GERRYMANDERING AND JUDICIAL INCAPACITY

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INTRODUCTION

It is difficult to imagine a situation more appropriate for the judiciary to resolve on constitutional grounds than partisan gerrymandering. This conclusion comes directly out of Legal Process School analysis and its clarion call in Footnote Four of *United States v. Carolene Products*.[1] The essential feature of our legal system is the election of its leaders by the people. These representatives, not the judiciary or some other expert body, then make public policy and remedy any wrongs that the people feel they have suffered. It was this principle that was misunderstood by the Court's economic due process decisions and that *Carolene Products* and its companion cases overruled.[2] But in reaffirming this principle, the Court noted a major exception. If the electoral process is distorted or corrupt, if

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1. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). The footnote suggests that there may be two types of legislation that might be subject to "more exacting judicial scrutiny" than is ordinarily the case. *Id.* First, "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Id.* Second, legislation based on "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.* at 152–53 n.4. The first type of legislation mentioned is explicitly about electoral procedure. *Id.* at 152. The second focuses on minority rights, but also in terms of the minority group's access to the electoral process. *See* Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985) (noting that the underlying concern about minorities in Footnote Four involves any type of defect in the electoral process, not only the one particular mentioned). Professor Ackerman states: "*Carolene* casually disregards the easiest case for finding a substantive defect in a formally fair electoral process: the case in which organizational difficulties have prevented a commanding majority of the population from influencing the ongoing flow of legislative decisions." *Id.* at 718–19.

2. *See West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)). The rejection of economic due process was definitively confirmed in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). For an insightful discussion of the rationale behind the *West Coast Hotel* decision, see generally BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 98–92 (1998).

the people's fundamental right to vote is impaired in some manner, then this essential feature of our government will not operate correctly. The people cannot remedy the situation because their means of doing so is precisely what has been impaired. This is the single most important reason, and according to some Legal Process thinkers, the only valid reason, for the judiciary to take action on constitutional grounds.[3]

In *Rucho v. Common Cause*,[4] the Supreme Court addressed the issue of partisan gerrymandering and concluded that this basic defect in our political process should not be addressed by the judiciary but rather resolved by that defective political process.[5] The rationale in Chief Justice Roberts' opinion for the majority is threadbare. Justice Kagan's dissent is devastating. But underlying the majority's unsatisfactory decision is a legitimate concern, one that surfaces repeatedly as the Chief Justice struggles to explain the result. This is the concern that Andrew Coan captures in his new book, *Rationing the Constitution*.[6] Professor Coan observes that the Supreme Court's capacity to address and resolve the issues presented to it is a limited resource, and argues that the Court's awareness of this limitation exercises a profound effect on its decisions.[7] *Rucho* could have been one of Professor Coan's leading examples of his thesis had it not been handed down after the book was published. The decision follows exactly the path that Professor Coan's theory would predict, and thus provides convincing evidence of his theory's explanatory force.

This Article will argue that the Court should have struck down partisan gerrymandering as unconstitutional. Its refusal to do so points to a basic defect in current constitutional doctrine. The Article then argues that the legitimate concern Professor Coan has identified, and that strongly influenced the Court, points to two larger defects that are beyond the Court's control. The first is a basic defect in the way the federal judiciary is organized, one that results from our failure to rethink the role of courts in a modern administrative state. Our courts are seriously understaffed and under-supported, thus lacking the capacity to make use of the knowledge and research methodologies that are available in our society and necessary

3. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 2 (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). For the rationale underlying Legal Process, see William N. Eskridge, Jr. & Phillip P. Frickey, Commentary, *The Making of* The Legal Process*,* 107 HARV. L. REV. 2031 (1994); Edward L. Rubin*,* Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

4. 139 S. Ct. 2484 (2019).

5. *Id.* at 2508.

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

7. *Id.* at 2–6.

for courts to address the complex questions that are presented to them. The second defect involves the way our government is structured and results from a failure to rethink that structure using the resources of the administrative state. We rely on courts, an institution that we inherited from our pre-administrative and indeed feudal past, to address the defects in the processes that are central to our democratic system.[8] What we need is a constitutional level electoral commission, staffed by experts in the field and supported by the research and enforcement mechanisms, of the sort that we use for other crucial issues such as public health, the environment, worker safety, and economic stability.

I. THE MAJORITY OPINION IN *RUCHO V. COMMON CAUSE*

Rucho reversed two District Court decisions striking down redistricting plans in North Carolina and Maryland. In each case, there was unrefuted evidence that the plan was intentionally designed to favor the party in control of the state legislature.[9] As the opinion stated, one of the chairs of the Republican-controlled redistricting committee in North Carolina declared that "electing Republicans is better than electing Democrats" and proceeded to draw a map that produced a delegation of ten Republicans and three Democrats in an election where Democrats candidates received more total votes.[10] The Democratic Governor of Maryland appointed a redistricting committee with instructions to eliminate one of the two Republican districts in the state, a result achieved by shifting some 360,000 voters in the process of making a required 10,000-voter adjustment to that district.[11]

The majority agreed that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust."[12] But, Chief Justice Roberts went on to argue, somewhat startlingly: "[T]he fact that such gerrymandering is 'incompatible with democratic principles' . . . does not mean that the

8. As Richard L. Hasen, who is not particularly favorable to the federal judiciary's role in monitoring the electoral process states:

> [C]ourts (and the law professors providing them with unsolicited advice!) do not have particular expertise in the design of political systems or government entities across the United States. But courts remain the government actors of last resort who must referee some of the high-stakes political battles and protect basic rights of political equality and the Supreme Court by necessity sets these basic refereeing rules and defines the protective floor.

RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 138 (2003).

9. *Rucho*, 139 S. Ct. at 2491, 2493.

10. *Id.* at 2491.

11. *Id.* at 2493.

12. *Id.* at 2506.

solution lies with the federal judiciary."[13] In the opinion, he offered several reasons why the Court, whose function, it would seem, is to strike down legislative action. Incompatible with democratic principles, he concluded that an abuse conceded to be incompatible with democratic principles was not justiciable by the Court.[14] First, he pointed out that partisan gerrymandering was a long-standing abuse that prevailed during the colonial period and throughout the subsequent history of our nation.[15] He suggested that the familiarity of the abuse at the time the Constitution was framed, combined with the absence of an explicit prohibition, demonstrated that the Framers were willing to tolerate it.[16] The Court did not proceed, however, to overrule *Brown v. Board of Education*,[17] but failed to explain the reason why.[18] Perhaps it was because the abusive practices in that case had only prevailed for about ninety years (four score and seven in fact) since the relevant constitutional provision was framed, rather than about two hundred and thirty, but the Court also failed to explain why it was not overruling *Lawrence v. Texas*, [19] *Miranda v. Arizona*,[20] or *Goldberg v. Kelly*.[21] In fact, most the Court's major decisions regarding civil rights and liberties address practices of long duration.[22] Structural cases such as separation of powers are sometimes brought immediately because they challenge a governmental innovation,[23] but

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13. *Id.* at 2506 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)).

14. *See generally id.*

15. *Id.* at 2494–95.

16. *See id.* at 2494–96.

17. 347 U.S. 483 (1954).

18. *See generally Rucho*, 139 S. Ct. 2484.

19. 539 U.S. 558 (2003).

20. 384 U.S. 436 (1966).

21. 397 U.S. 254 (1970). All these cases invalidated state laws, relying on the incorporation of the Bill of Rights in the Fourteenth Amendment. But if the Chief Justice is correct, they should all be overturned unless they had been applied to the federal government and the administration of federal territory (about half the land area of the nation prior 1867) from the beginning of the Republic.

22. This observation has been a basis for criticism of the Supreme Court's performance. *See, e.g.*, ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014) (describing the Court's failure to strike down practices such as compulsory sterilization and racial discrimination); GERALD R. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (describing that the Court tends to follow other actors in recognizing human rights, rather than taking the lead); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004) (describing the Court's failure to strike down wartime limits on free speech until the Vietnam Era).

23. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (invalidating action taken by federal officials appointed by Barak Obama in 2012 using the Recess Appointments Clause); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (striking down portions of the Sarbanes-Oxley Act of 2002 that created an innovative federal instrumentality); *Clinton v. City of New York*, 524 U.S. 417 (1998) (striking down the Line Item Veto Act of 1996). This is not always the case, of course. *See,*

rights cases tend to be the product of a gradual realization that a prevailing situation is in fact "incompatible with democratic principles."

Chief Justice Roberts then pointed out that James Madison had commented, during the Constitutional Convention, that cases or controversies justiciable by the judiciary should be of a "Judiciary Nature." [24] Because electoral politics, he suggested, does not fall into this category, it is non-justiciable.[25] He had to concede, of course, that the Court has in fact adjudicated crucial matters of electoral politics in its momentous decisions in *Baker v. Carr*,[26] holding challenges to state electoral districting justiciable, *Reynolds v. Sims*,[27] requiring that electoral districts have equal populations, and *Gomillion v. Lightfoot*,[28] prohibiting racial gerrymandering, and the vast number of Supreme Court and lower court cases that have followed from them.[29] But these cases, Chief Justice Roberts said, are distinguishable,[30] apparently forgetting that the conclusion that would follow from his argument is that the Court should never have adjudicated them in the first instance, not that they were decided on different grounds.

Aside from this troublesome point, the basis on which Chief Justice Roberts distinguished these two leading precedents raises questions. He

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eg., *INS v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto after several decades of use).

24. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). Chief Justice Roberts hints at an originalist argument here, but as Justice Kagan points out in her dissent, he does not actually rely on such an argument for the simple reason that it would be unsupportable. *Id.* at 2512–13 (Kagan, J., dissenting). She states: "[B]ig data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today's gerrymandering altogether different from the crude linedrawing of the past. . . . Mapmakers now have access to more granular data about party preference and voting behavior than ever before." *Id.*

25. *Id.* at 2506–07 (majority opinion).

26. 369 U.S. 186 (1962).

27. 337 U.S. 533 (1964).

28. 364 U.S. 339 (1960). *See also Shaw v. Reno*, 509 U.S. 630 (1995) (districting plan, although race-neutral on its face, may be constitutionally defective if it in fact designed for race-related purposes); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (holding that the population deviations among election districts fall within permissible limits of the Equal Protection Clause).

29. *Rucho*, 139 S. Ct. at 2496–97. The number of decisions that have been handed down by federal courts on these supposedly non-justiciable issues is too large to be catalogued here. For general descriptions, see James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Contex*t, 26 RUTGERS. L.J. 517 (1994); Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections* on Gomillion v. Lightfoot *After Half a Century*, 50 WASHBURN L.J. 133, 143 (2011); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POLICY 103, 106–07 (2000). HASEN, *supra* note 8, at 168–73 app. (listing 190 Supreme Court decisions between *Baker v. Carr* and 1989 that addressed issues of electoral politics).

30. *Rucho*, 139 S. Ct. at 2501–02.

argued that *Baker v. Carr* is distinguishable because "the one-person, one-vote rule is relatively easy to administer as a matter of math."[31] It is true that this rule requires only junior high school math, whereas formulating a rule to prohibit partisan gerrymandering may require high-school level statistics. Chief Justice Roberts, however, was not writing an opinion for a junior high school mock Supreme Court, but rather for the actual Supreme Court. We might expect that the most powerful court in the United States, or possibly the world, would find a way to acquire some rudimentary familiarity with a methodology that is not only central to science but to social science, that is regularly used by nearly every federal agency, and that is necessary to understand a good deal of contemporary news reporting.[32] To be sure, statistical analysis is not necessarily a decisive factor in a legal case,[33] but that is quite different from concluding that this basic methodology is too complex for the Supreme Court to consider.

Racial gerrymandering, the Chief Justice said, is distinguishable because it is a form of racial discrimination, a bad thing that we strive to eliminate, whereas partisanship is not a bad thing in itself and we "cannot ask for the elimination of partisanship."[34] This is true, but the argument depends on comparing a noun—partisanship—with a noun-adjective phrase—racial discrimination. Discrimination, the noun in the first phrase, is not a bad thing in itself; it enables us to make relative judgments about the quality of art, food, employee performance, and judicial opinions. It is a bad thing when used for the wrong purposes, such as the action described by the adjective: preferring some people to others on the basis of their race. Similarly, partisanship, the adjective in the second phrase, is not a bad thing in itself. In a democratic society, it is a means of organizing debate about issues, presenting them to the public, and providing people with an opportunity to participate in politics. But the noun-adjective phrase of partisan gerrymandering is a bad thing because it is the wrong type of partisanship, one that distorts and corrupts the political process, just as

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31. *Rucho*, 139 S. Ct. at 2501.

32. With respect to public policy, see generally EVAN BERMAN & XIAOHU WANG, ESSENTIAL STATISTICS FOR PUBLIC MANAGERS AND POLICY ANALYSTS 4–6 (2018); ELIZABETH ANN O'SULLIVAN ET AL., RESEARCH METHODS FOR PUBLIC ADMINISTRATORS 276–479 (6th ed. 2017).

33. *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011) (concluding that adverse events associated with use of a pharmaceutical product are material for purposes of required disclosure under § 10(b) of the Securities Exchange Act of 1934 even if no allegation of the statistical significance of those events has been alleged); Michelle M. Burtis et al., *Error Costs, Legal Standards of Proof, and Statistical Significance*, 25 SUP. CT. ECON. REV. 1, 1–3 (2017).

34. *Rucho*, 139 S. Ct. at 2505 ("Unlike partisan gerrymandering claims, a racial gerrymandering claim . . . asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.").

racial discrimination is the wrong type of discrimination.[35] In other words, discrimination is bad when it is based on race, and partisanship is bad when it is used for gerrymandering. This verbal clarification also addresses the Chief Justice's subsidiary point that courts cannot eliminate all cases of partisan gerrymandering. That is true, but it is also true that courts cannot eliminate all cases of racial discrimination. As Justice Kagan wrote in her dissent, that does not, and should not, preclude the courts from addressing egregious violations in each area.[36]

Having explained that the Court could not address an admitted abuse because that abuse had gone on too long, and that a subject that the Court had been addressing for about sixty years was inappropriate for the Court to address, Chief Justice Roberts went on to observe that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation."[37] He did not identify precisely where this invariable sound was coming from, since the claim in both cases and the decision by both District Courts was based on intentional manipulation of electoral outcomes, not lack of overall proportionality in the state's Congressional delegation, and the principle that they endorsed was neutrality, not proportionality.[38] In any case, responding to this sound from some unknown source, the Chief Justice said that proportionality was not a

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35. As noted above, Footnote Four, does not rely on the existence of "discrete and insular minorities" per se as its ground for heightened constitutional scrutiny of legislation. *See United States v. Carolene Prods.*, 304 U.S. 144, 152–53 n.4. The reason to be concerned about such minorities, it states, is that their isolation "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.*

36. *Rucho*, 139 S. Ct. at 2519–22 (Kagan, J., dissenting).

37. *Id.* at 2499.

38. Maryland has eight Congressional districts and thirty-five percent of its electorate voted Republican. *Id.* at 2520–21 (Kagan, J., dissenting). On proportional grounds, that would entitle the Republicans to three seats. *Cf. id.* at 2521. But neither the plaintiffs nor the District Court claimed that they should have received three seats. *Id.* The claim was that they should have received two, and more specifically that one district, the Sixth, was unconstitutionally flipped from Republican to Democrat by aggressive partisan gerrymandering that shifted 340,000 more voters than was necessary to achieve numerical equality. *Id.* at 2493. At least for Maryland, proportionality, far from being "invariable," was not part of the claim at all. *Id.* at 2521 (Kagan, J., dissenting).

On this question, the North Carolina case is a bit closer, but still cannot be fairly described as relying on a proportionality analysis. The plaintiffs' claim, as summarized by the Court, was based on the fact that the Democrats had received more votes in the House elections than the Republicans, but that ten of the thirteen House seats had been won by Republicans due to gerrymandering. *Id.* at 2491–92. This might be understood to be a claim that any plan that resulted in fewer than seven Democratic seats was unconstitutional, but that was not the claim, nor was it the District Court's decision. Instead, both were based on direct evidence of partisanship, combined with a gross discrepancy of the results. *Id.* at 2517. It is not hard to imagine a test for partisan gerrymandering that was based on gross discrepancy but not proportionality, that is, one that did not demand that the Democrats win seven seats on the basis of their total vote, but won more than three out of thirteen.

principle favored by the Framers, and it was not one that was enforced in the early Republic.[39] He quoted a historian who reports that "[b]y 1840, . . [i]t was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength."[40] This claim that the nation was fully reconciled to the role of partisanship, that partisanship was recognized as an acceptable basis for action, cannot be refuted, Chief Justice Roberts wrote, by the Apportionment Act of 1842, which forbid at large elections in favor of proportionality.[41] His reason was that another historian has observed that the Act was the product of partisanship, which is an unacceptable basis for action and thus has no normative force.[42] But if partisanship is such a bad thing that it counteracts the normative force of a Congressional enactment, it is difficult to understand why it can be invoked as a positive value to refute the claim that proportionality was favored by the Framers.

Because, Chief Justice Roberts continued, the plaintiffs were "[u]nable to claim that the Constitution requires proportional[ity],"[43] a claim that they had not chosen to make, they were then compelled to rely on the concept of fairness. "[F]ederal courts are not equipped to apportion political power as a matter of fairness," the Chief Justice declared.[44] He demonstrated this point by listing a variety of factors that might contribute to fairness, and pointed out that, as a result, fairness cannot be quantified.[45] Fairness, he concluded, "poses basic questions that are political, not legal."[46] He failed to explain, however, how concepts that are generally regarded as legal and not political, such as foreseeability, negligence, intent, pain and suffering, consortium, business judgment, desert, conspiracy, agency, fiduciary duty, breathing space, and accommodation, are amenable to quantification.[47]

There is, moreover, a further difficulty with the Chief Justice's assault on the concept of fairness. An election is ultimately a form of contest

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

40. *Id.* at 2494–95 (quoting ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 123 (1907)).

41. *Id.* at 2495–96, 2499.

42. *Id.* at 2499 (quoting ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 48 (2013)).

43. *Id.*

44. *Id.*

45. *Id.* at 2499–501.

46. *Id.* at 2500.

47. The upshot of all this, as Justice Kagan pointed out in her dissent, is: "In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights . . . the majority declines to provide any remedy . . . [and] declares that it can do nothing about an acknowledged constitutional violation." *Id.* at 2515 (Kagan, J., dissenting).

between adversary parties.[48] In the legal realm, therefore, it can be analogized to a trial. The idea that the fairness of such a contest is political, not legal, would be startling. We have, in fact, elaborately detailed codes to govern these contests and assure their fairness.[49] Outside the realm of law, athletic contests also demand fairness, and once again there are elaborate codes that define and secure it.[50] Admittedly, an election is more complex, with both connection to, and implications for, social conditions beyond its boundaries. But its character as a contest suggests that we have extensive cultural experience to draw upon to develop rules that secure the essential quality of fairness.

To be sure, Chief Justice Roberts is correct in asserting that the Supreme Court, having dealt with a number of gerrymandering cases in recent years, has not yet developed a clear legal standard for dealing with them.[51] He concluded that the proper course of action in this situation is to give up.[52] It is not possible, he argued, in addressing even excessive versions of partisan gerrymandering, to articulate a workable legal standard. On this basis, as Justice Kagan points out in dissent, the Court reverses the workable legal standards that the District Courts articulated in their two decisions.[53] Chief Justice Roberts then went on to argue that this should not be of concern to those who worry about the legitimacy of American democracy, or about the facts, as found by the District Courts, that gerrymandering of this sort results in "difficulty raising money, attracting candidates, and mobilizing voters," and in "'a sense of

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48. *See generally* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 63–89 (1956) (defining polyarchic democracy in terms of contested elections); MURRAY EDELMAN, CONSTRUCTING THE POLITICAL SPECTACLE (1988) (describing the way that policy issues are translated into elements of political competition); BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 42–93 (1997) (describing the development of representative democracy, as opposed to direct democracy, as based on competitive elections); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269–311 (1942) (emphasizing the competitive character of democratic elections, and connecting this to economic theory); IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 55–64 (2003) (discussing and endorsing Schumpeter's theory of electoral competition).

49. *See, e.g.*, FED. R. CIV. P.; FED R. CRIM. P.; FED. R. EVID.

50. *See, e.g*., ROGER GOODELL, NAT'L FOOTBALL LEAGUE, 2018 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE (2018); OFFICE OF THE COMM'R OF BASEBALL, OFFICIAL BASEBALL RULES (2018).

51. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923, 1934 (2018) (holding that plaintiffs lacked standing to bring suit in a challenge to partisan gerrymandering, and general issues remain unresolved); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (concluding that courts cannot resolve constitutionality of partisan gerrymanders due to lack of judicially manageable standards). For commentary on *Vieth*, see Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After* Vieth v. Jubelirer, 73 GEO. WASH. L. REV. 1166 (2005); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541 (2004).

52. *Rucho,* 139 S. Ct. at 2506–07.

53. *Id.* at 2516–19 (Kagan, J., dissenting).

disenfranchisement . . . disconnection, and confusion."[54] After all, "numerous . . . [s]tates are restricting partisan considerations in districting through legislation."[55] They are doing so, in some cases, by articulating workable legal standards, but Chief Justice Roberts insists that the Court could not possibly articulate such standards.[56] In other cases, he observes, states have established non-partisan commissions to implement redistricting plans.[57] This apparently demonstrates, once again, that the federal courts could not articulate standards for redistricting cases.[58] But these commissions lead to the exactly opposite conclusion. Whatever uncertainty or incompleteness was produced by the Court's articulation of a less than optimal standard could be counteracted by holding that a non-partisan commission would constitute a safe harbor for the state.[59] This cannot be an unworkable solution, since eight states have established such

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54. *Id.* at 2504.

55. *Id.* at 2507.

56. The explanation he provided is that the Florida Constitution has a Fair Districts Amendment but "there is no 'Fair Districts Amendment' to the Federal Constitution." *Id.* The opinion, however, does not turn on the authority of the federal courts; there is, after all, an Equal Protection Amendment to the Federal Constitution, and it has been used to strike down other types of electoral violations. *Id.* at 2514 (Kagan, J., dissenting). Instead, the Court relies on the lack of manageable standards. *Id.* But if Florida can articulate manageable standards in a constitutional amendment, it does not follow that the Court cannot do so in a judicial opinion. Judicial opinions cannot be as specific and precise as legislation, but that does not mean that they cannot be sufficiently specific and precise to remedy serious abuses. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–66 (1982) (explaining that judicial standards can be fashioned to parallel statutory provisions).

57. *Rucho*, 139 S. Ct. at 2507–08.

58. The general thrust of this discussion is a bit difficult to discern. The mere fact that the states can solve the problem does not mean that the Supreme Court should not take action. After all, every constitutional ruling issued by the Court is, by definition, constitutional, which means that a state government, which has the police power, can take that same action for any decision that applies within the state. States can desegregate their schools, grant *Miranda* rights to prisoners, legalize abortion, authorize same sex marriage and, most relevantly, provide that electoral districts must have equal populations. *See, e.g.*, *id.* at 2514 (Kagan, J., dissenting). That did not stop the Court from deciding that these actions were constitutionally required and imposing them on the states had not taken such actions. *See id.*

59. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels,* 116 HARV. L. REV. 593, 641–48 (2002) (proposing that the Supreme Court could deal with the problem of partisan gerrymandering by requiring state legislatures to create nonpartisan redistricting commissions); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 533–34 (1997).

commissions[60] and the Court has upheld their constitutionality.[61] More generally, a non-partisan commission accords with our deeply embedded cultural understanding of the way to organize a fair contest. In both trials and sporting events, we recognize that the competition between the parties must be subject to control, and that those who exercise this control—whether judges, umpires or referees—must be neutral with respect to the opposing sides.

We would not think very well of a teacher who responds to a student's question about penguins by saying that it is impossible to know anything about them because they live very far away. But what would we think of a teacher who used that same rationale to give a grade of "F" to a student who submitted an informative report about that subject?[62]

II. A BETTER EXPLANATION FOR THE RESULT IN *RUCHO V. COMMON CAUSE*

Reasoning as threadbare as the majority opinion in *Rucho* raises questions about the real motivation for the decision. A natural supposition is that the answer is politics. While both parties engage in partisan gerrymandering, as the facts in *Rucho* itself reveal, the Republican Party does so more consistently, more forcefully and, it would seem, more effectively. A recent study concludes: "Of the states that have high levels of partisan bias in 2012, nearly all of them are biased toward the Republicans."[63] The alignment in the case, with the five Justices appointed by Republicans and generally identified as conservatives constituting the majority, and the three other Democratic appointees, generally identified as liberals, joining Justice Kagan's dissent, lends credence to this

60. At least eight states have non-partisan commissions that are solely responsible for redistricting: *See* ALASKA CONST. ART. 6, § 8; ARIZ. CONST. art. 4, pt. 2, § 1; California, *see* CAL. CONST. art. XXI, § 2; CAL. GOV'T CODE §§ 8251–53 (West 2019); Colorado, *see* COLO. CONST. art. V, §§ 46-48; Idaho, *see* IDAHO CONST. art. III §2; Michigan, *see* MICH. CONST. art. IV, § 6; Montana, *see* MONT. CONST. art. V, § 14; Washington, *see* WASH. CONST. art. II § 43. *See* Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425 (2006).

61. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

62. The reference is to the well-known story of the ten-year-old girl who evaluated a book about penguins by saying "This book gives me more information about penguins than I care to have." *See* Duke of Bookingham, TUMBLR (Mar. 12, 2016), https://dukeofbookingham.tumblr.com/post/140914959958/this-book-gives-me-more-information-about-penguins [https://perma.cc/3YQH-HAWL].

63. ANDREW J. MCGANN ET. AL., GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY 88 (2016) (Southern states, Ohio and Michigan showed highest levels, all toward Republicans).

hypothesis.[64] But harshly legal realist explanations of this sort are generally disfavored.[65] They are easy to advance but they tend to lead observers to ignore the reasoning and thinking processes of the Justices themselves. In other words, they are the type of external observation that one provides about inanimate objects or non-reasoning organisms, not a Weberian effort to achieve understanding about the motivations of a human being who is the observer's equal.[66]

Andrew Coan's *Rationing the Constitution* offers an intriguing explanation. Professor Coan's theory, briefly stated, is that the Justices on the Supreme Court are intensely aware of the limited resources that they have available for resolving issues that are presented to them.[67] Given the Justices' "commitment to maintaining minimum professional standards of judging,"[68] they can only decide a small number of cases a year, whether that is the 150–200 they decided last century or the 80–90 that they have

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64. The alignment in *Ariz. State Legislature*, 135 S. Ct. 2652, provides additional support for the political interpretation. *See* Samantha Lachman, *Supreme Court Upholds Arizona's Independent Redistricting Commission*, 2015 SUP. CT. PREVIEW 108 (2015). The Arizona legislature, controlled by Republicans, challenged the constitutionality of an independent, non-partisan redistricting commission that had been established by referendum. *Id.* at 108. The four liberal Justices who dissented in *Rucho,* joined by Justice Kennedy, upheld the constitutionality of the provision, with the four conservative Justices on the Court at the time (Alito, Roberts, Scalia and Thomas) dissenting. *Id.* at 108–09; *Ariz. State Legislature*, 135 S. Ct. 2652; *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). Since the case has no direct doctrinal relationship to *Rucho*, as it involved a different kind of challenge and a different constitutional provision, it is difficult to resist the conclusion that the liberal Justices dislike gerrymandering and the conservative Justices favor it on political grounds. *Compare Ariz. State Legislature*, 135 S. Ct. 2652 *with Rucho*, 139 S. Ct. 2484.

65. For example, the political explanation of the economic due process cases of the *Lochner* era has been replaced, in recent scholarship, with an effort to understand the way the judges themselves thought and reasoned about these cases, and why they struck down some Progressive legislation but also upheld a good deal of it. *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011) (explaining that regulatory legislation seen as undermining the natural rights that supported social contract theory); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) (explaining that regulatory legislation regarded as favoring some private parties over others); DAVID N. MAYER, LIBERTY OF CONTRACT: DISCOVERING A LOST CONSTITUTIONAL RIGHT (2011) (demonstrating that regulatory legislation seen as impinging on the liberty that Americans had fought for in the Revolution); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980) (asserting that regulatory legislation impairs the property rights that are essential to liberty). *See also* PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL (1998) (Lochner reflected a conflict between competing ideologies).

66. *See* MAX WEBER, ECONOMY AND SOCIETY 4–22 (Guenther Roth & Claus Wittich eds., 1978). *See* FRITZ RINGER, MAX WEBER'S METHODOLOGY: THE UNIFICATION OF THE CULTURAL AND SOCIAL SCIENCES 27–35, 92–121 (1997).

67. *See* COAN, *supra* note 6, at 2–3.

68. *Id.* at 14.

decided in recent years.[69] This reality, which would appear to be about nothing more than judicial housekeeping, in fact exercises a significant impact on the content of the Court's decisions. It means that the Supreme Court will be reluctant to reach decisions that generate a high volume of cases in the federal judiciary, particularly when those cases involve high-stakes issues that the Court itself will feel obligated to resolve.[70]

There are two approaches, according to Professor Coan, that the Court can use to avoid being overwhelmed by cases that it will feel obligated to resolve in a conscientious and therefore time-consuming manner. The first is "defer to the political process,"[71] to hold that the issue is not one that is appropriate for judicial resolution. During the Lochner Era, as Professor Coan points out, the Supreme Court undertook an effort to police regulatory legislation by both the federal government and the states to determine whether the burdens it imposed on private property were consistent with the constitutional standard of due process.[72] The result was an inundation of cases that the Court felt compelled to resolve. Once the Court decided, in *West Coast Hotel v. Parrish*,[73] *Carolene Products* and a few other cases, that the level of regulatory intrusion on private property was a matter to be determined by the political process, all these cases disappeared, and the Court could move on to other matters.[74]

The second judicial capacity approach that Professor Coan describes is "to embrace hard-edged categorical rules."[75] Such rules reduce the volume of cases reaching the federal courts because parties know the value of their claim, and thus are more likely to avoid the cost of litigation by deciding not to initiate a case or to settle it before trial.[76] Those cases that are tried tend to be decided in a uniform manner by lower courts following the rule's clear instruction, thereby eliminating any need for the Supreme

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69. *See* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 738–40 (2001); Peter Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987).

70. Institutional capacity is an issue that arises in a variety of governmental contexts. *See, e.g.*, Alexander Bolton et al., *Organizational Capacity, Regulatory Review, and the Limits of Political Control*, 32 J.L. ECON. & ORG. 242, 242–43 (2015) (arguing that the level of scrutiny that the Office of Information and Regulatory Affairs (OIRA) exercises in its cost-benefit analysis of regulations depends more on its varying level of institutional resources than on its political orientation).

71. COAN, *supra* note 6, at 31. This phrase, and the one that follows, appears throughout the book. The page citation is to Professor Coan's summary statement of his theory.

72. *Id.* at 27–28.

73. 300 U.S. 379 (1937).

74. *See* Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Ruch*, 6 CHAP. L. REV. 31, 31 (2003).

75. COAN, *supra* note 6, at 31.

76. This follows the model of litigation advanced in George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

Court to review the decisions.[77] Modern challenges to economic regulation of private property, to use another of Professor Coan's examples, do not focus on whether the regulation is permissible—it is—but whether the government must compensate the owner for any resulting diminution in the value of the property.[78] Here, the Supreme Court was unwilling to defer to the political process entirely, and the volume of litigation that might have resulted from this decision could well have been overwhelming. But the Court responded with two hard-edged categorical rules: compensation is required for physical invasions of the property or for total elimination of the property's value.[79] Other situations are determined by a test that generally enables the government to prevail, and thus precludes a profusion of cases for the Supreme Court to resolve.[80]

Professor Coan's theory has considerable predictive power, not only in explaining the kinds of coordinated strategies that the Supreme Court will employ, but also the progressive realizations that that it seems to reach. In *Goldberg v. Kelly*,[81] the Court initiated modern procedural due process doctrine with a doctrinally and normatively appealing decision that abolished the right-privilege distinction and provided due process protection to rights with positive as well as common law origins. This recognized the legal realities of the modern administrative state, where statutes often structure private relations, and it extended to the poor person's welfare benefits the same protections that applied to the rich person's real estate.[82] The Court quickly realized, however, that it had opened the federal courts to the entire range of interactions between the government and individuals. Two years later, it partially closed the floodgates with a doctrinally questionable but judicial-capacity-based decision that only interests that could be characterized as liberty or

77. COAN, *supra* note 6, at 23–24.

78. *Id.* at 137–62.

79. *Id.* at 138.

80. *Id.* at 137–64. The cases that Professor Coan is referring to are *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical invasion); *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992) (total elimination of value); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (test for other takings that strongly favor the government). My own view is that both the physical invasion and the total value tests are incoherent because they are efforts to use takings doctrine to restrict generalized regulations, rather than particularized appropriations of property, and thus a partial revival of economic due process thinking. *See* Edward L. Rubin, *The Mistaken Idea of General Regulatory Takings*, 2019 MICH. ST. L. REV. 225. From that perspective, Professor Coan's theory that these cases were primarily motivated by concerns about case volume management seems particularly convincing.

81. 397 U.S. 254 (1970).

82. The seminal expression of this view was Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733–76 (1964); *see also* Paul R. Verkuil, *Revisiting the New Property after Twenty-Five Years*, 31 WM. & MARY L. REV. 365 (1989).

property would qualify for due process protection.[83] This still allowed a great deal of litigation, however, and so, a few years after that, in *Mathews v. Eldridge*,[84] the Court replaced the somewhat vague, balancing rule to determine the scope of these newly-recognized due process rights with a hard-edged computational formula that allowed lower courts to achieve greater uniformity.[85]

The concern for judicial capacity that Professor Coan identifies provides a much better explanation for the result in *Rucho* than any of the arguments in the majority opinion. To declare that excessive partisan gerrymandering is subject to judicial scrutiny on constitutional grounds would undoubtedly generate an extensive amount of litigation, with many state plans being challenged each time they were promulgated. Deferring to the political process clearly obviates this problem. The problem could also be obviated if the Court articulated a "hard-edged, categorical rule," but the Court found itself unable to do so. That inability is repeatedly mentioned, and in fact extoled, in the opinion.[86] As Professor Coan predicts, it induced the Court to avoid the threat to its judicial capacity by choosing to defer to the political process.[87]

Concern about judicial capacity seems to be a continuous subterranean stream that runs through the entire opinion and bubbles up to the surface whenever the majority's layer of argumentation becomes particularly thin. Chief Justice Roberts quotes a previous decision in saying that "[a]n expansive standard requiring 'the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political

83. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). The decision is doctrinally questionable because it took language that had previously been treated as a term of art for any adjudication that imposed disadvantages on an individual and infused it with legal significance. *Cf. id.* The Court was then required to decide the meaning of the terms "liberty and property," thereby reopening the sluices that it had wanted to close. *See, e.g.*, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (liberty includes damage to reputation); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (property interest in continued utility service); *Goss v. Lopez*, 419 U.S. 565 (1975) (ten-day suspension from public school is a deprivation of liberty due to potential stigma and a deprivation of property because school attendance is a valued benefit).

84. 424 U.S. 319 (1976).

85. This line of cases is not one of Professor's Coan's examples in his book. *See* COAN, *supra* note 6.

86. *See Rucho*, 139 S. Ct. at 2500 ("it is not even clear what fairness looks like"); *id.* ("There are no legal standards discernable in the Constitution for making such judgments, let alone limited and precise standards . . . .); *id.* at 2504 (explaining that plaintiffs are asking for holdings based "on unstable ground outside judicial expertise"); *id.* at 2505 (stating that the District Court's decision "offers no 'clear' and 'manageable' way of distinguishing permissible from impermissible partisan motivation.").

87. *See* COAN, *supra* note 6.

process.'" [88] A few pages later, he adds: "federal courts are not equipped to apportion political power as a matter of fairness . . . ." [89] "[I]t is vital," he explains, "that the Court act only in accord with especially clear standards: 'With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal responsibility . . . .'"[90] "If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable . . . ."[91] "A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow."[92] "What the appellees and dissent seek is an unprecedented expansion of judicial power."[93] "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."[94]

Beyond these specific statements is the oddity of the majority's general conclusion that an acknowledged abuse in an area where the Court had already handed down several major decisions is not justiciable by federal courts. It is one thing, for example, for the Court to hold that a stone slab with the text of the Ten Commandments on it,[95] or a concrete war memorial in the shape of a cross,[96] does not violate the Establishment Clause, but it would be quite another to hold that challenges to these monuments are not justiciable. The conditions in prison were considered non-justiciable before the 1960s, but that position has been definitively reversed.[97] Many categories of prisoner claims have since been denied by the Supreme Court, such as the claim that a prisoner has the right to a hearing before being transferred from one facility to another,[98] but the reason is that this practice does not violate the Constitution, not that it is non-justiciable.

The majority in *Rucho* did not distinguish excessively partisan gerrymandering from unequal districting or racial gerrymandering on the

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88. *Rucho*, 139 S. Ct. at 2498 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring)).

89. *Id.* at 2499.

90. *Id.* at 2498.

91. *Id.* at 2501.

92. *Id.*

93. *Id.* at 2507.

94. *Id.*

95. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

96. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019).

97. For an account of this process, see MALCOLM FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

98. *See, e.g.*, *Olim v. Wakinekona*, 461 U.S. 238, 251 (1983); *Meachum v. Fano*, 427 U.S. 215, 216 (1976).

ground that excessive partisan gerrymandering is not an abuse. Rather, its rationale was that clearer, more categorical rules could be framed in these other cases, the first because they involve simpler mathematics, the second because they involve a definitive and historically recognized group of people.[99] But neither of these explanations address the nature of the abuse or its relation to the Constitution. They relate only to the difficulty in formulating a hard-edged categorical rule, and thus to the danger that a ruling in favor of the plaintiffs will unleash a tsunami of litigation. That is the reason why the Court held that excessive partisan gerrymandering is not justiciable. In other words, the decision in *Rucho* is best explained, and perhaps only explained, by Professor Coan's theory of judicial capacity.

To explain this decision, of course, is not to exonerate it. The Court should not have deferred to the political process on the basis its concerns about judicial capacity. As Footnote Four asserts, and as Justice Kagan vehemently argues in her dissent, it is the judiciary's job to cure defects in the electoral process.[100] The counter-majoritarian argument that counsels against judicial intervention in so many other situations argues in favor of it in this one.[101] It is precisely when that process is distorted or corrupted that an external actor needs to intervene. To defer in that situation is to send the mangled patient back to the same incompetent surgeon.

Nor should the Court have responded to its previous difficulty in framing clear standards for addressing partisan gerrymandering by giving up.[102] It is also the judiciary's job to develop standards in areas where they do not presently exist. If its first effort produced the proverbial flood of litigation that strained the judicial capacity of the Supreme Court, then the Court should have revised the standard, as it did in the due process cases. In fact, the Court had no reason to fear this flood; a simple remedy was available, one which Chief Justice Roberts knew about because he

99. *See Rucho*, 139 S. Ct. at 2496, 2501.

100. *See supra* note 1 and accompanying text; *Rucho* 139 S. Ct. at 2509 (Kagan, J., dissenting).

101. For the classic statement of this argument, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962). *See also* Choper, *supra* note 3; Ely, *supra* note 3. For an account of the way the concern has evolved over time, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, *Part Five*, 112 YALE L.J. 153 (2003); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One*, 73 N.Y.U. L. REV. 333 (1998).

102. *Cf.* Samuel Isaacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance Reform*, 3 ELECTION L.J. 259 (2004) (stating similar concerns regarding a related area of election law).

mentioned it in his opinion.[103] This was to provide that any plan developed by a non-partisan districting commission would satisfy constitutional requirements.[104] It would have provided the states with a safe harbor from any uncertainties in the rule the Court developed, while simultaneously providing the Court with a safe harbor from the flood of litigation.[105] In fact, the Court did not necessarily need to restrict itself to a hard-edged rule at all. It could indulge itself in a nice, mushy standard that "permits consideration of all or most facts that are relevant to its underlying purpose"[106] as long as it provided this hard-edged alternative.

Professor Coan compares the capacity of the Supreme Court to a family budget.[107] It is true, he says, that the budget is limited, but that does not mean that the family has no choice.[108] Rather, it means that those choices are constrained and affect each other—the decision to buy a new car may mean that new living room furniture can't be afforded.[109] The relevant question is what is most important, which will provide the family with the greatest benefit. The abolition of excessive partisan gerrymandering is one item that the Supreme Court should have bought.

III. GOING BEYOND OUR CURRENT LIMITS

Unlike the reasons that are explicitly stated in Chief Justice Roberts' opinion, the subterranean theme of judicial capacity makes sense. While it does not excuse the Court's failure to do its job, it does point to larger failures of our system of government, and thus to larger implications of Professor Coan's book. This final section will briefly canvass the two failures that follow most directly from the subject matter of the decision, its disjointed reasoning and its disappointing conclusion. The first is that the federal courts should have an expanded institutional structure that allows them to obtain and process empirical information relevant to the cases they decide. The second is that the federal government should have a constitutional-level election commission, with wide ranging expertise in electoral politics and wide-ranging authority to remedy behaviors that impair the fairness of the electoral process.

A notable feature of Chief Justice Roberts' opinion is its declaration of ignorance. His basis for distinguishing the one-person, one-vote standard that the Court used to strike down, on the basis of equality, the districting plans of nearly every state in the nation and his refusal to strike

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103. *See supra* note 57 and accompanying text.
104. *See supra* notes 59–60.
105. *See* Issacharoff, *supra* note 58, at 644.
106. COAN, *supra* note 6, at 24.
107. *Id.* at 20–23.
108. *Id.* at 20–21.
109. *Id.*

down any plan that undermines the same principle of equality, no matter how extreme, is that the only math he knows is arithmetic.[110] But, as stated above the math required to assess the issue of partisan gerrymandering is basic statistics, not string theory. It appears widely in academic discussions of the subject,[111] and is familiar to most people with a degree in social science. A judiciary that is making momentous decisions that affect the entire structure of our government should have full access to this ubiquitous and essential methodology.

The majority's declaration of ignorance, however, goes well beyond math. Chief Justice Roberts wrote: "The District Courts relied on testimony about the difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded?"[112] Those are good questions, but the sense of bewilderment with which they are being asked is appropriate for the eighteenth century, not today. A marketing executive for any large firm who responded to such questions with a similar sense of bewilderment would be fired on the spot. More than a century of academic social science has provided us with the tools to obtain detailed empirical information about the entire range of voter beliefs and behaviors. Of course, the Chief Justice's barrage of questions (the dissent counted nine question marks in two paragraphs of the opinion)[113] includes a legal judgment that can only, and should only, be made by a legally-authorized judge. But it should be made on the basis of empirical information, not made or avoided on the basis of ignorance about that information.

Access to empirical information can also suggest new criteria or remedies. For example, empirical information about media markets might indicate that voters in highly gerrymandered districts suffer additional disadvantages. Placed in a district that cuts a thin slice through their city or rural area and then slithers away into some distant region, they will not be able to learn about the candidates they are voting for from their local radio or television stations or from local newspapers and magazines. In

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

111. *See, e.g.*, MCGANN ET AL, *supra* note 63, at 56–145; Stephen Ansolabehere & Maxwell Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741 (2016); Robert X. Browning & Gary King, *Seats, Votes, and Gerrymandering: Estimating Representation Bias in State Legislative Redistricting*, 9 L. & POL'Y 305 (1987); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263 (2016); Samuel S.-H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 15 ELECTION L.J. 367 (2016).

112. *Rucho*, 139 S. Ct. at 2504.

113. *Id.* at 2519 (Kagan, J., dissenting).

effect, they will be partially disenfranchised. But the courts can only obtain information of this sort if they have staff resources and research capacities that are currently unavailable to them.

The problem could be ameliorated, although not fully solved, immediately and at minimal cost. All that would be required would be to give federal judges the same access to the Congressional Research Service (CRS) that members of Congress currently possess.[114] CRS will produce a report on any reasonable subject on request, one that summarizes existing scholarship and data and, in some cases, provides a meta-analysis.[115] Its work is widely accepted as non-partisan; as an Article I agency, it would not survive very long if it failed to maintain that stance.[116] The increased demands by the judiciary would be unlikely to do more than double the current CRS budget of $100 million; in other words, it would represent a trivial addition to the federal budget.

But this would only be a partial and temporary fix. All important federal agencies, which have developed in the modern era, are staffed by full-time, permanent employees with specialized training and long-term experience.[117] Because courts are an institution that we have inherited from our pre-modern past, we provide the judges with little more than a few recent law school graduates, following the medieval practice.[118] But this is the twenty-first century; what the federal judiciary truly needs is a professional staff with subject area expertise and sophisticated research skills, one that can gather the data and carry out the analyses that the Court needs to reach informed and reliable decisions.

In other words, we need to expand the institutional capacities of the Supreme Court, and the other federal courts as well, so that the limitations that Professor Coan observes can be at least partially ameliorated. They will not be eliminated, to be sure; Professor Coan has discerned an inherent feature of our judicial system that remains true as long as that system is structured along its present lines. But increasing staff resources, specifically at the Supreme Court level, will have at least two beneficial effects on judicial capacity. First, it will enable the Justices to be less

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114. Established by the Legislative Reorganization Act of 1946, ch. 753, title II, § 203, 60 Stat. 812, 836 (August 2, 1946).

115. *See generally* Ida A. Brudnick, *The Congressional Research Service and the American Legislative Process*, http://digitalcommons.ilr.cornell.edu/ key_workplace/511/ [https://perma.cc/Z6KF-968Q].

116. *See* BRUCE BIMBER, THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT 81–83 (1996) (describing CRS success in achieving a reputation for neutrality).

117. In other words, they conform to Weber's description of a bureaucracy. *See generally* WEBER, *supra* note 66, at 218, 220, 958.

118. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 39 (1979); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 132–133; 141–42 (2d ed. 1998).

intimidated by the complexity of the cases that are presented, to delegate some of the research that they must now do themselves or rely upon a few recent law school graduates. Second, it will enable them to frame more precise remedies that reduce uncertainties in the lower courts, and thus decrease the amount of litigation generated by their rulings. It is quite conceivable that a truly expert staff could conduct research or run simulations regarding the effect of alternative legal remedies on the litigation rate.

Perhaps there are some doctrinal barriers to be overcome, but these are hardly insurmountable. Despite our commitment to the adversary process,[119] we accept, as we must, that judges will obtain information from outside sources in writing opinions and crafting remedies. In the *Rucho* opinion, for example, Chief Justice Roberts bases his disparaging treatment of the Apportionment Act of 1842 on a history book that he had happened to read.[120] He opines, without evidence, that "urban electoral districts are often dominated by one political party."[121] He asserts that "[e]ven the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another"[122] and attempts to buttress this unsupported assertion with equally unsupported comments that "[m]any voters split their ticket"[123] and that others "vote for candidates from both major parties at different points during their lifetimes."[124] And to support the Court's refusal to remedy an admitted abuse, he reassures us that "accurately predicting electoral outcomes is not so simple" and attempts to prove the point by citing the results of elections in two states that took place about thirty and forty years ago.[125]

It is hardly a protection of the adversary process to make sure that information gathered from outside the courtroom is random, amateurish, or outright guesswork. There are better ways to protect this process, such as subjecting research carried out by court employees to adversarial scrutiny at the appellate level, or remanding the case to a trial court with instructions to review that research. In the final analysis, however, we need to reconceptualize the role of courts, to recognize that they are required, in our modern administrative state, to do much more than find facts about

119. *See* ROBERT KAGAN, ADVERSARIAL LEGALISM; THE AMERICAN WAY OF LAW, 283–86 (2nd ed. 2019).

120. *Rucho*, 139 S. Ct. at 2499 (citing ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 43–51 (2013)). For a criticism of this sort of casual invocation of sources that happened to attract a judge's attention, see Peggy C. Davis, *"There is a Book out . . ." An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

121. *Rucho*, 139 S. Ct. at 2500.

122. *Id.* at 2503.

123. *Id.*

124. *Id.*

125. *Id.*

specific incidents or interactions. They are applying legal reasoning to broad and complex areas of policy, and they can only do so in a creditable and effective manner if their capacity to research and analyze complex situations is dramatically expanded.

But even this is not enough. In addition to an amplified judiciary, we need a high-level election commission to police the electoral process at both the state and the federal level. A number of scholars have advanced proposals of this sort, in a variety of forms.[126] The point here is simply that we need to think in these institutional terms, which invariably involve some sort of administrative apparatus. Courts, as noted above, are an institution that our nation inherited from a pre-modern, pre-democratic past. Obviously, we have adapted them to the very different system of governance that currently prevails, and they continue to serve important functions. But we should not assume that they fulfill all our needs; obviously they do not, which is one reason why we have created a large panoply of administrative agencies to address particular aspects of modern society. Many of these agencies can be viewed as having been established to replace and expand elements of legal doctrine that were previously enforced by the courts. The Interstate Commerce Commission displaced contract law regarding railroads,[127] the Federal Trade Commission displaced business torts,[128] the Environmental Protection Agency displaced nuisance torts,[129] the National Highway Traffic and Safety Administration displaced contract law regarding automobile safety,[130] and so forth. In all these cases, the replacement was accompanied by new functions and strategies that are beyond the capacities of an institution structured as a court, no matter how much that institution's staffing is

126. *See, e.g.*, Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 716–22 (2000) (recommending creations of a separate "democracy" branch of government with independent power to monitor elections); Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005) (recommending creation of a standing advisory authorized to introduce legislation or referendum proposals to ensure electoral fairness); Issacharoff, *supra* note 59, at 643–45 (recommending that the Supreme Court require states to institute non-partisan redistricting commissions); John Murphy, *An Independent Electoral Commission*, *in* FREE AND FAIR ELECTIONS 25, 35–39 (Nico Steyler ed., 1994) (describing varieties of independent electoral commission with extensive powers); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) (discussing varieties of electoral commissions and their relative success).

127. Interstate Commerce Act, 24 Stat. 379 (1887).

128. Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, § 1, 38 Stat. 717 (1914) (codified at 5 U.S.C. §§ 41–58).

129. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1709–10 (codified at 42 U.S.C. §§ 7401-7671q); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 859–70 (1972) (codified at 33 U.S.C. § 1251 et. seq.).

130. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, 80 Stat. 718 (codified at 49 U.S.C. § 30101 et seq.).

increased. The administrative agency is the basic and essential instrument of modern governance.

At present, the U.S. has an election commission that is charged with enforcing various features of our campaign finance laws.[131] That is certainly a start, but it is no more than that. What is needed is a comprehensive regulatory agency with a specifically designed structure and a status commensurate with the importance of that role. The design of such an agency is a matter that is obviously beyond the scope of this discussion. Simply as an illustration of the possibilities, we can envision an independent agency whose members are recognized experts in electoral politics chosen from, or with the approval of, the major political parties, and serving either fixed terms or for life as long as their party maintains its status. The agency would have an ample budget, set by its organic statute and independent of political control.[132] Its jurisdiction would be comprehensive and its decisions would be final within that jurisdictional range.

One important virtue that a commission of this sort would possess is expertise. The majority opinion in *Rucho* can be fairly characterized as electoral science denial. With respect to the topic of districting plans, a number of people have devoted significant proportions of their professional careers to this subject and been able to use sophisticated models based on statistics and geography to develop strategies that serve values such as fairness or neutrality.[133] It is depressing to see those who

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131. Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (codified at 52 U.S.C. § 30101 *et seq.*) (establishing rules for federal election campaign finances); Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263, 1280–84 (codified at 52 U.S.C. § 30101 *et seq.*) (expanding the campaign finance rules and establishing the Federal Election Commission).

132. For example, the budget could be set at the average cost of a year's subscription by a public school to a news magazine for student use multiplied by the number or registered voters. At present, the cost is about $10 and the number of registered voters is about 150 million, so that the total would be about 1.5 billion—a relatively small budget for a federal agency, although much larger than the paltry amount that is provided to the current commission, which is less than $100 million.

133. *See, e.g.*, DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES (1992); GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER, THE POLITICAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION (2002); DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS (1997); Micah Altman & Michael P. McDonald, *Redistricting Principles for the Twenty-First Century*, 62 CASE WESTERN RES. L. REV. 1179, 1193–1203 (2012); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 514 (1994); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymanders after* LULAC v. Perry*,* 6 ELECTION L.J. 22 (2007) Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after* Vieth, 3 ELECTION L.J. 626 (2004); Gary King, *Representation through Legislative Redistricting: A Stochastic Model,* 33 AM. J. POL. SCI. 787 (1989); David Hays Lowenstein, Bandemer's *Gap: Gerrymandering and Equal*

wield the coercive power of the state repeatedly declare that there is no way to achieve fair results. From the offhand way that this conclusion is stated, it seems apparent that Justices who comprised the majority were either unaware of this work or uninterested in it. One would hope that those in authority would display the more open-minded and respectful attitude of the dissenting Justices, but that cannot be expected or relied upon, as *Rucho* demonstrates. An election commission comprised of people with expertise and experience in the subject matter would be much more likely to treat the knowledge our society has generated in their field with the respect that it deserves.

A second advantage of an election commission, being an institution structured as an agency and not a court, is that it could take action outside the limits of a litigated case. It could receive complaints and investigate them, even when those complaints could not be framed in legal terms.[134] Chief Justice Roberts dismisses the serious concerns raised by the District Courts, such as difficulty attracting candidates and a sense of disenfranchisement, disconnection and confusion,[135] as based on "slight anecdotal evidence" that is difficult to quantify.[136] But it is tragic for a society to respond to such concerns by saying that they cannot be rectified because it has failed to develop the means to measure them. An electoral commission could receive and indeed elicit complaints from ordinary people who do not have access to lawyers and cannot frame their dissatisfactions in legal terms. It could then investigate these complains on its own to determine their extent and effect. It could also develop a research agenda that would seek out problems that had not been previously raised, but nonetheless have deleterious effects on our democratic system.

Third, but far from finally, an electoral commission could fashion remedies that go beyond the capacity of courts to develop and impose. Chief Justice Roberts responds to the dissent's argument that manageable judicial standards could be developed by "using a State's own districting criteria as a neutral baseline" with the observation that such state-by-state criteria would vary state by state.[137] That is hardly a persuasive answer to a reasonable proposal. But an electoral commission might go beyond that

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Protection, *in* POLITICAL GERRYMANDERING AND THE COURTS 64, 79–90 (Bernard Grofman ed., 1990); Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 POL. & POL'Y Q. 371 (2004). Regarding statistical analysis, see *supra* note 111.

134. These functions are sometimes carried out by ombudspersons, non-judicial officers who report to the legislature. *See* Tero Erkkilä, Ombudsman as a Global Institution: Transnational Governance and Accountability (2020); CHARLES HOWARD, THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS – A LEGAL GUIDE, 7–10 (2010).

135. *Rucho*, 139 S. Ct. at 2504.

136. *Id.*

137. *Id.* at 2505.

proposal by developing state-by-state solutions that do not depend on criteria generated by the state, but on more universal criteria adapted to specific circumstances. More generally, the commission could police campaign finance violations and prevent voter fraud in a way that would not be possible for courts. Those who want to undermine our democracy will have access to increasingly complex and effective technology, as Justice Kagan's dissent points out.[138] Our institutions must be able to respond, in kind.

Professor Coan has revealed for us the limits on the capacity of our judicial system, and specifically of the Supreme Court, that plays such a critical role in that system. But these are not the limits on our governmental system generally. The common law suffered from serious limits on its ability to solve problems of worker safety, consumer protection, environmental protection and economic management. That is why we devised new institutional mechanisms to address these issues. A similar mechanism could be developed to address the defects in our electoral process.

CONCLUSION

Chief Justice Roberts is correct about at least one matter. The problem of gerrymandering has been with us since the beginnings of our Republic, so long that we no longer use the terminology on which it is based. When the elongated, sinuous electoral districts that Elbridge Gerry created were first identified as an abuse, the word salamander referred to a fearsome monster that lived in fire, not the innocuous amphibian to which it was subsequently attached.[139] To conjure up the proper images in contemporary parlance, we should refer to a Gerry-monstrosity, or maybe Frankengerry.

It is a sign of a declining society that it cannot resolve long-standing, widely recognized problems. One reason the Latin part of the Roman Empire collapsed was because it could not generate the loyalty of its people to its institutions that the Greek city-states achieved.[140] One reason France's Ancient Regime collapsed is that it could not develop a way to finance the expanded activities of its centralized monarchy.[141] The majority opinion in *Rucho* is an announcement of an equivalent cultural despair, blandly tolerating conditions that it concedes to be unjust and

138. *Id.* at 2510–13 (Kagan, J., dissenting).

139. *See* SAINT AUGUSTINE, 2 THE CITY OF GOD 417 (Marcus Dods trans., 1948) ("[T]he salamander lives in fire.").

140. For further explication of this point, see EDWARD L. RUBIN, SOUL, SELF, AND SOCIETY: THE NEW MORALITY AND THE MODERN STATE 28–34 (2015).

141. *See* SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 60–71 (1989); G. R. R. TREASURE, SEVENTEENTH CENTURY FRANCE 431–42 (1966).

"'incompatible with democratic principles.'"[142] If we do not want it to provide a text for future historians who ask what happened to the United States, we need to devote some of our limited judicial capacity to the essential issue that the case presents, to increase the judicial capacity of our courts, and to increase our institutional capacities by making use of modern administrative mechanisms.

142. *Rucho*, 139 S. Ct. at 2506 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015)).