Rucho v. Common Cause

Supreme Court of the United States, 2019.
139 S.Ct. 2484

Chief Justice Roberts delivered the opinion of the Court.

… These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts.... The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately sexercised judicial power when they found them unconstitutional as well.

I

A

[The North Carolina General Assembly was controlled by Republicans.] As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." [That impossibility stemmed from the fact that North Carolina voters are closely divided between the two parties. The resulting map, approved in 2016 by a party-line vote, did indeed generate 10 Republican and 3 Democratic seats (though in 2018, one race required a rerun because of fraud.) Numerous parties challenged the apportionment in federal court. After a four-day trial, a three-judge District Court concluded unanimously that the 2016 Plan violated the Equal Protection Clause, and by a 2-1 vote that it also violated the First Amendent.]

B

[Maryland, by contrast, was dominated by Democrats in 2011. The Governor (Martin O'Malley) later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. "[A] decision was made to go for the Sixth," which had been held by a Republican for nearly two decades. The map was adopted by a party-line vote. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since. [In an action brought by three voters, the District Court held that the 2011 Plan violated the First Amendment, and it issued an injunction requiring the State to adopt a new plan for the 2020 election. As in the North Carolina case, the defendants appealed directly to the Supreme Court.]

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." *Flast v. Cohen* (1968). In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.' " *DaimlerChrysler Corp. v. Cuno*, (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison* (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer* (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v. Carr* (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.*

... The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. *Gill v. Whitford* (2018).

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution....

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations....

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required

single-member districts for the first time, specified that those districts be "composed of contiguous territory," in "an attempt to forbid the practice of the gerrymander," E. Griffith, The Rise and Development of the Gerrymander 12 (1907). Later statutes added requirements of compactness and equality of population. Act of Jan. 16, 1901; Act of Feb. 2, 1872. (Only the single member district requirement remains in place today. 2 U.S.C. § 2c.) ...

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See *Baker*. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. See *Wesberry v. Sanders* (1964); *Shaw v. Reno* (1993) (*Shaw I*).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress....

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions. See *Wood v. Broom* (1932); *Colegrove v. Green* (1946).

In the leading case of *Baker v. Carr*, voters in Tennessee complained that the State's districting plan for state representatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the action on the ground that the claim was not justiciable, relying on this Court's precedents, including *Colegrove*.... This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles.... In *Wesberry v. Sanders*, the Court extended its ruling to malapportionment of congressional districts, holding that Article I, § 2, required that "one man's vote in a congressional election is to be worth as much as another's."

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion v. Lightfoot* (1960), concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim. In *Wright v. Rockefeller* (1964), the Court extended the reasoning of *Gomillion* to congressional districting.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie* (1999)....

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth* (plurality opinion)....

As we summed up last Term in *Gill*, our "considerable efforts in [Vieth and three other cases] leave unresolved whether ... claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering." Two "threshold questions" remained: standing, which we addressed in *Gill*, and "whether [such] claims are justiciable."

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral" (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Davis v. Bandemer* (1986) (opinion of O'Connor, J.).

As noted, the question is one of degree .... And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain

limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth* (opinion of Kennedy, J.)....

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer* (opinion of O'Connor, J.).

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

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress....

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

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. [*Authors' note:* Justice Kagan's dissent explains these terms: A mapmaker "packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred

candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win."] But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party....

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

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents.... But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts....

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky v. Clinton* (2012).

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? ...

... Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," *Vieth* (plurality opinion), and "results from one gerrymandering case to the next would likely be disparate and inconsistent," *id.* (opinion of Kennedy, J.).

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It

hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters....[1]

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

IV

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

A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. In reaching that result the court first

[1] The dissent's observation that the Framers viewed political parties "with deep suspicion, as fomenters of factionalism and symptoms of disease in the body politic" is exactly right. Its inference from that fact is exactly wrong. The Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties.

required the plaintiffs to prove "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.' " The District Court next required a showing "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation."

The District Court's "predominant intent" prong is borrowed from the racial gerrymandering context.... But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party.... Judges not only have to pick the winner—they have to beat the point spread.

... Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. [In *Bandemer* and *Vieth*, Democrats in Indiana and Pennsylvania, lost challenges to Republican-controlled apportionments but then did far better than expected in subsequent elections.]

... For [numerous] reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court's third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a "legitimate redistricting objective"—adds to the inquiry. The first prong already requires the plaintiff to prove that partisan advantage predominates....

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. [They emphasized burdens on fundraising, attracting candidates and volunteers, generating enthusiasm, and motivating voters.]

… 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? …

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation…. The decisions below prove the prediction of the *Vieth* plurality that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting," contrary to our established precedent.

C

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

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." *Vieth* (plurality opinion)…. The dissent's answer says it all: "This much is too much." That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the

exercise of judicial discretion. For example, the dissent cites the need to determine "substantial anticompetitive effect[s]" in antitrust law. That language, however, grew out of the Sherman Act, understood from the beginning to have its "origin in the common law" and to be "familiar in the law of this country prior to and at the time of the adoption of the [A]ct." Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1.

D

The North Carolina District Court further … asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, § 2, "namely, that the voters should choose their representatives, not the other way around." That seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e.g.*, *Pacific States Telephone & Telegraph Co. v. Oregon* (1912).

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015), does not mean that the solution lies with the federal judiciary….

… Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The

States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. The dissent wonders why we can't do the same. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.... Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. [The Court cites constitutional provisions of Florida and Missouri and statutes of Delaware and Idaho.]

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

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting....

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

* * *

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

Justice Kagan, with whom Justices Ginsburg, Breyer, and Sotomayor join, dissenting.

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

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people….

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

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core….

A

[Justice Kagan reviews the facts of each case at some length. She notes that one of the criteria used for drawing the North Carolina map was labeled "Partisan Advantage" and that the resulting map worked just as planned: It gave Republicans 10 of 13 congressional seats in 2016 with only 53% of the vote, and 9 of 12 in 2018 with 50% of the vote. (The last seat was still in doubt when the Court decided the case; ultimately, in a re-vote, it, too, went Republican.) In Maryland, the mapmaker "received only two instructions: to ensure that the new map produced 7 reliable Democratic seats, and to protect all Democratic incumbents."]

Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats—including the once-reliably-Republican Sixth District.

B

… Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

… If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." Annals of Cong. (1794).

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them….

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." *Vieth* (Kennedy, J., concurring in judgment). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland….

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. The other is that political gerrymanders have always been with us. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact.[2] The majority's idea instead seems to be

[2] And even putting that aside, any originalist argument would have to deal with an inconvenient fact. The Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion, as fomenters of

that if we have lived with partisan gerrymanders so long, we will survive.

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

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country's history.... And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, "we the people" become sovereign no longer.

C

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

Partisan gerrymandering operates through vote dilution—the devaluation of

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factionalism and "symptom[s] of disease in the body politic." G. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, p. 140 (2009).

one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party.... Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds v. Sims* (1964). And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation....

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth* (opinion of Kennedy, J.)....

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution.... Once again, the majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

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

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

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

A

… [B]oth courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did….

… True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns. In *Gaffney v. Cummings* (1973), for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties.

And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight.... But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far....

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes.... The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes....

The majority claims all these findings are mere "prognostications" about the future, in which no one "can have any confidence." But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders' effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance.... They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

B

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

Consider neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain.... [T]he courts' analyses used the State's own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria.

All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office.…

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." But that is a virtue, not a vice—a feature, not a bug.

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country.…

And if the majority thought that approach too case-specific, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. See *ante,* at 2500 – 2501 (focusing on the difficulty of measuring effects). That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases.… Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above.… As this Court recently noted, "the law is full of instances" where a judge's decision rests on "estimating rightly … some matter of degree"—including the "substantial[ity]" of risk or harm. *Johnson v. United States*, (2015) …. To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority's suggestion, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well,

substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution….

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds*. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these…. Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

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

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. Some Members of the majority, of course, once thought such initiatives unconstitutional. See *Arizona State Legislature* (ROBERTS, C. J., dissenting). But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. I'd put better odds on that bill's passage than on all the congressional

proposals the majority cites.

The majority's most perplexing "solution" is to look to state courts.... But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?[3]

We could have, and we should have.... When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*. That is what the courts below did....

That is not to deny, of course, that these cases have great political consequence. They do.... Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. In our government, "all political power flows from the people." *Arizona State Legislature*. And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." But in Maryland and North Carolina they cannot do so.... Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

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

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[3] Contrary to the majority's suggestion, state courts do not typically have more specific "standards and guidance" to apply than federal courts have. The Pennsylvania Supreme Court based its gerrymandering decision on a constitutional clause providing only that "elections shall be free and equal" and no one shall "interfere to prevent the free exercise of the right of suffrage." And even the Florida "Free Districts Amendment," which the majority touts, says nothing more than that no districting plan "shall be drawn with the intent to favor or disfavor a political party." ...