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NICHOLAS O. STEPHANOPOULOS

THE ANTI-CAROLENE COURT

[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [should be] subjected to more exacting judicial scrutiny. . . .¹

[T]he fact that [partisan] gerrymandering is incompatible with democratic principles does not mean that the solution lies with the federal judiciary.²

Once upon a time, roughly in the middle of the twentieth century, *Carolene Products*'s famous footnote captured much of the Supreme Court's constitutional decision making.³ *Carolene*⁴ included three key prescriptions. First, the Court should *not* strike down ordinary social and economic legislation: the sorts of laws the Court had routinely nullified in the preceding *Lochner* era.⁵ Second, the Court *should* block efforts by incumbent politicians to distort the political process in their favor. These efforts are a democratic malfunction—a breach of

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¹ *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

² *Rucbo v Common Cause*, 139 S Ct 2484, 2506 (2019) (citations and quotation marks omitted).

³ See *Carolene*, 304 US at 152 n 4; see also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard, 1980) (making this argument at length).

⁴ I usually call the case *Carolene*, rather than *Carolene Products*, for the sake of brevity.

⁵ See *Carolene*, 304 US at 152 (“[R]egulatory legislation affecting ordinary commercial transactions is [generally] not to be pronounced unconstitutional. . . .”).

the majoritarian ideal—that the Court is well positioned to resolve.⁶ And third, the Court should also intervene when a minority group is consistently the loser of political battles. There’s no majoritarian problem in this scenario, but there *is* a violation of a different democratic value: pluralism, the idea that groups should endlessly make and break alliances as they compete over public policy, and no group should find itself perennially outside the winning coalition.⁷

It’s evident that the contemporary Court no longer heeds *Carolene*’s first directive. A Court that prevents states from restricting the possession of firearms,⁸ or that forbids Congress from mandating the purchase of health insurance under the Commerce Clause,⁹ isn’t a Court that’s willing to defer to most social and economic legislation. It’s equally plain that *Carolene*’s third pillar has crumbled. If it still stood, the Court would celebrate (or at least tolerate) laws that benefit politically weak minority groups, like affirmative action and school integration. But the Court subjects these policies to the strictest scrutiny and usually invalidates them,¹⁰ even though it’s implausible that America’s white majority is the victim of a pluralist failure.

Some observers had thought, however, that the second leg of *Carolene*’s tripod was still sound: that the Court would still stop politicians from entrenching themselves in office through electoral machinations. Michael Klarman wrote in 1991 that the majoritarian “prong of political process theory has emerged relatively unscathed from the barbs of [its] critics.”¹¹ A decade later, Michael Dorf and Samuel Issacharoff stated that “most have assumed that correcting [majoritarian] defects is a legitimate judicial function.”¹² And at his

⁶ See id at 152 n 4 (suggesting that “more exacting judicial scrutiny” might apply to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”).

⁷ See id (indicating that a “more searching judicial inquiry” might apply when “those political processes ordinarily to be relied upon to protect minorities” fail to function properly); see also Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 NYU L Rev 1527 (2015) (discussing this *Carolene* prong in depth).

⁸ See *McDonald v City of Chicago*, 561 US 742 (2010).

⁹ See *NFIB v Sebelius*, 567 US 519 (2012).

¹⁰ See, for example, *Fisher v Univ. of Texas*, 570 US 297 (2013); *Parents Involved v Seattle School Dist. No. 1*, 551 US 701 (2007).

¹¹ Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va L Rev 747, 748 (1991).

¹² Michael C. Dorf and Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U Colo L Rev 923, 931 (2001).

2005 confirmation hearing, then-Judge John Roberts described the special judicial obligation to safeguard the electoral process: “Without access to the ballot box, people are not in the position to protect any other rights that are important to them.”¹³

The Court’s recent decision in *Rucho v Common Cause*¹⁴ shows that the academic commentators were wrong. It also highlights the gulf between Roberts’s 2005 words and his deeds as Chief Justice. The Court he now leads—and for which he wrote the majority opinion in *Rucho*—is comprehensively anti-*Carolene*, as hostile to its second directive as to its first and third. *Rucho* involved a partisan gerrymandering challenge to a North Carolina district plan. This plan had been drawn pursuant to an explicit “Partisan Advantage” criterion that required “[t]he partisan makeup of [the state’s] congressional delegation” to be “10 Republicans and 3 Democrats.”¹⁵ Sure enough, Republican candidates won ten seats, and Democrats three, in both of the elections held under the plan, even though the state’s voters barely preferred Republican candidates in the first election, and narrowly favored *Democrats* in the second.¹⁶ The plan’s 10–3 breakdown was also more pro-Republican than any of the thousands of maps randomly generated by an expert’s computer algorithm.¹⁷

It’s hard to imagine a stronger case for judicial intervention under *Carolene*’s second prong. North Carolina’s gerrymander deliberately “restrict[ed] those political processes”—elections—“which can ordinarily be expected to bring about repeal of undesirable legislation”—by replacing one party’s legislators with the other’s.¹⁸ But the Court declined to step in. And not only did it stay on the sidelines, it also barred any future Court from entering the field, by declaring partisan gerrymandering categorically nonjusticiable. And not only that, the Court also mocked the very idea of a judicial responsibility to

¹³ Joan Biskupic, *The Chief: The Life and Turbulent Times of Chief Justice John Roberts* 163 (Basic Books, 2019).

¹⁴ 139 S Ct 2484 (2019).

¹⁵ *Id.* at 2510 (Kagan, J, dissenting). A companion case to *Rucho* involved a Democratic gerrymander in Maryland.

¹⁶ See Brief for Appellees League of Women Voters of North Carolina et al, *Rucho v Common Cause*, No 18-422, *15 (US filed Mar 31, 2019) (“LWV Brief”). Due to evidence of fraud, the Republican victory in one district in 2018 was never certified and a new election was called. See *Rucho*, 139 S Ct at 2492.

¹⁷ See *id.* at 2518 (Kagan, J, dissenting).

¹⁸ *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

guard the political process from the ploys of self-interested insiders. Yes, “gerrymandering is incompatible with democratic principles,” the Court conceded.¹⁹ But, contra *Carolene*, that “does not mean that the solution lies with the federal judiciary.”²⁰

I doubt anyone would seriously contest this claim: that *Rucho* is, at its core, an anti-*Carolene* decision. But I want to push the point further. Not only is *Rucho* an anti-*Carolene* decision, its *reasons* for defying *Carolene* are the same ones that judges and scholars have always given for resisting *Carolene*’s logic. *Rucho* is thus anti-*Carolene* in both result and analysis. Consider the Court’s argument that, to strike down North Carolina’s gerrymander, it would first need to determine what a “fair” district map is.²¹ But “it is not even clear what fairness looks like in this context,” and “[d]eciding among . . . different visions of fairness . . . poses basic questions that are political, not legal.”²²

The dissenters in the great one-person, one-vote cases of the 1960s objected to the Court’s rulings in exactly these terms. In *Baker v Carr*, for example, the 1962 decision that authorized suits about unequal district population, Justice Felix Frankfurter wrote that malapportionment couldn’t be condemned unless the Court could say how districts *should* be apportioned. “What is actually asked of the Court . . . is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.”²³ Similarly, when John Hart Ely published his seminal defense of *Carolene* in 1980,²⁴ the most common academic critique was that Ely, like *Carolene*, asked judges to make indeterminate, and inappropriate, decisions among dueling democratic theories. As Jane Schacter queried, “if political philosophers can agree on no singular formulation of democracy, how might we expect judges to do so?”²⁵

Rucho, then, is an anti-*Carolene* decision from top to bottom. In some respects, though, it’s only the tip of the Court’s anti-*Carolene* spear, a portent of grimmer rulings, from a *Caroline* perspective, still

¹⁹ *Rucho*, 139 S Ct at 2506 (quotation marks omitted).

²⁰ *Id.*

²¹ See *id.* at 2500.

²² *Id.*

²³ 369 US 186, 300 (1962) (Frankfurter, J, dissenting).

²⁴ See Ely, *Democracy and Distrust* (cited in note 3).

²⁵ Jane S. Schacter, *Ely and the Idea of Democracy*, 57 *Stan L Rev* 737, 753 (2004).

to come. That's because *Rucho* only prevented the *federal courts* from hearing partisan gerrymandering claims. It didn't block *other* institutions, like Congress, state courts, and the people themselves via voter initiatives, from tackling gerrymandering. To the contrary, *Rucho* encouraged these other actors to intercede. "The States . . . are actively addressing the issue on a number of fronts," the Court remarked.²⁶ "Congress" also has "the power to do something about partisan gerrymandering [through] the Elections Clause."²⁷

These invitations to other institutions ring hollow, however, given the Court's recent jurisprudence. In a 2015 dissent for four Justices (which would now probably command five votes), Chief Justice Roberts contended that the *only* state entity permitted to regulate redistricting is the *last* state entity that might wish to do so: the state legislature.²⁸ Taken to its logical endpoint, this position would preclude not just independent commissions adopted through voter initiatives (the subject of the 2015 case) but also state court suits and maybe even gubernatorial vetoes of gerrymandered maps. Chief Justice Roberts is the author, too, of *Shelby County v Holder*, the only Court decision in modern times to nullify a federal voting rights statute.²⁹ It's hardly a stretch that the *Shelby County* Court might look askance at congressional legislation, say, compelling states to use commissions to craft their district plans.³⁰

Nor is this more aggressive form of opposition to *Carolene*—not just refusing to fix democratic malfunctions judicially, but also thwarting nonjudicial actors from dealing with them³¹—limited to the redistricting context. In a 2013 case, the Court warned that Congress may "regulate *how* federal elections are held, but not *who* may vote in them."³² So "it would raise serious constitutional doubts" if Congress tried to stop vote-suppressing state policies like felon

²⁶ *Rucho*, 139 S Ct at 2507.

²⁷ *Id* at 2508.

²⁸ See *Ariz. State Leg. v Ariz. Independent Redistricting Comm'n*, 135 S Ct 2652, 2677–92 (2015) (Roberts, CJ, dissenting).

²⁹ 570 US 529 (2013).

³⁰ See, for example, HR 1, 116th Cong, 1st Sess, §§ 2400–35 (2019).

³¹ I refer to decisions that prevent nonjudicial actors from correcting democratic failures as *perverse Carolene* decisions—in contrast to *reverse Carolene* decisions where the Court itself declines to intervene in the face of democratic malfunctions. See Part I.

³² *Arizona v Inter Tribal Council of Ariz.*, 570 US 1, 16 (2013).

disenfranchisement laws or photo ID requirements for voting.³³ The Roberts Court has also been a relentless foe of campaign finance regulations, rejecting one such restriction after another.³⁴ But limits on electoral funding are usually passed after scandals by reformist coalitions—not by insiders guarding their privileged perches. Empirically, too, these measures boost competition (and challengers) because their bite is felt more acutely by incumbents.³⁵

If the Roberts Court isn't a *Carolene* Court, though, what exactly *is* it? Judicial restraint—avoiding the “expansion of judicial authority” into “American political life,” in *Rucho*'s words³⁶—can't explain the Court's election law cases. *Rucho* might plausibly be seen as a restrained decision, but the Court's campaign finance rulings, systematically deregulating the funding of elections, can't possibly fit that mold. Nor is originalism a satisfying answer. Notably, North Carolina's sole unsuccessful argument in *Rucho* was that “the Framers set aside electoral issues such as [partisan gerrymandering] as questions that only Congress can resolve.”³⁷ Nor does concern for individual liberty weave together the various doctrinal strands. Free speech claims prevailed in the Court's campaign finance cases, of course. But they failed in *Rucho*, dismissed in a few cursory paragraphs.³⁸ And the franchise is a freedom, too, yet the Roberts Court has never found a violation of it.

This leaves more and less sympathetic accounts. More charitably, the Roberts Court might think that American democracy functions reasonably well, at present, except when the elected branches restrict the financing of campaigns. On this view, contemporary politicians pose no serious threat to the right to vote—certainly not compared to past abuses—but *do* often endanger the liberty of electoral donors and spenders. More cynically, the Roberts Court may be as aware as any other observer of the pathologies of modern American democracy: gerrymandering, voter suppression, the enormous influence of the wealthy, and so on. But a majority of the Justices may realize,

³³ *Id.* at 17.

³⁴ See, for example, *Citizens United v. FEC*, 558 US 310 (2010).

³⁵ See, for example, Thomas Stratmann, *How Close Is Fundraising in Contested Elections in States with Low Contribution Limits?* 9 (May 2009), archived at <https://perma.cc/RC4Z-3Z7N>.

³⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

³⁷ *Id.* at 2495.

³⁸ See *id.* at 2504–05.

consciously or not, that these pathologies redound largely to their ideological benefit. Flipping *Carolene* on its head, they may then intervene in the political process, or refrain from acting, in a pattern that perpetuates the pathologies.

The article proceeds as follows. In Part I, I identify the ways in which Court decisions may relate to *Carolene*. They may follow its logic correctly or mistakenly, or they may spurn its prescriptions for courts or for all institutions. Next, in Part II, I analyze *Rucho* through *Carolene*'s lens. *Rucho* is a classic anti-*Carolene* decision in both its holding and its reasoning. But its rationales are far from unassailable, as demonstrated by Justice Elena Kagan's dissent. In Part III, I then look beyond *Rucho* to other election law contexts. Throughout the field, the Court may soon converge on a maximally anti-*Carolene* stance: barring all institutions, not just federal courts, from correcting democratic failures. Lastly, in Part IV, I try to divine what's driving the Roberts Court in this area, since it's plainly not *Carolene*. The more benign possibilities seem inapt, raising the likelihood of more unsettling options.

I. CAROLENE CATEGORIES

It's hard to overstate the centrality of *Carolene* in modern constitutional law.³⁹ For decades, *Carolene*'s first directive—that “legislation affecting ordinary commercial transactions is [generally] not to be pronounced unconstitutional”—explained the Court's deference to the elected branches in most cases.⁴⁰ It also highlighted the cardinal sin of the earlier *Lochner* era: the Court's substitution of its own substantive values for those of the people's elected representatives. *Carolene*'s second insight, in turn, eventually launched the field of

³⁹ See, for example, *Schuette v Coalition to Defend Affirmative Action*, 572 US 291, 368 (2014) (Sotomayor, J, dissenting) (“The values identified in *Carolene Products* . . . are central tenets of our equal protection jurisprudence.”); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 Colum L Rev 1087, 1088 (1982) (noting that *Carolene* “commenced a new era in constitutional law”).

⁴⁰ *United States v Carolene Products Co.*, 304 US 144, 152 (1938). Note that I'm bracketing, for present purposes, the first paragraph of *Carolene*'s famous footnote calling for heightened judicial review “when legislation appears on its face to be within a specific prohibition of the Constitution.” *Id* at 152 n 4. This is a textual rather than a democratic rationale for judicial intervention, and so represents “an idea quite foreign” to the rest of the footnote, in the words of the law clerk who originally drafted it. Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 Colum L Rev 1093, 1097 (1982).

election law.⁴¹ The discipline's foundational mission was identifying "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation": laws against which judicial intervention *is* arguably warranted.⁴² And *Carolene's* third pillar justified the Court's vigilance, at least for a time, against measures targeting African Americans and other vulnerable groups. "[T]hose political processes ordinarily to be relied upon to protect minorities," *Carolene* recognized, don't always function properly without judicial oversight.⁴³

I only want to say a word here about *Carolene's* first and third prongs, which is that the contemporary Court often honors them in the breach. The first prong holds that the Court should rarely invalidate acts of Congress, most of which are garden-variety social or economic legislation. But the Rehnquist Court struck down about two-fifths of the congressional statutes it considered, and the Roberts Court has nullified almost *three-fifths*. By comparison, the Vinson, Warren, and Burger Courts found unconstitutional only a quarter of the congressional laws they reviewed.⁴⁴ Likewise, *Carolene's* third prong instructs the Court to be receptive to claims brought by politically weak minorities. But the Court has ruled in favor of just one African American plaintiff mounting an equal protection challenge in recent decades.⁴⁵ In contrast, myriad white litigants have prevailed in their equal protection suits—against affirmative action plans,⁴⁶

⁴¹ See generally Luke P. McLoughlin, *The Elysian Foundations of Election Law*, 82 Temple L Rev 89 (2009).

⁴² *Carolene*, 304 US at 152 n 4.

⁴³ *Id.*; see also Stephanopoulos, 90 NYU L Rev 1527 (cited in note 7) (discussing in detail this *Carolene* prong).

⁴⁴ I calculated these fractions using Keith Whittington's illuminating dataset of Supreme Court cases involving constitutional challenges to acts of Congress. See Keith E. Whittington, *Judicial Review of Congress Database* (2019), archived at <https://perma.cc/KF7P-J8NC>; see also Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo L J 491, 547 (1997) (concurring that the Court has "burst asunder the restrictions imposed on judicial review by political process theory").

⁴⁵ See *Johnson v California*, 543 US 499 (2005) (requiring strict scrutiny to be applied to an informal prison policy of racially segregating inmates during their initial evaluation). African American plaintiffs have also succeeded in recent racial gerrymandering cases, starting with *Alabama Legislative Black Caucus v Alabama*, 135 S Ct 1257 (2015), but the litigants' race was irrelevant to (and sometimes not even noted by) the Court's analysis.

⁴⁶ See, for example, *Fisher v Univ. of Texas*, 570 US 297 (2013). But see *Fisher v Univ. of Texas*, 136 S Ct 2198 (2016) (ultimately upholding the University of Texas's affirmative action program and thus demonstrating that affirmative action isn't (yet) categorically unconstitutional). Numerous successful challenges to affirmative-action plans also predate the

school integration programs,⁴⁷ districts electing minority candidates,⁴⁸ and the like. From a *Carolene* perspective, all these litigants should have lost, being members of a group that can hardly be said to be powerless.⁴⁹

Turning to *Carolene*'s second prong—my focus in this article—its gist is reasonably clear. *Usually*, American democracy performs adequately. Usually, that is, “political processes” like free speech, free association, the franchise, and a properly structured electoral system “bring about [the] repeal of undesirable legislation” (or the enactment of desired policy).⁵⁰ Sometimes, though, self-interested politicians pass “legislation which restricts those political processes.”⁵¹ Sometimes, in Ely’s indelible words, “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.”⁵² When this scenario arises, it’s the Court’s duty to intervene: to break up the blockage that’s responsible for the democratic malfunction. Through its intercession, the Court doesn’t frustrate but rather vindicates the popular sovereignty that’s the core of the American constitutional order—by enabling the people (not the politicians) to *be* sovereign.

It’s true that this account of *Carolene*'s second prong papers over some tricky conceptual issues. In particular, when do “political processes,” in fact, “bring about [the] repeal of undesirable legislation”?⁵³ Just so long as everyone can freely speak, associate, and cast a ballot? Ely seemed to think so at times, labeling his elaboration of *Carolene* a “participation-oriented . . . approach to judicial review.”⁵⁴ Or are “political processes” a synonym for majoritarian democracy—the idea that the will of a popular majority should generally control? This

Roberts Court, of course. See, for example, *City of Richmond v J. A. Croson Co.*, 488 US 469 (1989).

⁴⁷ See, for example, *Parents Involved v Seattle School Dist. No. 1*, 551 US 701 (2007).

⁴⁸ See, for example, *Shaw v Reno*, 509 US 630 (1993).

⁴⁹ See, for example, Reva B. Siegel, *Foreword: Equality Divided*, 127 Harv L Rev 1, 7 (2013) (agreeing that “courts enforcing equal protection claims have come to intervene in the decisions of representative government to protect members of majority groups in ways they scarcely ever intervene to protect members of minority groups,” thus “turn[ing] the reasoning of *Carolene Products* on its head”).

⁵⁰ *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

⁵¹ *Id.*

⁵² Ely, *Democracy and Distrust* at 103 (cited in note 3).

⁵³ *Carolene*, 304 US at 152 n 4.

⁵⁴ Ely, *Democracy and Distrust* at 87 (cited in note 3).

is probably the most common view of *Carolene*,⁵⁵ and Ely expressed it, too, at other times.⁵⁶ Or is responsiveness to (rather than congruence with) public opinion the crux of *Carolene*'s "political processes"? This position, held by scholars like Samuel Issacharoff and Richard Pildes, stresses that as voters *change* their minds, public policy should *shift* accordingly.⁵⁷

I don't try to resolve this debate here. (I also don't think resolution is possible. *Carolene*'s second prong simply doesn't specify the precise form of democracy the Court had in mind.) But I do want to insist that *Carolene*'s "political processes" must encompass more than just unrestricted speaking, associating, and voting. This is because free participation, important as it is, doesn't necessarily "bring about [the] repeal of undesirable legislation." Say that citizens may participate as they please. But say that self-interested politicians get to choose how votes are *aggregated*: how votes, in other words, translate into legislative seats. Then there's no guarantee that unwanted policies will actually be reversed. It's perfectly possible that they'll remain in effect, shielded from the will of the electorate by a legislature that, thanks to the method of vote aggregation, fails to reflect public opinion.⁵⁸

To put the point another way, *Carolene*'s "repeal of undesirable legislation" is a reference to policy outcomes. A purely participational theory of democracy is silent about policy outcomes. It only stipulates that citizens should be able to speak, associate, and vote without restraint. It therefore can't be *Carolene*'s theory even if we remain unsure which democratic model that *does* incorporate the outputs of

⁵⁵ See, for example, Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L J 1287, 1293 (1982) ("[P]aragraph two of the footnote captures . . . the lesson of twentieth century perversions of the majoritarian forms of politics."); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv L Rev 1, 6 (1979) (noting *Carolene*'s "general presumption in favor of majoritarianism"). I'm also partial to a majoritarian theory of democracy, aiming above all for governmental outputs aligned with the preferences of the median voter. See generally Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 Colum L Rev 283 (2014).

⁵⁶ See, for example, Ely, *Democracy and Distrust* at 7 (cited in note 3) ("[M]ajoritarian democracy is . . . the core of our entire system. . . .").

⁵⁷ See, for example, Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan L Rev 643, 646 (1998) (asserting that "one of the central goals of democratic politics" is "that the policy outcomes of the political process be responsive to the interests and views of citizens").

⁵⁸ Election law has long recognized this point. See, for example, Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 Tex L Rev 1705, 1707–08 (1993) (noting that voting implicates people's interests in participation, aggregation, and governance).

the political process—majoritarianism, responsiveness, or some other approach—is *Carolene's* theory.

So understood, how may *Carolene's* second prong relate to Court rulings? First, a *correct Carolene* decision accurately perceives a democratic defect: a practice that prevents certain people from engaging in politics or that distorts the translation of voter sentiment into representation. A correct *Carolene* decision also holds the practice unconstitutional, thereby furthering key democratic values.⁵⁹ In the Court's jurisprudence, the one-person, one-vote cases of the 1960s are probably the most famous examples of correct *Carolene* decisions.⁶⁰ Malapportionment on a massive scale had led to a "rural strangle hold" on the legislature in many states: a glaring democratic defect.⁶¹ By requiring equally populated districts, the Court repaired the democratic damage, "releasing the strangle hold on the legislature" and ending the "frustration of the majority will."⁶²

Second, a *mistaken Carolene* decision tries to heed *Carolene's* logic but misdiagnoses the policy at issue. The Court may wrongly think the policy is benign—consistent with a properly functioning democracy—and so refrain from acting when it should have intervened. Or the Court may err by finding the policy democratically destructive, though in fact it's neutral or even helpful, and then invalidating a law it should have sustained.⁶³ I argue below that the Roberts Court's campaign finance cases are mistaken *Carolene* decisions. They assert that regulations of electoral funding are efforts by incumbents to squash competition. But these claims are incorrect; most campaign finance laws actually assist challengers. A *Carolene* Court should therefore have upheld these pro-competitive measures.⁶⁴

⁵⁹ Alternatively, in the absence of a democratic defect, a correct *Carolene* decision refrains from intervention. This is the scenario covered by *Carolene's* first prong.

⁶⁰ See, for example, Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 Harv L Rev 28, 44 (2004) ("Malapportionment . . . represents the paradigm instance of justified judicial oversight."); David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U Ill L Rev 1251, 1259 ("Perhaps the most dramatic example[s] of a *Carolene Products* success story . . . [are] the so-called reapportionment decisions.")

⁶¹ *Reynolds v Sims*, 377 US 533, 543 (1964).

⁶² *Id.* at 543, 576.

⁶³ Dorf and Issacharoff briefly note the possibility of mistaken *Carolene* decisions, "ask[ing] what happens if judges stray from the proper approach," and adding that "there [is] no guarantee that they would [apply *Carolene*] correctly." Dorf and Issacharoff, 72 U Colo L Rev at 941 (cited in note 12).

⁶⁴ See Part III.B.

Third, a *reverse Carolene* decision does the opposite of what *Carolene* instructs.⁶⁵ The Court acknowledges that a practice undermines democratic values by impeding political participation or skewing the conversion of voters' preferences into legislative influence. But the Court declines to step in because it rejects *Carolene's* basic tenet. It disagrees that it should exercise its power of judicial review to break up blockages of the political process. The propriety of judicial intervention is untethered, in its view, from the operation of American democracy.⁶⁶ *Rucho*, I contend in the next Part, is a quintessential reverse *Carolene* decision. It freely concedes that partisan gerrymandering is undemocratic. But this admission is followed not by the gerrymander's dismantling—the next step under *Carolene*—but by its insulation from any further challenge in the federal courts.⁶⁷

Lastly, a *perverse Carolene* decision heightens the Court's defiance of *Carolene* by another notch.⁶⁸ The Court sees other actors—Congress, state courts, ordinary people through voter initiatives—taking steps to fix democratic malfunctions. But the Court doesn't cheer these remedies as appealing alternatives to the judicial intervention it's unwilling to undertake. Instead, the Court stops the other actors' projects dead in their tracks, holding that they're barred by the federal Constitution. The Court thus prevents *any* entity from engaging in pro-democratic policymaking. It invokes its power of judicial review not to promote democracy but to ensure its continued subversion. Perverse *Carolene* decisions, I maintain below, have already begun to mar the Court's doctrine. And they may become even more common in the years ahead, particularly when the Court next considers the validity of redistricting commissions. These bodies are the primary nonjudicial response to gerrymandering. But the Court may well hold that they violate the Elections Clause or the First Amendment.⁶⁹

⁶⁵ For another scholar using similar terminology in a helpful contribution, see Aaron Tang, *Reverse Political Process Theory*, 70 Vand L Rev 1427 (2017). Tang calls it reverse political process theory when the Court "afford[s] special protections . . . to politically powerful entities that are able to advance their interests full well in the democratic arena." *Id.* at 1430–31. As the next paragraph explains, I refer to such rulings as *perverse Carolene* decisions, frustrating the efforts of nonjudicial actors to pursue democratic goals.

⁶⁶ Alternatively, a reverse *Carolene* decision *invalidates* a policy that's democratically *unproblematic*. But this scenario is better understood as a violation of *Carolene's* first prong.

⁶⁷ See Part II.

⁶⁸ I previously discussed perverse *Carolene* decisions (without employing that nomenclature) in Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U Chi Legal F 477, 487–91.

⁶⁹ See Part III.

Of course, this taxonomy of Court decisions is incomplete. It doesn't even try to incorporate most of the factors that drive judicial decision making: text, structure, history, precedent, and so on.⁷⁰ The taxonomy is thus best understood as the product of a thought experiment. If *Carolene's* second prong—the proposition that judicial review should be pro-democratic—were its own modality of constitutional interpretation, then how could that modality be applied? How, that is, could the Court follow or flout *Carolene's* command?

II. A REVERSE CAROLENE DECISION

One way the Court could flout the command is by issuing a ruling like *Rucho*. *Rucho*, I argue in this Part, is an archetypal reverse *Carolene* decision—a distillation of the genre to its purest form. The Court grants that partisan gerrymandering is undemocratic, yet bars federal courts from lifting a finger to stop it. I also situate *Rucho* within the corpus of anti-*Carolene* jurisprudence and scholarship. To an uncanny degree, the case echoes the positions of the one-person, one-vote dissenters of the 1960s and of the critics of Ely's political process theory. Those views, moreover, are far from irrebuttable. In her dissent in *Rucho*, in fact, Justice Kagan picks them apart, showing that while *Carolene* no longer animates a Court majority, its message still endures.

A. CAROLENE'S SPURNED LOGIC

The claim that partisan gerrymandering offends the democratic values that *Carolene* seeks to protect is uncontroversial. As I show below, even the *Rucho* Court agrees with that assessment (though not with what, under *Carolene*, courts should do about it). Nevertheless, it's useful to explain why, exactly, gerrymandering is undemocratic: both the North Carolina plan at issue in *Rucho* and the practice more generally. In a nutshell, gerrymandering awards the line-drawing party more seats than it would have earned under a neutral map. In a polarized era, these extra seats shift the ideological center of the legislature and, with it, the laws the legislature passes. Both legislative representation and enacted policy are thus skewed in the direction of the line-drawing party—and away from what voters actually want.⁷¹

⁷⁰ Cf. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford, 1984).

⁷¹ For a similar argument, see Stephanopoulos, 2015 U Chi Legal F at 489 (cited in note 68).

To phrase the point in terms of *Carolene's* democratic values,⁷² gerrymandering can lead to countermajoritarian outcomes. Sometimes the electorate prefers one party's candidates but, thanks to cleverly drawn districts, it gets a legislature run by the other party and advancing that party's agenda. Gerrymandering can also stifle electoral responsiveness. Modern map makers typically make their side's seats reasonably safe: closer to 60 percent of the vote (and a comfortable twenty-point margin) than 50 percent plus one.⁷³ Seats of this sort don't flip in all but the most extreme electoral environments, rendering futile even significant changes in voter sentiment. And gerrymandering can inhibit political participation, too. It doesn't *directly* prevent anyone from speaking, associating, or voting. But it *deters* some citizens from engaging in these activities since they realize, no matter how hard they try, their efforts will likely be in vain.

To make this discussion more concrete, consider the North Carolina plan in *Rucho*. Its architects weren't shy about their goal of guaranteeing ten seats for Republican candidates and three for Democrats—whether or not voters wanted so lopsided a congressional delegation. A legislative committee ratified a criterion explicitly labeled “Partisan Advantage,” providing that “[t]he partisan makeup of the congressional plan” would be “10 Republicans and 3 Democrats.”⁷⁴ The cochair of this committee added, in breathtakingly candid testimony, “I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats.”⁷⁵

The plan's results realized its drafters' ambitions. In both of the elections in which it was used, ten Republican candidates and three

⁷² Again, I don't try to choose among these values here, at least not beyond insisting that participation isn't the only relevant value.

⁷³ See, for example, *Common Cause v Rucho*, 279 F Supp 3d 587, 657–58 (MDNC 2018), rev'd, 139 S Ct 2484 (2019) (observing that “all ten Republican districts” in the North Carolina plan at issue in *Rucho* were “safe,” that is, “highly unlikely to change parties in subsequent elections”).

⁷⁴ *Rucho*, 139 S Ct at 2510 (Kagan, J, dissenting).

⁷⁵ *Id.*; see also *id.* (quoting the cochair's comment that “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.”). In *Rucho's* wake, such brazen partisan boasts are likely to become more common, as are even more aggressive gerrymandering techniques like drawing noncontiguous districts, redistricting more frequently than once per decade, and using computer algorithms to design more durably skewed maps. See Aaron Goldzimer and Nicholas Stephanopoulos, *Democrats Can't Be Afraid to Gerrymander Now*, Slate (July 3, 2019), archived at <https://perma.cc/GQ96-2UVX>.

Democrats won seats.⁷⁶ This breakdown held even though the second election—the Democratic wave of 2018—saw Democrats earn a majority of the statewide vote.⁷⁷ That election thus yielded both a countermajoritarian outcome and no responsiveness at all to the electorate’s pro-Democratic swing. More sophisticated metrics tell the same story. According to one expert, the North Carolina plan was the single most biased congressional map of the last half-century.⁷⁸ That expert also found that it would take a pro-Democratic wave on par with the Watergate election of 1974 for the plan’s bias to dissipate.⁷⁹ Another expert randomly generated thousands of North Carolina congressional maps based on all of the drafters’ *nonpartisan* criteria. Not one of them was as tilted in Republicans’ favor as the actual plan.⁸⁰

But perhaps these statistics don’t reveal a real democratic problem. Perhaps legislative representation and enacted policy still reflect voter opinion, when a map is gerrymandered, even if seat tallies are out of whack. Recent empirical research puts this rosy view to rest. When a state legislative⁸¹ or congressional⁸² plan is biased toward a party, the ideological midpoint of the chamber or delegation shifts significantly in that party’s preferred direction. So, too, do the measures that become law. In fact, “a one standard deviation change in [a plan’s bias] has a larger impact on state policy than a change in the party of the governor.”⁸³ The effects of gerrymandering thus aren’t limited to the seat and vote percentages that preoccupy election wonks. They extend, rather, to the ideological composition and policy output of the legislature—the very essence of democratic governance.

Indeed, they extend even further than that. Plaintiffs in several recent cases have testified that gerrymandering chills their political

⁷⁶ See *Rucho*, 139 S Ct at 2491–92; see also *id* (noting that one of the Republican victories in 2018 was tainted by fraud).

⁷⁷ See LWV Brief at *15 (cited in note 16).

⁷⁸ See *id* at *16–17; see also *Common Cause*, 279 F Supp 3d at 659–60.

⁷⁹ See *Common Cause*, 279 F Supp 3d at 660–61.

⁸⁰ See *Rucho*, 139 S Ct at 2518 (Kagan, J, dissenting).

⁸¹ See Devin Caughey et al, *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 Election L J 453, 462–64 (2017).

⁸² See Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm & Mary L. Rev 2115, 2140–43 (2018).

⁸³ See Caughey et al, 16 Election L J at 464–66 (cited in note 81).

participation, discouraging them from speaking, associating, and voting in races whose results are foreordained. As one litigant in *Rucho* remarked, “I can’t tell you how many people told me this election . . . ‘This system is rigged. My vote doesn’t count.’ It was really hard to try to galvanize people to participate.”⁸⁴ These anecdotes find support in new academic work. When a party is disadvantaged by a district plan, at either the state legislative or congressional level, its adherents suffer a host of participational harms. They become less likely to run for office; candidates who do choose to run have worse credentials; donors don’t give as much money; and voters are less apt to turn out.⁸⁵ “Prevented [by gerrymandering] from attaining their electoral or policy objectives, elites and voters alike . . . perform their [various] functions with less enthusiasm.”⁸⁶

Unsurprisingly,⁸⁷ the *Rucho* Court didn’t cite this (or any other) study. But it did repeatedly acknowledge that gerrymandering is undemocratic. (As Justice Kagan quipped in dissent, “really, how could it not?”⁸⁸) “Excessive partisanship in districting,” the Court observed, “leads to results that reasonably seem unjust.”⁸⁹ “[G]errymandering is ‘incompatible with democratic principles,’” the Court continued.⁹⁰ In fact, “partisan gerrymanders violate the core principle of [our] republican government . . . namely, that the voters should choose their representatives, not the other way around.”⁹¹ That’s why the

⁸⁴ *Common Cause*, 279 F Supp 3d at 679; see also, for example, *Benisek v Lamone*, 348 F Supp 3d 493, 523 (D Md 2018), rev’d, 139 S Ct 2484 (2019) (“[T]estimony provided by several of the plaintiffs revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting . . .”).

⁸⁵ See Nicholas O. Stephanopoulos and Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties* 13–21 (Aug 21, 2019), archived at <https://perma.cc/8KLL-S8XZ>.

⁸⁶ *Id.* at 4.

⁸⁷ Unsurprisingly, because Chief Justice Roberts, *Rucho*’s author, is a noted skeptic of empirical research. See, for example, Transcript of Oral Argument, *Gill v Whitford*, No 16-1161, *40 (Oct 3, 2017) (describing quantitative measures of partisan gerrymandering as “sociological gobbledygook”).

⁸⁸ *Rucho v Common Cause*, 139 S Ct 2484, 2512 (2019) (Kagan, J, dissenting); see also *id.* (“The majority disputes none of what I have said . . . about how gerrymanders undermine democracy.”).

⁸⁹ *Id.* at 2506.

⁹⁰ *Id.* (quoting *Ariz. State Leg. v Ariz. Independent Redistricting Comm’n*, 135 S Ct 2652, 2658 (2015)).

⁹¹ *Id.* (quotation marks omitted).

Court “does not condone excessive partisan gerrymandering,”⁹² but instead describes it, over and over, as a “problem.”⁹³

Under *Carolene*, the next step of the analysis is painfully obvious. Gerrymandering is “unjust,” “incompatible with democratic principles,” contrary to “the core principle of our republican government”—so therefore the Court should step in and halt the practice. In *Carolene*’s own words, gerrymandering “restricts those political processes” (legislative elections) “which can ordinarily be expected to bring about repeal of undesirable legislation” (by ousting unpopular legislators) and thus warrants “exact[ing] judicial scrutiny.”⁹⁴ Or as Jamal Greene recently put it, when a party “constructs district lines intentionally to maintain its own partisan advantage,” “[i]ts behavior falls squarely, almost comically, into the second paragraph of *Carolene Products* footnote four.”⁹⁵

And yet the *Rucho* Court declined to invalidate the North Carolina plan, announcing instead that partisan gerrymandering claims are inherently nonjusticiable. In so ruling, the Court pointedly rejected *Carolene*’s central claim: that the state of American democracy and the need for judicial intervention should be linked. “Gerrymandering is incompatible with democratic principles”—but that “does not mean that the solution lies with the federal judiciary.”⁹⁶ “Gerrymanders violate the core principle of our republican government”—but “[t]hat seems like an objection more properly grounded in the Guarantee Clause,” which “does not provide the basis for a justiciable claim.”⁹⁷ Some argue that “this Court *can* address the problem of partisan gerrymandering because it *must*”—but “[t]hat is not the test of our authority under the Constitution.”⁹⁸

⁹² Id at 2507.

⁹³ Id at 2494, 2496, 2507.

⁹⁴ *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

⁹⁵ Jamal Greene, *Foreword: Rights as Trumps?*, 132 Harv L Rev 28, 128 (2018); see also, for example, Pildes, 118 Harv L Rev at 55 (cited in note 60) (“Partisan gerrymandering is a paradigmatic instance of the structural pathology all democratic systems face.”); Kathleen M. Sullivan and Pamela S. Karlan, *The Elysian Fields of the Law*, 57 Stan L Rev 695, 711 (2004) (Ely “would have been outraged by the Court’s recent decision” refusing to rein in partisan gerrymandering).

⁹⁶ *Rucho*, 139 S Ct at 2506 (quotation marks omitted).

⁹⁷ Id (quotation marks and alterations omitted).

⁹⁸ Id at 2507 (quotation marks omitted). Or as Justice Kagan wrote in her dissent, “In the face of grievous harm to democratic governance,” and “in the face of escalating partisan

These passages are some of the clearest repudiations of *Carolene* ever to appear in the United States Reports.⁹⁹ The Court almost seems to flaunt its view that minority rule, electoral nonresponsiveness, and chilled participation—all the democratic injuries caused by gerrymandering—are irrelevant to the Court’s decision making. Democracy may be burning, but the Court flatly refuses any responsibility for extinguishing the flames. This position, of course, is the antithesis of *Carolene*, which holds that putting out the fire is the Court’s most critical task. That’s why I refer to *Rucho* as a paradigmatic reverse *Carolene* decision: as close to *Carolene*’s opposite as we’re ever likely to see.

B. DOCTRINAL ECHOES

Rucho, however, does more than just abjure *Carolene*’s logic. It also gives *reasons* for its renunciation: *arguments* why judicial intervention should be unconnected to democratic malfunction. I now turn to these reasons, and contend that they strongly resemble the ones offered by the dissenters in the one-person, one-vote cases of the 1960s. Reading *Rucho*, in fact, any student of the Court’s redistricting doctrine is likely to experience a powerful sense of déjà vu. It’s as though the 1960s dissenters are speaking from the grave, only this time for a prevailing majority of the Court instead of a defeated minority.¹⁰⁰

But why compare *Rucho* to the reapportionment cases of half a century ago? For one thing, those cases involved many of the same subjects as *Rucho*: redistricting, vote dilution, and the electoral influence of different groups. Those cases also *didn’t* involve (at least not

manipulation whose compatibility with this Nation’s values and law no one defends,” “the majority declines to provide any remedy.” *Id.* at 2515 (Kagan, J, dissenting).

⁹⁹ As I discuss in the next section, the dissents in the one-person, one-vote cases of the 1960s are the other contenders to the anti-*Carolene* throne. See, for example, *Wesberry v Sanders*, 376 US 1, 48 (1964) (Harlan, J, dissenting) (“The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short.”); *Baker v Carr*, 369 US 186, 270 (1962) (Frankfurter, J, dissenting) (asserting that “there is not under our Constitution a judicial remedy for every political mischief”). A striking earlier anti-*Carolene* decision was *Giles v Harris*, 189 US 475, 488 (1903), where the Court acquiesced in Alabama’s refusal to register African American citizens on the ground that “relief from a great political wrong . . . must be given by [the state] or by the legislative and political department of the [federal] government.”

¹⁰⁰ See, for example, Guy-Uriel Charles and Luis E. Fuentes-Rohwer, *Dirty Thinking About Law and Democracy in Rucho v. Common Cause*, 3 Am Const Soc’y Sup Ct Rev 293, 308 (2019) (“From an analytical perspective, there is nothing new in *Rucho*; Chief Justice Roberts basically sings from the standard hymnal.”).

front and center¹⁰¹) the distinct issue of racial discrimination, the focus of *Carolene's* third prong. Moreover, as noted earlier, those cases are widely regarded as the best historical examples of correct *Carolene* decisions.¹⁰² According to Pamela Karlan, “[n]othing provides a better model of anti-entrenchment judicial review than the Warren Court’s reapportionment cases,” where “the Court confronted . . . textbook examples of the systematic restriction of the political process.”¹⁰³ Lastly, those cases were hotly contested, featuring several Justices writing long, sophisticated dissents over a multiyear period. As a result, the rationales for pro-democratic judicial intervention were matched by rebuttals—thrust met by parry—in a vigorous debate unsurpassed before or since.

One of the *Rucho* Court’s reasons for not tackling gerrymandering, then, was its view that neither the Constitution’s text nor its history supports a judicial role in this area. Certain important modes of constitutional interpretation, in other words, don’t corroborate *Carolene* and may even undercut it. Citing the Elections Clause, the Court observed that it “assign[ed] the issue [of redistricting] to the state legislatures, expressly checked and balanced by the Federal Congress.”¹⁰⁴ “At no point was there a suggestion that the federal courts had a role to play” in curbing redistricting abuses.¹⁰⁵ The Court also commented that the constitutional provisions applicable to gerrymandering—the Elections Clause and the First and Fourteenth Amendments—are too abstract to be helpful. They “provide [] no basis whatever to guide the exercise of judicial discretion.”¹⁰⁶ “But we have no commission to allocate political power and influence in the absence of a constitutional directive . . . to guide us in the exercise of such authority.”¹⁰⁷

¹⁰¹ Several of the pivotal one-person, one-vote cases did arise in southern states (like Alabama, Georgia, and Tennessee) where racial discrimination was never far from the surface.

¹⁰² See Part I.

¹⁰³ Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 *Yale L J* 1329, 1333 (2005); see also, for example, Pildes, 118 *Harv L Rev* at 44 (cited in note 60); Strauss, 2010 *U Ill L Rev* at 1259 (cited in note 60).

¹⁰⁴ *Rucho*, 139 S Ct at 2496.

¹⁰⁵ *Id.*; see also *id.* (“Nor was there any indication that the Framers had ever heard of courts doing such a thing.”).

¹⁰⁶ *Id.* at 2506; see also *id.* at 2505 (noting that justiciable claims “typically involve constitutional . . . provisions . . . confining and guiding the exercise of judicial discretion”).

¹⁰⁷ *Id.* at 2508; see also *id.* at 2507 (“Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution. . . .”).

This argument—call it the *conventional modalities* point—ran through the 1960s reapportionment dissents as well. Those opinions stressed that the Court’s one-person, one-vote rule wasn’t grounded in the Constitution’s text, structure, or history. Justice John Marshall Harlan II thus wrote in *Wesberry v Sanders*, the 1964 case that applied the rule to congressional district plans, that “the language of [Article I], the surrounding text, and the relevant history are all in strong and consistent direct contradiction of the Court’s holding.”¹⁰⁸ In *Reynolds v Sims*, the case later in 1964 that extended the equal population principle to state legislative maps, Justice Harlan added that “the Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures.”¹⁰⁹ “This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted.”¹¹⁰ Justice Potter Stewart concurred in a companion case to *Reynolds*, opining that “[t]he Court’s draconian pronouncement . . . finds no support in the words of the Constitution . . . or in the 175-year political history of our Federal Union.”¹¹¹

A second reason the *Rucho* Court gave for not intervening against gerrymandering was its uncertainty how to recognize a *non*-gerrymandered plan. “[I]t is not even clear what fairness looks like in this context,” the Court remarked.¹¹² To some, a normatively attractive map “may mean a greater number of competitive districts.”¹¹³ To others, it may mean “ensur[ing] each party its ‘appropriate’ share of ‘safe’ seats.”¹¹⁴ Still others may think “fairness should be measured by adherence to ‘traditional’ districting criteria.”¹¹⁵ Faced with these competing districting goals, the Court threw up its hands. “Deciding

¹⁰⁸ 376 US 1, 41 (1964) (Harlan, J, dissenting).

¹⁰⁹ 377 US 533, 590–91 (1964) (Harlan, J, dissenting).

¹¹⁰ *Id.* at 591; see also, for example, *id.* at 614–15 (“[T]oday’s decisions are refuted by the language of the Amendment which they construe,” as well as “by history and by consistent theory and practice . . .”).

¹¹¹ *Lucas v Forty-Fourth Gen. Assembly of Colo.*, 377 US 713, 746 (1964) (Stewart, J, dissenting).

¹¹² *Rucho*, 139 S Ct at 2500.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal.”¹¹⁶ “There are no legal standards discernible in the Constitution for making such judgments. . . .”¹¹⁷

Justice Frankfurter made the same argument about the *lack of normative consensus* in *Baker v Carr*, the 1962 case holding that one-person, one-vote claims are justiciable.¹¹⁸ “Apportionment, by its character, is a subject of extraordinary complexity,” he wrote.¹¹⁹ It raises “fundamental theoretical issues concerning what is to be represented in a representative legislature.”¹²⁰ It also implicates more practical “considerations of geography, demography, electoral convenience, economic and social cohesions or divergences among particular local groups . . . and a host of others.”¹²¹ But “these are not factors that lend themselves to . . . judicial determinations.”¹²² To evaluate them, the Court would have to “choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.”¹²³ These aren’t matters that “judges are equipped to adjudicate by legal training or experience or native wit.”¹²⁴

Third, the *Rucho* Court asserted that judges lack the empirical skills to assess district plans’ electoral effects. The district court had included in its proposed test an element asking if a map’s bias would likely persist in future elections.¹²⁵ In response, the Court described historical cases where “predictions of durability proved to be dramatically wrong” due to “flawed assumptions about voter preferences and behavior.”¹²⁶ Generalizing its critique, the Court claimed

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 369 US 186 (1962).

¹¹⁹ *Id.* at 323 (Frankfurter, J, dissenting).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 324.

¹²³ *Id.* at 300.

¹²⁴ *Id.* at 324. In *Avery v Midland County*, 390 U.S. 474 (1968), similarly, Justice Harlan alleged that the Court had embraced “a particular political ideology” even though that view “has been the subject of wide debate and differences from the beginnings of our Nation.” *Id.* at 490 (Harlan, J, dissenting).

¹²⁵ See *Rucho v Common Cause*, 139 S Ct 2484, 2503 (2019).

¹²⁶ *Id.*

that voters' choices depend on a host of changeable conditions: "the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout," and so on.¹²⁷ Consequently, "asking judges to predict how a particular districting map will perform in future elections" would put them "on unstable ground outside judicial expertise."¹²⁸

The 1960s dissenters also leveled this *judicial capacity* objection. Addressing the one-person, one-vote rule after it was floated by Justice William Douglas's concurrence in *Baker*,¹²⁹ Justice Frankfurter labeled it a "mathematical quagmire" of "judicially inappropriate and elusive determinants," from which there would be no "means of extrication."¹³⁰ "To charge courts with the task of [solving] these mathematical puzzles is to attribute . . . omnicompetence to judges."¹³¹ Similarly, after *Reynolds* turned Justice Douglas's suggestion into the law of the land, Justice Harlan identified a series of empirical difficulties with the newly minted equal population principle. It couldn't "balance between keeping up with population shifts and having stable districts," nor could it say "how many legislative districts a State shall have," "what the shape of the districts shall be," or "where to draw a particular district line."¹³² "In all these respects, courts will be called upon to make particular decisions" that "are not amenable to the development of judicial standards."¹³³

Fourth, the *Rucho* Court worried about the unseemliness of involving the federal courts in partisan disputes over redistricting. Redistricting is "a process that often produces ill will and distrust," the Court stated.¹³⁴ So it blanched at the idea that the "federal courts are to 'inject [themselves] into the most heated partisan issues' by

¹²⁷ Id.

¹²⁸ Id at 2504.

¹²⁹ See *Baker v Carr*, 369 US 186, 244 (1962) (Douglas, J, concurring) (suggesting that "a State [may not] weight the vote of one county or one district more heavily than it weights the vote in another").

¹³⁰ Id at 268 (Frankfurter, J, dissenting).

¹³¹ Id.

¹³² *Reynolds v Sims*, 377 US 533, 621 (1964) (Harlan, J, dissenting).

¹³³ Id; see also, for example, *Avery v Midland County*, 390 US 474, 487 (1968) (Harlan, J, dissenting) (criticizing "these adventures of the Court in the realm of political science").

¹³⁴ *Rucho v Common Cause*, 139 S Ct 2484, 2503 (2019) (quoting *Vieth v Jubelirer*, 541 US 267, 307 (2004) (opinion of Kennedy, J)).

adjudicating partisan gerrymandering claims.”¹³⁵ This “expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life.”¹³⁶

Again, Justice Frankfurter aired this *partisan entanglement* point first. In *Colegrove v Green*, the 1946 case that was overruled by *Baker*, he maintained that “the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests.”¹³⁷ “From the determination of such issues this Court has traditionally held aloof,” because “[i]t is hostile to a democratic system to involve the judiciary in the politics of the people.”¹³⁸ Justice Frankfurter returned to this theme in his *Baker* dissent. “The Court’s authority,” he warned, would be undermined by “injecting itself into the clash of political forces in political settlements.”¹³⁹ “It will add a virulent source of friction and tension . . . to embroil the federal judiciary” in “[a]pportionment battles” that are “overwhelmingly party or intraparty contests.”¹⁴⁰

And fifth, the *Rucho* Court thought it didn’t have to grapple with gerrymandering because other actors could stop the practice instead. In some states, “[p]rovisions in state statutes and state constitutions . . . provide standards and guidance for state courts to apply.”¹⁴¹ “[O]ther States are restricting partisan considerations in districting through legislation,” in particular by “placing power to draw electoral districts in the hands of independent commissions.”¹⁴² And Congress, too, has the “power to do something about partisan gerrymandering in the Elections Clause.”¹⁴³ This authority underpins “[d]ozens of bills

¹³⁵ Id (quoting *Davis v Bandemer*, 478 US 109, 145 (1986) (opinion of O’Connor, J)).

¹³⁶ Id at 2507.

¹³⁷ 328 US 549, 555 (1946) (plurality), rev’d, *Baker v Carr*, 369 US 186 (1962); see also id at 553 (“[T]his controversy concerns matters that bring courts into immediate and active relations with party contests.”).

¹³⁸ Id at 553–54.

¹³⁹ *Baker v Carr*, 369 US 186, 267 (1962) (Frankfurter, J, dissenting); see also id (asserting that the Court’s legitimacy is “nourished by the Court’s complete detachment . . . from political entanglements”).

¹⁴⁰ Id at 324; see also id (“[I]n every strand of this complicated, intricate web of values meet the contending forces of partisan politics.”).

¹⁴¹ *Rucho*, 139 S Ct at 2507.

¹⁴² Id.

¹⁴³ Id at 2508.

[that] have been introduced to limit reliance on political considerations in redistricting.”¹⁴⁴ The Court’s nonjusticiability holding thus didn’t “condemn complaints about districting to echo into a void.”¹⁴⁵

Once more, the 1960s dissenters were the original exponents of this argument about *other actors*. In *Colegrove*, Justice Frankfurter noted that “[a]uthority for dealing with [malapportionment] resides elsewhere.”¹⁴⁶ Congress has “authority to secure fair representation by the States in the popular House.”¹⁴⁷ Another “remedy for unfairness in districting is to secure State legislatures that will apportion properly.”¹⁴⁸ In *Baker*, Justice Frankfurter emphasized the power of public opinion. “[R]elief must come through an aroused popular conscience that sears the conscience of the people’s representatives.”¹⁴⁹ Justice Harlan also observed in *Baker* that state institutions may equalize districts’ populations themselves. For the Court to intervene, then, would “turn our backs on the regard which this Court has always shown for the judgment of state legislatures and courts on matters of basically local concern.”¹⁵⁰

But so what if *Rucho* echoes the 1960s dissents? Why does it matter that *Rucho* gives the same reasons for not confronting gerrymandering that Justices Frankfurter, Harlan, and Stewart provided for allowing malapportionment to persist? It matters because it helps us to understand *Rucho*, to place it in doctrinal and historical perspective. *Rucho* plainly isn’t a novel decision, devising creative arguments for holding gerrymandering nonjusticiable. Instead it’s a deeply familiar decision, refusing to correct a democratic failure on the same grounds that anti-*Carolene* Justices have always invoked for their inaction. It’s a decision that wouldn’t have surprised had it been penned by the minority faction of the Warren Court rather than by the namesake of the Roberts Court.

¹⁴⁴ Id.

¹⁴⁵ Id at 2507.

¹⁴⁶ *Colegrove v Green*, 328 US 549, 554 (1946) (plurality), rev’d, *Baker v Carr*, 369 US 186 (1962).

¹⁴⁷ Id; see also id (“[T]he subject has been committed to the exclusive control of Congress.”).

¹⁴⁸ Id at 556.

¹⁴⁹ *Baker v Carr*, 369 US 186, 270 (1962) (Frankfurter, J, dissenting); see also id (“Appeal must be to an informed, civically militant electorate.”).

¹⁵⁰ Id at 332 (Harlan, J, dissenting).

The parallels between *Rucho* and the 1960s dissents also matter because the 1960s dissents were, well, dissents. Their objections to federal courts addressing unequally populated districts were *rejected*, not just once but over a series of major cases.¹⁵¹ Yet those same objections carried the day in *Rucho*. Anti-*Carolene* rationales that had been thought discredited (or at least defunct) roared back to life, unabashedly espoused by a majority of the Justices. The point, of course, isn't that the Warren Court's reapportionment decisions required *Rucho* to come out the other way, let alone that *Rucho* overruled those decisions sub silentio. Stare decisis applies to the Court's holdings, not to its reasons. But the affinity between *Rucho* and the 1960s dissents does indicate that it's outside the central current of the Court's redistricting cases. If *Rucho* had followed from those cases, it would have carefully considered their logic and implications. It *wouldn't* have repeated, time and again, the arguments those cases rebuffed.¹⁵²

C. ACADEMIC ECHOES

Just as *Rucho* should remind redistricting lawyers of the one-person, one-vote dissents, it should evoke for scholars a specific literature: the barrage of skeptical commentary that greeted the publication of John Hart Ely's landmark book, *Democracy and Distrust*, in 1980.¹⁵³ Ely's book was the academic analogue of the Warren Court's reapportionment decisions: a full-throated defense of *Carolene's* thesis that democratic malfunction should prompt judicial intervention. Also like those decisions, *Democracy and Distrust* was criticized as soon as it appeared. Over the years, in fact, a whole cottage industry emerged to attack Ely's (and *Carolene's*) idea of pro-democratic judicial review.

¹⁵¹ See John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U Miami L Rev 489, 501 (2002) (describing these objections as "consigned to the dustbin of history").

¹⁵² For a similar view of *Rucho*, see Joey Fishkin, *Rucho: A Sinkhole Dangerously Close to the House*, Election Law Blog (July 1, 2019), archived at <https://perma.cc/2Z2N8-8VUU>. Also notably, *Rucho* didn't say a word about the Court's racial vote dilution precedents, even though they necessarily involve claims "for a fair share of political power and influence, with all the justiciability conundrums that entails." *Rucho v Common Cause*, 139 S Ct 2484, 2502 (2019). See Nicholas O. Stephanopoulos, *The Erasure of Racial Vote Dilution Doctrine*, Election Law Blog (June 28, 2019), archived at <https://perma.cc/RH5W-JCHZ>.

¹⁵³ Ely, *Democracy and Distrust* (cited in note 3). For another scholar noting the connection between partisan gerrymandering and Ely's political process theory, see Karlan, 114 Yale L J at 1349 (cited in note 103) ("[Ely] saw partisan line drawing . . . as a paradigmatic example of *Carolene Products* process failure.").

This cottage industry, I argue here, supplies *Rucho*'s intellectual scaffolding. *Rucho*'s reasons for holding gerrymandering nonjusticiable are also scholars' reasons for resisting Ely's political process theory. *Rucho* therefore shouldn't be seen exclusively in doctrinal terms, as an exemplary reverse *Carolene* decision. It also reflects (one side of) the academic debate over *Carolene*, copying that camp's claims with eerie precision.

Consider *Rucho*'s conventional modalities point: that the Constitution's text and history don't support a judicial role in the fight against gerrymandering.¹⁵⁴ Scholars on both the right and left criticized Ely (and *Carolene*) on just this basis—for urging the Court to vindicate democratic values even though standard legal sources don't authorize this course of judicial action. Prominent conservative scholar and judge Robert Bork thus wrote that Ely's "notion of representation-reinforcement finds no support as a constitutional value beyond those guarantees written into the [Constitution]."¹⁵⁵ Well-known originalist Larry Alexander also pointed out that "Ely cannot cite any provision in the Constitution" that endorses his "conception of broad participation in the processes of government."¹⁵⁶ Ely has no answer to "the troubling question of how [his] moral ideal relates to the actual Constitution and its text."¹⁵⁷

Liberal academics who might not be expected to be as receptive to textual and historical claims joined in this line of attack as well. Discussing Ely's aspiration of majoritarian democracy, Lawrence Sager asserted that "the reach of that ideal is no more determinately fixed by the text or structure of the Constitution than is the reach of other rights-conferring principles."¹⁵⁸ Addressing an Ely-style proposal that courts decide election law cases based on the democratic value of

¹⁵⁴ See notes 104–07 and accompanying text.

¹⁵⁵ Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash U L Q 695, 699.

¹⁵⁶ Larry A. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 Ohio St L J 3, 10 (1981) (italics, quotation marks, and alterations omitted).

¹⁵⁷ Larry Alexander, *Lost in the Political Thicket*, 41 Fla L Rev 563, 569 n 25 (1989) (discussing vote-dilution doctrine); see also, for example, Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 121 (Apr 3, 2019), archived at <https://perma.cc/Z75N-PLJF> (commenting that, under Ely's theory, "it is not the original meaning of [constitutional] provisions that governs," but rather "the representation reinforcement principle").

¹⁵⁸ Lawrence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 NYU L Rev 417, 423 (1981).

competitiveness, Nathaniel Persily objected that “it is completely disconnected from the text of the Constitution.”¹⁵⁹ Even one of Ely’s staunchest defenders in the academy, Michael Klarman, noted that “[o]ne might well question the *constitutional* basis for this anti-entrenchment theory of judicial review.”¹⁶⁰ “Its grounding is not, in fact, the Constitution,” he candidly added.¹⁶¹

Or take *Rucho*’s argument that there’s no normative consensus what a nongerrymandered district plan looks like, meaning judges would have to resolve this value-laden issue themselves.¹⁶² A close variant of this critique was the most famous riposte to Ely’s political process theory. Ely had condemned all other approaches to constitutional interpretation on the ground that they allowed judges to impose their own substantive preferences.¹⁶³ A host of progressive scholars retorted that Ely’s theory, too, despite the procedural name he assigned it, required all kinds of substantive choices. For instance, Laurence Tribe wrote that “[t]he process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”¹⁶⁴ Likewise, Mark Tushnet alleged that “[t]he fundamental difficulty with Ely’s theory is that its basic premise, that obstacles to political participation should be removed, is hardly value-free.”¹⁶⁵ And according to Paul Brest, “in his heroic attempt to establish a value-free mode of constitutional adjudication, John Hart Ely [came] as close as anyone could to proving that it can’t be done.”¹⁶⁶

¹⁵⁹ Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv L Rev 649, 652 (2002).

¹⁶⁰ Klarman, 85 Geo L J at 499 (cited in note 44).

¹⁶¹ Id; see also, for example, Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v Carr to Bush v Gore* 153 (NYU, 2003) (noting the lack of “a ‘textual hook’ upon which to hang” an election-law approach focused on competitiveness).

¹⁶² See notes 112–17 and accompanying text.

¹⁶³ See Ely, *Democracy and Distrust* at 1–72 (cited in note 3).

¹⁶⁴ Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L J 1063, 1064 (1980).

¹⁶⁵ Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 Yale L J 1037, 1045 (1980).

¹⁶⁶ Paul Brest, *The Substance of Process*, 42 Ohio St L J 131, 142 (1981); see also, for example, Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 Tex L Rev 1207, 1223 (1984) (“[I]t is impossible for the Court to decide what is ‘fair’ or ‘just’ representation without making substantive value judgments.”);

I just called this response to Ely a close variant of *Rucho*'s argument about the absence of normative consensus as to fair redistricting. The points aren't identical because the former targets the very need to make substantive (as opposed to procedural) choices while the latter frets about the intractability of a particular substantive decision: defining a nongerrymandered map. Other liberal academics, though, foreshadowed *Rucho*'s argument even more accurately. The problem with Ely's approach, they contended, wasn't that it asked judges to tackle substantive issues; it was that the specific substantive issue it forced them to confront—the right conception of democracy—is indeterminate and unsuited to judicial resolution. Jack Balkin thus observed that “at any point in time in American society there are competing visions of what democracy requires: some in ascendance, some in dissent, and some that are completely ‘off the wall.’”¹⁶⁷ Jane Schacter also charged that “Ely's theory failed to treat democracy as the essentially contested concept that it is.”¹⁶⁸ And Ronald Dworkin opined that Ely's approach “might be persuasive if democracy were a precise political concept,” or “if the American experience uniquely defined some particular conception of democracy.”¹⁶⁹ “But none of this is true.”¹⁷⁰

Turn next to *Rucho*'s claim that courts lack the capacity to evaluate district plans' electoral effects.¹⁷¹ Progressive scholars expressed the same grievance with Ely (and *Carolene*): that they obliged judges to determine when democracy is, in fact, threatened by a given practice. Even if a single definition of democracy could be selected, these scholars maintained, judges don't have the ability to ascertain when the political process is operating smoothly and when it's misfiring. In David Strauss's words, “Ely's theory requires judges to be amateur political scientists: to determine when the channels of political change are blocked.”¹⁷² Or as Guy-Uriel Charles put it, Ely's

Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 Va L Rev 721, 723 (1991) (“Ely's [theory] ultimately relies on substantive judgments, many of which are extremely controversial.”).

¹⁶⁷ Jack M. Balkin, *The Roots of the Living Constitution*, 92 BU L Rev 1129, 1159 (2012).

¹⁶⁸ Schacter, 57 Stan L Rev at 738 (cited in note 25).

¹⁶⁹ Ronald Dworkin, *The Forum of Principle*, 56 NYU L Rev 469, 502 (1981).

¹⁷⁰ Id; see also, for example, Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 Ohio St L J 261, 306 (1981) (“[C]onsensus as to a certain sort of democratic process . . . is nonexistent.”).

¹⁷¹ See notes 125–28 and accompanying text.

¹⁷² David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 Stan L Rev 761, 777 (2004).

“inquiry presupposes that the Court is able to distinguish . . . a properly functioning democratic process from an improperly functioning one.”¹⁷³ Or per Heather Gerken and Michael Kang, “[j]udges aren’t particularly adept at adjudicating the inherently [empirical] claims at stake in election law cases.”¹⁷⁴ “They don’t possess the training to judge, let alone manage, politics.”¹⁷⁵

And last,¹⁷⁶ recall *Rucho*’s argument that courts would become entangled in raw partisan politics if they decided gerrymandering cases.¹⁷⁷ This, too, was a common academic critique of Ely (and *Caroleene*). Many electoral laws are adopted for partisan purposes, ran the objection, so if courts strike down these measures because of their undemocratic implications, then courts will inevitably be drawn into heated partisan disputes. Following this logic, Peter Schuck called it “a chilling prospect” for a court following political process theory to, in effect, “prescrib[e] the partisan configuration of the legislature—the most political of tasks.”¹⁷⁸ Gary Leedes also described “judicial involvement in [the] pursuit of political power” as “a form of entanglement so potentially divisive and disruptive that it should be avoided.”¹⁷⁹ And Richard Hasen complained that “structural theories” like Ely’s “require great intrusion by the judiciary into the political processes” and so “are misguided and dangerous.”¹⁸⁰

Again, my main goal here is to show the striking convergence between *Rucho*’s reasons for holding gerrymandering nonjusticiable and

¹⁷³ Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 NC L Rev 1103, 1134 (2002).

¹⁷⁴ Heather K. Gerken and Michael S. Kang, *Déjà Vu All Over Again: Courts, Corporate Law, and Election Law*, 126 Harv L Rev F 86, 88 (2013).

¹⁷⁵ Id; see also, for example, Hasen, *The Supreme Court and Election Law* at 154 (cited in note 161) (“I have become skeptical that the judges [do] a good job examining the social science evidence regarding the effects of court-mandated regulation of the political process.”).

¹⁷⁶ A careful reader may note that *Rucho* gave one more reason for holding gerrymandering nonjusticiable: that actors other than the federal courts may also take steps to stop gerrymandering. See notes 141–45 and accompanying text. This is *Rucho*’s sole justification that’s rooted only in the 1960s reapportionment dissents and not also in the academic literature criticizing Ely.

¹⁷⁷ See notes 134–36 and accompanying text.

¹⁷⁸ Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum L Rev 1325, 1365 (1987) (discussing the regulation of partisan gerrymandering)

¹⁷⁹ Gary C. Leedes, *Supreme Court Mess*, 57 Tex L Rev 1361, 1424 (1979).

¹⁸⁰ Hasen, *The Supreme Court and Election Law* at 139 (cited in note 161) (discussing Isacharoff and Pildes’s Ely-esque approach); see also, for example, Bruce E. Cain, *Garrett’s Temptation*, 85 Va L Rev 1589, 1600 (1999) (“The structural approach leads inevitably to intrusive judicial involvement in states’ political arrangements.”).

the scholarly literature opposing Ely (and *Carolene*). *Rucho* doesn't cite this literature but it plainly echoes it—sings in its distinctive key. However, I also want to note the irony of the many liberal attacks on political process theory. Virtually every progressive scholar disagreed with the Court's decision in *Rucho*. By my count, almost a hundred professors signed amicus briefs backing the *Rucho* plaintiffs, while *not one* put her name on a brief for North Carolina.¹⁸¹ Yet the *Rucho* Court channeled the progressive scholars' anti-Ely arguments, ticking through them point by point. Those arguments provided the intellectual backdrop that helped make the Court's ruling possible. Of course, the liberal critics mostly disparaged Ely from the left, urging *more* judicial intervention on grounds *beyond* democracy promotion. Nevertheless, it's remarkable how their own words came back to haunt them in *Rucho*. In a striking case of unintended consequences, work advocating a broader judicial role ended up enabling its contraction.

D. CAROLENE'S ENDURING APPEAL

The above discussion may suggest that *Rucho*'s reasons for holding gerrymandering nonjusticiable—which are also the 1960s dissenters' reasons for thinking malapportionment a political question and academics' reasons for objecting to political process theory—are highly persuasive. After all, I've now outlined those reasons several times, but I haven't yet identified any responses to them. I actually don't intend to rebut the arguments of the *Rucho* Court (and its kindred spirits) at length here. My aim in this article is to situate *Rucho* as a reverse *Carolene* decision, not to defend *Carolene*-style pro-democratic

¹⁸¹ See, for example, Brief of 27 Election Law, Scientific Evidence, and Empirical Legal Scholars as Amici Curiae, *Rucho v Common Cause*, No 18-422 (US filed Mar 8, 2019); Brief of Amici Curiae First Amendment and Election Law Scholars, *Rucho v Common Cause*, No 18-422 (US filed Mar 8, 2019); Brief of Amici Curiae Historians, *Rucho v Common Cause*, No 18-422 (US filed Mar 8, 2019); Brief of Amici Curiae Political Science Professors, *Rucho v Common Cause*, No 18-422 (US filed Mar 8, 2019); Brief of Amici Curiae Professors Christopher Elmendorf et al, *Rucho v Common Cause*, No 18-422 (US filed Mar 8, 2019); Brief of Amici Curiae Professors Wesley Pegden et al, *Rucho v Common Cause*, No 18-422 (US filed Mar 8, 2019); Brief of Professor D. Theodore Rave as Amicus Curiae, *Rucho v Common Cause*, No 18-422 (US filed Mar 8, 2019).

Of course, there's no irony when liberal scholars criticize political process theory and oppose judicial intervention against partisan gerrymandering. That position is completely consistent. See, for example, Hasen, *The Supreme Court and Election Law* (cited in note 161); Daniel H. Lowenstein and Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L Rev 1 (1985); Persily, 116 Harv L Rev at 649 (cited in note 159).

judicial review. As a backer of such review,¹⁸² though, I also don't want to leave the impression that *Rucho*'s rationales are unassailable. Accordingly, I now explain how Justice Kagan, in her *Rucho* dissent, countered each of the majority's points. Her refutation shows that the debate over *Carolene* is just that: a genuine two-sided dialogue, not a rout in favor of the anti-*Carolene* camp. Justice Kagan's dissent also demonstrates that even as the Court's majority becomes increasingly anti-*Carolene*, a vocal minority remains committed to *Carolene*'s thesis.

Start with the *Rucho* majority's conventional modalities argument.¹⁸³ Justice Kagan pointed out that, even if the Constitution's text and history don't support a judicial role in the fight against gerrymandering, a third mode of interpretation, reasoning from precedent,¹⁸⁴ does. "The Fourteenth Amendment, we long ago recognized," forbids the practice of "vote dilution—the devaluation of one citizen's vote as compared to others."¹⁸⁵ This bar on dilutive policies is why "this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations."¹⁸⁶ It's also why the Court subsequently recognized a cause of action for racial vote dilution: the diminution of minority voters' electoral influence through at-large elections, carefully crafted districts, and other dilutive measures.¹⁸⁷ Returning to partisan gerrymandering, "[t]he constitutional injury . . . is much the same, except that the dilution is based on party affiliation."¹⁸⁸ "In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to fully and effectively participate in the political process."¹⁸⁹

¹⁸² See, for example, Stephanopoulos, 114 Colum L Rev (cited in note 55); Nicholas O. Stephanopoulos and Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U Chi L Rev 831 (2015).

¹⁸³ See notes 104–07 and accompanying text.

¹⁸⁴ See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877 (1996).

¹⁸⁵ *Rucho v Common Cause*, 139 S Ct 2484, 2514 (2019) (Kagan, J, dissenting); see also *id* at 2523 ("This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions.").

¹⁸⁶ *Id* at 2514.

¹⁸⁷ See, for example, *White v Regester*, 412 US 755 (1973).

¹⁸⁸ *Rucho*, 139 S Ct at 2514 (Kagan, J, dissenting).

¹⁸⁹ *Id* (quotation marks and alterations omitted).

Justice Kagan also linked a different account of gerrymandering's constitutional harm to the Court's precedent. On this view, the problem with the practice isn't that it dilutes the votes of one party's adherents. The issue, instead, is that when the government gerrymanders, it injures voters because of their political beliefs and impedes their ability to associate with one another, in contravention of long-standing First Amendment principles. Justice Kagan thus cited cases holding that when the government "subject[s] certain voters to 'disfavored treatment' . . . because of 'their voting history and their expression of political views,'" it violates the First Amendment.¹⁹⁰ She referenced additional decisions establishing that when "the State frustrates [voters'] efforts to translate [their] affiliations into political effectiveness," the First Amendment is offended as well.¹⁹¹ "In both of those ways, partisan gerrymanders . . . undermine the protections of 'democracy embodied in the First Amendment.'"¹⁹²

The Court's precedent supplied Justice Kagan with one more response to the *Rucho* majority's argument about conventional modalities. If taken seriously, the Constitution's text and history indicate that courts shouldn't try to fix *any* democratic malfunctions: not partisan gerrymandering, and not malapportionment, racial vote dilution, or voter suppression either.¹⁹³ The Fourteenth Amendment, in particular, was originally intended to protect civil but not political rights,¹⁹⁴ and its language in no way distinguishes between gerrymandering and any other democratic failure. Yet as Justice Kagan remarked, "racial and residential gerrymanders were also once with us, but the Court has done something about that fact."¹⁹⁵ The Court, that is, has deemed those practices unconstitutional despite their validity under textual and historical modes of reasoning. The *Rucho* majority therefore can't "frame [its] point as an originalist constitutional argument."¹⁹⁶ Originalism would negate almost all of election

¹⁹⁰ Id (quoting *Vieth v Jubelirer*, 541 US 267, 314 (2004) (opinion of Kennedy, J)).

¹⁹¹ Id (citing *Cal. Dem. Party v Jones*, 530 US 567, 574 (2000)); see also id ("[A]dded to that strictly personal harm is an associational one.")

¹⁹² Id (quoting *Elrod v Burns*, 427 US 347, 357 (1976)).

¹⁹³ See notes 108–11 and accompanying text.

¹⁹⁴ See generally Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 Nw U L Rev (forthcoming 2020).

¹⁹⁵ *Rucho*, 139 S Ct at 2512 (Kagan, J, dissenting).

¹⁹⁶ Id.

law, but the majority accepts “a role for the courts with respect to at least some [redistricting] issues.”¹⁹⁷

Consider, second, the *Rucho* majority’s claim that no normative consensus exists as to what a nongerrymandered district plan looks like.¹⁹⁸ Relying on recent developments in the lower courts, Justice Kagan flatly denied this assertion. There now *is* consensus, she maintained, that a nongerrymandered plan is one that resembles maps that are randomly generated by a computer algorithm based only on a jurisdiction’s lawful, nonpartisan criteria. A plan isn’t a gerrymander, in other words, if it lies within the distribution of randomly created maps.¹⁹⁹ The *Rucho* majority thus “misses something under its nose: What it says can’t be done *has* been done.”²⁰⁰ “Over the past several years, federal courts across the country . . . have largely converged on a [single] standard.”²⁰¹ This standard “takes as its baseline a State’s *own* criteria of fairness, apart from partisan gain.”²⁰² These criteria are used to produce “a large collection of districting plans that incorporate the State’s physical and political geography.”²⁰³ Then “[w]e can line up those maps on a continuum” and “see where the State’s actual plan falls on the spectrum.”²⁰⁴ “The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution.”²⁰⁵

This approach, Justice Kagan continued, neatly sidesteps all of the *Rucho* majority’s allegedly unanswerable questions. How competitive should a plan’s districts be?²⁰⁶ As vigorously contested as a state wants.

¹⁹⁷ Id at 2495–96. Justice Kagan added that “any originalist argument would have to deal with an inconvenient fact”: that “[t]he Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion.” Id at 2512 n 1 (Kagan, J, dissenting).

¹⁹⁸ See notes 112–17 and accompanying text.

¹⁹⁹ Of course, the fact that lower courts have arrived at a consensus doesn’t mean it’s shared by the rest of society. I, for one, have some discomfort with using randomly generated maps as a baseline when the maps happen to be skewed in a party’s favor due to a state’s political geography. In such cases, I would hesitate to deem a plan a gerrymander if it’s *more* symmetric in its treatment of the major parties than most simulated maps.

²⁰⁰ *Rucho*, 139 S Ct at 2516 (Kagan, J, dissenting).

²⁰¹ Id; see also, for example, id at 2509 (“The majority’s abdication comes just when courts across the country . . . have coalesced around manageable judicial standards to resolve partisan gerrymandering claims.”).

²⁰² Id at 2516.

²⁰³ Id at 2518.

²⁰⁴ Id.

²⁰⁵ Id.

²⁰⁶ See note 113 and accompanying text.

How should parties' seats be related to their votes?²⁰⁷ It depends on where voters happen to live and which nonpartisan districting principles a state employs. How much compliance with these principles is enough?²⁰⁸ Again, it's up to each state. In Justice Kagan's words, "the comparator (or baseline or touchstone) is the result not of a judge's philosophizing but of the State's own characteristics and judgments."²⁰⁹ These factors "create[] a neutral baseline from which to assess whether partisanship has run amok."²¹⁰ So the reference point is *not* (what the *Rucho* majority thought it had to be) "the maps a judge, with his own view of electoral fairness, could have dreamed up."²¹¹

Third, the *Rucho* majority contended that courts lack the capacity to assess district plans' electoral effects.²¹² To the contrary, Justice Kagan responded, lower courts recently demonstrated their ability to do exactly that. In the years leading up to *Rucho*, five district courts (comprising fifteen federal judges) considered, and ruled in favor of, partisan gerrymandering claims in Maryland, Michigan, North Carolina, Ohio, and Wisconsin.²¹³ All of these cases involved voluminous empirical testimony. And in all of them, the courts' "findings about these gerrymanders' effects on voters . . . were evidence-based, data-based, statistics-based"—"[k]nowledge-based, one might say."²¹⁴ The courts "did not gaze into crystal balls, as the majority tries to suggest."²¹⁵ Instead "[t]hey evaluated with immense care the factual evidence . . . the parties presented."²¹⁶ "They looked hard at the facts, and they went where the facts led them."²¹⁷

One conclusion to which the facts led them was that modern gerrymanders are quite durable. Recall that the *Rucho* majority

²⁰⁷ See note 114 and accompanying text.

²⁰⁸ See note 115 and accompanying text.

²⁰⁹ *Rucho*, 139 S Ct at 2520 (Kagan, J, dissenting).

²¹⁰ *Id.*

²¹¹ *Id.*; see also *id.* at 2518 n 3 ("[T]his distribution of outcomes provides what the majority says does not exist—a neutral comparator for the State's own plan.").

²¹² See notes 125–28 and accompanying text.

²¹³ See *Rucho*, 139 S Ct at 2513, 2518 (Kagan, J, dissenting) (describing most of these suits).

²¹⁴ *Id.* at 2519.

²¹⁵ *Id.*

²¹⁶ *Id.* at 2525.

²¹⁷ *Id.* at 2519.

stressed the volatility of voters, who supposedly change their minds from year to year, and split their tickets even in the same election, at a high rate.²¹⁸ The empirical evidence the lower courts heard contradicted these “unsupported and out-of-date musings about the unpredictability of the American voter.”²¹⁹ In reality, today’s voters tend to be strong partisans, meaning that party-switching over time and ticket-splitting in a single election are both infrequent.²²⁰ As a result, “maps constructed with so much expertise and care to make electoral outcomes impervious to voting” don’t often “come apart.”²²¹ Most of the time, contemporary line-drawers “succeed[] in entrenching themselves in office” and thereby “beat[ing] democracy.”²²²

Fourth, the *Rucho* majority objected to courts’ entanglement in partisan politics, red in tooth and claw.²²³ Justice Kagan replied that cases’ partisan implications aren’t a justification for judicial inaction. Yes, gerrymanders “have great political consequence.”²²⁴ But this impact is *harmful*: “a cascade of negative results” including “the death-knell of bipartisanship,” “a legislative environment that is toxic and tribal,” and “the polarized political system so many Americans loathe.”²²⁵ These adverse outcomes oblige the Court to intervene, not to stare impassively as democracy deteriorates. Gerrymanders “imperil our system of government,” and “[p]art of the Court’s role in that system is to defend its foundations.”²²⁶

Justice Kagan also explained that courts’ partisan entanglement wouldn’t be as extensive as the *Rucho* majority feared. For one thing, her proposed standard (which mirrored that adopted by the lower courts) would reach only the “worst-of-the-worst cases of democratic subversion”: the handful of district plans designed with partisan motives and yielding large, durable, and unjustified partisan effects.²²⁷

²¹⁸ See notes 126–28 and accompanying text.

²¹⁹ *Rucho*, 139 S Ct at 2519 (Kagan, J, dissenting).

²²⁰ See LWV Brief at 25–26 (cited in note 16).

²²¹ *Rucho*, 139 S Ct at 2519 (Kagan, J, dissenting).

²²² Id; see also id at 2525 (“In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats.”).

²²³ See notes 134–36 and accompanying text.

²²⁴ *Rucho*, 139 S Ct at 2525 (Kagan, J, dissenting).

²²⁵ Id (quotation marks omitted).

²²⁶ Id at 2525.

²²⁷ Id at 2509.

“[B]y requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard [would] invalidate[] the most extreme, but only the most extreme, partisan gerrymanders.”²²⁸ For another, if the Court struck down a map or two, line-drawers would likely stop gerrymandering as much, and there would be less need for judicial involvement. “[S]moking guns” where politicians “openly proclaim their intent to entrench their party in office” would “all but disappear.”²²⁹ Fewer “officials [would] continue[] to try implementing extreme partisan gerrymanders.”²³⁰ After all, “[i]n districting cases no less than others, officials respond to what this Court determines the law to sanction.”²³¹

And fifth, the *Rucho* majority argued that it need not act thanks to the anti-gerrymandering efforts of other actors: legislators, voters via direct democracy, and state courts.²³² As to legislators, Justice Kagan accented the obvious; they’re the people with the strongest incentive to gerrymander, so “[n]o one can look to them for effective relief” from the practice.²³³ Yes, a few reformers occasionally introduce “bills limiting partisan gerrymanders.”²³⁴ But “what all these *bills* have in common is that they are not *laws*.”²³⁵ As to voter initiatives, Justice Kagan noted that they’re frequently unavailable; “[f]ewer than half the States” permit them.²³⁶ Even where voters can place measures directly on the ballot, redistricting initiatives tend to trigger furious opposition from the politicians whose mapmaking power is threatened. “[L]egislators often fight [those] efforts tooth and nail”—and often manage to defeat them.²³⁷

And as to state courts, Justice Kagan noted that they, too, are courts. How can gerrymandering not be justiciable for federal courts,

²²⁸ Id at 2516; see also id at 2522 (“[T]he combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others.”).

²²⁹ Id at 2522–23.

²³⁰ Id at 2523; see also id at 2523 n 5 (“A decision of this Court invalidating the North Carolina and Maryland gerrymanders would of course have curbed much of that behavior.”).

²³¹ Id at 2523 n 5.

²³² See notes 141–45 and accompanying text.

²³³ *Rucho*, 139 S Ct at 2523 (Kagan, J, dissenting); see also id at 2524 (“The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering.”).

²³⁴ Id at 2523.

²³⁵ Id at 2524.

²³⁶ Id.

²³⁷ Id.

then, when it is for their state counterparts? “[W]hat do those courts know that this Court does not?”²³⁸ “If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn’t we?”²³⁹ The answer isn’t that state constitutions typically include more specific anti-gerrymandering provisions than the federal Constitution. For example, “[t]he Pennsylvania Supreme Court based its gerrymandering decision on a constitutional clause providing only that ‘elections shall be free and equal.’”²⁴⁰ Even more starkly, two months after *Rucho*, a court invalidated North Carolina’s state legislative maps based on that state’s analogues to the First and Fourteenth Amendments.²⁴¹ Those, of course, are the very provisions from which the *Rucho* majority supposedly *couldn’t* derive a workable test.

As I mentioned above, I think the debate between the *Rucho* majority and Justice Kagan has a winner.²⁴² Point by point, I find her responses more persuasive than the majority’s reasons for holding gerrymandering nonjusticiable. But even a reader inclined to agree with the majority must concede that its anti-*Caroline* position hasn’t swept the field. Yes, that stance now commands the votes of five Justices. But that’s all it commands. In the rest of the Court—and in the lower federal courts that ruled in favor of gerrymandering challenges prior to *Rucho*, and in the state courts that continue to uphold these claims, and in the academy that nearly unanimously backs judicial action against gerrymandering—*Caroline*’s message still appeals. David Strauss once provocatively titled an article, *Is Caroline Products Obsolete?*²⁴³ Justice Kagan’s dissent shows that it’s not.

III. A PERVERSE CAROLINE FUTURE?

More precisely, Justice Kagan’s dissent shows that *Caroline* isn’t *intellectually* obsolete. *Doctrinally*, though—as a matter of

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 2424 n. 6.

²⁴¹ See *Common Cause v Lewis*, No 18 CVS 014001, 2019 WL 4569584 (NC Super Ct Sept 3, 2019).

²⁴² See note 182 and accompanying text.

²⁴³ See Strauss, 2010 U Ill L Rev at 1251 (cited in note 60). Strauss also answered his question in the negative. See *id.* at 1269 (“If you have a better idea about what courts should be doing in difficult constitutional cases, let me know.”).

constitutional law as fashioned by the current Court—*Carolene* is at grave risk of extinction. One threat to it comes from reverse *Carolene* decisions like *Rucho*. When the Court refuses to fix democratic malfunctions, it doesn't do the one thing that, *Carolene* holds, it should prioritize above all else. But I want to turn in this Part to a new and growing menace to *Carolene*: perverse (rather than reverse) *Carolene* decisions in which the Court prevents *other* actors from curbing democratic abuses and promoting democratic values.²⁴⁴ Perverse decisions compound the damage of reverse decisions. They represent not judicial apathy in the face of democratic failure (bad enough, one might think) but rather affirmative judicial protection for the subversion of democracy.

Rucho's subject, partisan gerrymandering, is one area where perverse *Carolene* decisions are on the horizon (though not yet overhead). Nonjudicial actors often try to thwart gerrymandering by adopting independent redistricting commissions. But there may now be five votes on the Court (the same five votes that made up the *Rucho* majority) for the proposition that commissions with authority over congressional mapmaking unlawfully abridge state legislatures' right to draw the lines as they please. Other plausible challenges to commissions also wait in the wings. Outside the gerrymandering context, perverse *Carolene* decisions may greet any congressional attempts to defend the right to vote. The Roberts Court may view laws easing franchise access as violations of states' prerogatives to limit their electorates as they see fit. And in the campaign finance arena, perverse *Carolene* decisions already fill the case reporters. The Roberts Court has systematically blocked federal and state actors from countering the corrosive effects of massive electoral funding on American democracy.

A. PARTISAN GERRYMANDERING

1. *Elections Clause*. In one of *Rucho*'s most startling passages, Chief Justice Roberts framed redistricting commissions as a potential solution to the problem of gerrymandering. He observed that states are increasingly "placing power to draw electoral districts in the hands of independent commissions."²⁴⁵ In the 2018 election, for instance,

²⁴⁴ See notes 68–69 and accompanying text.

²⁴⁵ *Rucho*, 139 S Ct at 2507.

“voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible . . . for creating and approving district maps for congressional and state legislative districts.”²⁴⁶ He also described “[t]he first bill introduced in the 116th Congress,” which “would require States to create 15-member independent commissions to draw congressional districts.”²⁴⁷ This bill followed an earlier congressional proposal to “require every State to establish an independent commission to adopt redistricting plans.”²⁴⁸ By citing these efforts, the Court meant to show that it didn’t “condone partisan gerrymandering” or “condemn complaints about districting to echo into a void.”²⁴⁹ Commissions, the Court suggested, could avert gerrymandering and address voters’ complaints about the mapmaking process.

This passage isn’t startling because of its prescription. Commissions are a common—and compelling—antidote to gerrymandering. Thirteen states currently use commissions to design their congressional districts, four of which switched to this line-drawing procedure in 2018 alone.²⁵⁰ Abroad, every Western democracy whose legislators are elected from single-member districts entrusts redistricting to a commission.²⁵¹ And for good reason. The root cause of gerrymandering is legislators’ self-interest: their desire to benefit their party and to shield themselves from meaningful competition. Commissions remove legislators’ self-interest from the mapmaking equation. When properly structured, they’re made up of members who *don’t* have a personal stake in how the lines are drawn, and who set the boundaries based on criteria *other* than partisan advantage and incumbent protection.²⁵² As a result, commission-crafted plans are more compliant

²⁴⁶ Id.

²⁴⁷ Id at 2508.

²⁴⁸ Id.

²⁴⁹ Id at 2507.

²⁵⁰ See Nat’l Conf. State Legislatures, *Redistricting Law 2010* at 197–99 (2009) (listing Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington as states using congressional redistricting commissions as of 2009). I also count Iowa, where a state agency designs congressional districts, in this group. Since 2009, California (2010), New York (2014), Colorado (2018), Michigan (2018), Ohio (2018), and Utah (2018) have switched to congressional commissions as well. See also Justin Levitt, *Who Draws the Lines?*, All About Redistricting, archived at <https://perma.cc/6E8W-X7BY>.

²⁵¹ See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U Chi L Rev 769, 780–86 (2013).

²⁵² For a longer version of this argument, see Stephanopoulos, 2015 U Chi Legal F at 489–91 (cited in note 68).

with traditional districting principles,²⁵³ more competitive,²⁵⁴ and more balanced in their treatment of the major parties²⁵⁵ than maps produced by politicians.

A majority of the Court was equally enthusiastic about commissions in the 2015 case *Arizona State Legislature v Arizona Independent Redistricting Commission*.²⁵⁶ Commissions “address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power,” the Court gushed.²⁵⁷ Commissions do so because they “check legislators’ ability to choose the district lines they run in” and “impede legislators from choosing their voters.”²⁵⁸ Commissions thus “ensure that Members of Congress [will] have ‘an habitual recollection of their dependence on the people.’”²⁵⁹ They “restore the core principle of republican government, namely, that the voters should choose their representatives, not the other way around.”²⁶⁰

The passage in *Rucho* is startling, then, because of its author rather than its argument. Chief Justice Roberts, who presented commissions as a solution to gerrymandering in *Rucho*, dissented in *Arizona State Legislature*, contending that Arizona’s congressional redistricting commission is unconstitutional. His logic was as follows: The Elections Clause states that the “Times, Places and Manner” of congressional elections “shall be prescribed in each State by the Legislature thereof.”²⁶¹

²⁵³ See, for example, Vladimir Kogan and Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 Cal J Pol & Pol’y 1, 11–16 (2012) (finding that when California switched to a commission, its districts split fewer political subdivisions and were more compact).

²⁵⁴ See, for example, Jamie L. Carson and Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 St Pol & Pol’y Q 455, 461–62 (2004) (finding that commission usage increases the share of House districts won by fewer than twenty points).

²⁵⁵ See, for example, Stephanopoulos, 2015 U Chi Legal F at 496–501 (cited in note 68) (finding that commission usage reduces the partisan bias of state legislative and congressional maps).

²⁵⁶ 135 S Ct 2652 (2015).

²⁵⁷ Id at 2658; see also id at 2677 (commissions “curb the practice of gerrymandering”).

²⁵⁸ Id at 2675–76.

²⁵⁹ Id at 2677 (quoting Federalist 57 (Madison)); see also id at 2675 (commissions “advanc[e] the prospect that Members of Congress will in fact be ‘chosen . . . by the People of the several States’” (quoting US Const, Art I, § 2)).

²⁶⁰ Id at 2677 (quotation marks omitted).

²⁶¹ US Const, Art I, § 4 (emphasis added).

The “Legislature” is “the representative body which makes the laws of the people.”²⁶² But in Arizona, “redistricting is *not* carried out by the legislature.”²⁶³ Instead, “an unelected body called the Independent Redistricting Commission draws the lines.”²⁶⁴ Aggravating the Elections Clause violation, the commission gained its mapmaking authority from not a legislative delegation but rather a voter initiative in which the legislature had no part.

Whatever the merits of this reasoning,²⁶⁵ it plainly amounts to a perverse *Carolene* position. Partisan gerrymandering is undemocratic. Arizona voters found a way to prevent gerrymandering by adopting a commission. But the commission is unlawful because it offends the Elections Clause. Therefore the power to redistrict must return to the Arizona legislature, which will then be free to gerrymander to its heart’s content. Or as Chief Justice Roberts put it, only slightly less starkly: “The people of Arizona have concerns about the process of congressional redistricting in their State,” in that they don’t want that process to yield an undemocratic gerrymander.²⁶⁶ But alas, “the Elections Clause of the Constitution does not allow them to address those concerns by displacing their legislature.”²⁶⁷ So the legislature must remain responsible for redistricting, and the people’s concerns about gerrymandering must stay unresolved.

Nor is the Arizona commission any more vulnerable to this attack than many other commissions. The Arizona commission’s plans go directly into effect, without any need for legislative approval. So do the congressional maps drawn by the California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, and Washington commissions.²⁶⁸ The Arizona commission was also created by a voter initiative that circumvented the legislature. So were the California and

²⁶² *Ariz. State Leg.*, 135 S Ct at 2679 (Roberts, CJ, dissenting).

²⁶³ *Id* at 2678 (emphasis added).

²⁶⁴ *Id*.

²⁶⁵ The majority’s main response is that “Legislature” actually means the “power that makes laws,” and in Arizona, “initiatives adopted by the voters legislate for the State just as measures passed by the representative body do.” *Id* at 2671 (quotation marks omitted).

²⁶⁶ *Id* at 2692 (Roberts, CJ, dissenting).

²⁶⁷ *Id*; see also, for example, *id* at 2678 (“No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution.”); *id* at 2690 (“[A] law’s virtues as a policy innovation cannot redeem its inconsistency with the Constitution.”).

²⁶⁸ See Levitt, *Who Draws the Lines?* (cited in note 250).

Michigan congressional redistricting commissions.²⁶⁹ Chief Justice Roberts's perverse *Carolene* position would thus nullify most American commissions. In fact, it would nullify the *best* American commissions: the ones that are most insulated from the individuals—self-interested legislators—who are most likely to gerrymander.²⁷⁰

Chief Justice Roberts's position could actually sweep even more broadly than that. Governors have the power to veto congressional district plans in forty-five states.²⁷¹ But governors are no more "the representative body which makes the laws" than are voters acting via direct democracy. Gubernatorial vetoes of congressional maps, then, might be unlawful under the Elections Clause.²⁷² Similarly, thirty state constitutions specify criteria like compactness and respect for political subdivisions for congressional districts.²⁷³ But state *constitutions* aren't state *statutes*. They're not enacted by state legislatures pursuant to the bodies' ordinary lawmaking processes. So they may be invalid, too, to the extent that they regulate congressional redistricting. And courts play a ubiquitous role in disputes over congressional district plans. But the judiciary isn't "the Legislature" either, meaning this court function is suspect as well. In short, under Chief Justice Roberts's view, every nonlegislative actor might be constitutionally barred from participating in congressional redistricting. On this account, not only would the fox be *allowed* to guard the henhouse, the fox *alone* could do so.

It's true that Chief Justice Roberts's opinion in *Arizona State Legislature* was a dissent. But it was a dissent that three other Justices joined,²⁷⁴ and one of the Justices in the majority, Justice Anthony

²⁶⁹ See generally Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J L & Pol 331 (2007) (discussing redistricting initiatives throughout American history).

²⁷⁰ Chief Justice Roberts asserted that his view would "not affect most other redistricting commissions" because they generally "play an 'auxiliary role' in congressional redistricting." *Ariz. State Leg.*, 135 S Ct at 2691 (Roberts, CJ, dissenting). This is simply incorrect, at least with respect to the commissions cited here.

²⁷¹ See Levitt, *Who Draws the Lines?* (cited in note 250).

²⁷² Chief Justice Roberts's position might thus require the reversal of *Smiley v Holm*, 285 US 355 (1932), in which the Court approved a gubernatorial veto of a congressional map against an Elections Clause challenge.

²⁷³ See Nat'l Conf. State Legislatures, *Redistricting Law 2010* at 125–27 (cited in note 250). Note that since this report's publication, California, Colorado, Florida, New York, and Ohio have adopted criteria for congressional districts.

²⁷⁴ These were Justices Alito, Scalia, and Thomas. Justice Scalia's replacement on the Court, Justice Gorsuch, presumably shares his Elections Clause views.

Kennedy, has now been replaced by Justice Brett Kavanaugh. Unlike Justice Kennedy, Justice Kavanaugh believes that partisan gerrymandering is nonjusticiable; he was part of the *Rucho* majority.²⁷⁵ It's at least plausible (and maybe even probable²⁷⁶) that Justice Kavanaugh would disagree with Justice Kennedy about the involvement of nonlegislative actors in congressional redistricting, too.

It's also the case that Chief Justice Roberts disclaimed the more radical implications of his Elections Clause stance, writing that "the state legislature need not be *exclusive* in congressional districting."²⁷⁷ If this caveat were to hold, then gubernatorial vetoes, state constitutional criteria, and lawsuits would remain permissible with respect to congressional districts. Unlike the Arizona commission, these measures don't "totally displace[] the legislature from the redistricting process."²⁷⁸ The caveat, however, is a classic ipse dixit. It's asserted without explanation after a long discussion of why "the Legislature" has to mean "the representative body which makes the laws."²⁷⁹ The caveat also contradicts the preceding discussion. If that's the right definition of "the Legislature," then how can the term encompass actors who are indisputably nonlegislative? How are congressional district lines "prescribed in each State by the Legislature thereof" if they're shaped, in part, by the governor, the state constitution, or a court? For these reasons, the caveat seems unlikely to limit the scope of the perverse *Carolene* revolution that Chief Justice Roberts's dissent would augur, if it gained one more vote.

2. *Congressional authority.* Even at its most extensive, though, this revolution would affect only *state* regulations (by nonlegislative actors) of *congressional* redistricting. That was the sole topic addressed in *Arizona State Legislature* by the majority or the dissenters. But what if *Congress* tried to stop gerrymandering by requiring commissions to design states' congressional *and state legislative* maps? The first bill the House of Representatives passed in 2019, after switching from

²⁷⁵ In contrast, Justice Kennedy pointedly refused to join the *Vieth* plurality's opinion deeming gerrymandering nonjusticiable.

²⁷⁶ Maybe probable because, to date, Justice Kavanaugh's voting behavior on the Court has been nearly identical to Chief Justice Roberts's. See, for example, Adam Feldman, *So Happy Together*, SCOTUSblog (May 23, 2019), archived at <https://perma.cc/UH56-V5QS>.

²⁷⁷ *Ariz. State Leg. v Ariz. Independent Redistricting Comm'n*, 135 S Ct 2652, 2687 (2015) (Roberts, CJ, dissenting) (emphasis added).

²⁷⁸ *Id* at 2691 (emphasis added).

²⁷⁹ See *id* at 2678–87.

Republican to Democratic control, would oblige states to create and use commissions for their congressional plans.²⁸⁰ (This bill was the *Rucho* majority's lead example of how Congress could still curb re-districting abuses even after the Court withdrew from the field.²⁸¹) Several commentators have also urged that the bill's coverage be broadened from congressional to state legislative maps, on the ground that the latter are just as susceptible to gerrymandering as the former.²⁸²

It's not alarmist to fear that this sort of legislation would receive a hostile reception from the Roberts Court. In the 1990s, an earlier conservative majority announced the so-called "anti-commandeering" doctrine, under which "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."²⁸³ In a 2003 case, six Justices agreed (albeit in dicta) that the anti-commandeering doctrine applies to the Elections Clause: the most explicit grant of power to Congress to fight gerrymandering. Writing for a four-Justice plurality, Justice Antonin Scalia emphasized that his interpretation of a federal redistricting statute wouldn't "permit[] a commandeering of the machinery of state government."²⁸⁴ Concurring for herself and Justice Clarence Thomas, Justice Sandra Day O'Connor rejected the view that "the anticommandeering jurisprudence is inapplicable to" the Elections Clause simply because that provision affirmatively contemplates congressional regulation of federal elections.²⁸⁵

²⁸⁰ See HR 1, 116th Cong, 1st Sess, §§ 2400–35 (2019). This bill has gone nowhere in the Republican-controlled Senate.

²⁸¹ See *Rucho v Common Cause*, 139 S Ct 2484, 2508 (2019).

²⁸² I'm one of these commentators. See Nicholas Stephanopoulos, *H.R. 1 and Redistricting Commissions*, Election Law Blog (Jan 9, 2019), archived at <https://perma.cc/C77S-P8HB>; see also, for example, Ryan P. Bates, Note, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 Duke L J 333, 338 (2005) ("Congress would be both authorized and justified in requiring the states to adopt independent and nonpartisan commissions . . . both for congressional and state legislative districts.").

²⁸³ *Printz v United States*, 521 US 898, 925 (1997); see also, for example, *New York v United States*, 505 US 144, 162 (1992) (Congress lacks "the ability to require the States to govern according to Congress' instructions").

²⁸⁴ *Branch v Smith*, 538 US 254, 280 (2003) (plurality).

²⁸⁵ *Id.* at 301 (O'Connor, J, concurring in part and dissenting in part). But note that some lower courts, in cases prior to *Branch*, held that Congress *may* commandeer state governments when it legislates under the Elections Clause. See, for example, *Condon v Reno*, 913 F Supp 946, 965 (DSC 1995); *Wilson v United States*, 878 F Supp 1324, 1327–28 (ND Cal 1995).

If Congress can't commandeer state governments when it legislates under the Elections Clause, then it's easy to see why the House's recently passed bill might skate on thin constitutional ice. The bill states that "[e]ach State *shall* establish a nonpartisan agency in the legislative branch."²⁸⁶ This agency "*shall* establish an independent redistricting commission" pursuant to a detailed appointment procedure.²⁸⁷ And the commission, in turn, "*shall* establish single-member congressional districts" that comply with several specified criteria.²⁸⁸ All these *shall*s are federal orders to the states: binding rules how (and by whom) their congressional districts must be drawn in subsequent cycles. That's why the House's bill, according to its conservative critics, "would likely run into the Supreme Court's doctrine against federal 'commandeering,'"²⁸⁹ and "would surely invite legal challenge as a violation of the anti-commandeering doctrine."²⁹⁰

This objection would hold regardless of the electoral level. The allegation of commandeering, in other words, would apply whether Congress legislated about congressional or state legislative plans. If Congress required commissions to be used for state legislative maps, however, it would run into an additional obstacle. The Elections Clause only empowers Congress to regulate federal elections.²⁹¹ So to tackle gerrymandering at the state legislative level, Congress would have to find another source of regulatory authority. The Fourteenth Amendment's Enforcement Clause is the most likely candidate, given the Court's view (even in *Rucho*) that extreme gerrymandering violates the Equal Protection Clause.²⁹² But the Court has sharply restricted Congress's ability to legislate in furtherance of Fourteenth Amendment values. With respect to any enforcement statute, "[t]here must be a congruence and proportionality" between Congress's

²⁸⁶ HR 1, 116th Cong, 1st Sess, §§ 2414(a)(1) (2019) (emphasis added).

²⁸⁷ Id § 2411(a)(1) (emphasis added).

²⁸⁸ Id § 2413(a)(1) (emphasis added).

²⁸⁹ Walter Olson, *House Passes Political-Omnibus Bill H.R 1*, Cato at Liberty (Mar 11, 2019), archived at <https://perma.cc/2RQM-TP2R>.

²⁹⁰ Ilya Shapiro and Nathan Harvey, *What Left-Wing Populism Looks Like*, National Review (Mar 7, 2019), archived at <https://perma.cc/8T9U-JCCZ>.

²⁹¹ See US Const, Art I, § 4 (referring to "Elections for Senators and Representatives").

²⁹² See, for example, *Rucho v Common Cause*, 139 S Ct 2484, 2504 (2019) (arguing that "separating constitutional from unconstitutional partisan gerrymandering" is impossible, but not disputing that unconstitutional gerrymandering exists).

means and the underlying constitutional “injury to be prevented or remedied.”²⁹³

Rucho itself raises doubts whether the compulsory use of commissions is a congruent and proportional response to the problem of gerrymandering. To repeat, commissions are appealing because they’re made up of members who have no incentive to benefit any candidate or party.²⁹⁴ The *Rucho* majority, though, held that “securing partisan advantage” is “[a] *permissible* intent” that “does *not* indicate that the districting was improper.”²⁹⁵ In that case, commissions’ removal of partisanship from the mapmaking process might be a non sequitur: a measure unrelated to the harm of gerrymandering, as understood by the *Rucho* majority. The House’s bill also stipulates that districts must abide by traditional districting principles and must not, “when considered on a Statewide basis, unduly favor or disfavor any political party.”²⁹⁶ But the *Rucho* majority thought that “adherence to ‘traditional’ districting criteria” is just another contestable “vision[] of fairness.”²⁹⁷ It even more stridently criticized the idea that “a districting map is . . . unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature.”²⁹⁸ Again, then, core elements of the House’s bill may have little to do with the *Rucho* majority’s conception of gerrymandering.

There are good rejoinders, of course, to these arguments that Congress is powerless to force the use of redistricting commissions.²⁹⁹ But whatever their flaws, the arguments are far from “off the wall,”³⁰⁰

²⁹³ *City of Boerne v Flores*, 521 US 507, 520 (1997).

²⁹⁴ See notes 250–60 and accompanying text.

²⁹⁵ *Rucho*, 139 S Ct at 2503 (emphasis added).

²⁹⁶ HR 1, 116th Cong, 1st Sess, §§ 2413(a)(1)–(2) (2019).

²⁹⁷ *Rucho*, 139 S Ct at 2500.

²⁹⁸ *Id* at 2499.

²⁹⁹ To wit: The anti-commandeering doctrine has no textual basis and needlessly prevents Congress from relying on mandates to states in circumstances where they’re the most effective tool. And the *Rucho* majority’s view that gerrymandering is unrelated to partisan intent, noncompliance with traditional districting principles, and extreme partisan asymmetry is strange, to say the least. On an ordinary account of gerrymandering, commissions are certainly a congruent and proportional response to it, since they prevent it from occurring in the first place.

³⁰⁰ See, for example, Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* 177–83 (Harvard, 2011) (discussing how constitutional arguments can go from “off the wall” to “on the wall”).

given the Roberts Court's prior record, as well as paradigmatic examples of perverse *Carolene* claims. No one (not even the *Rucho* majority) "disputes [that] gerrymanders undermine democracy."³⁰¹ Independent commissions are a common mechanism, in America and abroad, for preventing gerrymandering. But if Congress were to require commissions to redistrict, it's possible the Roberts Court would nullify its policy, thus allowing states to continue to gerrymander. This might be a correct decision, based on conventional modes of constitutional reasoning, or it might be a wrong one. From a *Carolene* perspective, though, it would certainly be a perverse one.

3. *First Amendment*. Opponents of independent redistricting commissions have one last arrow in their quiver. According to a recently filed complaint against Michigan's commission, the body's membership criteria violate the First Amendment.³⁰² These criteria exclude candidates for office, elected officials, party leaders, lobbyists, and the like from serving on the commission.³⁰³ This exclusion, the complaint asserts, is unlawful discrimination in hiring based on prospective employees' political beliefs. "In excluding certain categories of citizens from eligibility based on their exercise of core First Amendment rights . . . the State has unconstitutionally conditioned eligibility for a valuable benefit on their willingness to limit their First Amendment right[s]."³⁰⁴

Like the other looming challenges to commissions, this First Amendment claim can't be ignored. It builds on the Roberts Court's campaign finance precedents: cases that, as I discuss below, take a very expansive view of political speech and association.³⁰⁵ The claim is also supported by the Court's earlier decisions holding that the government can't hire or fire employees because of their partisan affiliations.³⁰⁶ Generalizing from these decisions, the complaint plausibly states that "[c]onditions of employment that compel or restrain

³⁰¹ *Rucho*, 139 S Ct at 2512 (Kagan, J, dissenting).

³⁰² See Complaint, *Daunt v Benson*, No 1:19-cv-00614 (WD Mich filed July 30, 2019) ("Daunt Complaint").

³⁰³ See id ¶ 1.

³⁰⁴ Id ¶ 46.

³⁰⁵ See id ¶ 53 (citing *Randall v Sorrell*, 548 US 230 (2006)).

³⁰⁶ See, for example, *Rutan v Republican Party of Ill.*, 497 US 62 (1990); *Elrod v Burns*, 427 US 347 (1976).

belief and association . . . are inimical to the process which undergirds our system of government.”³⁰⁷

The First Amendment theory would have more dramatic consequences, too, than the other objections to commissions. Chief Justice Roberts’s dissent in *Arizona State Legislature* would only bar voters (and maybe other nonlegislative actors) from regulating congressional redistricting. The anti-commandeering and congruence-and-proportionality doctrines would only impede congressional attempts to compel the use of commissions. In contrast, the First Amendment theory would extend to *all* commissions, whether created by voter initiative, state legislation, or Congress, and whether responsible for congressional or state legislative redistricting. All commissions would be unconstitutional if they excluded certain citizens from membership, and all commissions would have to throw open their doors to all comers to remain in operation.

This would be another perverse *Carolene* outcome—indeed, a perverse *Carolene* outcome with a twist. If a commission were shuttered because of its exclusionary membership criteria (the fate the lawsuit says should befall Michigan’s new body³⁰⁸), then the usual logic would apply. A court would have stopped a nonjudicial actor from addressing gerrymandering, ensuring that undemocratic redistricting practices would persist. On the other hand, if a commission dropped its membership criteria to avoid offending (this view of the First Amendment,³⁰⁹ then its capacity to draw fair lines would be compromised. Instead of being staffed by members with *no* reason

³⁰⁷ *Daunt* Complaint ¶ 44 (cited in note 302). Again, that this argument is plausible under current law doesn’t mean it’s compelling. The Court’s patronage cases allow the government to “choos[e] or dismiss[] certain high-level employees on the basis of their political views.” *Rutan*, 497 US at 74. Members of a redistricting commission are certainly “high-level employees.” It’s also more problematic for the government to hire or fire a *particular* party’s adherents than for the government to exclude *all* highly partisan individuals from positions that are meant to be nonpartisan. Only the former is viewpoint discrimination. And even if the Michigan commission’s membership criteria burden First Amendment rights and trigger heightened scrutiny, they should survive it. A commission staffed by partisans is unlikely to achieve its goal of preventing partisan gerrymandering. See Leah Litman, *Republicans Say the First Amendment Protects the Right to Gerrymander*, *Slate* (Aug 5, 2019), archived at <https://perma.cc/5DVP-QAF5>.

³⁰⁸ See *Daunt* Complaint ¶¶ 48–56 (cited in note 302) (arguing that the Michigan commission’s membership criteria can’t be severed from the rest of the measure establishing the body).

³⁰⁹ Of course, most commissions *can’t* voluntarily drop their membership criteria because those criteria are prescribed by the legal instruments that created the bodies.

to seek partisan advantage or protect incumbents, the commission would have to welcome the individuals with the *strongest* incentive to pursue these goals. The commission could stay in business, but at the behest of the judiciary, it would have to let the fox back in the henhouse.

B. OTHER AREAS

1. *The right to vote.* All the perverse *Carolene* arguments, to this point, have been drawn from the partisan gerrymandering context. If accepted by the Roberts Court—a real possibility—they would invalidate redistricting commissions and thus thwart the main non-judicial response to gerrymandering. Perverse *Carolene* claims, however, are hardly confined to the gerrymandering arena. They're increasingly being advanced in other election law fields, and the Roberts Court seems increasingly receptive to them. I now turn to these other fields, starting with the right to vote. I keep my discussion brief since the other fields aren't my focus in this article.

Access to the franchise, then, is often limited by state and local governments. Jurisdictions prohibit ex-felons from voting.³¹⁰ They require photo identification to vote and proof of citizenship to register to vote.³¹¹ They close polling places and cut the period for early voting.³¹² And they do so more and more; voting barriers have been erected over the last decade at the highest rate since the civil rights era.³¹³ These measures are obviously offensive from a *Carolene* perspective. They abridge a democratic value—political participation—that everyone agrees is protected by *Carolene*.³¹⁴ They *don't* need more sophisticated democratic theories of majoritarianism or responsiveness to be condemned.³¹⁵ And they burden a freedom, “the right to vote,” that's *Carolene's* lead example of “those political

³¹⁰ See *Felon Voting Rights*, Nat'l Conf. State Legislatures (Dec 21, 2018), archived at <https://perma.cc/2CBK-AATEG>.

³¹¹ See *Voter Identification Requirements*, Nat'l Conf. State Legislatures (Jan 17, 2019), archived at <https://perma.cc/B4XU-CZNC>.

³¹² See Christopher Ingraham, *Thousands of Polling Places Were Closed over the Past Decade. Here's Where*, Wash Post (Oct 26, 2018), archived at <https://perma.cc/T7AB-MDLU>.

³¹³ See *New Voting Restrictions in America*, Brennan Center for Justice (May 10, 2017), archived at <https://perma.cc/B4XU-CZNC>.

³¹⁴ See Part I.

³¹⁵ See *id.*

processes which can ordinarily be expected to bring about repeal of undesirable legislation.”³¹⁶

A correct *Carolene* decision would therefore strike down a voting restriction.³¹⁷ The Roberts Court has issued no such rulings; it has never nullified a law making it harder to vote.³¹⁸ A reverse *Carolene* decision, on the other hand, would uphold a voting restriction and so allow a jurisdiction to impede political participation. The Roberts Court has made several such rulings, sustaining, for instance, Indiana’s photo ID requirement for voting³¹⁹ and Ohio’s policy of purging nonvoters from the rolls.³²⁰ And for a perverse *Carolene* decision to be possible, a nonjudicial actor would first have to facilitate access to the franchise. Most intuitively, Congress or a state government could enact a law permitting more people to vote or making voting easier for everybody.

The first bill the House of Representatives passed in 2019—the same bill that would mandate redistricting commissions—would do just that. Among other things, the bill would end the disenfranchisement of ex-felons, prohibit photo ID requirements for voting, ban purges of the voter rolls, and set a floor of fifteen days for early voting.³²¹ The bill, that is, would reverse most of the recent efforts by subfederal jurisdictions to inhibit voting. In addition, a number of states have liberalized their voting rules over the last few years. In particular, automatic voter registration—registering citizens when they interact with government agencies unless they affirmatively decline to be enrolled—has been adopted by sixteen states since 2015.³²²

³¹⁶ *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

³¹⁷ I don’t mean to suggest that *Carolene* requires all voting restrictions to be struck down. Some restrictions serve compelling governmental interests like an orderly electoral process and others are justified by normative judgments about who belongs to the political community. *Carolene* is thus better understood as a thumb on the scale for (not an absolute guarantee of) easier political participation by more people.

³¹⁸ Though on a few occasions, the Roberts Court has concluded it was too close to an election to disturb lower-court rulings striking down voting restrictions. See, for example, *Frank v Walker*, 135 S Ct 7 (2014) (vacating the Seventh Circuit’s election-eve stay of a district court’s injunction barring the use of Wisconsin’s photo ID law). The Roberts Court also held in *Arizona v Inter Tribal Council of Ariz.*, 570 US 1, 16 (2013), that Arizona’s proof-of-citizenship requirement for voter registration was preempted by the National Voter Registration Act. However, this was a statutory rather than a constitutional ruling.

³¹⁹ See *Crawford v Marion County Elections Bd.*, 553 US 181 (2008) (plurality).

³²⁰ See *Husted v A. Philip Randolph Inst.*, 138 S Ct 1833 (2018).

³²¹ See HR 1, 116th Cong, 1st Sess, §§ 1401–08, 1201–02, 1611, 1903 (2019).

³²² See *Automatic Voter Registration*, Brennan Center for Justice (July 10, 2019), archived at <https://perma.cc/JQ7C-8DBH>.

If it became law, however, the House's bill would face a plausible constitutional challenge. Congress, again, is authorized by the Elections Clause to regulate the "Times, Places and Manner" of federal elections.³²³ The Qualifications Clause, though, enables *states* to specify "the Qualifications requisite for [their] Electors" in state and federal elections.³²⁴ Provisions like enfranchising ex-felons and allowing citizens to vote without photo IDs, the argument would thus run, exceed Congress's Elections Clause authority because they're not procedural regulations but rather attempts to choose states' voting qualifications for them. On this view, not having been convicted of a felony and possessing a valid ID are eligibility criteria that some states have adopted for voting, which Congress may not displace. As the Court put it in a 2013 case, "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."³²⁵ "One cannot read the Elections Clause as treating implicitly what [the Qualifications Clause] regulate[s] explicitly."³²⁶

The Roberts Court might also be skeptical of automatic voter registration. In recent cases, the Court has deemed it unlawful "compelled speech" when public employees were required to pay dues to support unions' collective bargaining³²⁷ and political³²⁸ activities. Voter registration is arguably as communicative as union dues, indicating citizens' preferences to be included in the voter rolls and to participate in future elections.³²⁹ Nor does it necessarily solve the coercion problem if citizens can decline to be registered, since in the Court's words, "[a]n opt-out system [still] creates a risk that [speech] will be used to further political and ideological ends with which [citizens] do not agree."³³⁰ Parroting these points, the conservative

³²³ See Part II.A.2.

³²⁴ US Const, Art I, § 2 (House elections); see also US Const, Amend XVII (Senate elections).

³²⁵ *Arizona v Inter Tribal Council of Ariz.*, 570 US 1, 16 (2013); see also *id* at 31 (Thomas, J, dissenting) ("The text of the Times, Places and Manner Clause . . . cannot be read to authorize Congress to dictate voter eligibility to the States."). One response to this argument is doctrinal. In *Oregon v Mitchell*, 400 US 112 (1970), the Court *upheld* a statutory provision lowering the voting age to eighteen in federal elections. The Court, in other words, *allowed* Congress to alter states' qualifications for voting.

³²⁶ *Inter Tribal*, 570 US at 16.

³²⁷ See *Janus v AFSCME*, 138 S Ct 2448 (2018).

³²⁸ See *Knox v SEIU*, 567 US 298 (2012).

³²⁹ Only arguably; one response is that voter registration expresses no political view at all and is better understood as bureaucratic record keeping.

³³⁰ *Knox*, 567 US at 312.

chair of the Election Assistance Commission has called voter registration “the embodiment of political speech protected by the First Amendment.”³³¹ Because “not registering to vote is a choice” just like registering is, “opt-out” allegedly isn’t “adequate in the voter registration context.”³³²

Right or wrong on non-*Carolene* grounds,³³³ these are quintessential perverse *Carolene* claims. If the Qualifications Clause bars Congress from enfranchising ex-felons or allowing citizens to vote without photo IDs, then states will keep limiting their electorates in these ways. Thanks to the judiciary, political participation will continue to be curbed, despite a nonjudicial actor’s attempt to expand it. Likewise, if the First Amendment forbids states (and Congress) from registering citizens automatically, then many citizens will remain unregistered. The voter pool won’t be as deep as it could be, again because of the courts and against the wishes of the elected branches.

2. *Campaign finance.* Proceeding to campaign finance, it’s the one area I examine where *private* activity—the funding of elections by wealthy individuals and organizations—constitutes the threat to democratic values. A large campaign contribution or expenditure may form half of a corrupt quid pro quo exchange, in which a candidate promises an official act in return for the money.³³⁴ In this case, the act reflects the funder’s rather than the electorate’s priorities. Even when quids and quos aren’t explicitly linked, politicians may be more responsive to those who give and spend on their behalf, and less attuned to their actual constituents. In this case, too, governmental policy may be more congruent with funders’ than with voters’ preferences. And because incumbent politicians may have stronger relationships with campaign donors and spenders (having already built those relationships to get elected), they may find it easier than challengers to raise funds. Challengers, then, may face the dual hurdles of opponents who are

³³¹ Christy McCormick, *Motor Voter Registration: Modernization and Challenges* 6, at https://electionlawblog.org/wp-content/uploads/Presentation_Christy_McCormick.pdf.

³³² *Id.*; see also *id.* at 5–6 (citing *Knox* and *Janus*).

³³³ As noted above, I think these arguments are flawed on non-*Carolene* grounds too. See notes 325, 329.

³³⁴ The Roberts Court has asserted that “independent expenditures . . . do not give rise to corruption or the appearance of corruption,” *Citizens United v FEC*, 558 US 310, 357 (2010), but that’s simply its ipse dixit, unsubstantiated by any evidence about the links between independent spending and corruption.

better known *and* better funded, yielding a lower level of electoral competition.³³⁵

Empirical evidence (which I recap here but have covered in more depth elsewhere³³⁶) confirms these effects. The ideological distributions of elected officials and of campaign donors are nearly identical: sharply bimodal patterns in which almost everyone is liberal or conservative and next to no one is politically moderate.³³⁷ In contrast, the ideological distribution of the general public resembles a bell curve: fattest in the political center and thinning quickly to the left and right.³³⁸ These findings suggest that campaign contributions lead politicians to mirror their donors' and discount their constituents' views. Why else would politicians risk ignoring the positions of the median voter?³³⁹

Similarly, when electoral funding is less regulated, incumbents massively outraise challengers and beat them by huge margins, on average.³⁴⁰ But when electoral funding is restricted by contribution limits,³⁴¹ or subsidized by public financing,³⁴² incumbents' fiscal advantage shrinks significantly. Contribution limits have more bite for incumbents because they're able to solicit more and larger donations. Public financing is also more helpful for challengers because they're more cash strapped in the absence of governmental funds. And the result of greater resource parity is more electoral competition. When contribution limits and public financing are in place, incumbents tend

³³⁵ I explore these threats to democratic values in more detail, while focusing on the possibility of campaign funding causing misalignment, in Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 Va L Rev 1425 (2015).

³³⁶ See Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 Nw U L Rev 989, 1047–52 (2018); Stephanopoulos, 101 Va L Rev at 1474–79 (cited in note 335).

³³⁷ See, for example, Joseph Bafumi and Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 Am Pol Sci Rev 519, 536–37 (2010); Michael J. Barber, *Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate*, 80 Pub Opinion Q 225, 236–37 (2016).

³³⁸ See sources cited in note 337.

³³⁹ There are actually several more reasons: politicians' own ideologies, pressure from party activists and leaders, strategies for professional advancement, and so on. Campaign finance is one, but not the only, explanation for misalignment between voters and their representatives.

³⁴⁰ See, for example, Thomas Stratmann, *How Close Is Fundraising in Contested Elections in States with Low Contribution Limits?* 9 (May 2009), archived at <https://perma.cc/XL2V-96WZ>.

³⁴¹ See, for example, Thomas Stratmann and Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 Pub Choice 177, 198 (2006).

³⁴² See, for example, Andrew B. Hall, *How the Public Funding of Elections Increases Candidate Polarization* 11–12 (Jan 13, 2014), archived at <https://perma.cc/43JP-SYAX>.

to win by narrower margins and to be ousted more often by their opponents.³⁴³

Given this evidence, a correct *Carolene* decision would curb the private (or expand the public) funding of campaigns. It would thus reduce corruption, improve the ideological alignment of voters and politicians, and trigger more competitive elections, all in one stroke. Such a ruling, though, is hard to imagine in our constitutional order. In general, only state action can violate the Constitution, and private activity—even democratically destructive private activity—is constitutionally valid. By the same token, a reverse *Carolene* decision would be an odd concept. Technically, it would be a ruling declining to cut private (or boost public) campaign finance, thereby allowing the democratic harms of money in politics to persist. But again, it's awkward to criticize judicial passivity in this context since judicial *intervention*, here, is so foreign to the American legal framework.

On the other hand, a perverse *Carolene* decision is quite easy to conceptualize. It's simply a ruling blocking an attempt by a nonjudicial actor, like Congress or a state government, to regulate electoral funding and so to fight corruption, promote majoritarianism, and enhance competition. Perverse *Carolene* decisions aren't just readily imaginable; they're also doctrinally plentiful. In recent years, the Roberts Court has struck down regular contribution limits³⁴⁴ as well as aggregate limits on how much donors can give to all recipients.³⁴⁵ It has first narrowed³⁴⁶ and then eliminated³⁴⁷ the federal ban on corporate and union electoral spending. It has invalidated a law loosening contribution limits for candidates running against personally wealthy opponents.³⁴⁸ And it has nullified a public financing scheme that tied the government's subsidies to the disbursements of privately funded candidates.³⁴⁹ In all these cases, the Court's position was that the First Amendment protects the funding of elections and that the

³⁴³ See, for example, Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 St Pol & Pol'y Q 263, 274, 276 (2008); Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 Election L J 125, 135 (2010).

³⁴⁴ See *Randall v Sorrell*, 548 US 230 (2006) (plurality).

³⁴⁵ See *McCutcheon v FEC*, 572 US 185 (2014) (plurality).

³⁴⁶ See *FEC v Wisconsin Right to Life, Inc.*, 551 US 449 (2007) (plurality).

³⁴⁷ See *Citizens United v FEC*, 558 US 310 (2010).

³⁴⁸ See *Davis v FEC*, 554 US 724 (2008).

³⁴⁹ See *Ariz. Free Enterprise Club's Freedom Club PAC v Bennett*, 564 US 721 (2011).

government's interests—even pro-democratic ones—can't justify the free speech burdens.

These cases' proponents, though, wouldn't concede that they're perverse *Carolene* decisions. Instead they would argue that they're *correct Carolene* decisions, intervening against laws that imperil democratic values. The proponents' reasoning is that most campaign finance regulations are enacted by self-interested incumbents. Surely these politicians wouldn't support measures that weaken their grip on their own offices. The proponents add that, to overcome voters' familiarity with incumbents, challengers typically need to raise and spend large sums of money. But campaign finance regulations impede this funding process, thereby lowering challengers' odds of success. As Justice Scalia wrote in a 2003 case, "[t]he first instinct of power is the retention of power," and "that is best achieved by the suppression of election-time speech."³⁵⁰ "[A]ny restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents."³⁵¹ Or as Chief Justice Roberts put it in 2014, "those who govern should be the *last* people to help decide who *should* govern."³⁵² When incumbents do limit electoral funding, they "compromis[e] the political responsiveness at the heart of the democratic process" by "favor[ing] some participants in that process" (themselves) "over others" (challengers).³⁵³

Scholars, even some progressives, have echoed this claim that the Roberts Court's campaign finance cases are correct *Carolene* decisions. "When incumbents limit the speech of their challengers . . . the Court's services as a referee are most urgently needed," Kathleen Sullivan and Pamela Karlan have asserted, in a piece trying to divine how Ely himself would have approached regulations of electoral funding.³⁵⁴ Laurence Tribe has also explained how a "skeptical view"

³⁵⁰ *McConnell v FEC*, 540 US 93, 263 (2003) (opinion of Scalia, J).

³⁵¹ *Id.* at 249.

³⁵² *McCutcheon v FEC*, 572 US 185, 192 (2014) (plurality).

³⁵³ *Id.* at 227; see also, for example, *Citizens United v FEC*, 558 US 310, 354 (2010) (claiming that, by banning electoral spending by corporations, "the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interest"); *Davis v FEC*, 554 US 724, 742 (2008) (maintaining that campaign finance regulations "arrogate the voters' authority to evaluate the strengths of candidates competing for office" and "use the election laws to influence the voters' choices").

³⁵⁴ Sullivan and Karlan, 57 *Stan L Rev* at 702 (cited in note 95); see also Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 *Harv L Rev* 1, 30 (2012) ("It certainly is possible to defend the result in *Citizens United* as an application of process theory.").

of these laws, rooted in “a particular fear that legislatures will enact incumbent-protection provisions,” “fits firmly into the political process tradition” and is “a descendant of the Warren Court’s reapportionment cases.”³⁵⁵ And Jack Balkin has contended that “*Citizens United* offers the conservative version of Ely’s *Democracy and Distrust*.”³⁵⁶ The decision “worries that because of defects in the political process, Congress is trying to snuff out political speech by defenseless corporations.”³⁵⁷

As noted above,³⁵⁸ both the Roberts Court and these academics have it wrong. In fact, most campaign finance regulations *disadvantage* incumbents and *increase* competition.³⁵⁹ Most campaign finance laws were also passed by reformers in rare moments following corruption scandals—not by self-interested incumbents practicing politics as usual.³⁶⁰ To the extent that *Citizens United* and its ilk are justified on *Carolene* grounds, then, the defense fails. These cases are *mistaken*, not correct, *Carolene* decisions that err in their arguments about how restrictions on electoral funding affect democratic values.

This error, though, is an interesting one. It highlights the hazards of commenting on policies’ democratic implications in the absence of empirical evidence. Both the Roberts Court and the academics have reasonable intuitions about how campaign finance regulations shape the electoral landscape. But these intuitions are aired without facts to back them up—and it turns out the facts *don’t* back them up. *Carolene*-style analysis thus shouldn’t proceed on the basis of logic, precedent, or conventional wisdom. To be done right, it should focus relentlessly on how the data say that policies and democratic values are related. Sometimes the data correspond to observers’

³⁵⁵ Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 Const Comm 463, 482 (2015).

³⁵⁶ Balkin, 92 BU L Rev at 1160 (cited in note 167).

³⁵⁷ Id; see also, for example, Daryl Levinson and Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L J 400, 461 (2015) (“Campaign finance regulations might well benefit incumbents at the expense of challengers. . . .”); Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 Colum L Rev 1326, 1339 (1994) (“[U]nder the line of argument in *Carolene Products* . . . campaign finance is subsumed under a larger topic in which constant judicial vigilance and consequent judicial jurisdiction are appropriate.”).

³⁵⁸ See notes 340–43 and accompanying text.

³⁵⁹ See id.

³⁶⁰ To take the two most prominent federal examples, the Federal Election Campaign Act was passed in 1974, in the wake of Watergate, and the Bipartisan Campaign Reform Act became law in 2002, after the Enron scandal.

expectations. But sometimes they don't, and in that scenario, heeding the empirics is the only way to avoid *Carolene* decisions that are simultaneously mistaken and perverse.

3. *Voting Rights Act*. Lastly, I want to say a word about the Voting Rights Act (VRA): a topic I have studiously avoided until now.³⁶¹ Most VRA litigation involves racial vote *dilution*: the reduction of minority voters' electoral influence through mechanisms like at-large elections and cleverly drawn districts.³⁶² Racial vote dilution is best understood as a ground for judicial intervention under *Carolene*'s third prong.³⁶³ It's only possible when voting is racially polarized, that is, when minority and nonminority voters have different political preferences.³⁶⁴ Racial polarization, in turn, is "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."³⁶⁵ Without racial polarization, in other words, minorities and nonminorities alike do well enough in the rough-and-tumble of pluralist politics, and *Carolene*'s third prong counsels judicial restraint.

Racial vote dilution, then, is beyond this article's scope because it involves *Carolene*'s third prong rather than its second. But the VRA also prohibits racial vote *denial*: measures making it more difficult for minority members to vote.³⁶⁶ Unlike racial vote dilution, racial vote denial fits naturally under *Carolene*'s second prong. It hinders political participation: the least controversial democratic value underpinning

³⁶¹ I have also studiously avoided discussing the Court's racial gerrymandering precedents. These cases are based on the excessive consideration of race in the redistricting process: a factor unrelated to *Carolene*'s concerns about the abridgment of democratic values. In other words, the racial gerrymandering cases aren't an exercise of pro-democratic judicial review and so are unrelated to my project here.

³⁶² See, for example, Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 Supreme Court Review 55, 73–74 ("While the VRA prohibits both vote dilution and vote denial, the former has accounted for the vast majority of activity under both Section 2 and Section 5.").

³⁶³ For another scholar agreeing with this framing, see Karlan, 114 Yale L J at 1336 (cited in note 103) ("[T]he analysis of racial vote dilution came essentially to unpack *Carolene Products*'s antidiscrimination rationale for judicial intervention . . .").

³⁶⁴ See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan L Rev 1323, 1338 (2016) ("Conceptually, there can be vote dilution only if there is racial polarization in voting.").

³⁶⁵ *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

³⁶⁶ For a full-length article on the VRA's treatment of racial vote denial, see Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L J 1566 (2019).

this part of *Carolene*.³⁶⁷ It can also lead to countermajoritarian outcomes if disenfranchised minority members would have changed election results had they been able to vote. Racial vote denial can undermine responsiveness, too, by allowing politicians to neglect the views of their minority constituents.³⁶⁸

I doubt I have to belabor how the categories of *Carolene* decisions would apply here. A correct *Carolene* decision would strike down a law making it harder for minority members to vote. A reverse *Carolene* decision would uphold it. And a perverse *Carolene* decision would prevent a nonjudicial actor—like Congress—from trying to stop racial vote denial—as through the VRA. Of course, the Roberts Court did exactly that in its 2013 ruling in *Shelby County v Holder*.³⁶⁹ For almost half a century, Section 5 of the VRA had barred certain jurisdictions, mostly in the South, from amending their election laws unless they first showed that their revisions wouldn't worsen the electoral position of minority voters.³⁷⁰ The *Shelby County* Court held that the formula for determining Section 5 coverage exceeded Congress's enforcement powers under the Reconstruction Amendments.³⁷¹ The Court thus nullified the most important provision ever passed to combat racial vote denial (and racial vote dilution).³⁷²

The Court's reasoning was as perverse, in *Carolene* terms, as its ruling. The Court conceded that racial discrimination in voting is undemocratic. It's "an insidious and pervasive evil" when "state and local governments work[] tirelessly to disenfranchise citizens on the basis of race."³⁷³ The Court also noted that Congress concluded that racial discrimination in voting continued to be common when it renewed Section 5. "Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act," emphasizing, in

³⁶⁷ See Part I.

³⁶⁸ For another scholar concurring that racial vote denial offends *Carolene*'s second and third prongs, see Ortiz, 77 Va L Rev at 728 n 5 (cited in note 166) ("Paragraph two's and paragraph three's theories do overlap to some extent. Laws disenfranchising blacks, for example, both impose a formal blockage and reflect prejudice.").

³⁶⁹ 570 US 529 (2013).

³⁷⁰ See id at 537–39.

³⁷¹ See id at 542–57.

³⁷² See id at 562 (Ginsburg, J, dissenting) (describing Section 5 as "one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history").

³⁷³ Id at 535, 552 (quotation marks omitted).

particular, “‘second-generation barriers,’ which are . . . electoral arrangements that affect the weight of minority votes.”³⁷⁴

But the Court then substituted its own judgment for Congress’s. According to the Court, racial discrimination in voting is less widespread than in earlier eras, so Section 5 is an excessive response to a waning problem. “[T]hings have changed in the South,” the Court opined.³⁷⁵ “Blatantly discriminatory evasions of federal decrees are rare.”³⁷⁶ “Voter registration and turnout numbers in the covered States have risen dramatically.”³⁷⁷ “[H]istory did not end in 1965,” with Section 5’s original enactment, and “that [modern] history cannot be ignored.”³⁷⁸ Maybe the Court’s view is correct or maybe it’s mistaken.³⁷⁹ What’s undeniable, though, is that it’s the *Court’s* view of racial discrimination in voting, which diverges sharply from *Congress’s* position on the subject. *Shelby County* thus introduced a novel rationale for a perverse *Carolene* decision. For the first time, the Roberts Court blocked a nonjudicial actor from curbing undemocratic practices based on the Court’s unshared opinion that these practices no longer warranted legislative action.

IV. CAROLENE ALTERNATIVES

A. APOLITICAL ACCOUNTS

The Roberts Court, then, richly deserves its moniker as the anti-*Carolene* Court. Its decision in *Rucho* is the purest reverse *Carolene* ruling in memory, openly admitting that partisan gerrymandering is undemocratic but refusing to do anything about it. *Rucho* may soon be followed by perverse *Carolene* decisions invalidating redistricting commissions—the main nonjudicial option for thwarting gerrymandering—on any of several bases. And in other areas, perverse *Carolene* results have already arrived. The Roberts Court’s campaign finance

³⁷⁴ Id at 553; see also, for example, id at 559 (Ginsburg, J, dissenting) (“Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated.”).

³⁷⁵ Id at 540 (quotation marks omitted); see also id at 547 (“Nearly 50 years later, things have changed dramatically.”).

³⁷⁶ Id at 540 (quotation marks omitted).

³⁷⁷ Id at 550.

³⁷⁸ Id at 532.

³⁷⁹ Justice Ginsburg’s dissent makes a powerful case that it’s mistaken. See id at 570–80 (summarizing the congressional record of continued racial discrimination in voting).

cases are classics of the genre, preventing federal and state authorities from addressing the harms of money in politics. *Shelby County* is another perverse *Carolene* masterpiece, announcing that Congress isn't free to check the undemocratic activity, racial discrimination in voting, that motivated both the Fifteenth Amendment and the VRA.

But the Roberts Court can't just *oppose Carolene*; it must also *favor* some other theory of judicial decision making.³⁸⁰ What might this alternative theory be? If not the promotion of democracy, that is, what other approach might explain the Roberts Court's rulings in cases implicating *Carolene*'s second prong? One possibility, supported by language in *Rucho* itself, is a commitment to judicial restraint. Perhaps the Roberts Court seeks to avoid the "expansion of judicial power," especially into "intensely partisan aspects of American political life."³⁸¹ That way, perhaps the Court hopes to stop "the unelected and politically unaccountable branch of the Federal Government" from "assuming such an extraordinary and unprecedented role."³⁸²

Judicial restraint could indeed account for the Roberts Court's *reverse Carolene* decisions: rulings like *Rucho*, declining to strike down a partisan gerrymander, and *Crawford v Marion County Elections Board*, upholding a photo ID requirement for voting.³⁸³ A *Carolene* Court would have intervened in these cases in order to vindicate democratic values. But a Court that prioritized the passive virtues could have justified its inaction on the ground that judges shouldn't nullify duly enacted laws in all but the most exceptional circumstances.³⁸⁴

Judicial restraint, however, can't possibly explain the Roberts Court's *perverse Carolene* decisions. In its campaign finance cases and in *Shelby County*, the Court didn't avoid the "expansion of judicial power" into "intensely partisan aspects of American political life."³⁸⁵ The Court didn't practice the passive virtues. Instead it skeptically evaluated, and then invalidated, regulation after regulation of electoral funding as well as the crown jewel of the VRA. There's plainly

³⁸⁰ I suppose it's possible, too, for the Court's rulings in this area to be ad hoc, unsystematic, and so irreconcilable by any single theory.

³⁸¹ *Rucho v Common Cause*, 139 S Ct 2484, 2507 (2019).

³⁸² *Id.*

³⁸³ 553 US 181 (2008).

³⁸⁴ See generally Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 Harv L Rev 40 (1961).

³⁸⁵ *Rucho*, 139 S Ct at 2507.

nothing restrained about these rulings. Nor would there be about the perverse *Carolene* decisions that may lie ahead: the elimination of redistricting commissions, the rejection of congressional efforts to facilitate access to the franchise, the conclusion that automatic voter registration violates the First Amendment, and so on. If they come about, these rulings would amount to unabashed judicial activism—“an extraordinary and unprecedented role” for “the unelected and politically unaccountable branch,” in the *Rucho* majority’s words.³⁸⁶

If not judicial restraint, then what about federalism? The claim that states should enjoy wide leeway in administering elections also appeared in *Rucho*. “The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment,” commented the majority, “is a critical and traditional part of politics in the United States.”³⁸⁷ Like judicial restraint, too, federalism may account for the Roberts Court’s reverse *Carolene* decisions. When the Court sustains state laws like partisan gerrymanders or photo ID requirements for voting, it prevents state choices about electoral processes from being disrupted by a federal authority. And unlike judicial restraint, federalism may justify some of the Roberts Court’s perverse *Carolene* rulings as well. A number of these cases have involved (or could soon involve) federal regulations of redistricting, the right to vote, campaign finance, and racial discrimination in voting. When the Court strikes down these regulations, it arguably creates space for states to manage their own elections, unimpeded by congressional mandates and proscriptions.³⁸⁸

Federalism, though, can’t explain Chief Justice Roberts’s *Arizona State Legislature* dissent. Arizona’s own electorate (not any federal body) decided to establish an independent redistricting commission. Yet Chief Justice Roberts would have undone this state choice on the basis of federal constitutional law. Nor is federalism a theme of the Roberts Court’s campaign finance cases. These cases have never distinguished between state and federal restrictions of electoral funding. In fact, several of the cases have nullified state policies like Vermont’s

³⁸⁶ Id.

³⁸⁷ Id at 2498 (quotation marks omitted).

³⁸⁸ Only arguably, because states may take advantage of this Court-created space to hinder participation, suppress competition, and otherwise undermine democratic values. The fear that states may act in these undemocratic ways, of course, is precisely why *Carolene* advocates judicial intervention and why Congress sometimes feels the need to constrain states’ electoral decision making.

contribution limits³⁸⁹ and Arizona's system of public financing.³⁹⁰ And nor is federalism the impetus for the looming First Amendment attacks on redistricting commissions and automatic voter registration. These attacks pack exactly the same punch whether the measures are enacted by the federal government or by states.

The conventional modalities I alluded to earlier—in particular, the Constitution's text and history—are another possible driver of the Roberts Court's election law decisions.³⁹¹ Notably, the *Rucho* majority did analyze the language of the Elections Clause, the congressional regulations of redistricting passed pursuant to that provision, and the long and sordid history of gerrymandering.³⁹² But this analysis was just one of numerous reasons (I counted five in total³⁹³) that the *Rucho* majority gave for its ruling. The majority's other reasons had nothing to do with constitutional text or history. More importantly, the only argument of North Carolina's that *failed* to persuade the majority was the state's originalist claim. The state contended that, “through the Elections Clause, the Framers set aside electoral issues such as [partisan gerrymandering] as questions that only Congress can resolve.”³⁹⁴ But the majority “d[id] not agree” because prior “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.”³⁹⁵

The Constitution's text and history were also dogs that didn't bark in the Roberts Court's other key anti-*Carolene* decisions. In *Crawford*, the plurality neither quoted nor said anything about the ratification of the First and Fourteenth Amendments: the provisions that Indiana's photo ID requirement for voting was alleged to violate.³⁹⁶ In *Citizens United*, the majority was almost as taciturn, citing the First Amendment's text only in passing³⁹⁷ and responding in just one paragraph

³⁸⁹ See *Randall v Sorrell*, 548 US 230 (2006) (plurality).

³⁹⁰ See *Ariz. Free Enterprise Club's Freedom Club PAC v Bennett*, 564 US 721 (2011).

³⁹¹ See notes 104–07 and accompanying text.

³⁹² See id; see also *Rucho*, 139 S Ct at 2494–96.

³⁹³ See Part II.B.

³⁹⁴ *Rucho*, 139 S Ct at 2495.

³⁹⁵ Id at 2495–96.

³⁹⁶ See *Crawford v Marion County Elections Bd.*, 553 US 181, 185–204 (2008) (plurality).

³⁹⁷ See *Citizens United v FEC*, 558 US 310, 336 (2010).

(out of sixty-two pages in the United States Reports) to “the view that the First Amendment, as originally understood, would permit the suppression of [corporate] speech.”³⁹⁸ This view, in contrast, was developed in great detail by Justice John Paul Stevens’s dissent.³⁹⁹ And in *Shelby County*, it was again the dissent that was more rigorously originalist than the majority. The majority stressed a free-floating “principle of equal sovereignty”⁴⁰⁰ as well as its idiosyncratic view that racial discrimination in voting is no longer a serious problem.⁴⁰¹ On the other hand, Justice Ruth Bader Ginsburg “firmly rooted” her dissent in the “constitutional text” and described the rationales of “the [Fifteenth] Amendment’s framers” in “choosing this language.”⁴⁰²

Of course, constitutional text and history aren’t the only conventional modalities; reasoning based on the Court’s precedents is another.⁴⁰³ But respect for the Court’s past rulings fares even worse as an explanation for the Roberts Court’s election law oeuvre. *Rucho* itself reversed the Court’s earlier holding, in the 1986 case of *Davis v Bandemer*,⁴⁰⁴ that partisan gerrymandering claims are justiciable. In so doing, the *Rucho* majority liberally quoted Justice O’Connor’s *Bandemer* dissent⁴⁰⁵ while virtually ignoring the plurality opinion that controlled the case’s outcome.⁴⁰⁶ Elsewhere in the redistricting arena, Chief Justice Roberts’s *Arizona State Legislature* dissent would have abrogated a series of early-twentieth-century cases. According to those cases, “the Legislature” empowered by the Elections Clause to regulate congressional elections includes not just “the representative body which makes the laws of the people”⁴⁰⁷—as Chief Justice

³⁹⁸ *Id.* at 353.

³⁹⁹ See *id.* at 425–32 (Stevens, J., dissenting).

⁴⁰⁰ *Shelby County v Holder*, 570 US 529, 534, 540, 542, 544, 556 (2013).

⁴⁰¹ See Part III.B.3.

⁴⁰² *Shelby County*, 570 US at 567 (Ginsburg, J., dissenting).

⁴⁰³ See generally Strauss, 63 U Chi L Rev at 877 (cited in note 184).

⁴⁰⁴ 478 US 109 (1986); see also *League of United Latin Am. Citizens v Perry*, 548 US 399, 414 (2006) (noting that, while “[a] plurality of the Court in *Vieth* [*v Jubelirer*, 541 US 267 (2004)] would have held [partisan gerrymandering] challenges to be nonjusticiable political questions,” “a majority declined to do so”).

⁴⁰⁵ See *Rucho v Common Cause*, 139 S Ct 2484, 2497, 2498, 2499, 2501, 2503 (2019).

⁴⁰⁶ See *id.* at 2497, 2500.

⁴⁰⁷ *Ariz. State Leg. v Ariz. Independent Redistricting Comm’n*, 135 S Ct 2652, 2679 (2015) (Roberts, CJ, dissenting).

Roberts maintained—but also a popular referendum⁴⁰⁸ and a gubernatorial veto.⁴⁰⁹

The Roberts Court has equally spurned *stare decisis* outside the redistricting context. In *Citizens United*, the Court reversed two prior decisions (one just seven years old at the time) that had upheld bans on corporate spending in elections.⁴¹⁰ In the 2014 case of *McCutcheon v FEC*, the Court abandoned its earlier position that aggregate contribution limits are constitutional.⁴¹¹ And in *Shelby County*, the Court turned its back on *four* previous holdings that Section 5 of the VRA was a valid exercise of Congress’s enforcement powers under the Reconstruction Amendments.⁴¹² Until then, as Justice Ginsburg observed in her dissent, the Court had always “accorded Congress the full measure of respect its judgments in this domain should garner.”⁴¹³

A last account of the Roberts Court’s election law jurisprudence might be libertarian. Maybe the Court strives to protect individual freedoms from governmental actions that threaten to abridge them. The Court’s campaign finance cases certainly sound in this key. “[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence,” declared the majority in *Citizens United*.⁴¹⁴ “The First Amendment confirms the freedom to think for ourselves.”⁴¹⁵ The other First Amendment claims discussed above—against redistricting commissions and automatic voter registration⁴¹⁶—could also be justified on libertarian grounds. The claims’ proponents would surely argue that they’re defending people’s rights to serve in government regardless of their political views and to choose for themselves whether to participate in the political process.

⁴⁰⁸ See *Davis v Hildebrandt*, 241 US 565 (1916).

⁴⁰⁹ See *Smiley v Holm*, 285 US 355 (1932).

⁴¹⁰ These prior decisions were *Austin v Mich. Chamber of Commerce*, 494 US 652 (1990), and part of *McConnell v FEC*, 540 US 93 (2003).

⁴¹¹ See 572 US 185, 200 (2014) (plurality) (“[W]e think [*Buckley v Valeo*’s] ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here.”).

⁴¹² These previous holdings were *South Carolina v Katzenbach*, 383 US 301 (1966), *Georgia v United States*, 411 US 526 (1973), *Rome v United States*, 446 US 156 (1980), and *Lopez v Monterey County*, 525 US 266 (1999).

⁴¹³ *Shelby County v Holder*, 570 US 529, 568 (2013) (Ginsburg, dissenting).

⁴¹⁴ *Citizens United v FEC*, 558 US 310, 340 (2010).

⁴¹⁵ *Id.* at 356.

⁴¹⁶ See Parts III.A.3, III.B.1.

Rucho, however, involved a First Amendment challenge, too.⁴¹⁷ Witness testimony and academic evidence established that partisan gerrymanders deter voters from going to the polls, candidates from running for office, and donors from giving money.⁴¹⁸ These are burdens on speech and association at least as heavy as those imposed by campaign finance regulations, let alone redistricting commissions or automatic voter registration. Yet the majority thought the First Amendment couldn't supply "a serious standard for separating constitutional from unconstitutional partisan gerrymandering."⁴¹⁹ Speech and association also aren't the only rights protected by the Constitution. "The precious right to vote," as Justice Ginsburg called it at a recent oral argument, is jealously guarded as well.⁴²⁰ Yet as noted earlier, the Roberts Court has never found that a law impermissibly interferes with citizens' exercise of the franchise.⁴²¹ For any libertarian theory of the Court's doctrine, this is embarrassing. A libertarian Court, after all, would champion *all* constitutional freedoms. It wouldn't pick and choose among them.

B. POLITICAL ACCOUNTS

None of the usual models of judicial decision making, then, can render coherent the Roberts Court's record in cases implicating *Carolene's* second prong. Judicial restraint, federalism, constitutional text and history, precedent, and individual freedom—all these approaches have been the exception as often as the rule. But maybe we're looking in the wrong place for a unifying principle. The subject of *Carolene's* second prong is the well-being of American democracy: the performance of "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."⁴²² So maybe we should be trying to come up with an explanation whose thrust is the Roberts Court's opinion of how American democracy is functioning.

⁴¹⁷ See *Rucho v Common Cause*, 139 S Ct 2484, 2504–05 (2019).

⁴¹⁸ See notes 84–86 and accompanying text.

⁴¹⁹ *Rucho*, 139 S Ct at 2504.

⁴²⁰ Transcript of Oral Argument, *Gill v Whitford*, No 16-1161, *24 (Oct 3, 2017); see also, for example, *Reynolds v Sims*, 377 US 533, 562 (1964) ("[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

⁴²¹ See note 318 and accompanying text.

⁴²² *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

Proceeding sympathetically, a perspective could be imagined that would unify the Roberts Court's election law decisions. On this view, American democracy generally works well enough when voters, campaign funders, and state electoral regulators are left to their own devices. At least in the modern era, state regulators rarely engage in the blatantly undemocratic activities—the suppression of large swaths of the electorate, particularly on racial grounds, and extreme malapportionment—that necessitated judicial intervention in earlier periods. But, this postulated view goes on, today's electoral regulators (especially at the federal level) still pose their own threats to a vibrant democratic order. The most common of these is the constriction of electoral funding, which benefits incumbents, stifles competition, and distorts the public debate. Another danger is heavy-handed legislation on behalf of minority groups, which balkanizes society on racial lines and isn't warranted by current conditions. Further, emerging concerns include independent redistricting commissions, the federalization of election administration, and automatic voter registration, all of which would upend a system that's far from broken. The Court must continue to protect American democracy from these pitfalls.⁴²³

While it's possible to articulate this view, though, it's not as easy to defend it. To begin with, if the Roberts Court thinks that partisan gerrymandering, voter suppression, and racial discrimination in voting no longer imperil American democracy, the Court is wrong. Gerrymandering has been more severe in the current cycle—giving rise to district maps more biased in the line-drawing party's favor—than at any point in at least half a century.⁴²⁴ This decade has also seen the passage of more laws making it harder to vote than any period since the civil rights era.⁴²⁵ And the phenomenon that makes racial vote denial and racial vote dilution appealing to certain politicians, racial polarization in voting, has rebounded in recent years to the highest levels in modern times.⁴²⁶ The Roberts Court may well be unaware of these facts. But even if so, the Court's lack of information

⁴²³ For a similar effort to understand the Roberts Court's jurisprudence, albeit in the equal protection rather than the electoral context, see Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 Cal L Rev 1565 (2013).

⁴²⁴ See Stephanopoulos and McGhee, 82 U Chi L Rev at 871–73 (cited in note 182).

⁴²⁵ See note 313 and accompanying text.

⁴²⁶ See Stephanopoulos, 68 Stan L Rev at 1354–58 (cited in note 364).

doesn't justify its reverse *Carolene* decisions. It makes them a series of *Carolene* mistakes.

The Roberts Court's perverse *Carolene* decisions, to date, rest on similar empirical misconceptions. As pointed out above, it simply isn't the case that most campaign finance limits help incumbents and throttle competition.⁴²⁷ To the contrary, they typically have the opposite effects because they erode the fundraising edge that officeholders enjoy in the absence of regulation. The democratic case for invalidating minority voting rights legislation like the VRA is doubly flawed, too. Not only does persistent racial polarization in voting indicate the continuing need for such laws.⁴²⁸ The VRA's signature remedy—the creation of districts where minority voters are able to elect their preferred candidates—also doesn't influence minority or nonminority voters' racial attitudes.⁴²⁹ These districts thus improve minority representation without fomenting racial strife.

And as for the perverse *Carolene* rulings just over the horizon, they're usually urged *despite* their democratic implications, not because of them. Consider Chief Justice Roberts's *Arizona State Legislature* dissent. He never argued that Arizona's political system would function better without an independent redistricting commission.⁴³⁰ His position, instead, was that democratic impact is irrelevant. "For better or worse, the Elections Clause of the Constitution does not allow [Arizonans] to address those concerns [about gerrymandering] by displacing their legislature."⁴³¹ Likewise, the other claims against redistricting commissions, as well as the objections to federalizing election administration and automatically registering voters, have no democratic basis. Their common stance is that the Constitution requires certain outcomes—and that, if democracy suffers as a result, well, that's the price of following the law.

If a sympathetic account of the Roberts Court's beliefs about American politics is unpersuasive, would a more cynical explanation

⁴²⁷ See notes 336–43 and accompanying text.

⁴²⁸ See note 426 and accompanying text.

⁴²⁹ See Stephen Ansolabehere and Nathaniel Persily, *Testing Shaw v. Reno: Do Majority-Minority Districts Cause Expressive Harms?*, 90 NYU L Rev 1041 (2015).

⁴³⁰ Though he did complain about the commission's supposed partisanship. See *Ariz. State Leg. v. Ariz. Independent Redistricting Comm'n*, 135 S Ct 2652, 2691–92 (2015) (Roberts, CJ, dissenting).

⁴³¹ *Id.* at 2692.

gain more traction? This thesis would go roughly as follows: Running like a red thread through the Roberts Court's anti-*Carolene* decisions is perceived, and actual, partisan advantage. Both when the Court intervenes and when it stays on the sidelines, its actions are consistent with the recommendations of conservative elites. Both the Court's intrusions into, and its abstentions from, the political process also empirically benefit the Republican Party, whose presidents appointed a majority of the sitting Justices.⁴³²

The amicus lineup in *Rucho* supports this legal realist thesis. Here's a list of every organization that filed an amicus brief on behalf of North Carolina: the Republican National Committee, the National Republican Congressional Committee, the National Republican Redistricting Trust, North Carolina's Republican members of Congress, the Republican-run Wisconsin State Legislature, ten other states with unified Republican governments, the Allied Educational Foundation, the American Civil Rights Union, Judicial Watch, the Public Interest Legal Foundation, and the Southeastern Legal Foundation.⁴³³ Each of these entities is either (1) a Republican Party committee; (2) a Republican-run legislature or state government; or (3) a right-wing think tank. And each of these entities—and *no* other entities—advocated the nonjusticiability of partisan gerrymandering claims.

The story was much the same in the Roberts Court's other major anti-*Carolene* cases. In *Crawford*, the Republican National Committee, Senator Mitch McConnell and other Republican members of Congress, nine Republican-run states, and an array of conservative foundations advised the Court to uphold Indiana's photo ID requirement for voting.⁴³⁴ In *Citizens United*, the amici arguing that the federal ban on corporate and union spending in elections should be struck down included Senator McConnell, the Chamber of Commerce,

⁴³² For a similar view of the Roberts Court by a pair of activists writing about the Court's entire docket, see Aaron Belkin and Sean McElwee, *Don't Be Fooled. Chief Justice John Roberts Is as Partisan as They Come*, NY Times (Oct 7, 2019), archived at <https://perma.cc/23GR-ZNLB>. For a similar view by a pair of academics writing about the right to vote, see Lisa Marshall Manheim and Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2019 Supreme Court Review 213.

⁴³³ See Docket, *Rucho v Common Cause*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-422.html> (last visited Oct 1, 2019).

⁴³⁴ See Docket, *Crawford v Marion County Elections Bd.*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/07-21.htm> (last visited Oct 1, 2019).

the National Rifle Association, and many right-wing think tanks.⁴³⁵ And in *Shelby County*, seven Republican-run states (across three separate briefs), eight former Republican Department of Justice officials, and the usual constellation of conservative groups asked the Court to nullify Section 5 of the VRA.⁴³⁶ In none of these cases could the Justices have had much doubt about the wishes of elite Republican and right-wing actors. Their views, expressed at length in their amicus briefs, were plain as day.

Nor were these actors mistaken about the partisan consequences of their positions. Academic evidence confirms that their stands electorally benefit Republicans. Gerrymandering, first, has no necessary partisan valence. Either party can craft an advantageous map when it has the opportunity to draw the lines. In the current cycle, though, Republicans had many more such chances than Democrats. The well-timed wave election of 2010 gave them unified control of most states (including almost all swing states) right before the country's districts were due to be reconfigured. As a result, eight of this decade's ten most biased congressional plans were skewed in a Republican direction.⁴³⁷ So were nine of this decade's ten most tilted state house maps.⁴³⁸ Across all district plans nationwide, the median map was more pro-Republican than at any earlier time.⁴³⁹

Second, the partisan effects of photo ID requirements for voting are often overstated, but the measures do seem to shift the vote by up to a percentage point in Republicans' favor.⁴⁴⁰ Democratic-leaning constituencies like minorities and the poor are less likely to possess valid IDs than whiter, wealthier Republican voters. Third, unlimited electoral spending by outside actors usually boosts Republicans because pro-Republican expenditures tend to exceed those backing

⁴³⁵ See Docket, *Citizens United v FEC*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/08-205.htm> (last visited Oct 1, 2019).

⁴³⁶ See Docket, *Shelby County v Holder*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/12-96.htm> (last visited Oct 1, 2019).

⁴³⁷ These data are on file with the author and cover the 2012, 2014, and 2016 elections.

⁴³⁸ These data also are on file with the author and apply to the 2012–16 period.

⁴³⁹ See Stephanopoulos and McGhee, 82 U Chi L Rev at 873 (cited in note 182) (analyzing elections up to 2012). Post-2012 data on file with the author confirm these trends.

⁴⁴⁰ See, for example, Stephanopoulos, 114 Colum L Rev at 328 (cited in note 55) (surveying the relevant academic literature).

Democrats. So after *Citizens United* removed the shackles on electioneering by corporations, unions, and other outside groups, Republican seat and vote shares surged in state legislatures.⁴⁴¹ And fourth, Section 5 of the VRA used to block covered jurisdictions (mostly Republican-run in recent years) from making it harder for minority voters (a heavily Democratic group) to cast ballots and earn representation. But since *Shelby County*, these jurisdictions have adopted scores of new voting restrictions, and in the next redistricting cycle, they will probably dismantle many districts that previously elected minority Democrats to office.⁴⁴²

To be clear, I have no interest in psychoanalyzing the Justices.⁴⁴³ I don't know (or think it's critical) what subjectively motivates their rulings. So my argument here isn't that Chief Justice Roberts, or the Justices who typically vote with him in election law cases, are *trying* to assist Republicans. Instead, my claims are that the Roberts Court consistently decides these cases in the ways preferred by conservative elites; and that its resulting decisions do, in fact, consistently aid Republicans. Moreover, partisan advantage is a *more* reliable explanation than any other factor. Whether or not it consciously drives any Justice's behavior, it better accounts for the Roberts Court's election law rulings than any alternative hypothesis.

If these claims are correct, they provide a coda for the Roberts Court's anti-*Carolene* record. The Court often issues reverse *Carolene* decisions, declining to intervene when American democracy is endangered. (*Rucho* is the most recent example.) The Court also commonly hands down perverse *Carolene* decisions, preventing nonjudicial actors from curbing democratic abuses. (*Citizens United* and *Shelby County* are the archetypes here.) And the most convincing *reason* for this anti-*Carolene* activity is perceived, and actual, partisan gain. By holding its fire when *Carolene* says to shoot, and by stepping

⁴⁴¹ See, for example, Nour Abdul-Razzak et al, *After Citizens United: How Outside Spending Shapes American Democracy* 24–25 (Mar 2019), archived at <https://perma.cc/7LX9-ZNTE>.

⁴⁴² See, for example, Stephanopoulos, 2013 Supreme Court Review at 102–06 (cited in note 362).

⁴⁴³ My reservations about attributing motives to the Justices (or anybody else) are why I have relegated this section to the end of the article. The article's core claim is that the Roberts Court is the anti-*Carolene* Court—not that partisanship is an explanation for the Roberts Court's anti-*Carolene* record (though I think it is). Even here, as the prior sentence makes clear, I only argue that partisanship is *an* (not *the*) explanation for the Roberts Court's record. I'm sure the other aspects of judicial decision making I have discussed play some role, too.

in when *Carolene* advises stepping back, the Court improves Republican electoral prospects at every turn.

If the claims are correct, they corroborate the objection to political process theory recently leveled by Eric Posner and Adrian Vermeule, too.⁴⁴⁴ Process theory, Posner and Vermeule point out, requires judges not to succumb to the partisan and political pressures that influence legislative and executive officials.⁴⁴⁵ Only if judges are insensitive to these forces can they protect “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”⁴⁴⁶ (*Carolene*’s formulation) or stop “the ins [from] choking off the channels of political change”⁴⁴⁷ (Ely’s). But, Posner and Vermeule continue, this requirement is frequently unrealistic. “Because the executive and legislative [branches] jointly control the process of judicial appointments,” the same group that dominates those branches may “filter out judges who would challenge [its] prejudices and filter in judges who share them.”⁴⁴⁸ That group may thus “structure judicial behavior so as to perpetuate [its] own power.”⁴⁴⁹

Posner and Vermeule’s model of judges as “inside the system”—not platonically outside it—seems to fit the Roberts Court. The members of its conservative majority have the same educations, affiliations, and qualifications as nonjudicial right-wing elites in the executive and legislative branches. These members were also selected for their positions precisely because of these backgrounds. So they may have no incentive to fix malfunctions in *Carolene*’s “political processes” that accrue to their copartisans’ benefit. Why would they want to correct such useful flaws? They may also be disinclined, in Ely’s terms, to block “the ins” from rigging the electoral system against “the outs.” Again, why should they, when they’re as much the ins as the politicians doing the rigging? And they may be keen to obstruct efforts by nonjudicial actors that threaten to advantage the outs. Once more, avoiding that edge for the outs takes priority over ameliorating American democracy.

⁴⁴⁴ See Eric A. Posner and Adrian Vermeule, *Inside or Outside the System?*, 80 U Chi L Rev 1743, 1763–66 (2013).

⁴⁴⁵ See *id.*

⁴⁴⁶ *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

⁴⁴⁷ Ely, *Democracy and Distrust* at 103 (cited in note 3).

⁴⁴⁸ Posner and Vermeule, 80 U Chi L Rev at 1765 (cited in note 444).

⁴⁴⁹ *Id.*

V. CONCLUSION

It's an irony of history that the same lawyer, Emmet Bondurant, argued both *Wesberry*, the 1964 case that announced the one-person, one-vote rule for congressional districts, and *Rucho*, which held that partisan gerrymandering claims are nonjusticiable.⁴⁵⁰ Bondurant made essentially the same point on both occasions. Malapportionment, he told the *Wesberry* Court as a twenty-six-year-old attorney just out of law school, is undemocratic because it allows a minority to entrench itself in power by cramming opposing voters into overpopulated districts.⁴⁵¹ Gerrymandering, he similarly explained to the *Rucho* Court as an eighty-two-year-old law firm partner with decades of legal experience, undermines democratic values in several ways. It, too, enables a minority to seize undeserved power, by cracking and packing the other side's voters so their ballots translate into fewer seats. Gerrymandering further stifles competition, by making most districts safe, and chills participation, by rendering futile voters' electoral efforts.⁴⁵²

But while Bondurant advanced the same arguments in *Wesberry* and *Rucho*, the cases' outcomes, of course, diverged. In *Wesberry*, the Court turned the political world upside down, declaring a principle of population equality that doomed most of the country's congressional districts and ended one of the most undemocratic features of mid-century America. In *Rucho*, in contrast, the Court slammed the door on partisan gerrymandering claims and thus permitted one of the most invidious practices in modern American politics to persist and even intensify. Why the difference? In a word, *Carolene*. The *Wesberry* Court was a true *Carolene* Court, committed to exercising (and refraining from exercising) judicial authority to serve democratic ends. The Roberts Court, on the other hand, is the anti-*Carolene* Court. It has a near-perfect record of doing nothing when it should have done something, doing all too much when it should have sat still, and promoting the same party's interests through all its maneuvers. *Rucho* is just the latest, saddest entry in this ledger of democratic frustration.

⁴⁵⁰ For a nice story on this historical twist, see Johnny Kauffman, *55 Years Later, Lawyer Will Again Argue Over Redistricting Before Supreme Court*, NPR (Mar 24, 2019), archived at <https://perma.cc/SH7U-T4QD>.

⁴⁵¹ See Transcript of Oral Argument, *Wesberry v Sanders*, No 22 (Nov 18, 1964).

⁴⁵² See Transcript of Oral Argument, *Rucho v Common Cause*, No 18-422 (Mar 26, 2019).