2024

Derailing Democracy, Shrinking Responsibility: The New Election Law Landscape

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Abstract

In democracy jurisprudence, the Roberts Court wears two faces. Its most recent duo of cases illustrates the inconsistency. In *Rucho v. Common Cause*, the Court ruled that even grossly partisan gerrymanders are nonjusticiable in federal courts. Yet, in *Moore v. Harper*, the Court rejected granting unreviewable authority to state lawmakers to regulate federal elections—for now. This combination of rulings is not ideological moderation or judicial restraint, as the Court claims. These recent cases are emblematic of broader unpredictability and selectivity in election law. The assertions of judicial humility in *Rucho* stand in stark contrast to the bald activism of *Citizens United v. Federal Election Commission* and *Shelby County v. Holder*, wherein the Court struck down large parts of campaign finance law and a vital part of the Voting Rights Act, respectively. Yet, the Court *is* consistent in two ways. In terms of outcomes, its democracy decisions favor anti-democratic maneuvering, and, in methodological terms, the claims of judicial restraint mask a general strategy of accruing power for itself while claiming judicial humility. Thus, the Court is avoiding controversy and shirking responsibility while achieving ideologically driven outcomes and promoting its own power. This Article reveals the variability and self-serving false modesty of the Court's jurisprudence at three levels: in the two most recent cases, in the broader democracy jurisprudence of the Roberts Court, and of the Court over time. It shows that claims of judicial restraint prevent accountability and allow the Court to evade its most vital responsibility: protecting democracy.

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INTRODUCTION

In *Moore v. Harper*,[1] the Supreme Court made a ruling that even critics of the Roberts Court heralded as a significant win for democracy.[2] It rejected the "Independent State Legislature Theory,"[3] holding that state lawmakers are not vested with sole authority to set rules for elections.[4] This meant that state judicial review is consistent with the Elections Clause of the Constitution,[5] which calmed fears that states could enact unconstitutional restrictions on voting without the possibility of review by state courts.[6] The decision also honored a promise from a few terms earlier in which the Court assured the public, in *Rucho v. Common Cause*,[7] that although partisan gerrymandering claims are nonjusticiable in federal courts, such claims would not be condemned to "echo into a void."[8] Many had feared that, by refusing to review even gross political gerrymanders, *Rucho* would be followed by a ruling prohibiting state court review of election shenanigans,[9] leaving states completely unchecked.

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1. 600 U.S. 1 (2023).

2. *See, e.g.*, Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory is Happy News for the Court, the Country, and Commentators*, 2022 CATO SUP. CT. REV. 275, 297 (2023).

3. *See id.* at 275–76 (defining the Independent State Legislature Theory).

4. *Moore*, 600 U.S. at 22.

5. *Id.*

6. *See, e.g.*, Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 137 (2023) (calling the theory "an unprecedented, unconstitutional, and potentially chaos-inducing intrusion into state election law"); Caren Short, *State Legislature Seeks Unchecked Power Over Elections in* Moore v. Harper, LEAGUE WOMEN VOTERS (Aug. 24, 2022), https://www.lwv.org/blog/state-legislature-seeks-unchecked-power-over-elections-moore-v-harper [https://perma.cc/FP97-7JDL].

7. 588 U.S. 684 (2019).

8. *Id.* at 719.

9. *E.g.*, Geoff Bennett & Saher Khan, *Supreme Court Rejects Legal Theory that Could Have Thrown 2024 Election into Disarray*, PBS NEWS HOUR (June 27, 2023, 6:55 PM), https://www.pbs.org/newshour/show/supreme-court-rejects-legal-theory-

Taken at face value, the decisional duo of *Rucho* and *Moore* project an impression of judicial modesty, evincing the Court's oft-cited reluctance to overstep its limited role and wade into the thicket of political bickering.[10] But a closer look reveals that the Court is engaged in a more calculated and troubling project. By divesting the federal courts of authority to adjudicate certain election law claims in *Rucho* while holding in *Moore* that state courts are free to do just that, the Court is shifting the burden of difficult decisions downward—not to the "democratic process," but to lower courts.

Such an evasive maneuver leaves vulnerable the fundamental principle of democratic representation. With its reputational prestige and its members enjoying lifetime appointments, the Court is uniquely positioned to tackle gerrymandering and other election law claims.[11] Given the national scope of its jurisdiction, the Court can set uniform standards and precedents, ensuring that election rules are addressed consistently across states.[12] By contrast, elected state court judges, especially in closely divided states, face intense political crosswinds, making it all but impossible to render impartial decisions in cases that could significantly influence the electoral prospects of the very parties or people that support or oppose their election.[13] The prospect of continuous election litigation opens the door to raucous and debilitating fights over the legitimacy of state court decisions

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that-could-have-thrown-2024-election-into-disarray[https://perma.cc/XQ6Y-CU9R] ("To me, this decision is a signal that six justices . . . are going to stand against monkeying and games and shenanigans in the 2024 election.").

10. Chief Justice John Roberts declared at his confirmation hearing that "[j]udges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States).

11. *See* Transcript of Oral Argument at 62, Gill v. Whitford, 585 U.S. 48 (2018) (No. 16-1161) ("[Y]ou are the only institution in the United States that can do -- that can solve this problem just as democracy is about to get worse because of the way gerrymandering is getting so much worse.").

12. *See Gill*, 585 U.S. at 74 (Kagan, J., concurring) ("[O]nly the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches."); *id.* at 86 ("Courts—and in particular this Court—will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.").

13. *See generally* Richard Lorren Jolly, *Judges as Politicians: The Enduring Tension of Judicial Elections in the Twenty-First Century*, 92 NOTRE DAME L. REV. ONLINE (2016) (arguing that judges cannot be both democratic and disinterested).

(as seen, for instance, in Wisconsin[14] and New York[15]). And even a state's highest court cannot, of course, set national standards.

It is arguable that, with this pair of decisions, the Court is appropriately exercising judicial restraint, by which judges employ procedural tactics to sidestep ruling on the merits of cases that could embroil the Court in political quagmires.[16] But in so doing, the Court has repudiated decades of precedent that adhered to the Equal Protection principle laid out in *United States v. Carolene Products*[17]: that the Court should be particularly vigilant and stand ready to intervene when the democratic process is stifled, hindered, or manipulated due to majority entrenchment of its own political power.[18] By giving a green light to state courts to honor the spirit of *Carolene* while refusing to do so itself, the Court is shirking one of its core obligations. It is also misleading because the Court is selective in such deference and is arguably using the appearance of self-restraint to mask longer-term activism. Indeed, multiple concurrences in *Moore* hint at a future revival of the Independent State Legislature Theory, even as the Court seemingly renounced it,[19] which would leave no court whatsoever to review election laws passed by self-serving politicians.

This maneuver is not new. It mirrors and extends a pattern evident from earlier election law decisions in which the Court applied a selective deference only when it would result in outcomes hostile to fully representative democracy.[20] Through this technique, the Court is able to absolve itself of direct involvement in election law disputes when it prefers to, while conveniently placing trust in other entities that often do not champion a broadly inclusive democratic process.[21] The result is a jurisprudence that, under the guise of deference, enables—

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14. *See infra* Section III.A.1.

15. *See infra* Section III.A.2.

16. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986) (describing the "passive virtues" of courts not deciding controversial issues).

17. 304 U.S. 144, 152 n.4 (1938).

18. *See* Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 111–12; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980).

19. *See infra* Section II.D.

20. *See generally* James Sample, *The Decade of Democracy's Demise*, 69 AM. UNIV. L. REV. 1559 (2020) (making this argument at length).

21. *See id.* at 1607.

rather than mitigates—legislative measures and state court decisions that erode the fabric of an equitable and participatory political system.

Democracy is currently in a perilous state, both around the world[22] and in the United States.[23] In the aftermath of the Court's evisceration of the Voting Rights Act in *Shelby County v. Holder*,[24] several states raced to implement laws that made it harder to vote.[25] The Court, meanwhile, "may be as aware as any other observer of the pathologies of modern American democracy: gerrymandering, voter suppression, the enormous influence of the wealthy, and so on" but may be unwilling to do anything about it because the majority of Justices realize that "these pathologies redound largely to their ideological benefit."[26] As Dean Franita Tolson has said, "I am skeptical . . . that the Constitution can endure when the courts interpret our most important document to justify and promote a crisis rather than address it."[27]

Given former- and future-President Donald Trump's relentless efforts to contest the 2020 election results,[28] the Court's decisions are especially concerning. By demonstrating an expansive tolerance for the manipulation of election laws, the Court has effectively laid a breeding ground for electoral subversion at the state level. This may, for instance, embolden some state legislatures to pass more restrictive laws under the

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22. *See Democracy Under Threat Around the World*, REUTERS (Nov. 1, 2023, 8:02 PM), https://www.reuters.com/world/democracy-under-threat-around-world-intergovernmental-watchdog-2023-11-02/ [https://perma.cc/8UL3-LDPW] ("Half of the world's countries are suffering democratic decline, ranging from flawed elections to curtailed rights including freedoms of expression and assembly.").

23. *See* Joel Rose & Liz Baker, *6 in 10 Americans Say U.S. Democracy is in Crisis as the 'Big Lie' Takes Root*, NPR (Jan. 3, 2022, 5:00 AM), https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6 [https://perma.cc/L6SX-5DZF]; Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want to Upend the System*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2022/07/13/us/politics/government-trust-voting-poll.html [https://perma.cc/625E-XMBB].

24. 70 U.S. 529 (2013).

25. *See* Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 59 (2020); Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2145 (2015). But note that multiple other states passed more expansive state voting rights acts. *See* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. 299, 301 (2023).

26. Stephanopoulos, *supra* note 18, at 116–17.

27. Franita Tolson, *Levinson and Balkin are Both Right?: Article V, the Supreme Court, and the Cost of Political Dysfunction*, 68 DRAKE L. REV. 237, 241 (2020).

28. *See generally* MICHAEL ISIKOFF & DANIEL KLAIDMAN, FIND ME THE VOTES (2024) (discussing Donald Trump's efforts to contest the 2020 election results).

guise of "safeguarding" elections, knowing that the federal courts maintain a hands-off approach and that friendlier state courts will be the primary venues for adjudication. Even worse, some state lawmakers could consider measures such as directly awarding electoral votes[29]—bypassing the people altogether—which could lead to the emergence of "alternate slates of electors"—one certified by the governor and another approved by the legislature—leaving the task of sorting it out to a divided, partisan Congress.[30] These scenarios paint a grim outlook for the future of American democracy. And that is the better-case scenario: if the signs that some of the *Moore* majority may be open to reconsidering the Independent State Legislature Theory in the future are true, state legislatures may then be completely free from judicial review altogether.

Even those who may want to see the current Supreme Court making fewer election law rulings should be concerned that *all* federal courts are now unable to correct gerrymanders and that state legislative shenanigans could be entirely unreviewable in the future if we take Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh at their words. We should believe them—Chief Justice John Roberts, in overturning part of the Voting Rights Act in *Shelby County*, reminded us that the Court had signaled that this was coming.[31] The Court continued on this path in *Citizens United v. Federal Election Commission*.[32] And the contrast between the so-called

29. *E.g.*, Rachel Leingang, *Arizona Republican Says State Lawmakers, Not Voters, Should Pick President*, THE GUARDIAN (Jan. 30, 2024, 4:05 PM), https://www.theguardian.com/us-news/2024/jan/30/arizona-legislature-elect-president -bill-senator-anthony-kern [https://perma.cc/8Z83-3L4U].

30. This would be contrary to the Constitution's command that electors must be chosen on election day, as set by Congress, U.S. CONST. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes."). But if the Independent State Legislature Theory holds, there may be no way of challenging such action in court. As explored below, *see infra* Section II.D, a future majority of Justices may still embrace such a view.

31. 570 U.S. 529, 540 (2013) ("Concluding that 'underlying constitutional concerns,' among other things, 'compel[led] a broader reading of the bailout provision,' we construed the statute to allow the utility district to seek bailout. . . . In doing so we expressed serious doubts about the Act's continued constitutionality." (alteration in original) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 207 (2009))).

32. 558 U.S. 310, 333 (2010) ("The controlling opinion in [*Wisconsin Right to Life, Inc. v. Federal Election Commission*], which refrained from holding the statute invalid except as applied to the facts then before the Court, was a careful attempt to accept the essential elements of the Court's opinion in *McConnell*, while vindicating the First Amendment arguments made by the [*Wisconsin Right to Life*] parties." (citing Fed. Election Comm'n v. WRTL, 551 U.S. 449, 482 (2007))).

deference in *Rucho* and the vigorous activism in *Shelby County* and *Citizens United* shows that the Court's deference is selective, and selective deference is no constraint at all. The problem is not so much that *Rucho* is wrong but that it is *false*, as is its promise of judicial modesty.

The Court's strategy of masking its ideologically-driven goals under the legitimizing cloak of judicial restraint goes beyond democracy jurisprudence. It began even before Chief Justice John Marshall became arguably the Court's greatest strategist at expanding judicial power while avoiding controversy with the elected branches.[33] And this approach essentially defines some subsequent Court eras.[34] We show that the Roberts Court's claim of judicial restraint does not hold up to close scrutiny and that the merits of this judicial philosophy are illusory. In fact, the practice is harmful, especially so in relation to democracy jurisprudence.

This Article ties together the Court's treatment of partisan gerrymandering, the Independent State Legislature Theory, the broader democracy jurisprudence, and the even broader concept of judicial restraint. It explores the resulting implications for democracy. Part I examines the Court's attempts to grapple with gerrymandering, culminating in its abandonment of the task in *Rucho*. Part II discusses the genesis and development of the Independent State Legislature Theory, and the broader significance of the Court's apparent rejection of it in *Moore*. Part III argues that the combination of *Rucho* and *Moore* imposes an inappropriate and selectively applied "deference," which ends up enabling anti-democratic actors. It also shows that this two-step by the Court is not unique to these two cases, but rather is part of a broader approach to election law in which the Supreme Court strategically selects issues to address and avoids others, all with the ultimate effect of protecting itself while doing little to protect democracy. Part IV puts this phenomenon in a historical context, revealing a Supreme Court aggrandizing its power while avoiding its core responsibilities.

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33. *See* Melvin I. Urofsky, *Marbury v. Madison*, BRITANNICA (June 17, 2024), https://www.britannica.com/event/Marbury-v-Madison [https://perma.cc/U4SJ-JEVV].

34. Ariz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 582–83 (2012).

I. THE COURT'S GRAPPLING WITH GERRYMANDERING

Because the task of post-census congressional redistricting is usually, though not always,[35] left to self-interested partisan legislators, it is highly susceptible to the practice of partisan gerrymandering.[36] A gerrymander occurs when the party controlling the redistricting process manipulates the district boundaries to gain an electoral advantage.[37] This is done in two ways: "packing" and "cracking." Packing involves concentrating the opposing party's voters into a few districts to reduce their influence in other districts; cracking means spreading those voters across many districts to dilute their voting power.[38] The result is a skewed political map where the distribution of seats does not accurately reflect the overall political leanings of the state's population.

Several harms result. Most obviously, it leads to disproportionate representation, due to "representational asymmetry" between the two parties,[39] wherein the non-gerrymandering party would have to receive a far greater share of the statewide vote to achieve the same number of seats as the gerrymandering party.[40] But the representational damage caused by gerrymandering goes beyond an imbalance in the number of seats relative to the percentage of votes received. It also results in "ideological skewing"—that is, a Democratic delegation that is more liberal than it would otherwise be or a Republican delegation that is more conservative.[41] Additionally, because partisan gerrymandering leads to "safe" (i.e., noncompetitive) districts for both parties, primary elections can become the sole meaningful opportunity for voters to influence their representation[42]—exacerbating political

35. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808–09 (2015). This case is discussed *infra* Section II.B.

36. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015).

37. *Id.*

38. *See* John N. Friedman & Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, But Never Crack*, 98 AM. ECON. REV. 113, 113 (2008).

39. Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Gerrymandering*, 68 STAN. L. REV. 1263, 1271–72 (2016).

40. *See id.*

41. Nicholas O. Stephanopoulos, *The Causes and Consequences of Partisan Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2120 (2020).

42. *See Wang*, *supra* note 39, at 1272. Competitive seats in the House of Representatives dropped from nearly 180 in 1980 to fewer than 120 in 2002. ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER 147 fig.7.2 (2010). In the same period, the

polarization because voting in primaries is more extreme than in the general election.[43] More broadly, gerrymandering is a perversion of the basic tenet that "voters should choose their representatives, not the other way around."[44] The mechanism by which votes translate into seats in government, termed "vote–seat representation," is essential for ensuring "responsiveness," i.e., that government policies reflect citizens' preferences.[45] When gerrymandering occurs, the "vote–seat representation" becomes skewed, leaving a group of legislators who are entirely unresponsive and unrepresentative.[46]

In *Rucho v. Common Cause*, the Court hinted at these concerns, admitting that partisan gerrymandering is "incompatible with democratic principles,"[47] but gave little true consideration to the serious harms that arise from a "hands off" approach to gerrymandering. The Court's jurisprudence on the issue has never been a model of clarity. Its previous attempts to navigate partisan gerrymandering have produced decades of knotty results—fragmented outcomes with pluralities and narrow concurrences,[48] frustrating searches for viable standards,[49] and increased grappling with ever-more extreme methods and types of gerrymandering.[50] Despite the struggle in addressing this issue, though, the Court had begun to inch closer to a standard for evaluating such claims—until its choice in *Rucho* to remove itself entirely from the fray. The earlier cases, and the many earnest and viable proposals from the bench that they produced, show how differently the jurisprudence could have developed. But, instead, the Court used various measures of avoidance before ultimately shirking all responsibility to police self-interested politicians from

House became overwhelmingly dominated by safe seats, rising from less than 140 to more than 200 in the same period. *Id.*

43. *The Polarization of the Congressional Parties*, VOTEVIEW (Jan. 30, 2016), https://legacy.voteview.com/political_polarization_2015.htm [https://perma.cc/Z8H6-TNH7].

44. Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005).

45. Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 ELECTION L.J. 453, 455 (2017).

46. *Id.* at 455–56.

47. Rucho v. Common Cause, 588 U.S. 684, 718 (2019) (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

48. *E.g.*, Davis v. Bandemer, 478 U.S. 109 (1986) (resulting in a plurality opinion).

49. *E.g.*, Vieth v. Jubelirer, 541 U.S. 267 (2004) (reviewing "possible standards" based on the opinion in *Bandemer*).

50. *E.g.*, Gill v. Whitford, 585 U.S. 48, 70 (2018).

distorting the democratic order and the constitutional voting system.

A. *Early Cases: Avoidance Through Judicial Management Concerns*

The Court first heard a constitutional redistricting claim in 1973, in *Gaffney v. Cummings*,[51] which had a considerably different posture than later cases.[52] *Gaffney* addressed a Connecticut legislative map, challenged due to perceived partisan skewing.[53] The plan was crafted by a three-member board, comprised of a Republican, a Democrat, and an impartial mediator, who consciously factored in the state's partisan distribution, drawing on data from the past three legislative elections.[54] The board's explicit goal was to align the proportion of legislative seats secured by each party with its statewide vote share in legislative elections.[55] This approach to political equity sought to implement a form of proportional representation, albeit within the limitations inherent to a single-member district electoral system.[56] The plaintiffs argued that this approach was too focused on minimizing population deviations between districts, leading to unnecessary division of towns and an alleged partisan bias in favor of Republicans.[57]

The Court rejected the challenge on two grounds. First, it determined that the Connecticut reapportionment plan did not constitute invidious treatment under the Equal Protection Clause of the Fourteenth Amendment.[58] This conclusion was based on the relatively minor deviations in population among districts—7.83% for House districts and 1.81% for Senate districts—which were within acceptable limits and did not significantly compromise the principle of "one person, one vote."[59] Second, the Court held that aiming for "political fairness" between major parties in the redistricting process did not render the plan constitutionally invalid.[60] The Court not only ruled that the aim to reflect a balance between the

51. 412 U.S. 735 (1973).
52. *Id.*
53. *Id.* at 735–36.
54. *Id.* at 736, 738.
55. *Id.* at 738.
56. *Id.*
57. *Id.* at 738–39.
58. *Id.* at 750.
59. *Id.* at 737.
60. *Id.* at 752.

Democratic and Republican parties did not inherently violate constitutional principles[61] but also declared the attempt at balancing political representation to be a legitimate and constitutionally permissible objective, distinguishing it from efforts to unduly favor one party over another.[62] The opinion indicated a tolerance for some degree of political consideration in redistricting, as long as it did not result in significant population imbalances or partisan bias.[63] But the type of "political consideration" that the Court tolerated in *Gaffney* was quite different in both type and impact from what it subsequently permitted under that rubric.

The *Gaffney* situation was distinct from later cases in that it did not involve "partisan gerrymandering" in the conventional sense, where the goal is to grant one political party an unfair advantage over another.[64] Instead, the redistricting plan in *Gaffney* was explicitly designed to achieve political fairness and balance between the two major parties.[65] But the decision recognized the complexity and inevitability of partisan factors in redistricting, framing the Court's approach to the issue of partisan gerrymandering in subsequent years, leading to more definitive rulings in later cases, and gradually permitting a shift away from this equalizing goal and toward its inverse.

The Court only complicated the jurisprudence with *Davis v. Bandemer*,[66] its first time squarely considering the justiciability of equal protection challenges to partisan gerrymandering. The case arose from Indiana, where Democrats alleged that a redistricting plan adopted by the Republican-controlled legislature had intentionally diluted the electoral strength of Democratic voters, infringing their rights under the Equal Protection Clause of the Fourteenth Amendment.[67]

Even though the Court in *Gaffney* had quite explicitly recognized the basic problem with gerrymandering and the correlative state interest in preventing its harms, a plurality of the Court in *Bandemer*, even while continuing to acknowledge the problem, made responding to that recognized state interest

61. *Id.* at 743.

62. *Id.* at 748, 754.

63. *See id.* at 748–49.

64. Eric McGhee, *Partisan Gerrymandering and Political Science*, 23 ANN. REV. POL. SCI. 171, 172 (2020).

65. *Gaffney*, 412 U.S. at 738.

66. 478 U.S. 109 (1986), *abrogated by* Rucho v. Common Cause, 588 U.S. 684 (2019) (holding that partisan gerrymandering claims present political questions beyond the reach of federal courts).

67. *Id.* at 115.

considerably more difficult. The ruling in *Bandemer* was split. The plurality opinion, penned by Justice Byron White, held that partisan gerrymandering claims were justiciable[68] but established an exceedingly high bar to successfully press such claims. To prevail, plaintiffs would need to demonstrate not only that a redistricting plan was driven by partisan intent but also that it led to a consistent degradation of their political influence over an extended period.[69] The persistent and systemic dilution requirement made it exceptionally hard for plaintiffs to successfully challenge partisan gerrymanders, especially as technology enabled greater precision in gerrymandering.[70] And indeed, the plaintiffs in *Bandemer* did not meet the standard, so the Court did not invalidate the redistricting plan.[71]

The Court in *Bandemer* both progressed and regressed the jurisprudence in terms of protecting democracy. On one hand, *Bandemer* marked the Court's recognition that extreme partisan gerrymandering could, in theory, violate the Constitution.[72] This was a significant step, suggesting that there were constitutional limits to the ways political parties could manipulate electoral maps to their advantage. On the other hand, by setting such a stringent standard for proving a violation, the decision effectively limited the ability of litigants to successfully challenge even egregious partisan gerrymanders. Eventually, the latter effect would come to dominate the former.

Together, *Gaffney* and *Bandemer* had twice recognized the democratic concerns associated with gerrymandering and the interest of the state in addressing both problems. Yet, the Court subsequently minimized the problem when, nearly twenty years later, it began its embrace of jurisprudential inaction. In *Vieth v. Jubelirer*,[73] the Court was expected to either renounce the justiciability of partisan gerrymandering claims altogether

68. *Id.*

69. *Id.* at 132.

70. Bernard Grofman, *Crafting a Judicially Manageable Standard for Partisan Gerrymandering: Five Necessary Elements*, 17 ELECTION L.J. 117, 127 (2018) (explaining that gerrymanders are now more persistent because "the newest, computer-driven redistricting now allows map drawers to make very precise refinements to district lines down to the census-block level. . . . [And they] can fashion maps that eliminate meaningful competition for most districts").

71. *Id.* at 131.

72. *Bandemer*, 478 U.S. at 143.

73. 541 U.S. 267 (2004).

or establish a more accessible standard for plaintiffs to meet.[74] It did neither. A plurality opinion authored by Justice Antonin Scalia found political gerrymandering claims nonjusticiable because there were no judicially discernible and manageable standards to address such claims.[75] According to Justice Scalia, no part of the Constitution offers a judicially enforceable limit on political considerations in districting.[76] The standard from *Bandemer* was deemed unmanageable, and Justice Scalia criticized other proposed standards for their lack of clarity and inability to provide concrete guidelines.[77]

Justice Anthony Kennedy, the fifth vote in favor of the outcome, concurred, but did not shut the door completely on the possibility of judicial intervention in political gerrymandering cases.[78] He acknowledged that there were significant challenges in adjudicating these claims—primarily the lack of agreed-upon principles for fair districting and standards for measuring the burden of partisan classifications.[79] But he argued it was not obvious that a workable standard might not emerge in the future.[80] Drawing on *Reynolds v. Sims*,[81] in which the Court affirmed the principle of "one person, one vote,"[82] Justice Kennedy emphasized the objective of districting as ensuring "fair and effective representation for all citizens" and asserted that, while existing standards might be unmanageable, the Court should not bar all future partisan gerrymandering claims.[83]

Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer dissented, in three separate writings, but all agreed that this case and future cases were fit to be determined by a court. Justice Souter, joined by Justice Ginsburg, proposed a five-part test to determine when partisan

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74. *See* Linda Greenhouse, *Court to Hear Case on Congressional Redistricting*, N.Y. TIMES (June 28, 2003), https://www.nytimes.com/2003/06/28/us/court-to-hear-case-on-congressional-redistricting.html [https://perma.cc/P583-HQ65].

75. *Vieth*, 541 U.S. at 281.

76. *Id.* at 306 ("Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application.").

77. *Id.* at 292–306 (disposing of arguments for standards proposed by Justices Stevens, Kennedy, Souter, and Breyer).

78. *Id.* at 306 (Kennedy, J., concurring).

79. *Id.* 306–07.

80. *Id.* at 311 ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

81. 377 U.S. 533 (1964).

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

83. *Vieth*, 541 U.S. at 307, 309 (Kennedy, J., concurring).

gerrymandering had gone too far and warranted judicial intervention.[84] Justice Breyer focused on extreme cases, arguing that courts should intervene only in situations where gerrymandering has resulted in "the unjustified entrenching in power of a political party that the voters have rejected."[85] Justice Stevens faulted the plurality's "failure of judicial will" to condemn such blatantly self-interested partisanship on the part of the lawmakers drawing the maps.[86] Justice Stevens also stressed that a majority of the Court—the four dissenters along with Justice Kennedy—held the view that gerrymandering claims were justiciable. Thus, he argued, the disagreement on the outcome in *Vieth* "should not obscure the fact that the areas of agreement set forth in the separate opinions are of far greater significance."[87]

Under the doctrine articulated in *Marks v. United States,*[88] when case decisions are split multiple ways such that no majority emerges, the narrowest opinion carries the power of precedent.[89] Justice Kennedy's opinion fit that description; the practical reality was that Justice Kennedy was the median on the issue and held sway over future outcomes for as long as that judicial division held.[90] His views provided a glimmer of hope for advocates opposed to partisan gerrymandering. Thus, while *Vieth* signaled the Court's continuing difficulty in establishing clear standards, it also emphasized the ongoing recognition, however hesitant, that at least extreme partisan gerrymandering might be subject to constitutional scrutiny.[91]

B. *Avoidance Through Standing*

The Roberts Court was presented with an opportunity to resolve directly the question of the justiciability of

84. *Id.* at 347 (Souter, J., dissenting).
85. *Id.* at 365 (Breyer, J., dissenting).
86. *Id.* at 341 (Stevens, J., dissenting).
87. *Id.* at 317 (Kennedy, J., concurring).
88. 430 U.S. 188 (1977).
89. *Id.* at 193.
90. *See* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 43 (2008) (showing that Justice Kennedy was an exceptionally powerful median Justice by virtue of not only his position at the center of the Court but also the ideological distance on either side of him to the next closest Justices).
91. *See* Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 58–59 (2004).

gerrymandering in 2018 in *Gill v. Whitford*.[92] In *Gill*, plaintiffs challenged Wisconsin's 2011 state assembly districting plan, claiming that the map was an unconstitutional gerrymander that disproportionately favored Republicans.[93] The Wisconsin Republican majority, having gained full control of the state government, had gone to great lengths to secure a gerrymander, outsourcing the map drawing to a private law firm, which used sophisticated data analysis and electoral predictions for its "cracking" and "packing" efforts.[94] The gerrymander was so effective that it was projected that Republicans could maintain control under almost any voting scenario.[95] The district court invalidated the gerrymander, finding overwhelming evidence of intentional partisan bias and disregard for traditional redistricting principles.[96]

Because *Vieth* had raised the specter of non-justiciability, there had been "a spate of work by lawyers, social scientists, and other concerned scholars, including computer scientists, offering new ways of measuring gerrymandering,"[97] likely in the hopes of persuading Justice Kennedy that manageable, concrete standards other than "fairness" could govern the Court's consideration of such claims. In *Gill*, the plaintiffs relied in part on a political science concept known as the "Efficiency Gap" (EG), a quantitative method of identifying potentially skewed electoral maps.[98] A high EG suggests one party's voters have more "wasted" votes than the other party's voters (that is, votes that did not contribute to a candidate's victory).[99] Fewer wasted votes signals that the districting plan unfairly favors that party.[100] Importantly, EG analysis was just one of the robust tools offered to the *Gill* Court to detect a potential gerrymander—other options included a system of

92. 585 U.S. 48, 60 (2018). The Court had also taken up a mid-decade challenge to a redistricting scheme in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414 (2006), but it declined to reconsider justiciability and instead analyzed the case on other grounds.

93. *Gill*, 585 U.S. at 55.

94. Brief for Appellees at 5–7, *Gill*, 585 U.S. 48 (No. 16-1161).

95. *Id.* at 10.

96. *Id.* at 3, 9.

97. Jonathan Cervas et al., *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections*, 21 U. N.H. L. REV. 421, 428 (2023).

98. *Gill*, 585 U.S. at 56; *see also* Stephanopoulos & McGhee, *supra* note 36; Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUD. Q. 55, 68–69 (2014).

99. *Gill*, 585 U.S. at 56.

100. *Id.*

creating hundreds of simulations to illustrate how unfair any given map was compared to the distribution.[101] The array of options showed that Justice Kennedy was right to predict in *Vieth* that technology would advance to provide manageable mechanisms for the Court to assess gerrymander problems.[102]

But Justice Stevens was also right in *Vieth* to conclude that the lack of manageable standards was not really the problem; he stated: "Quite obviously, however, several standards for identifying impermissible partisan influence are available to judges who have the will to enforce them," and he listed some of those standards.[103] Rather, Justice Stevens continued, it was a judicial *choice* to disregard "even the most blatant violations of a state legislature's fundamental duty to govern impartially."[104] Despite the effort in *Gill* to illustrate that highly determinate and practical options were available to the Court, and to dispel the idea that gerrymandering jurisprudence is inherently unmanageable, *Gill* ultimately resulted in the Court "punting" on the merits. The Court held that the plaintiffs lacked standing to bring the claim because their complaint of vote dilution from partisan gerrymandering was district-specific, and, as individual voters, they had standing only to challenge the gerrymandering in their own districts, not the statewide composition of the legislature.[105]

Use of standing is a well-recognized avoidance technique that allows the Court to evade the scrutiny that comes with deciding high-profile and controversial questions.[106] And the

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101. *See* Brief for Appellees at 55–56, *Gill*, 585 U.S. 48 (No. 16-1161) (reporting studies showing that "there are hundreds of Assembly maps that exhibit very small asymmetries" but perform just as well in terms of traditional redistricting criteria).

102. *See* Vieth v. Jubelirer, 541 U.S. 267, 311–13 (2004) (Kennedy, J., concurring).

103. *Id.* at 341 (Stevens, J., dissenting) ("We could hold that every district boundary must have a neutral justification; we could apply Justice Powell's three-factor approach in *Bandemer*; we could apply the predominant motivation standard fashioned by the Court in its racial gerrymandering cases; or we could endorse either of the approaches advocated today by Justice Souter and Justice Breyer.").

104. *Id.*

105. *Gill*, 585 U.S. at 65–66, 68. The holding in *Gill* creates an odd paradox: the harm experienced is inherently collective, affecting the fairness of representation at a statewide level, yet the Court's standing requirement necessitates demonstration of individual harm.

106. *See* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 27 (2016) ("Standing has always presented the tension between safeguarding judicial power by limiting it to private rights and abdicating judicial responsibility for protecting public rights in a countermajoritarian context."); *see also* discussion *infra* Section I.D.

oral argument in *Gill* reveals that the Court was not unaware of the potential controversy of the case; indeed, Chief Justice Roberts was quite explicit about his desire to avoid that role, buttressing the idea that deciding the issue on standing was a deliberate avoidance strategy. In a colloquy with the plaintiffs' advocate, Paul Smith, Chief Justice Roberts spoke with particular forthrightness about the potential public reaction to the Court's involvement in policing partisan gerrymandering:

> I would think if these -- if the claim is allowed to proceed, there will naturally be a lot of these claims raised around the country. Politics is a very important driving force and those claims will be raised. . . . We will have to decide in every case whether the Democrats win or the Republicans win. . . . And if you're the intelligent man on the street and the Court issues a decision, and let's say, okay, the Democrats win, and that person will say: "Well, why did the Democrats win?" And the answer is going to be "because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party X votes plus party Y votes." And the intelligent man on the street is going to say, "that's a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans." And that's going to come out one case after another as these cases are brought in every state. And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.[107]

Later, the Chief Justice went on to rather famously[108] dismiss Smith's argument as "throwing [the issue] into the courts pursuant to . . . sociological gobbledygook."[109] Chief Justice Roberts explained that perhaps this reflected his lack of education on the matter,[110] but, as other scholars have pointed

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107. Transcript of Oral Argument at 37–38, *Gill*, 585 U.S. 48 (No. 16-1161).

108. *See* Dylan Matthews, *Chief Justice John Roberts Is Now Feuding with the Entire Field of Sociology*, VOX (Oct. 12, 2017, 11:20 AM), https://www.vox.com/policy-and-politics/2017/10/12/16464188/john-roberts-sociological-gobbledygook-eduardo-bonilla-silva-gerrymandering [https://perma.cc/TVG2-JXNZ] (reporting that a group of sociologists "sent an open letter to Justice Roberts excoriating him for his dismissal of sociology and social science more generally").

109. Transcript of Oral Argument at 40, *Gill*, 585 U.S. 48 (No. 16-1161).

110. *Id.*

out, the Court quite often relies on social science evidence;[111] its hesitance to do so in *Gill*, as exemplified by the Chief Justice's gobbledygook remark, ignores the near-universal agreement on its measurement.[112] Thus, even this ostensibly humble remark is really a strategic effort to recharacterize the inquiry so as to justify the Court's avoidance.

Though the Court was unanimous on the application of the standing question to the specific circumstances arising in *Gill*, the sign of a future fracture on the merits was unmistakable. In a concurring opinion joined by her three fellow Democratic appointees, Justice Elena Kagan mapped out potential paths for future plaintiffs to establish standing, suggesting that plaintiffs could, for instance, show that they live in a district where their votes have been diluted due to partisan considerations.[113] This drew a subtle rebuke from Chief Justice Roberts (albeit one Justice Kagan signed on to), who wrote, "the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others."[114] Further, he emphasized that "[t]he reasoning of this Court with respect to the disposition of this case is set forth in this opinion and none other."[115] Notably, Justice Kennedy, who had left the door to justiciability open in *Vieth*, wrote nothing. Nine days later, he retired from the Court, allowing President Donald Trump to

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111. *See* Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn from Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL'Y 179, 189 (2011) (describing how use of social science is widespread enough to require a taxonomy of such uses). *See generally* Tonja Jacobi & Christopher Brett Jaeger, *Katz's Imperfect Circle: An Empirical Study of Reasonable Expectations of Privacy*, 77 FLA. L. REV. (forthcoming Mar. 2025) (summarizing the literature that cataloged the many forms of such reliance for over one hundred years).

112. *See* Kyle Reinhard, *"Sociological Gobbledygook":* Gill v. Whitford, Wal-Mart v. Dukes, *and the Court's Selective Distrust of "Soft Science"*, 67 UCLA L. REV. 700, 708 (2020) (arguing that "courts routinely wave away soft science testimony worth considering, a practice that systematically deprives plaintiffs of a whole category of academic disciplines by which they may prove especially subtle, but no less pernicious, harms under the law"); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1505 (2018) (noting that, for "several decades," there has been a virtual consensus among scholars that statistical formulas such as EG can detect whether a partisan gerrymander has occurred).

113. *Gill*, 585 U.S. at 76 (Kagan, J., concurring).

114. *Id.* at 68 (majority opinion).

115. *Id.* at 68–69.

replace him with Justice Brett Kavanaugh,[116] thus creating space for those wishing to avoid the question of gerrymandering to finally gain a majority.

C. *Avoidance Through the Political Question Doctrine: The End of Partisan Gerrymandering Litigation in Federal Court*

In the term after *Gill*, the Court finally addressed the issue of partisan gerrymandering head-on in *Rucho v. Common Cause*.[117] The case arose out of two gerrymanders, one by Republicans in North Carolina and another by Democrats in Maryland.[118] In North Carolina, the plaintiffs alleged that the plan had been drawn with the express intent to favor Republican candidates, effectively diluting the votes of Democratic voters.[119] The mapmakers, in fact, were candid about their intent to maximize the number of Republican congressional seats, aiming for a 10–3 split in favor of Republicans, even though the state's overall partisan split was far more even.[120] The ideological reverse had occurred in Maryland, where Governor Martin O'Malley admitted that the Democrats had "use[d] the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district.[121] As briefs for both sets of plaintiffs—North Carolina and Maryland—emphasized, this level of gerrymandering not only distorts the political landscape in favor of certain parties but also diminishes voter engagement and trust in the electoral process.[122] Indeed, the Maryland brief pointed out that "supporters of the Republican Party" in the newly-gerrymandered area had become "disengaged and disinterested, fewer voters ha[d] turned out for the primaries, and party fundraising ha[d] fallen off."[123] The plaintiffs sought to finally achieve what a majority of the Court had never been able to in its previous cases: a "straightforward, uniform, and

116. Amy Howe, *Anthony Kennedy, Swing Justice, Announces Retirement*, SCOTUSBLOG (June 27, 2018, 7:01 PM), https://www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/ [https://perma.cc/QB6Y-QWH4].

117. 588 U.S. 684 (2019).

118. *Id.* at 691.

119. *Id.* at 692.

120. *See id.* at 691.

121. *Id.* at 694.

122. Brief for Appellees at 2, Lamone v. Benisek, 588 U.S. 684 (No. 18-726); Brief for Common Cause Appellees at 55, *Rucho*, 588 U.S. 684 (No 18-422).

123. Brief for Appellees at 2, *Lamone*, 588 U.S. 684 (No. 18-726).

agreed-upon standard" for adjudicating allegations of partisan gerrymandering.[124]

In a 5–4 decision penned by Chief Justice Roberts, the Court ruled that federal courts cannot adjudicate political gerrymandering claims because such claims present nonjusticiable political questions.[125] The opinion argued that even though partisan gerrymandering was known during the Colonial era and at the time of the Constitution's drafting, the Framers chose not to assign federal courts a role in addressing it, instead empowering state legislatures to regulate congressional elections subject to congressional oversight.[126] Acknowledging that it had intervened in other redistricting areas, such as one-person–one-vote and racial gerrymandering, the Court emphasized that partisan gerrymandering claims are more challenging in nature, in part because some level of political consideration in districting is constitutionally permissible[127]—though the Court did not acknowledge the contrasting nature of the political considerations it had approved when setting that precedent in *Gaffney*.[128] According to the opinion, setting a standard for when partisan gerrymandering goes too far is difficult because the Constitution neither requires proportional representation nor outlines standards for fairness.[129] The opinion differentiated between vote dilution in one-person–one-vote cases and partisan gerrymandering, declaring that the latter's justiciability is not implied by the former.[130] And it claimed that none of the proposed standards for evaluating partisan gerrymandering were sufficiently clear and manageable for judicial application.[131]

Indeed, a significant part of the reasoning was, again, the lack of "manageable standards" for determining when a political gerrymander crosses constitutional lines.[132] Although the Court had previously established criteria to adjudicate

124. Mark Ercolano, *Self-Restraint or Judicial Disregard: Reviewing the Supreme Court's Answer to the Political Question of Partisan Gerrymandering*, 64 ARIZ. L. REV. 239, 259 (2022).

125. *Rucho*, 588 U.S. at 718.

126. *Id.* at 696.

127. *Id.* at 711.

128. *See supra* notes 58–63.

129. *Rucho*, 588 U.S. at 705.

130. *Id.* at 708.

131. *Id.* at 710.

132. *Id.* at 714.

gerrymandering based on racial considerations,[133] Chief Justice Roberts proclaimed that similar criteria simply did not exist for partisan considerations.[134] According to Chief Justice Roberts, determining what is essentially "fair" in the inherently political task of redistricting is beyond the purview of federal courts.[135]

The opinion in *Rucho* ended on a seemingly conciliatory note. While the Court's ruling effectively took federal courts out of the business of adjudicating partisan gerrymandering claims, the opinion emphasized that the Court "does not condone excessive partisan gerrymandering."[136] It pointed out that other remedies, including state constitutional provisions and voter referenda, could still address the problems raised by gerrymandering, ensuring that complaints about districting did not merely "echo into a void."[137] The opinion cited, as an example, the Supreme Court of Florida's decision in *League of Women Voters of Florida v. Detzner*,[138] wherein the state court struck down Florida's congressional districting plan based on a state constitutional provision.[139]

In a mournful dissent on behalf of herself and Justices Ginsburg, Breyer, and Sonia Sotomayor, Justice Kagan critiqued the majority's reference to state courts as a venue to address partisan gerrymandering issues.[140] Justice Kagan challenged the majority's assumption that state courts usually work from more explicit standards, pointing out that many state constitutional provisions used to address gerrymandering, such as those in Pennsylvania and Florida, are quite broad and no more detailed than federal standards.[141] For instance, the Florida "Free Districts Amendment," highlighted by the majority in connection to *Detzner*, simply stipulated that no districting plan should "favor or disfavor" a political party.[142] Likewise, Pennsylvania's highest court, in a similar case, had found merely that by diluting the power of certain voters' ballots, partisan gerrymandering rendered elections less than "free and equal"—not exactly a detailed

133. *See* Miller v. Johnson, 515 U.S. 900, 915 (1995).
134. *Rucho*, 588 U.S. at 712–13.
135. *Id.* at 705.
136. *Id.* at 719.
137. *Id.*
138. 172 So. 3d 363 (Fla. 2015).
139. *Rucho*, 588 U.S. at 719 (citing *Detzner*, 172 So.3d at 363).
140. *Id.* at 749 (Kagan, J., dissenting).
141. *Id.* at 749 n.6.
142. *Id.* at 719–20 (majority opinion) (citing Fla. Const., Art. III, § 20(a)).

roadmap for adjudicating claims of political bias.[143] Such state standards, Justice Kagan argued, are even *less* rigorous than what the federal courts had used.[144] Indeed, only a few states even have provisions comparable to Florida's, thereby limiting the reach of even the majority's proposed solution via state courts.[145]

Justice Kagan ultimately challenged the majority's premise, asking, "But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?"[146] Justice Kagan's evidence and argumentation suggests that the *Rucho* majority, in declaring gerrymandering nonjusticiable in federal courts, was once again merely strategically avoiding the issue, rather than identifying truly impenetrable barriers to acting.

D. Rucho*'s Shirking of the Court's Greatest Duty*

Rucho is unconvincing on at least three key levels: it fudges on the reason for the Court's avoidance; it glosses over the historical and constitutional significance of gerrymandering and its pernicious constitutional effect; and it winds back one of the most fundamental constitutional doctrines: the role of the Court in a democratic constitutional system.

First, the opinion muddies the water on what the Court is doing and why. Its holding was not legally required; even the Court did not claim that it was.[147] The political question doctrine, traditionally split between the "classical" and "prudential" views, dictates when a claim is inappropriate for judicial intervention.[148] The classical view restricts the doctrine to cases where the Constitution has assigned decision-making to a branch other than the judiciary, while the prudential view allows courts to apply the doctrine more flexibly based on pragmatic considerations.[149] The *Rucho* ruling implied that it was taking a classical approach, holding that the absence of

143. *Id.* at 749 n.6 (Kagan, J., dissenting).

144. *Id.*

145. *Id.*

146. *Id.* at 749.

147. *See id.* at 721–22.

148. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) (expressing the classical view); Alexander M. Bickel, Foreword, *The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961) (expressing the prudential view).

149. *Article III–Justiciability–Political Question Doctrine*–Rucho v. Common Cause, 133 HARV. L. REV. 252, 257 (2019).

manageable standards for adjudicating partisan gerrymandering claims took the issue outside the purview of Article III.[150] But the decision was clearly motivated by prudential concerns over the Court's legitimacy—not legal or textual factors.[151] And the Court's quest for "judicially manageable standards" is itself a discretionary endeavor, devoid of a clear constitutional guideline.[152]

Second, the *Rucho* opinion rewrites core constitutional history. The majority argued that forbidding legislators from considering partisan interests in redistricting is contrary to the Framers' intent that Congress, not the judiciary, would ensure fairness between political parties in districting.[153] But the Framers did not support the rise of political parties; in fact, they designed the Constitution with the aim of precluding their emergence.[154] Their hope was to align the "ambitions" of government officials with the interests of their own branches, and, by equipping each branch with the constitutional means and personal incentives to defend against overreach from the others—that is, to establish a system where "ambition would be made to counteract ambition"—the natural struggle for power would keep each branch within its appropriate limits.[155] But this never worked in practice. As Professors Daryl Levinson and Richard Pildes have persuasively shown, the Madisonian "separation of powers" framework was quickly overtaken by the rise of political rivalries.[156] Thus, "Rather than tying their ambitions to the constitutional duties or power base of their departments, officials responded to the material incentives of democratic politics . . . by forming incipient organizations that took sides on contested policy and ideological issues and by competing to marshal support for their agendas."[157] And soon,

150. *Id.*

151. *See id.* at 260.

152. *Id.* at 259.

153. Rucho v. Common Cause, 588 U.S. 684, 721–22 (2019) (Kagan, J., dissenting).

154. *See* THE FEDERALIST NO. 10 (James Madison) (Libr. of Cong.) ("[T]he majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression."); THE FEDERALIST NO. 15 (Alexander Hamilton) (Libr. of Cong.) ("Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint."); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006).

155. Levinson & Pildes, *supra* note 154, at 2317.

156. *Id.* at 2319.

157. *Id.*

those "incipient organizations" came to form the full-blown party system in place today.

Seen in this light, it is disingenuous and misleading for the Court to point to the fact that the Framers included a provision in the Constitution that allows "Congress" to override a state's districting decisions.[158] Reliance on that mechanism is little more than a fantasy:[159] the text is a dead letter in a political landscape dominated by a national party system never contemplated by the Founders.[160] And James Madison himself wrote that

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.[161]

This exemplifies the framing-era assumption that a majority, through the exercise of its voting rights, could prevent a minority faction from imposing its will in a manner contrary to the interests of the whole. That was taken for granted; gerrymanders were not. By misinterpreting the Framers' intentions and not accounting for the evolution of political parties, *Rucho* fails to address the contemporary challenges of partisan gerrymandering.

Third, and most importantly, the *Rucho* opinion silently reverses the most fundamental principle guiding the role of the Court when it comes to constitutional interpretation of democratic principles. *Rucho* unwisely rejected the vision set forth in *United States v. Carolene Products*—that the judiciary has a unique and pressing duty to intervene when the democratic machinery is stifled or manipulated.[162] *Carolene*'s

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158. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations* . . . ." (emphasis added)).

159. *But see* Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 48 (2021) (arguing that Congress has the power to end gerrymandering, among other electoral reforms, and is less likely to abuse that power than other bodies).

160. *See* Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2350 (2021).

161. *Id.* (alteration in original) (quoting THE FEDERALIST NO. 10 (James Madison)).

162. *See* ELY, *supra* note 18, at 86.

footnote four has been called the "foundational mission" of election law: to identify "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[163] The Court's role, as envisioned in *Carolene*, is to ensure the integrity of the democratic machinery, intervening especially when the majority seeks to entrench its power and stifle the minority's voice.

Gerrymandering, by its nature, distorts democratic processes. As described, it allows politicians to choose their voters, rather than the other way around, leading to legislative entrenchment, skewed political outcomes, fewer competitive seats, and a dilution of the minority's voting power.[164] Such actions are precisely the kind of democratic distortions that *Carolene* promised that the Court would be particularly vigilant in policing. In deciding that partisan gerrymandering claims are nonjusticiable, the Court in *Rucho* forwent its duty to ensure that political processes remain free, open, and fair. While the majority raised concerns about judicial overreach and the absence of a clear standard to adjudicate gerrymandering claims,[165] this caution came at the expense of the Court's responsibility to safeguard the democratic process.

The Court also decisively turned its gaze away from Professor John Hart Ely's influential theory touting the potential of judicial review to "reinforce representation."[166] According to Ely, the primary role of the judiciary, particularly in the context of the Constitution's more open-ended provisions, should be to ensure that the democratic processes function properly and that all citizens have an equal say in those processes.[167] Rather than attempting to discern specific substantive values from the Constitution, Ely held that courts should focus on clearing the channels of political change, ensuring that no group is systematically disadvantaged or excluded from the political process.[168] When those channels are blocked or skewed, the courts must step in to rectify the situation.

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163. *E.g.*, Stephanopoulos, *supra* note 18, at 117–18 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

164. *See supra* Part I.

165. *See* Rucho v. Common Cause, 588 U.S. 684, 703–04 (2019).

166. *E.g.,* Sample, *supra* note 20, at 1614.

167. ELY, *supra* note 18, at 87.

168. *Id.*

One of the critical implications of Ely's theory is that courts have a duty to be especially vigilant in cases where the very structure of the political process is threatened, especially by self-entrenching political actors.[169] When lawmakers manipulate the rules of the game to secure their own power and limit the power of future majorities—as they do with gerrymandering—courts have an especially strong duty to intervene.[170] This is because these are situations in which the political process itself may not be adequate to address the problem, because the actors who could correct the distortion have been either sidelined or co-opted.[171] Ely argued that if the Court is especially vigilant, it will ensure that the democratic process is protected, meaning the other branches of government will function appropriately and in a representative fashion, thus enabling two-thirds of the structure of government to respond to other constitutional demands.[172] It follows from Ely's logic that without this foundational basis, we cannot rely on the courts to protect other elements of the Constitution because an out-of-control executive or legislative branch can weaken and reshape the judiciary in its own unrepresentative image. Thus, ensuring that democracy works is the first and most fundamental job of the judiciary.[173]

Rucho is a profound departure from this vision. In *Rucho*, as mentioned, the Court acknowledged that political gerrymandering is "incompatible with democratic principles,"[174] yet it concluded that even the most extreme forms of political map drawing are beyond the purview of federal courts. The decision not only leaves potentially disenfranchised groups without a federal judicial remedy but also risks entrenching political power in ways that are resistant to democratic change.[175]

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169. *Id.* at 103; Michael C. Dorf, *U.K. Supreme Court Prorogation Judgment Exemplifies Representation-Reinforcing Judicial Review*, JUSTIA: VERDICT (Oct. 2, 2019), https://verdict.justia.com/2019/10/02/u-k-supreme-court-prorogation-judgment-exemplifies-representation-reinforcing-judicial-review [https://perma.cc/YA6Q-T5TG].

170. ELY, *supra* note 18, at 103.

171. *Id.*

172. *See id.* at 181–83.

173. *Id.* at 103.

174. Rucho v. Common Cause, 588 U.S. 684, 718 (2019).

175. *E.g.*, Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 269 (2018) ("Political gerrymandering is the most salient and perhaps most consequential expression of the manipulation

One possible defense of *Rucho* is that the Court was exercising appropriate "judicial restraint." Under this theory, courts should refrain from making decisions that challenge the actions of the elected branches because, in a democratic society, judicial review is potentially a deviant institution and so courts should act in ways that acknowledge and respect the primary role of majority rule.[176] On this view, the Court should be cautious to avoid rulings that might undermine its authority, especially when facing challenges that could destabilize the rule of law or require overly broad declarations that could incite significant public opposition.[177]

In this way, *Rucho*'s holding that partisan gerrymandering claims are beyond the purview of federal courts can be seen as a strategic move to avoid plunging the Court into the center of a political quagmire, because wading into gerrymandering might not only risk the Court's institutional integrity and legitimacy but also challenge its apolitical reputation. By emphasizing the lack of a clear, judicially manageable standard for determining when partisan gerrymandering crosses a constitutional line,[178] the Court arguably shielded itself from accusations of arbitrary or politically motivated decision-making.

The judicial restraint perspective, however, overlooks the "independent harm" to democratic integrity that occurs when partisan gerrymandering is tacitly accepted, by neither courts nor legislative bodies taking a stand against it.[179] And even if we accept that approach generally, it must be rejected when it comes to political gerrymandering. The justification on which judicial restraint relies is that the Court is counter-majoritarian, whereas the other branches are majoritarian and thus more legitimate.[180] Even putting aside the extent to which

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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.").

176. BICKEL, *supra* note 16, at 47.

177. *E.g.*, Ronald A. Cass & Jack M. Beermann, *Interpretation, Remedy, and the Rule of Law: Why Courts Should Have the Courage of Their Constitutional Convictions*, 74 ADMIN. L. REV. 657, 694–95 (2022).

178. *Rucho*, 588 U.S. 709–10.

179. Stuart Chinn, *Procedural Integrity and Partisan Gerrymandering*, 58 HOUS. L. REV. 597, 660 (2021). For a broader critique, see Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 24 (1964); *infra* Part IV.

180. BICKEL, *supra* note 16, at 47.

this is contrary to the Madisonian design of countering the will of the majority through checks and balances and the separation of powers,[181] this argument holds no water if the elected branches are not reliably representing majoritarian views. Gerrymandering prevents political competition and accountability and skews election outcomes away from the preferences of voters. Thus, *even if* the Court should exercise judicial restraint generally,[182] it must not do it in gerrymandering and other areas related to electoral fairness and representativeness, or else the justification for such restraint falls apart.

Ultimately, *Rucho* is wrong because it abandons voters to the mercies of state politicians and state courts, which are often influenced by the very same partisan biases that encourage gerrymandering in the first place. Without federal judicial oversight, political power imbalances become entrenched, leaving voters without any recourse to rectify an electoral process that is fundamentally unfair. This is a far cry from the "fair and effective representation" the Court once promised to enforce.[183]

II. THE INDEPENDENT STATE LEGISLATURE THEORY

Four years after *Rucho*, in *Moore v. Harper*, the Court rejected the "Independent State Legislature Theory" that would have effectively immunized state lawmakers from judicial review in setting new rules for elections.[184] In doing so, the Court appeared, at first blush, to embrace a more active role in safeguarding democratic interests, countering the hands-off approach seen in *Rucho*. In reality, though, *Moore* serves as a Potemkin village. Instead of providing a clear path for the resolution of gerrymandering and other electoral disputes, *Moore*, in combination with *Rucho*, imposes a system where difficult decisions are deferred, leaving democratic protections at the mercy of a fragmented and inconsistent judicial approach at the state level.

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181. THE FEDERALIST No. 47 (James Madison) (Libr. of Cong.) (arguing that separation of powers between the branches is central to protecting liberty); THE FEDERALIST No. 51 (James Madison) (Libr. of Cong.) (explaining that it is necessary to guard "one part of the society against the injustice of the other part . . . If a majority be united by a common interest, the rights of the minority will be insecure.").

182. For why we argue that it should not, see *infra* Part IV.

183. Reynolds v. Sims, 377 U.S. 533, 565–66 (1964).

184. Moore v. Harper, 600 U.S. 1, 22 (2023).

The "Independent State Legislature Theory" considered in *Moore* is a methodological attempt to restrict judicial review of state legislative action, a strategy that emerged at the Court in the past few decades. The theory claims that state legislatures possess the exclusive authority to oversee federal elections, free from interference or oversight by state courts.[185] Its proponents draw on the text of the Elections Clause: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[186]

The theory's proponents argue that this Section of the Constitution grants state legislatures, rather than state courts or other state entities, the sole authority to set rules for federal elections specifically for congressional and presidential contests.[187] On this theory, state courts and other state entities cannot intervene or modify election rules set by the state legislature, even when acting under authority of provisions or interpretations of the state's own constitution.[188]

If the Independent State Legislature Theory were to be upheld in a world where *Rucho* is the law, state legislatures—often heavily gerrymandered themselves—would operate with virtually unchecked authority over election laws. State courts would be unable to limit their legislatures under the Independent State Legislature Theory, while federal courts would be restricted from intervening due to *Rucho*. As a result, all paths for judicial review of state legislative actions concerning elections could be effectively closed off. The Court rejected the theory in *Moore*, thus avoiding that alarming outcome. But the combination of *Rucho* and *Moore* creates an odd imbalance: challenges to election rules can proceed in state courts, but federal courts are compelled to remain on the sidelines. This places the burden of election law review on a patchwork of state judiciaries, which vary widely in their competence and approaches, resulting in unequal and

185. *See generally* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000) (arguing that while state legislatures are integral to the Article V process, the people's role is more limited); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021) (listing examples of state statutes regarding elections).

186. U.S. CONST. art. I, § 4, cl. 1.

187. Brief for Petitioners at 11, *Moore*, 600 U.S. 1 (2023) (No. 21-1271).

188. *Id.* at 12.

inconsistent protection of voting rights and democratic norms.

Further, although the Court rejected the Independent State Legislature Theory in *Moore*, it is not dead. Some current Justices have indicated an interest in reviving it, in part or in whole, in future cases.[189] Thus, it is important to explore the import of the theory's potential revival.

A. *Birth of a Radical Theory: The 2000 Election Cases*

The theory's origins can be traced back to the 2000 presidential election, when Florida emerged as the pivotal state in the contest between Governor George W. Bush and Vice President Al Gore.[190] The Florida Secretary of State had attempted to certify the state election count for Bush without including manual recounts of ballots.[191] The Florida Supreme Court enjoined that certification, mandated inclusion of the recounts, and set a new deadline for the recounts.[192] In *Bush v. Gore*,[193] the U.S. Supreme Court held that this recount violated the Equal Protection Clause and ordered it halted.[194]

Chief Justice William Rehnquist's concurrence, joined by Justices Scalia and Thomas, embraced the Independent State Legislature Theory's interpretation. While acknowledging that in "most cases" federal courts defer to state courts on questions of state law,[195] because the Elections Clause "imposes a duty or confers a power on . . . the [state] *Legislature*," Chief Justice Rehnquist explained that the text of the state election law specifying how presidential electors are selected "takes on independent significance."[196] As such, it presents a federal constitutional question and is subject to review in federal court.

The concurrence did not command a majority, but in one passage of the per curiam opinion, the Court nodded toward the theory. Stating that the selection mechanism that the legislature sets out becomes "fundamental" and that the state "can take back the power to appoint electors,"[197] the majority of

189. *See infra* Sections II.C, II.D.

190. Brief for Petitioners at 41, *Moore*, 600 U.S. 1 (2023) (No. 21-1271).

191. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 74 (2000).

192. *Id.* at 71. On its first review, the U.S. Supreme Court sent the issue back for clarification of the Florida Supreme Court's reasons. *Id.* at 76.

193. 531 U.S. 98 (2000) (per curiam).

194. *Id.* at 98.

195. *Id.* at 112 (Rehnquist, C.J., concurring).

196. *Id.* at 112–13.

197. *Id.* at 104 (per curiam).

the Court arguably was suggesting that the legislature has unique authority under the Elections Clause.

That is an odd position for the majority to have flirted with because, at oral argument, Justices Sandra Day O'Connor and Kennedy had expressed strong skepticism of the theory. Justice Kennedy warned that its adoption would have "grave implications for our republican theory of government,"[198] to which Bush advocate Theodore Olsen conceded "it may not be the most powerful argument we bring to this court."[199] Justice O'Connor said that she had "the same problem Justice Kennedy does."[200] That frosty reception from the Court's center summed up the state of the theory during that period: a concept on the fringes of the Court, well-removed from mainstream legal thought.

B. *Another Implicit Rejection: An Expansive View of "Legislature"*

The issue of special state legislative authority in election matters did not surface again until fifteen years later, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[201] Arizona voters, motivated by concerns about gerrymandering, had passed an amendment to the state's constitution stripping the Arizona Legislature of its redistricting authority and transferring it to an independent body called the Arizona Independent Redistricting Commission.[202] After the 2010 census, the Commission, as per its mandate, drew up redistricting maps.[203] The Arizona Legislature claimed that the existence of the Commission and its 2012 redistricting maps violated the Elections Clause because redistricting must be done by the state's legislature.[204] The Arizona Legislature argued that the term "Legislature" should be strictly understood as the state's representative assembly, excluding bodies such as the Commission that are created through direct public initiatives.[205]

The Court held that Arizona's use of an independent commission for redistricting was consistent with the Elections

198. Transcript of Oral Argument at 4, *Bush*, 531 U.S. 98 (No. 00-949).
199. *Id.* at 6.
200. *Id.* at 7.
201. 576 U.S. 787 (2015).
202. *Id.* at 792.
203. *Id.*
204. *Id.*
205. *Id.*

Clause.[206] Although redistricting is a legislative function, the Court reasoned, how a state chooses to perform that function can vary, including through direct public initiatives.[207] The Court pointed to two factors in favor of such a reading. First, the primary aim of the Elections Clause was to allow Congress to intervene if states mismanaged elections, not to allow Congress to dictate how states legislate.[208] Second, there is no historical evidence suggesting that the term "Legislature" in the Elections Clause was intended to mean only the representative body and to exclude public initiatives.[209]

Though not directly implicated in the case, the Independent State Legislature Theory was lurking in the background.[210] The *Arizona State Legislature* opinion made emphatically clear that when the Constitution refers to a state "Legislature" in the context of a provision calling for state lawmaking, the term means a state law-making process as prescribed by the state constitution. In language seemingly fundamentally incompatible with the Independent State Legislature Theory, the Court wrote that "Nothing in [Article I] instructs, nor has this Court ever held, that a state legislature may [regulate] the . . . manner of holding federal elections in defiance of provisions of the State's constitution."[211] The theory was thus significantly undermined by *Arizona State Legislature*. That decision both explicitly acknowledged the flexibility inherent in the term "Legislature" within the context of the Elections Clause—suggesting a broader interpretation that encompasses the state's constitutional lawmaking process, not just the formal legislative body—and created a defined constitutional space in which state constitutions bind the hands of state legislatures in election disputes.

C. *The Theory Gains New Life from New Justices*

The Independent State Legislature Theory nevertheless reemerged at the Court during the 2020 elections. In *Democratic National Committee v. Wisconsin State*

206. *Id.* at 793.
207. *Id.* at 813.
208. *Id.* at 814–15.
209. *Id.* at 813–14.
210. *E.g.*, Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 34 (2021).
211. *See Ariz. State Legislature*, 576 U.S. at 817–18.

Legislature,[212] a federal district court invoked Fourteenth Amendment right-to-vote principles to prevent Wisconsin from applying its state election regulations.[213] Justice Kavanaugh, alongside four other Justices, criticized the district court for stepping in shortly before the election.[214] But he also included a noteworthy footnote that appeared to nod approvingly toward the rejected Independent State Legislature Theory. Repeatedly quoting Chief Justice Rehnquist's concurrence in *Bush v. Gore*, Justice Kavanaugh wrote:

> [U]nder the U.S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections. Article II expressly provides that the rules for Presidential elections are established by the States "in such Manner as the Legislature thereof may direct." §1, cl. 2. The text of Article II means that "the clearly expressed intent of the legislature must prevail" and that a state court may not depart from the state election code enacted by the legislature. In a Presidential election, in other words, a state court's "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[215]

This addendum from Justice Kavanaugh appeared to be an attempt to revive the Independent State Legislature Theory, which had been dismissed so firmly by the Court's majority.

Justice Kavanaugh was not alone in this effort. Justice Gorsuch, joined by Justice Kavanaugh, also hinted at agreement with the theory, writing that "[t]he Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."[216] Neither Justice had been on the Court for its decision in *Bush v. Gore*, making their friendliness to the theory significant: even though the theory was contrary to prior case law, many commentators

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212. 141 S. Ct. 28 (2020).

213. *See id.* at 28–29 (Gorsuch, J., concurring in denial of application to vacate stay).

214. *Id.* at 30 (Kavanaugh, J., concurring in denial of application to vacate stay); *id.* at 28 (Roberts, C.J., concurring in denial of application to vacate stay); *id.* at 40 (Kagan, J., dissenting).

215. *Id.* at 34–35 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay) (citations omitted).

216. *Id.* at 29 (Gorsuch, J., concurring in denial of application to vacate stay).

were concerned that, given the new conservative tilt of the Court, the argument would find new acceptance.[217]

Other Justices weighed in soon after. In *Republican Party of Pennsylvania v. Degraffenreid*,[218] the Court considered a controversy relating to application of Pennsylvania's laws allowing voters to use mail-in ballots and setting the deadline for receiving the ballots as election day.[219] When the legislature refused to extend the deadline in light of the COVID-19 pandemic, the Pennsylvania Democratic Party took the matter to state court.[220] It argued that the state constitution's clause that ensures "free and equal" elections authorized the court to extend the deadline by three days to accommodate potential postal delays.[221] The Pennsylvania Supreme Court agreed, invoking that clause to extend the deadline for ballot receipt and ruling that ballots without a clear postmark would be assumed to have been mailed by election day unless substantial evidence indicated otherwise.[222]

The Republican Party of Pennsylvania appealed to the U.S. Supreme Court, and the Court denied relief without comment.[223] But Justice Thomas dissented from its decision to do so, as did Justices Alito and Gorsuch in separate writings.[224] According to Justice Thomas, the problem was that, despite a clear constitutional command authorizing legislatures to determine election rules, "nonlegislative officials in various States took it upon themselves to set the rules instead."[225] This argument, contrary to the ruling in *Arizona State Legislature*, presumes the accuracy and legal effect of the Independent State Legislature Theory.

Likewise, Justice Alito lamented the "breadth"[226] of the Pennsylvania Supreme Court opinion, accusing the opinion of claiming "authority to override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections."[227] Justice Alito articulated perhaps the

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217. *E.g.*, Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235 (2022).

218. 141 S. Ct. 732 (2021).

219. *Id.* at 733 (Thomas, J., dissenting from the denial of certiorari).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 732.

224. *Id.* at 732; *id.* at 738 (Alito, J., dissenting from the denial of certiorari).

225. *Id.* at 732 (Thomas, J., dissenting from the denial of certiorari).

226. *Id.* at 739 (Alito, J., dissenting from the denial of certiorari).

227. *Id.*

clearest policy argument by a Justice to date in favor of the Independent State Legislature Theory:

> The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.[228]

Justice Alito was effectively saying that to reject the Independent State Legislature Theory is to make redundant a part of the federal Constitution. This argument not only ignores precedent to the contrary but also assumes bad faith on the part of state court judgments and that the Supreme Court would be powerless to review those judgments on the basis of that bad faith.

Between *Degraffenreid* and *Wisconsin State Legislature*, four Justices—Justices Thomas, Alito, Gorsuch, and Kavanaugh—had expressed some form of approval of the Independent State Legislature Theory, suggesting a close fight over the theory the next time it would arrive at the Court.

D. *The Court Rejects the Independent State Legislature Theory, and Yet . . .*

In 2023, in *Moore v. Harper*, the Court finally dealt head-on with the theory. *Moore* emerged from North Carolina, where the state's GOP-dominated legislature enacted a congressional map that was challenged as a partisan gerrymander favoring Republicans despite an evenly divided electorate.[229] Similar to the Pennsylvania Supreme Court in *Degraffenreid*, North Carolina's highest court had invalidated the electoral map as violating the state constitution's provision for "free elections."[230] North Carolina Republican legislators appealed to the Supreme Court, invoking the theory and asserting that

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228. *Id.* at 738. But see Amar & Amar, *supra* note 210, at 39, for an argument that, "[c]ontrary to Justice Alito's assertion, both [Independent State Legislature Theory] and non[–Independent State Legislature Theory] readings of the text make the clause meaningful, although the two readings attribute quite different meanings to the words."

229. *See* Moore v. Harper, 600 U.S. 1, 8–10 (2023).

230. Harper v. Hall, 868 S.E.2d 499, 546, 559 (N.C. 2022).

state courts have no authority to supervise how state legislatures oversee elections for Congress or the presidency.[231] This was, then, the ultimate test of the theory—squarely presented to the Court on its merits.

Writing for a 6–3 majority, Chief Justice Roberts repudiated the Independent State Legislature Theory, holding that "the Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review."[232] The opinion emphasized the longstanding tradition of state courts invalidating laws that contravene state constitutions and affirmed that this includes election laws.[233] The Court relied on two key precedents in coming to its conclusion. First, in *Ohio ex rel. Davis v. Hildebrant*,[234] the Court had upheld the power of the people to reject congressional districts through a referendum, emphasizing that the Elections Clause did not override this aspect of the Ohio Constitution.[235] State legislatures, therefore, do not have power over congressional districts to the exclusion of the people. Second, in *Smiley v. Holm*,[236] the Court had held that a state legislature's actions under the Elections Clause must align with the state's constitutional processes, including any requirements for legislative enactments such as the Governor's veto.[237] State legislatures, therefore, cannot exercise power over congressional districts in ways contrary to constitutional preclusion. Thus, founding-era practices, constitutional structures, and historical precedent all indicated that state legislative power to regulate congressional elections was not meant to be exercised in isolation from other constitutional constraints. Judicial review, the Court held, is one of those constraints.[238]

The *Moore* Court cautioned, though, that state courts "do not have free rein."[239] In other words, there is some point past which a state court's interpretation of its constitution will violate the Elections Clause's delegation of power to state legislatures. The details of this possible limit had been a

231. *See Moore*, 600 U.S. at 19.
232. *Id.* at 22.
233. *Id.* at 27.
234. 241 U.S. 565 (1916).
235. *Id.* at 569–70.
236. 285 U.S. 355 (1932).
237. *Id.* at 369.
238. *Moore*, 600 U.S. at 22 ("The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.").
239. *Id.* at 34.

leading point of discussion at oral argument, with each of the three challengers of the Independent State Legislature Theory emphasizing that any test set forth to measure a state court's deviation had to reflect utmost deference to the state court.[240] For instance, pressed by Justice Alito as to whether a state court could validly strike down a gerrymander by finding that the "essence of [the] state constitution is fairness" without pointing to a particular provision, plaintiffs' advocate Neil Katyal replied that it could.[241] The *Moore* opinion ultimately declined to adopt a specific formulation by which to measure a state court's deviation from its authority, because the state legislative defendants had not pressed the argument that the North Carolina Supreme Court had misinterpreted the state constitution.[242] Instead, they claimed that even if the state court's interpretation were entirely valid, the court still would have lacked the power of judicial review in this context.[243] Despite not adopting a standard, however, the Court made clear that state courts "may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[244]

In a concurrence, Justice Kavanaugh suggested that the Court should, in the future, adopt former Chief Justice Rehnquist's standard articulated in *Bush v. Gore*: whether the state court "impermissibly distorted" state law "beyond what a fair reading required."[245] Justice Kavanaugh agreed with the *Moore* majority that a specific standard did not need to be pronounced,[246] though he indicated that he would be far from an automatic vote in favor of state court interpretations going forward. "[I]n reviewing state court interpretations of state law," he wrote, "we necessarily must examine the law of the State as it existed prior to the action of the [state] court."[247] That is, Justice Kavanaugh's vision of review would not be especially deferential to a state court, but rather would closely

240. Transcript of Oral Argument at 94, 131, 179, *Moore*, 600 U.S. 1 (No. 21-1271).

241. *Id.* at 82–83.

242. *Moore*, 600 U.S. at 36.

243. *Id.* at 37.

244. *Id.* at 36.

245. *Id.* at 38 (Kavanaugh, J., concurring).

246. *Id.* at 39.

247. *Id.* (quoting Bush v. Gore, 531 U.S. 98, 114) (2000) (Rehnquist, C.J., concurring) (internal quotation marks omitted)).

examine the basis for its decision.[248] Nevertheless, given the Court's opinion, state courts interpreting state statutes and constitutions would not be subject to any significant federal review—at least for now.

E. Moore *Dodged a Bullet Aimed at Democracy*

The Court's decision in *Moore v. Harper* was correct as a matter of law and sound as a matter of policy. As the Court admitted, *Moore* was all but mandated by its precedents in *Hildebrant* and *Smiley*, both of which held that the power of state legislatures to redistrict under the Elections Clause is subject to the checks and balances of the state's constitutional framework, including the referendum processes and a governor's veto.[249] Those rulings emphasized a view of legislative power as integrated within the state's constitutional system. *Moore* built upon these principles by affirming that state lawmakers do not have exclusive, unchecked authority to set election rules. In this way, *Moore* reinforced the role of state constitutions and judicial review in maintaining a balance of power and ensuring fair electoral processes.

The historical record also provided a strong foundation for rejecting the Independent State Legislature Theory. Historically, the Framers of the Constitution envisioned a balanced and integrated system of governance where different branches and levels of government would check and balance each other.[250] This vision is embedded in the Constitution's text and the Federalist Papers, which reflect the Framers' intent to prevent any single entity from amassing excessive power.[251] The idea that state legislatures could unilaterally control

248. On the uncertainty this possibility raises, see Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News*, N.Y. TIMES (June 28, 2023), https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html [https://perma.cc/5FZE-G5TQ] ("[B]y endorsing a weak version of the independent state legislature theory, the court has ensured that legal uncertainty on this remaining constitutional front might roil the 2024 elections.").

249. *Moore*, 600 U.S. at 22–24.

250. *E.g.*, THE FEDERALIST NO. 48 (James Madison) (Libr. of Cong.) (recognizing that power "is of an encroaching nature" so it must be effectively restrained to ensure power between the branches is not blended).

251. *E.g.*, THE FEDERALIST NO. 51 (James Madison) (Libr. of Cong.) ("The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments"); THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining that "courts of justice" have the "duty . . . to declare all acts contrary to the manifest tenor of the Constitution void").

election laws without oversight or involvement from other state entities, such as courts or governors, is inconsistent with this historical understanding.

This was not a concern restricted to Congress, the federal legislature. The authors of the Federalist Papers were explicitly concerned with limiting the tyrannical powers of state legislatures in general. James Madison wrote that in the states, the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[252] Alexander Hamilton even more directly addressed the question. He asked, why not leave discretion over elections to the state legislatures? The Framers rejected this option, he wrote, because that "would leave the existence of the Union entirely at their mercy."[253] Hamilton opined that, given such powers, the states could simply refuse to provide people to administer its affairs and thus annihilate the federal system out of jealousy.[254] He admitted that the states could destroy the Union in other ways, such as in their power to appoint senators.[255] But Hamilton described how the Framers had created multiple mechanisms to protect the Senate through various checks: six-year terms, rotation such that only one-third of seats are vacant at any time, allowing only two senators to each state, and instituting a low quorum.[256] Tellingly, Hamilton described the danger to the federal government of states having power over the Senate as a necessary evil to include the states in their political capacities in the organization of national government; by contrast, giving the state legislatures unchecked power over congressional elections is an evil that is not necessary.[257]

Those responsible for crafting and promoting the national Constitution were not concerned with taking away power over congressional elections from state legislatures, but rather with giving them too much power. Alexander Hamilton practically described the Independent State Legislature Theory and characterized it as an evil that need not be risked. Any embrace of that theory, then, cannot rely on history or draw any legitimacy from pointing to a historical understanding of the Constitution.

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252. THE FEDERALIST NO. 48 (James Madison) (Libr. of Cong.).
253. THE FEDERALIST NO. 59 (Alexander Hamilton) (Libr. of Cong.).
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*

Furthermore, historical practices since the Constitution's ratification demonstrate that state legislatures have typically exercised their powers within a broader constitutional framework involving multiple branches.[258] This longstanding tradition undermines the claim of Independent State Legislature proponents of an extraordinary and historically unsupported level of autonomy for state legislatures in election matters. The historical context and consistent practice affirm that the Framers did not intend to grant state legislatures exclusive or unchecked authority over election laws.

Additionally, as a matter of policy, the Court's decision is a significant relief. Imposing the Independent State Legislature Theory on the states could have potentially stopped democracy in its tracks.[259] Such a holding would have empowered state legislatures to override state voters or state courts in selecting presidential electors, leading to scenarios where the will of the people, as expressed through their votes, could be overridden by lawmakers who hold their seats solely through gerrymandered districts—with no review by state courts.

Contemporary events make clear that the Framers were right to be concerned not to overly empower state legislatures to control congressional elections—and that their fears were not merely a product of the time in history in which they wrote and crafted the Constitution. The aftermath of the 2020 presidential election highlighted the potential ramifications of the theory. Then-President Donald Trump and his supporters challenged the election results in various key states, including Pennsylvania, Wisconsin, and Michigan, where former-Vice President Joe Biden had won the popular vote.[260] In late November 2020, President Trump invited Michigan's Republican state legislative leaders, State Senator Mike Shirkey and State Representative Lee Chatfield, to the White House.[261] Though the Administration did not specify the purpose of the meeting, it was generally seen as an attempt by President Trump to influence and interfere with the Michigan

258. *See* Moore v. Harper, 600 U.S. 1, 32 (2023).

259. *E.g.*, Amar & Amar, *supra* note 210.

260. *See generally* MARK BOWDEN & MATTHEW TEAGUE, THE STEAL: THE ATTEMPT TO OVERTURN THE 2020 ELECTION AND THE PEOPLE WHO STOPPED IT (2022) (describing the hearings that took place following the 2020 presidential election).

261. Maggie Haberman et al., *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. TIMES (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/us/politics/trump-michigan-election.html [https://perma.cc/AP2T-TME6].

electors' certification process.[262] Following the meeting, Shirkey and Chatfield attempted to calm fears, issuing a joint statement acknowledging that the state's election process had yielded a clear winner and that they did not have information that would change the outcome.[263]

They could, however, have made a different choice. Chatfield and Shirkey, along with their legislative chambers, could have claimed the sole power to appoint electors, disregarding the state's popular vote that favored Biden. If they had claimed such power, the legislature would have convened a special session to vote on a slate of electors that differed from those chosen according to the state's popular vote. In effect, the legislature would have been asserting its authority to override the established electoral procedures and the will of the voters under the pretext of alleged election "irregularities" or "fraud," claims that were central to President Trump's many legal challenges.[264]

Such a move would have been unprecedented in American history. It would have represented an extraordinary deviation from the democratic norm of respecting the outcome of the popular vote in presidential elections.[265] It would have set a

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262. *E.g.*, Laina G. Stebbins, *Shirkey, Chatfield Face Backlash Ahead of Trump Visit*, MICH. ADVANCE (Nov. 20, 2020), https://michiganadvance.com/2020/11/20/shirkey-chatfield-face-backlash-ahead-of-trump-visit/ [https://perma.cc/G5HD-2AUC].

263. *Michigan Republicans, After Meeting Trump, No Information to Change Election Outcome*, REUTERS (Nov. 20, 2020), https://www.reuters.com/article/us-usa-trump-michigan/michigan-republicans-after-meeting-trump-say-no-information-to-change-election-outcome-idUSKBN2802CK [https://perma.cc/Z98J-ACGA].

264. *E.g.,* Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899 (M.D. Pa.), *aff'd sub nom*. Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377 (3d Cir. 2020); Donald J. Trump for President, Inc. v. Benson, No. 1:20-CV-1083, 2020 WL 8573863, at *1 (W.D. Mich. Nov. 17, 2020); Complaint, Donald J. Trump for President, Inc. v. Hobbs, No. CV2020-014248 (Ariz. Super. Ct. Nov. 12, 2020); Complaint, In re Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on November 3, 2020, No. SPCV20-00982 (Ga. Super. Ct. Nov. 4, 2020).

265. Such a transition away from the peaceful transfer of power also would be exceptional in international terms, given the economic wealth of the United States. *E.g.,* Adam Przeworski, *Democracy as an Equilibrium*, 123 PUB. CHOICE 253, 253 (2005) (explaining that as of 2005, in 2005 dollars, "[n]o democracy ever fell in a country with a per capita income higher than that of Argentina in 1975, $6055. [By contrast], throughout history[,] about 70 democracies collapsed in poorer countries"). On the importance of the peaceful transfer of power, see, e.g., Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245 (1997) (describing democratic survival as requiring political officials abiding by election results).

dangerous precedent wherein state legislatures, rather than voters, become the ultimate arbiters of election outcomes. And it would have almost certainly led to widespread political turmoil and unrest. The disregard for the popular vote would have deeply undermined public trust in the electoral process and the principles of democracy.

Worse still, if the Independent State Legislature Theory had been judicially accepted and applied, there would have been little or no judicial recourse. State courts would have lacked the jurisdiction to review or overturn such a decision. And seeking relief in federal court would have proved daunting as well. Federal plaintiffs challenging the legislature's actions would have had to identify a viable constitutional claim sufficient to overcome the plenary power over federal election procedures that the theory asserts. This would have left no remedy for voters seeking to challenge a state legislature's decision to appoint electors in direct contradiction of the popular vote.

At oral argument, Justice Kagan aptly summed up the stakes of a potential contrary ruling in *Moore*. "[W]hat might strike a person," she said,

> is that [the Independent State Legislature Theory] is a proposal that gets rid of the normal checks and balances on the way big governmental decisions are made in this country. And -- and you might think that it gets rid of all those checks and balances at exactly the time when they are needed most.[266]

The Court wisely declined to do so, but the continuing life of the Independent State Legislature Theory poses an ongoing democratic threat.

III. THE DOWNWARD BURDEN-SHIFTING OF *RUCHO* AND *MOORE*

In making clear that state legislatures do not enjoy the unfettered power to set election rules as they please, that they are bound by ordinary constitutional constraints imposed by state courts based on state constitutional provisions,[267] *Moore v. Harper* also reinforced state courts as a potential avenue of relief for opponents of partisan gerrymandering. That sits uneasily next to the Court's choice in *Rucho*. Together, the decisions shift the burden to state courts to grapple with the complexities of election law claims. It is neither proper nor

266. Transcript of Oral Argument at 49–50, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271).

267. Rucho v. Common Cause, 588 U.S. 684, 687 (2019).

efficient for state courts, with their scattered approaches and limited jurisdictions, to bear this responsibility. The Supreme Court, with its institutional knowledge and broad purview, is better suited for the task. Additionally, the Court's "deferential" posture in both cases stands in significant contrast to its approach in other election cases, such as *Citizens United v. Federal Election Commission* and *Shelby County v. Holder*. This selective deference suggests an outcome-oriented Court intent on limiting and dismantling efforts to encourage democratic participation.[268]

A. *Institutional Incompetence: The Problem with State Courts*

Though the practice is all but entirely unknown in the rest of the world,[269] thirty-eight U.S. states use elections to choose their apex court justices.[270] And the significance of state courts in the political landscape has grown considerably in recent years, as evidenced by the increasing amounts of money poured into state judicial races.[271] This trend is partly driven by the role these courts play in redistricting, which has heightened the political parties' interest in securing ideologically aligned or partisan judges on state benches.[272] As financial contributions to judicial campaigns grow, there is a corresponding likelihood that state judges will become more ideologically driven and partisan, mirroring the polarization evident in both national- and state-level politics.[273]

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268. A unanimous Court recently expressed concern over the idea of state courts having scattered approaches for considering whether President Trump could appear on the ballot despite having been found to be an insurrectionist by a Colorado court. Trump v. Anderson, 601 U.S. 100, 116 (2024) ("Conflicting state outcomes concerning the same candidate could result not just from differing views of the merits, but from variations in state law governing the proceedings that are necessary to make Section 3 disqualification determinations.").

269. *See* Jolly, *supra* note 13, at 71–72 (noting that "only two other nations use elections for selecting or retaining judges").

270. Alicia Bannon, *Judicial Elections After Citizens United*, 67 DEPAUL L. REV. 169, 169 (2018). *See generally* MICHAEL KANG & JOANNA SHEPHERD, FREE TO JUDGE: THE POWER OF CAMPAIGN MONEY IN JUDICIAL ELECTIONS (2023) (describing the variety of electoral systems throughout the states, including retention elections).

271. *See, e.g.*, Douglas Keith, *New Money and Messages in Judicial Elections This Year*, BRENNAN CTR. FOR JUST. (Oct. 21, 2022), https://www.brennancenter.org/our-work/analysis-opinion/new-money-and-messages-judicial-elections-year [https://perma.cc/75H2-A4Y3].

272. Cervas et al., *supra* note 97, at 493.

273. *See generally* KANG & SHEPHERD, *supra* note 270 (using interviews and statistical analysis to show the influence of campaign contributions on judicial decision-making).

In a recently published book, Professors Michael Kang and Joanna Shepherd conducted interviews with state court judges and undertook comprehensive empirical analysis of the link between campaign contributions and case outcomes.[274] They showed empirically that campaign contributions directly affect judicial votes in a partisan direction, including in electoral jurisprudence cases, such as gerrymandering.[275] For instance, Kang and Shepherd looked at the votes of state court judges who were facing mandatory retirement and, thus, were in their final terms.[276] They found a significant difference in how those judges voted compared to when the judges are facing reelection.[277]

Increasingly, there may emerge scenarios where judges, influenced by their partisan affiliations, are reluctant to intervene in gerrymandering efforts orchestrated by their political allies. Indeed, several successful partisan gerrymandering challenges have been narrowly decided, hinging on the votes of only one or two justices who, despite belonging to the political party that benefited from the gerrymander, chose to side with justices from the opposing party to invalidate the gerrymander.[278] State courts, in other words, are susceptible to shifts in their composition, and changes in the makeup of these courts can significantly alter their decisions on gerrymandering. Two recent experiences—in Wisconsin and New York—exemplify this problem.

1. Wisconsin

The situation of Wisconsin Supreme Court Justice Janet Protasiewicz is a case study in political interference and turmoil around election law issues in state courts. During an event while campaigning for an open seat on that court in 2023, then-Judge Protasiewicz called Wisconsin's legislative maps "rigged," seemingly revealing her stance on the Wisconsin court's upcoming redistricting case.[279] These comments drew

274. *Id.*

275. *Id.* at 122–32; Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore: *Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1436–43 (2016) (finding statistical relationships among judicial partisanship, party campaign finance, and judicial decisions in election cases).

276. KANG & SHEPHERD, *supra* note 270, at 127–32.

277. *Id.*

278. Cervas et al., *supra* note 97, at 493.

279. Reid J. Epstein, *Costly Court Race Points to a Politicized Future for Judicial Elections*, N.Y. TIMES (Mar. 28, 2023), https://www.nytimes.com/2023/03/28/us/politics/wisconsin-supreme-court-race.html [https://perma.cc/729M-CCPH].

harsh criticism from Republicans, who controlled both houses of the Wisconsin legislature, accusing her of judicial bias and demanding her recusal from the redistricting case.[280] This escalated into talk of impeaching Justice Protasiewicz before she even took her seat, an idea which earned the support of top Wisconsin Republicans.[281] Eventually, that effort stalled, in part due to a letter sent from a conservative former–Wisconsin Supreme Court justice to the state's assembly speaker, arguing that impeachment "should not be considered unless the subject has committed a crime, or the subject has committed indisputable 'corrupt conduct' while 'in office.'"[282]

The failed impeachment effort was an obvious attempt to intimidate Justice Protasiewicz and prevent her from ruling in favor of the plaintiffs. But the fracas even spilled over to the Wisconsin Supreme Court's own chambers. In an extraordinary opinion dissenting from a routine grant of leave to file a response to the petition in the redistricting case, conservative Justice Rebecca Grassl Bradley took the opportunity to blast the integrity of her new colleague. "Despite receiving nearly $10 million from the Democrat Party of Wisconsin," wrote Justice Bradley, Justice Protasiewicz was conspiring with her fellow liberals to "adopt new maps to shift power away from Republicans and bestow an electoral advantage for Democrat candidates."[283] Justice Bradley's dissent ended with a flourish: "Entertaining these claims makes a mockery of our justice system, degrades this court as an institution, and showcases that justice is now for sale in Wisconsin. 'Rigged' is indeed an apt description—for this case."[284] At oral argument for the case, Justice Bradley repeated her accusations. "Everybody knows that the reason we're here is because there was a change in the membership of the court," she stated.[285]

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280. Reid J. Epstein, *Wisconsin Republicans Retreat from Threats to Impeach Liberal Justice*, N.Y. TIMES (Oct. 12, 2023), https://www.nytimes.com/2023/10/12/us/politics/wisconsin-republicans-impeach-janet-protasiewicz.html [https://perma.cc/2MXK-7QZ7].

281. *Id.*

282. *Id.*

283. Clarke v. Wis. Elections Comm'n, No. 2023AP1399-OA2023 (Wis. Aug. 15, 2023) (order).

284. *Id.*

285. Rich Kremer, *During Arguments in Wisconsin Redistricting Case, Liberal Justices Ask How Court Could Draw New Maps*, WIS. PUB. RADIO (Nov. 21, 2023), https://www.wpr.org/justice/during-arguments-wisconsin-redistricting-case-liberal-justices-ask-how-court-could-draw-new-maps [https://perma.cc/DTC8-5ZLX].

The Wisconsin court, with Justice Protasiewicz in the 4–3 majority, eventually invalidated the state legislature's maps on the grounds that they were not contiguous, as required by the state constitution.[286] Both Justice Bradley and fellow Republican Chief Justice Annette Ziegler penned strong dissents. Chief Justice Ziegler accused her colleagues of "power-hungry activism" and engaging in "judicial activism on steroids," and she repeatedly called the majority a "rogue court of four."[287] For her part, Justice Bradley slammed the majority, whom she called "handmaidens of the Democratic party," for "shed[ding] their robes, usurp[ing] the prerogatives of the legislature, and deliver[ing] the spoils to their preferred political party."[288]

The Wisconsin episode is a cautionary tale about the risk of entrusting state courts with the adjudication of election law issues. As elected officials themselves, state court judges may be thought of as political players—either politically aligned or antagonistic—and treated accordingly. In fact, in *Republican Party of Minnesota v. White*,[289] the Supreme Court ruled that those running for office of state judge may openly campaign on their views on legal and political issues.[290] The intense political and public scrutiny around Justice Protasiewicz even before she took the bench exposed the political player dynamic.[291] And the internal discord within the Wisconsin court reveals another dimension of the problem: partisan rifts within the judiciary itself. Although the Wisconsin Supreme Court has long been known for an unusual amount of ideological strife,[292] there is no reason to think that such problems will be confined to that state's borders in the future, especially if *only* state courts are permitted to hear partisan gerrymandering claims.

2. New York

Unlike in most states, the governor appoints New York's high court judges; they are not elected. But examining the

286. Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370, 379 (Wis. 2023).

287. *Id.* at 402.

288. *Id.* at 440.

289. 536 U.S. 765 (2002).

290. *Id.* at 788.

291. *See* Epstein, *supra* note 280.

292. *See, e.g.*, Henry Redman, *Shift in Majority Leads to Bitter Fighting on Wisconsin Supreme Court*, WIS. EXAM'R (Aug. 7, 2023), https://wisconsinexaminer.com/2023/08/07/shift-in-majority-leads-to-bitter-fighting-on-wisconsin-supreme-court/ [https://perma.cc/6CY3-MGDU].

sharp contrast between two recent gerrymandering decisions by the state's top court illustrates the effect of politics in state judiciaries and its implications for the composition of Congress.

Following the 2020 census, New York began redrawing its House district boundaries.[293] A bipartisan redistricting commission, established by a New York constitutional amendment, failed to reach an agreement on a new map, leading to deadlock.[294] The Democrat-controlled state legislature proceeded to adopt its own congressional map, which Republican challengers argued was an unconstitutional gerrymander.[295] The New York Court of Appeals, the state's highest court, agreed with the Republican argument in *Harkenrider v. Hochul*, holding 4–3 that the legislature had violated the constitution and appointing a neutral special master to draft a replacement map.[296] That map was used in the midterm elections of 2022, and, as a result, Republicans had an unusually strong showing, managing to flip four districts and securing eleven of the state's twenty-six House seats.[297] Indeed, given the narrowness of the national Republican victory, commenters proclaimed that the court-ordered redrawing in New York may have been a decisive factor in handing control of the House of Representatives to Republicans.[298]

Not long after, a group of New York voters, backed by the Democratic Congressional Campaign Committee,[299] filed a new lawsuit seeking to have the mapmaking process returned to the commission.[300] This move was ostensibly to allow for more public input, but it also had clear partisan motivation to favor Democrats, due to the likelihood of deadlock, that would result in state legislative mapmaking.[301] In December 2023, the Court of Appeals agreed with the Democrat-backed plaintiffs in

293. Harkenrider v. Hochul, 197 N.E.3d 437, 442 (N.Y. 2022).

294. *Id.*

295. *Id.* at 442–43.

296. *Id.* at 456.

297. Nicholas Fandos, *Top Court Clears Path for Democrats to Redraw House Map in New York*, N.Y. TIMES (Dec. 12, 2023), https://www.nytimes.com/2023/12/12/nyregion/new-york-redistricting-democrats.html [https://perma.cc/UJN8-X3M8].

298. Nathaniel Rakich & Elena Mejia, *Did Redistricting Cost Democrats The House?*, FIVETHIRTYEIGHT (Dec. 1, 2022), https://fivethirtyeight.com/features/redistricting-house-2022/ [https://perma.cc/35AS-3U49].

299. Fandos, *supra* note 297.

300. Hoffman v. N.Y. State Indep. Redistricting Comm'n, 41 N.Y.3d 341, 355 (2023).

301. Fandos, *supra* note 297.

Hoffmann v. New York State Independent Redistricting Commission,[302] ruling 4–3 in favor of redrawing the congressional map.[303] Because final authority for redrawing map lines lies with the state legislature, which has a Democratic supermajority, the decision was expected to enable Democrats to significantly improve their electoral chances in a number of Republican-held swing districts.[304]

Hoffmann was a clear repudiation, if not a formal overruling, of *Harkenrider*. This was no accident. In between the two decisions, the composition of the Court of Appeals had changed, with a more liberal judge taking the place of a member of the *Harkenrider* majority.[305] Chief Justice Rowan Wilson, who had previously dissented in *Harkenrider*, wrote the *Hoffmann* majority opinion, and the three remaining justices from the *Harkenrider* majority wrote a vociferous dissent.[306] This situation epitomizes the perils of reliance on the vagaries of state court majorities and illustrates the oddity of allowing national elections to hinge on such decisions. In *Harkenrider*, a court staffed by entirely Democratic appointees had nonetheless struck down a Democratic gerrymander; in *Hoffmann*, just a year later, following a surprising loss for Democrats under their remedial map, the same court thought better of that decision. Even if the *Harkenrider* court were justified in invalidating the original gerrymander, having a fair national congressional map would require similarly principled and scrupulous decisions from each of the other state high courts.

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302. 41 N.Y.3d 341 (N.Y. 2023).

303. *Id.* at 370.

304. Fandos, *supra* note 297. As it happened, to much surprise, New York Democrats declined to take advantage of the opportunity offered by the *Hoffmann* court to implement a gerrymander, instead delivering a map far more favorable to Republicans than expected. Alexander Sammon, *Democrats Blew Their Big Opportunity to Make New York Winnable in 2024*, SLATE (Mar. 1, 2024, 5:45 AM), https://slate.com/news-and-politics/2024/03/new-york-redistricting-map-might-cost-democrats-the-house.html [https://perma.cc/Z5L4-HGTQ]. In 2024, Democrats did retake three of the five competitive New York districts they had lost in the 2022 midterm elections, but this result was attributable to candidate quality rather than any shift in the partisan makeup of the districts. Ali Vitali, *New York Dealt House Democrats a Blow in 2022. In 2024, They Made a Comeback***,** NBC NEWS (Nov. 12, 2024, 3:18 PM), https://www.nbcnews.com/politics/2024-election/new-york-dealt-house-democrats-blow-2022-2024-made-comeback-rcna179787 [https://perma.cc/G3PE-VNZ4].

305. *Id.*

306. *Id.*

It would be naive to suggest that federal courts are free from such pressures.[307] But, structurally, federal judges are buffered from such overt partisan conflicts by their appointment and tenure procedures. Indeed, this is why federal courts exist. But, in the realm of constitutional litigation, where legal challenges are often posed against prevailing majority positions, "insulated judicial forums are necessary if constitutional rights are to remain viable."[308] States are not equipped to provide those forums.

B. *The "Deference" is Selective*

While the Supreme Court claimed that its motivation for its hands-off approach in *Rucho* was judicial restraint and deference to the legislative branch,[309] its interventionist stances in both *Citizens United v. Federal Election Commission* and *Shelby County v. Holder* suggest that it selectively intervenes to achieve a common outcome: facilitating voter disenfranchisement and vote dilution. Thus, acts of both intervention and so-called non-intervention serve to enable electoral manipulation and benefit those seeking to limit voting rights.[310]

1. Rewriting an Entire Jurisprudence in *Citizens United*

Examining *Citizens United* exposes the inconsistency in the Court's attitude to venturing into political disputes. In that sweeping 2010 decision, which held that corporations and unions have the same First Amendment rights as individuals to engage in political speech and, thus, the government cannot limit their independent political expenditures, the Court significantly altered the landscape of campaign finance law, overturning decades of precedent.[311] In so doing, the Court engaged in precisely the sort of non-deferential judicial

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307. *E.g.*, Louis Michael Seidman, Rucho *Is Right—But For The Wrong Reasons,* 23 U. PA. J. CONST. L. 865, 866, 873 (2021) (defending *Rucho*, despite it being a "dreadful" opinion, because to do otherwise would "turn[] the question over to nine unelected and unrepresentative judges who are part of an institution that has pretty consistently defended the most regressive forces in our society").

308. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1128 (1977).

309. Rucho v. Common Cause, 588 U.S. 684, 703–04 (2019) (quoting Vieth v. Jubelirer, 541 U.S. 267, 307 (2004) (plurality opinion)).

310. Sample, *supra* note 20, at 1607.

311. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010), *overruling* Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990) *and* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

intervention that the conservative majority disclaimed in *Rucho*.

The legal landscape of campaign finance law was shaped significantly by the Court's 1976 decision in *Buckley v. Valeo*.[312] In *Buckley*, the Court equated spending money on speech with the act of speaking itself.[313] But the Court distinguished between limits on spending and limits on contributions, applying strict scrutiny to spending limits while holding that contribution limits warranted less stringent scrutiny.[314] Two reasons were put forth for this differential treatment. First, contribution limits do not burden the freedom of association to the same extent that spending limits do.[315] Second, the potential harm of unregulated contributions is more serious; independent expenditures by individuals pose a lesser risk of corruption than contribution limits.[316] Two years later, in *First National Bank of Boston* v. *Bellotti*,[317] the Court recognized a First Amendment right for corporations to contribute to ballot initiative campaigns.[318] *Bellotti* created a narrow exception to the general prohibition on corporate political spending, but the decision hinted at broader implications for corporate speech in candidate elections.[319]

In two subsequent high-profile cases, the Court blessed restrictions on corporate expenditures and, in so doing, expanded on *Buckley*'s anti-corruption rationale, focusing specifically on the distorting effects of corporate expenditures in political campaigns. In *Austin v. Michigan Chamber of Commerce*,[320] the Court upheld a Michigan law that prohibited corporations from using treasury funds for independent expenditures in support of or in opposition to candidates in state elections.[321] The Court recognized a compelling state interest in addressing the corrosive and distorting effects of immense aggregations of wealth on the electoral process,

312. 424 U.S. 1 (1976) (per curiam).
313. *Id.* at 19.
314. *Id.* at 23.
315. *Id.* at 20–21.
316. *Id.* at 26.
317. 35 U.S. 765 (1978).
318. *Id.* at 775, 777.
319. *Id.* at 776–77.
320. 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
321. *Id.* at 668–69.

especially when a corporate form helps accumulate that wealth.[322]

The Court affirmed this rationale in *McConnell v. Federal Election Commission*.[323] In *McConnell*, the Court upheld the Bipartisan Campaign Reform Act of 2002 (BCRA) (often called the "McCain–Feingold Act"), which imposed restrictions on the use of soft money by political candidates and the funding of "electioneering communications" by corporations and labor unions.[324] Like *Austin*, the *McConnell* opinion relied heavily on the anti-corruption rationale, allowing lawmakers to address not just quid pro quo corruption but also the influence of large contributions on the political system in general.[325]

But neither *Austin* nor *McConnell* survived the scrutiny of the Roberts Court, which overturned both decisions by a 5–4 vote in *Citizens United*.[326] A political nonprofit corporation, funded by individuals and for-profit corporations, had paid $1.2 million to make a 90-minute documentary about Democratic presidential candidate Hillary Clinton, which was set to run on video-on-demand during the Democratic presidential primary in 2008.[327] The group also paid for advertisements of the film, which were tantamount to attack ads against Clinton.[328] The group challenged the constitutionality of the BCRA's ban on using general corporate funds for "electioneering communications," claiming it interfered with its right to engage in political speech.[329]

The Court agreed, holding, contrary to prior precedent, that expenditure limits on corporations violated the First Amendment.[330] Justice Kennedy's opinion for the Court explicitly rejected *Austin*'s anti-distortion rationale, explaining that "political speech is indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[331] By

322. *Id.* at 660 ("Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.").

323. 540 U.S. 93 (2003).

324. *Id.* at 108.

325. *Id.* at 141.

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

327. *Id.* at 319–20.

328. *Id.* at 320.

329. *Id.* at 321.

330. *Id.* at 340–41.

331. *Id.* at 349 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 77 (1978) (internal quotations omitted)).

suppressing the speech of corporations, Congress had "prevent[ed] their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[332] Thus, the Court rejected *Austin* and *McConnell*'s anti-distortion rationale and overruled both cases.[333]

In *Citizens United*, the Court disregarded and overturned decades of its own precedent. But that was not its only interventionism: it also expressly rejected Congress's judgment. The Court acknowledged that Congress had made a number of evidentiary findings about the potential for corporate and union spending to corrupt elections.[334] But the Court concluded that these findings were insufficient to justify the government's restrictions on corporate and union speech.[335]

Indeed, the majority Justices treated these congressional findings with disdain, giving several indications that their decision was motivated by mere disagreement with, and second-guessing of, Congress. Contemporary commentators noted that Justice Kennedy applied a "rigid, speech-protective principle" and failed to seriously grapple with the notion that Congress should receive deference for its conclusions about the corrupting effect of corporate and union speech expenditures.[336] In fact, Justice Kennedy even cast doubt on whether the favoritism or access afforded by such expenditures could be deemed corrupt at all.[337] Congress, according to the majority, offered "only scant evidence that independent expenditures even ingratiate," let alone corrupt.[338]

At oral argument, Justice Scalia made an additional Congress-skeptical point, suggesting to then-Solicitor General Elena Kagan that, due to their inherent self-interest in preserving the benefits of incumbency, members of Congress cannot reliably draft campaign finance legislation.[339] Solicitor General Kagan disputed this claim, giving evidence that "this

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332. *Id.* at 354.

333. *Id.* at 366.

334. *Id.* at 361.

335. *Id.*

336. William D. Araiza, Citizens United, Stevens, *and* Humanitarian Law Project*: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 826 (2011).

337. *Citizens United*, 558 U.S. at 359–60.

338. *Id.* at 360.

339. Transcript of Oral Argument at 50–51, *Citizens United*, 558 U.S. 310 (No. 08-205) ("Congress has a self-interest . . . I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents.").

may be the single most self-denying thing that Congress has ever done."[340] As Justice Stevens wrote in his passionate dissent for four Justices, the Court "shows great disrespect for a coequal branch" and "provides no clear rationale for being so dismissive of Congress."[341] This attitude made a mockery of the claim that the Court respects judicial deference to the elected branches.

By striking down provisions of the BCRA that limited corporate and union expenditures in federal elections, the Court reshaped American politics on the theory that the restrictions amounted to a suppression of free "speech" (i.e., expenditures). The Court disregarded concerns about the potential corrupting influence of money in politics, particularly in judicial elections.[342] And, in doing so, it overturned multiple major precedents, further indicating an outcome-oriented approach.[343]

As a First Amendment case, *Citizens United* does have its defenders.[344] But the judicial interventionism in *Citizens United* sharply contrasts with the Court's hostility to such action in *Rucho*. Both campaign finance and redistricting stand at the intersection of law and politics, shaping the dynamics of democratic governance. The Court's willingness to reshape the contours of campaign finance, while professing helplessness in the face of political gerrymandering, suggests that the Court's engagement or disengagement with political issues is not governed by principle but rather by outcome. Its "restraint" is selective, according to the impression it wants to give and the influence it wants to have over the development of doctrine. Selectively pointing to the concept of judicial restraint when the Court ideologically prefers not to act and ignoring that guide

340. *Id.* at 51 ("[C]orporate and union money go overwhelmingly to incumbents. This may be the single most self-denying thing that Congress has ever done.").

341. *Citizens United*, 558 U.S. at 412, 460.

342. Bannon, *supra* note 270, at 180–81 (arguing that secret spending in judicial elections can obscure conflicts of interest and erode public confidence in the integrity of state courts).

343. *See generally* Erwin Chemerinsky, *Supreme Court-October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863 (2011) (considering the Supreme Court's decisions in *Citizens United*, *McDonald v. City of Chicago*, and *Berghuis v. Tompkins*).

344. Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J. L. & POL'Y 63, 85 (2016) (arguing that *Citizens United* "embodied and applied classic First Amendment principles . . . especially the notion that it is the people, not the government, that must determine the nature and range of political speech").

when the Court prefers to act is not restrained or principled, it is self-serving.

2. Rewriting History in *Shelby County*

Shelby County v. Holder represents the apotheosis of non-deferentialism at the Roberts Court. *Shelby* involved the Voting Rights Act (VRA) of 1965, a statute emblematic of the civil rights era and pivotal in combating racial discrimination in voting.[345] Section 2 of the VRA prohibits practices that discriminate against minority voters; Section 5 provides an additional enforcement mechanism known as "preclearance," which required jurisdictions with a history of racial voting discrimination to obtain approval from the federal government before making any changes to their election systems.[346] Section 4(b) set forth the "formula" by which a state would fall under the preclearance regime,[347] hinging largely on a state having a long history of explicitly racist Jim Crow attempts to restrict the voting rights of African Americans.

Congress had an eminently sturdy constitutional basis for the Act: the Fifteenth Amendment directly and explicitly grants the power to Congress to enforce the right to vote.[348] Since the VRA's passage, the Court had repeatedly acknowledged its legitimacy. In *South Carolina v. Katzenbach*,[349] the Court upheld the constitutionality of both the preclearance requirement of Section 5 and the coverage formula in Section 4(b) as valid exercises of the Fifteenth Amendment.[350] The Court reaffirmed this in *City of Rome v. United States*,[351] holding that Congress can "prohibit changes that have a discriminatory impact."[352] Thus, with the Court's blessing,

345. *E.g.*, Transcript of Oral Argument at 43, Allen v. Milligan, 599 U.S. 1 (2023) (No. 21-1086) ("JUSTICE KAGAN: . . . . [Y]ou know, this is an important statute. It's one of the great achievements of American democracy to achieve equal political opportunities regardless of race, to ensure that African Americans could have as much political power as -- as -- as white Americans could. That's a pretty big deal.").

346. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

347. *Id.*

348. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

349. 383 U.S. 301 (1966).

350. *Id.* at 308.

351. 446 U.S. 156 (1980).

352. *Id.* at 177.

Congress renewed the VRA multiple times and with overwhelming majorities—in 1970, 1975, 1982, and 2006.[353]

The VRA's record of success came to an abrupt halt at the Roberts Court in 2013. In a 5–4 vote, the Court in *Shelby County* invalidated Section 4(b), leaving Section 5 with little force.[354] Absent a formula, no state or jurisdiction would fall under the preclearance regime—unless such jurisdictions are "bailed in" by a court as a remedy for persistent voting rights violations, a mechanism that is rarely used—leaving localities with a history of racial discrimination free to make changes to their election practices without any federal oversight.[355] And, unsurprisingly, that is exactly what happened: the Department of Justice explained that

> [o]n June 25, 2013, the very day that the Supreme Court issued the *Shelby County* opinion, Texas officials announced that they would implement a discriminatory and burdensome photo identification statute. And on June 26, the day after the *Shelby County* decision, Senator Tom Apodaca, Chairman of the North Carolina Senate Rules Committee, publicly stated that the North Carolina Legislature would be moving forward with an omnibus law imposing multiple voting restrictions. In the absence of preclearance, the statutes went into effect and the Department, along with private parties, had to file suit under a different part of the Voting Rights Act to enjoin them.[356]

To justify its decision, the Court invoked the vague principle of "equal sovereignty" of the states to override Congress's judgment.[357] That doctrine—which holds that the federal government should treat each state equally—had been infrequently invoked in the Court's history and never in this context.[358] It does not appear in the Constitution. Nonetheless, the Court found that the vague and implied concept of equal sovereignty was a "fundamental principle"[359] and a "historic

353. Shelby Cnty. v. Holder, 570 U.S. 529, 564 (Ginsburg, J., dissenting).

354. *Id.* at 557.

355. *See* 52 U.S.C. § 10302 (formerly 42 U.S.C. § 1973a(c)) (allowing a court to impose on a jurisdiction a regime akin to the Section 5 preclearance structure).

356. Kristen Clarke, *Reflecting On the 10th Anniversary of Shelby County v. Holder*, U.S. DEP'T OF JUST. (June 23, 2023), https://www.justice.gov/opa/blog/reflecting-10th-anniversary-shelby-county-v-holder [https://perma.cc/V8RQ-8K6Q].

357. *Shelby Cnty.*, 570 U.S. at 535.

358. *Id.* at 588 (Ginsburg, J., dissenting).

359. *Id.* at 542 (majority opinion).

tradition,"[360] trumping the explicit power given to Congress under the Constitution and justifying the invalidation of Section 4(b).

In invalidating the formula, the Court not only overturned congressional judgment but also did so by questioning the legislative branch's assessment of current needs and conditions. During the VRA reauthorization process in 2006, Congress compiled a record of 15,000 pages, which included twenty-one hearings of testimony from experts who gave evidence on the current conditions for minority voting, much of which reinforced the need for continuing the preclearance system.[361] Nonetheless, the *Shelby* majority found that Congress based the reauthorization on decades-old data and "eradicated practices,"[362] making it no longer responsive to current needs. The majority claimed that the formula "made sense"[363] at one point but, "[n]early 50 years later, things have changed dramatically,"[364] and the formula no longer "speaks to current conditions."[365] The actions of the states that had previously been covered by the preclearance requirement belie this claim that the VRA was no longer needed. In the ten years since *Shelby Country* was decided, twenty-nine states have passed voting restriction laws.[366]

The invocation of such an obscure and textually unsupported theory as the "equal sovereignty of the states" in the service of such a consequential decision indicates a Court in no mood for deference to democracy, but rather a Court intent on hindering efforts to create a more participatory and representative electoral system. In *Citizens United* and *Shelby County*, no deference was owed to lawmakers for their efforts to improve and equalize the electoral process. In *Rucho*, however, lawmakers were owed the greatest deference—no judicial intervention at all—for their attempts to entrench themselves

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360. *Id.* at 540.

361. Ellen D. Katz, *The* Shelby County *Problem*, *in* ELECTION L. STORIES 505, 519 (J. A. Douglas & E. D. Mazo eds., 2016).

362. *Shelby Ctny.*, 570 U.S. at 551.

363. *Id.* at 546.

364. *Id.* at 547.

365. *Id.* at 557.

366. Kareem Crayton & Kendall Karson Verhovek, Shelby County v. Holder *Turns 10, and Voting Rights Continue to Suffer from It*, BRENNAN CTR. FOR JUST. (June 20, 2023), https://www.brennancenter.org/our-work/research-reports/shelby-county-v-holder-turns-10-and-voting-rights-continue-suffer-it [https://perma.cc/UAN5-QVQX] ("[I]n the last 10 years, at least 29 states have passed 94 laws that make it more difficult to vote, particularly for communities of color.").

in power against the will of the voters. And in *Moore*, state courts, largely subject to the whims of judicial elections and unable to intervene on a national scale, received deference to engage in judicial review, at least up to a limit not yet specified. The larger pattern, then, is clear: the Court's interventions, as well as its refusals to intervene, consistently favor measures that facilitate electoral manipulation and advantage parties intent on restricting voting rights, undermining democratic principles, and tilting the electoral playing field.

IV. BEYOND DEMOCRACY JURISPRUDENCE: THE FALSE PROMISE OF JUDICIAL RESTRAINT

The Roberts Court promoting its own interests under the guise of self-restraint is not a new strategy; it has a long and storied history. Beyond election law and democracy jurisprudence, the notion of judicial restraint is greatly lauded by some who want to see less influence by the Court.[367] But the claim that judicial restraint is a form of judicial humility is misleading because "not doing" does not deny the exercise of judicial choice and subjectivity. In fact, such claims mask judicial discretion, thereby actually *reducing* judicial accountability. This Part puts the Roberts Court's claims of judicial constraint and humility in a broader context, showing that the fundamental concept is problematic.

A. *Existing Justifications for, and Critiques of, Judicial Restraint*

Judicial self-restraint, or judicial restraint, is a view that judges should defer to elected officials, presuming legislation to be constitutional or otherwise opting for non-action or limited action by the judiciary.[368] There are two main arguments in favor of judicial restraint. The first is a simple theoretical one: a restrained role is appropriate for an institution that is not popularly elected.[369] Professor Alexander Bickel coined this the "counter-majoritarian difficulty" and argued: "[T]he policy making power of representative institutions, born of the

367. *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing for a narrow reading of the Fourteenth Amendment).

368. Richard Hodder-Williams, *Six Notions of 'Political' and the United States Supreme Court*, 22 BRIT. J. POL. SCI. 1, 17 (1992).

369. *E.g.*, Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 440 (2020) (providing a summary of the "tremendous volume of commentary" on this issue).

electoral process, is the distinguishing characteristic of the [American] system."[370] As a non-elected body, the Court should defer to the elected branches of government.[371]

The second argument is more practical: that it is in the Court's interest to be restrained, for straining too strongly against the direction of Congress and the executive undermines its own legitimacy.[372] Because the Court has "no influence over either the sword or the purse," its popular legitimacy forms the basis on which other branches are compelled to obey its decisions.[373]

The two arguments are related: democracy is the process of recognizing and empowering public preferences; the Court's legitimacy ultimately rests on public respect for it as an institution.[374] And indeed, numerous studies have empirically established that courts anticipate and adjust to the constraints posed by the elected branches and the potential public opposition when making their most controversial decisions, shaping their decisions and methods according to their perceived vulnerability to congressional override[375] and taking

370. BICKEL, *supra* note 16, at 19.

371. *Id.* at 16–23 (describing the "counter-majoritarian difficulty"); Kenneth Ward, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law in Contemporary Constitutional Theory*, 18 J.L. & POL. 851, 851 (2002) (describing the counter-majoritarian difficulty as "an obsession of constitutional theorists" and a question of "how to justify judicial review, a non-democratic institution, in a government that derives its legitimacy from majority rule").

372. ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT (1960); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 12–13 (1988).

373. THE FEDERALIST NO. 78 (Alexander Hamilton) (Libr. of Cong.) ("The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment.").

374. MCCLOSKEY, *supra* note 372, at 14–15, 22–23 (explaining that the only way to manage a system with "two sovereigns" is for both partners to practice self-restraint, which means the Court's mandates must be "shaped with an eye not only to legal right and wrong, but with an eye to what popular opinion would tolerate").

375. *See generally* Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002) (analyzing the Court's assessment of the risk of being overridden by the other branches).

cues regarding public and political interest and acceptability of outcomes from the public[376] and organized interests.[377]

There have been multiple critiques put forth by others in response to these justifications for judicial restraint, with scholars arguing for a principled justification for greater judicial action.[378] In response to the argument that the Supreme Court should favor judicial inaction out of deference to governmental action, the obvious counter is that democracy is not the only central tenet of the American system.[379] The Framers constructed an elaborate system of checks and balances clearly aimed at curbing majorities: "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether . . . hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[380] De facto abdication of power by the judiciary, through deference to the other two branches of government, is equally dangerous to the system of checks and balances as any other lack of check or balance. On this view, the Court has a responsibility to protect less powerful groups from oppressive majoritarian decisions, which the Court is able to do *because* it is insulated from political pressures.[381] As the Court recognized over eighty years ago: The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts.[382]

As Justice William J. Brennan Jr. argued, "Under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for

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376. *E.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 374–76 (2009).

377. *E.g.*, Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 717–18 (1993).

378. *See generally* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (summarizing this debate).

379. *E.g.*, Gunther, *supra* note 179, at 16 ("[J]urisdiction under our system is rooted in Article III and congressional enactments, that it is not a domain solely within the Court's keeping.").

380. THE FEDERALIST NO. 47 (James Madison) (Libr. of Cong.).

381. David Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 652–53 (1985). Even then-Justice Rehnquist recognized this role of the Court. *E.g.*, SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 41–42 (1989).

382. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

redress of grievances."[383] And without court action, majorities have been "strengthened in their illiberal behavior by the failure of the courts to check their excesses."[384] Ultimately, then, far from being appropriate in a majoritarian democratic system, judicial restraint can constitute a failure of the judiciary to fill its core function of checking majoritarianism and the democratically elected branches. As Professor Michael Dorf puts it, the problem is not, as Alexander Bickel feared, the counter-majoritarian difficulty, but the "majoritarian difficulty": "Are courts that roughly follow public opinion capable of performing what is generally understood as their core counter-majoritarian function—protecting minority rights against majoritarian excesses?"[385]

In response to the pragmatic second argument, scholars have argued that the Court has a unique *capacity* to fulfill its role of protecting less powerful groups from oppressive majoritarianism, both because of its insulation from political pressures[386] and because of its unique national position, which enables it to enunciate highly diffuse, widely held inchoate beliefs.[387] In this way, the Supreme Court represents an alternative public opinion to that represented by legislative democracy.[388] And given the reliance of the American governmental system on litigation to resolve disputes, which arises due to the limitations of bicameralism and presentment in a system of political gridlock,[389] the Supreme Court necessarily must be involved in deciding major issues of law and policy. On this reasoning, the need for judicial participation in social policy is an enduring phenomena, which transcends

383. NAACP v. Button, 371 U.S. 415, 430 (1963).

384. RICHARD HODDER-WILLIAMS, THE POLITICS OF THE US SUPREME COURT 175 (1980).

385. Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 284–85 (2010).

386. Barnum, *supra* note 381.

387. Martin Shapiro, *The Supreme Court from Early Burger to Early Rehnquist*, *in* THE NEW AMERICAN POLITICAL SYSTEM 47, 48 (Anthony King ed., 2nd ed. 1990).

388. *But see* Dorf, *supra* note 385, at 285–86 (arguing that the "three leading normative approaches to constitutional interpretation—representation-reinforcement, originalism, and living constitutionalism—all assume a capacity for counter-majoritarianism that may exceed the abilities of real courts" because of the Court's responsiveness to popular opinion).

389. *See generally* Tonja Jacobi, *The Role of Politics and Economics in Explaining Variation in Litigation Rates in the U.S. States*, 38 J. LEGAL STUD. 205 (2009) (arguing that litigation rates are shaped by political structure, where fragmented political authority results in less precise legislation and a stronger judiciary, consequently heightening the need for judicial involvement).

calls for constitutional activism and restraint.[390] As Dean Erwin Chemerinsky puts it: if not the courts, then who?[391]

Altogether then, scholars have responded to both key justifications for judicial restraint. But we argue that there is an even more fundamental, vital response to the arguments in favor of judicial restraint. While judicial restraint sounds like a high-minded aspiration, in fact, the concept is malleable and often used to give legitimacy to short-term political viewpoints by cloaking them in the pretext of institutional ideology. Judicial restraint is essentially a strategic mask that covers judicial activism.

B. *Judicial Restraint as a Mask for Judicial Activism*

Professor Richard Hodder-Williams describes how the notion of judicial restraint became popularized.[392] The traditionally high public regard for the Court as a symbol of fundamental law meant that attacks on its holdings as driven by desired political outcomes were unpopular.[393] Ironically, this caused opponents of the Court's decisions instead to attack the Court in terms of its competence, method, and institutional role:

> '[S]elf-restraint' has become a code phrase designed to lend respectability to those who would hesitate to set limits on the actions of governments, largely because they approve of what the governments do and dislike the way the Court in recent years has enormously expanded the reach of the Bill of Rights and the Fourteenth Amendment. Popular and elite judgments of the Court have always depended on *what* it did rather than *how* it reaches its decisions.[394]

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390. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 9, 17 (1977).

391. Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1464 (2017) ("More generally, if not for the federal courts, what is to stop Congress or the President from enacting a law that is unconstitutional but politically expedient?").

392. *See* HODDER-WILLIAMS, *supra* note 384, at 135. *But see* Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 587 (2002) (explaining that the term "judicial restraint" has been a "fixture in the lexicon of judicial critique throughout the past one hundred years").

393. *See* HODDER-WILLIAMS, *supra* note 384, at 2 (illustrating the Supreme Court's significant political role).

394. *Id.* at 173; FRIEDMAN, *supra* note 376, at 274–77 (arguing that criticisms of the Court as counter-majoritarian are generally a product of dislike of the Court's decisions, particularly constitutional criminal procedure decisions).

The notion of judicial restraint, then, is often not a product of humility but of pragmatic defensiveness. But the power of the concept is that it can be used to counter opposition and deflect criticism while at the same time achieving activist goals. While Court critics may be appeased by the Justices' appearance of self-restraint, beneath this political guise, the façade of restraint can enable greater action.

1. The Ancient History of Strategic Use of Judicial Restraint

Both relying on judicial restraint as a shield against criticism and using the appearance of judicial restraint to actively achieve strategic goals are well-developed strategies long used by the Supreme Court. Chief Justice Marshall was expert at accruing judicial power while simultaneously appearing to limit Court power. Most famously, in *Marbury v. Madison*,[395] Chief Justice Marshall refused to strike down his political opponents' action of failing to honor appointments made by the previous Administration;[396] but, in doing so, he laid the groundwork for the power of judicial review over legislative and executive action more generally. In *Marbury*, the Federalist-leaning Supreme Court was asked to issue an order of mandamus compelling the new Republican government to deliver the commission of William Marbury, whose midnight appointment as a justice of the peace by the outgoing President John Adams had been confirmed by the Senate but not delivered.[397] The Judiciary Act empowered the Court to provide that remedy.[398] However, there was genuine fear of a standoff between the courts and the new Administration, particularly regarding the impeachment of judges, after the Republicans had eliminated a Court term.[399] So Chief Justice Marshall had to act in the context of a threat to judicial independence at a time when Court power had not been established.

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395. 5 U.S. 137 (1803).

396. *Id.* at 180.

397. *See id.* at 138; *see also* William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1 DUKE L.J. 1, 5 (1969) (noting the Federalist-dominated Supreme Court in 1802 while Marbury's case awaited resolution).

398. *Marbury*, 5 U.S. at 148 ("Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1, p. 58, sec. 13, have expressly given the supreme court the power of issuing writs of mandamus.").

399. *The Marshall Court, 1801–1835*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-courts/the-marshall-court-1801-1835/ [https://perma.cc/4RAM-YVEH] ("[T]he Republican Congress repealed the Judiciary Act of 1801 . . . and eliminated the August Term of the Court.").

The Court rejected Marbury's request, ruling that while Marbury had a right to the commission,[400] the statutory grant of jurisdiction to grant was unconstitutional and thus the Court lacked jurisdiction to issue the writ.[401] In this way, the Court acknowledged the legitimacy of the appointment of Marbury while not forcing the executive and legislature to actually make the appointment, which there was a good chance they would refuse. But Chief Justice Marshall did not stop there; he also established three[402] foundational principles of the American constitutional system along the way: first, that the Constitution is regulatory, not symbolic, i.e., that it is the supreme law of the land and controls all other laws;[403] second, that the judiciary has the power of judicial review of legislative acts, so statutes can be declared unconstitutional;[404] and third, that judicial review of executive actions is also possible.[405]

By finding in favor of his political opponents in the immediate battle about whether to install his compatriot Federalist nominees, Chief Justice Marshall won the larger war for the Federalists by laying the groundwork for judicial review. Notably, because he found that the Court had no jurisdiction in the case, he need not have addressed the three substantive questions that established the basics of constitutional law: the power of judicial review, the power to review executive actions, and constitutional supremacy. Chief Justice Marshall set out vast swathes of new doctrine, which are arguably dicta, but which became foundational to American constitutional law

400. *Marbury*, 5 U.S. at 151 ("The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed.").

401. *Id.* at 138 ("Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution."); *see also id.* at 175–76.

402. A lesser fourth ruling is that federal court jurisdiction is limited to Article III enumerated jurisdiction, so Congress cannot expand the jurisdiction of the federal courts. *Id.* at 174.

403. *Id.* at 178–79 ("The judicial power of the United States is extended to all cases arising under the constitution.").

404. *Id.* at 180 ("[T]he particular phraseology of the constitution of the United States confirms . . . that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.").

405. *Id.* at 166 ("[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").

pertaining to judicial power while seemingly exercising judicial restraint.

Constitutional scholars commonly recognize the strategy that Chief Justice Marshall exercised in *Marbury*, but they do not take the next step of realizing that the same happened elsewhere.[406] Chief Justice Marshall's strategies in *Marbury* were not exceptional; he regularly engaged in such behavior. For instance, he worked hard to forge a strong unwritten rule of joint opinion writing, abolishing the practice inherited from England of seriatim opinions and fractured coalitions.[407] That norm of unanimous opinion writing governed until the modern era and was essential to developing the institutional strength of the Supreme Court.[408] It not only made individual judgments more powerful due to their large and unopposed coalitions[409] but also strengthened the power of the Court by making it appear less political and more judicial.[410]

Further, Chief Justice Marshall had no monopoly on this kind of strategic maneuvering to promote the Court's own power: the Court used such devices even before Chief Justice Marshall joined it. For instance, in 1792 in *Hayburn's Case*,[411] several Justices, presiding over the circuit courts, refused to

406. Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1239 (2003) (summarizing this literature and arguing that this strategic story is incomplete).

407. Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, WASH. U. J.L. & POL'Y, 261, 270 (2000) (promoting that consolidated opinions "laid the groundwork for . . . abolishing fractured, seriatim decisions and maintaining straightforward precedents").

408. Although periods of strong dissent followed, such as during the 1930s, the Court never returned to the British tradition of seriatim opinions. *See* David M. O'Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 91, 111 (Cornell W. Clayton & Howard Gillman eds., 1999) ("[W]hen individual opinions are more highly prized than opinions for the Court, consensus not only declines but the Court's rulings appear more fragmented, uncertain, less stable, and less predictable.").

409. On the effect of coalition size on strengthening the power of precedent generally, see Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411 (2009).

410. *E.g.*, R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 150–52 (2001); Donald M. Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118, 119 (1965). In Roberts's words: "If the Court in Marshall's era had issued decisions in important cases the [divided] way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have." Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC (Jan./Feb. 2007), at 105.

411. 2 U.S. 409 (1792) (refusing to rule on whether non-judicial duties could be assigned by Congress to the courts).

carry out the mandate of the Invalid Pensions Act, in which Congress had tasked the federal courts with determining the eligibility of certain veterans for war pensions, subject to final approval and revision by the Secretary of War.[412] Although it never reached the full Supreme Court on the merits, the case is known for its assertion of the principle that courts cannot be compelled to perform non-judicial functions and that their decisions cannot be subject to revision or supervision by executive officials.[413]

Professor Robert McCloskey describes how, in *Hayburn's Case*, by refusing to include certain functions in the judicial realm, the Court denied itself power; but, in preserving its differences from the other branches, it laid the groundwork for power by indicating that what *are* judicial functions are so exclusively.[414] This was not simply a question of the Court acting slowly to preserve its fragile power base. By not issuing groundbreaking decisions, the Court not only appears less confrontational but also can avoid making clear pronouncements of principle and instead leave itself enormous discretion.[415] That is, restraint can mask activism and even the expansion of Court power.

McCloskey describes how *Hayburn's Case* was not the only instance of this tactic being used by the early Court. Throughout the late nineteenth century, the Court deliberately slowed down the development of doctrines; in doing so, it not only better preserved its power base but also developed a rule that was a "far more effective tool of judicial governance . . . because it was flexible enough to mean anything the Judiciary wanted it to mean" and could thus be used to shape social policy.[416] Clearly then, there is a long tradition of strategic judicial action under the guise of self-restraint, including the Supreme Court's tactics both of denying itself a power that was being tested while simultaneously asserting an untested power and of promoting its own discretion through the avoidance of groundbreaking decisions.

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412. *Id.* at 409; Maeva Marcus & Robert Teir, Hayburn's Case*: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 529–34.

413. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 84 (6th ed. 2009).

414. MCCLOSKEY, *supra* note 372, at 20–21.

415. *Id.* at 47 ("Paradoxical though it may seem, the Supreme Court often gains rather than loses power by adopting a policy of forbearance.").

416. *Id.*

2. Strategic Judicial Restraint in the Modern Court

Deliberately creating room for judicial discretion under the guise of judicial self-restraint is a tradition that was embraced by the Burger Court. Professor Martin Shapiro describes how a common strategy of the Burger Court was to be activist, not by announcing major new constitutional rights, as the Warren Court had done, but by using "balancing doctrines to reach ad hoc policy judgments in particular cases."[417] It was "typical for the Court to announce that a given case involved a class of various governmental, social and individual interests" and resolve the issue by saying that one was more weighty without giving any legal explanation for its conclusion.[418] Shapiro describes this not as an occasional exercise of strategy, but as a standard maneuver: "Its reaction to nearly any problem [was] to enhance its own policy discretion and then wield that discretion case by case to achieve what it believed to be desirable social results."[419] The Court developed "two lines of precedent, one on each side of the issue, so that it [was] always free to go whichever way it please[d]."[420] This gave the Burger Court expansive choice not only in which way to rule in any case but also in which cases to take. As Shapiro describes: "[U]nbound even by its own previous rules and in receipt of a large number of appeals," the Court is also able to increase the *area* of discretion.[421]

This description of the Burger Court illustrates that the claim that is sometimes made that conservative courts are by nature self-restrained courts[422] is not true.[423] The argument

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417. Martin Shapiro, *The Supreme Court Warren to Burger*, *in* THE NEW AMERICAN POLITICAL SYSTEM (Anthony King ed., 1978).

418. *Id.*

419. *Id.* at 211; *see also* Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT REV. 1, 2.

420. Shapiro, *supra* note 417, at 208.

421. *Id.* at 206.

422. J. Harvie Wilkinson III, *Is There A Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1383 (2002) (arguing that in the 1960s and 1970s, "[a] judicial liberal believed that the enlightened approach of the courts was the answer to many social problems while a judicial conservative placed faith in traditional democratic processes. In short, a liberal was an activist and a conservative practiced self-restraint").

423. *E.g.*, William J. Haun, *The Virtues of Judicial Self-Restraint*, NAT'L AFFS. (Fall 2018), https://www.nationalaffairs.com/publications/detail/the-virtues-of-judicial-self-restraint [https://perma.cc/SNB2-445A] (acknowledging that it is no longer true that the conservative legal movement has a principal focus on judicial

equates ideological conservatism with Burkean-style incrementalism,[424] which in turn is associated with judicial minimalism and self-restraint.[425] But this syllogism is belied by not only the actions of the Burger Court but also by the strategic use of judicial restraint beyond those actions. For instance, Professor Ernest Young has described, more generally, how following the guidelines proposed by those advocating judicial restraint can allow courts

> to intrude into areas of executive or legislative preeminence formerly shielded by the political question doctrine; to reshape state law according to the judge's own lights; to enjoin state criminal prosecutions; and to replace settled understandings of what the Constitution means with whatever happens to be the judge's own 'first best' interpretation.[426]

The inaccuracy of paralleling conservatism and judicial humility is further revealed by an analysis of the decision-making of the Rehnquist Court. The Rehnquist Court was significantly more ideologically conservative than the Burger Court[427] but no more restrained. Professor Lori Ringhand

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self-restraint but blaming liberal legislation for the shift). Commentators from both right and left critiqued the Rehnquist Court for activism. *E.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 223 (1990) (critiquing conservatives' judicial activism from a conservative perspective); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1244 (2002) ("Jurisdiction is limited, but not in key cases where ideological plaintiffs seek conservative results. Judicial creativity is avoided except in pursuit of conservative causes.").

424. Edmund Burke, *Reflections on the Revolution in France*, *in* TWO CLASSICS OF THE FRENCH REVOLUTION: REFLECTIONS ON THE REVOLUTION IN FRANCE AND THE RIGHTS OF MAN 184 (1989) ("It is one of the excellencies of a method in which time is amongst the assistants, that its operation is slow, and in some cases almost imperceptible.").

425. *E.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4–6 (1999) (advocating for judicial minimalism). *But see* Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 825 (2013) ("In law, as in ordinary life, the justifications for minimalism frequently fail, and hence sensible judges sometimes find it necessary to go well beyond minimalism."). Arguably, Professor Cass Sunstein provides an ideological mirror of the selectivity of the conservative Roberts Court's claims of judicial restraint.

426. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1181 (2002).

427. On measures of judicial ideology wherein Justices with scores below zero are conservative, and with scores above zero are liberal, the Burger Court scored

showed that "[t]he Rehnquist Court invalidated federal statutes in far more cases than did either of its predecessor Courts. The Rehnquist Court, in fact, issued an unprecedented thirty-four decisions invalidating federal statutes. By contrast, the Warren and Burger Courts issued only twenty-one and nineteen such decisions, respectively."[428] Then-Senator Joe Biden said of the Rehnquist Court: "These folks are judicial activists."[429]

Likewise, the Roberts Court has continued the tradition of strategically gaining power for itself while appearing to humbly exercise self-restraint—and not just in its developing democracy jurisprudence. Chief Justice Roberts himself was seen by many as highly strategic in his opinion in *NFIB v. Sebelius*,[430] siding with the Obama Administration[431] and upholding its healthcare law[432] while simultaneously attempting to develop multiple doctrines that, appliable broadly, would massively restrict federal government power.[433] The Roberts Court has been empirically shown to be increasingly activist in its decision-making process, with the Justices engaging in "judicial advocacy" at oral argument—increasingly making more comments than asking questions of

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almost a third of a standard deviation move to the right over the history of the Court. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 146 (2002). Updated data is available at http://mqscores.wustl.edu/measures.php [https://perma.cc/6G8E-SLFB].

428. Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033, 1035–36 (2007).

429. David G. Savage, *High Court Rejects U.S. Law Allowing Civil Suits in Rapes*, L.A. TIMES (May 16, 2000, 12:00 AM), https://www.latimes.com/archives/la-xpm-2000-may-16-mn-30545-story.html [https://perma.cc/TY87-WYYE].

430. 567 U.S. 519 (2012).

431. *See* Robert J. Pushaw Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 1997 (2013) ("Some commentators have charged that he caved in to public pressure from the Obama Administration and its supporters in Congress and the media.").

432. *Id.* at 588.

433. *E.g.*, Paul Campos, *Roberts Wrote Both Obamacare Opinions*, SALON (July 3, 2012, 6:13 PM), http://www.salon.com/2012/07/03/roberts_wrote_both_obamacare_opinions/ [https://perma.cc/8T7A-GGHZ]; Daniel Epps, *In a Health Care Ruling, Roberts Steals a Move from John Marshall's Playbook*, ATLANTIC (June 28, 2012), http://www.theatlantic.com/national/archive/2012/06/in-health-care-ruling-roberts-steals-a-move-from-john-marshalls-playbook/259121/ [https://perma.cc/39T5-H3J3] (arguing that the case mirrors *Marbury* and that, in future decades, legal observers will think of it in the same terms); Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 767 (2014) (describing Chief Justice Roberts's "sophisticated maneuvering to maximize long-term doctrinal development").

advocates, and particularly directing comments to the advocate the Justice ultimately votes against, and directing questions to the side they ultimately support.[434] Clearly, conservatism does not equate to judicial restraint, and the Roberts Court's claim of deference and restraint is selective at best.

3. The Underlying Theoretical Infirmity of Judicial Restraint

Ultimately, the Machiavellian underside to judicial inaction—the fact that the Court is really promoting itself while pretending to refrain—makes the theory impossible to reconcile with itself. The foundation of judicial restraint as a virtue stresses that the Court should avoid taking certain actions.[435] It can "not do" by employing devices such as vagueness and delegation[436] in order to "leave the other institutions, particularly the legislature, free . . . to make or remake their own decisions."[437] But "not doing," particularly failing to check another branch of government, means doing something else, namely legitimizing the decisions of another branch. As such, while taking no positive action, the Court nevertheless affects the outcomes of cases.

Inaction requires little justification. If the Court avoids having to take positive action, make clear rules, or provide lengthy explanations, it will not threaten the status quo, and its decisions are more likely to escape criticism.[438] But the Burger Court story illustrates that while this encourages minimalist decisions, those decisions lack enunciated principles and increase judicial discretion. Minimalist action in one case leaves the Court open to an array of options in subsequent cases. This is contrary to the notion of the development of the common law, whereby decisions build upon other decisions incrementally to clarify the boundaries of what is and is not lawful.[439] And while any individual decision to "not do" may be justifiable on some terms, it is certainly not justifiable as limiting judicial discretion or as being a constraint on the choice

434. Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1203, 1244 (2019).

435. BICKEL, *supra* note 16, at 200–01 (explaining that the Court exercises a "triune function: it checks, it legitimates, or it does neither"). Bickel labels these tactics "the devices of not doing" or "the passive virtues." *Id.* at 207.

436. *Id.* at 201.

437. *Id.* at 202.

438. *Id.*

439. *See* Alvaro Bustos & Tonja Jacobi, *Judicial Choice Among Cases for Certiorari*, 27 SUP. CT. ECON. REV. 117, 119 (2019) (modeling the operation of the common law as a gradually reducing range of discretion for subsequent courts).

of judicial action. It is impossible to have judicial restraint without judicial constraint.

Not only does not acting in this way not bind the specific current court but also refusing to make clear rules going forward prevents lower courts from being able to make authoritative decisions. Scholars have shown that decreasing the level of discretion available to lower courts under their jurisdiction can increase the power of the higher court.[440] This can be seen clearly in the changing attitudes to *Chevron* deference. The Rehnquist Court unanimously decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[441]—albeit with three judges not participating.[442] Professors Linda Cohen and Matthew Spitzer describe how, for the first few years, the conservative Rehnquist Court embraced *Chevron* deference.[443] At that time, the Reagan Administration was issuing conservative interpretations of laws, whereas the lower courts were more liberal. Within a few years, the appointees of Presidents Reagan and George H.W. Bush had filled the lower courts, and President Bill Clinton took the White House. And so, the still-conservative Supreme Court became more open to lower court interpretation than agency interpretation.[444] The story that Cohen and Spitzer told in the early 1990s has been supported by subsequent history: when President George W. Bush was in the White House, Justice Clarence Thomas wrote an opinion that expanded *Chevron* deference such that courts should defer to agencies even when the court believes that its

440. McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L.J. 1631, 1646–47 (1995) (showing that narrowing Supreme Court jurisdiction in particular areas can empower the Court by permitting more credible and extensive oversight of remaining areas, increasing obedience from lower courts); Tonja Jacobi et al., *A Positive Political Theory of Rules and Standards*, 2012 UNIV. OF ILL. L. REV. 1, 40 (2012) (showing, using the case study of the exclusionary rule, how creating standards rather than rules can allow higher courts to better constrain lower courts).

441. 467 U.S. 837 (1984).

442. *Id.* at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

443. Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L. & CONTEMP. PROBS. 65, 68, 77 (1994).

444. *See id.* (explaining that due to the more liberal administration under President Bush, the Supreme Court no longer required such deference to administrations' statutory interpretations and it allowed appellate courts to take a larger role in determining policy).

own interpretation is superior to that of the agency.[445] But once Barack Obama became president and started making liberal appointments to the courts, Justice Thomas changed his tune, announcing that "*Chevron* is in serious tension with the Constitution."[446]

Conservative support for *Chevron* historically hinged on the relative ideological alignment of the agencies versus the lower courts; yet at oral argument in the case that eventually overruled *Chevron*[447]—decided during a Democratic Administration but at a time with overwhelmingly conservative lower courts—the conservative Justices insisted that considering overturning *Chevron* would be an indication of judicial humility.[448] That illustrates the power of the self-restraint label—it implies that the Court is acting on principle,[449] perhaps even against its own interests in terms of its own power, when in fact it may be doing the opposite: promoting its power while claiming not to and thus expanding its influence while decreasing its accountability.

Ultimately, "not doing" means maintaining a given status quo, which will make some happy and others not. When taken to the extreme of declaring an entire area of law nonjusticiable, as the Court did in *Rucho*, judicial restraint has even more repercussions. "Not doing" can include permitting judgments of other courts to have a certain effect, such as state courts upholding political gerrymanders. It may mean standing by while state courts engage in constitutional experimentation, including action that, if the Supreme Court did review, it would find to be contrary to the federal Constitution.[450] And "not

445. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

446. Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari).

447. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

448. Transcript of Oral Argument at 37, *Loper Bright Enters.*, 144 S. Ct. 2244 (2024) (No. 22–451). ("JUSTICE GORSUCH: One lesson of humility is admit when you're wrong.").

449. BICKEL, *supra* note 16, at 203 (arguing that decisions do not bind an institution close to the electoral process unless they are "principled," but not defining that term); Wilkinson, *supra* note 422, at 1384–85 ("It is not the word 'activism' that settles the issue. It is whether a court's actions admit of principled justification.").

450. *See* BICKEL, *supra* note 16, at 201 (arguing that the Court permits lower courts to partake in "constitutional experimentation" when it refrains from doing

doing" in the form of burden shifting to other courts may not even have the effect of promoting majoritarian government action if it maintains court decisions that frustrate or check a prior legislative or regulatory action.

Even when Bickel first coined the "counter-majoritarian difficulty," commentators pointed out the dangers of court inaction when there are ripe and available principles for acting. Professor Gerald Gunther made this point and described, as one of the two "most disturbing examples," Bickel's advocacy for inaction in the area of legislative apportionment:[451]

> If the decision in *[Baker v. Carr]* [prohibiting inequality of individual representation] was right, and if the ultimate federal restraint on state apportionments should be a minimal one, how can the Court avoid "legitimating" some apportionments, how can it merely "let an apportionment be"? To deny jurisdiction on appeal from lower court invalidations of state statutes would not merely be without support in jurisdictional principles, but would have the effect of letting the lower court action stand. To deny the lower courts jurisdiction to consider state apportionments would be to overrule *Baker v. Carr*.[452]

Gunther was anticipating the problems with *Rucho*'s logic long before the Court even began questioning the justiciability of gerrymandering. The same paradox of logic holds for Court inaction in democracy jurisprudence more generally because inaction constitutes a different form of action—with consequences. The Supreme Court, in using notions of judicial restraint as a shield in *Rucho*, has yet to explain how three things can be true at the same time: that gerrymandering (or other electoral interferences) is inimical to democracy, that the Supreme Court is a coequal branch of government, and that the Supreme Court should not act to prevent harm to the constitutional system. When it comes to *Rucho*, the Court was willing to compromise on the second leg, judicial equality; when it comes to *Moore*, the Court reasserted its role in the constitutional system, and it let go of the third leg, judicial restraint. When it came to *Citizens United* and *Shelby County*,

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anything or declines to declare a proceeding unconstitutional on the grounds of vagueness).

451. Gunther, *supra* note 179, at 22–23.

452. *Id.* at 23.

the Court threw off the third leg with vigor. Surely judicial restraint cannot be reconciled with such selectivity. Thus, this Court may seek to dress itself in the legitimacy of restraint, but its actions reveal the motivating vices.

This is particularly true in gerrymandering jurisprudence, where "not doing" will enable whichever party is advantaged by a gerrymander to gain electoral power that it otherwise may not gain if the Court did its job and assessed the validity of the gerrymander. And to the extent that one party is advantaged by a permissive Court attitude toward restrictions on voting rights, the Court "refraining from action" is really *acting* by permitting those restrictions, advantaging the party in question. The fact that, currently, the party most actively developing restrictions on the right to vote is the conservative Republican party[453] and it is the conservative Roberts Court that is permitting those actions, is unlikely a coincidence. Especially when the issue is the proper functioning of the democratic system, looking the other way is a form of not acting. But it is a vice, not a virtue.

CONCLUSION

Though he was the author of *Brown v. Board of Education*,[454] former-Chief Justice Earl Warren said that his "one person, one vote" decisions amounted to his most important achievement.[455] This view reflects the paramount importance of those decisions on American democracy and the electoral process. Under Chief Justice Warren's leadership, the Court actively engaged in correcting imbalances in the electoral system and in reinforcing the foundational principle that every citizen's voice should have equal weight.

The Roberts Court has steered in the opposite direction, allowing and exacerbating existing political and electoral imbalances. *Moore* staved off a democratic crisis by rejecting the Independent State Legislature Theory, but numerous

453. John Laloggia, *Conservative Republicans are Least Supportive of Making it Easy for Everyone to Vote*, PEW RSCH. CTR. (Oct. 31, 2018), https://www.pewresearch.org/short-reads/2018/10/31/conservative-republicans-are-least-supportive-of-making-it-easy-for-everyone-to-vote/ [https://perma.cc/E986-S8CD] ("Two-thirds of Americans (67%) say everything possible should be done to make it easy for every citizen to vote, but Republicans—especially conservative Republicans—are less likely to hold this view.").

454. 347 U.S. 483 (1954).

455. Ari Berman, *The New Attack on 'One Person, One Vote'*, NATION (Nov. 25, 2015), https://www.thenation.com/article/archive/the-new-attack-on-one-person-one-vote/ [https://perma.cc/UF8P-TXSC].

Justices have suggested that they may return to that option in time. Meanwhile, *Moore*'s holding is a continuation of a trend evident in *Citizens United*, *Shelby County*, and *Rucho*: deference to legislatures and states only when those bodies appear antagonistic to the principles of broad, participatory democracy.[456] After *Moore*, state legislative action regarding election rules will be adjudicated solely by state court judges, who, thanks to an earlier ruling in *Republican Party of Minnesota v. White*, are free to openly campaign on their views on legal and political issues.[457] And given the frequency of judicial elections, any interventionist state decision is limited in its staying power; indeed, by the time the Court ruled in *Moore* itself, a new election in North Carolina had changed the partisan balance of the state court, which led to a reversal of the decision that invalidated the legislature's map.[458] Such a situation recalls a rueful maxim in international law: states are more likely to opt-in to human rights treaties when they know that their domestic legal system will not enforce them.[459] Similarly, the Court knows that its grant of authority to state legislatures will have limited impact and that fair-map victories in some states will be counterbalanced by losses in others.[460] Thus, there is little harm to the Court's anti-democratic agenda in allowing state courts some limited room to experiment.

Chief Justice Roberts has often expressed concerns about the Court's "legitimacy" in the eyes of the public, insisting that only by maintaining a sheen of apolitical neutrality can the Court properly exercise its authority when it really counts.[461] In many

456. Sample, *supra* note 20, at 1561.

457. 536 U.S. 765, 788 (2002).

458. *See* Harper v. Hall, 886 S.E.2d 393, 450 (N.C. 2023) (Earls, J., dissenting) ("Today's result was preordained on 8 November 2022, when two new members of this Court were elected to establish this Court's conservative majority.").

459. *See* Daniel W. Hill, Jr., *Avoiding Obligation: Reservations to Human Rights Treaties*, 60 J. CONFLICT RESOL. 1129, 1135 (2016).

460. *E.g.*, Harkenrider v. Hochul, No. 22-00506, 2022 WL 1179950 (N.Y. App. Div. Apr. 18, 2022) (invalidating New York's Democratic gerrymander, despite a court made up of only Democratic appointees).

461. *E.g.*, Adam Liptak, *John Roberts, Leader of Supreme Court's Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html [https://perma.cc/5YF9-SQGN] (quoting Chief Justice Roberts: "We don't work as Democrats or Republicans"); Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, ASSOC. PRESS (Nov. 21, 2018), https://apnews.com/article/c4b34f9639e141069c08cf1e3deb6b84 [https://perma.cc/2YNN-M9JN]

ways, this is true and important. But if a case involving the proper functioning of the electoral system is not a time when it "really counts," what is? Why is the preservation of a truly representative democracy not a boon, rather than a blow, to the Court's legitimacy? In refusing to fulfill this role, ultimately, the Court's current approach threatens not only its own legitimacy but also the very fabric of democratic governance in the United States.

(quoting Chief Justice Roberts saying, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges"); William Spruance, *Heckling the Umpire: John Roberts, Public Scrutiny, and the Court's Legitimacy*, 19 GEO. J.L. & PUB. POL'Y 633, 633 (2021) (arguing that Chief Justice Roberts has "dual objectives: to advance his preferred method of jurisprudence and to mitigate potential damage to the Court's reputation").