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Rucho v. Common Cause—A Critique

Emmet J. Bondurant

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RUCHO V. COMMON CAUSE—A CRITIQUE

*Emmet J. Bondurant**

ABSTRACT

Once upon a time, the right to vote was held by the Supreme Court to be among the most precious of the rights protected by the Constitution, on which all other rights were dependent for their existence. Protection of the right to vote was not a partisan issue. Some of the leading defenders of the right to vote—including Justices Brennan, Powell, Stevens, and Kennedy—had all been appointed by Republican Presidents. As the confirmation process of federal judges by the Senate has become increasingly partisan, so have the decisions of the Supreme Court. The partisan divide has been particularly evident in the Court’s campaign finance and election law cases, which have, to an increasing degree, been decided along partisan lines of the Supreme Court. These cases illustrate that the United States is very much a government of men (and women) and not of laws, and that Chief Justice Roberts’ claims that the Justices of the Court are impartial umpires and that there are no Republican Justices or Democratic Justices are myths.

*No case is a better illustration of the partisan trend in the Supreme Court’s election law decisions than *Rucho v. Common Cause*. In a 5-4 party-line vote, the Court disregarded thirty years of Supreme Court precedent and held for the first time that partisan gerrymandering is a political question beyond both the competence and the jurisdiction of the federal courts. The majority opinion was authored by Chief Justice Roberts, whose entire opinion was based on a misrepresentation of the constitutional basis of the plaintiffs’ claims. The Chief Justice also misrepresented the Court’s prior precedents and disregarded the factual findings and undisputed evidence of the effectiveness of partisan gerrymandering in favoring candidates and dictating electoral outcomes. The majority opinion is both contradictory and hypocritical. While the Chief Justice self-righteously insisted that the Court was not condoning partisan gerrymandering and conceded that partisan gerrymandering is “incompatible with democratic institutions” and “leads to results that reasonably seem unjust,” the Chief Justice, nevertheless, endorsed the constitutionality of*

* Mr. Bondurant is a partner in an Atlanta law firm, Bondurant, Mixson & Elmore, and he represented the Common Cause plaintiffs as counsel of record in *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484 (2019). He also was counsel of record and represented the plaintiffs in *Wesberry v. Sanders*, 376 U.S. 1 (1964).

partisan gerrymandering—the very issue that the Court had just held it had no jurisdiction to decide.

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INTRODUCTION

“No case shows more vividly that the conservative justices have abandoned the commitment to democracy and equality that was at the core of the Warren Court’s work” than *Rucho v. Common Cause*.¹ In *Rucho*, the Supreme Court had a perfect opportunity to end partisan gerrymandering.²

Although members of the Supreme Court on both the right and the left agree partisan gerrymandering is “incompatible with democratic principles” and “leads to results that reasonably seem unjust,”³ the Court voted along party lines and held 5-4 that the constitutionality of partisan gerrymandering is a political question that is beyond both the competency and the jurisdiction of the federal courts.

Partisan gerrymanders are based on “the idea that one group can be granted greater voting strength than another [that] is hostile to the one [person], one vote basis of our representative government.”⁴ Partisan gerrymanders operate by vote dilution,⁵ “jeopardize[] the ordered working of our Republic and of the democratic process[,] . . . [a]nd amount[] to rigging elections.”⁶

In *Rucho v. Common Cause*, the Roberts Court’s “conservative majority has taken the Court’s election jurisprudence on another pro-partisanship turn.”⁷ In

¹ GEOFFREY R. STONE & DAVID A. STRAUSS, *DEMOCRACY AND EQUALITY* 171 (2020).

² *Rucho*, 139 S. Ct. at 2506.

³ *Compare* *Ariz. St. Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)) (Justice Ginsburg and the Democratic majority), *with Rucho*, 139 S. Ct. at 2506 (Chief Justice Roberts and the Republican majority). This Article replaces the labels of “conservative,” “liberal,” or “progressive” for Justices with reference to the party of the President who nominated them.

⁴ *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969).

⁵ *Gerrymandering*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added); *see also Partisan Gerrymandering*, BLACK’S LAW DICTIONARY (11th ed. 2019) (noting that readers should refer to the definition of “Gerrymandering”).

⁶ *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring) (internal punctuation omitted).

⁷ Richard L. Hasen, *The Supreme Court’s Pro-Partisanship Turn*, 109 *GEO. L.J. ONLINE* 50, 50 (2020); *see also* Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 *SUP. CT. REV.* 111, 178 (2020) (“Running like a red thread through the Roberts Court’s . . . decision[] is perceived, and actual, partisan advantage [that] . . . benefit the Republican Party, whose Presidents appointed a majority of the sitting Justices.”). For additional examples, *see* *Citizens United v. FEC*, 558 U.S. 310, 319 (2010); *Ariz. Free Enter. Club’s Freedom PAC v. Bennett*, 564 U.S. 721, 728 (2011); *Shelby County v. Holder*, 570 U.S. 529, 536 (2013); *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014); *Husted v. A. Phillip Randolph Inst.*, 138 S. Ct. 1833, 1850 (2018); *Ariz. St. Legislature*, 135 S. Ct. at 2677–78. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, Chief Justice Roberts, joined by three other conservative Justices, argued that the Arizona Independent Redistricting Commission, which was adopted by a referendum of the people of Arizona over the objections of the Arizona legislature, was unconstitutional under the Elections Clause because the amendment deprived the Arizona legislature of the power to draw (and gerrymander) the lines of congressional districts.

holding the constitutionality of partisan gerrymandering to be a political question that is beyond the jurisdiction of the federal courts, the Court reversed decisions of district courts that had declared unconstitutional partisan gerrymanders of congressional districts in North Carolina and Maryland that the Court agreed were “highly partisan by any measure” and “involve[d] blatant examples of partisanship driving districting decisions.”⁸

In North Carolina, for example, Representative David Lewis, the Republican co-chair of the reapportionment committee, declared that “electing Republicans is better than electing Democrats” and drew the 2016 congressional map “to give a partisan advantage to 10 Republicans and 3 Democrats because . . . it [was not] possible to draw a map with 11 Republicans and 2 Democrats.”⁹

The Republican legislature in North Carolina made no attempt to defend the constitutionality of partisan gerrymandering on the merits. It did “not argue—and ha[s] never argued—that the 2016 Plan’s intentional disfavoring of supporters of non-Republican candidates advances any democratic, constitutional, or public interest.”¹⁰

Chief Justice Roberts, nevertheless, said “that the solution” to partisan gerrymandering does not “lie[] with the federal judiciary.”¹¹ The Court held for the first time in recent history that the constitutionality of partisan gerrymandering is a “political question[] beyond the reach of the federal courts.”¹²

The majority did not stop there. Although the majority insisted that “[o]ur conclusion does not condone excessive partisan gerrymandering,”¹³ the Chief Justice and the Republican majority *endorsed* the constitutionality of partisan gerrymandering in an advisory opinion, *despite* having ruled that the Court had no jurisdiction of partisan gerrymandering claims.

Ariz. St. Legislature, 135 S. Ct. at 2677–78. The independent commission survived the challenge by the Republican legislature only because Justice Kennedy refused to join his fellow Republicans in holding the commission unconstitutional under the Elections Clause. *Id.* at 2657.

⁸ *Rucho*, 139 S. Ct. at 2490–91, 2505.

⁹ *Id.* at 2509–10 (Kagan, J., dissenting) (quoting *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 808 (M.D.N.C. 2018)).

¹⁰ *Rucho v. Common Cause*, 279 F. Supp. 3d 587, 597 (M.D.N.C. 2018) (emphasis omitted); *Rucho*, 318 F. Supp. 3d at 848 (emphasis omitted).

¹¹ *Rucho*, 139 S. Ct. at 2506.

¹² *Id.* at 2506–07.

¹³ *Id.* at 2507.

There is a striking contrast between the Chief Justice’s opinion in *Rucho* and his opinion in *McCutcheon v. FEC*.¹⁴ In *McCutcheon*, the Chief Justice emphasized that “there is no right more basic in our democracy than the right to participate in electing our political leaders,” and that “those who govern should be the *last* people to . . . decide who *should* govern.”¹⁵

By contrast, in *Rucho*, Chief Justice Roberts said that “legislatures have the authority to engage in a certain degree of partisan gerrymandering,” and that voters “cannot ask for the elimination of partisanship” in redistricting.¹⁶ “The basic reason is that while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, ‘a jurisdiction may engage in constitutional political gerrymandering.’”¹⁷ The Chief Justice said that even when the predominant intent of a redistricting plan is to “secur[e] [a] partisan advantage,” that intent is “permissible” and “does not become constitutionally impermissible like racial discrimination, when that permissible intent ‘predominates.’”¹⁸

The Court’s decision is a body blow that will undermine public confidence in the democratic process and republican government whose legitimacy is dependent on the consent of the governed and the fairness of our elections. *Rucho* will also undermine public confidence in the independence of the Supreme Court itself as an impartial and non-partisan judicial body.

It also sent the wrong message to the two major political parties on the eve of the 2020 census. Not only did the majority put the Court’s imprimatur on partisan gerrymandering, but it also gave the major political parties the Court’s permission to enact even the most extreme partisan gerrymanders of congressional districts and state legislative districts after the 2020 census without fear of interference or restraint by the federal courts.¹⁹

This Article demonstrates that *Rucho v. Common Cause* is intellectually dishonest and fundamentally incorrect in at least thirteen distinct ways. The ultimate thesis of this Article is that the Supreme Court is no longer an impartial judicial body, but instead has become politically polarized and is likely to reflect

¹⁴ *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014).

¹⁵ *Id.* at 191–92.

¹⁶ *Rucho*, 139 S. Ct. at 2501–02.

¹⁷ *Id.* at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

¹⁸ *Id.* at 2503.

¹⁹ Currently, the governorships and both houses of the state legislatures in thirty-eight states (including Nebraska, which has a unicameral legislature) are under one-party control. *Partisan Composition of State Legislatures*, BALLOTPEdia (Dec. 4, 2020), ballotpedia.org/partisan_composition_of_state_legislators.

the ideological and partisan divisions of the Senate confirmation process for the indefinite future.

I. THE MAJORITY OPINION IN *RUCHO V. COMMON CAUSE* IS INTELLECTUALLY DISHONEST

Rucho is “not an easy case to take seriously as doctrine. Chief Justice Roberts’s opinion is more . . . of a debater’s brief than a judicial opinion[,] . . . an amalgam of misdirections, distortions and less-than-pellucid thinking.”²⁰

Put more simply, the majority opinion is primarily based on a misrepresentation of the constitutional basis of the plaintiffs’ claims that is inconsistent with the ruling of the Court only a year earlier in *Gill v. Whitford*.²¹

First, the Chief Justice *misrepresented* the constitutional basis of the plaintiffs’ partisan gerrymandering claims. Partisan gerrymanders, by definition, operate by vote dilution.²² The plaintiffs objected to the partisan gerrymanders of their respective congressional districts primarily on the ground that they *diluted* plaintiffs’ votes based on the plaintiffs’ political party affiliations and voting histories in support of the opposition party’s candidates.²³ The decisions of the lower courts were also based on extensive findings of vote dilution that were not contested on appeal.²⁴ Chief Justice Roberts, nevertheless, ignored both the plaintiffs’ allegations and the district courts’ findings of vote dilution. Instead, the Chief Justice made up his own unique definition of partisan gerrymandering simply by declaring that partisan gerrymandering claims are “invariably” and “inevitably” based on the absence of proportional representation.²⁵

The plaintiffs’ claims were *never* based on proportional representation for a reason. The Supreme Court had repeatedly held thirty years ago that “[o]ur cases . . . clearly foreclose any claim that the Constitution requires proportional representation.”²⁶ By misrepresenting the plaintiffs’ claims, the Chief Justice converted their claims from justiciable vote-dilution claims into something else

²⁰ Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Dirty Thinking About Law and Democracy in Rucho v. Common Cause*, 2018–2019 ACS SUP. CT. REV. 293, 293–94 (2019).

²¹ *Gill v. Whitford*, 138 S. Ct. 1919, 1931 (2018).

²² *Partisan Gerrymandering*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²³ *Rucho*, 139 S. Ct. at 2523 (Kagan, J., dissenting).

²⁴ *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 903 (M.D.N.C. 2018).

²⁵ *Rucho*, 139 S. Ct. at 2499.

²⁶ *Davis v. Bandemer*, 478 U.S. 109, 130 (1986).

entirely—into nonjusticiable demands for proportional representation, “a ‘norm that does not exist’ in our electoral system.”²⁷

Second, although the Court concluded in *Rucho* “that partisan gerrymandering claims present political questions beyond the reach of the federal courts,”²⁸ the Chief Justice and the Republican majority did not let absence of jurisdiction and judicially manageable standards prevent them from endorsing the constitutionality of partisan gerrymandering in an advisory opinion. Although the Supreme Court has never ruled on the constitutionality of partisan gerrymandering, the Chief Justice declared that state “legislatures have the authority to engage in a certain degree of partisan gerrymandering,”²⁹ and that “constitutional political gerrymandering” is not illegal under the Constitution.³⁰

Not only was this endorsement of the constitutionality of partisan gerrymandering an extreme departure from established judicial norms, but it also “impermissibly inject[s] the Government into the debate over who should govern” and is a hypocritical contradiction by Chief Justice Roberts of his dictum in *McCutcheon* that “those who govern should be the last people to help decide who should govern.”³¹

“Constitutional partisan gerrymandering” is an oxymoron. There are no exceptions for partisan gerrymanders in either the First Amendment or the Equal Protection Clause that immunize partisan gerrymanders from judicial review or authorize state legislatures to engage in a “certain degree of political gerrymandering.”³² There is no more room in the Constitution for a certain degree of partisan gerrymandering than there is room for any other form of vote dilution or viewpoint discrimination—as long as the legislatures do not go too far and their discrimination is not too “extreme.”

Third, the Chief Justice also misrepresented the Court’s prior decisions in partisan gerrymandering cases. The Chief Justice said that the Court had left the

²⁷ *Rucho*, 139 S. Ct. at 2499 (quoting *Davis*, 478 U.S. at 159).

²⁸ *Id.* at 2506–07.

²⁹ *Id.* at 2501.

³⁰ *Id.* at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 555 (1999)); see also Hasen, *supra* note 7, at 61 (“In *Rucho*, the Court appeared to have recognized for the first time a constitutional right of a state to engage in partisan gerrymandering.”).

³¹ *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (quotation marks omitted).

³² *Rucho*, 139 S. Ct. at 2501.

justiciability of partisan gerrymandering claims “unresolved” in *Davis v. Bandemer*, *Vieth v. Jubelirer*, and *LULAC v. Perry*.³³ That was not true.³⁴

The Court expressly held in *Davis* and in *Vieth* that partisan gerrymandering claims are justiciable and are not political questions.³⁵ The Court did not reject the plaintiffs’ claims in those cases because there were no judicially manageable standards in the Constitution on which to base a decision. Instead, the Court rejected the plaintiffs’ claims in each case on the merits because they were based on an alleged right to or the absence of proportional representation, a legal theory that the Court held does not exist and does not violate any of the judicially manageable standards of the Constitution.³⁶

Fourth, buried within the Court’s opinion in *Rucho* is a radical new interpretation of the Elections Clause.³⁷ This new interpretation is the opposite of what was intended by the Framers of the Constitution.³⁸ The justiciability of questions of congressional redistricting has been settled for almost ninety years “in favor of justiciability” of questions involving the constitutionality of state laws regulating congressional elections.³⁹ Chief Justice Roberts would apparently overrule these prior decisions and, with two exceptions, would transform the Elections Clause from a constitutional *limitation* on the powers delegated to the states by the Elections Clause to the *power* to adopt “procedural rules” for the conduct of congressional elections into an immunity that would divest the federal courts of jurisdiction for disputes involving state laws regulating congressional elections, and leave those issues solely to the political judgment of Congress whether to “make or alter” those regulations.⁴⁰

³³ *Id.* at 2498.

³⁴ *See, e.g., Davis*, 478 U.S. at 118–27, 142–43 (“[W]e hold that political gerrymandering cases are . . . justiciable under the Equal Protection Clause.”); *Vieth v. Jubelirer*, 541 U.S. 267, 313–15 (2004) (Kennedy, J., concurring) (declining to overrule *Davis*); *LULAC v. Perry*, 548 U.S. 399, 413–14 (2006) (plurality opinion) (per Kennedy, J., declining to “revisit the justiciability holding” in *Davis* and *Vieth*).

³⁵ *Davis*, 478 U.S. at 143; *Vieth*, 541 U.S. at 306, 309–11 (2004) (Kennedy, J., concurring).

³⁶ *See Davis*, 478 U.S. at 130 (“Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation.”); *Vieth*, 541 U.S. at 287–88 (plurality opinion).

³⁷ *Rucho*, 139 S. Ct. at 2495–97.

³⁸ *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 832–34 (1995) (“[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes.”); *Cook v. Gralike*, 531 U.S. 510, 527–28 (2001) (Kennedy, J., concurring) (“The Elections clause . . . delegates but limited power over federal elections to the States.”).

³⁹ *See, e.g., Baker v. Carr*, 369 U.S. 186, 232 (1962) (indicating that the justiciability of cases involving congressional districts was resolved in *Smiley v. Holm*, 285 U.S. 355 (1932), *Koenig v. Flynn*, 285 U.S. 375 (1932), and *Carroll v. Becker*, 285 U.S. 380 (1932)).

⁴⁰ U.S. CONST. art. I, § 4.

Fifth, although the Chief Justice acknowledged that the congressional redistricting plans at issue were “highly partisan, by any measure” and were “blatant examples of partisanship driving districting decisions,”⁴¹ he said that the partisan gerrymanders impose “no restrictions on speech, association, or any other First Amendment activities.”⁴²

The Chief Justice’s statement is untrue on many levels. It is contradicted by the undisputed findings of the district court, which found that the 2016 partisan gerrymander of North Carolina’s congressional districts injured the plaintiffs (1) by diluting their votes,⁴³ and (2) by imposing an undue burden on the plaintiffs’ First Amendment rights of political association.⁴⁴ Chief Justice Roberts’s assertion that partisan gerrymanders impose “no restrictions on . . . First Amendment activities”⁴⁵ is contrary to the Court’s holding in *Gill v. Whitford*.⁴⁶ In *Gill*, the Chief Justice held a partisan gerrymander of the Wisconsin legislature caused an injury-in-fact that was sufficient to give voters standing when the voter’s placement in a packed or cracked district “cause[d] his vote . . . to carry less weight than it would carry in another, hypothetical district.”⁴⁷

Sixth, the Chief Justice also said dismissively that “there is no ‘Fair Districts Amendment’ to the Federal Constitution.”⁴⁸ The Equal Protection Clause is, however, a “Fair Districts Amendment” to the Constitution that requires states to “adopt[] rules . . . defining electoral boundaries, [and that] those rules . . . serve the interests of the entire community. If they serve no purpose other than to favor one segment [and] . . . disadvantage a politically weak segment[,] . . . they violate . . . equal protection.”⁴⁹

Finally, in *Rucho*, Chief Justice Roberts exhibited what Richard Hasen has described as his “real or pretextual naivete about . . . social science [and] . . . political behavior” that fails to conform to his own conservative political views.⁵⁰ The Chief Justice downplayed the impact of partisan

⁴¹ *Rucho*, 139 S. Ct. at 2491, 2505.

⁴² *Id.* at 2504.

⁴³ *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 821–27 (M.D.N.C. 2018).

⁴⁴ *Id.* at 828–29.

⁴⁵ *Rucho*, 139 S. Ct. at 2504.

⁴⁶ *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

⁴⁷ *Id.* at 1931.

⁴⁸ *Rucho*, 139 S. Ct. at 2507.

⁴⁹ *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[I]f . . . ‘equal protection of the laws’ means anything, it must . . . mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (emphasis omitted)).

⁵⁰ Hasen, *supra* note 7, at 51.

gerrymandering in rigging the outcomes of elections. He said that “[e]xperience proves that accurately predicting electoral outcomes is not so simple . . . because the plans are based on flawed assumptions about voter preferences and behavior.”⁵¹ He pointed to “the predictions of ‘durability’” of the 1981 gerrymander at issue in *Davis v. Bandemer*, and the 2001 gerrymander at issue in *Vieth v. Jubelirer*, which he said “proved to be dramatically wrong” because their partisan effects had dissipated after several election cycles.⁵²

The Chief Justice violated Rule 52(a)(6) by substituting his own subjective judgment for the findings of the district courts in both cases that were fully supported by the record and were not contested on appeal.⁵³ Chief Justice Roberts based his “experience” on the results of the gerrymanders in *Davis* and *Vieth* that occurred nearly forty and twenty years ago, rather than the facts in the record that reflected the actual results of the elections that were held under the two partisan gerrymanders before the Court in *Rucho*. Both gerrymanders that were at issue in *Rucho* worked exactly as intended and were 100% effective in dictating the outcomes of congressional elections 100% of the time over a succession of congressional election cycles.⁵⁴

II. PARTISAN GERRYMANDERS OPERATE THROUGH VOTE DILUTION

Partisan gerrymandering is defined as “the practice of dividing . . . electoral districts to give one political party an unfair advantage *by diluting the opposition’s voting strength*.”⁵⁵

Partisan gerrymanders “operate[] through vote dilution—the devaluation of one citizen’s vote as compared to others. A mapmaker draws district lines to ‘pack’ and ‘crack’ voters [who are] likely to support the disfavored party.”⁵⁶

⁵¹ *Rucho*, 139 S. Ct. at 2503.

⁵² *Id.*

⁵³ See FED. R. CIV. P. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous.”).

⁵⁴ *Rucho*, 139 S. Ct. at 2491–92.

⁵⁵ See *supra* note 5.

⁵⁶ *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting); see also *Vieth v. Jubelirer*, 541 U.S. 267, 335 (2004) (Stevens, J., dissenting) (“[Political] [g]errymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of . . . opponents.”); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (defining partisan gerrymandering as “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power”); *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring) (defining partisan gerrymandering as “the deliberate and arbitrary distortion of district boundaries and populations for partisan . . . political purposes”).

Vote dilution is an injury-in-fact to the constitutional rights of voters, is fairly traceable to a partisan gerrymander, and is sufficient to give a voter standing to challenge a partisan gerrymander of the voter’s individual district.⁵⁷ As Chief Justice Roberts himself explained in *Gill v. Whitford*, “[t]hat harm arises from the particular composition of the voter’s own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.”⁵⁸

Vote dilution is a defining feature that distinguishes a partisan gerrymander from other unconstitutional apportionments in the one-person, one-vote cases *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims*,⁵⁹ and the racial gerrymanders in *Shaw v. Reno*, *Miller v. Johnson*, and the other racial gerrymander cases.⁶⁰

The apportionments in all three one-person, one-vote cases violate the Constitution—but for different reasons.

Partisan gerrymanders violate the Constitution because (1) they are *not viewpoint neutral*—they discriminate between and segregate voters based on their political views, their political party affiliations, and voting histories; and (2) they *operate by vote dilution*—they operate directly to dilute the relative weight, influence, and effectiveness of a ballot cast by an opponent of the party

⁵⁷ *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018).

⁵⁸ *Id.*

⁵⁹ Although the one-person, one-vote cases *Baker v. Carr*, 369 U.S. 186 (1962), *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964), are referred to by the Supreme Court as “vote-dilution” cases, they are more accurately *representation-dilution cases*. In the one-person, one-vote cases, the apportionments at issue were viewpoint neutral and did not discriminate between Democratic *vis-à-vis* Republican voters. They gave rural voters in underpopulated districts greater influence and a share of representation in state legislatures per capita (*Baker*, *Reynolds*) or in Congress (*Wesberry*) than voters who lived in urban districts with much larger populations. The relative weight and influence of the ballots cast within each district were identical to that of the ballots cast by other voters in the same district. The Georgia County Unit System in *Gray v. Sanders*, 372 U.S. 368 (1963), was also viewpoint neutral. The Georgia County Unit System was a miniature electoral college that gave people who lived in rural counties two county-unit votes in elections for Governor, Senator, and other statewide offices, and gave voters in each of Georgia’s six largest counties a maximum of six county-unit votes, which gave rural voters far greater influence in statewide elections than voters in the six largest counties. The county unit system did not distinguish between the weight of the ballots of Democratic voters *vis-à-vis* those of Republican or independent voters.

⁶⁰ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 347–48 (1960). In *Shaw v. Reno*, 509 U.S. 630, 641–42 (1993), the “appellants did not claim that the . . . reapportionment plan unconstitutionally ‘diluted’ [their] voting strength[.] . . . [r]ather appellants’ complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to . . . a ‘color-blind’ electoral process.” See also *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“*Shaw* recognized a claim ‘analytically distinct’ from a vote dilution claim.”).

in power in comparison to the weight of ballots cast *in the same district* by supporters of the party in power.

In the one-person, one-vote cases, the apportionments are viewpoint neutral and injure voters by diluting a voter's relative share of representation in the state legislature or Congress, rather than by diluting the weight of a voter's ballot. In the racial gerrymanders, such as *Shaw v. Reno*, the gerrymanders were also viewpoint neutral and did not dilute either the weight of the plaintiffs' ballots as compared to those of other voters in the same district based on the voters' race, or their share of representation as compared to voters in other districts as in the one-person, one-vote cases.⁶¹ The Court held in *Shaw v. Reno* that racial gerrymanders are unconstitutional because they injure voters by "reinforce[ing] racial stereotypes and . . . [by] undermin[ing] . . . representative democracy by signaling to elected officials that they represent a particular racial group [in their districts] rather than their constituency as a whole."⁶²

III. *RUCHO V. COMMON CAUSE* IS AN ABRUPT DEPARTURE FROM *BAKER V. CARR* AND *WESBERRY V. SANDERS*

The Court's decision in *Rucho v. Common Cause* is an abrupt departure from the principles established in *Baker v. Carr*⁶³ and *Wesberry v. Sanders*.⁶⁴

Baker held that federal courts are not barred by the political question doctrine in *Colegrove v. Green*⁶⁵ from ruling on the constitutionality of a state law that divides the people of a state into election districts.⁶⁶ The Court held in *Baker* that the validity of state election laws under the Constitution is no different than the validity of any state laws in any other cases, and it is not a political question of legislative policy that must be decided in the "political thicket" by the state legislature as the political branch of government.⁶⁷

The Supreme Court explained in *Baker* that the only question for the courts in an apportionment case "is [whether] the . . . state action" dividing the people of a state into election districts is consistent "with the Federal Constitution."⁶⁸ The Court said that the answer to this question does not require a court to make

⁶¹ See *Miller*, 515 U.S. at 911.

⁶² *Shaw*, 509 U.S. at 650.

⁶³ *Baker*, 369 U.S. at 226.

⁶⁴ *Wesberry*, 376 U.S. at 67.

⁶⁵ *Colegrove v. Green*, 328 U.S. 549 (1944).

⁶⁶ *Baker*, 369 U.S. 186.

⁶⁷ *Id.*

⁶⁸ *Id.* at 226.

“policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar.”⁶⁹

The Court held in *Baker* that resolution of the plaintiffs’ “equal protection claim . . . does not require decision of a political question, and . . . the presence of a matter affecting state government does not render the case non justiciable.”⁷⁰

Rucho v. Common Cause is an even greater departure from the Court’s decision in *Wesberry v. Sanders*. In *Wesberry*, the Court held that the constitutionality of state laws apportioning congressional districts is not a political question.⁷¹ The power of Congress under the Elections Clause in Article I § 4 to “make or alter” state regulations apportioning congressional districts does not represent “a textually demonstrable constitutional commitment of the issue [involving congressional districts] to a coordinate political department” of the national government to the exclusion of the federal courts.⁷²

The Court applied this principle in *Wesberry* when it squarely rejected “Mr. Justice Frankfurter’s *Colgrove* opinion . . . that Art. I § 4 of the Constitution had given Congress ‘exclusive authority’ to protect the right of citizens to vote for Congressmen.”⁷³ The Court said that “we made it clear in *Baker* that nothing in the language of that article . . . support[s] . . . a construction that would immunize state congressional apportionment laws from the power of courts to protect the constitutional rights of individuals from legislative destruction.”⁷⁴ Going further, the Court stated, “The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I.”⁷⁵

The Court held in *Wesberry* that it would violate Article I § 2 and “defeat the principle . . . embodied in the Great Compromise . . . to hold that . . . the State[] legislatures may draw the lines of congressional districts . . . to give some voters a greater voice in choosing Congressmen than others.”⁷⁶

⁶⁹ *Id.*

⁷⁰ *Id.* at 232.

⁷¹ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁷² *Baker*, 369 U.S. at 217.

⁷³ *Wesberry*, 376 U.S. at 6.

⁷⁴ *Id.* at 6–7.

⁷⁵ *Id.*

⁷⁶ *Id.* at 14 (emphasis added).

Taken together, *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims*⁷⁷ established the principle that “[s]tate legislatures may [not] draw the lines of congressional districts”⁷⁸ or state legislative districts⁷⁹ “to give some voters a greater voice in choosing” their elected representatives, without regard to the particular means that are used by the legislature to achieve that unconstitutional objective.⁸⁰

Baker, *Wesberry*, and *Reynolds* also established the principle that the constitutionality of state laws that divide the people of a state into districts is not a political question. It is quintessentially a judicial question. It requires, for its resolution, a court (1) to “say what the law is” by interpreting the Constitution, (2) to decide in the particular case whether the law has been violated by applying the law to the facts, and (3) to frame a judicial remedy by declaring the state law unconstitutional and (if necessary) by enjoining its enforcement by the state.⁸¹

IV. THE CONSTITUTIONALITY OF PARTISAN GERRYMANDERING HAS NOT ALWAYS BEEN A PARTISAN ISSUE WITHIN THE SUPREME COURT

The constitutionality of partisan gerrymandering has not always been a partisan issue that divided members of the Supreme Court on party lines. A number of prominent Republican Justices, including Justices John Paul Stevens, Lewis Powell, and Anthony Kennedy, have urged the Court to declare partisan gerrymandering unconstitutional under the First Amendment or the Equal Protection Clause of the Fourteenth Amendment.

In *Karcher v. Daggett*, for example, Justice Stevens emphasized that the boundaries of congressional districts must be drawn evenhandedly to serve the interests of the entire community, rather than to favor the parochial political interests of the party in power.⁸² He said,

When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire

⁷⁷ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁷⁸ *Wesberry*, 376 U.S. at 14.

⁷⁹ *Baker*, 369 U.S. at 226; *Reynolds*, 377 U.S. at 560–61.

⁸⁰ See *Baker*, 369 U.S. at 208. Although Chief Justice Roberts did not purport to overrule *Wesberry v. Sanders*, he treated the Court’s ruling in *Wesberry* and other one-person, one-vote cases as if they were to exceptions to a general rule of nonjusticiability under the Elections Clause. See *Rucho*, 139 S. Ct. at 2495. The Constitution prohibits vote dilution. There is no support in the Court’s previous cases for this hair-splitting distinction in *Rucho*, between the justiciability of some vote-dilution claims (race and one-person, one-vote claims) and vote dilution by other means. See *Baker*, 369 U.S. at 208.

⁸¹ *Baker*, 369 U.S. at 228; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

⁸² *Karcher v. Daggett*, 462 U.S. 725, 748 (1982) (Stevens, J., concurring).

community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious or political, that may occupy a position of strength—disadvantage a politically weak segment[,] . . . they violate the constitutional guarantee of equal protection.⁸³

Justice Powell wrote an even more forceful condemnation of partisan gerrymandering in *Davis v. Bandemer*.⁸⁴ Justice Powell joined the plurality in *Davis* in holding that partisan gerrymandering claims are justiciable under the Equal Protection Clause.⁸⁵ He said that “the essence of a [partisan] gerrymandering claim is that members of a political party as a group have been denied the right to ‘fair and effective representation.’”⁸⁶ He said that partisan gerrymandering violates:

[t]he Equal Protection Clause[, which] guarantees citizens that their State will govern them impartially Since the contours of a voting district powerfully . . . affect citizens’ ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria. . . . [T]he State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliations.⁸⁷

The controlling opinion in *Vieth v. Jubelirer* was written by Justice Kennedy, who refused to join Justice Scalia and a plurality of more conservative Republican justices in overruling *Davis v. Bandemer*.⁸⁸ Justice Kennedy said in *Vieth* that “if a State passed an enactment that declared ‘All future apportionment shall be drawn so as most to burden Party X’s right to fair an effective representation, though still in accord with one-person, one-vote principles’ we would surely conclude the Constitution has been violated.”⁸⁹

Justice Kennedy also suggested that partisan gerrymanders may violate the First Amendment:

[T]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering [because they] . . . involve the First Amendment

⁸³ *Id.*

⁸⁴ *Davis v. Bandemer*, 478 U.S. 109, 161 (1986).

⁸⁵ *Id.*

⁸⁶ *Id.* at 162.

⁸⁷ *Id.* at 166.

⁸⁸ *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004).

⁸⁹ *Id.* at 312; *see also* *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 870–71 (1982) (“If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order [violated the First Amendment.]”).

interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. . . . Under general First Amendment principles those burdens are unconstitutional absent a compelling government interest.⁹⁰

For more than thirty years, bipartisan majorities of the Supreme Court, which included many prominent Republican Justices,⁹¹ followed *Baker v. Carr* and held that the constitutionality of partisan gerrymandering is not a “political question” that can be resolved only by Congress.⁹²

Although the plaintiffs’ partisan gerrymandering claims in *Davis*, *Vieth*, and *LULAC* were unsuccessful, they did not fail because of an absence of judicially manageable standards. The plaintiffs’ claims failed on the *merits* because they were based on a legal theory—that voters have a “right” to proportional representation—that does not exist under the judicially manageable standards of the Constitution.

In *Davis*, for example, the plaintiffs “claim[ed] that the 1981 apportionment discriminate[d] against Democrats on a statewide basis[,] . . . that Democratic voters over the State as a whole, not Democratic voters in particular districts, ha[d] been subjected to unconstitutional discrimination.”⁹³ The Court held that the plaintiffs’ claims in *Davis* were justiciable, but rejected their claims on the merits because “our cases . . . clearly foreclose any claim that the Constitution requires proportional representation.”⁹⁴

In *Vieth*, the plaintiffs alleged that a partisan gerrymander of congressional districts in Pennsylvania violated the Equal Protection Clause because it deprived a majority of the voters, who happened to be Democrats, of the right to elect a majority of the state’s congressional delegation.⁹⁵ Writing for the plurality in *Vieth*, Justice Scalia said that the “appellants’ test would invalidate the districting only when it prevents a majority of the electorate from electing a majority of the representatives. . . . Deny it as appellants may (and do), this

⁹⁰ *Vieth*, 541 U.S. at 314.

⁹¹ *Davis* and *Vieth* were decided by bipartisan majorities of the Court that included three Republican justices—Justices Lewis Powell, John Paul Stevens, and Harry Blackmun in *Davis*; and Justices Anthony Kennedy, John Paul Stevens, and David Souter in *Vieth*.

⁹² *Davis*, 478 U.S. at 121–27, 142; *Vieth*, 541 U.S. at 307; *LULAC v. Perry*, 548 U.S. 399, 413–14 (2006) (Kennedy, J., opinion) (refusing to revisit the “justiciability holding” in *Davis*).

⁹³ *Davis*, 478 U.S. at 127.

⁹⁴ *Id.* at 130.

⁹⁵ *Vieth*, 541 U.S. at 288.

standard rests upon the principle that groups . . . have a right to proportional representation. But the Constitution contains no such principle.”⁹⁶

The justiciability of partisan gerrymandering did not become a partisan issue within the Supreme Court until Justice Kennedy retired at the end of the term in 2018 and was succeeded by a more conservative Republican Justice, Brett Kavanaugh, after a bitter partisan confirmation vote in the Senate.⁹⁷ The new and more conservative majority then wasted no time in rejecting Justice Kennedy’s and the Court’s long-standing position that partisan gerrymandering claims are justiciable.⁹⁸

In *Rucho*, the new Republican majority held the constitutionality of partisan gerrymandering, as defined by Chief Justice Roberts, to be a political question that is beyond the jurisdiction of the federal courts.⁹⁹ They went even further to endorse the constitutionality of partisan gerrymandering in an advisory opinion in which they gave partisan state legislatures the Court’s permission to “engage in constitutional political gerrymandering.”¹⁰⁰

V. THE COURT’S DECISION WAS BASED ON A DISTORTED DEFINITION OF PARTISAN GERRYMANDERING THAT MISREPRESENTED THE PLAINTIFFS’ CLAIMS

Vote dilution is the defining feature of a political gerrymander.¹⁰¹ Vote dilution distinguishes partisan gerrymandering claims from both one-person, one-vote claims and the racial gerrymandering claims that were held to be unconstitutional in *Shaw v. Reno*.¹⁰²

Chief Justice Roberts defined partisan gerrymandering in a way that misrepresented the constitutional basis for the plaintiffs’ claims and ignored the multiple allegations of vote dilution in the plaintiffs’ complaints, as well as the district courts’ findings of vote dilution on which their decisions were based.

⁹⁶ *Id.* at 287–88 (plurality opinion). The plaintiffs’ claims in *LULAC*, 548 U.S. 399, were also rejected on the merits. In *LULAC*, the plaintiffs contended Texas legislature’s mid-decade reapportionment of the state’s congressional districts was unconstitutional. *Id.* While the Court “decline[d] to revisit the holding” in *Davis* that partisan gerrymandering claims are justiciable, the Court rejected the plaintiffs’ claim on the merits. *Id.* at 413–14. The Court held that the Constitution does not prohibit mid-decade redistricting by state legislatures. *Id.*

⁹⁷ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2497.

¹⁰¹ *See supra* note 5.

¹⁰² *Shaw v. Reno*, 509 U.S. 630, 641–42 (1993); *see Miller v. Johnson*, 515 U.S. 900, 911 (1995).

At trial, for example, Common Cause alleged that the 2016 North Carolina congressional redistricting plan unconstitutionally “diluted or nullified” the votes of the Democratic members of Common Cause in each of North Carolina’s thirteen congressional districts.¹⁰³ The North Carolina Democratic Party (NCDP) made similar allegations of vote dilution on behalf of its members, as did fourteen individual North Carolina voters (thirteen Democrats and one Republican) who alleged that the relative weight of their individual votes in congressional elections in their districts “for the U.S. House of Representatives will be diluted or nullified as a result of [their] placement” by the 2016 plan in gerrymandered districts.¹⁰⁴

The district court based its decision on meticulous district-by-district findings of vote dilution. The court found that the 2016 plan unconstitutionally diluted the votes of the Democratic plaintiffs in twelve of North Carolina’s thirteen congressional districts.¹⁰⁵ The district court also found that the 2016 plan diluted the vote of the Republican plaintiff, Morton Lurie, by placing Mr. Lurie in the Fourth Congressional District that had been packed with a supermajority of Democratic voters.¹⁰⁶

Chief Justice Roberts ignored the plaintiffs’ allegations of vote dilution and the findings of vote dilution by the three-judge district courts in North Carolina and Maryland. Like Humpty Dumpty in Lewis Carroll’s *Through the Looking Glass*, Chief Justice Roberts made up his own definition of partisan gerrymandering that had no basis in the record and misrepresented the entire

¹⁰³ Amended Complaint at 2, *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018) (No. 1:16-CV-1026).

¹⁰⁴ *Id.* (emphasis added) (alleging that the 2016 congressional redistricting plan “diluted or nullified” the votes of the Democratic members of Common Cause in each of North Carolina’s thirteen congressional districts); *id.* at 4–9 (alleging that the votes of the fourteen individual plaintiffs in their districts will be “diluted or nullified” by the 2016 plan).

¹⁰⁵ *Rucho*, 318 F. Supp. 3d at 821–27. The district court also found that the 2016 plan unconstitutionality burdened the First Amendment rights of both the NCDP and its members and the Democratic plaintiff voters by making it more difficult for them to recruit Democratic candidates to run for congress in the gerrymandered districts, raise money, enlist volunteers, and turn out the vote on their behalf. *Id.* at 829–30; see also *Gill v. Whitford*, 138 S. Ct. 1916, 1937–40 (2018) (Kagan, J., concurring) (discussing the First Amendment injuries caused by partisan gerrymanders); *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983).

¹⁰⁶ *Rucho*, 318 F. Supp. 3d at 822 n.12. The First Amendment claims of the plaintiffs in *Benisek v. Lamone*, 348 F. Supp. 3d 493, 519–20 (D. Md. 2018), were based on vote dilution. The Republican plaintiffs in *Benisek* alleged—and the trial court found—that the Democratic legislature in Maryland penalized Republican voters who were residents of the heavily Republican Sixth Congressional District by (1) cracking the Sixth District and placing Republican voters in districts packed with large majorities of Democratic voters, and (2) creating a new Sixth District with a safe majority of Democratic voters. *Id.*

legal theory and constitutional basis of the plaintiffs' partisan gerrymandering claims.¹⁰⁷ Chief Justice Roberts simply declared *ex cathedra* that,

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. . . . Partisan gerrymandering claims invariably sound in a desire for proportional representation. . . . [P]laintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*.¹⁰⁸

The plaintiffs' partisan gerrymandering claims were not based on proportional representation, nor did "the plaintiffs or the lower courts in either case ma[ke] any arguments in favor of proportional representation as the standard for judging whether there was unconstitutional partisan gerrymandering."¹⁰⁹ The plaintiffs recognized that the Supreme Court held in *Davis* that "[o]ur cases . . . clearly foreclose any claim that the Constitution requires proportional representation"¹¹⁰ and reaffirmed that position in *Vieth*.¹¹¹

As Justice Kagan pointed out in dissent in *Rucho*, "everything in [the majority] opinion" was based on an assumption "that is not so," and which *misrepresented* the constitutional basis of the plaintiffs' claims and the legal theory of the plaintiffs' case.¹¹² Justice Kagan said that "everything in today's opinion assumes that these cases grew out of a 'desire for proportional representation' *But that is not so*. . . . The plaintiffs asked only that the

¹⁰⁷ In *Through the Looking Glass*, Alice complained that she did not know what Humpty Dumpty meant by his use of the word glory. "Humpty Dumpty smiled contemptuously. 'Of course, you don't—till I tell you. . . . When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" LEWIS CARROLL, *ALICE IN WONDERLAND & THROUGH THE LOOKING GLASS* 238 (Grosset & Dunlap 1946) (1871).

¹⁰⁸ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). *But see* Hasen, *supra* note 7, at 57 (arguing that the Court's opinion in *Rucho* was based on the false statement that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation"). Chief Justice Roberts was half right—the partisan gerrymander claims of *some* plaintiffs in *other cases* were based on proportional representation and were rejected on the *merits* by the Supreme Court for that reason. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 130 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion). In *Gill*, the Court rejected Professor Whitford's individual claim for lack of standing because his claim was not based on vote dilution, but on his assertion that Democrats could not achieve a majority and were not proportionally represented in the Wisconsin legislature and could not pass legislation that Professor Whitford supported. 138 S. Ct. at 1924–25.

¹⁰⁹ Hasen, *supra* note 7, at 55.

¹¹⁰ *Davis*, 478 U.S. at 130.

¹¹¹ *Vieth*, 541 U.S. at 288.

¹¹² *Rucho*, 139 S. Ct. at 2523 (Kagan, J., dissenting).

courts bar politicians from entrenching themselves in power *by diluting the votes of their rivals' supporters.*"¹¹³

The Chief Justice conflated the purpose of a partisan gerrymander (disproportionate representation of the majority party) with the injuries to voters that are "fairly traceable" to a partisan gerrymander (vote dilution). The motive of a partisan gerrymander is to give the majority party an unfair advantage and entrench its hold on political power by allowing the majority party to capture more seats (disproportionate representation) than it could win on a level playing field.¹¹⁴ Partisan gerrymanders do not injure voters by denying them proportional representation. They injure voters by depriving them of the opportunity to elect candidates of their choice by diluting their votes and causing their votes—"having been packed or cracked—to carry less weight than [they] would carry in another, hypothetical district."¹¹⁵

By defining plaintiffs' objections to partisan gerrymandering as demands for proportional representation, the Chief Justice, by sleight-of-hand, misrepresented plaintiffs' claims and the question before the Court from justiciable claims of unconstitutional vote dilution into a nonjusticiable demand for proportional representation, "a 'norm that does not exist' in our electoral system."¹¹⁶

VI. PARTISAN GERRYMANDERING CLAIMS ARE JUSTICIABLE UNDER A VOTE DILUTION INJURY THEORY AND ARE NOT POLITICAL QUESTIONS

Although a majority of the Supreme Court held in a party-line vote that partisan gerrymandering claims, as *defined* by Chief Justice Roberts, are nonjusticiable political questions, that decision is totally divorced from the Court's decisions in other cases, many of which were authored by Chief Justice Roberts. *Rucho* should not foreclose a future Supreme Court that is differently composed from holding partisan gerrymandering to be unconstitutional under a more accurate definition of partisan gerrymandering that reflects the injuries inflicted by partisan gerrymanders on the constitutional rights of voters and other political parties.

For example, the Chief Justice has recognized in other cases that "there is no right more basic in our democracy than the right to participate in electing our

¹¹³ *Id.* (emphasis added).

¹¹⁴ See *supra* note 9 and accompanying text.

¹¹⁵ *Gill*, 138 S. Ct. at 1931.

¹¹⁶ *Rucho*, 139 S. Ct. at 2499 (quoting *Davis*, 478 U.S. at 159 (O'Connor, J., opinion)).

political leaders,” that “the First Amendment has its fullest and most urgent application to . . . campaigns for political office,” and that “the concept that government may restrict speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”¹¹⁷

The right to vote, join a political party, and support candidates of one’s choice are core First Amendment rights.¹¹⁸ These rights are far more fundamental to a free and democratic society than the rights of corporations and wealthy individuals to make political contributions and expenditures to elect candidates of their choice to public office.¹¹⁹

“[T]he Constitution visualizes no preferred class of voters.”¹²⁰ “Our Constitution [also] leaves no room for classification of people in a way that unnecessarily abridges” their right to vote.¹²¹ The right to vote includes the right to cast an effective ballot of equal weight to ballots cast by all other voters in the same district and is protected by both the First and Fourteenth Amendments.¹²²

Partisan gerrymanders of congressional district lines are prohibited by Article I § 2 of the Constitution precisely because their purpose and effect are to dilute the votes of supporters of the political opposition.¹²³ In *Wesberry*, the Supreme Court held that it “would defeat . . . the Great Compromise . . . to hold that . . . State[] legislatures may draw the lines of congressional districts . . . to give some voters a greater voice in choosing a Congressman than others.”¹²⁴

Partisan gerrymanders of congressional districts are also prohibited by the Elections Clause in Article I § 4 of the Constitution.¹²⁵ The Supreme Court has held that the Elections Clause is a *limited delegation* to state legislatures of the

¹¹⁷ *McCutcheon v. FEC*, 572 U.S. 185, 191–92, 207 (2014) (quotation marks omitted).

¹¹⁸ *See Elrod v. Burns*, 427 U.S. 347, 356 (1976).

¹¹⁹ *See, e.g., McCutcheon*, 572 U.S. 185 (holding that a limit on individual contributions over a two-year period to a national party and a federal candidate committee is unconstitutional); *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that the First Amendment prohibits the government from restricting political contributions by corporations, nonprofit corporations, labor unions, and other associations).

¹²⁰ *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

¹²¹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

¹²² *See Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (holding that qualified voters have the right to cast an effective vote); *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968) (holding that voters’ rights to an effective vote are protected by the First and Fourteenth Amendments).

¹²³ U.S. CONST. art. 1, § 2.

¹²⁴ *Wesberry*, 376 U.S. at 14; *see also Reynolds v. Sims*, 377 U.S. 533, 563 (1964) (“[T]he Framers of the Constitution [did not] intend[] to permit . . . vote-diluting discrimination to be accomplished through the devise of districts.”).

¹²⁵ U.S. CONST. art. 1, § 4.

power to adopt “*procedural regulations*” that prescribe the “[t]imes, [p]laces and [m]anner of holding” congressional elections.¹²⁶ Partisan gerrymanders are not “procedural regulations” that are authorized by Article I § 4. They are substantive regulations whose purpose and effect are to dilute the weight and effectiveness of the ballots of some voters and are *ultra vires* under the Elections Clause.

The Framers of the Constitution did not intend the Elections Clause to be a source of power that would allow state legislatures “to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade [other] important constitutional restraints.”¹²⁷ Partisan gerrymanders are *ultra vires* because their purpose and their effect is to “dictate [the] . . . outcome[.]” of the general election in each gerrymandered district, to “favor” the election of the majority party’s candidate and “disfavor” the election of rival candidates.¹²⁸ Partisan gerrymanders also violate other “important constitutional restraints,” including the restraint on viewpoint discrimination that is those imposed by the First and Fourteenth Amendments.¹²⁹

The Chief Justice said in *Rucho* that the Framers of the Constitution did not intend that the limitations on the authority delegated to the States by the Elections Clause be enforced by the federal courts.¹³⁰ That is not true. Alexander Hamilton said in *Federalist* 78 that the duty of the courts of justice is to declare “every act of a delegated authority, contrary to the . . . commission . . . void. No legislative act . . . contrary to the constitution [is] . . . valid.”¹³¹

Partisan gerrymanders also violate the First Amendment prohibition against viewpoint discrimination. Partisan gerrymanders discriminate between voters based on their political beliefs, political party affiliations or memberships, and voting histories in support of political candidates in past elections.¹³² The purpose and the effect of a partisan gerrymander is to give supporters of the party

¹²⁶ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832 & n.46 (1995) (quoting U.S. CONST. art. I, § 4, cl. 1); *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

¹²⁷ *U.S. Term Limits*, 514 U.S. at 833–34; *Cook*, 531 U.S. at 527.

¹²⁸ *U.S. Term Limits*, 514 U.S. at 833–34; *Cook*, 531 U.S. at 523 (quoting *U.S. Term Limits*, 514 U.S. at 833–34).

¹²⁹ *U.S. Term Limits*, 514 U.S. at 834; *Cook*, 531 U.S. at 523 (quoting *U.S. Term Limits*, 514 U.S. at 834).

¹³⁰ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019).

¹³¹ THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cook ed., 1961); see also *Wesberry v. Sanders*, 376 U.S. 1, 15–16 (quoting John Steele, a delegate to the North Carolina ratification convention, noting that if state legislatures or Congress made laws under Article I, Section 4 “inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them” (internal quotation marks omitted)).

¹³² *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

in power greater influence in an election and penalize supporters of the political opposition by diluting the influence and relative weight of their votes.¹³³ Viewpoint discrimination is presumptively unconstitutional under the First Amendment and shifts the burden of proof to the State to justify the discrimination under strict scrutiny by a legitimate state interest of paramount importance.¹³⁴

Partisan gerrymanders also violate the Equal Protection Clause.¹³⁵ “The concept of equal justice under law requires the State to govern impartially.”¹³⁶ The Supreme Court specifically held in *Reynolds v. Sims* that “[d]iluting the weight of votes because of place of residence [in one district versus another] impairs basic constitutional rights” under the Equal Protection Clause.¹³⁷

VII. THE COURT’S RULING IN *RUCHO V. COMMON CAUSE* CONFLICTS WITH ITS RULING IN *GILL V. WHITFORD*

Chief Justice Roberts’ definition of partisan gerrymandering claims in *Rucho v. Common Cause* also conflicts with the Court’s ruling in *Gill v. Whitford*.

¹³³ See *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (arguing that political patronage prevents support of opposing political interests). The 2016 congressional redistricting plan also violated the other First Amendment principles. The purpose and the effect of the 2016 plan was to (1) dictate “what shall be orthodox in politics . . . [or] religion” by favoring the election of Republicans over Democrats to Congress—*W. Va. State Bd. of Educ. v. Barette*, 319 U.S. 624, 642 (1943); (2) penalize voters who supported Democratic candidates by diluting their votes—*Elrod*, 427 U.S. at 359; *Vieth*, 541 U.S. at 314–15 (Kennedy, J., concurring); *id.* at 324–25 (Stevens, J., dissenting); (3) deprive Democratic voters of an equal opportunity to elect Democratic candidates of their choice to represent them in Congress, rather than by the Republican candidates favored by the state legislature—*Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); and (4) deprive Democratic voters of their First Amendment rights as citizens to join a political party or vote for candidates of their choice—*Elrod*, 427 U.S. at 357; *Gill v. Whitford*, 138 S. Ct. 1916, 1937–40 (2018) (Kagan, J., concurring); *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (Scalia, J., opinion) (reversing the dismissal of a partisan gerrymandering claim that was based on the theory suggested by Justice Kennedy in *Vieth*).

¹³⁴ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–30 (1995); see also *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (holding that contest-based laws are presumptively unconstitutional and are subject to strict scrutiny).

¹³⁵ See *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[I]f . . . ‘equal protection of the laws’ means anything, it must . . . mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”); *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

¹³⁶ *Lehr v. Robertson*, 463 U.S. 248, 265 (1983); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 (1985) (“[E]lements of legitimacy and neutrality . . . must always characterize . . . the sovereign’s duty to govern impartially.”).

¹³⁷ *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

Gill involved a challenge to the constitutionality of a partisan gerrymander of the Wisconsin legislature under the Equal Protection Clause.¹³⁸ Chief Justice Roberts held that the vote-dilution allegations of the four Wisconsin voters were sufficiently definite and concrete to give these voters standing to challenge the constitutionality of the gerrymander of their respective districts under the Equal Protection Clause on a district-specific injury theory.¹³⁹ The Court held that the “harm” to a voter from a partisan gerrymander “arises from the particular composition of the voter’s own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.”¹⁴⁰

The difference between the Chief Justice’s treatment of the Wisconsin plaintiffs’ partisan gerrymandering claims and his treatment of the plaintiffs’ partisan gerrymandering claims in *Rucho* is both striking and unexplained.

In *Gill*, Chief Justice Roberts did not reject the partisan gerrymandering claims of four of the Wisconsin plaintiffs on the grounds that they were based, “explicitly or implicitly,” “invariably” or “inevitably,” on “a desire for proportional representation” as he did of plaintiffs’ claims in *Rucho*.¹⁴¹ Nor did the Chief Justice hold that the Court was without jurisdiction of the partisan gerrymandering claims of the four Wisconsin plaintiffs. Nor did he suggest that their partisan gerrymandering claims should be dismissed because they presented only political questions that are nonjusticiable by federal courts.

Although the four Wisconsin plaintiffs offered no evidence at trial in support of their standing under Article III, the Court remanded the Wisconsin plaintiffs’ vote-dilution claims and gave each plaintiff a second chance to prove (1) that they had standing and (2) that the cracking and packing “cause[d] his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.”¹⁴²

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

¹³⁹ *Id.* at 1931.

¹⁴⁰ *Id.*

¹⁴¹ *But see Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).

¹⁴² *Gill*, 138 S. Ct. at 1931, 1933–34.

VIII. THE CHIEF JUSTICE MISREPRESENTED THE FACT THAT THE SUPREME COURT HAD REPEATEDLY HELD PREVIOUSLY THAT THE CONSTITUTIONALITY OF PARTISAN GERRYMANDERING IS NOT A POLITICAL QUESTION

Chief Justice Roberts said in *Gill* and repeated in *Rucho* that *Davis*, *Vieth*, and *LULAC* left the justiciability of partisan gerrymandering claims “unresolved.”¹⁴³

Both statements are untrue. To the contrary, the Supreme Court had previously held partisan gerrymandering to be justiciable by federal courts. Similarly, the Supreme Court had also rejected attempts by a minority of Justices to dismiss them as political questions.¹⁴⁴ In *Vieth*, a majority of the Court refused to overrule *Davis*.¹⁴⁵

In *Shapiro v. McManus*, the Supreme Court reversed the dismissal of a partisan gerrymander case that had been dismissed by a single judge for want of jurisdiction without convening a three-judge district court.¹⁴⁶ The reversal is particularly significant because the decision of the Court was unanimous, and the opinion was written by Justice Scalia, the author of the plurality opinion in *Vieth*.¹⁴⁷ In *Shapiro*, the Court acknowledged that the constitutionality of partisan gerrymandering under the First Amendment, advanced by Justice Kennedy in *Vieth*, had never been ruled on by a majority of the Court. Thus, the Court remanded the plaintiffs’ First Amendment claim for a hearing before a three-judge district court.¹⁴⁸ Neither Chief Justice Roberts, nor any other member of the Supreme Court, argued that the plaintiffs’ First Amendment claim was not justiciable or that the judgment of the lower court dismissing the plaintiffs’ claim for want of jurisdiction should have been affirmed, rather than reversed.

The Supreme Court had another opportunity to revisit the justiciability of partisan gerrymandering claims in *Gill*.¹⁴⁹ Although the Chief Justice did not

¹⁴³ *Id.* at 1929; *see Rucho*, 139 S. Ct. at 2498.

¹⁴⁴ *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (“[W]e hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause.”).

¹⁴⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 312–14 (2004) (plurality opinion). In *LULAC*, after reciting that *Davis* held that “an equal protection challenge to a political gerrymander is a justiciable case or controversy” and that “a plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions, . . . a majority declined to do so,” the Court said that “we do not revisit the justiciability holding[s].” 548 U.S. 399, 413–14 (2004).

¹⁴⁶ *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

¹⁴⁷ *Vieth*, 541 U.S. 267.

¹⁴⁸ *Shapiro*, 136 S. Ct. at 456.

¹⁴⁹ *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

have the necessary votes to overrule *Davis* as long as Justice Kennedy remained on the Court, he laid the foundation for his ruling in *Gill*. The Chief Justice said in *Gill* that the justiciability of partisan gerrymandering claims had been left “unresolved” by the Court in *Davis*, *Vieth*, and *LULAC*, and that Court was deciding only the question of the Wisconsin plaintiffs’ standing in *Gill* and was not deciding the justiciability of their claims.¹⁵⁰ Despite the Chief Justice’s attempt to separate the two issues, the Court could not have held in *Gill* that the Wisconsin plaintiffs’ allegations of vote dilution were sufficient to establish injury-in-fact as an element of their standing, if the plaintiffs’ vote-dilution claims were also justiciable.¹⁵¹

The only explanation for the difference between the Court’s decisions in *Vieth*, *LULAC*, *Shapiro*, and *Gill*, and its decision in *Rucho* is the change in the composition of the Supreme Court—Justice Kennedy’s retirement and the confirmation of Brett Kavanaugh, a more conservative Republican, as his successor.

IX. THE FACT THAT PARTISAN GERRYMANDERS HAVE BEEN A
“TRADITIONAL PART OF POLITICS IN THE UNITED STATES” DOES NOT MEAN
THAT PARTISAN GERRYMANDERS ARE CONSTITUTIONAL

The majority opinion is replete with internal contradictions. On one hand, Chief Justice Roberts acknowledged that partisan gerrymandering is “incompatible with democratic principles.”¹⁵² He also insisted that the Court “does not condone excessive partisan gerrymandering.”¹⁵³ On the other hand, the Chief Justice said that partisan gerrymandering is not “illegal,”¹⁵⁴ and that

¹⁵⁰ *Id.* at 1929.

¹⁵¹ Injury-in-fact is the most important element of a plaintiff’s standing under Article III. The Court could not have held that the allegations of the four Wisconsin plaintiffs were sufficient to establish injury-in-fact as an element of their standing unless there were judicially manageable standards in the Constitution that were sufficient to enable the Court to decide (1) that the four Wisconsin plaintiffs had a cognizable legal right under the Constitution to cast an effective and undiluted ballot, (2) that their allegations of vote dilution were sufficient to establish a violation of that right that is fairly traceable to the partisan gerrymander of the Wisconsin legislature and (3) that they suffered an actual injury to themselves as individuals that was sufficiently definite and concrete. The Court held that when “the plaintiffs’ alleged harm is the dilution of their votes, that injury is district specific [and] . . . arises from the particular composition of the voter’s own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.” *Id.* at 1930–31. A plaintiff may or may not have standing to assert a justiciable claim, but a plaintiff like Professor Whitford can never have standing to assert a nonjusticiable claim that is predicated on an alleged violation of a legal right, such as the absence of proportional representation, that does not exist under the Constitution.

¹⁵² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2497.

voters “cannot ask for the elimination of partisanship” in redistricting,¹⁵⁵ because “[t]he opportunity to control the drawing of electoral district boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States.”¹⁵⁶

The Chief Justice did not explain how a practice that is “incompatible with democratic principles”¹⁵⁷ can also be a lawful and “critical . . . part of politics in the United States.”¹⁵⁸

There are many practices that were once widely accepted and a “traditional part of politics in the United States,”¹⁵⁹ which have subsequently been held unconstitutional.¹⁶⁰

Political patronage and poll taxes were at least as old as the United States itself. They were also more common, widely accepted, deeply ingrained, and more of “a traditional part of politics in the United States”¹⁶¹ than partisan gerrymandering.¹⁶² At the time of the founding, many states imposed poll taxes and property qualifications on the right to vote.¹⁶³ The political parties also used their control over public employment, awards of government contracts, and discretionary grants of government privileges and benefits to reward their political friends and punish their political enemies.¹⁶⁴ The fact that poll taxes and political patronage had a long heritage and were once “a traditional part of politics in the United States” did not prevent the Supreme Court from holding poll taxes unconstitutional in *Harper v. Virginia State Board of Elections*,¹⁶⁵ nor did it prevent the Court from holding political patronage unconstitutional under the First Amendment in a series of cases beginning with *Elrod v. Burns*.¹⁶⁶

In *Elrod*, the Court held that political patronage violates the First Amendment because it restricts the “free functioning of the electoral process”

¹⁵⁵ *Id.* at 2502.

¹⁵⁶ *Id.* at 2498 (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O’Connor, J., dissenting) (quotation marks omitted)).

¹⁵⁷ *Id.* at 2506 (citation omitted).

¹⁵⁸ *Id.* at 2498 (quoting *Davis*, 478 U.S. at 145 (O’Connor, J., dissenting) (quotation marks omitted)).

¹⁵⁹ *Davis*, 478 U.S. at 145.

¹⁶⁰ *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (segregated schools); *Baker v. Carr*, 369 U.S. 186 (1962) (malapportioned legislatures); *Harper v. Va. State Bd. Elections*, 383 U.S. 663 (1966) (poll taxes); *Elrod v. Burns*, 427 U.S. 347 (1976) (political patronage).

¹⁶¹ *Davis*, 478 U.S. at 145.

¹⁶² *See Elrod*, 427 U.S. 347 (political patronage); *Harper*, 383 U.S. 663 (poll taxes).

¹⁶³ *See Harper*, 383 U.S. 663.

¹⁶⁴ *Elrod*, 427 U.S. 347.

¹⁶⁵ *Harper*, 383 U.S. 663.

¹⁶⁶ *Elrod*, 427 U.S. 347.

by coercing or deterring political participation by public employees, “starv[ing] political opposition [of] . . . support [and] . . . tip[ping] the electoral process in favor of the incumbent party.”¹⁶⁷

Partisan gerrymandering has an even greater impact on First Amendment rights than political patronage. The fact that partisan gerrymandering has been a “traditional part of politics in the United States” has not made partisan gerrymandering any less “incompatible with democratic principles,”¹⁶⁸ nor is it a justification for its continued existence any more than the long history of segregated schools, malapportioned state legislatures and congressional districts, poll taxes, and political patronage a justification for their continued existence.

X. “CONSTITUTIONAL PARTISAN GERRYMANDERING” IS AN OXYMORON

“Constitutional political gerrymandering” is an oxymoron. It makes no more sense than if the Court had said that the Constitution allows “constitutional vote dilution” or “constitutional viewpoint discrimination.”

The Supreme Court has never held that political gerrymandering is constitutional. The references to “constitutional political gerrymandering” in the majority opinion in *Rucho* were based on dicta that was quoted out of context from a racial gerrymandering case, *Hunt v. Cromartie*, in which Justice Thomas used the term “constitutional political gerrymandering” to describe one of the defenses that is commonly used by states to rebut a claim that race was the predominant factor in the drawing of district lines.¹⁶⁹

Racial gerrymandering claims are “analytically distinct” from the vote-dilution claims.¹⁷⁰ In *Shaw*, the Court held that voters have a constitutional right under the Equal Protection Clause to “participate in a ‘color blind’ electoral process” and do not have to allege or prove that their votes were diluted to have standing to challenge a racial gerrymander as a violation of that clause.¹⁷¹ “[A]n effort [by a state legislature] to classify and separate voters by race injures voters in other ways.”¹⁷² Further, the Court noted that such efforts “reinforce[] racial stereotypes and threaten[] to undermine our system of representative democracy

¹⁶⁷ *Id.* at 356; *see also* *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *O’Hare Truck Serv., Inc. v. City of Northlake*, 515 U.S. 712 (1996).

¹⁶⁸ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

¹⁶⁹ *Hunt v. Cromartie*, 526 U.S. 541 (1999).

¹⁷⁰ *Shaw v. Reno*, 509 U.S. 630, 641–42, 650 (1993); *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

¹⁷¹ *Shaw*, 509 U.S. at 641–42.

¹⁷² *Id.* at 650.

by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.”¹⁷³ To have standing under *Shaw*, a voter is not required to prove either that he or she was a member of a particular race or that his or her vote was diluted.¹⁷⁴ To invoke strict scrutiny of a racial gerrymander, it is “the plaintiff’s burden is to show . . . that race was the predominant factor [in] . . . the legislature’s decision to place a significant number of voters within or without a particular district.”¹⁷⁵ The Court also held in *Miller* that “a State can defeat a claim that a district has been gerrymandering on racial lines” by proving that the district was gerrymandered for a different reason.¹⁷⁶

In *Bush v. Vera*, the Court held that it is not sufficient to prove in a racial gerrymander case that the “district lines merely correlate with race.”¹⁷⁷ If the primary intention of the legislature was not to discriminate against Black voters because they were Black, but because they were Democrats, “there is no racial classification.”¹⁷⁸

The Court did not hold in *Vera* that partisan gerrymandering—an intent on the part of the legislature to discriminate against voters because they were Democrats—would not *also* violate the Constitution. The Court said that “[i]f the States’ goal is otherwise constitutional political gerrymandering, it is free to use . . . political data” to draw district lines.¹⁷⁹

The constitutionality of partisan gerrymandering was not raised or decided by the Supreme Court in *Vera*, *Hunt*, or any of the Court’s other racial gerrymander cases.¹⁸⁰

In short, nothing in the racial gerrymandering cases supports the assertions in the majority opinion in *Rucho* that “legislatures have the authority to engage in a certain degree of partisan gerrymandering.”¹⁸¹

In *Vieth*, Justice Scalia also argued that partisan gerrymandering claims are nonjusticiable because “partisan districting is a lawful and common practice”

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 641–42, 649.

¹⁷⁵ *Miller*, 515 U.S. 916.

¹⁷⁶ *Id.* at 912.

¹⁷⁷ *Bush v. Vera*, 517 U.S. 952, 968 (1996).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ *See, e.g., Cooper v. Harris*, 137 S. Ct. 1455 (2017).

¹⁸¹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019).

and that *Davis* should be overruled.¹⁸² Justice Scalia conceded that “severe partisan gerrymanders [are incompatible] with democratic principles” and that “an *excessive* injection of politics *is unlawful*.”¹⁸³ Justice Scalia, nevertheless, insisted in *Vieth* that “setting out to segregate [voters] by political affiliation is (so long as one doesn’t go too far) lawful and hence ordinary.”¹⁸⁴

A majority of the Court rejected Justice Scalia’s opinion and refused to hold partisan gerrymandering claims to be nonjusticiable and overrule *Davis*.¹⁸⁵ The controlling opinion in *Vieth* was not the plurality opinion of Justice Scalia, but the concurring opinion of Justice Kennedy who refused to agree that partisan gerrymandering claims cannot be justiciable. He said that “[i]f a State passed an enactment that declared ‘All future apportionment[s] shall be drawn so as most to burden Party X’s rights to fair and effective representation’ . . . we would surely conclude the Constitution had been violated.”¹⁸⁶

Justice Kennedy pointed out that Justice Scalia had not said in *Vieth* “that partisan gerrymandering that disfavors one party is permissible. Indeed, the court seem[ed] to acknowledge it is not.”¹⁸⁷

Justice Kennedy disagreed with Justice Scalia that only “an excessive injection of politics [in districting] is *unlawful*.”¹⁸⁸ Justice Kennedy said in *Vieth* that “courts must be cautious about adopting a standard that turns on whether partisan interests in the redistricting process were excessive. Excessiveness is not easily determined.”¹⁸⁹

¹⁸² *Veith v. Jubelirer*, 541 U.S. 267, 286 (2004).

¹⁸³ *Id.* at 292–93. Scholars and litigants have hoped to cobble together a majority of the Court by accepting Justice Scalia’s distinction in *Vieth* between the usual and customary amount of partisan gerrymandering and have urged the Court to declare that partisan gerrymanders are unconstitutional only in a limited number of rare cases that involve only the most “extreme” partisan gerrymanders. Those arguments were destined to fail because they were unprincipled—there is no room under the First Amendment or the Equal Protection Clause for a “little bit” of viewpoint discrimination as long as it does not go too far and is not “extreme.” The distinction was also a manageability trap. Even though the 10-3 partisan gerrymander of the congressional districts in North Carolina was an “extreme statistical outlier,” and Representative Lewis had admitted that it was impossible to draw an 11-2 map, Chief Justice Roberts and the conservative majority still held partisan gerrymandering claims to be nonjusticiable. Brief for Appellee at 14, *Rucho*, 139 S. Ct. 2484 (No. 18-422). Chief Justice Roberts said in *Rucho*, “even if we were to accept the dissent’s proposed baseline [of excessiveness] it would return us to the original unanswerable question (How much partisan motivation and effect is too much?).” *Rucho*, 139 S. Ct. at 2505 (citing *Vieth*, 541 U.S. at 297).

¹⁸⁴ *Vieth*, 541 U.S. at 293.

¹⁸⁵ *Id.* at 267 (citing *Davis v. Bandemer*, 478 U.S. 109, 143 (1986)).

¹⁸⁶ *Id.* at 312.

¹⁸⁷ *Id.* at 316 (quoting Justice Scalia’s acknowledgment that the plurality did “not disagree with [the] judgment’ that ‘partisan gerrymanders [are incompatible] with democratic principles.’”).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

Justice Kennedy gave two examples of partisan gerrymanders he said were equally “culpable.”¹⁹⁰ The first involved an extreme gerrymander in which “Party X . . . draws the lines so it captures every congressional seat.”¹⁹¹ His second example involved gerrymanders that were less extreme in which “Party Y . . . is not so blatant . . . but proceeds by a more subtle effort, capturing less than all of the seats,” but still enough seats to give Party Y a majority of the seats.¹⁹² He said that although “Party X’s gerrymander [is] more egregious. Party Y’s gerrymander [is] more subtle . . . each is culpable.”¹⁹³

Although Justice Kennedy and the majority refused to overrule *Davis*, they agreed with Justice Scalia and the plurality that the dismissal of the plaintiffs’ statewide partisan gerrymandering claims should be affirmed on the merits.¹⁹⁴ Justice Scalia said in *Vieth* that “appellants’ test would invalidate the districting only when it prevents a majority of the electorate from electing a majority of representatives Deny it as appellants may (and do), this standard rests upon the principle that groups . . . have a right to proportional representation. But the Constitution contains no such principle.”¹⁹⁵

Justice Kennedy went further and suggested in *Vieth* that “[t]he First Amendment may be the more relevant constitutional provision in future cases” because partisan gerrymandering “involve[s] the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. . . . Under general First Amendment principles those burdens . . . are unconstitutional absent a compelling government interest.”¹⁹⁶

Justice Scalia objected to the application of the First Amendment to partisan gerrymanders.¹⁹⁷ He said that a “First Amendment claim . . . would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs,” and require “that political affiliation *be disregarded*.”¹⁹⁸

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 269.

¹⁹⁵ *Id.* at 287–88 (plurality opinion). This was essentially the same reason that the plaintiffs’ statewide partisan gerrymandering claims had been rejected on the merits in *Davis*.

¹⁹⁶ *Id.* at 314 (citing *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion)). Justice Stevens also agreed in *Vieth* that partisan gerrymanders violate basic First Amendment principles. *Id.* at 324–25.

¹⁹⁷ *Id.* at 294 (Scalia, J., dissenting).

¹⁹⁸ *Id.*

Justice Kennedy responded that this objection “misrepresent[ed] the First Amendment analysis.”¹⁹⁹ Justice Kennedy explained that the First Amendment “inquiry is not whether political considerations were used,” to draw district lines, but *how* and *why* “political classifications were used to draw district lines.”²⁰⁰ Justice Kennedy said that the proper inquiry “is whether political classifications were used to burden a group’s representational rights. If . . . a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest.”²⁰¹

Chief Justice Roberts did not mention, much less address, Justice Kennedy’s opinion in *Vieth*. Nor did the Chief Justice mention the fact that the Court had reversed the dismissal of the plaintiff’s partisan gerrymandering claim in *Shapiro v. McManus* that was based on the First Amendment theory advocated by Justice Kennedy in *Vieth*, which the Court held was “uncontradicted by the majority in any of our cases.”²⁰² The Chief Justice instead based the entire opinion on *his* unique definition of partisan gerrymandering that both misrepresented the plaintiffs’ claims and contradicted the unanimous ruling of the Court in *Gill v. Whitford*.

XI. CHIEF JUSTICE ROBERTS’S OPINION PROPOSES A RADICAL NEW INTERPRETATION OF THE ELECTIONS CLAUSE

Buried within the majority opinion in *Rucho*, is a radical new interpretation of the Elections Clause in Article I § 4 of the Constitution that has largely gone unnoticed.

According to Chief Justice Roberts, “[t]o hold that legislators cannot take partisan interests into account when drawing [congressional] district lines would essentially countermand the Framers’ decision to entrust districting to political entities.”²⁰³ He said that “[t]he Framers were aware of electoral problems” when they drafted the Elections Clause “and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures expressly checked and balanced by the Federal Congress.”²⁰⁴

¹⁹⁹ *Id.* at 315.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015).

²⁰³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

²⁰⁴ *Id.* at 2496.

The Chief Justice accepted appellants' argument that "through the Elections Clause, the Framers set aside electoral issues" involving congressional elections, "as questions that only Congress can resolve."²⁰⁵ He agreed with the exception of "two areas—one-person, one-vote and racial gerrymandering" cases.²⁰⁶

The Chief Justice also said that "[a]t no point" during the adoption of the Constitution "was there a suggestion that the federal courts had a role to play" in the enforcement of the Elections Clause, "[n]or was there any indication that the Framers had ever heard of courts doing such a thing."²⁰⁷

The Chief Justice's interpretation of the Elections Clause is without support in the language or the history of the Elections Clause, and it is the opposite of what was intended by James Madison and the other Framers of the Constitution. Chief Justice Roberts's interpretation represents a radical departure from prior interpretations of the Elections Clause by the Supreme Court—none of which were addressed by the Chief Justice—they were simply ignored.

When the Elections Clause was being debated at the Constitutional Convention, James Madison expressed a concern that that state legislatures were likely to abuse their powers to "prescribe the times, places, and manner of holding" of congressional elections and "to mold their regulations . . . to favor candidates" for Congress.²⁰⁸ Madison said,

The Legislatures . . . ought not to have the [uncontrolled] right of regulating the times[,] places & manner of holding elections. . . . It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislature had a favorite measure to carry, they would take care so to mold their regulations as to favor the candidates they wished to succeed.²⁰⁹

The Framers did two things to prevent state legislatures from abusing the power to prescribe "the times, places and manner" of elections of members of Congress. The Framers granted the states the power to adopt only "procedural regulations" for the conduct of congressional elections.²¹⁰ The Framers also

²⁰⁵ *Id.* at 2495 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 2496.

²⁰⁸ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240–41 (Max Farrand ed., 1937).

²⁰⁹ *Id.*

²¹⁰ *U.S. Term Limits v. Thornton*, 514 U.S. 779, 832–33 (1995); *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

added a proviso to Article I § 4 that reserved to Congress the power “to make or alter” those regulations.²¹¹

In *U.S. Term Limits v. Thornton*, the Court held that States did not have unlimited control over their elections:

The Framers intended the Election Clause to grant States authority to create *procedural regulations*, not to provide States with [a] license to exclude . . . candidates [from being elected] . . . [T]he Framers understood the Elections Clause as a grant of authority to issue *procedural regulations*, and not as a source of power to dictate *electoral outcomes, to favor or disfavor . . . candidates, or to evade [other] important constitutional limitations.*²¹²

It is not true that “at no point” during the framing of the Constitution “was there a suggestion that the federal courts had a role to play” in the enforcement of the Elections Clause,” and that there was no “indication that the Framers had ever heard of courts doing such a thing.”²¹³

Alexander Hamilton described the proposed new constitution in *Federalist* 78 as “a limited constitution . . . which contains specified exceptions to the legislative authority [that] . . . can be preserved in . . . no other way than through the . . . courts of justice; whose duty must be to declare all acts contrary to the manifest tenor of the constitution *void*.”²¹⁴ Hamilton also said that “there is no . . . clearer principle[,], than that every act of a delegated authority, contrary to the [constitution] . . . is *void*.”²¹⁵

Contrary to the Chief Justice’s assertions in *Rucho*, the Supreme Court has held that the constitutional limitations in Article I § 4 on the powers delegated to the states by the Elections Clause are affirmatively enforceable by the federal courts.²¹⁶

In *U.S. Term Limits v. Thornton*, the Supreme Court declared a provision of the Arkansas Constitution that imposed term limits on candidates for reelection to Congress unconstitutional under the Elections Clause.²¹⁷ The Court held that

²¹¹ *Cook*, 531 U.S. at 522.

²¹² *U.S. Term Limits*, 514 U.S. at 833–34 (emphasis added).

²¹³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019).

²¹⁴ THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cook ed., 1961) (emphasis added).

²¹⁵ *Id.* (emphasis added). John Steele said during the North Carolina ratification convention that if a state were to use the Elections Clause “to ma[k]e laws inconsistent with the Constitution, independent judges would not uphold them.” *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) (cleaned up).

²¹⁶ *U.S. Term Limits*, 514 U.S. at 779; *Cook*, 531 U.S. at 510.

²¹⁷ *U.S. Term Limits*, 514 U.S. at 779.

the provision exceeded the authority delegated to the State by the Elections Clause because it was intended to “dictate electoral outcomes” and “disfavor . . . a class of candidates” by disqualifying long-time incumbents from running for reelection and favoring the election of political newcomers to Congress.²¹⁸

In *Cook v. Gralike*, the Court held a provision of the Missouri Constitution unconstitutional under the Elections Clause.²¹⁹ Article VIII of the Missouri Constitution required the Missouri Secretary of State to print truthful information on the ballot regarding the position of each candidate for election to Congress on the subject of term limits.²²⁰ The Court held that “Article VIII is plainly designed to favor candidates who . . . support the . . . term limits amendment . . . and to disfavor those who either oppose term limits entirely or would prefer a different proposal. . . [F]ar from regulating the procedural mechanisms of elections, Article VIII attempts to ‘dictate electoral outcomes.’”²²¹

It is true, as Chief Justice Roberts pointed out, that in 1842 Congress “exercised its Elections Clause power . . . to address partisan gerrymandering” when it “required single-member districts.”²²² It is also true, as Chief Justice Roberts also pointed out, that in the census acts of 1872 and 1901, Congress required that congressional districts have “equality of population[s],” and that Congress omitted that requirement from later census acts.²²³

The Court was fully aware of these facts in 1964 when it held in *Wesberry* that Article I § 2 of the Constitution requires not only that representation in Congress be apportioned among the people not only between states, but also within each state according to population on a one-person, one-vote basis.²²⁴ The Court held:

Nothing in the language [of the Elections Clause in Article I, Section 4] . . . support[s] . . . a construction that would immunize state congressional apportionment laws which debase a citizen’s right to vote from the power of the federal courts to protect the constitutional rights of individuals from legislative destruction The right to vote

²¹⁸ *Id.* at 833–34.

²¹⁹ *Cook*, 531 U.S. at 510.

²²⁰ *Id.* at 514–15.

²²¹ *Id.* at 524–26 (citing *U.S. Term Limits*, 514 U.S. at 833–34).

²²² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019).

²²³ *Id.* at 2495.

²²⁴ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

is too important . . . to be stripped of judicial protection by such an interpretation of Article I.²²⁵

Although *Wesberry* was a one-person, one-vote case, the Court's decision was based on more fundamental constitutional principles. The Court held that to allow states to create numerically unequal districts "would defeat the principle . . . in the Great Compromise . . . to hold that legislatures *may draw the lines of congressional districts . . . to give some voters a greater voice in choosing a Congressman than others.*"²²⁶

The Chief Justice's radical new interpretation of the Elections Clause is contrary to settled law. In 1962, the Supreme Court said that *Smiley v. Holm*,²²⁷ *Koenig v. Flynn*,²²⁸ and *Carroll v. Becker*²²⁹ had settled the "the issue in favor of justiciability of questions concerning congressional redistricting."²³⁰ The Court reaffirmed the justiciability of questions involving congressional districts in 1964 in *Wesberry*.²³¹ The Court held that the constitutionality of congressional districts is not a political question that is committed to Congress, a coequal branch of government, by the Elections Clause, or that a decision of those issues by the federal courts would violate the doctrine of separation of powers.

Although *Baker* and *Wesberry* were one-person, one-vote cases, *Smiley*, *Koenig*, and *Carroll* were not one-person, one-vote cases, nor were they racial gerrymander cases. Neither were *U.S. Term Limits*, *Cook*, nor the many other cases that have been decided by the Supreme Court under the Elections Clause.²³²

It is impossible to know whether the Chief Justice's discussion of the Elections Clause in *Rucho* should be taken seriously. It would not only turn the Elections Clause on its head and convert it from a limitation on the powers delegated to the states into blanket immunity of state election laws and procedures regulating federal elections from judicial review. It would also mean

²²⁵ *Id.* at 1, 6–7.

²²⁶ *Id.* at 14 (emphasis added).

²²⁷ *Smiley v. Holm*, 285 U.S. 355 (1932).

²²⁸ *Koenig v. Flynn*, 285 U.S. 375 (1932).

²²⁹ *Carroll v. Becker*, 285 U.S. 380 (1932).

²³⁰ *Baker v. Carr*, 369 U.S. 186, 232 (1962).

²³¹ *Wesberry*, 376 U.S. at 6–7.

²³² *See, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572–73 (2000) ("States have a major role to play in structuring . . . the election process . . . they must act within limits imposed by the Constitution."); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) ("The power to regulate the time, place and manner of elections does not justify . . . the abridgment of fundamental rights, such as the right to vote . . . or . . . the freedom of political association.").

that over ninety years of Supreme Court cases have been overruled without explanation and would “entrust” all future disputes involving the constitutionality of state procedures for electing members of Congress to the political judgement of “political entities” (with the exception of the one-person, one-vote cases).

XII. IT IS NOT TRUE THAT PARTISAN GERRYMANDERS IMPOSE “NO
RESTRICTIONS ON SPEECH, ASSOCIATION OR ANY OTHER FIRST
AMENDMENT ACTIVITIES”

The Roberts Court has been far more sympathetic to and protective of the First Amendment rights of corporations, wealthy candidates, and businesspeople to make political contributions and expenditures²³³ than of the First Amendment rights of voters to cast an effective ballot. While the Roberts Court has treated money as a sacred form of political speech and subjected campaign finance laws to strict scrutiny under the First Amendment, in *Rucho*, Chief Justice Roberts was dismissive of the plaintiffs’ claims that partisan gerrymandering burdened their First Amendment rights. He said that that the partisan gerrymanders at issue imposed “no restrictions on speech, association or any other First Amendment activities The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district[s].”²³⁴

Chief Justice Roberts disregarded a fundamental rule of appellate procedure—that “findings of fact . . . must not be set aside [on appeal] unless clearly erroneous.”²³⁵ The district court found that the 2016 partisan gerrymander of North Carolina’s congressional districts burdened First Amendment rights by diluting the votes of Democratic voters in twelve of North Carolina’s thirteen congressional districts.²³⁶ The district court also found that the 2016 plan imposed an undue burden on the First Amendment rights of political association of both the North Carolina Democratic Party and Democratic voters by making it harder for them to recruit Democratic candidates to run for Congress in the gerrymandered districts and to raise money, enlist volunteers, and turn out the vote in support of Democratic candidates in those

²³³ See, e.g., *Davis v. FEC*, 554 U.S. 274 (2008) (the Millionaire’s Amendment); *Citizens United v. FEC*, 558 U.S. 310 (2010) (corporations); *Ariz. Free Enter. Club’s Freedom PAC v. Bennett*, 564 U.S. 721 (2011) (matching funds); *McCutcheon v. FEC*, 572 U.S. 185 (2014) (aggregate limit on contributions).

²³⁴ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019).

²³⁵ FED. R. CIV. P. 52(a)(6).

²³⁶ *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 821–27 (M.D.N.C. 2018).

districts.²³⁷ The findings of the district court were fully supported by the evidence and were not contested on appeal.²³⁸

Chief Justice Roberts also ignored the glaring inconsistency between his ruling in *Rucho* that partisan gerrymandering does not harm the First Amendment rights of voters and his ruling in *Gill* that partisan gerrymandering does injure the constitutional rights of voters under the Equal Protection Clause.²³⁹

The injury to the First Amendment rights of voters from partisan gerrymandering in *Rucho* was far greater, more personal, more definite, more tangible, and more concrete than the burden of a \$48,600 limit imposed by the Bipartisan Campaign Reform Act (BCRA) on the total amount that Shaun McCutcheon, a wealthy Alabama businessman, was allowed to contribute to congressional candidates in a single election cycle.²⁴⁰ The \$48,600 limit in the BCRA had no effect on McCutcheon's First Amendment right to contribute \$2,600 every two years to each of the eight Republican candidates running for Congress in his home state of Alabama. The BCRA's only effect on McCutcheon's First Amendment rights was to limit the amount the McCutcheon was allowed to contribute to Republican candidates who were not running to represent him or the people of Alabama, but to Republican candidates in other states.²⁴¹

XIII. THE COURT IS WILLFULLY BLIND TO THE FACT THAT PARTISAN GERRYMANDERING WORKS

Richard Hasen is one of the country's leading experts on elections. He has observed that Chief Justice Roberts has "exhibited [a] real or pretextual naivete about what social scientist[s] . . . and . . . courts can know about voters' political behavior."²⁴²

Although Chief Justice Roberts has never served in a state legislature, the lack of first-hand legislative experience did not prevent him from discounting the effects of partisan gerrymandering on the results of congressional elections.

²³⁷ *Id.* at 822 n.12; see *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (Kagan, J., concurring); *Anderson v. Celebrezze*, 460 U.S. 780, 790–95 (1983).

²³⁸ *Rucho*, 318 F. Supp. 3d 777.

²³⁹ *Gill*, 138 S. Ct. at 1931.

²⁴⁰ *McCutcheon v. FEC*, 572 U.S. 185, 194–95 (2014).

²⁴¹ Members of the House of Representatives are elected to represent the people of their districts. They are not elected to represent the special interests of wealthy campaign contributors from other states.

²⁴² Hasen, *supra* note 7, at 51.

He said that “[e]xperience proves that accurately predicting electoral outcomes is not so simple . . . because [gerrymandering] plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time.”²⁴³

The Chief Justice’s so-called “experience” was not based on the North Carolina²⁴⁴ and Maryland gerrymanders, but on results of the gerrymanders in two earlier cases—the 1981 gerrymander at issue in *Davis* and the 2001 gerrymander at issue in *Vieth*—in which the plaintiffs’ “predictions of durability were dramatically wrong.”²⁴⁵

The Chief Justice ignored findings of the district courts that were based on the actual results of the congressional elections in both North Carolina and Maryland, which showed that both gerrymanders had worked exactly as the mapmakers had intended and had been 100% effective in achieving their partisan objectives 100% of the time over a succession of election cycles.

The Chief Justice apparently overlooked the fact that he had accepted these findings earlier in the majority opinion.

The Chief Justice found that in North Carolina, “[i]n November 2016, . . . Republican candidates won 10 of the 13 congressional districts[, and] in the 2018 elections, Republican candidates won nine congressional seats, while Democrats won three.”²⁴⁶ Further, “[t]he Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.”²⁴⁷

The Chief Justice also found that the Democratic gerrymander of the Sixth Congressional District in Maryland had also worked exactly as intended and had been 100% effective in “flipping” the Sixth District from a safe Republican district into a safe Democratic district that elected a Democrat to Congress in 2012, 2014, 2016, and 2018.²⁴⁸

Beside ignoring the actual results of the elections at issue, the Chief Justice also ignored the testimony of Dr. Thomas Hofeller, who was the Republican

²⁴³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019).

²⁴⁴ As Justice Kagan pointed out her dissent, the Court should at least have given North Carolina Representative David “Lewis credit[.] . . . [t]he map ha[d] worked just as he planned and predicted.” *Id.* at 2510 (Kagan, J., dissenting).

²⁴⁵ *Id.* at 2503 (majority opinion).

²⁴⁶ *Id.* at 2491.

²⁴⁷ *Id.* at 2492.

²⁴⁸ *Id.* at 2493.

National Committee's leading gerrymandering expert for more than thirty years and was the mapmaker who actually drew the North Carolina congressional map.²⁴⁹

Dr. Hofeller testified that precinct-level data reflecting the voting history of the people of a precinct in favor of Democratic or Republican candidates in state-wide elections is the best predictor of future voting behavior and has been widely accepted as the "industry standard," and it is supported both by his own experience and by social scientists and other experts.²⁵⁰ Dr. Hofeller also testified that he had:

drawn numerous plans in . . . North Carolina over decades . . . in his experience[,] . . . the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it. . . . So once a precinct is found to be a strong Democratic precinct, it's probably going to act as a strong Democratic precinct in every subsequent election. The same would be true for Republican precincts.²⁵¹

CONCLUSION

The claims of unconstitutional partisan gerrymandering are not political questions and are justiciable by federal courts under two well-established injury theories: (1) *vote dilution*, which is a district-specific injury-in-fact that was explicitly recognized by the Court in *Gill*,²⁵² and (2) imposition of an undue burden on the First Amendment rights of political parties and voters of *political association*.²⁵³

²⁴⁹ See Robert Draper, *The League of Dangerous Mapmakers*, ATL. MONTHLY (Oct. 2012), <https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>; David Daley, *The Secret Files of the Master of Modern Republican Gerrymanderer*, NEW YORKER (Sept. 6, 2019), <https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering>; Michael Wines, *Republican Gerrymander Whiz Had Wider Influence Than Was Known*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/2019/09/10/us/republican-gerrymander-thomas-hofeller.html>; David Daley, *GOP Racial Gerrymandering Mastermind Participated in Redistricting in More States Than Previously Known, Files Reveal*, INTERCEPT (Sept. 23, 2019, 3:13 PM); David Daley, "Worth the Investment": *Memos Reveal the Scope and Racial Animus of GOP Gerrymandering Ambitions*, INTERCEPT (Sept. 27, 2019, 10:21 AM), <https://theintercept.com/2019/09/27/gerrymandering-gop-hofeller-memos/>.

²⁵⁰ *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018).

²⁵¹ *Id.* at 806.

²⁵² 138 S. Ct. 1916, 1930 (2018).

²⁵³ *Id.* at 1934 (Kagan, J., concurring); *Anderson v. Celebrezze*, 460 U.S. 780, 790–95 (1983); *Elrod v. Burns*, 427 U.S. 347, 355–56 (1976) (plurality opinion).

The Court based its decision in *Rucho* on a Humpty Dumpty definition of partisan gerrymandering that was, as Justice Kagan pointed out, “not so.”²⁵⁴ Instead, the Court *misrepresented* the constitutional basis of the plaintiffs’ partisan gerrymandering claims and converted their claims from justiciable vote-dilution claims into something else entirely—into nonjusticiable demand for proportional representation, “a ‘norm that does not exist’ in our electoral system.”²⁵⁵

The conclusion is inescapable that Roberts’s Court is not composed, as the Chief Justice has claimed, of nine impartial umpires who merely call balls and strikes.²⁵⁶ Nor is it true that there are no Republican Justices or Democratic Justices on the Supreme Court. Too many of the Court’s decisions in voting rights, campaign finance, and other election law cases have been decided by party-line votes of the Republican majorities that have dominated the Court for the last decade to make those claims credible.

Although Chief Justice Roberts acknowledged in *Rucho* that partisan gerrymanders are “incompatible with democratic principles,” he and the current Republican majority nevertheless made it crystal clear “that the solution [does not] lie[] with the federal judiciary”—at least as long as the Supreme Court is currently composed.²⁵⁷

The Court’s decision in *Rucho* is profoundly anti-democratic and is a reflection of the ideological and partisan nature of the confirmation process within the Senate. Although the *Rucho* decision will ultimately be reversed, the solution for partisan gerrymandering is not likely to come from the Roberts Court; instead, it will come only when process for the selection and confirmation of members of the Supreme Court is reformed and becomes far less partisan than it is currently.

²⁵⁴ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523 (Kagan, J., dissenting).

²⁵⁵ *Id.* at 2499 (majority opinion).

²⁵⁶ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of then-Judge John G. Roberts, Jr. of the United States Court of Appeals for the D.C. Circuit).

²⁵⁷ *Rucho*, 139 S. Ct. at 2506.