

# **Election Law**

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## **Cases and Materials**

**SIXTH EDITION**

## **2020 Supplement**

**Daniel Hays Lowenstein**

PROFESSOR OF LAW EMERITUS  
UNIVERSITY OF CALIFORNIA, LOS ANGELES  
SCHOOL OF LAW

**Richard L. Hasen**

CHANCELLOR'S PROFESSOR OF LAW AND POLITICAL SCIENCE  
UNIVERSITY OF CALIFORNIA, IRVINE  
SCHOOL OF LAW

**Daniel P. Tokaji**

FRED W. & VI MILLER DEAN AND PROFESSOR OF LAW  
UNIVERSITY OF WISCONSIN LAW SCHOOL

**Nicholas Stephanopoulos**

PROFESSOR OF LAW  
HARVARD LAW SCHOOL



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## Chapter 3. Representation and Districting

ADD THE FOLLOWING TO THE END OF NOTE 20 ON PAGE 107:

The Supreme Court recently decided a different question concerning the 2020 Census, one that has major implications for the apportionment of U.S. Representatives among the states as well as for the drawing of districts within states. In 2018, Secretary of Commerce Wilbur Ross announced that question regarding citizenship would be added to the census questionnaire. The Census Bureau has asked some people questions about citizenship in the past, but in recent decades the question was asked as part of the American Community Survey (formerly known as the long-form questionnaire) that only a sampling of households receive, rather than the census questionnaire that all households receive. For background on the history of citizenship questions on the census, see Thomas P. Wolf and Brianna Cea, *A Critical History of the United States Census and Citizenship Questions*, 108 GEORGETOWN LAW JOURNAL ONLINE 1 (2019).

The Department of Commerce argued that addition of the citizenship question was needed to facilitate enforcement of the Voting Rights Act (VRA). Claims of minority vote dilution under Section 2 of the VRA often rely on evidence of how many voting-age *citizens* of different races and ethnicities live in different regions (see Chapter 5 of the Casebook). Opponents of the citizenship question argued that its addition would depress participation, especially among Latino households and those which include noncitizens, ultimately resulting in a less accurate count. They sued on multiple grounds, alleging that addition of the citizenship question would violate the Enumeration Clause of the U.S. Constitution, the Census Act, and the Administrative Procedures Act (APA). Three different district courts agreed with at least one of these claims, issuing injunctions against the question.

A federal district court in New York ruled that the Department of Commerce’s decision to add the citizenship question was “arbitrary and capricious.” In an opinion by Chief Justice Roberts, the Supreme Court reversed in part and affirmed in part, remanding the case to the district court for further proceedings. *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). Different groups of justices joined different portions of the Chief Justice’s majority opinion. In an opinion joined by the other conservative justices (Justices Thomas, Alito, Gorsuch, and Kavanaugh), the Court upheld the Department of Commerce’s authority to ask about citizenship under the Enumeration Clause. That Clause, according to the majority, gives Congress—and by implication, the Department of Commerce—broad authority to decide what questions to add as part of the Census. The same group of justices found that the stated reason for adding the question, that is was needed to enforce the VRA, was “reasonable and reasonably explained.” They also rejected the argument that the addition of the citizenship question violated the Census Act.

The Court nevertheless concluded that the Department of Commerce’s decisionmaking process violated the APA. A different group of justices formed the majority for this part of the opinion, with Justices Ginsburg, Breyer, Sotomayor, and Kagan joining the Chief Justice. The Court concluded that the Secretary’s decision “rested on a pretextual basis,” therefore justifying remand to the Department of Commerce. The Court relied on evidence showing that improved enforcement of the VRA was not the real reason for adding the citizenship question to the 2020 census:

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That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court’s view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question “well before” receiving DOJ’s request, and did so for reasons unknown but unrelated to the VRA. . . .

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. The Secretary’s Director of Policy did not know why the Secretary wished to reinstate the question, but saw it as his task to “find the best rationale.” The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ’s Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility that DOJ’s Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued.

Even so, it was not until the Secretary contacted the Attorney General directly that DOJ’s Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ’s interest was directed more to helping the Commerce Department than to securing the data. The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors. Their influence may explain why the letter went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency—to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census. Finally, after sending the letter, DOJ declined the Census Bureau’s offer to discuss alternative ways to meet DOJ’s stated need for improved citizenship data, further suggesting a lack of interest on DOJ’s part.

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary’s telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we

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have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are “not required to exhibit a naïveté from which ordinary citizens are free.” *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.

Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented from this portion of the Chief Justice’s majority opinion.

The majority concludes that enforcement of the VRA was not the Department of Commerce’s real reason for adding the citizenship question. What then was the real reason? The Court professes agnosticism on this question, saying that the reasons are “unknown.” But documents that came to light shortly before the Court’s decision shed some light on the answer. The documents came from the electronic files of the late Thomas B. Hofeller, a Republican political operative who has been referred to as the “Michelangelo of gerrymandering” for his role in designing redistricting plans favorable to the party. After his death in 2018, his estranged daughter turned over information from Hofeller’s hard drives to Common Cause, an advocacy group involved in cases challenging partisan gerrymandering. Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES, May 30, 2019.

The information from Hofeller’s hard drives included a 2015 analysis of how political representation would be affected if only citizens—rather than the entire population—were counted in drawing legislative districts. At the time, the plaintiffs in *Evenwel v. Abbott* (see *supra* note 12, pages 100-01 of the Casebook) were challenging Texas’s use of total population to divide the state into legislative districts. Hofeller’s analysis of Texas found that using only voting-age citizens (rather than total population) to draw districts “would be advantageous to Republicans and non-Hispanic whites.” The problem was that the detailed citizenship data needed to draw districts in this way was lacking. As Hofeller put it, “the use of citizen voting age population is functionally unworkable” without a citizenship question on the 2020 Census. *Id.*

This evidence suggests that the real reason—at least the main one—for adding the citizenship question to the 2020 Census was to allow Republican-dominated legislatures to equalize the voting-age citizen population instead of the total population when drawing districts. Drawing districts in this way would advantage Republicans, while disadvantaging Democrats and

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Latino voters. Even before the Hofeller documents became public, some speculated that this was the real reason for the Department of Commerce wanting to add the citizenship question. See Justin Levitt, *Citizenship and the Census*, 119 COLUMBIA LAW REVIEW 1355 (2019).

While the Supreme Court remanded the case to the district court, its decision did not prohibit the Department of Commerce from trying again. Before the Supreme Court's decision, the government had informed the Court that the question whether to add the citizenship question to the 2020 census had to be resolved by June 2019. Immediately after the decision, President Trump announced that he had "asked the lawyers if they can delay the Census, no matter how long, until the United States Supreme Court is given additional information from which it can make a final and decisive decision on this very critical matter." It seemed quite possible that this approach might work. See Richard L. Hasen, *Donald Trump Is Promising to Fight the Census Case. That Might Actually Work*, SLATE, June 27, 2019, available at <https://slate.com/news-and-politics/2019/06/john-roberts-trump-census-question-supreme-court-october.html>. But the government ultimately decided to abandon its effort to add the citizenship question to the 2020 census. Ted Hesson, *Census to Leave Citizenship Question off 2020 Questionnaire*, POLITICO, July 2, 2019.

If the Department of Commerce had tried again, would that have been legally permissible? In addition to the APA issue, there is a question whether adding the citizenship question would be intentionally racially discriminatory, in violation of equal protection. Two days before the Supreme Court's decision in *Department of Commerce v. New York*, the Fourth Circuit remanded the Maryland case to the district court, for further proceedings on this question. *La Union del Pueblo Entero v. Ross*, 771 Fed. Appx 323 (4th Cir. 2019).

Suppose the Department of Commerce had tried again to add the citizenship question, asserting (as it did before) that the question is needed for enforcement of the VRA. Suppose further that the Department came forward with new evidence from reputable social scientists, asserting that the citizenship question will enhance enforcement of claims of minority vote dilution. Should the addition of this question be enjoined, on the ground that this rationale is pretextual, just as it was the first time? What if the Department of Commerce had admitted that enhancing Republican partisan advantage in the next round of redistricting is the real reason for adding the question? Given that partisan gerrymandering has now been deemed a nonjusticiable "political question" (see *Rucho v. Common Cause*, Chapter 4 of this Supplement), is it now permissible for the government to provide partisan justifications for its actions?

## Chapter 4. Partisan Gerrymandering and Political Competition

ADD THE FOLLOWING AT THE END OF NOTE 1 ON PAGE 144:

Since it was introduced, the efficiency gap has been the subject of significant academic commentary. For criticisms, see Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STANFORD LAW REVIEW 1131 (2018) (arguing that the efficiency gap is in tension with democratic values like competition, participation, and proportional representation); and Jonathan S. Krasno et al., *Can Gerrymanders Be Detected? An Examination of Wisconsin's State Assembly*, 46 AMERICAN POLITICS RESEARCH (forthcoming 2018) (alleging that the efficiency gap is overly volatile). For responses to these and other points, see Nicholas O. Stephanopoulos and Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STANFORD LAW REVIEW 1503 (2018).

DELETE THE MATERIAL FROM *VIETH V. JUBELIRER* ON PAGE 160 UP TO PART III ON PAGE 194, AND REPLACE WITH THE FOLLOWING:

### The Long Partisan Gerrymandering Interregnum

After holding in *Bandemer* that partisan gerrymandering may violate the Constitution and is justiciable, too, the Court did not consider another case of this kind until *Vieth v. Jubelirer*, 541 U.S. 267 (2004). The plaintiffs in *Vieth* were Democratic voters in Pennsylvania who objected to the state's congressional plan, under which Republicans won a supermajority of the seats even though the state's voters were nearly evenly split between the parties. The plaintiffs also proposed a new test to replace the one adopted by the *Bandemer* plurality, which, as noted above, had proved impossible for litigants to satisfy. Under this test's intent prong, the predominant purpose for a district map had to be the pursuit of partisan advantage. *See id.* at 284 (plurality opinion). Under the test's effect prong, the cracking and packing of the targeted party's voters had to thwart their ability to translate a majority of votes into a majority of seats. *See id.* at 286-87.

A majority of the *Vieth* Court rejected as unworkable both the plaintiffs' proposal and several other suggested legal standards: (1) that adopted by the *Bandemer* plurality; (2) a district-specific predominant-partisan-intent requirement, offered by Justice Stevens; (3) a five-part approach modeled on the Court's racial vote dilution precedents and focusing on compliance with traditional districting criteria, offered by Justice Souter; and (4) a statewide test asking if a partisan minority has unjustifiably entrenched itself in power, offered by Justice Breyer. *See id.* at 277-301. A plurality of four Justices would also have reversed *Bandemer* and held that all partisan gerrymandering claims are nonjusticiable. We bracket the arguments for and against justiciability until our discussion of *Rucho v. Common Cause*, which largely echoed the debate in *Vieth*. The reason the *Vieth* plurality's nonjusticiability conclusion commanded the support of only four Justices was that Justice Kennedy declined to embrace that position.

In his concurrence in the judgment, Justice Kennedy floated a First Amendment theory of partisan gerrymandering. As we shall see, this theory enjoyed some traction until it was ultimately rejected in *Rucho*:

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I note that the complaint in this case also alleged a violation of First Amendment rights. The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve 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 in other contexts are unconstitutional absent a compelling government interest. . . . As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

The plurality suggests there is no place for the First Amendment in this area. The implication is that under the First Amendment any and all consideration of political interests in an apportionment would be invalid. That misrepresents the First Amendment analysis. The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that 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. . . .

Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause. The equal protection analysis puts its emphasis on the permissibility of an enactment's classifications. This works where race is involved since classifying by race is almost never permissible. It presents a more complicated question when the inquiry is whether a generally permissible classification has been used for an impermissible purpose. That question can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlawful burdens. The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association. The analysis allows a pragmatic or functional assessment that accords some latitude to the States.

*Id.* at 314-15 (Kennedy, J., concurring in the judgment) (internal citations omitted). If the crux of a First Amendment challenge is the mapmaker's partisan intent—"burdening or penalizing citizens because of . . . their association with a political party"—then would such a suit succeed whenever a single party has full control of the redistricting process and so is able to disadvantage its opponent? Alternatively, if a First Amendment claim requires both partisan intent and a "burden [on] a group's representational rights," then how is it different from an equal protection claim, which also includes intent and effect prongs?

Around the time of *Vieth*, the issue of *re*-redistricting—enacting a second district map in a decade, even though the initial map was lawful—arose in several states. In Colorado, the legislature changed a court-drawn congressional plan following a Republican victory in the 2002

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election. The Colorado Supreme Court struck down the plan on state law grounds, ruling that the Colorado Constitution prohibited a second redistricting plan during the decade. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (en banc), cert. denied *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004). In New Hampshire, the legislature was unable to update its own districts after the 2000 election, so a court-drawn plan was used in 2002. The New Hampshire Supreme Court upheld under state law a plan that the new legislature adopted in 2004. *In re Below*, 855 A.2d 459 (N.H. 2004). The court held that the legislature had authority under the state constitution to adopt only a single plan each decade, but that its authority was not obviated by the occurrence of an election under a court-drawn plan.

The fiercest controversy was in Texas. As in Colorado and New Hampshire, a divided legislature and governor had failed to produce a congressional plan after the 2000 census. Republicans claimed that a court-drawn plan simply carried forward a Democratic gerrymander enacted in 1991. Republicans won control of the state government in the 2002 elections and decided to turn the tables. The nation was entertained by the spectacle of Democratic legislators fleeing to Oklahoma and New Mexico to prevent Republicans from obtaining a quorum. Eventually Republicans succeeded in passing their plan and Democrats challenged it on a number of grounds. We shall discuss one of these claims, under Section 2 of the Voting Rights Act, in Chapter 5, Part IV. More relevant here, Democrats argued that whatever the difficulty of finding constitutional standards in the case of ordinary redistricting addressed by *Vieth*, a mid-decade re-districting should be treated differently. Once a plan has been adopted that satisfies one-person, one-vote, no new plan is necessary. Therefore, a new plan adopted by a legislature controlled by one party should be treated as presumptively void.

The Supreme Court rejected this argument in *League of Unified Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*). As in *Vieth*, Justice Kennedy wrote the pivotal opinion. In one paragraph joined by the four *Vieth* dissenters and therefore speaking for the Court, he stated that he would not revisit the holding of *Bandemer* that partisan gerrymandering claims are justiciable. Proceeding for himself only, Justice Kennedy disagreed with the plaintiffs that partisan gain is necessarily the “sole” motivation for re-districting. “Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous.” *Id.* at 418 (opinion of Kennedy, J.). More fundamentally, Justice Kennedy objected to striking down maps because of their subjective purposes alone. “[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants’ sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants’ representational rights.” *Id.*

Justice Kennedy further commented on a “symmetry standard,” proposed by a group of distinguished political scientist amici, “that would measure partisan bias by ‘compar[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote.’” *Id.* at 419. “Under that standard the measure of a map’s bias is the extent to which a majority party would fare better than the minority party, should their respective shares of the vote reverse.” *Id.* at 420. Justice Kennedy observed that “[t]he existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside.” *Id.* He added that he was “wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.” *Id.* Moreover, “the counterfactual plaintiff would

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face the same problem as the present, actual appellants: providing a standard for deciding how much partisan dominance is too much.” *Id.* Accordingly, “[w]ithout altogether discounting its utility in redistricting planning and litigation,” Justice Kennedy “conclude[d] asymmetry alone is not a reliable measure of unconstitutional partisanship.” *Id.*

Noticing that this passage did not definitively dismiss the relevance of partisan asymmetry, a group of plaintiffs challenged Wisconsin’s state house plan in the 2010 cycle based in part on its extreme asymmetry. In particular, the plaintiffs showed that the plan exhibited some of the most pro-Republican efficiency gaps and partisan biases in modern history in the 2012 and 2014 elections. [See page 144, Note 1 of the Casebook, defining the efficiency gap and partisan bias.] For the first time since *Bandemer*, the three-judge district court invalidated the plan on partisan gerrymandering grounds. Specifically, the court adopted a three-part test, under which a plan (1) must be “intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation”; (2) must “achieve[] the intended effect” by “burden[ing] the representational rights of [voters] by impeding their ability to translate their votes into legislative seats, not simply for one election but throughout the life of [the plan]”; and (3) must be incapable of being “justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process.” *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

Wisconsin appealed the district court’s decision to the Supreme Court. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Court unanimously vacated the decision below on the ground that the plaintiffs had not yet proven (but might still show) their standing to sue. Standing in a partisan gerrymandering suit brought on a vote dilution theory, according to the Court, does *not* extend to all supporters of the victimized party. Rather, only voters who *themselves* were placed in cracked or packed districts—and who could have been placed in uncracked or unpacked districts by some other, fairer map—have standing:

To the extent the plaintiffs’ alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This “disadvantage to [the voter] as [an] individual[]” therefore results from the boundaries of the particular district in which he resides. And a plaintiff’s remedy must be “limited to the inadequacy that produced [his] injury in fact.” In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual’s own district. . . .

Here, the plaintiffs’ partisan gerrymandering claims turn on allegations that their votes have been diluted. That 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. Remedying the individual voter’s harm, therefore, does not necessarily require restructuring all of the State’s legislative districts. It requires revising only such districts as are necessary to reshape the voter’s district—so that the voter may be unpacked or uncracked, as the case may be. . . .

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The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest “in their collective representation in the legislature,” and in influencing the legislature’s overall “composition and policymaking.” But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on “the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” A citizen’s interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen’s abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable “general interest common to all members of the public.”

*Whitford*, 138 S. Ct. at 1930–31 (internal citations omitted). Is the Court’s holding that standing in partisan gerrymandering cases is district-specific in tension with the theory of vote dilution? Vote dilution is typically understood as an aggregate concept: a particular group is underrepresented in the legislature because its members’ votes have been diluted by district lines that crack and pack these voters. If this is what vote dilution means, does it make sense for partisan vote dilution standing to be district-specific?

On remand from the Court, the *Whitford* litigants added numerous new plaintiffs in state house districts across Wisconsin. They also compiled expert evidence that the plaintiffs lived in districts that (1) were cracked or packed; and (2) could be uncracked or unpacked by a different map. Does this prove that the plaintiffs had standing to allege partisan vote dilution? More importantly, after *Whitford*, three-judge district courts ruled in favor of partisan gerrymandering plaintiffs in cases from Maryland, Michigan, North Carolina, and Ohio. See *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019); *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated*, 139 S. Ct. 2484 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019).

Three of these cases (all but the Maryland litigation) involved partisan vote dilution claims like the one in *Whitford*. The plaintiffs showed that particular districts were intentionally cracked or packed, and could have been uncracked or unpacked by other maps. The plaintiffs also showed that each plan was extremely asymmetric by historical standards, based on metrics like the efficiency gap and partisan bias. The plaintiffs further showed that each plan was more asymmetric than thousands of maps generated randomly by a computer algorithm using nonpartisan districting criteria. In addition, all four cases included First Amendment claims along the lines described by Justice Kennedy in *Vieth* (as well as by Justice Kagan in *Whitford*). These claims were plan-wide in Michigan, North Carolina, and Ohio, and limited to a single district in Maryland. Regardless of their scope, the claims succeeded in the district courts because of evidence that the mapmakers intended to disadvantage certain voters due to their political beliefs and, in fact, imposed burdens on these voters’ rights of free speech and association.

Two of the major post-*Whitford* cases, *Common Cause* involving North Carolina’s congressional plan and *Benisek* involving a single Maryland congressional district, were appealed to the Supreme Court and decided in June 2019. In these cases, there were five votes for the

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position that commanded only plurality support in *Vieth*: namely, that all partisan gerrymandering claims are nonjusticiable political questions.

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

Chief Justice ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States’ congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State’s districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State’s plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are “justiciable”—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

## I A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. *Rucho v. Common Cause*. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. As one of the two Republicans chairing the redistricting committee stated, “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.” He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did “not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.” One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not “fair, reasonable, [or] balanced” because, as recently as 2012, “Democratic congressional candidates had received more votes on a statewide basis than Republican candidates.” The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three.

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The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

. . . The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of “the People” to elect their preferred candidates for Congress, in violation of the requirement in Article I, § 2, of the Constitution that Members of the House of Representatives be chosen “by the People of the several States.” Finally, they alleged that the Plan violated the Elections Clause by exceeding the State’s delegated authority to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress.

. . . On remand [after *Whitford*], the District Court again struck down the 2016 Plan. It found standing and concluded that the case was appropriate for judicial resolution. On the merits, the court found that “the General Assembly’s predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates,” and to “entrench Republican candidates” through widespread cracking and packing of Democratic voters. The court rejected the defendants’ arguments that the distribution of Republican and Democratic voters throughout North Carolina and the interest in protecting incumbents neutrally explained the 2016 Plan’s discriminatory effects. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause.

The court also agreed with the plaintiffs that the 2016 Plan discriminated against them because of their political speech and association, in violation of the First Amendment. . . . Finally, the District Court concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. The District Court enjoined the State from using the 2016 Plan in any election after the November 2018 general election.

### B

The second case before us is *Lamone v. Benisek*. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State’s eight congressional districts. The Governor at the time, Democrat Martin O’Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a “serial gerrymanderer,” to advise the committee. The Governor later testified that his aim was to “use the redistricting process to change the overall composition of Maryland’s congressional delegation to 7 Democrats and 1 Republican by flipping” one district. “[A] decision was made to go for the Sixth,” which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. The map was adopted by a party-line vote.

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It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, § 2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. It concluded that the plaintiffs' claims were justiciable, and that the Plan violated the First Amendment by diminishing their "ability to elect their candidate of choice" because of their party affiliation and voting history, and by burdening their associational rights. On the latter point, the court relied upon findings that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." . . . .

### II A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'"

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth*. In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker*. Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Id.*

Last Term in *Gill v. Whitford*, we reviewed our partisan gerrymandering cases and concluded that those cases "leave unresolved whether such claims may be brought." This Court's authority to act, as we said in *Gill*, is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere.

### B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's

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districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe.

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker “gerrymander” was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. “By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength.”

The Framers addressed the election of Representatives to Congress in the Elections Clause. That provision assigns to state legislatures the power to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress, while giving Congress the power to “make or alter” any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

“[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local coveniency or prejudices. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.”

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress’s power under the Elections Clause would allow Congress to make itself “omnipotent,” setting the “time” of elections as never or the “place” in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment. The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain.

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be “composed of contiguous territory” in “an attempt to forbid the practice of the gerrymander.” Later statutes added requirements of compactness and equality of population. (Only the single member district requirement remains in place today.) Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections.

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role

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for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts.

But the history is not irrelevant. The Framers were aware of electoral districting problems 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. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

### C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. [The Court then summarizes its one-person, one-vote and racial gerrymandering precedents. See Chapter 3, Part I and Chapter 5, Part III of the Casebook.] . . .

Partisan gerrymandering claims have proved far more difficult to adjudicate. 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."

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth*. See *LULAC* (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much"). . . .

### III

#### A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer* (opinion of O'Connor, J.). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process." *Vieth* (opinion of Kennedy, J.).

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As noted, the question is one of degree: How to “provid[e] a standard for deciding how much partisan dominance is too much.” *LULAC* (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: “With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Vieth* (opinion of Kennedy, J.). If federal courts are to “inject [themselves] into the most heated partisan issues” by adjudicating partisan gerrymandering claims, *Bandemer* (opinion of O’Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from “constitutional political gerrymandering.”

## B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. 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. But such a claim is based on a “norm that does not exist” in our electoral system—“statewide elections for representatives along party lines.” *Bandemer* (opinion of O’Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O’Connor put it, such claims are based on “a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes.” *Id.* “Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” *Id.* (plurality opinion).

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or “general ticket” elections. Such States typically sent single-party delegations to Congress. That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: “their party garnered 43 percent of the statewide vote, yet did not receive a single seat.” When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

“‘Fairness’ does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state

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legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking."

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer* (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth* (opinion of Kennedy, J.).

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

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If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are “unguided and ill suited to the development of judicial standards,” and “results from one gerrymandering case to the next would likely be disparate and inconsistent.”

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, “vote dilution” in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, “this Court is not responsible for vindicating generalized partisan preferences. The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.”

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. “[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country’s long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion.” Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

## IV

Appellees and the dissent propose a number of “tests” for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

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## A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina’s 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. In reaching that result the court first required the plaintiffs to prove “that a legislative mapdrawer’s predominant purpose in drawing the lines of a particular district was to ‘subordinate adherents of one political party and entrench a rival party in power.’” The District Court next required a showing “that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party.” Finally, after a *prima facie* showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are “attributable to a legitimate state interest or other neutral explanation.”

The District Court’s “predominant intent” prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a “predominant intent” inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because “race-based decisionmaking is inherently suspect.” But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent “predominates.”

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution “is likely to persist” to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. But “[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites ‘findings’ on matters as to which neither judges nor anyone else can have any confidence.” *Bandemer* (opinion of O’Connor, J.). And the test adopted by the Common Cause court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.

The appellees assure us that “the persistence of a party’s advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions.” Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of

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House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates’ campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court’s third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a “legitimate redistricting objective”—adds to the inquiry. The first prong already requires the plaintiff to prove that partisan advantage predominates. Asking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question.

## B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. Both District Courts concluded that the districting plans at issue violated the plaintiffs’ First Amendment right to association. The District Court in North Carolina relied on testimony that, after the 2016 Plan was put in place, the plaintiffs faced “difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance.” Similarly, the District Court in Maryland examined testimony that “revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion,” and concluded that Republicans in the Sixth District “were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting.”

To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.

The plaintiffs’ argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, “[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to

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invalidate it.” The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? The Common Cause District Court held that a partisan gerrymander places an unconstitutional burden on speech if it has more than a “*de minimis*” “chilling effect or adverse impact” on any First Amendment activity. The court went on to rule that there would be an adverse effect “even if the speech of [the plaintiffs] was not *in fact* chilled”; it was enough that the districting plan “makes it easier for supporters of Republican candidates to translate their votes into seats,” thereby “enhanc[ing] the[ir] relative voice.”

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no “clear” and “manageable” way of distinguishing permissible from impermissible partisan motivation. The *Common Cause* court embraced that conclusion, observing that “a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an ‘acceptable’ level of partisan gerrymandering from ‘excessive’ partisan gerrymandering” because “the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering.” The decisions below prove the prediction of the *Vieth* plurality that “a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting,” contrary to our established precedent.

## C

The dissent proposes using a State’s own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the “median” map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent.

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent’s proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much?).” *Vieth* (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent?

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Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, but it seems a useful way to make the point.) The dissent’s answer says it all: “This much is too much.” That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine “substantial anticompetitive effect[s]” in antitrust law. That language, however, grew out of the Sherman Act, understood from the beginning to have its “origin in the common law” and to be “familiar in the law of this country prior to and at the time of the adoption of the [A]ct.” Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as “substantial risk” or “substantial harm,” but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See [the Elections Clause]. . . .

## V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles” does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. “[J]udicial action must be governed by *standard*, by *rule*,” and must be “principled, rational, and based upon reasoned distinctions” found in the Constitution or laws. *Vieth* (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: “this Court *can* address the problem of partisan gerrymandering because it *must*.” That is not the test of our authority under the Constitution; that document instead “confines the federal courts to a properly judicial role.”

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today’s ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

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Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State’s congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. The dissent wonders why we can’t do the same. The answer is that there is no “Fair Districts Amendment” to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan “shall be drawn with the intent to favor or disfavor a political party” provides little guidance on the question.) Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, § 20(a) (“No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”); Mo. Const., Art. III, § 3 (“Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. ‘Partisan fairness’ means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.”). . . .

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering.

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H.R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts “with the major purpose of diluting the voting strength of any person, or group, including any political party,” except when necessary to comply with the Voting Rights Act of 1965.

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative’s residence.

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We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

\* \* \*

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. “It is emphatically the province and duty of the judicial department to say what the law is.” In this rare circumstance, that means our duty is to say “this is not law.”

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

*It is so ordered.*

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is not beyond the courts. The majority’s abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority’s own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

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### I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

### A

[Justice Kagan extensively discusses the facts in *Rucho* and *Lamone*, focusing on the raw partisan motives underlying the North Carolina and Maryland maps as well as the drafters' success, in subsequent elections, in accomplishing their objectives.]

### B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people."

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." Members of the House of Representatives, in particular, are supposed to "recollect[] [that] dependence" every day. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way

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around.” Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, “in the Government over the people.”

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is “incompatible with democratic principles.” And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. The other is that political gerrymanders have always been with us. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. The majority’s idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic’s earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today’s gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today’s world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. While bygone mapmakers may have drafted three or four alternative districting plans, today’s mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather’s—let alone the Framers’—gerrymanders.

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country’s history. I’ve already recounted the results from North Carolina and Maryland, and you’ll hear even more about those. But the voters in those States were not the only ones to fall prey to such districting perversions. Take Pennsylvania. In the three congressional elections occurring under the State’s original districting plan (before the State Supreme Court struck it down), Democrats received between 45% and 51% of the statewide vote, but won only 5 of 18 House seats. Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats. (Nor is there any reason to think that the results in those States stemmed from political geography or non-partisan districting criteria, rather than from partisan manipulation.) And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn’t hold a candle (or an LED bulb?)

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to what will become possible with developments like machine learning. And someplace along this road, “we the people” become sovereign no longer.

## C

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren’t bad enough). It violates individuals’ constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others. A mapmaker draws district lines to “pack” and “crack” voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment’s Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, “guarantees the opportunity for equal participation by all voters in the election” of legislators. *Reynolds*. And that opportunity “can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.* Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus “dilut[e] the weight of votes because of place of residence.” *Id.* The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens’ votes, and thereby deprive them of their capacity to “full[y] and effective[ly] participat[e] in the political process[.]” *Id.* . . .

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to “disfavored treatment”—again, counting their votes for less—precisely because of “their voting history [and] their expression of political views.” *Vieth* (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is “unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views.” By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of “democracy embodied in the First Amendment.”

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, e.g., *Vieth* (plurality opinion) (“[A]n excessive injection of politics [in districting] is unlawful” (emphasis deleted)). . . . Once again, the majority

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never disagrees; it appears to accept the “principle that each person must have an equal say in the election of representatives.” And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

### II

So the only way to understand the majority’s opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals’ rights—in the face of escalating partisan manipulation whose compatibility with this Nation’s values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation’s history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. . . . And second, the majority argues that even after establishing a baseline, a court would have no way to answer “the determinative question: ‘How much is too much?’” . . .

I’ll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can’t be done has been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State’s own criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed, and describe its application in these two cases. Doing so reveals in even starker detail than before how much these partisan gerrymanders deviated from democratic norms. As I lay out the lower courts’ analyses, I consider two specific criticisms the majority levels—each of which reveals a saddening nonchalance about the threat such districting poses to self-governance. All of that lays the groundwork for then assessing the majority’s more general view, described above, that judicial policing in this area

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cannot be either neutral or restrained. The lower courts' reasoning, as I'll show, proves the opposite.

## A

Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into “a number of ‘tests.’” But in doing so, it fails to convey the decisions' most significant—and common—features. Both courts focused on the harm of vote dilution, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' “predominant purpose” in drawing a district's lines was to “entrench [their party] in power” by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by “substantially” diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights: North Carolina's redistricting committee used “Partisan Advantage” as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that “electing Republicans is better than electing Democrats.” For their part, Maryland's Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly “permissible,” even when it is the predominant factor in drawing district lines. But that is wrong. True enough, that the intent to inject “political considerations” into districting may not raise any constitutional concerns. In *Gaffney*, for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. Consider again Justice Kennedy's hypothetical of mapmakers who set out to maximally burden (i.e., make count for as little as possible) the votes going to a rival party. Does the majority really think that goal is permissible? But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims,

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that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes.

Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might be called the "extreme outlier approach." (Here's a spoiler: the State's plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, except for partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (i.e., the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other. We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (e.g., compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.<sup>4</sup>

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<sup>4</sup> The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan's "partisan asymmetry." Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. See Stephanopoulos & McGhee, *The Measure of a Metric*, 70 STAN. L. REV. 1503, 1505–07 (2018). The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State.

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. . . The majority claims all these findings are mere “prognostications” about the future, in which no one “can have any confidence.” But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders’ effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They availed themselves of all the information that mapmakers (like Hofeller and Hawkins) and politicians (like Lewis and O’Malley) work so hard to amass and then use to make every districting decision. They refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter. They did not bet America’s future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

## B

The majority’s broadest claim, as I’ve noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be “politically neutral” or “manageable.” . . . But [the majority] never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you’ve already heard enough to know, is the latter. That kind of oversight is not only possible; it’s been done.

Consider neutrality first. Contrary to the majority’s suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State’s actual map to an “ideally fair” one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn’t been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge’s philosophizing but of the State’s own characteristics and judgments. The effects evidence in these cases accepted as a given the State’s physical geography (e.g., where does the Chesapeake run?) and political geography (e.g., where do the Democrats live on top of each other?). So the courts did not, in the majority’s words, try to “counteract ‘natural’ gerrymandering caused, for example, by the urban concentration of one party.” Still more, the courts’ analyses used the State’s own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians’ effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I’ve mentioned formed the core of the plaintiffs’ case that the North Carolina plan was an “extreme[] outlier.” Those maps took the State’s political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. On top of that, the maps took the State’s legal landscape

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as a given. They incorporated the State’s districting priorities, excluding partisanship. So in North Carolina, for example, all the maps adhered to the traditional criteria of contiguity and compactness. But the comparator maps in another State would have incorporated different objectives—say, the emphasis Arizona places on competitive districts or the requirement Iowa imposes that counties remain whole. The point is that the assemblage of maps, reflecting the characteristics and judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. Not as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The Maryland court lacked North Carolina’s fancy evidence, but analyzed the gerrymander’s effects in much the same way—not as against an ideal goal, but as against an *ex ante* baseline. To see the difference, shift gears for a moment and compare Maryland and Massachusetts—both of which (aside from Maryland’s partisan gerrymander) use traditional districting criteria. In those two States alike, Republicans receive about 35% of the vote in statewide elections. But the political geography of the States differs. In Massachusetts, the Republican vote is spread evenly across the State; because that is so, districting plans (using traditional criteria of contiguity and compactness) consistently lead to an all-Democratic congressional delegation. By contrast, in Maryland, Republicans are clumped—into the Eastern Shore (the First District) and the Northwest Corner (the old Sixth). Claims of partisan gerrymandering in those two States could come out the same way if judges, *à la* the majority, used their own visions of fairness to police districting plans; a judge in each State could then insist, in line with proportional representation, that 35% of the vote share entitles citizens to around that much of the delegation. But those suits would not come out the same if courts instead asked: What would have happened, given the State’s natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation? And that is what the District Court in Maryland inquired into. The court did not strike down the new Sixth District because a judicial ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override its own political geography and districting criteria. So much, then, for the impossibility of neutrality.

The majority’s sole response misses the point. According to the majority, “it does not make sense to use” a State’s own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria “will vary from State to State and year to year.” But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State’s districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (e.g., must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority’s analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a

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single partisan distribution—the one reflecting proportional representation. But those two demands are different, and only the former is at issue here.

The majority’s “how much is too much” critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State’s political geography and districting criteria built in) reflects “too much” partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The only one that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. Even the majority acknowledges that “[t]hese cases involve blatant examples of partisanship driving districting decisions.” If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, it could have used the lower courts’ general standard—focusing on “predominant” purpose and “substantial” effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map “substantially” dilutes the votes of a rival party’s supporters from the everything-but-partisanship baseline described above. (Most of the majority’s difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) As this Court recently noted, “the law is full of instances” where a judge’s decision rests on “estimating rightly . . . some matter of degree”—including the “substantial[ity]” of risk or harm. The majority is wrong to think that these laws typically (let alone uniformly) further “confine[] and guide[]” judicial decisionmaking. They do not, either in themselves or through “statutory context.” To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority’s suggestion, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. Illicit purpose was simple to show here only because politicians and mapmakers thought their actions could not be attacked in court. They therefore felt free to openly proclaim their intent to entrench their party in office. But if the Court today had declared that behavior justiciable, such smoking guns would all but disappear. Even assuming some officials

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continued to try implementing extreme partisan gerrymanders, they would not brag about their efforts. So plaintiffs would have to prove the intent to entrench through circumstantial evidence—essentially showing that no other explanation (no geographic feature or non-partisan districting objective) could explain the districting plan’s vote dilutive effects. And that would be impossible unless those effects were even more than substantial—unless mapmakers had packed and cracked with abandon in unprecedented ways. As again, they did here. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling—by even the strictest measure, inordinately partisan.

The majority, in the end, fails to understand both the plaintiffs’ claims and the decisions below. Everything in today’s opinion assumes that these cases grew out of a “desire for proportional representation” or, more generally phrased, a “fair share of political power.” And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice’s removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals’ supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people’s power to vote.

## III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians’ districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that “our oath and our office require no less.” *Reynolds*. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. “For here, politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.” Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. “Dozens of [those] bills have been introduced,” the majority says. One was “introduced in 2005 and has been reintroduced in every Congress since.” And might be reintroduced until the end of time. Because what all these bills have in common is that they are not laws. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. Some Members of the majority, of course, once thought such initiatives unconstitutional. But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland),

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voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. I'd put better odds on that bill's passage than on all the congressional proposals the majority cites.

The majority's most perplexing "solution" is to look to state courts. "[O]ur conclusion," the majority states, does not "condemn complaints about districting to echo into a void": Just a few years back, "the Supreme Court of Florida struck down that State's congressional districting plan as a violation" of the State Constitution. And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, this was law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the amicus briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. In our government, "all political power flows from the people." And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But

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everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

### *Notes and Questions*

1. At first glance, *Rucho* is a puzzling decision. It holds that partisan gerrymandering claims are nonjusticiable even though majorities of the Justices had repeatedly concluded to the contrary—including as recently as the year before, in *Gill v. Whitford*. *Rucho* also ignores various passages in *Whitford* that seemed to be giving clues to future partisan gerrymandering litigants: for example, the Court's statement that evidence of partisan intent "may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims." *Whitford*, 138 S. Ct. at 1932. What explains these oddities? Could it be the Court's changed composition? Note that Justice Kennedy was on the Court (and its median voter on this issue) in *Vieth*, *LULAC*, and *Whitford*, but that, by the time *Rucho* was decided, he had been replaced by Justice Kavanaugh. Is there any reason to think that Justice Kennedy would have joined the *Rucho* majority? See Nicholas Stephanopoulos, *The Denouement of Kennedy's Retirement*, ELECTION LAW BLOG (July 1, 2019), <https://electionlawblog.org/?p=105881>.

2. Most of *Rucho* discusses one reason why a legal theory may be a nonjusticiable political question: that there exists "a lack of judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. 186, 217 (1962). However, the appellants argued that partisan gerrymandering claims are political questions for a second reason: because the Elections Clause assigns responsibility for regulating federal elections to state legislatures and to Congress—but not to courts. See *id.* (observing that nonjusticiability also follows when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"). In what may have been the plaintiffs' only victory in *Rucho*, the majority rejected this argument. The majority did "not agree" that "through the Elections Clause, the Framers set aside electoral issues . . . as questions that only Congress can resolve" because "[i]n two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts." *Rucho*, 139 S. Ct. at 2495-96.

Why did the majority dismiss the appellants' Elections Clause theory, even though it would have given the majority a second reason to hold partisan gerrymandering claims nonjusticiable? As the majority notes, the appellants' Elections Clause theory would seemingly have extended to one-person, one-vote and racial gerrymandering claims, since they too involve judicial intervention in the area of congressional redistricting. Would the theory have extended even further, to *all* judicial intervention with respect to congressional elections? Under the text or history of the Elections Clause, is there any way to distinguish redistricting from other aspects of electoral regulation? Note as well that, on its face, the Elections Clause is simply a power-conferring provision, bestowing certain authorities to state legislatures and to Congress. What implications

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would follow from the position that all power-conferring provisions are nonjusticiable unless they explicitly mention a role for the courts?

3. The *Rucho* majority mentions two other kinds of redistricting claims—one-person, one-vote and racial gerrymandering challenges—but pointedly makes no reference to a third category: racial *vote dilution* claims. As we shall see in Chapter 5, Part II, such claims have been recognized under the Fourteenth Amendment since the early 1970s. They typically attack an electoral arrangement, such as an at-large electoral system or a single-member-district map, on the ground that it intentionally dilutes the electoral influence of a racial minority group. Why might the *Rucho* majority have declined to discuss racial vote dilution claims? (It's not because the plaintiffs didn't bring them up; they featured heavily in the plaintiffs' briefs.) How similar are racial and partisan vote dilution? Racial vote dilution requires discriminatory intent as well as the effect of a minority group's reduced electoral influence, often achieved through district lines that crack or pack the group's members. And what would be the fate of Section 2 of the Voting Rights Act, which bans racial vote dilution as a statutory matter, if constitutional racial vote dilution is no longer a cognizable claim? See Nicholas Stephanopoulos, *The Erasure of Racial Vote Dilution Doctrine*, ELECTION LAW BLOG (June 28, 2019), <https://electionlawblog.org/?p=105855>.

4. One of the *Rucho* majority's key analytical moves takes the following form: (1) *Some* partisan motivation in redistricting is permissible. (2) The Constitution only prohibits *excessive* partisanship. (3) There is no way to distinguish reliably between some and too much partisanship. (4) Therefore, no judicially manageable partisan gerrymandering standard exists. One response to this reasoning is to attack its premise: that some partisan motivation in redistricting is constitutionally unobjectionable. True, the *Vieth* plurality said the same thing, but that view only gained the support of four Justices. As Justice Stevens remarked in dissent in *Vieth*, until the plurality's opinion in that case, "there ha[d] not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 337 (Stevens, J., dissenting). See also Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICHIGAN LAW REVIEW 351 (2017) (arguing that any partisan motivation in redistricting is impermissible); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WILLIAM & MARY LAW REVIEW 1993 (2018) (same).

A different response is to argue that a *predominant*-partisan-intent requirement successfully navigates between acceptable and unacceptable levels of partisanship in redistricting. This is the tack taken by Justice Kagan in her dissent in *Rucho*. "[W]hen political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far." *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting). But note that both the *Vieth* appellants and Justice Stevens in dissent in *Vieth* proposed predominant-partisan-intent criteria (plan-wide in the appellants' case, district-specific in Justice Stevens's), and that five Justices in *Vieth* rejected both formulations. How, then, can Justice Kagan maintain that this approach is still doctrinally available?

5. The *Rucho* majority insists that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Rucho*, 139 S. Ct. at 2499. What does the majority mean here by proportional representation? In political science, proportional representation has a clear

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definition: a share of legislative seats for a party that is *equal* to its share of the vote. Under this definition, neither the plaintiffs nor the lower courts sought to impose proportional representation. In particular, the quantitative metrics on which the plaintiffs and the lower courts relied, such as the efficiency gap and partisan bias, capture a plan's deviation from *partisan symmetry*, not proportionality. [See the discussion at pages 142-44, Note 1 in the Casebook.] But perhaps the *Rucho* majority means something broader by proportional representation, more like any argument that even looks to how a party's legislative representation compares to its popular support. In that case, it might be fair to label the efficiency gap and partisan bias as measures of disproportionality. But how tenable is this view? In a democracy, is it really possible, normatively, to divorce a party's legislative representation from its popular support?

6. The *Rucho* majority observes that there are multiple desiderata in redistricting. Some want “a greater number of competitive districts.” Others prefer “to ensure each party its ‘appropriate’ share of ‘safe’ seats.” Still others advocate “adherence to ‘traditional’ districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents.” *Rucho*, 139 S. Ct. at 2500. What do these redistricting objectives have to do with claims of *partisan* gerrymandering? Would anyone call it a partisan gerrymandering challenge if a plaintiff wanted lines to be drawn to yield greater electoral competitiveness? Or if a plaintiff sought districts that better corresponded to political subdivisions or communities of interest? To put the point another way, would courts actually have to “decid[e] among . . . these different visions of fairness” to adjudicate partisan gerrymandering claims, *id.*, or could courts simply stay agnostic between them?

7. Prior to *Rucho*, the last time the Supreme Court held that a redistricting cause of action was nonjusticiable was in *Colegrove v. Green*, 328 U.S. 549 (1946). In that case, as we discuss in Chapter 3, Part I, a plurality of the Court deemed one-person, one-vote claims to be political questions. The *Colegrove* plurality, and the dissenters in the 1960s reapportionment cases (which reversed *Colegrove*), made a number of arguments reminiscent of the *Rucho* majority's reasoning. Among other things, they contended that (1) conventional modes of constitutional interpretation do not support the justiciability of one-person, one-vote claims; (2) no normative consensus exists as to what a fairly apportioned map is; (3) judges lack the empirical skills to tackle the quantitative issues associated with malapportionment; (4) it would be unseemly for the federal courts to involve themselves in redistricting; and (5) other actors, like legislatures and state courts, could solve the problem of malapportionment instead. See Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUPREME COURT REVIEW 111, 128-35 (tracing the parallels between the *Rucho* majority and the opponents of one-person, one-vote in the mid-twentieth century).

8. Perhaps the most powerful evidence relied on by the plaintiffs, the lower courts, and Justice Kagan are computer simulations of alternative district maps. The logic of these simulations is as follows: First, identify all redistricting criteria used by a jurisdiction *other* than partisan advantage. (These may include compactness, respect for political subdivisions, compliance with the Voting Rights Act, and any other nonpartisan goal.) Second, deploy a computer algorithm to generate randomly thousands of district maps based on these criteria. Third, use election results to estimate the likely partisan consequences of both the enacted plan and all of the computer-generated maps. And fourth, compare the enacted plan's partisan performance to that of the computer-generated maps. If the enacted plan is similar to the computer-generated maps, then it is

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unproblematic. But if the enacted plan is more biased than the computer-generated maps—yielding more seats for the line-drawing party—then one may infer partisan intent, partisan effect, and a lack of any legitimate justification for this impact.

The *Rucho* majority objects that “it does not make sense to use criteria that will vary from State to State and year to year as the baseline.” *Id.* at 2505. But why isn’t this fluctuating benchmark “a virtue, not a vice—a feature, not a bug,” as Justice Kagan argues in her dissent? *Id.* at 2521 (Kagan, J., dissenting). After all, the Court has always given mapmakers a great deal of discretion in selecting parameters for redistricting. The fluctuating benchmark is simply a product of this discretion. The *Rucho* majority also complains that it is unclear *how* different from the computer-generated maps the enacted plan must be to be condemned. “Would twenty percent away from the median map be okay? Forty percent? Sixty percent?” *Id.* at 2505. The dissent does not propose a quantitative standard, like more than two standard deviations away from the median, or more biased than 95 percent of computer-generated maps. Should it have?

A different critique of the computer simulations is that they may not be a representative sample of the universe of district maps that satisfy the specified criteria. In that case, it is arguably irrelevant how near to, or far from, the median of the distribution of computer-generated maps the enacted plan happens to be. If this median is unrepresentative of the appropriate universe, then it may carry little or no normative weight. For scholars making this point, see Micah Altman et al., *Revealing Preferences: Why Gerrymanders Are Hard to Prove, and What to Do About It* (Mar. 23, 2015), and Benjamin Fifield et al., *A New Automated Redistricting Simulator Using Markov Chain Monte Carlo* (May 24, 2018).

9. The *Rucho* majority asserts that voters’ partisan preferences may change from race to race and year to year. As a result, district plans alleged to be gerrymanders for one party (like the Indiana state house map at issue in *Bandemer* and the Pennsylvania congressional map at issue in *Vieth*) may produce majorities for the opposing party in subsequent elections. In her dissent, Justice Kagan calls these claims “unsupported and out-of-date musings about the unpredictability of the American voter.” *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). The political science literature backs her up. Modern American voters rarely split their tickets or switch their partisan preferences from one election to the next. See, for example, Donald P. Green et al., *PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS* (2002) and Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 365 (2017). But even if the *Rucho* majority is wrong empirically, could there be sound jurisprudential reasons to assume that voters do not necessarily follow the party line but, rather, make choices based on issues, candidates, and campaigns? For an exploration of this possibility, see Michael Morley, *Rucho, Legal Fictions, and the Judicial Models of Voters*, *ELECTION LAW BLOG* (July 4, 2019), <https://electionlawblog.org/?p=106008>.

10. The *Rucho* majority makes short work of the argument that partisan gerrymandering is justiciable under the First Amendment. First, the *Rucho* majority claims that district plans impose “no restrictions on speech, association, or any other First Amendment activities” because “plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.” *Rucho*, 139 S. Ct. at 2504. But even if gerrymanders do not *directly* burden First Amendment rights, why don’t they do so *indirectly*, through their chilling effects on targeted voters

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who realize that their speech and association have been rendered meaningless in gerrymandered districts? The Court has often recognized First Amendment claims of this kind. See, for example, *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (applying “exacting scrutiny” to disclosure requirements even though their associational burden “arises, not through direct government action, but indirectly as an unintended but inevitable result of the government’s conduct”) and *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (striking down an order that the NAACP reveal its membership list because the order “may induce [NAACP] members to withdraw from the Association and dissuade others from joining it”). See also Christopher Warshaw and Nicholas Stephanopoulos, *The Impact of Partisan Gerrymandering on Political Parties* (Feb. 21, 2019) (finding empirically that when parties are disadvantaged by gerrymandering, associational functions such as running for office and donating money are impeded).

Second, the *Rucho* majority asserts that, under the First Amendment, “any level of partisanship in districting would constitute an infringement.” *Rucho*, 139 S. Ct. at 2504. The First Amendment thus “provides no standard for determining when partisan activity goes too far.” *Id.* Perhaps it is true that a theory of viewpoint discrimination would find a violation whenever district lines are drawn to benefit certain voters, and disadvantage other voters, because of their political beliefs. But is this also the case for an associational theory that focuses on the ways in which gerrymanders prevent likeminded voters from collaborating politically? As we discuss in Chapter 6, Part C and Chapter 9, associational claims typically trigger sliding-scale scrutiny, under which the stringency of judicial review varies based on the severity of the burden imposed on associational rights. Why wouldn’t this approach prevent the outcome feared by the Court, namely, the invalidation of all districts drawn for partisan reasons? See Daniel P. Tokaji, *Gerrymandering and Association*, 59 WILLIAM & MARY LAW REVIEW 2159 (2018).

11. In the final section of its opinion, the *Rucho* majority observes that state courts, unlike federal courts, may fight gerrymandering on the basis of state constitutional provisions that are more specific than any clause in the federal Constitution. “[T]here is no ‘Fair Districts Amendment’ to the Federal Constitution,” as there is to the Florida constitution. *Rucho*, 139 S. Ct. at 2507. But notice that the Pennsylvania Supreme Court recently struck down the state’s congressional plan based on a provision stating only that “elections shall be free and equal.” *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). Is this language any more determinate than the First Amendment or the Equal Protection Clause? Also note that, shortly after *Rucho*, a North Carolina trial court invalidated the state’s legislative maps based on (among other theories) North Carolina’s analogues to the First and Fourteenth Amendments. This court explicitly disagreed with the Supreme Court that these provisions are nonjusticiable in this context. See *Common Cause v. Lewis*, 2019 WL 4569584 (N.C. Super. Sept. 3, 2019). And observe (as Justice Kagan does in her dissent) that, prior to *Rucho*, district courts in Michigan, North Carolina, Ohio, and Wisconsin arrived at essentially the same three-part test for adjudicating claims of partisan vote dilution. Does this lower court consensus suggest that, even if the federal Constitution is highly abstract, its dictates can be made more concrete through conventional judicial interpretation? See Nicholas Stephanopoulos, *The Emerging Consensus of the Lower Courts*, ELECTION LAW BLOG (Apr. 27, 2019), <https://electionlawblog.org/?p=104888>.

The *Rucho* majority further points out that gerrymandering may be combatted by voter initiatives that “mandate[ ] at least some of the traditional districting criteria” or “plac[e] power to

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draw electoral districts in the hands of independent commissions.” *Rucho*, 139 S. Ct. at 2507. But how helpful is direct democracy in this context? Most attempts to reform redistricting through voter initiatives fail due to the ferocious opposition of sitting legislators. See Nicholas O. Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 JOURNAL OF LAW AND POLITICS 331 (2007). Voter initiatives are also available in only about half the states; they are *not* available, for example, in Maryland, North Carolina, and Wisconsin—the states that gave rise to *Lamone*, *Rucho*, and *Whitford*, respectively. And the constitutionality of independent redistricting commissions remains hazy. Their validity was affirmed in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), which we discuss in Chapter 7, Part D. But Chief Justice Roberts, joined by three other Justices, dissented on the ground that when a commission is responsible for redistricting, the Elections Clause is violated because the “Legislature” does not get to draw the lines. Now that Justice Kennedy is no longer on the Court, this position may well command five votes.

Much the same points apply to the *Rucho* majority’s final option for thwarting gerrymandering: congressional legislation. How likely is it that, for the first time in American history, members of Congress, many of whom are elected from gerrymandered districts, will pass laws seriously restricting the practice? One might think, not very likely, except that the House of Representatives recently approved a bill that would mandate the use of redistricting commissions for congressional district plans. See H.R. 1, 116th Cong. §§ 2401, 2411 (2019). However, there is no sign that the Senate will take any action on this bill. In addition, is it clear that congressional action in this area would be constitutionally permissible? Congress has near-plenary authority over congressional elections under the Elections Clause. But what if, in exercising this power, Congress orders states to take certain steps (like creating redistricting commissions)? Would such directives violate the anti-commandeering doctrine? And even if Congress can fight congressional gerrymandering, can it curb state and local gerrymandering? To do so, Congress would presumably have to invoke its Fourteenth Amendment enforcement authority. Any such invocation would require the Court to determine how “congruent and proportional” the legislation is to underlying constitutional offenses.

12. What will mapmakers do now that there is no possibility of federal courts checking partisan gerrymandering? More aggressive gerrymandering of the kind seen in the 2010 cycle, relying on the cracking and packing of the opposing party’s voters, is a near-certainty. But consider the following additional steps that mapmakers could take: (1) using computer algorithms to maximize the size and durability of a party’s redistricting advantage; (2) redrawing districts more frequently (as often as every two years) to keep fine-tuning a party’s electoral position; and (3) creating noncontiguous districts that combine clusters of voters in different parts of a state. How plausible are these options? How much value do they add to traditional gerrymandering? And is it definitely the case that federal courts would stay on the sidelines if these tactics were tried? See Aaron Goldzimer and Nicholas Stephanopoulos, *Democrats Can’t Be Afraid to Gerrymander Now*, SLATE (July 3, 2019).

## Chapter 5. Minority Vote Dilution

ADD THE FOLLOWING NOTE ON PAGE 295, AFTER NOTE 9:

9.5. Can white voters bring racial vote dilution claims under Section 2 of the Voting Rights Act? The statutory text, which refers to “a denial or abridgement of the right of *any citizen* . . . to vote *on account of race or color*,” suggests so. And that is indeed what most lower courts have held. However, even if they could satisfy the *Gingles* preconditions, white voters would presumably have a very difficult time establishing liability under the Senate factors, most of which involve the presence of historical and ongoing racial discrimination. For a recent case recognizing white voters’ right to bring a racial vote dilution challenge, but ruling against them on the merits, see *Harding v. County of Dallas*, 948 F.3d 302 (5th Cir. 2020) (holding that plaintiffs failed to prove that a second Anglo opportunity county commissioner district could be drawn in Dallas County, Texas).

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 316:

And what if a state has already drawn a majority-minority district, but minority voters are still unable to elect their preferred candidate (due to low turnout or less-than-perfect cohesion)? Can the state still be found liable under Section 2? The Fifth Circuit recently said yes, striking down a majority-minority Mississippi state senate district as dilutive. See *Thomas v. Bryant*, 938 F.3d 134 (5th Cir. 2019). In so ruling, the court rejected the idea that *Bartlett* barred Section 2 claims against majority-minority districts, explaining that “the Court did not hold . . . that if the district being challenged already contains a majority-minority population, then a § 2 claim is precluded.” *Id.* at 157. However, Judge Willett dissented on this ground, arguing that the majority’s “blinkered focus on outcomes rather than opportunity clashes with the VRA’s express text and relevant caselaw, both of which underscore electoral participation and opportunity—not electoral success.” *Id.* at 183 (Willett, J., dissenting). Sitting en banc, the Fifth Circuit also vacated the decision below on the ground that the case became moot after the 2019 election was held. See *Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (en banc).

ADD THE FOLLOWING NOTE ON PAGE 317, AFTER NOTE 8:

8.5. In *Abbott v. Perez*, 138 S. Ct. 2305 (2018), the Supreme Court relied on *Gingles*’s first prong to reverse a lower court’s ruling that one congressional district and two state house districts in Texas violated Section 2 of the Voting Rights Act. The lower court had held that Congressional District 27 was unlawful because it was not a Latino opportunity district, even though such a district could have been constructed in its vicinity. The Supreme Court disagreed, concluding that Texas had satisfied its Section 2 obligation by creating a Latino opportunity district (Congressional District 35) elsewhere in the state. Justice Alito’s opinion for the five-justice majority observed that “the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan.” *Abbott*, 138 S. Ct. at 2331. Contrary to the lower court, the Supreme Court concluded that voting was sufficiently racially polarized in CD 35 for it to count toward the tally of Latino opportunity districts in the state: “[T]here is ample evidence that this factor [of racial polarization] is met. Indeed, the [lower] court found that majority bloc voting exists throughout the State.” *Abbott*, 138 S. Ct. at 2332. The

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Court thus held that the Texas legislature was justified in drawing CD 35 as a Latino opportunity district instead of CD 27.

Similarly, the Court held that the lower court erred in ruling that State House District 32 and House District 34 violated Section 2. These two state house districts make up all of Nueces County, where Latinos account for approximately 56 percent of the voting age population. House District 34 was undisputedly a Latino opportunity district, while House District 32 was not. According to the majority, the plaintiffs’ “own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district.” *Abbott*, 138 S. Ct. at 2332. “In order to create two performing districts in that area, it was necessary, he found, to break county lines in *multiple* places”—a districting choice the lower court found unwarranted. *Id.* The majority therefore concluded: “So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines, the logical result is that Texas did not dilute the Latino vote.” *Id.* Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan) dissented as to all three districts.

The fireworks in *Abbott* were not just about Section 2. They also pertained to whether Texas had intentionally discriminated against Latinos in enacting its congressional and state legislative plans. (Recall that a finding of intentional discrimination is necessary both to strike down maps under the Constitution and to trigger bail-in under Section 3 of the VRA.) According to the lower court, Texas engaged in intentional racial discrimination when it originally passed its maps in 2011. The lower court then “attributed this same intent to the 2013 Legislature” when it enacted new plans that corresponded to interim court-drawn maps “because it had ‘failed to engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.’” *Abbott*, 138 S. Ct. at 2318. This was legal error, in the view of the Supreme Court. As Justice Alito wrote for five Justices:

The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. “[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” The “ultimate question remains whether a discriminatory intent has been proved in a given case.” The “historical background” of a legislative enactment is “one evidentiary source” relevant to the question of intent. But we have never suggested that past discrimination flips the evidentiary burden on its head. . . .

. . . Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature. The 2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court pursuant to instructions from this Court “not to incorporate . . . any legal defects.”

Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs’ burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent.

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The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true “change of heart” and had “engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.”

*Id.* at 2324–25 (internal citations omitted).

Justice Sotomayor dissented vigorously, joined by Justices Ginsburg, Breyer, and Kagan. She argued that the lower court had not, in fact, shifted the burden to Texas to show that it had cured the taint of past discrimination. She also contended that the evidence in the record amply supported the lower court’s finding of intentional discrimination:

The majority believes that, in analyzing the 2013 maps, the District Court erroneously “attributed [the] same [discriminatory] intent [harbored by the 2011 Legislature] to the 2013 Legislature” and required the 2013 Legislature to purge that taint. The District Court did no such thing. . . .

. . . To start, there is no question as to the discriminatory impact of the 2013 plans, as the “specific portions of the 2011 plans that [the District Court] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects ‘continu[ing] to this day.’” Texas, moreover, has a long “history of discrimination” against minority voters. “In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost.”

There is also ample evidence that the 2013 Legislature knew of the discrimination that tainted its 2011 maps. “The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment.” The Legislature was also well aware that “the D.C. court concluded that [its 2011] maps were tainted by evidence of discriminatory purpose,” and despite the District Court having warned of the potential that the Voting Rights Act may require further changes to the maps, “the Legislature continued its steadfast refusal to consider [that] possibility.”

Turning to deliberative process—on which the majority is singularly focused, to the exclusion of the rest of the factors analyzed in the orders below—the District Court concluded that Texas was just “not truly interested in fixing any remaining discrimination in the [maps].” Despite knowing of the discrimination in its 2011 maps, “the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.” . . . The Legislature made no substantive changes to the challenged districts that were the subject of the 2011 complaints, and “there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans.” . . .

The absence of a true deliberative process was coupled with a troubling sequence of events leading to the enactment of the 2013 maps. Specifically, “the Legislature pushed the redistricting bills through quickly in a special session,” despite months earlier having been urged by the Texas attorney general to take on redistricting during the regular session.

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By pushing the bills through a special session, the Legislature did not have to comply with “a two-thirds rule in the Senate or a calendar rule in the House,” and it avoided the “full public notice and hearing” that would have allowed “‘meaningful input’ from all Texans, including the minority community.”

*Abbott*, 138 S. Ct. at 2346–48.

Who has the better of this dispute? Is it fair to infer discriminatory intent when (1) a legislature is found guilty of intentional discrimination when it originally passes a map; (2) a court orders an interim remedial plan to be used; and (3) the legislature then enacts a new map that largely follows the contours of the interim remedial plan? Additionally, how common is this scenario? Especially now that Section 5 is a dead letter thanks to *Shelby County*, how often will legislatures find themselves in the position of deciding whether to ratify a court-drawn map?

ADD THE FOLLOWING AFTER NOTE 4 ON PAGE 372:

On remand from the Supreme Court, the lower court held that eleven Virginia state house districts were unconstitutional racial gerrymanders. The lower court based its conclusion that race predominated in the construction of these districts on the state’s use of a 55 percent black voting age population target as well as extensive district-specific evidence. The court also ruled that the districts could not survive strict scrutiny because, above all, the 55 percent target was unnecessary for compliance with either Section 2 or Section 5 of the Voting Rights Act. See *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018).

Virginia’s Attorney General decided not to appeal the district court’s decision. However, the Virginia House of Delegates, which had intervened as a defendant at the trial stage, chose to continue the litigation. In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Supreme Court held that the House lacked standing and thus avoided commenting (for a second time) on the merits of the racial gerrymandering claims:

To begin with, the House has not identified any legal basis for its claimed authority to litigate on the State’s behalf. Authority and responsibility for representing the State’s interests in civil litigation, Virginia law prescribes, rest exclusively with the State’s Attorney General. . . . Virginia has thus chosen to speak as a sovereign entity with a single voice. In this regard, the State has adopted an approach resembling that of the Federal Government, which “centraliz[es]” the decision whether to seek certiorari by “reserving litigation in this Court to the Attorney General and the Solicitor General.” Virginia, had it so chosen, could have authorized the House to litigate on the State’s behalf, either generally or in a defined class of cases. . . . But the choice belongs to Virginia, and the House’s argument that it has authority to represent the State’s interests is foreclosed by the State’s contrary decision.

. . . . The House [also] has standing, it contends, because it is “the legislative body that actually drew the redistricting plan,” and because, the House asserts, any remedial order will transfer redistricting authority from it to the District Court. But the Virginia

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constitutional provision the House cites allocates redistricting authority to the “General Assembly,” of which the House constitutes only a part.

That fact distinguishes this case from *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, in which the Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature’s authority under the Federal Constitution over congressional redistricting. In contrast to this case, in *Arizona State Legislature* there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority. Just as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.

. . . . Aside from its role in enacting the invalidated redistricting plan, the House, echoed by the dissent, asserts that the House has standing because altered district boundaries may affect its composition. . . .

. . . . [A]lthough redrawing district lines indeed may affect the membership of the chamber, the House as an institution has no cognizable interest in the identity of its members. Although the House urges that changes to district lines will “profoundly disrupt its day-to-day operations,” it is scarcely obvious how or why that is so. As the party invoking this Court’s jurisdiction, the House bears the burden of doing more than “simply alleg[ing] a nonobvious harm.”

Analogizing to “group[s] other than a legislative body,” the dissent insists that the House has suffered an “obvious” injury. But groups like the string quartet and basketball team posited by the dissent select their own members. Similarly, the political parties involved in the cases the dissent cites select their own leadership and candidates. In stark contrast, the House does not select its own members. Instead, it is a representative body composed of members chosen by the people. Changes to its membership brought about by the voting public thus inflict no cognizable injury on the House.

*Virginia House of Delegates*, 139 S. Ct. at 1951-55. Justice Alito, joined by Chief Justice Roberts, Justice Breyer, and Justice Kavanaugh, dissented. In an interesting passage, he argued that how district lines are drawn has significant implications for the behavior of both individual legislators and the legislature as a whole. As to individual legislators, “[w]hen the boundaries of a district are changed, the constituents and communities of interest present within the district are altered, and this is likely to change the way in which the district’s representative does his or her work.” *Id.* at 1956. And as to the legislature as a whole, “it matters a lot how voters with shared interests and views are concentrated or split up.” “The cumulative effects of all the decisions that go into a districting plan have an important impact on the overall work of the body.” *Id.*

Does *Virginia House of Delegates* create opportunities for gamesmanship? Suppose that a district plan is enacted under conditions of unified government, that the minority party captures

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the attorney general position later in the decade, and that plaintiffs then successfully challenge the plan in federal district court. If the attorney general (who may be aligned politically with the plaintiffs) declines to appeal, is the plan then doomed, even if the Supreme Court would likely reverse the district court? Assuming the answer is yes, is this a sensible rule? It would seem to allow the invalidation of district maps, without possibility of appeal, when an initially unified government is replaced by a divided government. But maybe this is actually desirable if one posits that unified governments typically pass gerrymandered maps. Then making it easier for these maps to be struck down could be a net positive.

*Virginia House of Delegates* rests, in part, on the fact that Virginia had authorized the Attorney General to make decisions for the state in litigation. Could states circumvent the case's holding by simply authorizing *multiple* parties, or *other* parties, to represent the state? Wisconsin Republicans may have done just that when, after losing the races for governor and attorney general in 2018, they passed a lame duck law that enabled the legislature (still under Republican control) to instruct the attorney general how to proceed. "If requested by the governor or either house of the legislature," the attorney general must "appear for and represent the state" and "prosecute or defend in any court . . . any cause or matter, civil or criminal." Wis. Stat. § 165.25(1m).

Perhaps the most interesting portions of *Virginia House of Delegates* address the very nature of a legislature (and thus whether it is harmed by the invalidation of a district map). The majority has a thin conception of a legislature, under which its only function is formally to represent the people of a state. On this view, it doesn't matter who composes the legislature or what the legislature does; only the official provision of representation is relevant. The dissent, on the other hand, has a much thicker understanding of a legislature, under which its membership and output are every bit as significant as its nominal representation of the people. On this account, a legislature necessarily has an interest in the preservation of its current district map, because any change to the map would affect its makeup and policies. Which theory do you find more persuasive? If a legislature only has an interest in its formal representation of the people, as the majority opinion maintains, then why should it matter whether one chamber or both are appellants? Even if both chambers appeal, isn't their grievance still not judicially cognizable?

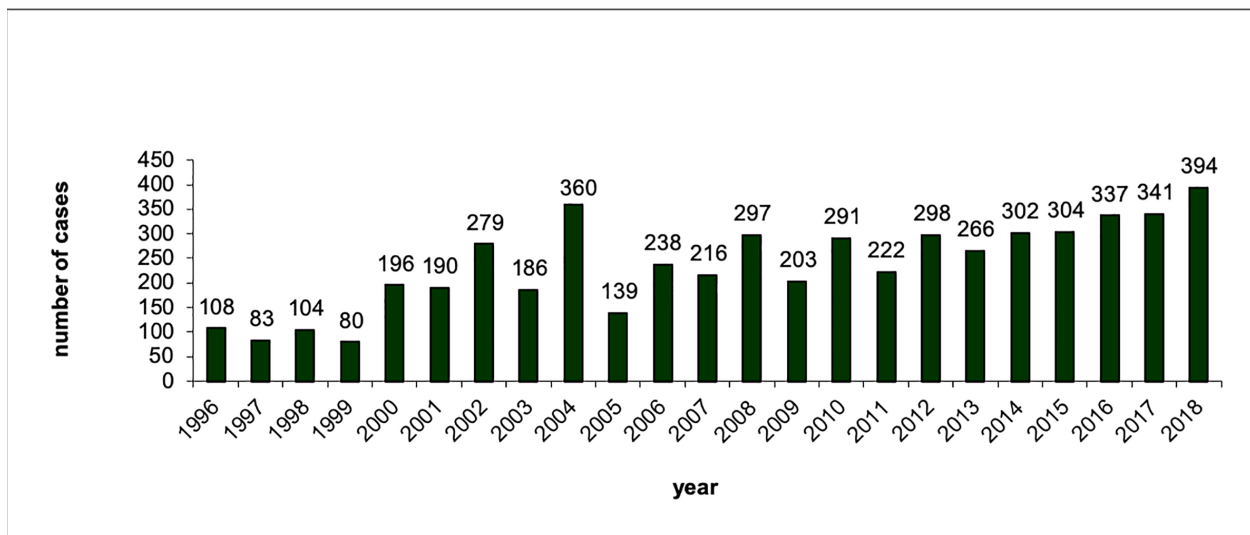
## Chapter 6. Election Administration and Remedies

REPLACE NOTE 9 ON PAGE 397 WITH THE FOLLOWING:

9. *Increased Election Litigation.* Election litigation has increased substantially since 2000. Consider Figure 6.2, which shows that the number of election-related cases in the pre-2000 period was just 94 per year, compared to an average of 270 cases per year from 2000-2018. “The nonpresidential year of 2018 saw the most cases, 394, since at least since 1996 (and likely ever).” RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 56 (2020). The current election season will likely surpass the 2018 record.

We discuss two of the most active subjects of litigation – voting technology and voter identification – in Sections B and C.

**Figure 6.2** “Election Challenge” Cases per Year: 1996-2018:



Source: Richard L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 56 (2020).

The disruption arising from the COVID-19 pandemic has provided additional grist for the election litigation mill in the 2020 election season. See Justin Levitt, *The List of COVID-19 Election Cases*, ELECTION LAW BLOG (June 11, 2020), <https://electionlawblog.org/?p=111962> (last updated July 14, 2020, with 154 cases in 41 states and Washington D.C.). One prominent subject of litigation is absentee voting. As the pandemic worsened in March, in-person voting in the Ohio and Wisconsin primary elections was called off shortly before the polls were to open. While litigation over Ohio’s decision was unsuccessful and ultimately declared moot, *State ex re. Ohio Democratic Party v. LaRose*, 2020 WL 1536508 (Ohio Mar. 31, 2020), the Wisconsin Supreme Court overturned Governor Tony Evers’ decision to suspend in-person voting on the ground that it violated the state constitution, *Wisconsin Legislature v. Evers*, No. 2020AP608-OA (slip op. April 6, 2020), [https://www.wicourts.gov/news/docs/2020AP608\\_2.pdf](https://www.wicourts.gov/news/docs/2020AP608_2.pdf). In a related federal lawsuit, the Democratic Party obtained a preliminary injunction requiring the state to

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accept absentee ballots postmarked after the scheduled election day, but the Supreme Court stayed that injunction by a 5-4 vote. *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020). The Court later stayed another preliminary injunction issued by a federal court in Alabama, which would have relaxed the requirements for absentee voting and made curbside voting available. *Merrill v. People First of Alabama*, 2020 WL 3604049 (July 2, 2020). These decisions, which are driven by the Court's skepticism of last-minute election injunctions, are discussed further below (Supplement to page 463 of the Casebook).

With many citizens concerned about the risks associated with voting in person, we are likely to see an increase in mail voting. Currently, 34 states have no-excuse absentee voting, which allows people to cast their votes through the mail without providing a reason. National Conference of State Legislators, *Voting Outside the Polling Place Report*, Table 1: States with No-Excuse Absentee Voting (May 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx>. The Fifth Circuit rebuffed an attempt to force Texas to make mail voting more broadly available. *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). The pandemic is also disrupting the usual pathways by which people register to vote and update their registrations, which could diminish turnout and cause problems for people trying to vote in November. For a discussion of these and some of the other legal issues arising from the pandemic, see the *University of Chicago Law Review Online's* series on "Pandemic Elections," featuring contributions from Richard Briffault, Jim Gardner, Rick Hasen, Rick Pildes, Nick Stephanopoulos, and Dan Tokaji: <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-election/>. For discussion of some of the underlying problems with American election administration that the pandemic is exposing, see Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, \_\_ ELECTION LAW JOURNAL \_\_ (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3604668](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3604668).

ADD THE FOLLOWING AT THE BOTTOM OF PAGE 401:

The American electoral infrastructure, including our voting technology, is receiving renewed attention in the wake of the Russian government's interference with the 2016 election. One aspect of that interference was the targeting of election websites in at least 21 states, according to the Department of Homeland Security. See Michael McFaul & Bronte Kass, *Understanding Putin's Intentions and Actions in the 2016 U.S. Presidential Election*, in SECURING AMERICAN ELECTIONS: PRESCRIPTIONS FOR ENHANCING THE INTEGRITY AND INDEPENDENCE OF THE 2020 U.S. PRESIDENTIAL ELECTION AND BEYOND (2019), available at <https://cyber.fsi.stanford.edu/securing-our-cyber-future>. The Mueller Report documented Russian attempts to interfere with state and local election systems, as well as the private firms servicing them. Those efforts included the placement of malware within the software of a voter registration vendor. While there is no evidence to date that such hacking affected any actual votes in the 2016 election, the incidents have prompted increased concern about the security of voting technology. Recent reports by Stanford's Cyber Policy Center and the National Academies of Sciences, Engineering, and Medicine recommend another overhaul of the United States' electoral infrastructure. Herbert Lin et al., *Increasing the Security of the U.S. Election Infrastructure*, in SECURING AMERICAN ELECTIONS: PRESCRIPTIONS FOR ENHANCING THE INTEGRITY AND INDEPENDENCE OF THE 2020 U.S. PRESIDENTIAL ELECTION AND BEYOND (2019); National Academies of Sciences, Engineering, and

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Medicine, *SECURING THE VOTE: PROTECTING AMERICAN DEMOCRACY* (2018). The Stanford report’s recommendations include requiring a voter-verifiable paper audit trail and auditing of all elections, securing election technology through independent code inspection and “white-hat” attacks, and committing regular funding streams to strengthen election cybersecurity.

The State of Georgia has faced especially serious problems with its voting systems. In 2018, a federal district court found that the state had failed to address the “mounting tide of evidence of the inadequacy and security risks” posed by its direct record electronic (DRE) voting system but declined to order an immediate rollout of a paper-based system. *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1307 (N.D. Ga. 2018). As the 2020 election approached, the court found that the state’s DRE machines, election software, and voter databases were “antiquated, seriously flawed, and vulnerable to failure, breach, contamination, and attack,” posing “imminent threats of contamination, dysfunction, and attacks on State and county voting systems.” *Curling v. Raffensperger*, 397 F. Supp. 3d 1334, 1339-40 (N.D. Ga. 2019). In response, the district court issued a preliminary injunction requiring the state to stop using its current voting system and software. *Id.* at 1410. In its June 2020 primary, the state attempted to roll out a new ballot-marking device, a voting system that prints out a ballot with a bar code that can be read by an electronic scanner. *Id.* at 1341 n. 10.

The rollout of Georgia’s new voting system did not go well. Problems with the delivery and activation of equipment caused some voters to wait for hours, which polling places – understaffed due to the COVID-19 pandemic – struggled to troubleshoot. Nick Corasanti and Stephanie Saul, *Georgia Havoc Raises New Doubts on Pricey Voting Machines*, N.Y. TIMES, June 11, 2020. What’s the lesson from the Georgia fiasco? That state and local election officials should be more careful and deliberate when implementing new voting technology? That courts should hesitate to order technologically complex changes to a state’s voting system? Perhaps both?

ADD THE FOLLOWING AT THE END OF NOTE 4 ON PAGE 421:

Litigation over voter ID requirements continues in state courts. Missouri adopted a law requiring most voters to present photo ID, while providing an exception allowing voters to provide non-photo ID if they submit an affidavit that meets certain requirements. The Missouri Supreme Court concluded that this law was too burdensome on voters. The court therefore affirmed an order enjoining the state from requiring an affidavit from voters using non-photo ID and from disseminating materials indicating that photo ID is required – a decision that effectively eliminates the photo ID requirement. *Priorities USA v. State of Missouri*, 591 S.W. 3d 448 (Mo. 2020). In Iowa, a state trial court upheld that state’s ID law, while striking down a provision that would make it more difficult to get a voter ID card. Anna Sporre, *Judge Upholds ID Requirement at Polls but Strikes down Other Parts of 2017 Iowa Voting Reform Law*, DES MOINES REGISTER, Oct. 1, 2019.

ADD THE FOLLOWING AT THE END OF NOTE 5 ON PAGE 422:

Can voter mobilization efforts successfully counter the effects of voter ID laws? A recent empirical study finds evidence that they can. Jacob R. Neihsel and Rich Horner, *Voter Identification Requirements and Aggregate Turnout in the U.S.: How Campaigns Offset the Costs*

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*of Turning Out When Voting Is Made More Difficult*, 18 ELECTION LAW JOURNAL 227 (2019). The authors find that while new voter ID laws decreased turnout by about two percentage points in counties without a corresponding increase in campaign activity, there was no effect in counties with more campaign activity, presumably including voter mobilization.

ADD THE FOLLOWING AFTER THE FIRST PARAGRAPH OF NOTE 2 ON PAGE 442:

Recent scholarship continues to explore how Section 2 should apply to practices that make it more difficult for racial minorities to vote. Drawing on disparate impact law in employment and housing, Nick Stephanopoulos argues that courts should *not* require Section 2 plaintiffs to show that the challenged voting practice interacts with social and historical conditions. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE LAW JOURNAL 1566 (2019). For more academic commentary on Section 2's application to alleged vote denial, see Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM LAW REVIEW 1515, 1546-51 (2019), and Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALABAMA CIVIL RIGHTS & CIVIL LIBERTIES LAW REVIEW 93 (2018). For commentary on the considerable work that still needs to be done to move toward racial equality in the realm of voting, see Richard L. Hasen, *Civil Right No. 1: Dr. King's Unfinished Voting Rights Revolution*, 49 UNIVERSITY OF MEMPHIS LAW REVIEW 137 (2018).

ADD THE FOLLOWING AT THE END OF NOTE 4 ON PAGE 443:

The federal court in New Jersey finally terminated the consent decree against Republican ballot security measures, which had been in effect for more than three and one-half decades. *Democratic National Committee v. Republican National Committee*, Order (Jan. 8, 2018), available at <http://electionlawblog.org/wp-content/uploads/consent-order.pdf>. For a discussion of the concerns arising from the lifting of this decree, see Richard L. Hasen, *Vote Suppressors Unleashed*, SLATE, Nov. 27, 2017, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/11/donald\\_trump\\_will\\_supercharge\\_voter\\_suppression\\_if\\_the\\_rnc\\_consent\\_decree.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/donald_trump_will_supercharge_voter_suppression_if_the_rnc_consent_decree.html). The Third Circuit affirmed. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, \_\_\_ Fed. Appx. \_\_\_, 2019 WL 117555 (3d Cir. Jan. 7, 2019).

ADD THE FOLLOWING AT THE END OF NOTE 6 ON PAGE 444:

In *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018), a divided panel of the Fifth Circuit reversed an injunction against a revised version of Texas's voter ID law. After Texas's 2011 law was enjoined, the legislature adopted a modified version in 2017. The new law allows voters without the requisite identification to cast a ballot if they swear or affirm under penalty of perjury that they face a "reasonable impediment" to obtaining some form of compliant identification. *Id.* at 796–97. The law also prohibits election officials from questioning whether the claimed impediment is reasonable. *Id.*

Two of the three judges on the Fifth Circuit panel voted to reverse the order enjoining Texas's 2017 ID law. Writing only for herself, Judge Jones thought that the district court erred in finding the new law "tainted" by the discriminatory purpose behind the old law. *Id.* at 801-02.

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Judge Higginbotham concurred, reasoning that the district court had erred in enjoining the new law “without any suggestion of its independent invalidity.” *Id.* at 805. Judge Graves dissented, agreeing with the district court that the new ID law was motivated by racially discriminatory intent. *Id.* at 807. There was no petition for rehearing en banc.

The new *Veasey* decision raises the question whether invidious intent may be presumed, when a court enjoins one voting statute on the basis of its discriminatory purpose and the legislature then enacts a different one in its place. In a recent redistricting case, the Supreme Court concluded that it was inappropriate to presume that a new law is tainted by racial discrimination merely because a similar prior law was motivated by discriminatory intent. *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (discussed *supra* Chapter 5 of this Supplement).

For more on voting rights litigators’ shift toward discriminatory intent claims, see Danielle Lang and J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE LAW JOURNAL FORUM 779 (2018). For a discussion of the difficulties and limitations inherent in an approach focused on discriminatory intent, see Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WILLIAM & MARY LAW REVIEW 2211 (2018).

ADD THE FOLLOWING AFTER THE SECOND FULL PARAGRAPH ON PAGE 449:

Another recent article by Professor Tolson concludes that Congress has broad authority to limit state voter qualification standards under the Elections Clause of Article I, Section 4 of the Constitution:

Using the Elections Clause as its focal point, this Article argues that the Court should interpret federal election laws, and their underlying legislative record, within the broader scope of authority that the U.S. Constitution delegates to Congress over elections. The Elections Clause, which gives the states the power to “choose the Times, Places and Manner of . . . [federal] Elections,” is power that the states exercise freely, so long as Congress does not assert its authority to “make or alter” state regulations. In essence, Congress has a veto power over certain state electoral practices, a veto that is present in the VRA’s suspension of regulations that govern federal elections in targeted states. Thus, to interpret broadly means that the Court credits the authority that Congress has across constitutional provisions—here, the Elections Clause and the Fourteenth and Fifteenth Amendments—in assessing the legislative record underlying voting rights legislation. This multi-clause analysis shows how the Elections Clause complicates the federalism narrative that scholars and courts embrace in describing our election system because federalism is not a barrier to aggressive federal action under the Elections Clause seeking to protect the fundamental right to vote.

Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 BOSTON UNIVERSITY LAW REVIEW 317, 321-22 (2019). Is such broad congressional power to regulate elections consistent with Article I, Section 2, which gives the *states* power to set qualifications for voting in congressional elections?

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

ADD THE FOLLOWING AFTER THE CARRYOVER PARAGRAPH AT THE TOP OF PAGE 450, JUST BEFORE “4. *The Help America Vote Act*”

In a 5-4 decision, the U.S. Supreme Court upheld Ohio’s practice of using the failure to vote as a basis for initiating the removal of voters from the rolls. *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018). Under Ohio’s process, registered voters are sent a notice if they do not vote during a two-year period. Voters who fail to either respond to that notice or to vote in the next two federal election cycles are then removed from the rolls.

The relevant section of the NVRA provides that “[a]ny State program or activity to protect the integrity of the electoral process . . . shall not result in the removal of the name of any person from the official list of voters . . . by reason of the person’s failure to vote . . . .” 52 U.S.C. § 20507(b). This provision, which the Court referred to as the “Failure-to-Vote Clause,” includes an exception for voter removal programs relying on change-of-address information from the U.S. Post Office and the failure to vote after a notice from election authorities.

Writing for the five-justice majority in *Husted*, Justice Alito explained:

We reject [plaintiffs’] argument because the Failure-to-Vote Clause . . . simply forbids the use of nonvoting as the sole criterion for removing a registrant, and Ohio does not use it that way. Instead, . . . Ohio removes registrants only if they have failed to vote *and* have failed to respond to a notice . . . .

[Ohio’s system] does not strike any registrant solely by reason of the failure to vote. Instead, as expressly permitted by federal law, it removes registrants only when they have failed to vote *and* have failed to respond to a change-of-residence notice.

*Husted*, 138 S. Ct. at 1842–43.

Four justices dissented. Writing for the dissenters, Justice Breyer expressed the view that Ohio’s process violated the NVRA because “under it, a registrant who fails to vote in a single federal election, fails to respond to a forwardable notice, and fails to vote for another four years may well be purged. If the registrant had voted at any point, the registrant would not have been removed.” *Id.* at 1854 (Breyer, J., dissenting) (internal citation omitted).

For an argument that the voter purge in *Husted* should be understood as an intentional—and therefore unconstitutional—effort to keep eligible people from voting, see Lisa Marshall Manheim and Elizabeth G. Porter, *The Elephant in the Room: Intentional Vote Suppression*, 2019 SUPREME COURT REVIEW 213.

Meanwhile, back in Kansas, the federal district court enjoined a state law requiring documentary proof of citizenship from those seeking to register. *Fish v. Kobach*, 309 F. Supp. 3d 1048 (D. Kan. 2018). After a bench trial, the district court concluded that the law violated both the NVRA and the constitutional right to vote. Rejecting Kansas’s argument that the evidence of noncitizen voting was “the tip of the iceberg,” the court found “that there is no iceberg; only an icicle, largely created by confusion and administrative error.” *Id.* at 1103. The Tenth Circuit affirmed. *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

## CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

ADD THE FOLLOWING NOTE AFTER THE FIRST FULL PARAGRAPH ON PAGE 458:

North Carolina recently witnessed the most egregious example of absentee voting fraud in many years, which led the State Board of Elections to order a new election for the state's Ninth Congressional District. The 2019 election for that seat was closely contested between Republican Mark Harris and Democrat Dan McCready. On Election Night, Harris appeared to have won by a narrow margin. Some weeks afterwards, it came to light that a Republican operative named L. McCrae Dowless, Jr. had engaged in some old-fashioned ballot stuffing using absentee ballots. According to published reports, Dowless and his agents would request absentee ballots and then go to voters' homes when the ballots were sent. After collecting the ballots, they would mark them for return. It was estimated that over 1,200 ballots were illegally marked in this way, more than the approximately 900 votes separating the candidates. There was also evidence that absentee ballot fraud was not new to this part of North Carolina, but had been going on for years. David A. Graham, *North Carolina Had No Choice: A House Election Tainted by Fraud Gets Its Inevitable Do-Over*, THE ATLANTIC, Feb. 22, 2019.

Should absentee voting laws be tightened to prohibit so-called "ballot harvesting," the practice of collecting other people's absentee ballots and returning them to election authorities? For an argument that they should, see Steven F. Huefner, *The Perils of Voting by Mail*, ELECTION LAW @ MORITZ, Dec. 9, 2018, <https://moritzlaw.osu.edu/election-law/article/?article=13451>.

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 460:

A recent article develops and applies a new index for assessing state election administration. Quan Li, Michael J. Pomante II and Scot Schraufnagel, *Cost of Voting in the American States*, 17 ELECTION LAW JOURNAL 234 (2018). The authors develop a "Cost of Voting Index" (COVI), designed to measure the "totality of time and effort associated with casting a vote" in every state, by looking at rules regarding voter registration, convenience voting, voter ID, and polling hours. The authors rank Mississippi, Virginia, Tennessee, Indiana, and Texas (in that order) as the worst states in 2016, and Oregon, Colorado, California, North Dakota, Iowa, and Maine (again in order) as the best. The authors intend to update the COVI to keep pace with the ever-changing landscape of voting laws.

ADD THE FOLLOWING ON PAGE 461, RIGHT BEFORE PART IV:

Upon taking control of the U.S. House in early 2019, the Democratic leadership made election reform its first legislative priority. The "For the People Act of 2019" (H.R. 1), proposed major changes to federal election administration, as well as redistricting, campaign finance, and ethics. See For the People Act, H.R. 1, 116th Cong. (2019), *available at* <https://www.congress.gov/bill/116th-congress/house-bill/1/text>. Among its changes to election administration would be expansion of early voting, automatic voter registration, limits on voter purges, and making Election Day a federal holiday. The bill also includes provisions regarding election security, including the sharing of intelligence information on threats with state election officials. The bill passed on a party-line vote in the House, with all 234 Democrats who voted supporting it and all 193 Republicans opposing it. With a Republican majority in the U.S. Senate, the bill has no chance of becoming law at present.

## CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

What reforms should Congress pursue? For a collection of election law experts' views on that question, see an online symposium hosted by the *Election Law Blog* and *Take Care Blog*, available at <https://electionlawblog.org/?p=102590>.

ADD THE FOLLOWING NOTE AFTER NOTE 5 ON PAGE 472:

6. A recurrent question in election administration is what should be done when a natural disaster, terrorist attack, or other emergency disrupts an election that has already begun. A recent article finds that, when such events occur, courts are often asked to intervene without clear standards to guide them. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY LAW JOURNAL 545 (2018). Professor Morley argues that courts should generally be reluctant to extend voting hours for run-of-the-mill problems like bad weather or power outages. The better approach, he suggests, is for states to adopt laws providing clear criteria for when election officials should take remedial action in response to emergencies.

These questions have become very real and pressing during the COVID-19 pandemic, which caused some states to make last-minute changes to their 2020 primaries and is certain to cause additional disruption in the general election (see Supplement to page 397, note 9 above). One affected state was Wisconsin. The state had its presidential primary on April 7, 2020, in the midst of the pandemic lockdown. To accommodate voters who were concerned about voting in person, a federal district court issued an order allowing absentee ballots to be mailed and postmarked *after* election day, so long last they were received within one week. By a 5-4 vote, the U.S. Supreme Court stayed that court order, with Justice Kavanaugh writing for the majority:

Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election. And again, the plaintiffs themselves did not even ask for that relief in their preliminary injunction motions. Our point is not that the argument is necessarily forfeited, but is that the plaintiffs themselves did not see the need to ask for such relief. By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election. See *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014).

The unusual nature of the District Court's order allowing ballots to be mailed and postmarked after election day is perhaps best demonstrated by the fact that the District Court had to issue a subsequent order enjoining the public release of any election results for six days after election day. In doing so, the District Court in essence enjoined nonparties to this lawsuit. It is highly questionable, moreover, that this attempt to suppress disclosure of the election results for six days after election day would work. And if any information were released during that time, that would gravely affect the integrity of the election process. The District Court's order suppressing disclosure of election results showcases the unusual nature of the District Court's order allowing absentee ballots mailed and

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

postmarked after election day to be counted. And all of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.

*Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020).

Justice Ginsburg wrote a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan. The dissenters expressed concern that “massive disenfranchisement” would result from the Court’s order, because some voters who timely requested an absentee ballot would not receive them by election day. *Id.* at 1209. Those voters, she argued, faced a Hobson’s Choice of “brav[ing] the polls, endangering their own and others’ safety,” or “los[ing] their right to vote.” *Id.* at 1211.

Three months later, the Supreme Court again issued a stay of a district court order liberalizing voting rules in response to the pandemic. *Merrill v. People First of Alabama*, 2020 WL 3604049 (July 2, 2020). In that case, a federal district court had enjoined Alabama’s witness requirement and photo ID rules for at-risk voter voters, as well as the state’s de facto ban on curbside voting. This time, there was no published opinion, but the vote was again 5-4. As in the Wisconsin case, the Republican-appointed justices voted to stay the lower court’s order, while the Democratic-appointed justices would have denied the stay.

The Court’s decisions in *Republican National Committee* and *Merrill* send an unambiguous message that the majority justices will look skeptically on lower court injunctions altering voting procedures shortly before election day, even in the middle of a pandemic. Has the *Purcell* principle hardened into an ironclad rule against such injunctions? What impact are these decisions likely to have on 2020 election litigation? Should we be concerned about the seemingly partisan character of the Court’s decisionmaking, with all nine justices voting consistent with the preferences of the political party of the President who appointed them? See Hasen, *Three Pathologies of American Voting Rights* \_\_ ELECTION LAW JOURNAL \_\_ (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3604668](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3604668).

## Chapter 7. Ballot Propositions

ADD THE FOLLOWING AFTER THE THIRD PARAGRAPH ON PAGE 474:

In order for an initiative, referendum, or recall to appear on the ballot, its proponents must gather enough signatures within a set amount of time. These rules are specific to state and local law. The COVID-19 pandemic, and accompanying closures of public places, have made signature gathering substantially more difficult. Ballot measure proponents have asked federal and state courts to relax requirements, such as by cutting the number of signatures required to qualify a measure, lengthening the time for the collection of ballots, and allowing signatures submitted electronically rather than signed in ink on a physical paper. So far many courts have been reluctant to loosen such rules, even during the pandemic. *Arizonans for Fair Elections v. Hobbs*, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020); *Bambenek v. White*, 2020 WL 2123951, \*2 (C.D. Ill. May 1, 2020); *Morgan v. White*, No. 1-20-cv-02189 (N.D. Ill. May 18, 2020); *Thompson v. DeWine*, 959 F.3d. 804 (6th Cir. 2020); *Fight for Nevada v. Cegavske*, No. 2:20-cv-00837-RFB-EJY, <https://www.scribd.com/document/461649223/Fight-for-Nevada-TRO-rejection> (D. Nev., May 15, 2020).

Courts have been more willing to loosen signature requirements for candidates to qualify for the ballot. See, for example, *Esshaki v. Whitmer*, 2020 WL 2185553, \*1 (6th Cir. May 5, 2020), requiring the state of Michigan to make reasonable accommodations for candidates seeking ballot access. These rulings can help minor parties and independent candidates, who often are not afforded automatic ballot access like Democratic and Republican candidates. *Libertarian Party v. Pritzker*, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (loosening Illinois ballot access rules during the pandemic for Illinois minor parties).

For an argument that the courts should not treat ballot measure proponents worse than candidates when it comes to loosening qualifying rules in the time of a pandemic, See Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative During a Pandemic*, UNIVERSITY OF CHICAGO LAW REVIEW ONLINE, June 26, 2020, <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-initiative-hasen/>.

ADD THE FOLLOWING ON PAGE 544 AS THE LAST PARAGRAPH IN THE CHAPTER:

Note that *Arizona State Legislature* was a 5-4 decision and that one of the Justices in the majority, Justice Kennedy, recently retired from the Supreme Court. What is the likelihood that the case will remain good law going forward? There will be no shortage of opportunities to challenge it soon since we are rapidly approaching the next redistricting cycle, in which an array of commissions with responsibility for congressional plans will release new maps.

## Chapter 8. Major Political Parties

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 573:

Fewer delegates chose their presidential delegates through caucuses in 2020. Spurred by the Democratic National Committee, the states of Washington, Minnesota, and Colorado (the three largest caucus states) moved to primaries, along with Utah, Idaho, and Nebraska. Nate Cohn, *Fewer States Will Have Caucuses in 2020. Will It Matter?*, N.Y. TIMES, Apr. 12, 2019. What effects does the move away from caucuses have? Is it a good thing? Consider that more people participate in primaries, while highly motivated voters tend to dominate the caucus process.

The Democratic Party reduced the influence of so-called “superdelegates,” political insiders who played a prominent role in the 2008 process. Astead W. Herndon, *Democrats Overhaul Controversial Superdelegate System*, N.Y. TIMES, Aug. 25, 2018. For a skeptical view of such “populist” reforms, designed to decrease the influence of party insiders and increase the voice of the people, see Stephen Gardbaum and Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 NEW YORK UNIVERSITY LAW REVIEW 647 (2018). Professors Gardbaum and Pildes “challenge the unexamined notion that our current populist system of candidate selection is the best way to choose the nominees who then compete in the general election for President.” They argue in favor of institutional mechanisms providing more influence to party insiders, on the ground that they furnish a kind of “peer review” that helps prevent the party from being captured by extreme and even anti-democratic forces. Do you agree? For more suggestions on how the presidential selection process might be improved, see Symposium, *The Presidential Nominations Process*, 93 NEW YORK UNIVERSITY LAW REVIEW 589 (2018), available at <https://www.nyulawreview.org/symposia/>.

The 2020 presidential nominations were decided fairly quickly once primaries began. President Donald Trump secured the Republican nomination without serious opposition, and former Vice-President Joe Biden emerged as the preferred candidate among an initially crowded field of Democrats after South Carolina’s February primary. By early April, all of Biden’s opponents had suspended their campaigns. In a close race, the COVID-19 pandemic might have caused significant disruption to the presidential nominating process.

Even without a contested presidential nomination, there was still litigation in New York, over that state’s decision to cancel its Democratic primary after all the candidates except Biden had dropped out. On March 28, 2020, Governor Andrew Cuomo issued an executive order rescheduling the April primary for June 23, 2020. The state legislature subsequently enacted a statute authorizing the New York State Board of Elections – and specifically, commissioners affiliated with the major party holding a primary – to omit candidates who had suspended their campaigns or publicly announced their withdrawal. Then on April 27, 2020, the Board’s two Democratic commissioners removed the names of the ten candidates who had done so. With only Biden remaining, the commissioners cancelled New York’s primary, which they described as nothing more than a “beauty contest,” citing the COVID-19 pandemic as the reason for their decision.

Supporters of two presidential candidates, Andrew Yang and Bernie Sanders, disagreed with the Board’s decision. At their request, a federal district court ordered that the removed candidates be restored to the ballot and that the Democratic presidential primary take place. The

## CHAPTER 8. MAJOR POLITICAL PARTIES

Second Circuit affirmed, applying the *Anderson-Burdick* balancing standard (Casebook, page 636-38), and concluding the burden on voters and delegates outweighed the state's interests. *Yang v. Kosinski*, 960 F.3d 119 (2d. Cir. 2020). Addressing the central question of what purpose a presidential primary would serve after the nominee had effectively been chosen, the Second Circuit explained:

Yang wants an opportunity to compete for delegates. And so does Sanders. . . . By the same token, the Yang and Sanders delegates also want to compete for an opportunity to attend the Democratic National Convention. These are not trivial interests. Those familiar with the internal structure of the Democratic Party and the history of its National Convention will have no difficulty appreciating their significance.

At the Democratic National Convention, delegates have many important responsibilities, some with long-term consequences. In addition to participating in the selection of the presidential nominee, they vote on the procedural rules of the Convention; the National Democratic Party electoral platform; issues of party governance; and not insignificantly, the selection of the vice-presidential nominee. Furthermore, the power of the elected delegates extends beyond the quadrennial national convention. The delegates of the National Convention remain “the highest authority [and governing body] of the Democratic Party” until new delegates are selected. Accordingly, the programs and policies adopted at the Democratic National Convention will continue to influence state party rules or actions of the Democratic National Committee.

*Id.* at 130-31.

Do you agree that voters and would-be delegates have an important interest in having a primary take place, even after all but one of the candidates has dropped out? Was it appropriate for a federal court to intervene in this intra-party dispute, especially during a pandemic? Why didn't “the *Purcell* principle,” which generally counsels against federal court injunctions just before a scheduled election, apply here? See Casebook page 462-63 and *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020), discussed in this Supplement to Chapter 6.

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 575:

Under the Electoral College system, each state's voters actually select a slate of electors, who in turn vote for presidential candidates. Most of the time, those electors vote for the candidate whom they agreed to support, consistent with the wishes of their state's voters. But not always. In 2016, three of the State of Washington's electors violated their pledge to support Hillary Clinton, in an unsuccessful effort to persuade Donald Trump's electors to do the same.

Electors who don't vote for the presidential candidate they are pledged to support are called “faithless electors.” Washington is one of 15 states that imposes sanctions on faithless electors, and the three electors who violated their pledge to support Clinton were each fined \$1000. They challenged their fines on the ground that the Constitution allows members of the Electoral College to vote as they wish. The U.S. Supreme court unanimously disagreed. In *Chiafalo v. Washington*, 2020 WL 3633779 (U.S. July 6, 2020), an opinion for eight justices (all but Justice Thomas), Justice Kagan concluded that the Constitution allows states to sanction faithless electors:

## CHAPTER 8. MAJOR POLITICAL PARTIES

Article II, §1’s appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint. [E]ach State may appoint electors “in such Manner as the Legislature thereof may direct.” This Court has described that clause as “conveying the broadest power of determination” over who becomes an elector. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. . . .

The Electors argue that three simple words stand in for more explicit language about discretion. Article II, §1 first names the members of the Electoral College: “electors.” The Twelfth Amendment then says that electors shall “vote” and that they shall do so by “ballot.” The “plain meaning” of those terms, the Electors say, requires electors to have “freedom of choice.” If the States could control their votes, “the electors would not be ‘Electors,’ and their ‘vote by Ballot’ would not be a ‘vote.’”

But those words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he “votes” or fills in a “ballot.” In those cases, the choice is in someone else’s hands, but the words still apply because they can signify a mechanical act. . . .

The Electors’ constitutional claim has neither text nor history on its side. Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights. Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

Is the Court right that the Constitution’s use of the word “vote” need not be understood to imply an independent choice? Would we understand citizens to have a right to vote, if they were ordered to vote for a particular candidate on pain of monetary sanctions? Of what relevance is the consistent practice of states, which have long tied the members of the Electoral College to the preferences of state voters?

ADD THE FOLLOWING NOTE ON PAGE 587, AFTER NOTE 7:

8. Under *Tashjian*, states may not bar independents from *voting* in a party primary when the party wants them to be able to participate. But what about a state bar on independents *running as candidates* in a party primary, when the party wants those independents to be able to run? In *State of Alaska v. Alaska Democratic Party*, 426 P.3d 901 (2018), the Alaska Supreme Court held that such a law violates the party’s freedom of association. Although relying on the state constitution’s protection of associational rights, the opinion cites *Tashjian* and other federal constitutional precedents.

## CHAPTER 8. MAJOR POLITICAL PARTIES

The Alaska Democratic Party amended its bylaws to allow independents to run in party primaries, contrary to state law. Using a balancing test like that set forth in First Amendment association cases, the Alaska Supreme Court found that the law imposed a “substantial” burden on the party’s rights. It then applied strict scrutiny, requiring that the law be narrowly tailored to the state’s compelling interests. The court rejected the state’s proffered interests in ensuring public support for the Democratic Party, ensuring that candidates have strong public support, and preventing voter confusion, and therefore held that the state-imposed burden on the party’s associational rights was unjustified.

Isn’t it reasonable to require that people for running for office as a nominee of a political party be a member of that party? Should it matter that the party alleging a violation of its associational rights (the Alaska Democratic Party) is the minority party in the state?

ADD THE FOLLOWING NOTE ON PAGE 599, AFTER NOTE 2:

3. One of the arguments for a “top two” primary like that upheld in *Washington State Grange* is that it could mitigate political polarization. The theory is that moderate candidates are more likely to make it out of a top two primary than a traditional party primary. A recent study, however, finds mixed evidence on whether a top two primary system actually promotes moderation. Eric McGee and Boris Shor, *Has the Top Two Primary Elected More Moderates?*, 15 PERSPECTIVES ON POLITICS 1053 (2017). Looking at California and Washington, two states which use a top-two primary, the authors find an “inconsistent effect.” There was greater evidence of moderation in California than in Washington, but that could be explained by a contemporaneous policy change: the use of an independent redistricting commission to draw district lines, which resulted in more competitive districts.

4. A recent Tenth Circuit case addresses the extent to which a state political party has a constitutional right to determine how its candidates are selected. The Utah Republican Party has traditionally begun its candidate selection process with a convention. If one candidate gained over 60 percent of the convention vote, then that candidate would appear on the general election ballot as the party’s nominee. If no candidate reached that threshold, then the top two vote-getters at the party convention would appear on the primary ballot.

In 2014, Utah’s overwhelmingly Republican legislature approved an alternative pathway to the primary ballot. Under this new law, candidates may now qualify by gathering a prescribed number of signatures. The Utah Republican Party challenged this law, alleging that it infringed on its First Amendment right of association. A majority of the Tenth Circuit rejected the Utah Republican Party’s challenge, concluding that the state’s interests in managing elections—increasing participation, and enhancing access to the ballot—outweighed the “minimal” burden on political parties’ associational rights. *Utah Republican Party v. Cox*, 892 F.3d 1085 (10th Cir. 2018). Chief Judge Tymkovich dissented in part, finding evidence that the 2014 law was intended to “change the *substantive type* of candidates the Party nominates, all the while masquerading as mere *procedural* reform.” *Id.* at 1095 (Tymkovich, C.J., concurring in part and dissenting in part). The Tenth Circuit subsequently denied rehearing en banc, with Chief Judge Tymkovich urging that the U.S. Supreme Court reconsider its approach to major parties’ associational rights embodied in cases like *California Democratic Party v. Jones*:

## CHAPTER 8. MAJOR POLITICAL PARTIES

The behemoth, corrupt party machines we imagine to have caused the progressive era's turn to primaries are now, in many respects, out of commission. In important ways, the party system is the weakest it has ever been—a sobering reality given parties' importance to our republic's stability. And given new evidence of the substantial associational burdens, even distortions, caused by forcibly expanding a party's nomination process, a closer look seems in order. The time appears ripe for the Court to reconsider (or rather, as I see it, consider for the first time) the scope of government regulation of political party primaries and the attendant harms to associational rights and substantive ends.

*Id.* at 1072 (concurring in denial of rehearing en banc). The Supreme Court denied certiorari. 139 S. Ct. 1290 (2019).

Do you agree that a reconsideration of major parties' associational rights is in order? If so, how should courts think about those rights?

ADD THE FOLLOWING ON PAGE 600, IMMEDIATELY BEFORE PART IV:

A recent essay criticizes the U.S. Supreme Court's approach to the associational rights of major parties:

The Court has long determined that, with respect to political parties, First Amendment rights ought to be allocated in ways that promote democratic values and good governance. Unfortunately, in doing so, it has adopted a set of theoretical assumptions that do not hold true in the real world of contemporary politics. Known in the literature as “responsible party government,” the theory, which, as it happens, also accounts for the specifics of the recent calls for party reform, presumes that electoral accountability emerges from the choice between ideologically distinct political parties during competitive elections.

Responsible party government theory underpins the Court's jurisprudence on the First Amendment rights of political parties. It is responsible party government that explains not only why current constitutional doctrine entrenches the two-party system but also why it invariably sides with the leaders of the two major parties when internal disputes arise. . . .

The commitment to responsible party government in the Court's jurisprudence, and also among party reformers, is a colossal mistake. Responsible party government has not panned out. The political parties are stronger and more ideologically distinct than in any prior era. Yet, responsible party government has not emerged. . . .

Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUMBIA LAW REVIEW 1225 (2018).

Professor Abu El-Haj advocates a different kind of constitutional analysis, under which courts would focus on “a party's capacity to mobilize broad and representative political participation and facilitate a two-way street of information transmission through party activists.” *Id.* at 1234. The idea is to enhance the political parties' ability to function as effective civic associations, allowing for interaction between party elites and the broader electorate. *Id.* at 1300. Is Professor Abu El-Haj's critique of the Court's jurisprudence persuasive? Is her alternative vision realistic? For an argument that Professor Abu El-Haj's diagnosis is accurate, but that legislative

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and party-based solutions are likely to be more productive than focusing on the courts, see Michael Kang, *The Problem of Irresponsible Party Government*, 119 CLR FORUM, No. 1, <https://columbialawreview.org/content/the-problem-of-irresponsible-party-government/>. Professor Abu El-Haj responds in *The Possibilities for Responsive Party Government*, 119 CLR FORUM, No. 4, <https://columbialawreview.org/content/the-possibilities-for-responsive-party-government/>.

## Chapter 9. Third Parties and Independent Candidates

ADD THE FOLLOWING TO NOTE 1, AT THE BOTTOM OF PAGE 638:

The Eleventh Circuit again ruled in favor of a third party and its candidates challenging Georgia's ballot-access laws in *Cowen v. Georgia Secretary of State*, 960 F.3d 1339 (11th Cir. 2020). That case challenged the state's qualification requirements for congressional candidates. The Eleventh Circuit reversed the district court's decision granting summary judgment to the state, on the ground that it had failed to apply the contextual balancing standard mandated by *Anderson*. *Id.* at 1345-46.

For a decision taking a more deferential approach to state ballot access requirements for third party candidates, see *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). The Seventh Circuit rejected Green Party members' constitutional challenge to Illinois's law requiring that new political parties' candidates obtain petition signatures equal to five percent of the total number of votes cast in the last state legislative district election to appear on the general election ballot. Even considered alongside additional requirements that petition sheets be notarized and that petitions be gathered in a 90-day period, the court found that Illinois's signature requirement did not impose a severe burden. The court went on to conclude that the state's interests in preventing ballot overcrowding, voter confusion, and circulator fraud justified these requirements. On the other hand, the Seventh Circuit recently ruled in favor of an independent candidate challenging Illinois's ballot access requirements, on the ground that the district court had granted summary judgment to the state without applying the fact-intensive balancing standard that *Anderson* and *Burdick* demand. *Gill v. Scholz*, 962 F.3d 360 (7th Cir. 2020).

On the challenge of minor party and independent candidates qualifying for the ballot by collecting signatures during the COVID-19 pandemic, see this Supplement to Page 474.

CHAPTER 9. THIRD PARTIES AND INDEPENDENT CANDIDATES

## Chapter 10. Campaigns

ADD THE FOLLOWING AFTER NOTE 13 ON PAGE 698:

14. We have focused thus far on the campaign speech of candidates, parties, committees, and others who are involved in promoting or opposing candidates or ballot measures. Campaigns end when voters cast their ballots and many state laws bar certain forms of electioneering in or near polling places in the moments before that ballot is cast. The idea is that voters should have a chance to cast their ballot free from undue pressure or intimidation.

In *Burson v. Freeman*, 504 U.S. 191 (1992), a case cited in a few of the principal cases in this chapter, the Supreme Court upheld against a First Amendment challenge to Tennessee’s ban on certain forms of electioneering within 100 feet of polling place entrances. This was a rare case in which (a plurality of) the Court upheld the constitutionality of a law under strict scrutiny review.

The Court applied *Burson* and struck down a Minnesota ban on “political” apparel in polling places in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). Among other things, the state law provided that a “political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day.” The case arose from a complaint of a Tea Party group, the Minnesota Voters Alliance, that in 2010 sent its members to vote wearing political paraphernalia, including T-shirts containing Tea Party messages such as “Don’t tread on me” and a button saying “Please I.D. Me,” even though Minnesota has no voter-ID law. Poll workers asked the voters to cover up their political messages because of a state law banning electioneering at and around polling places.

The Court recognized that the state “may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most.” *Id.* at 1888. But it held the Minnesota statute unconstitutionally overbroad, viewing the great discretion afforded election officials to determine improper apparel a violation of the First Amendment. The court asked, “Would a ‘Support Our Troops’ shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a ‘#MeToo’ shirt, referencing the movement to increase awareness of sexual harassment and assault?” *Id.* at 1890.

*Mansky* affirmed that a state “may prohibit messages intended to mislead voters about voting requirements and procedures,” but noted that the state excluded the “Please I.D. Me” buttons because they were political, not because they were misleading. *Id.* at 1889 n.4.

The Court offered as permissible alternatives other, rather broad state laws that prohibit electioneering, including a Texas statute banning “a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election” at polling places and within 100 feet of them. Texas Elections Code § 61.010. The Court added that such laws do not necessarily set the “outer limit” of what states may proscribe. *Mansky*, 138 S. Ct. at 1891.

## CHAPTER 10. CAMPAIGNS

As we will see in Chapters 12-14, the “relating to” language used in the Texas statute to separate campaign speech from non-campaign speech is much broader than the language the Court has demanded of campaign finance laws to comply with the First Amendment. Why the more permissive approach to laws regulating campaign speech as opposed to campaign spending?

If someone walks into a Houston polling place in 2020 wearing a red cap reading “America is Already Great,” does that violate the Texas statute? Does the Texas statute solve the overbreadth problem the Court objected to in the Minnesota case?

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 741:

Declaring that “*Williams-Yulee* marked a palpable change in the approach to state regulations of judicial-campaign speech—a change perhaps best exemplified by our unanimous en banc decision in *Wolfson*,” a unanimous Ninth Circuit panel in *French v. Jones*, 876 F.3d 1228, 1235 (9th Cir. 2017), cert. denied 138 S. Ct. 1598 (2018) rejected a judicial candidate’s challenge to a Montana rule barring such candidates from seeking, accepting, or using political endorsements in their campaigns. (Montana did not bar political parties from endorsing those candidates.) Applying post-*Williams-Yulee* strict scrutiny, the court held that two compelling interests justified Montana’s rule:

The first is an interest in both actual and perceived judicial impartiality . . . [The rule] furthers a second interest that might be more compelling still: a related but distinct interest in a *structurally* independent judiciary. See *Wolfson*, 811 F.3d at 1186–88 (Berzon, J., concurring). If judicial candidates, including sitting judges running for reelection, regularly solicit and use endorsements from political parties, the public might view the judiciary as indebted to, dependent on, and in the end not different from the political branches.

*French*, 876 F.3d at 1237–38.

The court rejected the candidate’s under-inclusiveness and overbreadth arguments in light of *Williams-Yulee* and *Wolfson*, suggesting they would have fared better if analyzed solely under *White*. The Supreme Court declined to hear the case. 138 S. Ct. 1598 (2018).

Along similar lines, the Sixth Circuit rejected First Amendment and Equal Protection challenges to six provisions of the Ohio Code of Judicial conduct. These provisions included those: barring judicial candidates from making speeches on behalf of a political party or another candidate; endorsing or opposing a candidate for another public office; with three exceptions, preventing them from personally soliciting campaign contributions; and limiting the window for fundraising to 120 days before a primary and 120 days after a general election. Citing *Williams-Yulee*, the court applied strict scrutiny in upholding the provisions. *Platt v. Bd. of Comm’rs on Grievs. & Discipline*, 894 F.3d 235 (6th Cir. 2018).

A federal district court in Alabama tentatively barred enforcement of another judicial canon in *Parker v. Judicial Inquiry Commission of Alabama*, 295 F. Supp. 3d 1292 (M.D. Ala. 2018). A member of the Alabama Supreme Court and candidate for that court’s chief justice challenged an

## CHAPTER 10. CAMPAIGNS

Alabama rule which provided, among other things, that “a judge should abstain from public comment about a pending or impending proceeding in any court.” Ala. Canon of Judicial Ethics 3A(6). A complaint had been filed against the state justice for making comments on a talk radio program about legal questions then pending before his court concerning the effects of the U.S. Supreme Court’s decision on same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Citing the Ninth Circuit’s claim in *French* that *Williams-Yulee* significantly changed the constitutional calculus, the Alabama Court said *Williams-Yulee* was not a “reversal” of *White* and that *White* and *Williams-Yulee*, while in tension, must be read together. *Parker*, 295 F. Supp. 3d at 1301–02. The court agreed the government had a compelling interest in preserving public confidence in the integrity and impartiality of the state’s judiciary. *Id.* at 1302–03. But it found the Alabama rule impermissibly over-inclusive and overbroad because the rule barred discussion of pending and impending judicial proceedings in *any* court, and it was not clear that discussion of issues pending in other courts would affect public confidence in the Alabama judiciary. *Id.* at 1305–07.

The court issued a preliminary injunction enjoining Alabama from enforcing the rule “to the extent that it proscribes public comment by a judge that cannot reasonably be expected to affect the outcome or impair the fairness of a proceeding in Alabama.” *Id.* at 1313. Doesn’t the federal court order raise its own vagueness problems? Can a judicial candidate in Alabama speak about a pending U.S. Supreme Court case on LGBT rights and religious liberties, when cases involving that issue could well be before Alabama courts in the near future?

Meanwhile, the Third Circuit concluded that a provision of the Delaware Constitution requiring that judicial candidates be members of the Democratic or Republican parties violated the First Amendment rights of a candidate who was neither. The Supreme Court is now examining the case. *Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), cert. granted 140 S. Ct. 602 (2019).

## CHAPTER 10. CAMPAIGNS

## Chapter 11. Bribery

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 791:

The Supreme Court again addressed the meaning of a “scheme or artifice to defraud” in *Kelly v. United States*, 140 S. Ct. 1565 (2020). That case arose out of New Jersey’s “Bridgegate” scandal. Employees in the office of then-Governor Chris Christie and the Port Authority of New York and New Jersey allegedly reallocated traffic lanes on the George Washington Bridge (which connects New Jersey and New York). This was allegedly done to create a massive traffic jam in Fort Lee, New Jersey, as political retaliation against the city’s mayor for not supporting Governor Christie’s reelection. Bridget Kelly was Deputy Chief of Staff in the Governor’s Office, and William Baroni was Deputy Executive Director of the Port Authority. Both Kelly and Baroni allegedly participated in this scheme.

The government alleged that this was a scheme to defraud, in violation of the federal wire fraud statute since electronic communications were used to accomplish the lane reallocation. It did not allege “honest services” fraud, as there was no evident bribery or kickback, as required under *Skilling*. Instead, the government’s theory was that these public officials defrauded the Port Authority of property (lanes and toll booths) and money (wages of public employee who worked on the lane closure) through their scheme. Kelly and Baroni were convicted, and the Third Circuit accepted the government’s theory on appeal. *United States v. Baroni*, 909 F.3d 550 (3d Cir. 2018).

The Supreme Court reversed, with Justice Kagan writing for a unanimous Court. While acknowledging that act could be characterized as “corrupt,” 140 S. Ct. at 1574, the Court explained that the defendant public officials could not be convicted under the wire fraud statute merely on a showing that they lied about their reasons for the lane closure. *Id.* at 1572. Rather, the officials must have had the “object” of obtaining public money or property. *Id.* Kelly and Baroni may have misused their authority to regulate traffic over the bridge, and may even have wasted public resources on their scheme, but they did not have the object of obtaining public property. *Id.* at 1574.

Should public officials be subject to federal criminal prosecution where they allocate public resources based on false pretenses? Does the Court’s narrow interpretation of the fraud statute open the door to government officials misuse of public resources for political payback? Conversely, would a broader reading of the statute lead to a different type of political retaliation, in the form of prosecutions of public officials on the ground that they lied about the reasons for their actions? After all, some public money or property is likely to be used in just about any action that a public official might take.

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 805:

In the wake of *McDonnell*, one high-profile bribery prosecution ended in charges being dropped. Senator Robert Menendez (D-NJ) was indicted for his interactions with a longtime friend, Dr. Salomon Melgen. The government alleged that Dr. Melgen made gifts and contributions to political committees in exchange for political favors from Senator Menendez. Their 2017 trial ended in a hung jury. Prosecutors announced their intention to retry the defendants, but changed

## CHAPTER 11. BRIBERY

their mind after a ruling from the district court that relied heavily on *McDonnell*. The court in *United States v. Menendez*, 291 F. Supp. 3d 606 (D.N.J. 2018), allowed some of the bribery counts to stand, but granted defendants' motion for acquittal on those involving political contributions, on the ground that there was insufficient evidence of a *quid pro quo*. In particular, the court concluded that a "close temporal relationship between political contributions and favorable official action, without more, is not sufficient" to prove a *quid pro quo*. *Id.* at 624. A few days later, the government announced it was dropping all charges against the defendants.

Another high-profile bribery conviction was reversed, on the ground that the question or matter to be influenced must be identified at the time of the promise to perform an official act. Former New York Assembly Speaker Sheldon Silver allegedly received referral fees through a law firm with which he was affiliated in exchange for taking official actions that benefitted a cancer researcher and real estate developers. The Second Circuit vacated his first conviction based on a jury instruction on "official acts" that resembled the one invalidated in *McDonnell*. *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017). Silver was retried and, after a revised instruction on official action, was again convicted. The Second Circuit again reversed the bribery conviction, on the ground that the "particular *question or matter* to be influenced" must be identified at the time of the official's promise. *United States v. Silver*, 948 F.3d 538, 545 (2d Cir. 2020). Because the district court's post-*McDonnell* jury instruction did not require that the specific matter be identified at the time the bribe was allegedly accepted, the Second Circuit vacated the second bribery conviction.

Has *McDonnell* made it too hard to convict public officials of bribery?

## Chapter 13. Spending Limits

ADD THE FOLLOWING AFTER NOTE 3 ON PAGE 947:

3.5. The question of foreign spending in U.S. elections took on new urgency after extensive reports of foreign (especially Russian government) interference in the 2016 elections. As explained in Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMENDMENT LAW REVIEW 200, 206–07 (2018):

As part of a larger effort to influence the 2016 presidential election and U.S. politics, Russia undertook an extensive propaganda effort, which included publishing negative stories about [Democratic presidential candidate Hillary] Clinton and U.S. interests as well as inflaming passions and spreading false stories aimed at influencing the outcome of the election in Trump’s favor. “For example, [Russian news website] Sputnik published an article that said the [John] Podesta email dump included certain incriminating comments about the Benghazi scandal, an allegation that turned out to be incorrect. Trump himself repeated this false story” at a campaign rally.

Sources allied with the Russian government paid at least \$100,000 to Facebook to spread election-related messages and false reports to specific populations (a process called “microtargeting”), including aiming certain false reports at journalists who might be expected to further spread the propaganda and misinformation. Russia and others also used automated “bots” to spread and amplify false news across social media platforms such as Facebook and Twitter.

But, according to Hasen, it was not clear how much of this activity violated the current federal ban on foreign spending in U.S. elections or, if federal law were amended to prohibit such activity, whether the Supreme Court would strike down some of the prohibitions as inconsistent with the First Amendment:

After investigation, Facebook announced finding at least \$100,000 in spending from sources connected to the Russian government on roughly 3,000 ads intended to influence the election. The ads reached at least 10 million people (44% before the 2016 election) and some focused on social controversies over immigration rights, gun rights, and racial justice.

If Russia paid for these ads without coordinating with any campaign, then it almost certainly did not violate current federal campaign finance law as to most of the ads.<sup>74</sup> Further, laws that would bar Russia from placing these ads could well be found at least partially unconstitutional under the First Amendment as the Supreme Court currently construes it.

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<sup>74</sup> See 52 U.S.C. § 30121(a)(1)(A) (2012). If the activity was done in consultation with a campaign, this would constitute an impermissible “contribution” of a “thing of value” in violation of the statute.

## CHAPTER 13. SPENDING LIMITS

Federal law bars foreign nationals, including foreign governments, from making expenditures, independent expenditures, and electioneering communications in connection with a “Federal, State or local election.”<sup>75</sup> However, it is at best uncertain whether independent online ads that do not expressly advocate the election or defeat of candidates are covered by the foreign expenditure ban.<sup>76</sup> For example, a Russian ad promoting a Black Lives Matter rally, but not mentioning or showing a candidate for office, likely would not be considered an election ad under current law, which does not cover pure issue advocacy even if intended to influence election outcomes.

These advertisements also would not be covered under proposed federal legislation, the “Honest Ads Act,” which would extend rules barring foreign spending on television or radio “electioneering communications” to communications via digital outlets like Facebook.<sup>78</sup> Electioneering communications must feature the name or likeness of a candidate for office to be covered.

Even if Congress passed a statute purporting to make illegal all of the activity Russians engaged in during the 2016 election, such a statute would likely run into First Amendment resistance. After the Supreme Court decided *Citizens United* . . . the Court summarily affirmed a lower court decision in *Bluman v. Federal Election Commission*. *Bluman* upheld a federal law barring foreign nationals—in the case of Benjamin Bluman, a foreign national working in New York on a temporary work visa—from spending even fifty cents to print and distribute flyers expressly advocating the reelection of President Obama.

*Bluman* seems to indicate that, despite tensions with the holding in *Citizens United* that the identity of the speaker does not matter for First Amendment purposes, the government has a compelling interest in banning foreign spending in our elections...

But the *Bluman* court, in an opinion by conservative-libertarian D.C. Circuit judge Brett Kavanaugh, narrowly construed the foreign spending ban to cover only express advocacy and not issue advocacy. “This statute, as we interpret it, does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate.” Indeed, three FEC Republican commissioners relied upon this dicta from *Bluman* in voting to hold that the foreign spending ban does not apply to ballot measure elections.

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<sup>75</sup> *Id.* § 30121 (establishing foreign contribution and spending ban); *Id.* § 30101(8)(a) (defining contribution).

<sup>76</sup> Spending to influence an election which appears on the Internet but which lacks words of express advocacy cannot count as an “electioneering communication” (which must be a broadcast, cable or satellite communication under 52 U.S.C. § 30104(f)(3) (2012)) or an independent expenditure (which must contain words of express advocacy pursuant to the Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976)), 52 U.S.C. § 30101(17) (2012). The foreign spending ban, however, also prohibits a foreign national, including a foreign government, from making “an expenditure,” *id.* § 30121(a)(1)(C), which includes “any purchase . . . made by any person for the purpose of influencing any election for Federal office,” *id.* § 30101(9)(A)(1). Money to pay bots or otherwise to spread fake news on Facebook with an intent to influence the U.S. election would appear to be an expenditure under this definition, but such an argument may run into constitutional problems that I discuss in the text.

<sup>78</sup> H.R. 4077, 115th Cong., 1st Sess., § 6 (as introduced by Rep. Kilmer & Rep. Coffman, Oct. 19, 2017) (expanding the definition of electioneering communications to cover digital advertising).

## CHAPTER 13. SPENDING LIMITS

While this interpretation is not free from doubt—the statute is written broadly to cover all expenditures and not just independent expenditures—it seems like the kind of interpretation likely to be favored by the current Supreme Court.

Indeed, it is not clear that the courts would accept a more clearly written foreign spending ban going beyond express advocacy and electioneering communications to cover foreign-funded ads meant to stir social unrest without using candidates' names or likenesses. These ads should be covered, not because they necessarily contain false speech, but because they constitute a foreign government's interference with American self-government.

Hasen, *supra*, at 217–19.

Do you agree? Should a statute barring foreign interference be able to ban more than express advocacy and electioneering communications by foreign individuals, governments, and entities? Just governments? What about foreign media corporations? If *The Guardian* newspaper from Great Britain editorializes in favor of a candidate for U.S. President, should it be allowed to post a link to that endorsement via a paid Facebook ad targeted at U.S. readers?

Judge Kavanaugh, the author of the unanimous *Bluman* opinion, is now Justice Kavanaugh, having been named to the Supreme Court by President Trump. Does his confirmation increase or decrease the chances of the Court construing the foreign spending ban to apply only to express advocacy?

The much-anticipated report from Special Counsel Robert Mueller detailed Russian interference in the 2016 elections. Mueller's investigation "identified numerous links between the Russian government and the Trump Campaign. Although the investigation established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the [Trump] Campaign expected it would benefit electorally from information stolen and released through Russian efforts, the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities." I SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1-2 (Mar. 2019). The official version appears at <https://www.justice.gov/storage/report.pdf>, and a searchable version appears at <https://www.documentcloud.org/documents/5955379-Redacted-Mueller-Report.html#document/> [<https://perma.cc/9TEW-JD3Z>].

Relying upon the Supreme Court's summary affirmance in *Bluman*, the Ninth Circuit rejected a challenge to the federal foreign contribution ban's application to state and local elections, finding the law within Congress's powers and not a First Amendment violation. *United States v. Singh*, 924 F.3d 1030, 1043 (9th Cir. 2019), cert. denied 140 S. Ct. 1265 (2020).

## CHAPTER 13. SPENDING LIMITS

## Chapter 14. Contribution Limits

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 984:

The Supreme Court recently embraced Justice Breyer’s plurality analysis in *Randall* as the position of the Court. Courts had continued to uphold low contribution limits despite *Randall*. The Fifth Circuit upheld Austin, Texas’s individual campaign contribution limit of \$300 indexed to inflation (and raised to \$350 by the time of the lawsuit) against claims that it was unconstitutionally low under *Randall*. *Zimmerman v. City of Austin*, 881 F.3d 378, 387–88 (5th Cir.), cert. denied 139 S. Ct. 639 (2018). The court did not weigh in on another provision of Austin’s law, passed by voter initiative, which prohibited candidates from accepting, in the aggregate, more than \$36,000 (or \$24,000 in a runoff) in contributions from sources other than natural persons living in the Austin city limits. It held the candidate did not have standing to raise the argument. *Id.* at 388.

The Ninth Circuit similarly upheld a \$500 individual contribution limit and a \$5,000 political party contribution limit to candidates for state office in Alaska. *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018).

The Supreme Court in a *per curiam* (unsigned) opinion reversed that portion of the Ninth Circuit opinion in *Hebdon* upholding the \$500 individual limit. *Thompson v. Hebdon*, 140 S. Ct. 348 (2019). The Court held that the Ninth Circuit erred in failing to apply Justice Breyer’s plurality opinion in *Randall*. The Ninth Circuit had failed to apply that precedent because no opinion for the Court commanded a majority. Now, the Supreme Court indicated that Justice Breyer’s opinion is the operable test, and remanded the case for reconsideration by the Ninth Circuit in light of *Randall*. In doing so, the Court avoided deciding, for example, that contribution limits should be judged under strict scrutiny.

Despite the failure to tighten the scrutiny, *Hebdon* is not good news for supporters of the Alaska regulation, because the Court gave reasons to suggest that under the *Randall* test, the limits were so low as to violate the First Amendment:

In *Randall*, we identified several “danger signs” about Vermont’s law that warranted closer review. Alaska’s limit on campaign contributions shares some of those characteristics. First, Alaska’s \$500 individual-to-candidate contribution limit is “substantially lower than . . . the limits we have previously upheld.” The lowest campaign contribution limit this Court has upheld remains the limit of \$1,075 per two-year election cycle for candidates for Missouri state auditor in 1998 (citing *Shrink Missouri*). That limit translates to over \$1,600 in today’s dollars. Alaska permits contributions up to 18 months prior to the general election and thus allows a maximum contribution of \$1,000 over a comparable two-year period. Accordingly, Alaska’s limit is less than two-thirds of the contribution limit we upheld in *Shrink*.

Second, Alaska’s individual-to-candidate contribution limit is “substantially lower than . . . comparable limits in other States.” *Randall*. Most state contribution limits apply on a per-election basis, with primary and general elections counting as separate elections. Because an individual can donate the maximum amount in both the primary and general

## CHAPTER 14. CONTRIBUTION LIMITS

election cycles, the per-election contribution limit is comparable to Alaska’s annual limit and 18-month campaign period, which functionally allow contributions in both the election year and the year preceding it. Only five other States have any individual-to-candidate contribution limit of \$500 or less per election: Colorado, Connecticut, Kansas, Maine, and Montana. Moreover, Alaska’s \$500 contribution limit applies uniformly to all offices, including Governor and Lieutenant Governor. But Colorado, Connecticut, Kansas, Maine, and Montana all have limits above \$500 for candidates for Governor and Lieutenant Governor, making Alaska’s law the most restrictive in the country in this regard.

Third, Alaska’s contribution limit is not adjusted for inflation. We observed in *Randall* that Vermont’s “failure to index limits means that limits which are already suspiciously low” will “almost inevitably become too low over time.” The failure to index “imposes the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to ensure the adequate financing of electoral challenges.” So too here. In fact, Alaska’s \$500 contribution limit is the same as it was 23 years ago, in 1996.

In *Randall*, we noted that the State had failed to provide “any special justification that might warrant a contribution limit so low.” The parties dispute whether there are pertinent special justifications here.

Justice Ginsburg concurred separately, accepting the remand but saying that under the *Randall* test, Alaska’s limits could still survive. This seems quite doubtful should the case make it back to the Supreme Court, and the Ninth Circuit is likely to get that message. It has ordered supplemental briefing in the case.

REPLACE THE LAST SENTENCE OF NOTE 7 ON PAGE 1005 WITH THE FOLLOWING:

The trial court again enjoined the attorney general from collecting the information following a trial on the merits. *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016), and the Ninth Circuit again reversed, *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000 (9th Cir. 2018). The full court, over five dissenters, declined to take the case en banc, 919 F.3d 1177 (9th Cir. 2019), pet’ns for cert. filed Nos. 19-251, 19-255 (Aug. 26, 2019).

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 1031:

The Supreme Court recently declined the opportunity to explore the fourth question listed above regarding the evidence necessary to support the constitutionality of a campaign finance contribution limit. In *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017), cert. denied *sub nom. Lair v. Mangan*, 139 S. Ct. 916 (2019), a divided Ninth Circuit panel upheld Montana’s campaign contribution limits against constitutional challenge. The court had upheld the limits in an earlier case, *Montana Right to Life Ass’n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), and after the Supreme Court decided *Randall*, plaintiffs renewed their challenge in the *Lair* case. Among the arguments plaintiffs raised was that there was insufficient evidence of quid pro quo corruption or

## CHAPTER 14. CONTRIBUTION LIMITS

its appearance in Montana to justify the law. The *Lair* majority disagreed, relying on the test it set out in *Eddleman*:

Montana’s evidence shows the threat of actual or perceived quid pro quo corruption in Montana politics is not illusory. State Representative Hal Harper testified groups “funnel[] more money into campaigns when certain special interests know an issue is coming up, because it gets results.” State Senator Mike Anderson sent a “destroy after reading” letter to his party colleagues, urging them to vote for a bill so a PAC would continue to funnel contributions to the party:

Dear Fellow Republicans. Please destroy this after reading. Why? Because the Life Underwriters Association in Montana is one of the larger Political Action Committees in the state, and I don’t want the Demo’s to know about it! In the last election they gave \$8,000 to state candidates. . . . Of this \$8,000—Republicans got \$7,000—you probably got something from them. This bill is important to the underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be \$15,000. Let’s keep it in our camp.

State Senator Bruce Tutvedt stated in a declaration that during the 2009 legislative session the National Right to Work group promised to contribute at least \$100,000 to elect Republican majorities in the next election if he and his colleagues introduced and voted for a right-to-work bill in the 2011 legislative session. Finally, a state court found two 2010 state legislature candidates violated state election laws by accepting large contributions from a corporation that “bragged . . . that those candidates that it supported ‘rode into office in 100% support of [the corporation’s] . . . agenda.’”

*Lair*, 873 F.3d at 1179.

Judge Bea dissented, arguing that the majority’s standard was inconsistent with Supreme Court precedent, including *McCutcheon*, and suggesting that all campaign contribution limits are unconstitutional. “Absent a showing of the existence or appearance of quid pro quo corruption based on objective evidence, the presence of a subjective sense that there is a risk of such corruption or its appearance does not justify a limit on campaign contributions.” *Id.* at 1191 (Bea, J., dissenting).

The Ninth Circuit denied en banc rehearing, with five judges dissenting. 880 F.3d 571 (9th Cir. 2018) (en banc). Judge Ikuta, writing for the dissenters, argued that the Ninth Circuit’s *Eddleman* test had been “swept away” by the Supreme Court’s decisions in *Citizens United* and *McCutcheon*. *Id.* at 572 (Ikuta, J., dissenting from denial of rehearing en banc). “In light of the Supreme Court’s clarification, a state can justify imposing regulations limiting individuals’ political speech (via limiting political contributions) only by producing evidence that it has a real problem in combating actual or apparent quid pro quo corruption.” *Id.* at 574. Judge Ikuta wrote that a “risk” of corruption is not enough. *Id.* at 575.

## CHAPTER 14. CONTRIBUTION LIMITS

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 1033:

The Court has once again turned down a case raising the question of the constitutionality of a corporate spending ban. *1A Auto, Inc. v. Dir. of Office of Campaign & Political Fin.*, 105 N.E.3d 1175 (Mass. 2018), cert. denied 139 S. Ct. 2613 (2019).

ADD THE FOLLOWING TO THE END OF THE SECOND FULL PARAGRAPH ON PAGE 1035:

In *Deon v. Barasch*, 960 F.3d 152 (3d Cir. 2020), the Third Circuit held that Pennsylvania statute that prohibited individuals with interests in businesses that had gaming licenses from making any contributions, no matter how small, to any politician, political candidate, public official, or political organization violated the First Amendment.

The Fifth Circuit held unconstitutional an Austin, Texas law barring city candidates from soliciting or accepting campaign contributions within 180 days of an election. *Zimmerman v. City of Austin*, 881 F.3d 378, 393 (5th Cir.), cert. denied 139 S. Ct. 639 (2018). The court distinguished *Thalheimer* and an earlier Fourth Circuit case upholding temporal limits by noting that they predated *McCutcheon* and “upheld temporal limits on campaign contributions without any specific evidence that the timing of a contribution creates a risk of actual corruption or its appearance that is distinct from that created by the size of a contribution.” *Id.* Such evidence is now required after *McCutcheon*, the *Zimmerman* court ruled. Compare to *Platt v. Bd. of Comm’rs on Grievs. & Discipline*, 894 F.3d 235 (6th Cir. 2018) (described in greater detail in this Supplement to Chapter 10), upholding temporal campaign finance limits in judicial elections.

ADD THE FOLLOWING TO THE END OF THE SECOND FULL PARAGRAPH ON PAGE 1035:

The Eighth Circuit upheld a preliminary injunction against an Arkansas law that prohibited public officials from raising funds more than two years before election. *Jones v. Jegley*, 947 F.3d 1100 (8th Cir. 2020). “Arkansas has not shown that contributions made more than two years before an election present a greater risk of actual or apparent quid pro quo corruption than those made later.” *Id.* at 1105.

ADD THE FOLLOWING TO THE END OF THE FIRST FULL PARAGRAPH ON PAGE 1036:

In *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018) (discussed in this Supplement to page 984 on another point), the Ninth Circuit held unconstitutional a provision of Alaska law limiting candidates from accepting more than \$3,000 per year from out-of-state residents. The dissenting judge would have accepted as compelling Alaska’s stated interest in “self-governance” to justify the limitation on accepting contributions from out-of-state residents. Along similar lines, federal district court blocked a South Dakota ballot measure which banned out-of-state contributions to South Dakota ballot measure committees, rejecting the self-government interest. *SD Voice v. Noem*, 380 F. Supp. 3d 939 (D.S.D. 2019).

## Chapter 15. Public Financing

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 1089:

The Second Circuit unanimously affirmed. *Corren v. Condos*, 898 F.3d 209 (2d Cir. 2018).

ADD THE FOLLOWING TO THE END OF LAST FULL PARAGRAPH ON PAGE 1096:

The Washington Supreme Court rejected a First Amendment challenge to Seattle's voucher program, and the Supreme Court declined to intervene. *Elster v. City of Seattle*, 444 P.3d 590 (Wash. 2019), cert. denied 2020 WL 1496625 (U.S. Mar. 20, 2020).

## CHAPTER 15. PUBLIC FINANCING

## Chapter 16. Disclosure

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 1144:

Lower courts continue to deal with a wide swath of cases challenging the constitutionality of various disclosure laws. In *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018), the Second Circuit rejected the ideological group Citizens United’s First Amendment challenge to a New York law requiring charities that solicit for contributions to disclose their donor information (already submitted to the Internal Revenue Service) to New York officials. The information is not made public. The court rejected the argument that disclosure to government officials would impermissibly chill political speech in general, or Citizens United’s speech in particular. A federal district court reached the same conclusion as to a similar California law. *Center for Competitive Politics v. Harris*, 296 F. Supp. 3d 1219 (E.D. Cal. 2017). The Ninth Circuit summarily affirmed, and a petition for cert., No. 19-793, is currently pending before the Supreme Court.

In *Doe v. Federal Election Commission*, 920 F.3d 866 (D.C. Cir. 2019), cert. denied 2020 WL 1325843 (U.S. Mar. 23, 2020), the D.C. Circuit rejected a motion to enjoin the FEC from revealing the name of a trust that had illegally made a contribution in the name of another. In *National Association for Gun Rights v. Mangan*, 933 F.3d 1102 (9th Cir. 2019), cert. denied 2020 WL 2814774 (U.S. June 1, 2020), the Ninth Circuit rejected a challenge to Montana’s broad disclosure provisions.

Relatedly, courts have grappled with state and federal definitions of political committee status, which usually triggers enhanced disclosure requirements. For a recent example, see *Citizens for Responsibility and Ethics in Washington v. FEC*, 299 F. Supp. 3d 83 (D.D.C. 2018) (rejecting the FEC’s refusal to treat groups which fund extensive electioneering communications as political committees). Finally, in *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), the Fourth Circuit held unconstitutional a Maryland law requiring online publishers to self-publish information about paid political advertisements posted on their websites and to make records about those ads available for state inspection, which news outlets alleged were unconstitutional. Nothing prevented the state from requiring those running their ads to make the required disclosures.

## CHAPTER 16. DISCLOSURE