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## Partisan Gerrymanders: Upholding Voter Suppression and Choosing Judicial Abdication in *Rucho v. Common Cause*

Frances R. Hill  
*University of Miami School of Law*

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# Partisan Gerrymanders: Upholding Voter Suppression and Choosing Judicial Abdication in *Rucho v.* *Common Cause*

FRANCES R. HILL\*

*Under the Constitution, voters choose their elected officials. Partisan gerrymanders, however, enable elected officials to choose their voters and, in the process, dilute the votes of citizens who do not support them. From this perspective, partisan gerrymanders undermine the sovereignty of the people and, thereby, undermine the foundation of this democratic republic. In *Rucho v. Common Cause*, the Supreme Court declared that partisan gerrymandering raises a nonjusticiable political question beyond the competence of the federal courts. This Article asks: How did this happen? How could the Supreme Court abdicate its duty to protect the sovereignty of the people and its duty to provide access to justice? The majority opinion, written by Chief Justice John Roberts, located the issues raised in these cases not in the jurisprudence of voting and voting rights but in a series of narrow claims about the competence of federal courts to craft appropriate legal standards. The dissent, penned by Justice Elena Kagan, focused on voters, voting, and the sovereignty of the people. Grounded in the constitutional values of a democratic republic, the dissent offered a passionate repudiation of virtually every element of the majority opinion.*

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\* Professor of Law and Dean's Distinguished Scholar for the Profession at the University of Miami School of Law. She earned her Ph.D. at Harvard University in comparative politics and political theory and her J.D. at the Yale Law School. She has written broadly on elections and on campaign finance and testified as an expert witness several times before congressional committee hearings on these topics. She teaches courses in tax, business, and constitutional law.

*Yet, in the end, it was the dissent that developed a methodology, based on the work of the lower federal courts, for a workable standard for addressing the challenges that the majority rejected as impossible. It was the dissent that found a way forward based on the recognition of the modern technology of vote dilution that provides the basis for preserving the voters' access to justice. Nevertheless, the crafty and at times disingenuous framework of the majority opinion that ignored voting rights and democracy prevailed. This Article suggests that this may well be only a temporary victory as a younger generation of lawyers, judges, and citizens with more experience with the technology of partisan gerrymandering will find the majority's framework and strategy as implausible and unpersuasive as the dissent already did in Rucho.*

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## INTRODUCTION

In *Rucho v. Common Cause*, the Supreme Court held that partisan gerrymandering is a nonjusticiable political question and remanded the two cases before the Court to the appropriate United States district courts “with instructions to dismiss for lack of jurisdiction.”<sup>1</sup> The majority opinion, written by Chief Justice John Roberts, located the issues raised by partisan gerrymanders not in the jurisprudence of voting and voting rights but in a series of narrow claims relating to what he portrayed as the inability of the federal courts to craft appropriate legal standards and remedies.<sup>2</sup>

The dissent, written by Justice Elena Kagan, focused on voters, voting, and the sovereignty of the people.<sup>3</sup> It is grounded in constitutional values and the values of a democratic republic.<sup>4</sup> It is a passionate repudiation of virtually every element of the majority’s opinion.<sup>5</sup> It excoriated the majority for what the dissent concluded was the majority’s failure to fulfill the duty of the federal courts to uphold the concept that in the United States the people are sovereign.<sup>6</sup>

The majority found the issue of partisan gerrymandering technically beyond the capacity of the courts to craft legal standards, but it did not find that partisan gerrymandering posed any difficulty to the operation of the constitutional system.<sup>7</sup> The majority noted that

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<sup>1</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

<sup>2</sup> *Id.* at 2491, 2494 (“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.”). The Chief Justice was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh.

<sup>3</sup> *Id.* at 2511–13 (Kagan, J., dissenting).

<sup>4</sup> *Id.* at 2512–15.

<sup>5</sup> *See id.* at 2509–25.

<sup>6</sup> *See id.* at 2511, 2525.

<sup>7</sup> *See id.* at 2500, 2507 (majority opinion).

partisan gerrymanders had been controversial from the beginning of the republic.<sup>8</sup> It concluded that the United States could continue to live with partisan gerrymandering.<sup>9</sup>

The dissent focused on what it regarded as the existential threat that partisan gerrymandering posed to the sovereignty of the people.<sup>10</sup> It dismissed the majority's complacency based on historical experience by analyzing the changes in partisan gerrymanders over time and concluded that partisan gerrymanders both diluted the vote of individuals and undermined the constitutional structure based on the sovereignty of the people.<sup>11</sup> It pointed out to the majority that "[t]hese are not your grandfather's—let alone the Framers'—gerrymanders."<sup>12</sup> These were instead stratagems for enduring entrenchment of a particular political party in power.<sup>13</sup> In sum, the dissent found that partisan gerrymanders, which were always a problem, had become so dangerous that the Supreme Court had a duty to craft a remedy.<sup>14</sup> The dissent pointed out that the majority's abdication of its constitutional duty was not only wrong, but it was also unnecessary.<sup>15</sup> Accusing the majority of failing to understand the opinions of the lower courts, the dissent claimed that the lower courts had already offered a methodology allowing courts to decide cases involving partisan gerrymanders.<sup>16</sup>

Each of these opinions is complex and consequential. The majority opinion is a carefully crafted enigma that can only be described as radical. But its radicalism was carefully concealed in what

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<sup>8</sup> *Id.* at 2494–96.

<sup>9</sup> *See id.* at 2508; *id.* at 2512 (Kagan, J., dissenting) (“The majority’s idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.”).

<sup>10</sup> *See id.* at 2513 (Kagan, J., dissenting) (“And gerrymanders will only get worse . . . . And someplace along this road, ‘we the people’ become sovereign no longer.”).

<sup>11</sup> *See id.* at 2512–13.

<sup>12</sup> *Id.* at 2513.

<sup>13</sup> *See id.* at 2512–13.

<sup>14</sup> *See id.* at 2513, 2515.

<sup>15</sup> *See id.* at 2516 (“But in throwing up its hands, the majority misses something under its nose: What it says can’t be done *has* been done.”).

<sup>16</sup> *Id.* (“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).”).

it presented as technical issues relating to the definition of standards and the application of appropriate legal tests.<sup>17</sup> It ended with an off-ramp for the federal courts and an unpersuasive denial that this judicial abdication left the people of the United States no access to justice relating to the vote dilution on which partisan gerrymanders are built.<sup>18</sup> The majority reached this radical conclusion by discussing partisan gerrymanders without locating that discussion within election jurisprudence, without acknowledging the harm that partisan gerrymanders inflict on individual voters, who are only allowed to cast a diluted vote, without acknowledging the harm to democracy itself and with only occasionally referencing the constitutionality of certain partisan gerrymanders.<sup>19</sup>

Efforts in the majority opinion to reconcile the reasoning with the result required a careful analysis of not only what was written but how it was written, as well as a careful consideration of what was not written. Silence played a significant role in the majority opinion. This is well-concealed radicalism undermining the very foundation of the Constitution—the principle that the people choose their government and the principle that government is accountable to the people.

The dissent offered a reminder of the role of voters and voting as the source of sovereignty under the Constitution.<sup>20</sup> Silence played no role in the dissenting opinion. The dissent documented the harms inflicted on individual citizens and on the democratic system through partisan gerrymandering.<sup>21</sup> Without honest elections, the foundational premise of the Constitution has no operational meaning. Without access to federal courts, voting rights cannot be protected and voter suppression cannot be combatted. Treating the question of partisan gerrymandering as nonjusticiable imposes

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<sup>17</sup> *See id.* at 2500, 2507 (majority opinion).

<sup>18</sup> *See id.* at 2506–08.

<sup>19</sup> *See id.* at 2495, 2499. These references were cryptic and were based only on one case not directly involved with elections and voting. *See id.* at 2499. Nevertheless, references to the constitutionality of partisan gerrymanders is like a land mine hidden in the language of the majority opinion in case it might be useful in a future case seeking to strip partisan gerrymanders from the constitutional protection afforded them by the court's holding that partisan gerrymandering cases are not justiciable.

<sup>20</sup> *See id.* at 2511–12 (Kagan, J., dissenting).

<sup>21</sup> *See id.* at 2512.

lasting harm without meaningful remedies on both individual voters and the democratic system. At the same time, so the majority seemed to claim, it will protect the Court from undue entanglement in contested and divisive issues.<sup>22</sup> In short, the Court cast its vote for voter suppression without appearing to do so.

*How did this happen?* It happened because there was a majority on the Court that supported an opinion that was carefully and cleverly designed to produce the result that partisan gerrymanders are not justiciable.<sup>23</sup> In other words, there was a majority on the Court for this form of voter suppression. Why this was so is itself an intriguing question, but it is not the question addressed in this Article. Here, the focus is on how the majority crafted its opinion without acknowledging what it was doing.

Judicial opinions are not simply a discussion of the law as applied to the facts of a case. Opinions are constructed.<sup>24</sup> They reflect both tactical and strategic considerations.<sup>25</sup> In other words, judicial opinions reflect a conscious, intentional framework identifying the issues the opinion will and will not discuss, the facts that it will and will not acknowledge, the precedents it will rely on and past cases that it will not mention. Judicial opinions end in a manner consistent with how they begin.<sup>26</sup> Frameworks usually include what may be called a game plan dealing with how the elements of the framework will be presented, what will be the tone of the opinion, and what kind of language will be used to present essential claims.<sup>27</sup> Judicial

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<sup>22</sup> *Id.* at 2495–97 (majority opinion) (distinguishing Court’s role in one-person, one-vote and racial gerrymandering from its role in general partisan gerrymandering).

<sup>23</sup> *See id.* at 2507–08.

<sup>24</sup> *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1386 (1995).

<sup>25</sup> *See id.* at 1394 (discussing complex choices judges must make when articulating legal principals, choosing between “tests couched in general or even abstract terms—mansions of many rooms in which implementing judges move about freely—and tests using very specific words that cabin judges’ discretion tightly.”).

<sup>26</sup> *See id.* at 1386–88.

<sup>27</sup> *See id.* at 1405 (“The basic analytical structure that judges use to decide such cases—be it risk assessment, utilitarian weighing of costs, or political philosophy—not only determines the results but displays the judge’s own inner thought processes. The rhetoric will generally follow that of the analytical mode

opinions do not explicitly articulate the framework or the game plan.<sup>28</sup> Sometimes these frameworks, along with the embedded game plans, are obvious, and sometimes they are not.<sup>29</sup> Sometimes it is possible to understand the reasoning in an opinion without focusing directly on the framework and the game plan. *Rucho* is not one of those cases.

The majority decision achieved its remarkable and alarming outcome by simply refusing to treat partisan gerrymanders as a form of voter suppression or, indeed, as an activity that is related to voting at all. Partisan gerrymanders were treated as a hyper-technical issue of defining a standard of partisanship.<sup>30</sup> Defining the issue as one of procedural fairness and claiming that the federal courts are not equipped to deal with such an issue allowed the majority to claim that the Court was committed to good government at the very time it was casting its lot with voter suppression that undermined democracy.<sup>31</sup> In a strategic commitment to silence, the majority acknowledged no harm arising from partisan gerrymanders.<sup>32</sup> Silence was so important to the majority opinion that only rarely and briefly did the Court refer to judicial restraint,<sup>33</sup> lest it become apparent that any benefit to the Court came at a very high cost to voters and to democracy. Silence and avoidance were so important to the majority that it treated the significant constitutional issues in this case as matters of technical detail that could and should be subdivided into slices and snippets of issues that could be separated or reagggregated as necessary to suit the majority's purposes.<sup>34</sup> This remarkable position could not have been unconsidered. No one would have written an opinion dealing with partisan gerrymandering without considering

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chosen, and the adoption of a particular way of analyzing the problem may be as important to the judge as the instant result.”).

<sup>28</sup> *See id.* at 1405 (“Their rhetoric will sound very neutral and principle oriented, as if the results in this or any one case were secondary. The authors, however, are quite aware that they are determining or influencing the outcome of many cases, defining a field of law and the considerations or values that will predominate.”).

<sup>29</sup> *See id.*

<sup>30</sup> *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2499–500, 2507 (2019).

<sup>31</sup> *See id.*; *id.* at 2512 (Kagan, J., dissenting).

<sup>32</sup> *See id.* at 2506 (majority opinion); *but see id.* at 2516 (Kagan, J., dissenting).

<sup>33</sup> *See id.* at 2506–07 (majority opinion).

<sup>34</sup> *See id.*

the role of voting in the legitimacy of the Constitutional system, and no one would have been so unmindful of the harm arising from this omission, unless they specifically intended to do this.

The dissent also had a framework and a game plan. Nothing about the dissent was hidden or indirect. Silence played no role. Big constitutional issues like the sovereignty of the people and accountability to the people were not disaggregated but remained to be considered in their fulsome import for democracy and for the rights of voters.<sup>35</sup> The dissent identified the issue as voter suppression.<sup>36</sup> The dissent identified the harms inflicted on individual voters and on democracy.<sup>37</sup> The dissent found the relevant facts in the record compiled by the lower courts as triers of fact and found the relevant law in the Constitution and its history.<sup>38</sup> To the dissent, the core issue was to avoid voter suppression through vote dilution and to maintain the ability of the people to exercise their constitutional role as the sovereign that chooses the people who will govern them—at least until the next election.<sup>39</sup> To the dissent, voters' assurance that they will be able to cast an undiluted vote in the next election is their expression of sovereignty and their means of holding their representatives accountable.<sup>40</sup> To the dissent, this is the core idea of democracy.<sup>41</sup> As such, the dissent identified the harms arising from partisan gerrymanders that permit politicians to entrench themselves as rulers over voters who do not wish to be ruled by them. Partisan gerrymanders matter because they violate the right of individual voters and undermine democracy as a system of government.<sup>42</sup> Like the majority opinion, the dissent illustrates how outcomes are shaped by the analytical framework, by the questions acknowledged, and by the questions neither asked nor acknowledged.<sup>43</sup>

These themes, and the frameworks and game plans written by the majority and the dissent, are considered in four parts, each of

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<sup>35</sup> *See id.* at 2509 (Kagan, J., dissenting).

<sup>36</sup> *See id.* at 2513 (“Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others.”).

<sup>37</sup> *See id.* at 2514–15.

<sup>38</sup> *See id.* at 2509–12.

<sup>39</sup> *See id.* at 2511–13.

<sup>40</sup> *See id.* at 2512–14.

<sup>41</sup> *See id.* at 2512.

<sup>42</sup> *Id.* at 2513.

<sup>43</sup> *See id.* at 2516–23.

which compares and contrasts the approaches of the majority and the dissent. Part I asks where each of the opinions begin and what questions each opinion sets out to address. What values are referenced in each opinion? Why do partisan gerrymanders matter? Under what circumstances do they matter? What role should the judicial branch of the federal government play? In short, what is a partisan gerrymandering case about and why do partisan gerrymandering cases matter, if at all?

Part II locates these issues and values in the broader fields of election law and constitutional law. It poses the question of whether partisan gerrymanders are technical puzzles or choices of values. It then considers how the answers to this question shape the analysis of the facts in the cases before the Court in *Rucho*. This Part suggests that partisan gerrymanders cannot be separated from the rights and duties of voters and that voting is both an individual right and a constitutional duty to “ordain and establish this Constitution.”<sup>44</sup> If “We the People”<sup>45</sup> are sovereign, voting is our means of expressing and exercising that sovereignty. The harms addressed and the constitutional predicates available to redress these harms turn on vote dilution, which is to say disenfranchisement of voters of the “other” political party.

Part III considers how the majority and the dissent view the reasoning of the lower federal courts in the two cases before the Court. The majority concluded that partisan gerrymanders raise political questions that make cases arising from partisan gerrymanders non-justiciable. The dissent concluded that the very standard that the majority claimed could not be developed by a federal court had already been developed by the lower courts.

Part IV considers how *Rucho* ends, if, indeed, it does end. Does the majority see its opinion as a means of weaponizing the political question doctrine in the service of voter suppression? Did the majority understand what the lower courts had achieved in shaping a path forward in partisan gerrymandering cases, or did the majority deliberately ignore the path forward laid out in the lower court opinions because it was intent on permitting partisan gerrymanders as disguised instruments of voter suppression? Did the majority see its opinion as protection for the Court, justified even at the cost of

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<sup>44</sup> U.S. CONST. pmbl.

<sup>45</sup> *Id.*

abdicated its duty to do justice in cases dealing with an issue as foundational as voting and the sovereignty of the people? Did the majority actively suppress voters and voting, or did it abandon voters to the predations and ambitions of the political branches? What does *Rucho* mean for democracy?

#### I. DISTINCTIVE FRAMEWORKS FOR DIVERGENT OUTCOMES

The majority opinion is an enigma. Indeed, it is a radical enigma that denies the targets of partisan gerrymandering access to justice. However, it is never quite clear why the legal reasoning leads to this conclusion. Every element of the framework is so veiled that it is difficult to state with any certainty what the majority thinks the issue is and what the precedents are. At every turn, what the majority does not say raises questions about what it does say, yet these questions are never addressed. The game plan in the majority opinion deployed an impressively broad array of the skills of a renowned advocate who insisted on at least trying to control the discussion, limit the applicable precedents, and so describe either the precedents or the facts that they become scarcely recognizable. It is possible that the majority hoped to write a quiet opinion that simply rid the federal courts of what the majority may have regarded as annoying cases. But that was not to be.

The dissent was a passionate refutation of every aspect of the majority opinion—its identification of the issue, its mode of reasoning, and certainly, its holding. The dissent developed an entirely distinct framework and argued it out loud and without strategic or tactical silence. Grounded in constitutional values, the dissent argued for the rights of the people of the United States and the protection of the political system of the United States.<sup>46</sup> It argued that federal courts should do their jobs and demonstrated that the lower courts had been doing this throughout the history of the cases before the Court in *Rucho*.<sup>47</sup> Like the majority, the dissent fully understood that where it began would be foundational in determining where it ended.

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<sup>46</sup> See *Rucho*, 139 S. Ct. at 2524–25 (Kagan, J., dissenting).

<sup>47</sup> *Id.* at 2516.

A. *Beginning with the Court: A Framework for Judicial Abdication*

The majority opinion by Chief Justice Roberts treated a neutral standard as an end in itself. From the beginning of its opinion, the majority stated that the cases before it “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.”<sup>48</sup> The majority stated that “[t]he 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.”<sup>49</sup> These concerns with the role of the federal courts took center stage in the majority opinion.<sup>50</sup> Voters were not on stage at all and voting as a constitutional process was nowhere to be found. Instead, the majority opinion focused on Article III and the role of the federal courts, stating that Article III “limits federal courts to deciding ‘Cases’ and ‘Controversies.’”<sup>51</sup> Chief Justice Roberts then stated that “[w]e have understood that limitation to mean that federal courts can address only questions ‘historically viewed as capable of resolution through the judicial process.’”<sup>52</sup> He then presented a series of cursory references to the political question doctrine<sup>53</sup> and concluded by framing the question in this case in the following terms: “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.”<sup>54</sup>

It may seem that the majority began in a strange place—somewhere in the middle of the discussion of something that is not quite the heart of what is at issue here. The majority opinion admitted that partisan gerrymanders are a problem but not such a significant problem that the Court must attempt to find a way to address them.<sup>55</sup> It

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<sup>48</sup> *Id.* at 2491 (majority opinion).

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 2496.

<sup>51</sup> *Id.* at 2493.

<sup>52</sup> *Id.* at 2493–94 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

<sup>53</sup> *See id.* at 2494.

<sup>54</sup> *Id.* at 2494 (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1926–37 (2018)).

<sup>55</sup> *See id.* at 2494, 2501.

never acknowledged harms to voters or to the United States political system. This, as becomes abundantly clear, precluded discussion of the issue that would have made the majority's holding seem even more inexplicable. What was the majority doing? Was it limiting access to justice in voting rights matters? Was it protecting the federal courts from the intense controversies swirling around voting and elections? Was it tipping the balance in favor of some political interest? It is impossible to say with any certainty, and that appears to have been by design.

B. *Beginning with the Voters: A Framework for Protecting Democracy*

The dissent began with democracy and the Constitution and never wavered in putting both at the core of the opinion.<sup>56</sup> In the dissent, *Rucho* is about vote dilution and voter suppression, and it is about a Constitution based on the sovereignty of the people.<sup>57</sup> Most of all, the dissent is about the sovereignty of the people depending on the ability of the people to vote without having their votes diluted and their right to vote suppressed by officeholders seeking to entrench themselves in power.<sup>58</sup> It condemned the majority opinion as “tragically wrong” because it misconstrued the Constitution and the role of the people under the Constitution.<sup>59</sup>

Justice Kagan's beginning could not be further from Chief Justice Roberts' beginning and it could not have been closer to the Constitution and the issues raised in this case. She began:

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

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<sup>56</sup> See *id.* at 2509 (Kagan, J., dissenting).

<sup>57</sup> See *id.* at 2511–13.

<sup>58</sup> See *id.* at 2512.

<sup>59</sup> *Id.* at 2509.

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.<sup>60</sup>

The difference between this starting point and Chief Justice Roberts' starting point could not be more pronounced. Justice Kagan began with the Constitution, constitutional rights, and constitutional harms.<sup>61</sup> She wonders whether “[m]aybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core.”<sup>62</sup> She noted that the majority “dutifully recit[es]” the facts in the two cases here but then “leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved.”<sup>63</sup>

In the face of this approach by the majority, the dissent chose to focus on the facts, “[t]o recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think” and then “to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights.”<sup>64</sup> Recounting the facts and considering the harms arising from the partisan gerrymanders was of critical importance to Justice Kagan because it “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.”<sup>65</sup> She then urged the readers of her

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<sup>60</sup> *Id.*

<sup>61</sup> *See id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

presentation of the facts and the harms they caused to “ask yourself: Is this how American democracy is supposed to work?”<sup>66</sup>

Justice Kagan then presented a saga of what intentional partisan gerrymanders accomplished through experts using the latest technology to draw electoral maps.<sup>67</sup> She shows that gerrymanders reflect the ambitions and values of the party in power and that, in each state, mapmakers accomplished the partisan goals they were paid to produce.<sup>68</sup> She found that “Maryland’s Democrats proved no less successful than North Carolina’s Republicans in devising a voter-proof map.”<sup>69</sup> She also shows that the officeholders in charge of these efforts spoke openly about their purposes and made these purposes abundantly clear to the mapmakers selected for this important role.<sup>70</sup> The results produced numerous potential maps, including at least one map in each case that served the purposes that the mapmaker was hired to produce.<sup>71</sup> Experience showed that the mapmakers were skillful and fulfilled their contractual obligations.<sup>72</sup> The new district, or districts, produced reliable partisan results that entrenched the paying party in a position of power over the will of the people who were assigned, through packing or cracking, to have their votes diluted and, thus, their right to vote suppressed.<sup>73</sup> Justice Kagan described this as a “grisly tale” of partisan entrenchment.<sup>74</sup> Justice Kagan then asked again: “Is that how American democracy is supposed to work?”<sup>75</sup> She answered her own question by observing, “I have yet to meet the person who thinks so.”<sup>76</sup> She is equally clear and direct in articulating the reason that no one thinks so, stating: “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.”<sup>77</sup> Sovereignty of the people means that the people choose

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2509–11.

<sup>68</sup> *See id.* at 2510–11.

<sup>69</sup> *Id.* at 2511.

<sup>70</sup> *See id.* at 2510–11.

<sup>71</sup> *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> *Id.* at 2510–14.

<sup>74</sup> *Id.* at 2510.

<sup>75</sup> *Id.* at 2511.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

their representatives; this requires voting and care in preserving voting rights.<sup>78</sup> The dissent stated clearly that,

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 . . . . 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.<sup>79</sup>

In the next sentence, the dissent concluded, “partisan gerrymandering can make it meaningless.”<sup>80</sup>

## II. PARTISAN GERRYMANDERING IN CONSTITUTIONAL PERSPECTIVE

The majority expressed no particular concern, much less alarm, over vote dilution and voter suppression resulting from partisan gerrymandering. It focused on the harm that courts would experience if they heard these cases.<sup>81</sup> It did not focus on the harm to the people and to democracy from partisan gerrymandering, and it only acknowledged these harms in passing at the end of its opinion.<sup>82</sup> The dissent linked the selective dilution of some votes in order to entrench politicians of a different political party in power to fundamental attacks on the Constitution and on the principle of the sovereignty of the people.<sup>83</sup> The majority asked how this might affect

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<sup>78</sup> *See id.*

<sup>79</sup> *Id.* at 2511–12. Kagan bolsters her statement by citing to James Madison for the proposition that “republican liberty” requires “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.” THE FEDERALIST NO. 37, at 4 (James Madison) (J. & A. McLean eds., 1788).

<sup>80</sup> *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting).

<sup>81</sup> *See id.* at 2499–500, 2503–05 (majority opinion).

<sup>82</sup> *See id.* at 2506.

<sup>83</sup> *See id.* at 2512–13 (Kagan, J., dissenting).

courts.<sup>84</sup> The dissent addressed how this does in fact affect American democracy.<sup>85</sup>

A. *The Majority Refuses to Acknowledge Harms to Democracy*

The majority asserted that “[p]artisan gerrymandering is nothing new.”<sup>86</sup> Although true, it is far from clear what argument the majority was attempting to make. The majority recounted gerrymandering controversies even during the debates over ratification of the Constitution, but concluded that “[a]t no point was there a suggestion that the federal courts had a role to play”<sup>87</sup> and then added that “[n]or was there any indication that the Framers had ever heard of courts doing such a thing.”<sup>88</sup> While the majority made no argument based on this history, it did state that “[e]arly on, doubts were raised about the competence of the federal courts to resolve those questions.”<sup>89</sup> This is a robust assertion of the meaning of the silence relating to courts that the majority had found in the ratification debates.

At this point, recognition of *Baker v. Carr*<sup>90</sup> became unavoidable. Nothing in Chief Justice Roberts’ brief acknowledgment of *Baker* as a “leading case” indicated its significance in challenging voter suppression and vote dilution.<sup>91</sup> Nothing in the majority opinion acknowledged the new era of voting rights litigation that followed the Court’s decision in *Baker*.<sup>92</sup> He noted that the district court had held that the case was not justiciable, based on *Colegrove v. Green* and other Supreme Court precedents, but that “[t]his Court reversed.”<sup>93</sup> He instead emphasized the Court’s review of the

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<sup>84</sup> *See id.* at 2499–500, 2503–05 (majority opinion).

<sup>85</sup> *See id.* at 2512 (Kagan, J., dissenting).

<sup>86</sup> *Id.* at 2494 (majority opinion).

<sup>87</sup> *Id.* at 2496.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* The Court then cited two of the last of the Jim Crow cases through which the federal courts upheld the suppression of black voters in blatant disregard of the 15<sup>th</sup> Amendment. *Id.* (first citing *Wood v. Broom*, 287 U.S. 1 (1932); and then citing *Colegrove v. Green*, 328 U.S. 549 (1946)) (both cases holding that gerrymanders were not justiciable).

<sup>90</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>91</sup> *See Rucho*, 139 S. Ct. at 2496.

<sup>92</sup> *See id.*

<sup>93</sup> *Id.* (referencing *Colegrove*, 328 U.S. 549).

political question doctrine, “including whether there is ‘a lack of judicially discoverable and manageable standards for resolving it.’”<sup>94</sup> The Chief Justice then summarized the Court’s decision, stating that, “[t]he Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles.”<sup>95</sup> From this, one might assume that *Baker* was a relatively predictable or insignificant case, rather than the beginning of a new jurisprudence taking account of the valence of each vote. The majority refused to acknowledge that the world of elections and voting had changed or started to change and that *Baker* and its numerous consequential progeny reframed vote dilution and voter suppression.<sup>96</sup> The only other reference, albeit oblique and indirect, to this line of cases was a subsequent assertion that this line of cases does not apply in any way to partisan gerrymander cases.<sup>97</sup>

The Chief Justice then embraced the concept of a “constitutional political” gerrymander.<sup>98</sup> The majority opinion neither addressed what a “political gerrymander” might be nor discussed how it might relate to a partisan gerrymander. But the reference to a “political gerrymander” moved the discussion away from the powerful reasoning and holdings of *Baker* and its progeny—grounded in the rights of voters and the constitutional structure based on the sovereignty of the people—to a far more circumscribed discussion of grounds for determining that an issue raises a political question that cannot be decided by the federal courts.<sup>99</sup> Moving the analysis away from voting was essential to Chief Justice Roberts’ determination that partisan gerrymanders are political questions and, as such, may

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<sup>94</sup> *Id.* (quoting *Baker*, 369 U.S. at 217).

<sup>95</sup> *Id.* (citing *Baker*, 369 U.S. at 226).

<sup>96</sup> In 1964, the Supreme Court issued two landmark decisions that extended the reasoning of *Baker v. Carr* to Congressional districts and to both houses of a bicameral state legislature. *Wesberry v. Sanders*, 376 U.S. 1, 7–8, 18 (1964) (requiring “one person, one vote” apportionment based on population in congressional districts in Georgia); *Reynolds v. Sims*, 377 U.S. 533, 558, 568–570, 586–87 (1964) (requiring that both houses of Alabama state legislature be apportioned on the basis of population consistent with the principle of “one person, one vote”).

<sup>97</sup> *See Rucho*, 139 S. Ct. at 2497 (referencing numerous “one-person, one-vote” cases without expressly referencing *Baker*).

<sup>98</sup> *Id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

<sup>99</sup> *See id.*

not be challenged by voters in federal courts.<sup>100</sup> Vote dilution and voter suppression may thus continue undisturbed. The shift in the terms of the discussion from “partisan” to “political” consideration allowed Chief Justice Roberts to claim a principled position, although one that required a contrived argument that the Framers approved of this position.<sup>101</sup> The Chief Justice claimed that:

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.”<sup>102</sup>

At this point, the Chief Justice abandoned any references to *Baker* to instead offer a review of the partisan gerrymandering cases focused solely on a judicially discoverable and manageable standard for determining whether there has been an impermissible partisan gerrymander, rather than the unexplained category of a “constitutional political gerrymander” within the meaning of *Hunt v. Cromartie*.<sup>103</sup>

The Chief Justice took a position similar to that of Justice Kennedy’s concurrence in *Vieth v. Jubelirer*, where Justice Kennedy stated that an appropriate standard must have a “limited and precise rationale” and be “clear, manageable, and politically neutral.”<sup>104</sup> He found support for this approach in Justice O’Connor’s concurrence in *Davis v. Bandemer*.<sup>105</sup>

Chief Justice Roberts then claimed that “[p]artisan gerrymandering claims invariably sound in a desire for proportional

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<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)).

<sup>103</sup> *See id.* at 2497–98.

<sup>104</sup> *See id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring)).

<sup>105</sup> *See id.* (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O’Connor, J., concurring)).

representation.”<sup>106</sup> He emphasized that the Court had never found that the Constitution required proportional representation.<sup>107</sup> As a result, the Chief Justice claimed that plaintiffs phrase their claims in other terms, usually implicating fairness.<sup>108</sup> His rejection of fairness as a relevant or even reasonable value in the discussion of partisan gerrymandering became the centerpiece of his rejection and even ridicule of the idea that partisan gerrymanders imposed harms on voters and on the constitutional system.<sup>109</sup> He explained his approach in the following terms:

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.<sup>110</sup>

Quoting Justice Scalia in *Vieth*, Chief Justice Roberts found that “[f]airness’ does not seem to us a judicially manageable standard.”<sup>111</sup> He then argued that there is no “‘clear, manageable and politically neutral’ test for fairness.”<sup>112</sup> The first problem identified by the majority was that “it is not even clear what fairness looks like in this context.”<sup>113</sup> The next sentence observes that “[t]here is a large measure of ‘unfairness’ in any winner-take-all system.”<sup>114</sup> Chief Justice Roberts speculated that “[f]airness may mean a greater number of competitive districts” but then observed that undoing the

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<sup>106</sup> *Id.* at 2499.

<sup>107</sup> *See id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.* at 2499–502.

<sup>110</sup> *Id.* at 2499.

<sup>111</sup> *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004)).

<sup>112</sup> *Id.* at 2500. The internal quotation is in the original but there is no citation. It seems to be a reference to the language of Justice Kennedy in *Vieth*, which appears in *Rucho* as something of a mantra. *See Vieth*, 541 U.S. at 307–08.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

previous cracking and packing in the interest of more competitive districts “could be a recipe for disaster for the disadvantaged party.”<sup>115</sup> A second alternative, according to the Chief Justice, might require more cracking and packing reflecting the “gravitational pull of proportionality” so that each party has “its ‘appropriate’ share of ‘safe’ seats.”<sup>116</sup> However, this approach, the majority asserted, would undermine making districts more competitive.<sup>117</sup> A third possibility is to measure fairness “by adherence to ‘traditional’ districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents.”<sup>118</sup> But this approach would not serve the goal of neutrality. At this point, the Chief Justice declared defeat and concluded that:

Deciding among just these different versions 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.<sup>119</sup>

The majority claimed the determination that fairness cannot be given operational meaning in the context of defining electoral districts means that the “determinative question” relating to partisan gerrymanders—“How much is too much?”—cannot be answered.<sup>120</sup> The majority asked: “At what point does permissible partisanship become unconstitutional?”<sup>121</sup> This is a rhetorical question, followed

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (citing *Davis v. Bandemer*, 478 U.S. 109, 130–31 (1986)).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (citations omitted).

<sup>119</sup> *Id.* (citing *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

<sup>120</sup> *Id.* at 2501.

<sup>121</sup> *Id.* This question would have greater force if the opinion did not interchange the idea of permissible partisanship for the idea of a constitutional partisan gerrymander, which are two quite distinct things. They may become the same thing if every district reflects an intentional partisan gerrymander and the concept

by several others, that the Chief Justice made no attempt to consider.<sup>122</sup> He concluded where he intended to conclude and again drew his reasoning and his language from *Vieth*, stating:

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.”<sup>123</sup>

At the end of the section of the opinion dealing with what the majority considered the applicable precedents, it raised the issue it attributes to the appellees in this case, who “contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims.”<sup>124</sup> The majority struggled to address a question premised on the existence of a larger voting rights jurisprudence that is relevant to partisan gerrymandering cases. The first sentence of the response was short but revealing, asserting that “the one-person, one-vote rule is relatively easy to administer as a matter of math.”<sup>125</sup> The next sentence marked a denial of the relevance of voters in partisan gerrymander cases, which the majority now treated as solely about political parties.<sup>126</sup> The majority took the position that partisan gerrymander cases are not easy to administer “because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly.”<sup>127</sup> The majority did not even acknowledge its pivot from voters to political parties or why such a distinction might be appropriate or what relationships between voters and political parties might be relevant. Instead, the majority simply asserted, without explanation, that “[i]t

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of a constitutional partisan gerrymander is given operational constitutional meaning.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)); *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

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.”<sup>128</sup> The majority then extended this reasoning to vote dilution claims in the following terms:

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.”<sup>129</sup>

This pivot from accountability to influence and from individual voters to political parties captures the reasoning of the majority opinion. Why the majority found that this particular pivot required no supporting reasoning is itself unexplained by the remainder of the opinion. One might reasonably think that a partisan gerrymandering case is itself about the mechanisms of accountability available to voters in particular districts in the face of extreme partisanship. That, after all, was the claim in this case. However, that was not the position taken in the reasoning in the majority opinion. Here, Chief Justice Roberts characterized partisan gerrymandering claims as guaranteeing a certain level of representation to political parties.<sup>130</sup>

The majority opinion also rejected the idea that the cases involving racial gerrymanders “provide an appropriate standard for assessing partisan gerrymandering.”<sup>131</sup> The majority drew the following distinction: “Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *See id.* at 2501–02 n.1 (referring to an assertion in the dissent “that the Framers viewed political parties ‘with deep suspicion’” and then managing to turn this observation into the insinuation that the dissent used this observation to support “a constitutional theory that guarantees a certain degree of representation to political parties.”); *see infra* notes 106–17 and accompanying text.

<sup>131</sup> *Rucho*, 139 S. Ct. at 2502.

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.”<sup>132</sup>

Justice is not possible because the need for precise metrics has proved, in the majority’s view, too difficult to satisfy with sufficient precision.<sup>133</sup> Reaching this decision was made possible by the careful avoidance of considerations of justice and the role of voting in achieving it. The majority opinion was designed to avoid what the dissent treated as foundational values by treating them as less constitutionally significant than the complexities of implementation. This asserted problem was exacerbated by the barely articulated premise that partisan gerrymanders require that only one standard be applied,<sup>134</sup> ignoring the possibility that the empirical diversity of partisan gerrymanders might be addressed by a range of standards based on a constitutionally permissible methodology. In other words, the majority treated partisan gerrymanders as a doctrinal issue rather than as an empirical issue. This may well have been part of the game plan—a deliberate insistence on an unachievable uniformity that impedes the identification and understanding of partisan gerrymanders. Because the majority refused to acknowledge the individual and systemic harms arising from partisan gerrymanders, it did not acknowledge that its understanding was attenuated. How it could have maintained that view after reading the opinions of the courts below, as well as at least certain amicus briefs, suggests that the majority was not clear about what it thought was at stake and for whom.

#### B. *The Dissent Affirms the Sovereignty of the People*

The dissent reminded the majority what is at stake in this case—the viability of democracy based on the sovereignty of the people, who exercise their sovereignty through voting and the right of individuals to vote.<sup>135</sup> Both are necessary. Yet, noted the dissent, neither was addressed by the majority.<sup>136</sup> It reminded the majority, which

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<sup>132</sup> *Id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

<sup>135</sup> *See id.* at 2509 (Kagan, J., dissenting).

<sup>136</sup> *See id.* at 2509, 2511–12.

quoted the language of *Vieth* repeatedly, that Justice Kennedy had observed that partisan gerrymanders can lead to “rigg[ed] elections.”<sup>137</sup> The dissent also reminded the majority that “this Court has recognized” that the “‘core principle of republican government’ . . . is ‘that the voters should choose their representatives, not the other way around.’”<sup>138</sup> The dissent concluded: “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.’”<sup>139</sup>

The dissent emphasized that “[t]he majority disputes none of this.”<sup>140</sup> The dissent found this statement worth repeating, possibly hoping that doing so would allow the majority to understand the implications of its agreement: “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.’”<sup>141</sup> At this point the dissent asked: “And therefore what?”<sup>142</sup> and noted that “[t]hat recognition would seem to demand a response.”<sup>143</sup> The dissent identified two ideas put forward by the majority. One idea is to leave the entire matter to the political branches, and the other is that political gerrymanders are as old as the Constitution.<sup>144</sup> Justice Kagan found the suggestion that the issue of gerrymanders should be left to the political branches “so dubious on its face” that a response could be postponed until the end of the dissent.<sup>145</sup> The idea that the long history of partisan gerrymanders justifies complacency about them was rejected by the dissent as “ha[ving] no cause.”<sup>146</sup>

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<sup>137</sup> *Id.* at 2512 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring)).

<sup>138</sup> *Id.* (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015)).

<sup>139</sup> *Id.* (quoting 4 ANNALS OF CONG. 934 (1794)).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (quoting *id.* at 2506 (majority opinion)).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Pointing to technological advances and reliance on big data, the dissent looked at the methodology used by the lower courts and warned that “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.”<sup>147</sup> Because the framework of the dissent was grounded in constitutional values regarding voting and the sovereignty of the people of the United States, the dissent reminded everyone, including the members of the majority, that “someplace along this road, ‘we the people’ become sovereign no longer.”<sup>148</sup>

It is the ability to acknowledge the harms arising from partisan gerrymanders that distinguishes the two opinions. The majority tried to normalize partisan gerrymanders while claiming that they could not be addressed through judicial remedies.<sup>149</sup> The dissent identified and analyzed the harms and found ways to achieve what the majority found to be impossible.<sup>150</sup> It is the framework based on constitutional principles that permitted the dissent to identify and address harms in the interest of democratic governance and the sovereignty of the people. The dissent provided a trenchant summary of its position, stating: “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.”<sup>151</sup> The dissent did not claim to have special insight in stating the effect on individual voters, but instead it found that “[t]his Court has recognized extreme partisan gerrymandering as such a violation for many years.”<sup>152</sup> This practice operates through vote dilution, which the dissent explained as “the devaluation of one citizen’s vote as compared to others.”<sup>153</sup> According to the dissent, vote dilution implicates the Equal Protection Clause of the Fourteenth Amendment—which the dissent stated “we long ago recognized, ‘guarantees the opportunity for equal participation by all voters in the election’ of legislators.”<sup>154</sup> The dissent amplified its reliance on what have become known as the one-

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<sup>147</sup> *Id.* at 2513.

<sup>148</sup> *Id.*

<sup>149</sup> *See id.* at 2494, 2502 (majority opinion).

<sup>150</sup> *See generally id.* at 2509–25 (Kagan, J., dissenting).

<sup>151</sup> *Id.* at 2513.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 2514 (quoting *Reynolds v. Sims*, 377 U.S. 533, 566 (1964)).

person, one-vote cases, observing that the opportunity for equal participation “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.”<sup>155</sup>

The dissent noted that partisan gerrymandering also implicates the First Amendment by inflicting both personal and associational harm.<sup>156</sup> The dissent found that “[b]y diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness.”<sup>157</sup>

The dissent then reminded the majority that “[t]hough 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.”<sup>158</sup> Indeed, the dissent again noted that “the majority never disagrees; it appears to accept the ‘principle that each person must have an equal say in the election of representatives.’”<sup>159</sup> Looking forward to the majority’s discussion of standards applicable to partisan gerrymanders, the dissent observed that, “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.”<sup>160</sup> In sum, the dissent indicated the majority declares defeat prematurely, before it had allowed itself to understand both the issue and the possibility of a reasonable response.

### III. “FAIRNESS” IN DISTRICTING: DEBATING JUDICIAL CAPABILITIES AND THE LOWER COURTS’ DECISIONS

Because the majority and dissent asked different questions at the beginning of their opinions, they focused on very different questions relating to the efforts made to draw congressional district boundaries

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<sup>155</sup> *Id.* (quoting *Reynolds*, 377 U.S. at 555).

<sup>156</sup> *See id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2514–15.

<sup>159</sup> *Id.* at 2515 (quoting *id.* at 2501 (majority opinion)).

<sup>160</sup> *Id.*

in North Carolina and Maryland.<sup>161</sup> Thus, the majority and the dissent came to different conclusions about the opinions of the three-judge district courts in each case.

A. *The Majority Holds That the Cases Are Not Justiciable*

The majority begins with a complete rejection of a role for a federal court in the matters before it in this case, stating:

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.<sup>162</sup>

This introduction to the assessment of the holdings and decisions in opinions by the lower federal courts in the North Carolina and Maryland cases are consistent with the majority’s resolution to focus on the courts and not on the voters in this case. The majority uses this perspective to highlight the inadequacies of the standards and tests used by these courts with respect to each of the claims made in these cases.

1. THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM  
IN THE NORTH CAROLINA CASE

The majority began with the test developed by the district court in North Carolina to evaluate the claim based on the Equal Protection clause of the Fourteenth Amendment.<sup>163</sup> The district court developed a three-part test that required the plaintiffs to establish the state’s “predominant purpose” to dilute the vote of the Democratic Party voters<sup>164</sup> and to establish that such vote dilution is “likely to persist” in subsequent elections.<sup>165</sup> The defendants must also prove

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<sup>161</sup> Compare *id.* at 2494 (majority opinion), with *id.* at 2509 (Kagan, J., dissenting).

<sup>162</sup> *Id.* at 2502 (majority opinion).

<sup>163</sup> See *id.* at 2492–93.

<sup>164</sup> *Id.* at 2502 (citing *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 865 (M.D.N.C. 2018)).

<sup>165</sup> *Id.* (citing *Rucho*, 318 F. Supp. 3d at 867).

that the discriminatory effects are “attributable to a legitimate state interest or other neutral explanation.”<sup>166</sup> The majority dismissed each of the elements of this test briskly with cryptic conclusory pronouncements.<sup>167</sup> With respect to the first element, the majority asserted without further explanation that “determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper.”<sup>168</sup> Perhaps by way of explanation, the majority then asserts that “[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when the permissible intent ‘predominates.’”<sup>169</sup> This approach raises obvious questions that are not addressed. What makes seeking partisan advantage in this particular way constitutionally permissible? The issue here is not just one of a constitutionally permissible intent—partisan advantage—but that inflicting the harm on targeted voters and on democracy itself goes far beyond some unspecified partisan intent. This rephrasing of a question without appearing to have done so is part of the game plan that the majority devised. A political party that sends a solicitation for funds does not inflict harm on other voters in the same way that it does when it implements a partisan gerrymander to suppress voting. What other kinds of voter suppression activities would the majority be willing to claim might be consistent with the Constitution? It mentions nothing else in this opinion. Would any redistricting effort stop a modest or limited partisan advantage if it has the political authority and the political power to define a partisan advantage that would elect members of a particular political party? How persuasive is the majority’s earlier suggestion that partisan gerrymandering does not violate the Constitution?<sup>170</sup>

The second factor, the likelihood of persistent dilution of the votes of voters from the non-favored party—the party that did not draw the district boundaries at issue—is dismissed as “prognostications as to the outcome of future elections.”<sup>171</sup> The majority is

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<sup>166</sup> *Id.* (citing *Rucho*, 318 F. Supp. 3d at 868).

<sup>167</sup> *See id.* at 2502–04.

<sup>168</sup> *Id.* at 2502–03.

<sup>169</sup> *Id.* at 2503.

<sup>170</sup> *See id.* at 2499–500.

<sup>171</sup> *Id.* at 2503. The majority asserts that

certainly correct that voters can change their preferences and their votes in future elections, but it is noteworthy that the examples given refer to examples not related to the redistricting plans at issue in this case.<sup>172</sup> Even here, however, the main problem is that the Court is concerned more with the possible burden on the judges hearing these cases rather than on the voters supporting candidates in whose favor they can cast only diluted votes.<sup>173</sup> After a rather scattershot parade of imponderables, the majority concludes that “asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.”<sup>174</sup> The majority never considers the possibility that what seems such a daunting task might well be made manageable by adequate fact-finding based on contemporary comparables in the hands of the district courts in these cases.

The majority summarily rejects the usefulness of the third prong—the defendants’ showing of a legitimate reason for the discriminatory effects—stating that it “just restates the question.”<sup>175</sup> The majority never seemed to consider that this question was intended as the basis of a balancing test that applied to the relative harms affecting certain voters and that, in these circumstances, it would aid in understanding the context of the factors at issue.

## 2. THE FIRST AMENDMENT CLAIMS IN BOTH CASES

These cases also involved a three-part test related to the First Amendment that the majority rejected. The test is based on “proof of intent to burden individuals based on their voting history or party

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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.

*Id.*

<sup>172</sup> *Id.* at 2503–04. Remarkings with respect to the redistricting efforts at issue in *Bandemer* and *Vieth*: “In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong.” *Id.* at 2503. Whatever else one can conclude with respect to these two examples, it is certainly true that they occurred before the technological and data innovations that characterize current gerrymandering efforts.

<sup>173</sup> *See id.* at 2502–04.

<sup>174</sup> *Id.* at 2503–04.

<sup>175</sup> *Id.* at 2504.

affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden.”<sup>176</sup>

The majority began its critique of this test with an assertion that form controls substance and that form alone is sufficient.<sup>177</sup> In its critique, the majority opinion stated that “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.”<sup>178</sup> There is no such provision in the plan because a successful gerrymander makes it unnecessary. If a gerrymander is done successfully, it can suppress the voters and dilute votes without leaving fingerprints, apart from the boundaries, which define the voters included or excluded, or in gerrymandering language, “packing and cracking.”<sup>179</sup> Nevertheless, the majority concluded complacently that “[t]he First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.”<sup>180</sup>

The majority was similarly dismissive of the second prong of the First Amendment test, which involved the “actual burden” on voters.<sup>181</sup> The majority concluded that “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.”<sup>182</sup>

As for the third prong of the test, the causal link between the intent to burden particular voters and an actual burden found, the majority focused primarily on its critique of anecdotal evidence and examples, suggesting that this causal link requires very little evidence of an actual burden.<sup>183</sup> In an indirect reference to the causal link, the majority again invoked the idea of a “constitutional partisan gerrymander”<sup>184</sup> as a phantom it has summoned from an apparently

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<sup>176</sup> *Id.*

<sup>177</sup> *See id.*

<sup>178</sup> *Id.*

<sup>179</sup> *See id.* at 2513–14 (Kagan, J., dissenting).

<sup>180</sup> *Id.* at 2504 (majority opinion).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 2504–05.

<sup>184</sup> *See id.* at 2504.

limitless reservoir of concepts that themselves have no grounding in the Constitution or election law statutes or regulations. The majority is simply attempting to create a phrase that it may hope it can transform into a constitutional principle. In other words, the majority is simply making this up and telling us to believe it and act accordingly. It is at times like this that the majority should remember that “the people” of the United States are sovereign and no institution of government is the source of sovereign authority. This is a remarkable enterprise in a case that claims it is acting in the interest of judicial restraint.

### 3. THE DISSENT’S TEST

The majority had little to say with respect to the dissent’s test, and most of what it does say is dismissive.<sup>185</sup> It begins with the idea that the criteria must be the same for all states during all time periods.<sup>186</sup> This sudden appearance of uniformity is something of a surprise, a tardily summoned rabbit emerging briefly from a handy hat. This is bolstered, if that is the word, by the observation that “[t]he degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves.”<sup>187</sup> Why not? Who would be a better source of insight into the intentions and expertise involved?

The majority also claimed that the dissent’s test has no response to the question of how much is too much.<sup>188</sup> However, the majority certainly does not refer to the entire response of the dissent, although it does seem to have time and space for a bit of gloating over what it interprets as the dissenters’ pique over what it sees as an unsatisfactory response.<sup>189</sup> But, at this point the majority seems to have depleted its reserve of equanimity and has no substantive insights of its own to offer. The majority responded to the dissent’s answer— “[t]his much is too much”<sup>190</sup>—by complaining “[t]hat is not even trying to articulate a standard or rule.”<sup>191</sup>

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<sup>185</sup> See *id.* at 2505–06.

<sup>186</sup> *Id.* at 2505.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* (citing *id.* at 2521 (Kagan, J., dissenting)).

<sup>191</sup> *Id.*

While the majority agreed with the dissent's observation that matters of degree are left to the courts in other instances, it responded by trying to distinguish partisan gerrymandering from these other instances, stating: "[j]udges began with a significant body of law about what constituted a legal violation . . . . Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion."<sup>192</sup> The sleight of hand here again illuminates the majority's insistence that, in the case of partisan gerrymanders, the guidance must come from the Constitution,<sup>193</sup> and that the guidance from the election law cases arising from *Baker*, which freed districting law from the political question doctrine, was not relevant. This, too, illustrates another strategy in the game plan. As it does throughout the opinion, the majority designs a series of narrowly crafted boxes and then insists that no guidance from one small box has any relevance to the contents of any of the other small boxes. An opinion without reference to values is perfectly positioned to deny that there is no relevant guidance.

The majority concludes its brief comments on the dissent's test by pointing out that the only reference in the Constitution "that specifically addresses the matter assigns it to the political branches."<sup>194</sup> It is entirely unclear what the majority is doing here. The language in Article I, Section 4, Clause 1 of the Constitution deals with elections for members of the House of Representatives and refers only to "Times, Places and Manner."<sup>195</sup> These issues are referred to the state legislatures, although Congress may intervene as it sees fit.<sup>196</sup> What is not made clear, although every member of the majority undoubtedly has a very clear understanding of this, is that areas of responsibility are not assigned to the judicial branch in the same way they are assigned to the legislative branch.<sup>197</sup> Courts do not define their own agendas based on similar express allocations of authority. Instead, courts hear cases within their jurisdiction as defined in

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<sup>192</sup> *Id.* at 2506.

<sup>193</sup> *See id.*

<sup>194</sup> *Id.*

<sup>195</sup> *See* U.S. CONST. art. I, § 4, cl. 1.

<sup>196</sup> *See Id.*

<sup>197</sup> Article I "enumerates" the powers of Congress. U.S. CONST. art. I, § 1. Article II references three tasks of the Executive Branch as well as mentioning certain other duties and responsibilities. *See* U.S. CONST. art. II.

applicable federal law, including federal statutes.<sup>198</sup> Such definitions of judicial jurisdiction are not limited to the terms of the Constitution because Congress has the power to statutorily create judicial jurisdiction through the “Laws of the United States” and the Court’s precedents further define judicial jurisdiction.<sup>199</sup> Yet, in this case, the majority was not interested in expanding the applicable precedents to include cases on voting rights or the conduct of elections.<sup>200</sup>

#### 4. VIOLATION OF THE ELECTIONS CLAUSE AND ELECTION BY THE PEOPLE IN THE NORTH CAROLINA CASE

The North Carolina district court held that “the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts.”<sup>201</sup> It also held that “partisan gerrymandering infringes the right of ‘the People’ to select their representatives.”<sup>202</sup> The majority then asserted that this holding by the district court was inconsistent with the language in Justice Kennedy’s concurring opinion in *Vieth*.<sup>203</sup> At this point it would be useful to consider that a plurality opinion, like that in *Vieth*,<sup>204</sup> is not necessarily binding precedent, and it, thus, arguably does not bind the North Carolina district court.<sup>205</sup> The majority seems somewhat miffed that, in its words, “[t]he District Court nevertheless asserted that partisan gerrymanders violate ‘the core principle of [our] republican government’ preserved in Art. I, § 2, ‘namely, that the voters should choose their

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<sup>198</sup> See U.S. CONST. art. III, § 2.

<sup>199</sup> See *id.*; *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>200</sup> *Rucho*, 139 S. Ct. at 2508.

<sup>201</sup> *Id.* at 2506 (quoting *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 937 (M.D.N.C. 2018)).

<sup>202</sup> *Id.* (citing *Rucho*, 318 F. Supp. 3d at 938).

<sup>203</sup> See *id.*

<sup>204</sup> See *id.* at 2498. See generally *Vieth v. Jubelirer*, 541 U.S. 267, 285–86 (2004) (plurality opinion).

<sup>205</sup> See, e.g., *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’”(quoting *Greg v. Georgia* 428 U.S. 153, 169 n.15 (1976))).

representatives, not the other way around.”<sup>206</sup> The majority’s game plan of subdividing precedents and concepts into slivers of reasoning confined to narrow boxes offers no possible response to this kind of reasoning.

The Chief Justice responded by identifying another small box defined by the Guarantee Clause of Article IV, Section 4.<sup>207</sup> This stratagem is perfectly consistent with the core purpose of the majority opinion because “[the] Court has several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim.”<sup>208</sup> The majority offers no further insight into why the Guarantee Clause might be a more suitable and appropriate claim than the language in Article I.<sup>209</sup>

#### B. *The Dissent Offers a Test Based on the Lower Courts’ Opinions*

The dissent seems perplexed by the majority opinion. In an extended section dealing with the lower courts’ development of tests of partisan gerrymanders and the dissent’s development of how to apply the lower courts’ approaches more broadly, the dissent begins by remarking:

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.<sup>210</sup>

The dissent highlights the two problems identified by the majority. “First and foremost” is the lack of a neutral baseline from which to

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<sup>206</sup> *Rucho*, 139 S. Ct. at 2506 (citing *Rucho*, 318 F. Supp. 3d at 940)).

<sup>207</sup> *See id.*; *see also* U.S. CONST. art. IV, § 4.

<sup>208</sup> *Rucho*, 139 S. Ct. at 2506 (citing *Rucho*, 318 F. Supp. 3d at 940)).

<sup>209</sup> *See id.*

<sup>210</sup> *Id.* at 2515 (Kagan, J., dissenting).

measure injury.<sup>211</sup> Because the plaintiffs want some form of proportional representation, which is not required under the Constitution, the federal courts are left in the position of having to define political fairness.<sup>212</sup> The second and “determinative” question is “[h]ow much is too much?” gerrymandering.<sup>213</sup> Claiming that “no ‘discernible and manageable’ standard is available,” the majority expresses a concern that “courts could willy-nilly become embroiled in fixing every districting plan.”<sup>214</sup>

The dissent agreed that “[r]espect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.”<sup>215</sup> But the dissent insisted that the majority’s declaration of the impossibility of a constructive role for the judiciary was ill-advised and premature.<sup>216</sup> It concluded that,

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) . . . . 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.<sup>217</sup>

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<sup>211</sup> *Id.*

<sup>212</sup> *See id.* at 2499–500 (majority opinion).

<sup>213</sup> *Id.* at 2515 (Kagan, J., dissenting).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 2516.

<sup>216</sup> *See id.*

<sup>217</sup> *Id.* The dissent references three district court opinions, each of which was struck down by the Supreme Court. *Id.*

The dissent stated that the majority's critiques of the lower courts' approaches revealed "a saddening nonchalance about the threat such districting poses to self-governance."<sup>218</sup> The dissent rejected the majority's view that "judicial policing in this area cannot be either neutral or restrained" and concluded that "[t]he lower courts' reasoning . . . proves the opposite."<sup>219</sup>

### 1. A STANDARD CRAFTED BY THE LOWER COURTS

The dissent began by suggesting, indirectly but forcefully, that the majority could not see or understand the standard developed by the lower courts because it chose not to see it.<sup>220</sup> It claimed that the majority disregarded the common features of the lower courts' test because it "disaggregates the opinions below, distinguishing the one from the other and then chopping up each into 'a number of 'tests.'"<sup>221</sup> The dissent accused the majority of deliberately misreading the lower court cases and deliberately misinterpreting these approaches to develop a common standard.<sup>222</sup>

The dissent explained that both of the lower courts focused on "the harm of vote dilution," which the North Carolina court analyzed under the Fourteenth Amendment and the Maryland court analyzed under the First Amendment.<sup>223</sup> The dissent then asserted that the lower courts used "basically the same three-part test" based on intent, effects, and causation to determine whether plaintiffs had made out a vote dilution claim.<sup>224</sup> This vote dilution claim required showing that state officials' "predominant purpose" was to "'entrench [their party] in power' by diluting the votes of citizens favoring its rival."<sup>225</sup> In addition, the plaintiffs must establish that the gerrymandering efforts have diluted their votes "'substantially."<sup>226</sup> If the plaintiffs make these showings of "predominant purpose" and

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See id.* at 2515–16.

<sup>221</sup> *Id.* at 2516.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* (quoting *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 864 (M.D.N.C. 2018) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015))).

<sup>226</sup> *Id.* (quoting *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (D. Md. 2018)).

“substantial[.]” vote dilution, then the State must offer a “legitimate, non-partisan justification to save its map.”<sup>227</sup>

The dissent then concluded that the test developed by the lower courts looks “utterly ordinary,” at least to lawyers, and that “[i]t is the sort of thing courts work with every day.”<sup>228</sup> Justice Kagan challenged the idea that the task at hand exceeded the judicial competence of the federal courts and thus rejected the majority’s holding that partisan gerrymandering cases are nonjusticiable.<sup>229</sup>

The dissent offered both a detailed analysis of the application of this standard to North Carolina and Maryland and challenged the critique of these cases by the majority. In both cases, state officials openly declared partisan purposes for the maps that were drawn at their direction and under their supervision.<sup>230</sup> To the dissent, these unabashed public statements satisfied the “predominant purpose” prong of the test of a partisan gerrymander.<sup>231</sup> It then stated that it found the majority’s remarks about the purpose analysis “discomforting.”<sup>232</sup> It was not a disagreement over the lower courts’ findings but an assertion that “state officials’ intent to entrench their party in power is perfectly ‘permissible,’ even when it is the predominant factor in drawing district lines.”<sup>233</sup> The dissent stated bluntly and unequivocally: “But that is wrong.”<sup>234</sup> The dissent explained that it may be true in some instances, such as “when state officials used political data to ensure rough proportional representation between the two parties,”<sup>235</sup> 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

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<sup>227</sup> *Id.* (citing *Rucho*, 318 F. Supp. 3d at 867). “Neither North Carolina nor Maryland offered much of an alternative explanation for the evidence that the plaintiffs put forward. Presumably, both States had trouble coming up with something. Like the majority . . . I therefore pass quickly over this part of the test.” *Id.* at 2516 n.2.

<sup>228</sup> *Id.* at 2516–17.

<sup>229</sup> *Id.* at 2519–20.

<sup>230</sup> *Id.* at 2517.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (citing *Gaffney v. Cummings*, 412 U.S. 735, 738 (1973)).

intended gain is slight.”<sup>236</sup> The dissent distinguished these two situations from the situation in the court below, explaining, “[b]ut when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far.”<sup>237</sup> The dissent then addressed the cases before the Court directly: “But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims, 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.”<sup>238</sup>

The dissent then addressed the consequences of the activity, focusing in particular on whether it substantially diluted the plaintiffs’ votes.<sup>239</sup> The dissent noted that the majority had not focused on the “evidence the District Courts relied on” and then noted that the evidence, particularly from North Carolina, “is the key to understanding both the problem these cases present and the solution to it they offer.”<sup>240</sup> The dissent explained the importance of this evidence as follows: “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.”<sup>241</sup> The approach, labelled the “extreme outlier approach,” used advanced computer technology “to randomly generate a large collection of districting plans” that reflected a state’s geographical and political geography and meet its declared districting criteria, except for partisan gain.<sup>242</sup> The computer program then used actual precinct-level votes from past elections to determine a partisan outcome.<sup>243</sup> Justice Kagan explained how the resulting maps can be used to find and cure partisan gerrymanders by creating a continuum of, for example, one thousand maps, ranging from maps most

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<sup>236</sup> *Id.* (citing *Vieth v. Jubelirer*, 541 U.S. 267, 285–86 (2004) (plurality opinion)).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* (citing *Vieth*, 541 U.S. at 312–13 (Kennedy, J., concurring)) (noting that Justice Kennedy predicted this development).

<sup>242</sup> *Id.* at 2517–18.

<sup>243</sup> *Id.* at 2518.

favorable to Republicans to maps most favorable to Democrats.<sup>244</sup> This allows a court to identify the “median outcome” and compare it to the maps at each tail of the continuum, which are maps representing partisan extremes and the most significant vote dilution.<sup>245</sup> Using this approach showed that the North Carolina map generated by the State “was an out-out-out-outlier.”<sup>246</sup> The dissent concluded that

this distribution of outcomes provides what the majority says does not exist—a neutral comparator for the State’s own plan . . . . It essentially answers the question: In a State with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?<sup>247</sup>

Maryland involved only one district requiring “only a minimal change,” but the “Democratic officials reconfigured the entire district.”<sup>248</sup> The Maryland district court found that “the gerrymandered Maryland map substantially dilute[d] Republicans’ votes.”<sup>249</sup>

Noting that the majority dismissed these findings as “‘prognostications’ about the future, in which no one ‘can have any confidence,’” the dissent responded with a ringing endorsement of the methods used by the two federal district courts and an unmistakable repudiation of the majority’s reasoning.<sup>250</sup> The dissent concluded:

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

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<sup>244</sup> *Id.*

<sup>245</sup> *See id.* (citing Brief for *amicus curiae* Eric S. Lander in Support of Appellees at 7–22, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422)).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* n.3.

<sup>248</sup> *Id.* at 2518–19.

<sup>249</sup> *Id.* (citing *Benisek v. Lamone*, 348 F. Supp. 3d 493, 519–20 (D. Md. 2018)).

<sup>250</sup> *Id.* at 2519.

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 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.<sup>251</sup>

This summation of the methodological challenges posed by the partisan gerrymander cases and the resourcefulness of the lower federal courts in addressing these challenges also served as a harsh rebuke of the majority opinion. There was more to come as the dissent detailed its objections to the majority's claim that judicial oversight of partisan gerrymandering cases would not be either "politically neutral" or "manageable."<sup>252</sup>

The dissent was unpersuaded by and somewhat offended at what seems to have been portrayed as a lack of effort and engagement by the majority. The dissent found that 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."<sup>253</sup> The dissent answered its own question with the observation that judicial oversight "is not only possible; it's been done."<sup>254</sup> It then applies this insight to both neutrality and manageability.

## 2. JUDICIAL NEUTRALITY

The dissent pointed out that the district court never had to address issues of fairness because it never had to "choose among competing visions of electoral fairness."<sup>255</sup> The lower courts "did not try to compare the State's actual map to an 'ideally fair' one" but "[i]nstead, they looked at the difference between what the State did

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 2520. The dissent illustrated this characterization of the majority opinion by noting: "To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs . . .)." *Id.* at 2519–20.

<sup>254</sup> *Id.* at 2520.

<sup>255</sup> *Id.*

and what the State would have done if politicians hadn't been intent on partisan gain."<sup>256</sup> Rather, "the courts' analyses used the State's own criteria for electoral fairness—except for naked partisan gain."<sup>257</sup>

In the case of North Carolina, all the maps took account of the "State's districting priorities" as well as its "political" and "legal landscape."<sup>258</sup> The dissent explained that:

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.<sup>259</sup>

The same process occurred in Maryland, where, again, the district court "analyzed the gerrymander's effects in much the same way—not as against an ideal goal, but as against an *ex ante* baseline."<sup>260</sup> The dissent concluded that in the Maryland case,

[t]he 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.<sup>261</sup>

As discussed above, the majority simply remarked that this "does not make sense" because the criteria will vary over time.<sup>262</sup>

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 2521.

<sup>262</sup> *Id.* at 2505 (majority opinion).

The dissent is having none of this concern about change over time, responding crisply:

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.<sup>263</sup>

The dissent took this as yet another opportunity to point out that the majority does not understand the facts or the applicable law in these two cases.<sup>264</sup> It pointed out that “the majority’s analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation.”<sup>265</sup> The dissent concluded that those two demands are not the same and only partisan gerrymandering is at issue in this case.<sup>266</sup>

### 3. HOW MUCH IS TOO MUCH?

As discussed above, the majority insisted that a court could not determine how much partisanship is too much.<sup>267</sup> The dissent had little patience for this reasoning. It pointed to the two cases before the Court and asked: “How about the following for a first-cut answer: This much is too much.”<sup>268</sup> The majority had dismissed this response as “not . . . serious.”<sup>269</sup> The majority perhaps did not fully appreciate the implications of its dismissal of the dissent’s standard and its application as “not serious.” The dissent explained:

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<sup>263</sup> *Id.* at 2521 (Kagan, J., dissenting).

<sup>264</sup> *Id.* at 2523.

<sup>265</sup> *Id.* at 2521.

<sup>266</sup> *Id.*

<sup>267</sup> *See id.* at 2499 (majority opinion).

<sup>268</sup> *Id.* at 2521 (Kagan, J., dissenting).

<sup>269</sup> *Id.* at 2504 (majority opinion).

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 . . . . 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 in 2011 was responsible for the largest partisan swing of a congressional district in the country . . . . 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.<sup>270</sup>

Alternatively, the dissent suggested that the majority could have focused on the “‘predominant’ purpose and ‘substantial’ effects.”<sup>271</sup> The dissent noted: “Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases.”<sup>272</sup> The dissent concluded that purpose analysis “would be no harder here than in other contexts.”<sup>273</sup>

The dissent was similarly pointed in its dismissal of the idea that courts cannot determine whether a particular district map “‘substantially’ dilutes the votes of a rival party’s supporters” from the baseline described by the dissent.<sup>274</sup> As the dissent noted, courts make such determinations “all the time.”<sup>275</sup> The dissent observed that, “[i]f courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.”<sup>276</sup> The dissent pointed out, in this case, “[t]hat 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.”<sup>277</sup>

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<sup>270</sup> *Id.* at 2521–22 (Kagan, J., dissenting).

<sup>271</sup> *Id.* at 2522.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 2523.

In a general condemnation of the majority's opinion, the dissent concluded:

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 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.<sup>278</sup>

The majority did not cheer. It accomplished, at least for a moment or two in judicial history, what the plurality in *Vieth* failed to accomplish<sup>279</sup>—it achieved a 5–4 majority for treating partisan gerrymanders as nonjusticiable political questions not subject to judicial review. The Court had been led out of the political thicket by a willful, skillful, and crafty Chief Justice. But where did Chief Justice Roberts lead the Court and where did he leave the law?

#### IV. A REPUBLIC, IF YOU CAN KEEP IT: CONSIDERING HOW *RUCHO* ENDED

*Rucho* ended with the unobtrusively radical outcome that the beginning foreshadowed. It ended as every tragedy ends—in an inexorable place that had been the whole purpose of the enterprise. *Rucho* ends by choosing to remove the Court from its constitutional duty to ensure that the people choose their representatives and that these representatives do not become rulers who are able to choose their own voters. Trying to explain why the majority did this is

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 2498 (majority opinion).

beyond the scope of this Article. The reason for doing it matters less than the fact that the majority did it. Chief Justice Roberts used his estimable skills as an advocate to devise ways to discuss partisan gerrymanders without discussing voters or voting, and to discuss the dangers he might have feared would befall courts without discussing the appropriate role of the courts. He invoked the Constitution without discussing the constitutional values at stake in this case. He managed to discuss partisan gerrymanders from a bygone era without acknowledging the far greater precision that modern technology and contemporary databases make possible and without ever acknowledging the constitutional harm that results from the changing circumstances. Chief Justice Roberts wrote an opinion about standards unrelated to behavior or consequences and constitutional values.

Chief Justice Roberts cannot claim that he did not know what he was doing. He clearly knew exactly what he was doing. The final section of his opinion begins with the observation: “Excessive partisanship in districting leads to results that reasonably seem unjust.”<sup>280</sup> This dizzying mixture of defensiveness and condescension was followed by Chief Justice Roberts quoting *Arizona State Legislature v. Independent Redistricting Commission*, saying that such gerrymandering is “incompatible with democratic principles.”<sup>281</sup> Nevertheless, Chief Justice Roberts then announced that this conclusion “does not mean that the solution lies with the federal judiciary.”<sup>282</sup> What problem is he discussing? Not the voting rights of American citizens, which remains nowhere to be found in the majority’s reasoning. Instead of the rights of voters, the majority insisted that “[f]ederal 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.”<sup>283</sup> The Chief Justice then castigated the appellees and the dissent—the appellees apparently for seeking justice and the dissent for its reading of the Constitution.<sup>284</sup> The Chief

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<sup>280</sup> *Id.* at 2506.

<sup>281</sup> *Id.* (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 791 (2015)).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 2507.

<sup>284</sup> *Id.* (citations omitted).

Justice, who found no harm in partisan gerrymanders, catalogued the harms arising from any view but his own in this case:

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.<sup>285</sup>

This brief reference to the burden on the federal courts and the fleeting reference to harms arising from any attempt to address these burdens is the only rationale for this extraordinary opinion. The voters and the role of voting remain unaddressed. Indeed, to have addressed such issues would have been to admit their importance, and this, in turn, would have raised inconvenient questions about access to justice.

At this point, the majority’s search for a rationale for their entire approach gave way to a self-protective defensiveness. The majority asserted: “Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void.”<sup>286</sup> What follows is a remarkable catalogue of options that have not proved successful by actors other than the federal judiciary.<sup>287</sup> Certain of these options depend on strategies that the tactically narrow focus of the majority opinion had not considered when analyzing the role of the federal courts, while

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *See id.* at 2507–08.

some have been recognized as exercises in political futility from the beginning. The majority suggested that the states should address partisan gerrymanders through legislation, by establishing independent commissions, by appointing a state demographer, or by prohibiting actions taken for the purpose of partisan advantage.<sup>288</sup>

The majority, having failed to discuss the long line of districting cases decided by the federal courts in response to *Baker*, stated approvingly that some states “have mandated at least some of the traditional districting criteria for their mapmakers,” something that the majority found did not apply to federal action relating to partisan gerrymanders.<sup>289</sup> The majority pointed to actions taken by state courts and suggested that the state courts benefit from more focused legislation than that available to the federal courts, observing that “[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”<sup>290</sup> The majority also noted that the Constitution gave Congress authority to amend actions taken by states and listed several bills that have never attracted strong support in Congress.<sup>291</sup> Indeed, the majority took the position that “the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.”<sup>292</sup> But, the majority never admitted that this admission strongly suggests that the broad power of judicial review provides constitutional support for the federal courts to play their traditional role in this area just as they did in other voting rights matters. From this perspective, the majority’s final defense of what it had done lacks persuasive power. The majority insists that “[n]o one can accuse this Court of having a crabbed view of the reach of its competence.”<sup>293</sup> That is exactly the point. Why did a Court that does not have a crabbed view of the reach of its competence as a general matter write an opinion based on a crabbed view of its competence in dealing with partisan gerrymanders? The question that remains unanswered is why the majority insisted that it had no authority to pursue justice in a matter at the core of the constitutional system.

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 2507.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 2508.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

The dissent ended where it had begun, with its reasoning firmly grounded in constitutional values. But the dissent proved to be decidedly more practical than the majority about locating these foundational values in contemporary controversies and devising solutions that, while far from perfect, were designed to be far better than abdication or any other operational approach to the challenge of high-tech, big data partisan gerrymanders.<sup>294</sup> The dissent understood in ways that the majority refused to admit that the elected politicians in the executive and legislative branches would prioritize their own careers over the future of the republic. The dissent understood that Benjamin Franklin was speaking in practical terms when he described the new government as “a republic[,] if you can keep it.”<sup>295</sup> The dissent also understood that “keeping” the republic would always require the active support of the judicial branch, observing that,

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians’ districting decisions[,] . . . recognizing as we established the one-person-one-vote rule that “our oath and our office require no less.” . . . 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.<sup>296</sup>

The dissent then made short work of the various reform opportunities the majority belatedly discovered. Noting that the majority highlighted a list of bills that had, over the years, been filed in Congress, the dissent observed that “what all these *bills* have in common

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<sup>294</sup> See *id.* at 2520–22 (Kagan, J., dissenting).

<sup>295</sup> *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 618 (1906).

<sup>296</sup> *Rucho*, 139 S. Ct. at 2523 (Kagan, J., dissenting) (citations omitted).

is that they are not *laws*.”<sup>297</sup> The dissent found the Chief Justice’s comments on state courts “perplexing,” leading it to ask, “what do those courts know that this Court does not?”<sup>298</sup> The dissent concluded that “[w]e could have, and we should have” done what the lower courts had already done.<sup>299</sup> The dissent then at some length detailed the contributions made by the lower federal courts.<sup>300</sup> The dissent concluded with a note of disappointment at what it regarded as a failure by the Court, observing:

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.<sup>301</sup>

Then, Justice Kagan signed her opinion: “With respect but deep sadness, I dissent.”<sup>302</sup>

#### CONCLUSION

It is far from clear that the majority opinion can or will survive to shape the law in this area. Its very reliance on the strategic and tactical stratagems of its framework and its game plan are also a source of potential vulnerability in future cases challenging the treatment of partisan gerrymanders as political questions. As more lawyers and judges develop greater understanding of the mechanisms of modern gerrymandering technology, the day is likely to come—perhaps sooner rather than later—that a majority can be found among justices who understand the technology and have the will to address the harms of partisan gerrymandering. Until that time, the majority opinion will deny access to justice to the individual voters who are harmed and, thereby, undermine democracy. In

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<sup>297</sup> *Id.* at 2524.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 2524–25.

<sup>301</sup> *Id.* at 2525.

<sup>302</sup> *Id.*

an era of politicians who accept no boundaries, courts that accept no responsibilities are a misfortune for democracy.