A REPUBLIC, IF THE COURTS CAN KEEP IT?

LAURENCE CLAUS*

This contribution to a conference celebrating Andrew Coan's *Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making* (Harvard Univ. Press, 2019) makes three primary points. First, I explain why the Supreme Court's flawed reasoning in *INS v. Chadha* supports Coan's judicial capacity theory of Supreme Court decision-making. Second, I show why judicial capacity concerns do not support the Supreme Court's decision in *Rucho v. Common Cause* to treat the constitutionality of partisan gerrymandering as a nonjusticiable political question. The Court could and should have announced a bright line rule against any partisan calculation in districting decision-making, and let lower courts adjudicate the pure question of fact that such a rule would raise. Third, I argue that the Court should have identified a nonjusticiable political question not in *Rucho,* but, as other recent scholarship has suggested, in *Shelby County v. Holder*. Congress's provision for preclearance in the Voting Rights Act serves not only to uphold the promises of the Fourteenth and Fifteenth Amendments, but also to fulfill the national government's constitutional duty to guarantee every state in the Union a republican form of government. The Court has long held that it will not second-guess the judgment of the elected branches about what republican form requires.

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INTRODUCTION

What a privilege and pleasure it is to share in this discussion of Andrew Coan's *tour de force*. My contribution to the celebration first reflects on the separation of powers issues to which Coan applies his judicial capacity model of Supreme Court decision-making. I then consider how judicial capacity affected the Court's decision last term to call the constitutionality of partisan gerrymandering a nonjusticiable political question and ask whether judicial capacity truly posed the

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obstacle to adjudication that the Court's majority appears to have thought it did. I close by contending that another of the Court's recent cases on equal protection and voting presented a much more appropriate circumstance for invoking the political question doctrine.

I. JUDICIAL CAPACITY TO SUPERVISE LEGISLATURE-EXECUTIVE RELATIONS

As Coan observes, the Supreme Court's efforts to implement a separation of powers are complicated by the fact that "it is exceedingly difficult to draw a clear distinction between legislative power and executive power."[1] Even without broad explicit delegations of rulemaking power from Congress to the so-called executive departments and agencies, executing existing law through large organizations would involve making more law, if only to keep execution consistent. On the other hand, Congress itself is an executive body in relation to the Constitution—Congress's acts execute the powers conferred upon it by the law of the Constitution. Yet the Constitution's insistence that "[a]ll legislative Powers herein granted," "the executive Power," and "the judicial Power" be assigned to Congress, the President, and the courts, respectively, was not an exercise in tautology.[2] Taking their cue from Montesquieu, the American founders thought they were investing three different kinds of power in different institutions.[3] What is to be done, when this cannot be?

Coan's account of how the Supreme Court has handled broad Congressional delegations of lawmaking power to executive institutions and extensive Congressional efforts to control how those institutions govern illuminates an obverse relationship. As Coan recounts, the Court has largely waved through both Congressional endeavors, and in applying his judicial capacity model, he shows convincingly why the Court has had little choice but to do so.[4] Rather than police a boundary that reserves a lot more lawmaking to Congress and another set of boundaries that leave executive institutions a lot less supervised by Congress, the Court has avoided the avalanche of litigation that those boundaries would have invited. Instead, the Court has let Congress clean up after itself. Congress can protect its own lawmaking primacy by policing how the executive goes about exercising powers that Congress delegates. Coan shows why

1. ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 96 (2019).

2. U.S. CONST. art. I, § 1.; *id.* art. II, § 1; *id.* art III, § 1. *Cf.* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

3. Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. 419, 429, 442–45 (2005).

4. COAN, *supra* note 1, at 91–99.

this answer makes sense in practice. But it makes sense in theory too. It would be the right answer even if the Court were not constrained by limited adjudicative capacity.

The liberty-promoting value of a separation of powers lies in distributing power among power-hungry *people*, not abstract institutions. Congress is intrinsically a much safer repository of power than a solo chief executive because Congress consists of many minds, many egos, checking and balancing one another. The founders' core reason for creating a separate, singular chief executive was Montesquieu's reason—that some governing needs to be done quickly.[5] The safeguards against abuse of power supplied by a multi-member multi-chamber legislative structure leave little scope for swift decision-making. That is no reason not to let Congress deploy its cumbersome processes to supervise the executive, so long as they do not paralyze the executive. But the case for Coan's judicial capacity explanation of the Court's separation of powers jurisprudence is made stronger by the Court's occasional choice to indulge in unnecessary boundary drawing where it can do so without overloading itself. An egregious example of this is *INS v. Chadha*.[6] If the Court is going to let Congress delegate sweeping legislative powers to executive institutions, why stop Congress from vetoing individual exercises of those legislative powers? Letting either House of Congress veto executive lawmaking helps protect Congressional legislative primacy in general, and bicameralism in particular. If either House of Congress can say no to new statutes, why shouldn't either House of Congress be able to say no to new executive lawmaking that is purportedly done pursuant to old statutes? Letting Congress keep reins on the horses it has set in motion seems especially desirable if the Court is going to hold its own reins loosely. *Chevron* deference,[7] which also seems to fit the judicial capacity model well, may concert with *Chadha* to concentrate power dangerously in executive institutions. A Court that was waving through Congressional delegations and allowing other modes of Congressional supervision pursuant to an

5. *See* 1 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. 11, ch. 6, 222 (Nugent translation, 2nd ed., 1752) (1748). ("The executive power ought to be in the hands of a monarch; because this branch of government, which has always need of expedition, is better administered by one than by many . . . ."); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 65 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] ("Mr. Wilson moved that the Executive consist of a single person. . . . A considerable pause ensuing and the Chairman asking if he should put the question, Docr. Franklin observed that it was a point of great importance and wished that the gentlemen would deliver their sentiments on it before the question was put. . . . Mr. Wilson preferred a single magistrate, as giving most energy dispatch and responsibility to the office.") (Madison's Notes, June 1, 1787); *id.* at 70 (King's Notes, June 1, 1787); *id.* at 97 (Madison's Notes, June 4, 1787); *id.* at 105 (Yates's Notes, June 4, 1787); *id.* at 106–07 (King's Notes, June 4, 1787).

6. 462 U.S. 919 (1982).

7. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 468 U.S. 837 (1984).

overarching and coherent theoretical vision would have decided *Chadha* differently. Justice Powell's concurrence in the judgment identified the true constitutional problem with the particular exercise of one-House veto power in *Chadha*. Vetoing a lawful executive decision not to deport a particular individual amounted to deciding to deport a particular individual.[8] The Constitution calls for Congress to write the rules of the game, not decide the fate of particular players. That vision is reflected in the Constitution's prohibition of bills of attainder.[9] Nothing in that principle speaks to situations where execution involves writing more rules of the game. Condemning what one House of Congress did in *Chadha* need not and should not have involved condemning one-House vetoes of lawmaking acts that Congress could certainly have chosen to do itself. The Court's discordant combination of decisions on delegation and supervision is better explained by Coan's judicial capacity model.

II. JUDICIAL CAPACITY TO SUPERVISE ELECTION OF LEGISLATURES AND EXECUTIVES

Last term, the Supreme Court, by majority, invoked the related constraints of judicial capacity and judicial competence when calling partisan gerrymandering a nonjusticiable political question.[10] In the opening words of the dissenters, the Court refused "to remedy a

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8. Justice Powell observed:

> Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability.

Chadha, 462 U.S. at 966.

9. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

10. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). Early in their opinion, the *Rucho* majority refer to James Madison's observation at the Philadelphia Convention that the Court's jurisdiction over cases arising under the Constitution should be limited to those of a "Judiciary Nature." *Id.* at 2494. The majority treat that observation as alluding to a political question doctrine, but that is unlikely. Immediately after Madison made the observation, the Convention voted unanimously, according to his own notes, to expand the Court's jurisdiction to all cases arising under the Constitution, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." 2 FARRAND'S RECORDS, *supra* note 5, at 430 (Madison's Notes, Aug. 27, 1787). That lack of debate suggests that Madison's limitation was meant and understood to be the limitation that the Court has found in the Constitution's reference to cases and controversies, namely, a rule against advisory opinions and a requirement of live disputes among concretely affected parties in interest. Had Madison meant and been understood to be fine-tuning a vision of constitutional review to distinguish between justiciable and nonjusticiable constitutional violations based on their subject matter, surely the delegates would have felt some need to discuss what was in and what was out, just as they had with respect to Congress's powers.

constitutional violation because it thinks the task beyond judicial capabilities."[11]

Common ground between the majority and the dissent was that the Fourteenth Amendment's Equal Protection Clause does not demand that we expel all partisan calculation from the process of electoral districting.[12] That concession made constitutionality under the Equal Protection Clause a question of degree. Answering that "how much is too much?" question was, said the majority, not susceptible to judicially manageable standards—a classic political question.[13] Applying Coan's judicial capacity model, we can identify a concern in the majority's reasoning that opening the courts to the equal protection issue as they had framed it would invite a high volume of high stakes litigation.[14]

But were the majority and dissent right to let existing precedents cabin their vision of the equal protection issue that gerrymandering presents? Why would *any* degree of partisan calculation in electoral districting ever be constitutionally permissible? As Coan has explained, the Court's prime alternatives when faced with a capacity problem are finding a political question or announcing a bright line rule.[15] So why not announce a bright line rule of no partisan considerations in electoral districting, and then leave the pure question of fact that such a rule raises for straightforward resolution by trial courts and appellate review under only a deferential standard of clear error? In what follows, I shall argue that the Court should have done just that. Though the Justices in *Rucho* made nothing of it, recent scholarship is converging in this direction.[16]

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11. *Rucho*, 139 S. Ct. at 2509 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting).

12. *Id.* at 2497 (Roberts, C.J., opinion of the Court, joined by Thomas, Alito, Gorsuch, and Kavanaugh, JJ.); *id.* at 2517 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting).

13. *Id.* at 2507.

14. "'[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. *Vieth*, 541 U.S. at 278, 279, 124 S.Ct. 1769 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements. . . . 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." *Rucho*, 139 S. Ct. at 2507.

15. COAN, *supra* note 1, at 31.

16. *See generally* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017); Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018); Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage Is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107 (2016); *see also* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 240 (2018); Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 1029 (2019). *Cf.* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 846–47.

Such a rule would restore coherence to the Court's equal protection jurisprudence on electoral justice and would resolve most districting disputes conclusively in the lower courts. It is the right answer both in theory and in practice. Nothing less is morally adequate to meet the threat posed by gerrymandering to democracy.

Oddly, the *Rucho* majority's account of gerrymandering in American political history ends before the adoption of the Fourteenth Amendment. The majority open their account with the words "[p]artisan gerrymandering is nothing new,"[17] without being clear about how this fact helps. If a practice is iniquitous, age hardly mitigates its iniquity. Old ways of cheating are still cheating. They identify in the Elections Clause (U.S. Const. Art. I § 4 cl. 1) Congressional power to police the provision that state legislatures make for Congressional elections and observe that "[a]t no point [during the Founding debates] was there a suggestion that the federal courts had a role to play."[18]

The *Rucho* majority nonetheless concede that the federal courts do have a role to play. They accept that the Equal Protection Clause of the Fourteenth Amendment imposes a judicially enforceable constraint on electoral districting by state governments. They affirm that malapportionment remains a constitutional violation that the Court stands ready to remedy.[19] Yet districting matters only because it is part of the process that determines who will govern. If a constitutional principle of equal protection demands that districts contain close to equal numbers of voters, it is surely only because equal protection of the laws that govern voting for our leaders requires that we have an equal say, an equal influence, in choosing who our leaders will be. The core principle of the one vote one value cases is that we should have equal influence in choosing those who make the laws that govern our lives.[20] How else could

17. *Rucho*, 139 S. Ct. at 2494.

18. *Id.* at 2496.

19. *Id.* at 2495–96.

20. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *see also id.* at 565 ("Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less."); *id.* at 563 ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'"); *id.* at 578–79 ("A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."); *id.* at 581 ("[A] State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.").

a constitutional requirement of *equal protection* have been a reason to rule out malapportionment?

Districting that departs to any discernible degree from equality of voter influence over who will govern must be justified by good reasons. All districting will frequently produce outcomes that differ from proportional representation, but we have good reasons to value geographically local representation that may justify districting as a general practice. The lesson of the malapportionment cases is that partisan advantage does not count as a good reason for districting along particular lines.[21] Partisan advantage is not a constitutionally permissible reason to give some voters more influence than others over *who will govern.* Yet gerrymandering does just that for just that reason. Those who look likely not to support the incumbent government are targeted for inclusion in districts where their influence over *who will govern* will be minimized. Those who look likely to support the incumbent government are moved into districts where their influence over who will govern will be greater.

The majority argue that "[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities."[22] How does this follow? If a reason for action is a bad reason, an official may be morally obliged not to act on that reason in discharging her duties even if acting on it would be in her career self-interest, and we may expect that moral obligation to find its way into conventional ethics and formal law. Being competitively elected does not evacuate one's ethical obligations to competitors. An elected legislator is no more justified in using her districting power to advantage herself or her allies over competitors in the next election than an elected DA is justified in using her prosecutorial power to eliminate electoral rivals or an elected President is justified in using his power over disbursing foreign aid to such an end. Even if the founders did put foxes in charge of henhouses in this respect, the adopters of the Fourteenth Amendment made clear that equal protection was required not just as matter of informal ethics, but of formal law. And the *Rucho* majority accept that Congress's power to enforce that amendment does not exclude the Court's power to do so too and the Court's ultimate judgment about what equal protection requires.[23]

The logic of the Court's general constitutional baseline standard that governing actions must have a rational basis presupposes that bad reasons won't do. How can partisan gerrymandering be said to bear a rational relation to a legitimate state interest? How is the interest served by partisan gerrymandering a state interest at all, let alone a legitimate one?[24] Partisan

21. *Id.* at 578–79, 581.
22. *Rucho*, 139 S. Ct. at 2497.
23. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).
24. *See generally* Kang, *supra* note 16.

interests are private, not public. If regulators are constitutionally precluded from acting for no reason, *a fortiori* they are constitutionally precluded from acting for a bad reason. And it won't do to say that the overall project of districting serves the public interest even when it is a little bit tainted. By that reasoning, the overall project of vote counting in *Bush v. Gore*[25] served the public interest even if it was a little bit tainted. The majority in *Bush v. Gore* had none of that. And they did not find the equal protection issue hanging over the national executive election in that case to be a political question. On the contrary, they found it justiciable and insisted on precluding the equal protection violation that they found.[26] If it does not matter that voters' influence over who will govern is affected by districting decisions made for partisan advantage, why would it matter under the same Equal Protection Clause that voters' influence over who will govern is affected by recount decisions made under inconsistent standards? Both matter and for the same reason—that they deprive voters for no good reason of an equal say in deciding who will govern.[27] Why would any of the Justices hold the equal protection question justiciable in the second case and not the first? Coan's judicial capacity model may help supply an answer.

For more than half a century, the Court has consistently called malapportionment an equal protection violation but sent mixed messages on gerrymandering. Did this reflect some deep moral difference between the two tactics? The *Rucho* majority suggest that of the two, only malapportionment violates the individual right to an equally weighted vote.[28] That suggestion detaches the concept of equal weight from the reason that equal voting matters. Why do individual citizens have reason to care that their votes be equally weighted? Not so that they get same-sized participation trophies, but so that they have an equal say in settling *who will govern*. Voting matters only because it affects who will govern. The value of voting rights cannot be measured in isolation from the pervasive reality of party politics. Rights to an equal say in deciding who

25. 531 U.S. 98 (2000).

26. *Id.* at 111.

27. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Id.* at 104. "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104–05. "'[T]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.'" *Id.* at 107 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)).

28. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). *Cf.* Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 56–57 (2008).

will govern are as threatened by partisan gerrymandering as they are by malapportionment. The persistent reason for the difference in how the Court has handled malapportionment and gerrymandering over the past half century is not that some factual discovery or moral insight has revealed one tactic to be more morally justifiable than the other. Rather, the difference derives from the Court's perception of its capacity and competence. The Court has identified a bright line, easily administrable rule to stop malapportionment but not one to stop gerrymandering.[29]

Justice Kagan argues that policing gerrymanders could be kept to preventing extreme outcomes and that lower courts have already shown that manageable standards can be established for doing that.[30] Whether or not she is right about the practicality of policing only extreme gerrymanders, arguing that only extreme gerrymanders violate equal protection sits at odds with the reason that gerrymanders violate the Equal Protection Clause at all. Basic to equal protection analysis is that many reasons for drawing distinctions are *good*, and that the distinctions so drawn may therefore be morally justified. But those distinctions that are not morally justified are *violations*.

What is the moral case for partisan gerrymandering? The *Rucho* majority do not make it. If that case could be made, it would be a case for prioritizing partisan success over democracy. Benjamin Franklin's immortal reply "a republic, if you can keep it" presupposed the goodness of trying to keep it. Partisan gerrymandering scorns that aspiration. Why does it nonetheless happen so often? As Richard Pildes observes, Justice Scalia supplied the answer:

> [I]n the campaign finance context, Justice Scalia rightly admonished that the "first instinct of power is the retention of power." Nowhere would that lesson seem more apt than in the context of partisan gerrymandering. Indeed, Justice Scalia's full statement is worth quoting: "The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech." Not quite. Retention of power is achieved even more directly by the suppression of competitive elections themselves.[31]

If there is no moral case for partisan gerrymandering, then the distinctions among voters that it draws necessarily deny them the equal protection of

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29. *See Rucho*, 139 S. Ct. at 2501.

30. *Id.* at 2509 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting).

31. Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 55–56 (2004) (quoting *McConnell v. FEC*, 540 U.S. 93, 293 (2003) (Scalia, J., concurring in part and dissenting in part)).

the laws. Failing to acknowledge this is the source of the flawed analogy drawn by members of the Court and commentators alike between how we think about partisan considerations in districting and how we think about racial affirmative action in districting.

Supporters of racial affirmative action in districting forthrightly argue that it is *good* to help historically disadvantaged racial minorities elect some representatives from within their own communities. Like racial affirmative action in admissions to educational institutions, racial affirmative action in districting is supported by an authentic moral argument. Dissenters from the Court's most recent decision upholding racial affirmative action in higher education said of that policy's articulated goals: "[t]hese are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences."[32] When has anyone on the Court ever called the goals of partisan gerrymandering *laudable*? The *Rucho* majority certainly do not. They acknowledge:

> Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," . . . does not mean that the solution lies with the federal judiciary.[33]

We might decide, as some on the Court have, that countervailing moral reasons outweigh the arguments for racial affirmative action. Or we might decide, as Justices Kennedy and O'Connor did, that the rightness of such race-influenced distinctions turns on questions of degree—that considering race for the purpose of affirmative action may be morally justified so long as that racial consideration is carefully calibrated.[34] But

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32. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2223 (2016) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting).

33. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (internal citation omitted).

34. *See Miller v. Johnson*, 515 U.S. 900, 912–16, 928–29 (1995). *Cf. Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017) (Kagan, J., opinion of the Court, joined by Thomas, Ginsburg, Breyer, and Sotomayor, JJ.) ("When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis. First, the plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.' *Ibid*. The plaintiff may make the required showing through 'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both. *Ibid*. Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. See *Bethune–Hill*, 580 U.S., at ——, 137 S.Ct., at 800. The burden thus shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end. *Ibid*. This Court has long

no one thinks that a *bad* reason for action is redeemed by being low impact. Where the Court has detected a white racist purpose lurking behind governing actions, the Court has upheld those actions *only* upon being satisfied that other reasons for doing what was done would have led to the same result anyway. Equal protection requires that bad reasons for an outcome have *no* impact on that outcome.[35]

The Equal Protection Clause does not let those who govern us be a little bit racist or a little bit sexist. Likewise, if partisan reasons for districting are out of bounds when they hurt democracy a lot, they are also out of bounds when they hurt democracy a little. Partisan reasons for districting decisions are not like racial affirmative action reasons. Partisan reasons for districting decisions are like white racist reasons.[36] It is not enough that those bad reasons be kept from predominating. Those reasons should not affect districting at all. No one has made a serious argument that partisan advantage is a *good* reason for districting decisions.[37] Applying a predominant factor test to partisan gerrymandering cannot be reconciled with the essential promise of equal protection.

Whether or not it is possible to distinguish extreme gerrymanders from generic ones, there is no good reason to do so. The courts *should* decide every case where partisanship is alleged to infect districting. Why cling to precedents that say otherwise? What rule-of-law reliance interests counsel against overruling them? Redistricting must happen periodically anyway to reflect demographic reality. And the reliance interests of boundary riggers are contemptible. They have no moral weight. In rejecting a First Amendment argument that partisanship in districting is

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assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 . . . ."); *cf.* the Court's higher education affirmative action jurisprudence in *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016).

35. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). "Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977).

36. *See* Levitt, *supra* note 16, at 2030–31.

37. "Why in the name of heaven should the fact that the majority party was rigging the lines 'simply' in order to entrench itself count as a *defense* to a charge of prominority racial gerrymandering? Why, indeed, should it not be a separate (and in my opinion more serious) count in the indictment?" John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 621 (1998). *See also* John Hart Ely, *Confounded by* Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 500–01 (2002).

viewpoint discrimination against those who support political opponents, the *Rucho* majority observed that such an argument would necessarily condemn all partisanship in districting, contrary to precedents that concede some degree of partisan gerrymandering to be constitutional.[38] That's the tail wagging the dog. If the Court's precedents take insufficient account of the First Amendment problem with partisan districting, then it is time to overrule them.

Would such a change in the law truly stretch judicial capacity? Not if the new law is a bright line rule that presents trial courts with only a pure issue of fact, on which they can take evidence and rule conclusively, subject to appellate review only for clear error. And that is what we get when we take equal protection seriously and insist that districting be done free of partisan considerations.[39]

Districting violates equal protection if partisan considerations infect it. That simple rule would indeed trigger a flood of litigation in the federal district courts. All districting by state government entities—all congressional, state, and local districting maps—would be subject to challenges that would pour in from parties who think different maps would suit them better. But the federal district courts have ample capacity to handle those trials. If the district courts could do desegregation, they can do redistricting. There are far fewer maps than schools. And the issue at trial would be a simple question of fact—"did partisan considerations affect the districting?"—on which the district courts can hear evidence and rule on the balance of probabilities, sending infected maps back for redrawing again and again until the infection is undetectable. The obvious safe harbor for state legislatures is to create authentically independent districting commissions.[40] Whatever the eighteenth-century founders

38. *Rucho*, 139 S. Ct. at 2504–05.

39. In contrast, a predominant purpose test would likely prove much harder to administer in policing partisan gerrymandering than it has been in policing racial affirmative action in districting. Richard Pildes's suggestion to the contrary, Pildes, *supra* note 31, at 66–70, attends insufficiently to the difference in the reasons that politicians do these things. Incumbent politicians have a deep self interest in partisan gerrymandering that they mostly lack in racial affirmative action districting, indeed the latter might hardly have occurred at all but for the mandate that state politicians received from Congress through the Voting Rights Act. State politicians have needed no outside encouragement to engage in partisan gerrymandering. History has shown that many will push the envelope as far as they can.

40. *See Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (upholding the constitutionality of an independent redistricting commission even when established by voter initiative). Samuel Issacharoff has argued that "the Court should forbid ex ante the participation of self-interested insiders in the redistricting process, instead of trying to police redistricting outcomes ex post." Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 643 (2002). He contends that "taking the process of redistricting out of the hands of partisan officials offers the prospect of realizing our constitutional values." *Id.* at 647–48. Indeed it does. But the Constitution's text, to which the Court looks for its own power of judicial review, explicitly

intended, the Fourteenth Amendment demands nonpartisanship, by whatever means necessary.

Would a no-partisanship rule strain the Supreme Court's truly limited capacity? No. Intermediate appellate review under a clear error standard would produce opinions that let the Court summarily affirm in almost all cases. And even in the district courts, the volume of litigation would settle down once plaintiffs came to see what it took to win a case and defendants began to change their ways. In contending for a rule of this genre, which he characterizes as prohibiting "invidious partisan intent," Justin Levitt argues:

> Like all statutes, redistricting plans delivered through lawful procedures arrive at the courthouse with a presumption of constitutionality. To prevail on a claim of invidious intent, successful partisan gerrymandering plaintiffs would have to offer convincing proof meeting the standard articulated in *Personnel Administrator of Massachusetts v. Feeney*: that particular lines were drawn not merely with the knowledge of their partisan impact, or with use of partisan information, but that they were drawn "at least in part '*because of*,' not merely 'in spite of,' [their] adverse effects" on a partisan group. This is no modest requirement.[41]

Arlington Heights,[42] on which the Court in *Feeney* relied,[43] makes clear, however, that proving the presence of a bad reason for the challenged decision is enough to shift the burden to the defendant to show that the decision would have been the same even without that reason. Plaintiffs do not have to prove that defendants' bad reason was a but-for cause of the challenged decision—defendants have to prove that it wasn't.[44] It should be sufficient for a *prima facie* case of partisan discrimination, just as it is sufficient for a *prima facie* case of racial discrimination, that plaintiffs adduce enough evidence to establish on the balance of probabilities that a discriminatory purpose was in the mix. And

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assigns to state legislatures the power to prescribe the manner of Congressional elections, subject to Congressional supervision, and nothing in that text identifies any other institution to prescribe the manner of state and local elections. The Court cannot just rule out districting done by the constitutionally designated actors. But the Court can and should hold those actors' feet to the equal protection fire—those actors cannot seek to affect voters' influence over who will govern by reference to partisan considerations. Repeated rejections of partisan-biased maps would soon enough send state legislatures in the direction that Issacharoff wants them to go.

41. Levitt, *supra* note 16, at 2037–38 (citing and adding emphasis to *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

42. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

43. *Pers. Adm'r of Mass.*, 442 U.S. at 275.

44. *Vill. of Arlington Heights*, 429 U.S. at 270 n.21.

the Court in *Feeney* observed, citing *Arlington Heights* for the point, that "[i]f the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral."[45] If districting could be challenged on this basis, state legislatures would soon enough get the message that trying to be partisan in districting had become a waste of time and energy. Unlike the unmanageable volume of litigation that would follow from judicial attempts at actively policing all Congressional delegations and supervisory devices, policing districting would be straightforward, so long as the Court kept its rule simple.

III. DEMOCRACY AND POLITICAL QUESTIONS

In *Shelby County v. Holder*,[46] the Supreme Court held that the Voting Rights Act's extant criteria for that law's preclearance requirement are no longer supported by Congress's enforcement powers under the Fourteenth and Fifteenth Amendments. In reaching that conclusion, the Court emphasized what an intrusion upon *state sovereignty* is posed by federal preclearance requirements for state voting rules.[47] Missing from the Court's analysis was the Founding era orthodoxy on why state sovereignty, why federalism, *matters*. It matters, as Montesquieu explained, because keeping power local helps to keep government accountable to its people.[48] Keeping power local helps keep truly republican government and truly democratic government alive.[49] The American founders' intellectual heritage taught them that state sovereignty in a federal system was valuable, but that value was instrumental—it lay in helping to secure a republican form of government.

The United States Constitution requires the national government to guarantee "to every State in this Union a Republican Form of Government."[50] Through the Voting Rights Act, the elected branches of the national government adopted measures that plainly aspired to make

45. *Pers. Adm'r of Mass.,* 442 U.S. at 275.

46. 570 U.S. 529 (2013).

47. *Id.* at 543–44.

48. MONTESQUIEU, *supra* note 5, at 183.

49. "If a republic is small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection. To this twofold inconvenience both Democracies and Aristocracies are equally liable, and that whether they be good or bad. The evil is in the very thing itself; and no form can redress it. It is therefore very probable that mankind would have been at length obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic." *Id*. Of Montesquieu's two republican species, the American founders made clear that republicanism throughout the United States was to be democratic, not aristocratic. *See* U.S. CONST. art. I § 9, cl. 8; *id.* § 10, cl. 1.

50. U.S CONST. art. IV § 4.

good on that guarantee.[51] That the Act sought to enforce the Fourteenth and Fifteenth Amendments detracts not at all from its relation to the republican and democratic form of American government.

The Supreme Court has made quite clear, starting in *Luther v Borden*[52] and continuing in the twentieth century through the malapportionment cases,[53] that it will treat what the Republican Form Clause requires as a political question for the elected branches of the national government. What Congress thinks is necessary to ensure that state governments are truly republican, truly accountable to their people, is a conclusion that the Court has repeatedly said it will not second guess. Yet in *Shelby County*, the Court second guessed it. On a different subject, *City of Boerne v. Flores*[54] rejected Justice Brennan's "ratchet" theory of Congress's Fourteenth and Fifteenth Amendment enforcement powers[55] and insisted that it was indeed possible to have too much of a good thing, given the morally important interests with which that thing may be in tension.[56] But the Republican Form Clause makes *democracy* a subject on which Congress gets to enforce its vision. The Republican Form Clause helps make a much stronger case for letting Congress police democracy in the states than there is for letting any legislature police itself. There are voting rights cases that can aptly be understood to pose nonjusticiable political questions. *Shelby County* was such a case. *Rucho* was not. The Court has been finding political questions in all the wrong places.

CONCLUSION

Gerrymanders do not cause opposition factions to fade away. They hand opposition factions the moral high ground. They are like a dam wall that builds the pressure on itself as they degrade the moral stature of incumbents. They fill opponents with righteous indignation and cause unaffiliated observers to shake their heads in disgust. They corrode civility, they polarize, they alienate. All participants end up suffering when "[s]omething is rotten in the state."[57] Gerrymandering is such a thing.

Partisan advantage is not a good reason to subvert democracy. Electoral justice matters more than who wins. As we citizens of a republic let go of these propositions, we become less so. What matters more in the constitution of a republic than democracy? All of a constitution's other

51. *See* Gabriel J. Chin, *Justifying A Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1562 (2014) ("[T]he Guarantee Clause was designed to protect majority rule.").

52. 48 U.S. 1, 42 (1849).

53. *See Baker v. Carr*, 369 U.S. 186, 209–10, 228–29 (1962).

54. 521 U.S. 507, 519–29 (1997).

55. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966).

56. *Flores,* 521 U.S. at 519–20.

57. WILLIAM SHAKESPEARE, HAMLET act I sc. 4.

promises are precarious if leaders are not in fact accountable to their people. As John Hart Ely memorably argued forty years ago, keeping democracy on its rails should be at the center of constitutional adjudicators' field of vision.[58] Ruling in ways that are representation reinforcing lets the Supreme Court more readily defer to the elected branches in other matters.[59] That comports with the constraints imposed by the Court's limited capacity. Andrew Coan has resoundingly reminded us how constraining that limited capacity truly is. Upholding democracy is its highest and best use.

58. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 87–104 (1980).

59. "External institutions, including courts, are needed to ensure that the background conditions that sustain democracy, particularly the absence of artificial barriers to robust partisan political competition, remain properly structured. The U.S. Supreme Court has defaulted at times on that role. But if those conditions are adequately protected, the processes of political competition themselves might more effectively secure rights and equality interests in politics than do judicial efforts to protect those interests directly." Pildes, *supra* note 31, at 154.