting and apportionment, ... judicial interest should be at its lowest ebb when a State purports *fairly* to allocate political power to the parties in accordance with their voting strength."[97] However, the Court also expressed some skepticism for such redistricting plans, warning of constitutional "vulnerab[ility] if racial *or political* groups have been fenced out of the political process and their voting strength invidiously minimized."[98] This tug of war of interests between judicial deference of political matters to the states and judicial protection of an individual's right to vote primed the issue of the justiciability of partisan gerrymanders in federal court.

The Supreme Court's first full foray into the justiciability of partisan gerrymandering came with *Davis v. Bandemer*, where a divided Court applied the central thrust of *Baker* and its progeny to ultimately decide that such claims were justiciable.[99] The Court rejected the argument that partisan gerrymanders are not justiciable just because no judicially manageable standard can be applied to guide

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constitutional rights of individuals from legislative destruction . . . . *The right to vote is too important in our free society to be stripped of judicial protection* . . . ." (emphasis added)).

95. *See supra* notes 41–55 and accompanying text.

96. *See* Douglass Calidas, *Hindsight Is 20/20: Revisiting the Reapportionment Cases to Gain Perspective on Partisan Gerrymanders*, 57 DUKE L.J. 1413, 1424–27 (2008).

97. 412 U.S. 735, 753–54 (1973) (emphasis added).

98. *Id.* at 754 (emphasis added).

99. 478 U.S. 109, 123 (1986) (reasoning that because partisan gerrymanders "do[] not involve us in a matter more properly decided by a coequal branch of our Government . . . . [I]n light of our cases since *Baker* we are not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided").

its analysis.[100] A plurality of the Court distinguished partisan gerrymandering claims from those alleging malapportioned districting by stating that a "lack of proportional representation" in politics by itself was not a sufficient basis for finding a plan unconstitutional; rather, a higher—and ill-defined—bar must be set for when a partisan gerrymander is unconstitutional.[101] In response, Justice O'Connor criticized the plurality for potentially "inject[ing] the courts into the most heated [of] partisan issues."[102] She found the loose standard proposed by the Court's plurality—that partisan gerrymandering is unconstitutional when the state intentionally blocks a disfavored party from influencing the political process—to be one that "will over time . . . prove unmanageable and arbitrary."[103]

With six Justices concluding that partisan gerrymanders are justiciable[104] and three Justices finding the opposite,[105] and no clear standard to assess when a partisan gerrymander proves to be unconstitutional, federal courts remained in limbo following *Davis*. This confusion only bolstered Justice O'Connor's position that finding a judicial standard for partisan gerrymanders was infeasible for the judiciary.[106] In the years that followed, the Court seldom took cases challenging the *Davis* precedent that partisan gerrymanders were justiciable in federal court. Yet when the Court did take on such cases, it failed to elaborate what constituted an unconstitutional partisan gerrymander apart from indicating the burden remained quite high.[107]

Nearly 20 years after *Davis*, the Supreme Court finally revisited this question in *Vieth v. Jubelirer*,[108] where the Justices became even more divided on the question of justiciability. Justice Scalia, writing for a plurality of the Court, parroted the same concerns voiced by Justice O'Connor in *Davis*, calling it a "fantasy" to think lower courts had "brought forth 'judicially discernible and

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100. *Id.* ("[T]he mere fact . . . that we may not now similarly perceive a likely arithmetic presumption in the instant context does not compel a conclusion that the claims presented here are nonjusticiable. The one person, one vote principle had not yet been developed when *Baker* was decided.").

101. *Id.* at 130–32 (plurality opinion) ("[U]nconstitutional discrimination occurs *only* when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influences on the political process as a whole." (emphasis added)).

102. *Id.* at 145 (O'Connor, J., concurring) ("[T]he legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out-by the very parties that are responsible for this process-present a political question in the truest sense of the term.").

103. *Id.* at 155 (O'Connor, J., concurring).

104. Justices White, Brennan, Marshall, Blackmun, Powell, and Stevens. *Id.* at 112, 118–20.

105. Justices O'Connor and Rehnquist, and Chief Justice Burger. *Id.* at 112, 143.

106. *Id.* at 145 (O'Connor, J., concurring).

107. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 253 (2001); Hunt v. Cromartie, 526 U.S. 541, 551–52 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in *constitutional political gerrymandering*, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." (first emphasis added)).

108. 541 U.S. 267 (2004).

manageable standards'" for partisan gerrymanders.[109] After calling the *Davis* plurality's test "one long record of puzzlement"[110] and identifying that "a person's politics [are] rarely as readily discernible—and *never* as permanently discernible—as a person's race,"[111] Justice Scalia, joined by three other Justices, expressed unwavering commitment to overturning *Davis* by holding partisan gerrymandering claims to be nonjusticiable in federal court.[112]

In dissent, four Justices issued three different opinions, each offering a different standard.[113] The lone holdout in *Vieth* was Justice Kennedy, who reserved caution on closing the door to partisan gerrymanders for good, instead arguing that although there was no current standard, it is not the province of the Court to "foreclose the judicial process from the attempt to define standards . . . where it is alleged that a constitutional right is burdened or denied."[114]

In the wake of *Vieth*, both Chief Justice Rehnquist and Justice O'Connor—two of the three Justices who voted to find partisan gerrymanders nonjusticiable in *Davis*—departed from the Court.[115] What followed was the newly established Roberts Court,[116] which did not rush to revisit *Davis* or *Vieth*.[117] Justice Kennedy

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109. *Id.* at 279–81 (plurality opinion) (citation omitted) (finding that for almost 20 years, lower courts applied the *Davis* plurality's test only for its application to "almost invariably produce[] the same result . . . as would have obtained if the question were nonjusticiable: Judicial intervention has been refused").

110. *Id.* at 282 (plurality opinion).

111. *Id.* at 287 (plurality opinion).

112. *Id.* at 288, 290 (plurality opinion) (drawing a line between racial and malapportioned gerrymanders, which have a basis in Equal Protection of the laws, and partisan gerrymanders, which are facially permissible and can only be found unconstitutional when premised "upon a sea of imponderables" and a nonexistent general "right to proportional representation" in the political system).

113. *See generally id.* at 317–68 (dissenting opinions of Justices Stevens, Souter and Ginsburg, and Breyer, respectively).

114. *Id.* at 309–10 (Kennedy, J., concurring) ("A determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene."). At the heart of Justice Kennedy's opinion is judicial restraint in holding a matter to be prematurely nonjusticiable, a different form of restraint than that used by the plurality to find the matter beyond the purview of federal courts. *See id.* at 316 (Kennedy, J., concurring) ("The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself."). Therefore, while Justice Scalia claims judicial restraint to block any involvement by federal courts, Justice Kennedy asserts a different form of restraint against the plurality's categorical restraint of judicial review.

115. Chief Justice Rehnquist passed away in 2005, and Justice O'Connor retired from the Court in 2006. These vacancies were swiftly filled by Chief Justice Roberts and Justice Alito, respectively.

116. (2005–present).

117. The few cases discussing partisan gerrymanders added little to the caselaw. *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018) (limiting analysis to standing); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 410 (2006).

remained on the Court,[118] which likely meant that a majority of the Court continued to embrace the view that partisan gerrymanders may be justiciable and that a workable standard to adjudicate them by could eventually be designed. Nevertheless, many elected state officials believed that a majority of the Court likely would not agree upon a standard for adjudicating partisan gerrymanders, thus inviting these officials to manipulate districts to ensure their own political power with little fear of meaningful federal-court oversight.[119]

II. THE ROBERTS COURT'S ANSWER TO THE POLITICAL QUESTION OF PARTISAN GERRYMANDERING

*A. Lower Federal Courts Pre-*Rucho

Post-*Vieth*, lower federal courts were tasked with the insurmountable responsibility of discerning a manageable standard for partisan gerrymandering claims following the 2010 redistricting cycle. A plurality of the Court in *Vieth* ripped to shreds the standard formulated by the *Davis* plurality, and the four dissenting Justices did not agree upon a proper test. Thus, lower courts had no guidance from the Supreme Court regarding how to handle the question of when a partisan gerrymander went too far.[120] That is, even if partisan gerrymandering claims were theoretically justiciable in federal court, it remained practically unmanageable in application.

Following the 2010 midterm elections, the Republican Party enjoyed massive gains in both the House of Representatives and state legislatures.[121] With political polarization on the rise and an innate sense of importance to secure control of the political process—through Congress or the state legislatures—a bipartisan interest in partisan gerrymandering mounted.[122] Because this competitive interest in

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118. Justice Kennedy would remain on the Court until his retirement in 2018—only one year before the Court would render its opinion in *Rucho*. *See* Michael Wines, *Kennedy's Retirement Could Threaten Efforts to End Partisan Gerrymandering*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/kennedy-scotus-gerrymandering.html [https://perma.cc/GTK7-T7V2]; *infra* note 128 and accompanying text.

119. *See* Nicholas R. Seabrook, *The Limits of Partisan Gerrymandering: Looking Ahead to the 2010 Congressional Redistricting Cycle*, 8 FORUM 1, 13–14 (2010).

120. *See, e.g.*, *League of United Latin Am. Citizens*, 548 U.S. at 420 (Kennedy, J., concurring) (noting that the threshold question for finding a partisan gerrymander unconstitutional is discovering "a standard for deciding how much partisan dominance *is too much*" (emphasis added)).

121. *See Republicans Exceed Expectations in 2010 State Legislative Elections*, NAT'L CONF. ST. LEGISLATURES (Nov. 3, 2010), https://www.ncsl.org/press-room/republicans-exceed-expectations-in-2010.aspx [https://perma.cc/A8DZ-EP2J] (detailing that the GOP captured at least 54 of 99 state legislative chambers in 2010, putting the Republicans in position to draw a majority of both congressional and state legislative districts).

122. *See, e.g.*, Michael Cooper, *How to Tilt an Election Through Redistricting*, N.Y. TIMES (Sept. 25, 2010), https://www.nytimes.com/2010/09/26/weekinreview/26cooper.html [https://perma.cc/CNM7-TK9H] ("[W]ith the 2010 census complete, Democrats and Republicans across the country are preparing for another once-a-decade exercise in creative cartography."); Michael P. McDonald, *The 2010 Midterm Elections: Signs and Portents for the Decennial Redistricting*, 44 POL. SCI. & POL. 311, 312–13 (2011) (identifying prospective

political gamesmanship found its way into the districting process, it was no surprise that both Democratic and Republican redistricting plans were instantly challenged in federal court.[123] Lacking a standard blessed by the Supreme Court, lower federal courts crafted a general three-part test that was premised on (1) the state's discriminatory intent against a political group; (2) whether that targeted group sustained a vote-dilution injury (such as "cracking" or "packing"[124]); and (3) either a causal relationship or a lack of justification by the state.[125] Adhering to this general test, a handful of lower courts were able to find and use a workable standard to determine when a partisan gerrymander violated the Constitution,[126] without the fear that the court was going too far in exceeding its judicial-review power.[127] With various lower courts issuing orders to invalidate redistricting plans because of an unlawful partisan gerrymander, it was only a matter of time until the Supreme Court once again granted certiorari on the matter.

B. Rucho v. Common Cause

By the time the issue of partisan gerrymandering returned to the Supreme Court in 2018, Justice Kennedy had retired and been replaced by Justice Kavanaugh.[128] Consequently, when constitutional challenges to redistricting maps in North Carolina (an alleged Republican gerrymander) and Maryland (an alleged Democratic gerrymander) reached the Court, the prospect of a decisive (and landmark) decision felt very real. Arguing that the lower-court decisions should remain intact—which would affirm the principle that partisan gerrymanders are indeed justiciable and that there is a judicially manageable standard—the appellees

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opportunities for both Republicans and Democrats to enact partisan gerrymanders in the 2010s).

123. *See, e.g.*, Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019) (alleged unlawful Democratic partisan gerrymander); Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019) (alleged unlawful Republican partisan gerrymander).

124. The effect of partisan gerrymandering where alike voters are either "packed" into a district "in excess of what the candidate needed to win a given district," or "cracked" amongst districts to dilute the number of voters of the disfavored party from having enough voter support to win in a given district. *Common Cause*, 318 F. Supp. 3d at 886, *vacated and remanded*, 139 S. Ct. 2484 (2019).

125. The constitutional basis—e.g., the First Amendment or Fourteenth Amendment—determines if the final prong is a causal relationship or a lack of justification. *See, e.g.*, *Benisek*, 348 F. Supp. 3d at 521–24, *vacated and remanded*, 139 S. Ct. 2484 (2019); *Common Cause*, 318 F. Supp. 3d at 860–68, *vacated and remanded*, 139 S. Ct. 2484 (2019). These tests will be fleshed out in greater detail below. *See infra* Section II.B.

126. The constitutional bases include the First Amendment (associational rights), Fourteenth Amendment (equal protection), and Article I, §§ 2, 4 (Elections and Composition Clause). *See, e.g.*, *Common Cause*, 318 F. Supp. 3d at 860, 923–24, 935–36, *vacated and remanded*, 139 S. Ct. 2484 (2019).

127. *See, e.g.*, Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 1085–92 (S.D. Ohio), *vacated and remanded*, 140 S. Ct. 102 (2019).

128. *See* Schapiro, *supra* note 12 ("The retirement of Justice Anthony Kennedy and his replacement with Justice Brett Kavanaugh will likely shape the doctrine of the United States Supreme Court in significant ways for decades to come."); Wines, *supra* note 118.

in *Rucho* provided both the constitutional bases and their respective judicial tests to determine when a partisan gerrymander went too far.[129]

Appellee Common Cause argued that Supreme Court precedent supported the contention that the First Amendment serves as a constitutional base for adjudicating partisan gerrymanders because six Justices previously noted that "partisan gerrymandering strikes at the heart of . . . First Amendment values."[130] Common Cause emphasized that partisan gerrymandering creates First Amendment injuries by limiting political-mobilization efforts in affected districts, which then hinders a party's ability to generate enthusiasm, raise funds, and attract the interest of potential candidates in diluted districts.[131] In adopting a test comprised of (1) discriminatory intent by the state; (2) a resulting discriminatory effect; and (3) a causal element between intent and effect, Common Cause argued lower courts are justified in imposing strict scrutiny review of a state's redistricting plan when all three aforementioned elements are present.[132]

In addition to the First Amendment, Common Cause also argued the Fourteenth Amendment's Equal Protection Clause serves as a constitutional basis for reviewing partisan gerrymanders because the states are generally prohibited from "intentionally disfavor[ing] a class of citizens absent sufficient justification."[133] To evaluate if a state implemented a partisan gerrymander incompatible with the Equal Protection Clause, Common Cause proffered another three-prong test consisting of (1) a state's discriminatory intent to burden a political party; (2) that party experienced discriminatory effects; and (3) the state lacked justification (such as a legitimate purpose tied to districting).[134] While the burden of proving the first two prongs rests with the party challenging the plan, the burden of proving a legitimate purpose shifts to the state after the challenger makes a prima facie case that an illegitimate purpose animated and a discriminatory effect ensued.[135] If the challenger is successful in showing both discriminatory intent and effect, the state may still prevail if it can establish that it had legitimate justifications for adopting the plan.[136]

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129. *See* Brief for Common Cause Appellees, *supra* note 29, at 53–63. I do note that although appellees offer novel constitutional bases in Article I, §§ 2 and 4, I will narrow this Note's scope to primarily address the First Amendment and the Fourteenth Amendment to preserve length and avoid redundant arguments.

130. *Id.* at 54 (citing Gill v. Whitford, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) and Vieth v. Jubelirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring)).

131. *See id.* at 55.

132. *Id.* at 55–56 (clarifying that such a test and standard "would ban only *invidious* discrimination on the basis of political expression and association, when not narrowly tailored to a compelling State interest").

133. *Id.* at 57.

134. *Id.* at 57–59 (addressing that such a test would—like that under the First Amendment—invalidate only those plans that have the intention and effect of invidiously discriminating against a political group).

135. *See* Brief for League of Women Voters of North Carolina Appellees at 62–63, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (No. 18-422).

136. Such justifications may include "traditional redistricting factors" that are often used for racial gerrymandering cases, including compactness, respecting geographical boundaries, and preserving communities that share a mutual interest. *See* Bethune-Hill v. Va.

By arguing that partisan gerrymandering has been justiciable in federal court since *Davis*, as well as setting forth tests that mirrored those used in racial gerrymandering cases, Common Cause believed they did what a majority of the Justices failed to do fifteen years earlier in *Vieth*: propose a straightforward, uniform, and agreed-upon standard to assess partisan gerrymandering claims.

Unfortunately for Common Cause, the Supreme Court did not share this belief. Adhering to the same concerns first espoused in *Davis* by Justice O'Connor—"a Justice with extensive experience in state and local politics"[137]—five Justices in *Rucho* deemed partisan gerrymandering claims to be nonjusticiable in federal court.[138] The central thrust behind the majority's decision was relatively similar to the rationale expressed by the *Vieth* plurality: because partisan gerrymanders have been around since the United States was a fledgling republic and have been a frequent tool used by elected officials, it is no business of federal courts to intervene into such a political question.[139] The Framers were aware of such tactics to secure political seats, which resulted in the initial compromise of assigning districting powers to the state legislatures to then be "expressly checked and balanced by the Federal Congress."[140] As history has demonstrated, Congress has not been an institution to shy away from checking the states' powers by requiring certain redistricting criteria from time to time.[141] Therefore, in light of Framer intent and U.S. history, the *Rucho* majority was convinced that partisan gerrymandering, unlike its close districting relatives,[142] was a facially permissible practice.[143]

State Bd. Of Elections, 137 S. Ct. 788, 795, 799 (2017); *see also* Brief for Common Cause Appellees, *supra* note 29, at 62.

137. Rucho v. Common Cause, 139 S. Ct. 2484, 2498 (2019).

138. *Id.* at 2507–08.

139. *Id.* at 2494–95 ("At no point [when drafting the Constitution] was there a suggestion that the federal courts had a role to play [in remedying electoral-districting claims]. Nor was there any indication that the Framers had ever heard of courts doing such a thing."); *see also* Vieth v. Jubelirer, 541 U.S. 267, 274–75 (2004) (plurality opinion). While the Court does indicate that Framer intent could be interpreted to show that federal courts lack enumerated authority to adjudicate right-to-vote cases, the Court does note that federal courts were ultimately brought in to resolve questions of malapportioned districting and racial gerrymanders under the Equal Protection Clause. *See Rucho*, 139 S. Ct. at 2495–96. For sake of clarity, nowhere in *Rucho*'s holding is it implied that these prior cases are in threat of being overturned.

140. *Rucho*, 139 S. Ct. at 2496; *see* U.S. CONST. art. I, § 4, cl. 1.

141. *Rucho*, 139 S. Ct. at 2495; *see* Smith, *supra* note 63, at 1649 (collecting congressional acts instituting criteria for the states to meet in drafting federal congressional districts).

142. Malapportioned districting (or questions of "one person, one vote") and racial gerrymandering claims.

143. *Rucho*, 139 S. Ct. at 2497–98 (2019) (reasoning that partisan gerrymanders are harder to adjudicate than racial gerrymanders because "[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities"). Instead, as the Court further elaborates, "[t]he 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'" *Id.* (quoting *Vieth*, 541 U.S. at 296 (plurality opinion)).

The majority opinion dismissed Common Cause's Equal Protection and First Amendment tests, finding the intent prongs in both tests to be unworkable because it is facially permissible to consider politics, and even attempt to secure a "partisan advantage," when drafting redistricting plans.[144] Also, because partisan identity is not necessarily static—i.e., a person could vote for a Democrat in one election and then cast a ballot for a Republican in the next—map makers truly cannot know the outcome of a redistricting plan before it takes effect.[145] In rejecting the proffered First Amendment arguments, the Court found the claim that partisan gerrymandering renders a political party less competitive in a given district was not a sufficiently "serious standard for separating constitutional from unconstitutional gerrymandering."[146] Finally, in measuring discriminatory effect, the majority contemplated that even if a federal judge were to consider how far the actual districting map deviated from a nonpartisan-generated map, the important question still remained of how much deviation is too much.[147]

Because partisan gerrymandering by itself does not violate the Constitution, the majority concluded that no judicially manageable standard would define the line that separates a permissible partisan gerrymander from an impermissible partisan gerrymander.[148] For the majority, an appropriate standard would "invariabl[y] sound in a desire for proportional representation," a concept that a number of Justices did not believe was constitutionally required nor intended by the Framers.[149] Balking at adopting a test for "proportionality" or "fairness" because a "winner-take-all system" is inherently unfair[150] and "fairness" is too subjective,[151] the Court viewed these concerns as being addressed only through political—and not

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144. *Id.* at 2503 (noting that "partisan advantage" is a permissible intent that "does not become constitutionally impermissible . . . when that permissible intent 'predominates'" in drawing districts). In contrast, it is facially impermissible to have malapportioned districts or to gerrymander on the basis of race. *See id.* at 2502–03.

145. *See id.* at 2504–05.

146. *Id.* at 2504 (responding to the alleged First Amendment injury of reduced political enthusiasm: "How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded?").

147. *Id.* at 2505–06; *see also* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 420 (2006) (Kennedy, J., concurring).

148. According to the majority, in such a situation the Court risks entering into a political thicket that could prove quite detrimental to damaging the appearance of federal courts' impartiality and independence. *See Rucho*, 139 S. Ct. at 2494, 2500–01. Therefore, no standard could assist federal courts in determining how much politics is too much.

149. *Id.* at 2499; *see also* City of Mobile v. Bolden, 446 U.S. 55, 75–76 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

150. Even if a candidate loses an election by one vote, that candidate is nonetheless still a "loser" in terms of receiving no political position flowing from that election. *Rucho*, 139 S. Ct. at 2500.

151. "Fairness may mean a greater number of competitive districts . . . . On the other hand, perhaps the ultimate objective of a 'fairer' share of seats in the congressional delegation . . . . Or perhaps fairness should be measured by adherence to 'traditional' districting criteria." *Id.*

legal[152]—standards.[153] Because of the lack of judicially manageable standards, partisan gerrymandering claims were therefore deemed to be nonjusticiable in federal court.[154]

By concluding that partisan gerrymandering presents a nonjusticiable political question, the *Rucho* majority claimed it was exercising judicial restraint here because the only perceived legal standards in the judge's toolkit were subjective, arbitrary, and post hoc criteria.[155] Even though the Court punted on assuming judicial responsibility for policing extreme partisan gerrymandering, it admitted that the practice is "incompatible with democratic principles."[156] The Court remarked that its decision did not "condemn complaints about districting to echo into a void"[157] but instead sent such concerns back to the political institutions: Congress, the states, and even direct-democracy initiatives could provide redress to prevent partisan gerrymandering.[158] In summary, the majority in *Rucho* determined that even if partisan gerrymandering is unliked, undesirable, and undemocratic, the Court is limited to the restraints set forth in the Constitution.[159]

C. Reviewing Rucho*'s Answer to Partisan Gerrymandering*

The majority opinion in *Rucho* at first blush appears quite reasonable: why should judges with lifelong tenure strain themselves to draw a fine distinction for when a redistricting plan is impermissibly "too political?" The three decades that preceded *Rucho* certainly exemplified the struggles of federal judges failing to cobble together a single standard to handle partisan gerrymandering claims in the absence of any express constitutional language. In light of these shortfalls, Chief Justice Roberts and four other Justices decided the caselaw would no longer linger

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152. The Court, therefore, draws a distinction between having a set of political standards and a set of legal standards, with the latter required to overcome the political question doctrine and find an issue to be justiciable in federal court. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is . . . a lack of judicially discoverable and manageable standards for resolving it . . . .").

153. *Rucho*, 139 S. Ct. at 2500–01.

154. *See id.* at 2502 (holding that there is no standard that "provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties"). Concluding that federal courts would carry out "an unprecedented expansion of judicial power" if partisan gerrymanders continued to be justiciable in federal court, the *Rucho* majority found that such claims fail to amount to a "case and controversy" and are instead a nonjusticiable political question. *Id.* at 2493–94, 2506–07.

155. *See id.* at 2507.

156. *Id.* (internal quotation marks omitted) (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

157. *Id.*

158. *Id.* at 2506–08.

159. *Id.* at 2507 ("Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."); *cf.* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.").

in a doctrinal limbo and instead redirected the claims to institutions closer to the political process.[160] In doing so, the Court sought to ensure that judges do not exceed their constitutional authority of judicial review for matters too entrenched in a political thicket. By identifying the judicial "sidelines" to help the public better understand where a claim falls out of bounds or remains "in-play" in federal court, the Supreme Court believed it successfully preserved the perception of federal judges as being impartial and independent decision-makers.[161] Playing the part of a noninterventionist for partisan gerrymandering affairs, the Court likely believed its use of judicial restraint would preserve its appearance of neutrality in the eyes of the American public.

The Court misses the mark for three reasons. First, if the Court truly wanted to practice judicial restraint, it should not have overruled over 30 years of precedent.[162] In *Davis*, six Justices found partisan gerrymandering to be justiciable,[163] and a majority in *Vieth* also believed such claims should be heard in federal court.[164] So, while the majority in *Rucho* was correct that there has never been a single instance of a partisan gerrymander being deemed unconstitutional in the Supreme Court,[165] this does not negate the fact that *Rucho* actually reverses long-

160. *See Rucho*, 139 S. Ct. at 2506–08.

161. It is important to note that this current Court often concerns itself with the public's perception of the Court and its degree of—or lack of—political bias. In fact, the Chief Justice has frequently made clear his interest in defending the impartiality of federal judges. *See, e.g.*, Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge*,*'* N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html [https://perma.cc/MT3X-GZLL] (stating that: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges." (internal quotation marks omitted)). *But see* Adam Serwer, *The Lie About the Supreme Court Everyone Pretends to Believe*, THE ATLANTIC (Sept. 28, 2021), https://www.theatlantic.com/ideas/archive/2021/09/lie-about-supreme-court-everyone-pretends-believe/620198/ ("This insistence—that justices are simply following the law—is a common rhetorical tool in the partisan conflict over the Court. The most partisan judges will not admit to being hacks, instead framing their actions as consistent with the rule of law.").

162. This Note acknowledges that judicial restraint and stare decisis are not the same concept. *See Judicial Restraint*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019). However, "the interest in adhering to settled rules of law . . . undergirds the doctrines of *stare decisis* and judicial restraint." Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 600 n.7 (1993) (Stevens, J., concurring); *see also* Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274–82 (2005); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 287–89 (1990). This Note treats adherence to stare decisis as an integral component of judicial restraint, even if the two are not one and the same.

163. Davis v. Bandemer, 478 U.S. 109, 113, 143 (1986).

164. Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in judgment) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."); *id.* at 317 (Stevens, J., dissenting) ("The central question presented by this case is whether political gerrymandering claims are justiciable. Although our reasons for coming to this conclusion differ, *five Members of the Court* are convinced that the plurality's answer to that question is erroneous." (emphasis added)).

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

standing precedent. Instead of judicial restraint, it appeared to be more of an active disregard of the Court's duty to preside over cases that implicate the right to vote.[166] Judicial restraint was, therefore, better manifested in the form of Justice Kennedy's line of concurrences in the 2000s that left the door open for the development of proper judicial guideposts without the blanket refusal to monitor gross distortions of the franchise.[167] Instead of upheaving precedent at its roots, genuine judicial restraint arguably calls for a skeptical, but nonetheless inquisitive and patient, mind to hold off from making a categorical—and premature—decision, especially when the right at issue is fundamental.[168] If the appearance of impartiality is truly paramount to federal judges—as the Chief Justice has indicated[169]—then *Rucho* appears problematic because the Court overruled over-three-decades-long precedent centered around the right to vote.

Second, despite the Court's claimed good intentions, its decision was shortsighted by ignoring (or at least deflating) the important consequences flowing from the *Rucho* outcome. The negative effects of finding partisan gerrymandering claims to be nonjusticiable could cause a substantial amount of harm by permitting new potential threats on the fundamental right to vote:

> Political gerrymandering is the most salient and perhaps most consequential expression of the manipulation of electoral rules for partisan gain. If the Court does not rein in partisan gerrymandering, it will communicate to political elites not just that partisan gerrymandering is normatively acceptable, but also that partisan manipulation of electoral rules is permissible, as long as they can get away with it.[170]

After *Rucho*, elected officials and "political elites" have the green light from the Supreme Court that gerrymandering will not be reviewed in federal court as long as it is based on partisanship.[171] No matter how much ire the public may have toward future uses of partisan gerrymandering, any resolution is now forgone because the Supreme Court declined to provide any more judicial resources into reviewing if such claims run counter to the Constitution. Additionally, because the Court was seemingly split along ideological lines, the *Rucho* decision impedes the pursuit of judicial impartiality by making the decision look "political" rather than one

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166. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); THE FEDERALIST NO. 78 (Alexander Hamilton); *supra* notes 48–49 and accompanying text.

167. *See, e.g.*, *Vieth*, 541 U.S. at 309–10 (Kennedy, J., concurring) (concluding that the Court has historically not been willing "to foreclose the judicial process" when attempting to resolve disputes where "it is alleged that a constitutional right is burdened or denied . . . . *A determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene*" (emphasis added)).

168. *See id.* at 311 (Kennedy, J., concurring) (reasoning that the reliance on distinguishing "between a claim having or not having a workable standard of that sort involves a difficult proof: proof of a categorical negative . . . . That no such standard has emerged in this case should not be taken to prove that none will emerge in the future . . . .").

169. *See supra* note 161.

170. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 269 (2018).

171. *See id.*; *see also supra* notes 142–143 and accompanying text.

involving impartial Justices simply "applying the law" to a legal dispute.[172] If the *Rucho* majority truly placed a great deal of emphasis on judicial restraint, it would have more fully considered public interests that may be undermined by its decision, such as the public's faith in the integrity of elections and the promise that federal courts are not composed of "politicians with robes."[173]

Third and finally, the Court's judicial-restraint justification is questionable in light of prior election-law cases decided since the turn of the new millennium.[174] For example, when the outcome of the 2000 presidential election came down to Florida, why was it then appropriate for the Court—on seemingly ideological lines—to step in and speak on one of the most political matters in the United States: electing the next president?[175] If it was permissible for the Court to then interject itself into handling a question regarding the presidential-selection process, then what is materially different from the Court handling a question regarding the process of constructing districts by which members of Congress are selected?[176] In this same vein, why can the Court, in a 5–4 decision, expansively read the First Amendment to protect independent corporate expenditures from excessive regulation if it pertains to elections, but decline to find that a legal standard can ever be used to assess excessive partisanship in the districting process?[177] Lastly, if the theoretical thrust behind the Court's decision to water down a "super-statute"[178] was because

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172. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (recording the statement of then-Judge Roberts: "Judges are like umpires. Umpires don't make the rules, they apply them.").

173. *See* Denise Lavoie & Michael Tarm, *Trump's Supreme Court Pick Wary of "Politicians with Robes"*, AP NEWS (Feb. 4, 2017), https://apnews.com/article/a4f6dbcd739f48a69a4ea334c58548e0 [https://perma.cc/E9L8-C7EN].

174. For purposes of this Note, only a handful of important election-law cases will be addressed here. Other election-related issues of utmost importance—e.g., ballot-casting provisions in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the intent behind a state's removal process of registered voters in *Husted v. A. Phillip Randolph Institute*, 138 S. Ct. 1833 (2018), and voter-identification laws in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)—are acknowledged, but beyond this Note's scope.

175. Bush v. Gore, 531 U.S. 98, 109–11 (2000) (holding there is an equal protection violation because there was a lack of uniformity within Florida regarding individual counties conducting recounts in different manners).

176. *See id.* at 111 ("None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, *however*, it becomes our *unsought responsibility* to resolve the federal and constitutional issues the judicial system has been forced to confront." (emphasis added)).

177. *See* Citizens United v. FEC, 558 U.S. 310, 340–43, 365–66 (2010) (reasoning that the First Amendment extends to businesses and protects the political speech of such entities, including corporate independent expenditures).

178. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (identifying a "super-statute" as "a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time 'sticks' in the public culture such that (3) the super-statute and its institutional or normative principles

"[o]ur country has changed" and redress is limited to a "remedy that . . . speaks to current conditions,"[179] then why can this same line of reasoning not be applied to the conditions of our current political system—chock-full of political polarization and division?[180] This Note does not attempt to wrangle with the complex issues of these prior election-law cases, nor does it try to argue that those cases were wrongly decided. Instead, this Note simply questions the determination that partisan gerrymandering is patently different from prior election-law matters, unconvinced that the Court's assertion of judicial restraint through the political question doctrine in *Rucho* is sufficiently distinct from other questions pertaining to elections and our political process.

Many of these critiques of the *Rucho* majority opinion appear in the dissent, where four Justices indicated a more receptive posture to protecting the right to vote in the face of potential abuses of government power.[181] In noting that the Court's "abdication" of judicial review arrives on the heels of various district courts finally "coalesc[ing] around manageable judicial standards to resolve partisan gerrymandering claims," the dissent warns of elected officials now capable of "cherry-pick[ing] voters to ensure their reelection."[182] Further, the fact that partisan gerrymanders have been a common occurrence in the United States should not be dispositive here, as "racial and residential gerrymanders were also once with us, but the Court has done something about that fact."[183] Without any intervention by the Court, coupled with technological improvements over the years, the "backfire" of a "dummymander" appears less likely as each redistricting cycle refines packing and cracking efforts to enhance partisan advantages to the incumbent mapmakers.[184] Therefore, to capture the essence of the dissent and ensure that the government

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have a broad effect on the law"); *see also* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1218–19 (2015) (indicating that the 1965 Voting Rights Act is a "super-statute").

179. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

180. *See, e.g.*, Stephen Mihm, *The Easiest Political Force to Ignore Is Only Getting Bigger*, BLOOMBERG (Jan. 31, 2021, 6:00 AM), https://www.bloomberg.com/opinion/articles/2021-01-31/political-polarization-and-independent-voters-in-the-u-s [https://perma.cc/S2GJ-Q72Y]; Gerald F. Seib, *How America's Polarized Politics Produced Democrats' Internal Fight*, WALL ST. J. (Oct. 4, 2021, 10:09 AM), https://www.wsj.com/articles/how-americas-polarized-politics-produced-democrats-internal-fight-11633356582 [https://perma.cc/44TH-XZMC]; George Skelton, *Column: Trump Is Gone. But America's Enduring Problem with Political Polarization Remains*, L.A. TIMES (Feb. 8, 2021, 12:00 AM), https://www.latimes.com/california/story/2021-02-08/skelton-biden-trump-democrats-republicans-political-polarization [https://perma.cc/9KHS-GJ8W].

181. Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting).

182. *Id.* at 2509, 2512 (Kagan, J., dissenting).

183. *Id.* at 2512 (Kagan, J., dissenting); *see also* Baker v. Carr, 369 U.S. 186, 209 (1962) (showcasing an example of the Court doing "something" about "residential gerrymanders").

184. *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting) ("These are not your grandfather's—let alone the Framers'—gerrymanders."); *see also* Charles & Fuentes-Rohwer, *supra* note 170, at 267–75.

continues to be "derived from the great body of the society,"[185] federal courts, "as the bulwarks of a limited Constitution," should retain the ability to intervene in partisan gerrymandering cases because such practices are "legislative encroachments" on the rights of the people.[186]

Despite these critiques, the Court chose not to be the referee to call a penalty on an encroachment. Instead, the Court chose to implicitly acquiesce to any sort of invidious intent serving as the driving force behind a redistricting plan so long as it targets segments of society based on their politics and not on their race. *Rucho* is now binding precedent, compelling inferior courts not only to apply its reasoning to partisan gerrymandering cases[187] but also to a wide array of cases across the legal spectrum.[188] Moving forward, as expressed by the *Rucho* majority, with federal courts out of the picture, the redress for partisan gerrymandering is now solely reserved to the government institutions more closely aligned with the political process.[189]

III. THE ALTERNATIVES TO FEDERAL COURT?

Turning to the potential remedies provided by the political process, the idea is that these alternative avenues to federal court would be able to get the job done. While the political process may be theoretically more receptive to the interests of the public in ensuring fair and uncorrupt elections, it is also necessary to leave open the door to judicial review for instances of political-process breakdown.[190] Such a breakdown can occur when elected officials, possibly driven by competitive political gamesmanship, put their own self-interests above the interests of their constituents and the public at large.[191] Therefore, in periods of highly inflamed

185. THE FEDERALIST NO. 39 (James Madison); *see supra* note 44 and accompanying text.

186. THE FEDERALIST NO. 78 (Alexander Hamilton); *see supra* note 49 and accompanying text.

187. *See, e.g.*, Hinds Cnty. Republican Party v. Hinds Cnty., 432 F. Supp. 3d 684, 693–94 (S.D. Miss. 2020) ("In any event, even if the Supervisors had engaged in more severe partisan redistricting, all agree that the Supreme Court's decision earlier this year in *Rucho* forecloses this theory of relief.").

188. *See, e.g.*, Jacobson v. Florida Sec'y of State, 974 F.3d 1236, 1260–61 (11th Cir. 2020) (holding that a Florida law regulating candidate placement on a voting ballot "presents a nonjusticiable political question" because it "shares the same critical feature . . . in *Rucho*"); Luft v. Evers, 963 F.3d 665, 670–71 (7th Cir. 2020) (upholding a Wisconsin law that reduced the available hours for early voting because of "the holding of *Rucho* that legislators are entitled to consider politics when changing the rules about voting"); Juliana v. United States, 947 F.3d 1159, 1169, 1173 (9th Cir. 2020) (holding that plaintiffs' claimed injuries are not "redressable by an Article III court" because the offered proposal to protect a "substantive constitutional right to a 'climate system capable of sustaining human life'" is not a "'limited and precise' standard discernible in the Constitution for redressing the asserted violation" (quoting *Rucho*, 139 S. Ct. at 2500)).

189. *Rucho*, 139 S. Ct. at 2507–08.

190. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . . [Such as] restrictions upon the right to vote[.]").

191. *See supra* notes 43–46, 57 and accompanying text.

political polarization, the potential remedies offered by Congress, the states, and "the People" (direct-democracy initiatives) prove to be more limited in protecting the right to vote than the more politically insulated avenue of federal courts. As such, emphasis shall be placed on the shortfalls of each alternative avenue to provide redress, indicating that partisan gerrymanders should, once again, be justiciable in federal court.

A. The U.S. Congress

In both the *Vieth* plurality[192] and the *Rucho* majority,[193] the Court felt comfortable asserting the political question doctrine because Congress has historically intervened to mandate that states use certain districting criteria.[194] Such a congressional intention for intervention can be observed in the recent omnibus election-law bill to prohibit partisan gerrymandering and establish independent redistricting commissions[195] to draw congressional districts (instead of leaving it to the states).[196] Any act that creates independent redistricting commissions would surely be a welcomed safeguard against partisan gerrymandering and would likely pass constitutional muster under the Elections Clause.[197] And with the vacuum left by federal courts, Congress could easily fill in as the unilateral fix to preclude the use of partisan gerrymandering across all states.[198]

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192. Vieth v. Jubelirer, 541 U.S. 267, 276–77 (2004) (plurality opinion).

193. *Rucho*, 139 S. Ct. at 2495–96, 2508.

194. *See* Smith, *supra* note 63, at 1649 (collecting congressional acts).

195. Independent redistricting commissions are thought to reduce partisan gerrymandering because "political insiders are prohibited from participation" when crafting congressional districts, thereby "eliminating the clear conflict of interest that exists when elected officials or those close to them draw districts." *Independent and Advisory Citizen Redistricting Commissions*, COMMON CAUSE, https://www.commoncause.org/independent-redistricting-commissions/# [https://perma.cc/4FWP-6VGH] (last visited Mar. 13, 2021). For a good article that generally discusses the benefits and history of independent redistricting commissions, see Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1810–13 (2012). Additionally, the California Supreme Court has also assessed the positive effects of the State's independent redistricting commission on its elections. *See* Vandermost v. Bowen, 269 P.3d 446, 477 (Cal. 2012) ("[T]he Commission's maps . . . 'represent[ ] an important improvement on the legislature-led redistricting of 2001. The new district boundaries kept more communities together and created more compact districts while at the same time increasing opportunities for minority representation.'").

196. For the People Act of 2021, H.R. 1, 117th Cong. § 2401. The Bill provides that these independent commissions would create districts that, to the extent possible, "ensure the practical ability of a group . . . to participate in the political process and to nominate candidates and to elect representatives of choice is not diluted or diminished." *Id.* § 2403(a). Moreover, the Bill is expressly emphatic that no plan is to "be drawn with the intent or the effect of unduly favoring or disfavoring any political party." *Id.* § 2403(b).

197. U.S. CONST. art. I, § 4, cl. 1 (conferring the express power to Congress to "make or alter such Regulations" that concern the "Manner of holding Elections" for federal Congress members); *see supra* notes 52–55 and accompanying text; *see also* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. 79, 101–03 (2016).

198. *See* Nicholas Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 76–77, 81 (2021) (expressing an expansive view of the Elections Clause that allows Congress to "compel" the states to create independent redistricting commissions without posing a commandeering question).

However, all of the benefits of Congress having the enumerated constitutional authority to act here is precepted on the crucial notion that Congress actually acts. As previously referenced, the United States is politically polarized.[199] This phenomenon has been snowballing for decades,[200] resulting in our elected officials—representing our divided beliefs—compromising on less and less for the fear of an imminent primary challenge.[201] As a result, Congress is seen as (and appears to actually be) a failed institution that cannot work together even in the time of great crisis, as evidenced during the COVID-19 pandemic.[202] This documented inability of Congress to pass crucial legislation has irritated many public officials and groups that grow increasingly impatient for the legislative body to show signs of life again. One reform could come by changing the rules of the Senate filibuster,[203] a long-standing tactic that allows the minority party in the Senate to effectively block the full Senate from voting on a legislative act.[204] While this potential reform is noted, the likelihood that the Senate ends the use of the filibuster does not look imminent[205] and thus leaves Congress gridlocked in a period of problematic partisanship.

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199. *See supra* note 180.

200. *See, e.g.*, Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/ [https://perma.cc/MF2N-WJV9]; Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411, 418–21 (2014).

201. *See* ROBERT G. BOATRIGHT, GETTING PRIMARIED: THE CHANGING POLITICS OF CONGRESSIONAL PRIMARY CHALLENGES 23–24 (2013) (recounting various instances of incumbents being "primaried out" by intra-party challengers for being perceived as "insufficiently partisan").

202. *See, e.g.*, Megan Brenan, *Congress' Approval Drops to 18%, Trump's Steady at 41%*, GALLUP (July 30, 2020), https://news.gallup.com/poll/316448/congress-approval-drops-trump-steady.aspx [https://perma.cc/E9V5-UTNQ]; Mike Dorning & Steven T. Dennis, *'Glaring Failure': Washington's Dysfunction Hits a New Low*, BLOOMBERG (Dec. 22, 2020, 12:00 AM), https://www.bloomberg.com/news/articles/2020-12-22/trump-congress-dysfunction-delayed-vital-aid-in-year-of-crises [https://perma.cc/9C7G-MJ2Y]; Paul Kane, *Congress Deeply Unpopular Again as Gridlock on Coronavirus Relief Has Real-Life Consequences*, WASH. POST (Aug. 1, 2020, 4:00 AM), https://www.washingtonpost.com/powerpost/congress-deeply-unpopular-again-as-gridlock-on-coronavirus-relief-has-real-life-consequences/2020/07/31/6d2f10c4-d36a-11ea-8c55-61e7fa5e82ab_story.html [https://perma.cc/V4KT-7QNP].

203. The filibuster is "a loosely defined term for action designed to prolong debate and delay or prevent a vote on a" legislative act that can be overcome with 60 Senators voting for cloture on the legislative act. *U.S. Senate: About Filibusters and Cloture*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm [https://perma.cc/6RUN-QYHD] (last visited Mar. 14, 2021).

204. *See* Susan Cornwell, *Explainer: What Is the U.S. Senate Filibuster and Why Is Everyone Talking About It?*, REUTERS (Mar. 17, 2021, 7:51 AM), https://www.reuters.com/article/us-usa-congress-filibuster-explainer/explainer-what-is-the-u-s-senate-filibuster-and-why-is-everyone-talking-about-it-idUSKBN2B22HK [https://perma.cc/EA47-YWGH].

205. *See, e.g.*, Siobhan Hughes & Eliza Collins, *Democrats Fail in Push to Change Senate Filibuster, Sinking Elections Bill*, WALL ST. J. (Jan. 19, 2022, 11:26 PM),

In this Author's view, the grisly gridlock on Capitol Hill cuts against the Court's presumption that Congress is capable of resolving partisan gerrymandering questions. As of late, elected officials appear keener on promoting their own self-interests as opposed to furthering the best interests of the United States as a whole.[206] Therefore, with the current Congress split evenly along party lines, it is hard to have much faith in Congress acting anytime soon to establish independent redistricting commissions or prohibit partisan gerrymandering altogether.[207]

B. The States

Also central to the *Rucho* decision was judicial deference to the states because many jurisdictions have acted in the past to control the use of partisan gerrymanders.[208] Unlike the U.S. Congress, which is limited to enumerated powers derived from the Elections Clause and any subsequent constitutional amendments, the states enjoy general, broad powers to regulate elections.[209] Possessing this power, a majority of states[210] have gone higher than the "floor" set by the U.S. Constitution[211] and provided Free Election or Fair District Clauses, which say something to the effect that elections shall be free or equal.[212] With those textual

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https://www.wsj.com/articles/senate-democrats-brace-for-defeat-on-elections-bill-filibuster-changes-11642617597 [https://perma.cc/U3C2-Q73B]; Kyrsten Sinema, *Opinion: Kyrsten Sinema: We Have More to Lose than Gain by Ending the Filibuster*, WASH. POST (June 21, 2021, 8:31 PM), https://www.washingtonpost.com/opinions/2021/06/21/kyrsten-sinema-filibuster-for-the-people-act/ [https://perma.cc/26D6-GM8C].

206. *See, e.g.*, Shalev Roisman, *Constitutional Acquiescence*, 85 GEO. WASH. L. REV. 668, 681 (2015) (drawing reference to the idea that elected Congress members' "primary motivation" is to be reelected). For a candid example, the attorney representing the Arizona Republican Party admitted before the Supreme Court that the party's interest in a pair of voting restriction laws was to give the party a competitive advantage against Democrats: "[p]olitics is a zero-sum game." Laurie Roberts, *Republicans Admit the Real Reason for Election "Reforms" – They Help Republicans Win*, AZCENTRAL (Mar. 2, 2021, 5:48 PM), https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2021/03/02/arizona-gop-lawyer-admits-real-reason-wants-election-reform/6895380002/ [https://perma.cc/F75E-8R8D]; *see also supra* note 29.

207. Sarah D. Wire, *Slim Majorities in the New Congress Will Make Big Legislation Difficult*, L.A. TIMES (Jan. 3, 2021), https://www.latimes.com/politics/story/2021-01-03/house-democrats-small-majority-nancy-pelosi-challenges [https://perma.cc/PRY3-73LD].

208. Rucho v. Common Cause, 139 S. Ct. 2484, 2507–08 (2019).

209. *See supra* notes 52–55 and accompanying text.

210. *See Free and Equal Election Clauses in State Constitutions*, NAT'L CONF. STATE LEGISLATURES (Nov. 4, 2019), https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx [https://perma.cc/8SCR-5B4S] (collecting the 30 states with constitutional provisions that include a "Free and Equal Election Clause," which has been used to invalidate redistricting plans by state courts).

211. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) ("But the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution.").

212. *See, e.g.*, FLA. CONST. art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party . . . ."); N.C. CONST.

hooks, state courts then in turn have a legitimate basis to inquire into and invalidate plans that are politically unfair or discriminate against a group of partisans.[213]

But this point actually raises the question posed by the *Rucho* dissent: "[W]hat do those courts know that this Court does not?"[214] No Free Election Clause expressly provides any sort of judicially manageable standard on its face (in fact, at least one just generally states that "elections shall be free").[215] The Fourteenth Amendment's Equal Protection Clause arguably goes further by proclaiming that no state shall "deny to *any person* within its jurisdiction *the equal protection of laws*."[216] If the Court is indeed accurate that such a sharp distinction should be drawn between the open-ended terminologies of "equal protection" and "free and equal," then such a strain should surely cause mischief in other areas of the Court's jurisprudence.[217]

Even moving past that argument, the pitfall of leaving the issue of partisan gerrymandering to the states (with a bitterly split Congress unable to act) is that not every state has a Free Election Clause. In the 20 states that do not have such a constitutional provision,[218] partisan gerrymanders are free from any sort of judicial review. And while respect towards federalism rested at the heart of *Rucho*, the decision implicates the disparate and undesirable effects of some states having strong protections against partisan gerrymanders while others offering no protections whatsoever.[219] Without federal courts providing review, an issue that involves a fundamental right—partisan gerrymandering and the right to vote—is instead kicked to each respective state. With a gridlocked Congress unable to adequately check each state's actions regarding the manner of holding elections, the threat of partisan gerrymandering increases exponentially after *Rucho*. One would be hard-pressed to truly believe that state elected officials would willingly relinquish

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art. I, § 10 ("All elections shall be free."); PA. CONST. art. I, § 5 ("Elections shall be free and equal . . . .").

213. *See, e.g.*, League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 416 (Fla. 2015); Adams v. DeWine, No. 2021-1428, 2022 WL 129092, at *5, *9–15 (Ohio Jan. 14, 2022); League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 824 (Pa. 2018); Harper v. Hall, No. 413PA21, 2022 WL 343025, at *1, *3 (N.C. Feb. 4, 2022) (entering an order with an opinion to follow); Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584, at *135 (N.C. Super. Ct. Sept. 3, 2019).

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

215. N.C. CONST. art. I, § 10.

216. U.S. CONST. amend. XIV, § 1 (emphasis added).

217. For example, why should laws that limit independent expenditures be violative of Freedom of Speech while a redistricting plan that discriminates against a targeted group of people fails to implicate equal protection of the law? *See* Citizens United v. FEC, 558 U.S. 310 (2010). Or, if the Equal Protection Clause does not really direct that "all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), then what else—besides partisanship—fails to receive any constitutional protection?

218. *See Free and Equal Election Clauses in State Constitutions*, *supra* note 210.

219. As a common form of protection to combat partisan gerrymandering, independent districting commissions are often approved not by elected officials but instead by the people. *See infra* notes 221, 224 and accompanying text.

partisan gerrymandering (which bolsters their reelection chances) to instead embrace an increased risk of defeat in a more politically neutral (and competitive) district. If they enacted the gerrymander, why surrender its use now that federal courts are blocked from judicial review? These discrepancies indicate that the states are unable to comfortably provide the redress necessary to resolve claims of partisan gerrymandering.

C. (We) The People

With the pronounced defects of Congress and the states, the final avenue is arguably the most controversial as well as the most successful: "the People" (through direct democracy[220]). Even when state politicians wish to continue using partisan gerrymanders, they may nonetheless be out of luck when the public authorizes the use of independent redistricting commissions to draw districts.[221] With a statewide vote, the citizenry can be assured that the will of the people will be adequately represented, as they approve or reject a direct-democracy measure.[222] However, the pervasive problem concerning such an avenue is that "[f]ewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest . . . voters are dependent on legislators to make electoral changes."[223] So far, only 15 states will use independent redistricting commissions to draw its state legislative districts for the 2020 redistricting cycle and beyond—with all 15 states adopting the commissions through direct-democracy initiatives.[224] This is problematic, as a majority of states do not offer voter-initiative means. And for those that do have direct-democracy means, only 15 states have enacted independent redistricting commissions. But at least in those 15 states, direct democracy appears—absent judicial intervention—fairly successful in its limited sample size in enacting independent redistricting commissions to combat partisan gerrymandering.

Importantly, the crux here is "absent judicial intervention." In 2015, the Court narrowly decided *Arizona State Legislature v. Arizona Independent*

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220. Variations of direct democracy include voter initiatives and referendums, legislative referrals, and recalls. *See* Stephan Kyburz & Stefan Schlegel, *8 Principles of Direct Democracy*, CTR. GLOBAL DEV. (July 29, 2019), https://www.cgdev.org/blog/8-principles-direct-democracy [https://perma.cc/G4F5-YR68].

221. *See* Graham Moomaw, *In Historic Change, Virginia Voters Approve Bipartisan Commission to Handle Political Redistricting*, VA. MERCURY (Nov. 4, 2020, 1:17 AM), https://www.virginiamercury.com/2020/11/04/in-historic-change-virginia-voters-approve-bipartisan-commission-to-handle-political-redistricting/ [https://perma.cc/GK68-ZZP8] (detailing that over two-thirds of Virginia voters approved a bipartisan commission in 2020 that was previously rejected by state lawmakers).

222. I do note, but do not further address, the possible distinction between the will of the people and what may actually be in the best interests of society. *See* THE FEDERALIST NO. 51 (James Madison) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.").

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

224. *See Creation of Redistricting Commissions*, NAT'L CONF. STATE LEGISLATURES (Dec. 10, 2021), https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx [https://perma.cc/SL5K-5A26].

Redistricting Commission,[225] which held that direct-democracy initiatives operate functionally the same as a state legislature per the Elections Clause.[226] In dissent was Chief Justice Roberts, who noted the text of the Elections Clause clearly delegates such power to the state's legislature and not to its people.[227] The dissent would have held Arizona's (and presumably all other states') independent redistricting commissions to be unconstitutional when enacted through direct-democracy initiative.[228] Justices Alito and Thomas joined the Chief Justice in dissent; agreeing that direct-democracy initiatives are not a proper means to combat partisan gerrymandering. While this position was then only the dissent, it may now command a majority.[229] If the new Justices concur with the Chief Justice and vote to overrule this recent precedent, then the only options left will be for Congress and the states to prevent extreme partisan gerrymandering. Therefore, the current Court may eliminate the direct-democracy avenue altogether. That would mean the only cures to partisan gerrymandering would lie in the hands of each state—which draws the gerrymandered districts in the first place—or a polarized and gridlocked Congress, a Congress seated via the very same gerrymanders enacted by the states.

So, although "the People" have been successful in curbing partisan gerrymandering in the states where direct democracy is available, this avenue may soon be on the judicial chopping block. After *Rucho*, it seems worrisome to restrict yet another avenue of redress by finding commissions established through direct-democracy means to be unconstitutional. And because of that concern, the Justices should exercise restraint in the event the matter finds itself again before the Court.[230] But even if the dissenting opinion in *Arizona State Legislature* prevails, it underscores the importance of partisan gerrymandering being justiciable in federal court.[231]

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225. 576 U.S. 787 (2015).

226. *Id.* at 824; *see also* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections . . . shall be prescribed in each State *by the Legislature thereof* . . . ." (emphasis added)).

227. *Ariz. State Legislature*, 576 U.S. at 824–25 (Roberts, C.J., dissenting) (quipping that Arizona was "the second State . . . to ratify the Seventeenth Amendment . . . . The Amendment resulted from an arduous, decades-long campaign . . . . What chumps! Didn't they realize that all they had to do was interpret the constitutional term 'the Legislature' to mean 'the people'?").

228. *Id.* at 849–50 (Roberts, C.J., dissenting).

229. Both Justices Ginsburg (the author of the opinion) and Kennedy composed the majority and have since been replaced by Justices Barrett and Kavanaugh, respectively. Justice Scalia, who joined the dissent, has since been replaced by Justice Gorsuch. So, it is currently uncertain how these new Justices would rule in a similar case.

230. *See* Citizens Protecting Michigan's Const. v. Sec'y of State, 921 N.W.2d 247, 278 (Mich. 2018) (noting that "it is not a judge's role to philosophize a theory of government. Rather, we are stewards of the people and must faithfully abide by the decisions they make through the laws they adopt").

231. For if the only avenues left are an inefficient Congress and self-interested lawmakers, there is a supreme need for federal courts to represent the people's rights—especially if direct-democracy means are off the table.

CONCLUSION

Although judicial restraint is an invaluable trait that judges should exercise when the Constitution is silent, it should not be invoked where a fundamental right like that of the vote is at stake. Partisan gerrymandering—like malapportioned districting and racial gerrymandering—dilutes votes through packing and cracking and jeopardizes the citizenry's ability to effectively cast a ballot and have their vote be weighted equal to that of another's in a different district. When a claim invokes the sacred right to vote[232]—one that is inextricably intertwined with the very heart of a democratic society—federal courts should be able to exercise the expansive power of judicial review to protect that right.[233] Other public avenues do exist to resolve the problem of partisan gerrymandering, but those roads often entail delays and serious deficiencies[234] that lead the United States down a pathway to a political-process breakdown.

Federal courts have historically used their power to preserve and protect the fundamental rights of the populace.[235] Although all these decisions involve complex matters of judgment and line-drawing, they have nevertheless been deemed to be justiciable. So, this same treatment should extend to the right to vote in a free and fair election not hopelessly encumbered and distorted by extreme partisan gerrymandering. Because the right to vote is a fundamental right, the Supreme Court should revisit its holding in *Rucho* and, once again, find partisan gerrymandering claims to be justiciable in federal court. Even if the Court's rationale rested on judicial restraint, a more appropriate use of this restraint would be not closing the door to partisan gerrymandering claims for good, especially when such a decision stands on a finding that there can never be a workable, judicially manageable standard.[236]

Additionally, if the Court is truly concerned about public perceptions of legitimacy, it has had a rocky track record thus far with perhaps the most political process: elections. From intervening in the 2000 presidential election,[237] to expanding free speech protection to independent expenditures,[238] to watering down a long-standing landmark act,[239] to now holding partisan gerrymanders to be

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232. *See* Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

233. *See supra* notes 48–49 and accompanying text.

234. *See supra* Part *266*III.

235. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

236. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring) ("This is a difficult proposition to establish, for proving a negative is a challenge in any context . . . . Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution.").

237. *See* Bush v. Gore, 531 U.S. 98 (2000); *supra* notes 175–176 and accompanying text.

238. *See* Citizens United v. FEC, 558 U.S. 310, 365–66 (2010); *supra* note 177 and accompanying text.

239. *See* Shelby Cnty. v. Holder, 570 U.S. 529 (2013); *supra* notes 178–179 and accompanying text.

nonjusticiable in federal court,[240] the Court surely has never been one to shy away from claims revolving around politics.[241] So, even if judicial restraint is the proffered proposition in *Rucho*, perhaps surrendering some restraint is appropriate when the underlying action resembles other justiciable claims[242] and speaks directly to the fundamental right to vote. If *Citizens United v. Federal Elections Commission* protected one's freedom of speech and expression through political campaign expenditures, and *Shelby County v. Holder* protected a state's sovereignty from a federal government that is "too involved," then this Court should extend this same commitment to protecting an individual's right to vote when blocs of people are pretextually placed in districts for the purpose of diluting their vote.[243]

In the end, our government is to be comprised by the interests of the people who elect their representatives rather than by the representatives elected by the people.[244] If elected representatives wielded with unbridled authority the power to entrench themselves at the expense of the public, our government is less "of the People"[245] and more of what our Founders feared.[246] When the judicial branch forgoes its constitutional power to check its sister branches in the name of a political question, how long until all questions are corrupted by politics, rendering all possible matters outside the purview of federal court? If state constitutions contain similarly broad language to guide state courts in managing partisan gerrymandering claims, then what is truly hindering federal courts from doing the same? Further, a handful of district courts finally coalesced around standards based on Equal Protection and Freedom of Speech. As Justice Kennedy previously indicated on the

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240. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

241. *See* Baker v. Carr, 369 U.S. 186, 209 (1962) ("Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.'" (quoting Nixon v. Herndon, 273 U.S. 536, 540 (1927))).

242. For example, malapportioned districting and racial gerrymandering claims.

243. *See* Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

244. *See* THE FEDERALIST NO. 39 (James Madison) ("It is ESSENTIAL to such a [republican] government that it be *derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it* . . . ." (emphasis added)). Without such a protective promise, however, Madison warned that "a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic." *Id.*

245. Address at the Dedication of the Gettysburg National Cemetery (Nov. 19, 1863), *in* THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 786, 788 (Philip Van Doren Stern ed., 2000) ("It is . . . for us to be here dedicated to the great task remaining before us . . . that this nation, under God, shall have a new birth of freedom—and that government *of the people, by the people, for the people*, shall not perish from the earth." (emphasis added)).

246. *See* THE FEDERALIST NO. 57 (James Madison) ("If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant . . . spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.").

matter: "A determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene."[247] This sentiment holds true today: political tension is high, yet the Supreme Court surrendered its power to review claims that, if left solely to the political process, could further fuel the partisan inferno spreading across the country.[248]

In *Rucho*, the Court curtailed the right to vote by holding partisan gerrymandering claims to be a nonjusticiable political question.[249] I believe, in the same vein as Justice Kennedy, that this decision was premature, especially when state and federal courts have used standards to assess when a partisan gerrymander goes too far. Compounded by the practical defects of leaving the solution solely to Congress and the states, and the uncertainty behind direct-democracy initiatives, the Supreme Court should revisit its decision and once again determine that partisan gerrymandering claims are justiciable in federal court. If our Constitution truly "leaves no room for classification of people in a way that unnecessarily abridges" the fundamental right to vote,[250] then partisan gerrymandering claims must be reviewable by those without a nefarious stake in the political process: impartial and independent federal judges.

247. Vieth v. Jubelirer, 541 U.S. 267, 309–10 (2004) (Kennedy, J., concurring).
248. *See supra* notes 27–31, 180, 199–202 and accompanying text.
249. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).
250. Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964).