

2022

Roberts, Rules, and Rucho

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Recommended Citation

Oldfather, Chad M. and Star, Sydney, "Roberts, Rules, and Rucho" (2022). *Connecticut Law Review*. 542.
https://opencommons.uconn.edu/law_review/542

CONNECTICUT LAW REVIEW

VOLUME 53

MARCH 2022

NUMBER 4

Article

Roberts, Rules, and *Rucho*

CHAD M. OLDFATHER & SYDNEY STAR

*This Article arises out of a symposium exploring the connection between the political question doctrine and judicial legitimacy in the wake of the Supreme Court's decision in *Rucho v. Common Cause*, and more specifically a panel devoted to the implications of *Rucho* for theories of judgment and judging. Chief Justice Roberts's majority opinion in *Rucho* emphasizes the need for judicial action to "be governed by standard, by rule" and to be "principled, rational, and based on reasoned distinctions." Yet our analysis—which compares and contrasts the arguments, reasoning, and rhetoric in *Rucho* with their counterparts in the Chief Justice's other opinions—suggests that *Rucho* ultimately fails its own test. Each justification he offers in *Rucho* is one that Chief Justice Roberts has disclaimed or acted contrary to in other cases, leading to the impression that his reasons were cynically, rather than sincerely, deployed. In particular, the argumentative structure in *Rucho* stands in deep tension with that in *Shelby County v. Holder*, thereby giving rise to the very appearance of partisan motivation that *Rucho* decries. The Chief Justice's ostensible effort to avoid appearing to act out of expediency in the short term thus threatens to undermine the Court's perceived legitimacy when viewed in the context of his larger body of work.*

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Roberts, Rules, and *Rucho*

CHAD M. OLDFATHER & SYDNEY STAR*

INTRODUCTION

Toward the end of his opinion for a majority of the Supreme Court in *Rucho v. Common Cause*,¹ as Chief Justice John Roberts wrapped up the Court's analysis of the justiciability of challenges to partisan gerrymandering, he offered a quote from the plurality opinion in *Vieth v. Jubelirer*:² “[J]udicial action must be governed by *standard*, by *rule*,’ and must be ‘principled, rational, and based upon reasoned distinctions’ found in the Constitution or laws.”³

In doing so, he invoked a familiar conception of what lies at the heart of adjudication. “Beyond doubt,” Henry Hart and Albert Sacks observe in their classic materials on the legal process, “it is an integral part of the concept of adjudication as exemplified in the conventional forms of the judicial process that decision is to be arrived at by reference to impersonal criteria of decision applicable in the same fashion in any similar case.”⁴ It is therefore a process with “reasoned elaboration”⁵ at its core. A court must demonstrate that its application of standards or rules in a given case is consistent with its application in past cases. Whether such materials are available to guide judicial consideration of claims relating to partisan gerrymandering is a matter of longstanding debate, and, in a sense, *Rucho*'s conclusion that such claims are nonjusticiable represents the seeming conclusion of that dialogue.

As is often true with respect to major Supreme Court decisions,⁶ the dominant narrative surrounding *Rucho* is that it was a product of partisanship—a case in which a conservative majority reached a result that favored its interests because Republicans are simply better at gerrymandering.⁷ Commentators have also addressed the question of

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¹ 139 S. Ct. 2484 (2019).

² 541 U.S. 267 (2004) (plurality opinion).

³ *Rucho*, 139 S. Ct. at 2507 (quoting *Vieth*, 541 U.S. at 278).

⁴ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 643 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

⁵ *Id.* at 147 (emphasis omitted).

⁶ See generally Barry Sullivan & Cristina Carmody Tilley, *Supreme Court Journalism: From Law to Spectacle?*, 77 WASH. & LEE L. REV. 343 (2020) (noting the tendency toward media depictions of the Supreme Court's decisions that characterize them in ideological terms).

⁷ See, e.g., Jelani Cobb, *The Supreme Court Just Legitimized a Cornerstone Element of Voter Suppression*, NEW YORKER (July 3, 2019), <https://www.newyorker.com/news/daily-comment/the-supreme-court-just-legitimized-a-cornerstone-element-of-voter-suppression> (“The precision of these

whether the Court in *Rucho* correctly reasoned its way to its conclusion.⁸ The reception, generally speaking, has not been favorable.⁹

This Essay arises out of a presentation at a symposium dedicated to exploring the connection between the political question doctrine and judicial legitimacy, and, more specifically, it was delivered as part of a panel devoted to re-examination of the theories of judgment and judging in light of *Rucho*.¹⁰ We approach that task via an effort to engage with *Rucho* on its own terms. A single case can, of course, shed only so much light on broad questions of judicial behavior, and a single opinion can provide only so much information about the true motivations that generated it. Yet a qualitative analysis of a single opinion can yield clues as to whether it appears to have been the product of reasoned elaboration. And so, we examine Chief Justice Roberts's opinion in *Rucho* against the backdrop of his other opinions with an eye toward whether it meets the standard that it sets. Are the reasons that he offers sufficiently consistent with his reasoning in other cases to permit the conclusion that all are the product of the sort of decision-making he extols? If not, are there nonetheless benign explanations for any seeming inconsistencies? Or does the depiction of the Justices as partisans provide the most parsimonious explanation?

Although we explore a range of possible explanations for the Chief Justice's behavior, our aim is not to settle on one as "correct." We are instead, like the Chief Justice, concerned with appearances. At the core of *Rucho*'s articulated rationale is a concern with the judiciary's need to act, and appear to be acting, out of principle, and correspondingly to avoid the appearance of partisanship. One might expect, then, to find consistency in the analytical moves that Roberts makes, and in the conclusions that he draws from them, across the opinions he has authored. An observer might

districts will generate Republican majorities that will then retain the power to draw even more favorable districts, in a tribalistic feedback loop."); Richard North Patterson, *Why the Supreme Court Is Broken. And How to Fix It.*, BULWARK (Aug. 15, 2019), <https://thebulwark.com/why-the-supreme-court-is-broken-and-how-to-fix-it/> (characterizing *Rucho* along with *Citizens United* and *Shelby County* as presenting "a classic illustration of using a fundamental organ of government—our Supreme Court—to weaken democracy. It is no coincidence that these rulings favor one particular political party.").

⁸ For examples of commentary that critique the substance of the Court's reasoning, see G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1303 (2020); Edward L. Rubin, *Gerrymandering and Judicial Incapacity*, 2020 WIS. L. REV. 257, 272–73; Louis Michael Seidman, *Rucho Is Right – But for the Wrong Reasons*, U. PA. J. CONST. L. (forthcoming); Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 983 (2020); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 128–29.

⁹ For examples of reactions of legal scholars in the popular press, see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *SCOTUS's Ruling on Gerrymandering Endangers U.S. Democracy*, TIME (July 11, 2019, 7:00 AM), <https://time.com/5623638/scotuss-ruling-on-gerrymandering-endangers-us-democracy/>; Charles Fried, *A Day of Sorrow for American Democracy*, ATLANTIC (July 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/rucho-v-common-cause-occasion-sorrow/593227/>.

¹⁰ Chad M. Oldfather, Professor of L., Marquette Univ. L. Sch., Panelist at the Connecticut Law Review Symposium: Empires or Umpires? Political Questions, Separation of Powers, and Judicial Legitimacy (Oct. 9, 2020).

disagree with the moves, conclusions, or both, but they would recognize, and could respect, the consistency. Unfortunately, that is not what we find. The Chief Justice's opinions exhibit a glaring situationism when it comes to his willingness to credit certain sorts of arguments.

We offer no confident verdict about the ultimate explanation for the Chief Justice's behavior. We do conclude that, especially when viewed against the backdrop of other opinions he has written, *Rucho* failed to satisfy its own standards for principled decision-making. We base that conclusion on two sets of reasons. First, the articulated decisional process in *Rucho*. Each justification the Chief Justice offered in support of the conclusion in *Rucho* is one that he has disclaimed or acted contrary to in past cases. Indeed, as we will show, the set of justifications offered in *Rucho* is, in all material respects, the converse of those Roberts provided in support of the decision to strike down a portion of the Voting Rights Act in *Shelby County v. Holder*.¹¹ In addition, the *Rucho* Court's sub silentio overruling of *Davis v. Bandemer*¹² runs counter to his protestations in other cases about the "special justification"¹³ necessary to depart from the doctrine of stare decisis. Second, application of the political question doctrine itself and, in particular, the strand relating to the need for "judicially manageable and discoverable standards," involves the very sort of *ad hoc* decision-making that the Chief Justice decries. That is not necessarily problematic, or unprincipled, or even avoidable,¹⁴ but it is, at a minimum, ironic.

I. JUDICIAL BEHAVIOR AND JUDICIAL MANAGEABILITY

This Part sets up the analysis that follows. Subpart A situates our inquiry and approach within the context of more general efforts to understand the Justices' behavior. Those approaches tend either to take "the Court," rather than individual Justices, to be the appropriate unit of analysis or to assess individual Justices' behavior by way of large-scale empirical study. Subpart B then turns to the political question doctrine and, more specifically, to the "judicially manageable and discoverable standards" prong that the Court relied on in *Rucho*.

A. Assessing the Justices' Behavior

Analyses of Supreme Court decisions typically involve an effort to assess the degree to which a present opinion fits within the larger body of

¹¹ 570 U.S. 529 (2013).

¹² 478 U.S. 109 (1986).

¹³ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (2018) (Roberts, C.J., dissenting).

¹⁴ Richard Fallon contends that any attempt to impose something like a "judicially manageable standards" requirement on the process of identifying judicially manageable standards "could at most only postpone an ultimate, open-ended, value-based choice about how best to implement constitutional norms that are not themselves judicially manageable standards in the input sense." Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1296 (2006).

case law to which it belongs. “The Court,” in this conception, operates as a constant and coherent entity, ideally both spinning and traversing a seamless web of law. A given decision may fit within the pattern or it may be a mistake. Either way, it is a product of “the Court,” and thus the appropriate way to assess it is by reference to the remainder of the Court’s decisions.

As an ideal, that vision has considerable appeal. But as a description of reality it misses something. For a point that is as often overlooked as it is obvious: the Supreme Court is a “they” rather than an “it.”¹⁵ The Court’s output is best regarded not as the product of a consistent corporate unit, but rather as the aggregation of nine individuals’ behavior. Those individuals have different preferences and perceptions and will be motivated by different things. To take just a single, stark example, what drove Justice David Souter differed in a multitude of respects from what drove Justice William O. Douglas.¹⁶ The Court thus speaks with nine voices rather than one, and it will function differently—and reach different results, justified in different ways—as its membership changes over time. As tempting as it is to articulate a narrative in which the relevant actor is “the Court”—and in which decisions from one era, or one decade, or one Justice can simply be compared and contrasted on their own terms with those from another—to do so is to overlook important determinants of the institution’s behavior.

There is, of course, a large body of empirical research that approaches the Court’s work in a manner consistent with this insight. That work tends to view the Justices’ behavior as the product of ideology. Its roots are in studies that rely on reductionist proxies for the ideological valence of both judges and their decisions.¹⁷ Its starkest embodiment is the attitudinal model, which “holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist vote[d] the way he [did] because he [was] extremely conservative; Marshall voted the way he did because he was extremely liberal.”¹⁸ Later iterations have refined this point, and the strategic, rather

¹⁵ Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 550 (2005) (identifying “the fundamental mistake of overlooking the collective character of judicial institutions—of overlooking that the judiciary, like Congress, is a ‘they,’ not an ‘it’”).

¹⁶ Compare generally TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT (2005) (depicting a Justice who epitomized integrity and avoided the spotlight), with BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003) (depicting a Justice who was at best casual with the truth and craved the spotlight).

¹⁷ For powerful critiques of the approach, see generally Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79 (2010); Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477 (2009).

¹⁸ JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002).

than attitudinal, model now holds sway among political scientists.¹⁹ On a strategic account, judges and Justices do not simply vote their preferences in every case; they may take a longer view, sometimes sacrificing immediate results in service of larger goals, mindful all the while of the need to secure their colleagues' agreement and of the broader legal and political contexts in which they operate. But the core idea remains: The Justices comprise a "they" that is a group of political actors fundamentally indistinguishable from their counterparts across First Street in Congress.

On this view, the story of Chief Justice Roberts and gerrymandering is a simple one. Gerrymandering is a technique that primarily benefits Republicans. Roberts, as an appointee of a Republican President, is thus inclined, as an ideological actor, to favor gerrymandering and thus to favor a legal regime in which the judiciary has no role to play in policing the boundaries of gerrymandering. As we will see, much of the reaction to *Rucho* reflects a similar interpretation of Roberts's behavior.²⁰

But not all observers of the Court or of judicial behavior more generally accept the view that the Justices are simply "politicians in robes." To acknowledge that legal rules often allow space for the operation of value judgments²¹ or to acknowledge more generally that judicial behavior will be influenced by aspects of judges' psychology or acculturation,²² is not to concede that judging is entirely or fundamentally an ideological enterprise. The ideological correlations apparent across a range of cases may be products of factors that correlate with ideology, but that are not themselves ideology.

An alternative mode of studying judicial behavior is to approach it by engaging in a particularized qualitative analysis of judges' deployment of reasoning—not quite in the fashion of traditional doctrinal scholarship, but with an emphasis on process over substance. Doing so will often reveal more than the study of results alone can uncover. Most of the cases that make it to the Court are difficult cases, the sort that pit an array of competing considerations against one another. It often will be the case that any given Justice will have an ideologically driven preference for a particular outcome that will feature among the considerations driving her approach to the case. But there are values that a Justice might hold that can conflict with first-order ideological concerns. A Justice might embrace a "passive virtues"-driven

¹⁹ LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 7 (2006) (noting that "a strategic conception of judicial behavior is now the closest thing to a conventional wisdom about judicial behavior").

²⁰ See *infra* notes 200–04 and accompanying text. See also Spann, *supra* note 8, at 1024 (contending that "one of the consequences of the *Rucho* decision is that it now leaves the white Republicans who control most statehouses and governorships in the United States free to engage in unbridled partisan gerrymandering that seems certain to help whites and harm racial minorities").

²¹ Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1946 (2009) (arguing that "some play for inherently contestable political judgments is simply built into law").

²² See Chad M. Oldfather, *Aesthetic Judging*, 52 U.C. DAVIS L. REV. 981, 1009–16 (2018).

desire to avoid conflict with other branches. Other generally accepted jurisprudential considerations can clash with one another in the context of a specific case or issue. A Justice's general preference for federalism might clash with a broad understanding of an individual right. A taste for rules over standards could run counter to a substantive principle that counsels in favor of a more contextualized inquiry. A Justice who values *stare decisis* could feel compelled to adhere to a result that she regards as wrong.²³ As Justice David Souter once put the point, even “[t]he explicit terms of the Constitution . . . can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises.”²⁴ To focus simply on results or to remain in a doctrinal silo is to overlook the multidimensional nature of the enterprise.

Perhaps many of these conflicts play out at once or in different ways in different cases. For a somewhat pedestrian yet often overlooked point, observers of the Court tend to imagine the Justices as having more cognitive bandwidth than they probably do. It's incredibly difficult to remain principled and consistent across a range of cases pitting conflicting and incommensurable values against one another. One can easily imagine the Justices having the subjective sense that they are engaged in the application of neutral principles even as the precise mix of principles they draw upon and apply shifts from one case to the next for reasons that might be heavily influenced by political or other non-legal considerations. In Judge Henry Friendly's phrasing, “each judge judges differently from every other judge and . . . any one judge judges differently in each case.”²⁵

This Essay focuses on Chief Justice Roberts and, more specifically, undertakes to analyze his opinion for the Court in *Rucho* in light of his jurisprudence more generally. Given the relationships among the justifications he offers across his opinions, what appears to be taking place? Does ideology seem to be the only, or at least the best, explanation for *Rucho*'s reasoning and result? Was Roberts being political in a nonpartisan sense—acting in a way that he perceived as necessary to protect the Court's institutional image? Was he simply following the law as he understands it to the best of his ability? Was he less concerned with the result in *this* case and as to *this* issue and more concerned about advancing some doctrine or principle that cuts across a range of cases? In short, how and where does this opinion satisfy its own criteria for principled decision-making in light of what we might call *The Collected Works of John G. Roberts, Jr.*?

²³ This is likely true of the three justices who wrote the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

²⁴ David H. Souter, Just., U.S. Sup. Ct., Keynote Address at the 359th Harvard University Commencement Ceremony (May 27, 2010), <https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

²⁵ Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 229 (1961).

B. “Judicially Discoverable and Manageable Standards”

The political question doctrine, as characterized by Chief Justice Roberts in his opinion for the Court in *Zivotofsky v. Clinton*,²⁶ is a “narrow exception” to the judiciary’s general “responsibility to decide cases properly before it, even those it ‘would gladly avoid.’”²⁷ Fundamentally, as Martin Redish puts it, the doctrine is a manifestation of the Court’s recognition of “the possibility that it should avoid involvement in certain so-called ‘political’ disputes, largely because of an unstated fear that resolution is for some reason beyond its province.”²⁸ Redish continues by offering the following list of possible reasons the Court might reach that conclusion: “because the dispute does not lend itself to the development of judicial standards, or because the Court deems itself incapable of assessing the potentially momentous impact of its decision, or because the Court is concerned about the adherence to its decisions by the political branches.”²⁹

Whatever the precise logic, the result of the doctrine’s application is to entirely insulate a category of claims from judicial review, as opposed to allowing the claims to be reviewed but under a highly deferential standard. Notably, this can lead to situations—and both *Rucho* and the earlier gerrymandering case *Vieth v. Jubelirer* seem to be examples³⁰—where a majority of the Justices acknowledges the existence of a constitutional violation while simultaneously disclaiming the power to address it.³¹

The canonical statement of the doctrine came in *Baker v. Carr*:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already

²⁶ 566 U.S. 189 (2012).

²⁷ *Id.* at 194–95 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

²⁸ Martin H. Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031, 1037 (1985).

²⁹ *Id.*

³⁰ See *infra* note 59 and accompanying text.

³¹ Fallon, *supra* note 14, at 1276 (noting that application of the judicially manageable standards can result in a situation in which “a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other”).

made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³²

As the *Baker* Court noted, “The nonjusticiability of a political question is primarily a function of the separation of powers.”³³

Most of the criteria do indeed relate to situations in which the Court could justifiably be wary of intruding on the operations of the other branches of the federal government. But the lack of “judicially discoverable and manageable standards” prong, which the Court primarily relied on in *Rucho*, is different. When those components of the doctrine are in play, the underlying judgment is not that the constitutional text requires that the decision rest with another branch or that prudential considerations lead the Court to conclude that the question is best addressed by a coordinate branch. It is instead that there is no law based on which a court can make, or reason its way to, a decision. As with the political question more generally, the idea is at least hinted at in *Marbury v. Madison*.³⁴

Crucially, the Court has provided no definitive framework for determining when judicially manageable standards exist. Stated differently, there is no developed body of law by which to determine whether a specific type of dispute can be resolved by reference to law.³⁵ Richard Fallon has undertaken the most comprehensive effort to extract principles from the Court’s cases.³⁶ He identified three types of criteria the Court uses in identifying judicially manageable standards. The first is intelligibility—whether a proposed standard is something that can be understood.³⁷ Although this seems self-evident, Fallon notes the existence of disagreement over, for example, whether tests involving an inquiry into legislative intent are coherent.³⁸ The second is a collection of “practical desiderata” that can

³² 369 U.S. 186, 217 (1962). For a comprehensive history of the doctrine, see generally Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015).

³³ *Baker*, 369 U.S. at 210.

³⁴ 5 U.S. (1 Cranch) 137 (1803).

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

Id. at 165. These sentences, which appear in the Court’s discussion of whether *Marbury* has a remedy if he has a right, can be interpreted in two ways. One reading is that it’s a reference to a distinction between “law” and “not law,” and an assertion that courts can properly rule on a dispute only if they are able to do so by resort to law. Under that reading, *Marbury* clearly presages the “judicially discoverable and manageable standards” prong of the doctrine. The second, perhaps less natural, reading emphasizes the reference to guidance to the court in the exercise of its jurisdiction. On that view, the reference would not be to the standard governing the specific dispute but rather to a jurisdictional rule along the lines of the political question doctrine.

³⁵ Fallon, *supra* note 14, at 1281.

³⁶ *Id.*

³⁷ *Id.* at 1285–86.

³⁸ *Id.*

be emphasized to a greater or lesser degree in a given context, including “analytical bite,”³⁹ “formal realizability,”⁴⁰ the “ability to generate predictable and consistent results,”⁴¹ “administrability without overreaching the courts’ empirical capacities,”⁴² and “capacity to structure awards of remedies.”⁴³ These factors, Fallon hypothesizes, carry no clear determinative weight across categories: “there is no single quantum that would be both necessary and sufficient in every case, regardless of the nature and importance of the constitutional provision at issue.”⁴⁴ The third type of criterion accordingly involves an all-in consideration of whether all that has come before yields the conclusion that a claim is appropriate for the courts. “The inquiry at this stage seems perhaps no better defined than the question whether, all things considered, the costs of permitting adjudication under a particular proposed standard outweigh the benefits.”⁴⁵ Fallon’s conclusion is striking: The question of whether disputes can be resolved by resort to judicially manageable standards ultimately reduces to “substantially open-ended judgments about whether it would be better, all things considered, to allow litigation to proceed or instead to decree a category of disputes nonjusticiable.”⁴⁶ The standards for determining whether something is a political question might fail themselves. Put differently, there is no law governing the question of when there is no law.

As explicated by Fallon, the concept of judicial manageability recalls Lon Fuller’s articulation of the limits of adjudication.⁴⁷ Fuller’s goal was to identify the features separating the types of disputes that can appropriately be resolved through an adjudicative process from those that cannot, and he links the inquiry directly to the political question doctrine,⁴⁸ which “could hardly be said to rest on any principle made explicit in the Constitution; it was grounded rather in a conviction that certain problems by their intrinsic

³⁹ “Even if a test or standard is rationally comprehensible as applied to clear or paradigmatic cases, it may still be judicially unmanageable if it requires distinctions for which conceptual resources are lacking in too many instances.” *Id.* at 1287.

⁴⁰ “If formal realizability were a requirement of judicial manageability, a test would need to mandate clear results in all or nearly all cases, with little need for further contestable judgments, in order to count as judicially manageable.” *Id.* at 1288.

⁴¹ “If we ask why some indeterminate standards are judicially manageable whereas others are not, the answer seems to lie largely in predictive judgments about the pattern of results that decisionmaking pursuant to any particular standard would likely produce.” *Id.* at 1289. This, in turn, seems to be a product of a “relative consensus or lack of consensus about the meaning of underlying norms.” *Id.* at 1290.

⁴² “A test may be deemed judicially unmanageable if it would require courts to make empirical findings or predictive judgments for which they lack competence.” *Id.* at 1291. Often this is a comparative assessment, in which courts’ abilities are contrasted with those of other institutions. *Id.*

⁴³ “Concerns about standards to guide the award of remedies occasionally influence judicial decisions to dismiss disputes on political question grounds.” *Id.* at 1292.

⁴⁴ *Id.* at 1293.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1296.

⁴⁷ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393–409 (1978).

⁴⁸ *Id.* at 355.

nature fall beyond the proper limits of adjudication.”⁴⁹ At the core of his analysis is “one simple proposition, namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”⁵⁰ From that, it becomes possible to identify the limits of adjudication. Stated generally, “[w]herever successful human association depends upon spontaneous and informal collaboration, shifting its forms with the task at hand, there adjudication is out of place except as it may declare certain ground rules applicable to a wide variety of activities.”⁵¹

Under Fuller’s conception of the judicial role, disputes may be unfit for adjudication because they are “polycentric,” involving many variables interacting in such a way that adjustments to one will invariably have effects on the others.⁵² Fuller suggests the analogy of a spider web, where “[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.”⁵³ Difficulties may likewise stem from a lack of preexisting rules from which reasoned arguments may be made.⁵⁴ Fuller concedes, though, that reasons need not always preexist, but can in some instances be developed on a case-by-case basis through the mechanism of adjudication. He cites federalism as an example of a concept that, in its general form, is too amorphous to provide the basis for reasoned analysis, but allows its contours to be worked out over time, and “this kind of development—this gradual tracing out of the full implications of a system already established—can take place only in an atmosphere dominated by the shared desire to make federalism work.”⁵⁵ Incremental development of principles by courts over a run of cases is sometimes permissible, but only where it can be based on a sufficiently broad consensus regarding the governing norms.

It bears noting again that a determination that a matter presents a political question precludes judicial review of such matters at all. This is striking because constitutional law is rife with doctrines the contours of which are informed by the very sorts of considerations underlying the “judicially manageable standards” prong.⁵⁶ Constitutional claims receive more or less deferential review based on a set of inferences that parallels

⁴⁹ *Id.*

⁵⁰ *Id.* at 364.

⁵¹ *Id.* at 371.

⁵² *Id.* at 394–95.

⁵³ *Id.* at 395.

⁵⁴ *Id.* at 377.

⁵⁵ *Id.* at 377–78. Fuller uses the example of federalism, which he characterizes as involving the “gradual tracing out of the full implications of a system already established.” *Id.* at 377.

⁵⁶ Richard H. Fallon, Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1487 (2020) (“[T]he kinds of considerations that bear on political question determinations are frequently inseparable from the considerations that bear on merits rulings.”).

those involved in the political question determination. A large part of the rationale for the deferential nature of review under the Commerce Clause or of Equal Protection claims that do not involve suspect classifications is that the laws under review are typically rooted in underlying judgments of degree and policy that are better left to the political branches.⁵⁷ Courts will nearly always defer in such situations, but, because they retain jurisdiction to hear the claims, they remain able to intervene in circumstances where the political branches have acted irrationally or otherwise abused their discretion. As Fallon points out, there are many doctrinal areas in which such an approach results in the underenforcement of constitutional norms.⁵⁸ But a determination that an issue presents a political question is another matter entirely. It removes courts' ability to police even the boundaries of a constitutional provision and thereby creates the prospect of a situation in which an agreed upon violation of the Constitution goes unremedied. Again, one interpretation of *Vieth v. Jubelirer* is that all nine Justices agreed that extreme partisan gerrymandering violates the Constitution, even as a majority concluded that the specific claims presented were nonjusticiable.⁵⁹ The *Rucho* Court can arguably be characterized in the same way. Extreme partisan gerrymandering may thus be both unconstitutional and nonjusticiable.

II. ANALYZING *RUCHO*

A. *An Overview*

In *Rucho*, the Court considered challenges to the gerrymandering of two congressional districting maps. A map from North Carolina favored Republicans, and one from Maryland favored Democrats.⁶⁰ In both cases a federal district court had found in favor of the challengers.⁶¹ The claims were that the gerrymandering ran afoul of the Equal Protection Clause, the First Amendment, the Elections Clause, and Article I, Section 2, which provides

⁵⁷ See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 308–11 (2002) (considering the analogous ways in which the Court has treated the political question doctrine and its review of Congress's exercise of the commerce power). The key point here is that the underlying legislative determinations are not clearly of a different sort than what is involved in redistricting. Both involve the balancing of complex factors and the assessment of causal relationships that are not susceptible to easy resolution. And yet the Court has not hesitated to impose outer bounds on the exercise of the commerce power. Indeed, in *United States v. Lopez*, 514 U.S. 549, 567 (1995), it did so against a longstanding backdrop in which the imposition of such bounds had been abandoned as unworkable.

⁵⁸ Fallon, *supra* note 14, at 1299–1303.

⁵⁹ See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 809–10 (2005) (“For the first time, all the Justices agreed that the pursuit of partisan advantage in redistricting is sometimes unconstitutional.”).

⁶⁰ *Rucho v. Common Cause*, 139 S. Ct. 2848, 2491 (2019).

⁶¹ *Id.*

that members of the House of Representatives be selected “by the People of the several States.”⁶²

The effectiveness of the gerrymandering was not in question. Both the majority and dissenting opinions acknowledged its extent. Chief Justice Roberts’s majority opinion noted that “[t]he districting plans at issue here are highly partisan, by any measure”⁶³ and that they “involve blatant examples of partisanship driving districting decisions.”⁶⁴ The majority conceded that “[e]xcessive partisanship in districting leads to results that reasonably seem unjust”⁶⁵ and emphasized that the majority “does not condone excessive partisan gerrymandering.”⁶⁶ Justice Kagan’s dissent used more pointed phrasing. A small sample, from the opinion’s second paragraph: “These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction.”⁶⁷ From there, the opinion proceeded to walk through the evidence that the district courts had taken into account in concluding that these gerrymanders were constitutionally problematic.⁶⁸ Invoking a core piece of evidence concerning the extremism of the North Carolina map, the dissent offered that “[b]y any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State’s political geography and districting criteria built in) reflects ‘too much’ partisanship.”⁶⁹

The issue the Court faced, then, was not whether the gerrymandering under review was excessive. One can at least infer a general agreement that, no matter how one defines excessive partisanship in gerrymandering, these cases met the standard. The issue instead was whether partisan gerrymandering, no matter how excessive, presents the sort of question that is within the competence of the federal courts to decide or whether it is instead a nonjusticiable political question outside the scope of the judicial power.⁷⁰ For the first time in its history, the Court drew on a perceived lack of judicially manageable standards to answer the latter question in the affirmative.⁷¹

Chief Justice Roberts’s opinion in *Rucho* draws on the second and third strands of the doctrine as laid out in *Baker v. Carr*, both of which concern what might be characterized as the boundary between legal and non-legal determinations. If there are not rules of the sort that courts are accustomed to working with, the reasoning goes, then resolution of a dispute would be

⁶² *Id.* at 2492.

⁶³ *Id.* at 2491.

⁶⁴ *Id.* at 2505.

⁶⁵ *Id.* at 2506.

⁶⁶ *Id.* at 2507.

⁶⁷ *Id.* at 2509 (Kagan, J., dissenting).

⁶⁸ *Id.* at 2516–19.

⁶⁹ *Id.* at 2521.

⁷⁰ *Id.* at 2491.

⁷¹ See Fallon, *supra* note 56, at 1491.

according to factors that are not law and which are accordingly beyond the proper scope of the judicial function. Consistent with Fuller's characterization of the nature of the judicially manageable standards framework, the opinion takes a somewhat protean approach to characterizing the nature of the political question inquiry presented. As in *Vieth*, even the majority appears to acknowledge that the gerrymandering in question is constitutionally problematic, noting that it “does not condone excessive partisan gerrymandering,”⁷² which is “incompatible with democratic principles,”⁷³ while acknowledging that the problem it confronts involves “separating constitutional from unconstitutional partisan gerrymandering.”⁷⁴

For the most part, the opinion deems the key question to be whether there are “judicially discoverable and manageable standards” available to provide rules of decision in partisan gerrymandering cases.⁷⁵ But two additional supporting considerations appear at various points along the way. One—a concern about judicial interventions that would directly affect the allocation of power between the political parties—seems to be an invocation of *Baker*'s third prong, relating to policy determinations.⁷⁶ The other, which we explore in greater depth below, is that there is no clause in the Constitution that gives the courts the authority to entertain such claims.⁷⁷

The Court's reasoning proceeds as follows. First, that partisan gerrymandering has been with us since the beginning: “The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution.”⁷⁸ The key implication is that some partisan gerrymandering must therefore be acceptable, such that the question that would confront a court is not simply whether it exists, but whether too much of it exists.⁷⁹ It briefly traced the history of its past efforts to address the question, then turned to the matter of justiciability. The Court made no real effort to articulate the standards by which it would approach that inquiry, noting at the outset simply that “we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a ‘limited and precise rationale’

⁷² *Rucho*, 139 S. Ct. at 2507.

⁷³ *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)).

⁷⁴ *Id.* at 2504.

⁷⁵ *See id.* at 2491 (“This Court . . . has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims.”); *id.* at 2494 (characterizing the difficulty presented by partisan gerrymandering cases in terms of judicially manageable standards); *id.* at 2500 (“There are no legal standards discernable in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.”); *id.* at 2502 (rejecting the challengers' proposed tests on the ground that “none meets the need for a limited and precise standard that is judicially discernable and manageable”).

⁷⁶ *Id.* at 2499–2500.

⁷⁷ *Id.* at 2507 (asserting that there is “no plausible grant of authority in the Constitution”).

⁷⁸ *Id.* at 2494.

⁷⁹ *Id.* at 2497.

and be ‘clear, manageable, and politically neutral,’”⁸⁰ so as to avoid entanglement with the political process.⁸¹ Because the decisions under review would be inherently partisan, it is important to have a clear standard lest the courts end up appearing to be political actors themselves.

The opinion next turns to exploration of how an assessment of excessive partisanship might work, beginning with an effort to identify the baseline from which such an assessment would proceed. “Partisan gerrymandering claims,” it asserts, “invariably sound in a desire for proportional representation.”⁸² But, because proportionality has never been required, the Court continues, “plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end.”⁸³ Note the Court’s characterization of a *political* judgment, which it then discusses in terms of versions of how the concept of “fairness” might be defined and applied to partisan gerrymandering claims. Such judgments, it concludes, are beyond its capacity:

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernable in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is “fair” in this context would be an “unmoored determination” of the sort characteristic of a political question beyond the competence of the federal courts.⁸⁴

Even were it possible to establish a baseline, there would remain the problem of determining when a departure from that baseline becomes too great. Here, the Court proceeds primarily by providing a list of questions that would have to be answered and, in doing so, points out the various difficulties that courts would face in prioritizing the factors they would be required to consider.⁸⁵

Justice Kagan in dissent concedes that the majority identifies legitimate concerns. “Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much.”⁸⁶ They should intervene only in “egregious cases,”⁸⁷ with the baseline being not

⁸⁰ *Id.* at 2498 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring)).

⁸¹ *Id.* at 2498–99.

⁸² *Id.* at 2499.

⁸³ *Id.*

⁸⁴ *Id.* at 2500.

⁸⁵ *Id.* at 2501.

⁸⁶ *Id.* at 2515–16 (Kagan, J., dissenting).

⁸⁷ *Id.* at 2516.

some abstract concept of fairness but rather a given state's own stated districting criteria.⁸⁸ In answer to the majority's concerns about the difficulties involved in assessing how much partisanship is too much, Justice Kagan offers a simple rebuttal: "How about the following for a first-cut answer: This much is too much."⁸⁹ It is not necessary to decide every case in the first case, and the dissent contemplates the development of standards over a series of cases if necessary to address future extreme cases.⁹⁰

The majority rejects both the use of states' own criteria as a baseline and the dissent's "this much is too much" approach to assessing degree.⁹¹ It acknowledges that courts often must grapple with matters of degrees, but it contends that "those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion."⁹² Here, it continues, neither the Constitution nor common experience provide enough raw material for judicial analysis.⁹³

In sum, Chief Justice Roberts's opinion for the Court echoes the factors that Fallon and Fuller identify, even as it does not engage in a deep or systematic way with the concept of judicial manageability. The opinion's framing of partisan gerrymandering places it squarely within Fuller's category of polycentric disputes.⁹⁴ Viewed in isolation, the analysis seems entirely consistent with the rationale underlying the judicially manageable standards prong of the political question doctrine. If the Chief Justice sincerely believes the concerns he identifies to be legitimate, then it follows that he could legitimately and sincerely conclude that questions relating to partisan gerrymandering are beyond the judiciary's capacity to resolve. As we will see, however, there are reasons to question Roberts's sincerity.

B. *Breaking Down Rucho's Rationale*

We turn now to assessing *Rucho's* analysis in light of Chief Justice Roberts's jurisprudence more generally. Has he made the same arguments and raised the same concerns consistently? Does the best reading suggest that he indeed believes the concerns set forth in *Rucho's* analysis to be legitimate? Or does his deployment of arguments appear to be cynical and thus inconsistent with principled decision-making? We have not analyzed all of his opinions. But even our limited review supports the conclusion that, at the very least, he has not found the arguments he offered in *Rucho* to carry the same weight in other contexts. To the contrary, he has frequently offered arguments and made rhetorical moves that are the converse of those in

⁸⁸ *Id.* at 2521.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2516–23.

⁹¹ *Id.* at 2505.

⁹² *Id.*

⁹³ *Id.* at 2506.

⁹⁴ See Fuller, *supra* note 47, at 394–95.

Rucho. His opinion for the Court in *Shelby County v. Holder*⁹⁵ alone provides considerable support for this conclusion. It offers reasoning that is, at best, in deep tension with and, at worst, directly contrary to that in *Rucho* on each important component of their respective analyses.

1. *There Is No Clause in the Constitution*

As noted above, the Court acknowledged in *Rucho* that the gerrymandering in question was, at best, problematic, though it stopped short of characterizing it as a constitutional violation, concluding instead that “we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us”⁹⁶ “There are no legal standards discernible in the Constitution for making such judgments,”⁹⁷ the Court noted in concluding its discussion concerning what it regarded as the need for it to settle on a meaning of “fairness” in order to adjudicate partisan gerrymandering claims. It responded to the dissent’s plainly correct assertion that courts routinely assess matters of degree by suggesting that partisan gerrymandering claims are different: “[T]hose instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. . . . Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion.”⁹⁸ The Guarantee Clause having already been deemed an insufficient peg on which to hang justiciable claims,⁹⁹ there is “no plausible grant of authority in the Constitution.”¹⁰⁰ The fact that state courts have formulated and adopted approaches to partisan gerrymandering is inapposite; those courts have done so on the basis of text that “can provide standards and guidance for state courts to apply.”¹⁰¹ But “there is no ‘Fair Districts Amendment’ to the Federal Constitution.”¹⁰²

This is curious logic on its own terms. Florida’s Fair Districts Amendment provides simply that “[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”¹⁰³ That text no doubt limits to some extent the universe of possible judicial approaches to gerrymandering, but it’s difficult to conclude that it is materially more concrete than the Equal Protection, Due Process, or, for that matter, Guarantee clauses. And, as Justice Kagan pointed out, the

⁹⁵ 570 U.S. 529 (2013).

⁹⁶ *Rucho*, 139 S. Ct. at 2508.

⁹⁷ *Id.* at 2500.

⁹⁸ *Id.* at 2505–06.

⁹⁹ *Id.* at 2506.

¹⁰⁰ *Id.* at 2507.

¹⁰¹ *Id.* As Justice Kagan points out, the state constitutional text in question hardly provides precise guidance. *Id.* at 2524 n.6 (Kagan, J., dissenting).

¹⁰² *Id.* at 2507. The Chief Justice has employed similar rhetoric before. See *Obergefell v. Hodges*, 576 U.S. 644, 694 (2015) (Roberts, C.J., dissenting) (“There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the Constitution.”).

¹⁰³ FLA. CONST., art. III, §20(a).

Pennsylvania Supreme Court grounded its approach to gerrymandering in clauses providing that “elections shall be free and equal” and that no one may “interfere to prevent the free exercise of the right of suffrage.”¹⁰⁴

Because something as indefinite as a Fair Districts Amendment would apparently make a difference in Roberts’s estimation, the suggestion here seems to be that even an indeterminate constitutional provision—though not the Equal Protection Clause¹⁰⁵—could somehow work to save a claim from the argument that it cannot be resolved by resort to judicially discoverable and manageable standards. One might, if one were unaware of the fate of the Guarantee Clause, imagine that this is a nod in the direction of an exception to the judicial manageability requirement for situations where claims are tied to a specific textual provision. The logic, as noted, is opaque at best.

What is more, the Chief Justice does not consistently weigh the absence of a provision in the Constitution as grounds for declining to exercise the Court’s authority or for concluding that deferential review is appropriate. Consider his opinion for the Court in *Seila Law LLC v. Consumer Financial Protection Bureau*,¹⁰⁶ in which the Court struck down restrictions that Congress had placed on the President’s power to remove the CFPB’s director. “It is true,” the Court explained, “that ‘there is no ‘removal clause’ in the Constitution,’ but neither is there a ‘separation of powers clause’ or a ‘federalism clause.’ These foundational doctrines are instead evident from the Constitution’s vesting of certain powers in certain bodies.”¹⁰⁷

Consider, as well, *Shelby County*,¹⁰⁸ in which the Court struck down § 4(b) of the Voting Rights Act, which was originally passed in 1965 pursuant to Congress’s power to enforce the Fifteenth Amendment. As originally enacted, it had a built-in limited term, and it had been periodically reauthorized since. The reauthorization before the Court in *Shelby County*, which was backed by extensive factfinding, took place in 2006,¹⁰⁹ and, while it did not change § 4(b)’s formula for determining which jurisdictions were covered by the Act, it did expand the scope of prohibited conduct under § 5.¹¹⁰ In striking the Section down, the Court relied on three concepts—federalism; “the principle that all States enjoy equal sovereignty;” and the proposition that “the Act imposes current burdens and must be justified by

¹⁰⁴ *Rucho*, 139 S. Ct. at 2524 n.6 (Kagan, J., dissenting) (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803–04 (2018)).

¹⁰⁵ *Cf. Miller v. Johnson*, 515 U.S. 900, 932 (1995) (Stevens, J., dissenting) (“In my view, districting plans violate the Equal Protection Clause when they ‘serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of [political] strength’”) (quoting *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring)).

¹⁰⁶ 140 S. Ct. 2183 (2020).

¹⁰⁷ *Id.* at 2205.

¹⁰⁸ 570 U.S. 529 (2013).

¹⁰⁹ *Id.* at 539.

¹¹⁰ *Id.*

current needs”—that have no textual home.¹¹¹ The Court nonetheless found itself compelled to conclude that Congress had overstepped its bounds.

2. *The Lack of a Developed Body of Law*

In addition to the lack of directly applicable text in the Constitution, Chief Justice Roberts’s opinion for the Court in *Rucho* leans on the lack of any other developed set of legal standards—by implication, a body of case law—on which courts could draw in assessing the appropriateness of partisan gerrymandering. This features most prominently in the opinion’s response to Justice Kagan’s dissent, pointing out that courts commonly adjudicate questions of degree. “True enough,” the Court replies, “[b]ut those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion.”¹¹² It characterizes the dissent’s analogy to the need to deal with anticompetitive effects under the Sherman Act as inapposite based on the common law roots of antitrust law.¹¹³ This is, at best, a clumsy sleight of hand. Much of the Court’s work involves making judgments of degree under the banner of vague provisions that may serve as a hook for the Court’s analyses, but often provide no guidance apart from the body of law that the Court has developed around them.¹¹⁴

Such concerns have not troubled Roberts in other cases. Indeed, they do not otherwise trouble him in *Rucho* itself, in which he fails to acknowledge that the judicially manageable standards prong of the political question doctrine fails this very test because, while there are past cases discussing the concept, they do not converge on a clear test and certainly not one invoked in *Rucho*.¹¹⁵ Moreover, the Chief Justice’s opinion never pauses to consider that even the common law had to start somewhere. Every line of cases and every body of precedent began with a first case, and that first case did not answer all the questions raised in subsequent cases. The Court does not say why *Rucho* could not be that case.¹¹⁶

It is with respect to this aspect of *Rucho* that *Shelby County* provides the starkest contrast. The “equal sovereignty” principle on which the Court relied to invalidate § 4(b) of the Voting Rights Act was, in one characterization, “surprisingly unsupported.”¹¹⁷ Judge Richard Posner called

¹¹¹ *Id.* at 535–36.

¹¹² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2505 (2019).

¹¹³ *Id.* at 2505–06.

¹¹⁴ “If one examines the litany of case law either interpreting the broad language of the due process or equal protection clauses or establishing standards on which to invoke the first amendment right of free speech, one must suspect the disingenuousness of the ‘absence-of-standards’ rationale.” Redish, *supra* note 28, at 1046.

¹¹⁵ *See supra* note 14.

¹¹⁶ *See* Parsons, *supra* note 8, at 1356–57 (characterizing Chief Justice Roberts as acting “as if all doctrinal questions must be answered in one fell swoop”).

¹¹⁷ Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1089 (2016).

it “a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle.”¹¹⁸ But there is more. Roberts in *Shelby County* provides little authority for the proposition that the Voting Rights Act “imposes current burdens and must be justified by current needs”¹¹⁹ beyond the Court’s assertion of that proposition in its opinion—also authored by the Chief Justice—in *Northwest Austin Municipal Utility District*,¹²⁰ where it appears unaccompanied by anything other than a general cite to a law review article.¹²¹ And while the idea that courts should have some authority to consider whether changed facts bear on the continued constitutionality of a law is not a new one,¹²² it is underdeveloped both in *Shelby County* and in general.¹²³ Yet, in neither case—and in contrast to what we will encounter in the next subpart—did the Chief Justice seem troubled by or even raise the multitude of questions left unanswered.¹²⁴ What are the standards by which current burdens and current needs are to be assessed? How much change is necessary to invalidate a previously valid statute? Does recent legislative engagement with a statute undercut claims that changed facts have undermined the statute’s rationale? Are these questions that can be answered by resort to judicially discoverable and manageable standards? Do they involve policy determinations of a kind clearly unfit for judicial discretion? *Shelby County* engages in a great deal of performative handwringing about the need to not act lightly in striking down an act of Congress,¹²⁵ coupled with concern about an approach to doing so that would leave the Act “effectively immune from scrutiny.”¹²⁶ But, in doing so, it exhibited little concern about the fact that there is no clear constitutional provision or developed body of law on which to ground its analysis.

3. *An Unwillingness to Determine Matters of Degree*

Rucho places a great deal of reliance on the fact that courts considering claims relating to partisan gerrymandering would have to determine when it becomes excessive. The “central problem,” the Chief Justice notes by way of quoting the *Vieth* plurality, is “determining when political

¹¹⁸ Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking Down the Law Is All About Conservatives’ Imagination*, SLATE (June 26, 2013, 12:16 AM), <https://perma.cc/D2ZE-EZT4>.

¹¹⁹ *Shelby Cnty. v. Holder*, 570 U.S. 529, 542 (2013).

¹²⁰ 557 U.S. 193 (2009).

¹²¹ *Id.* at 202–03. The article it cites focuses on whether the factual preconditions for the Voting Rights Act continue to exist and does not engage in any deep fashion with the question of judicial review of the connection between the original justification for a law and its continued viability. Samuel Isaacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

¹²² Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 60 (2015).

¹²³ As Larsen notes, “the Supreme Court has not given clear guidance about what to do when . . . facts change over time.” *Id.* at 62.

¹²⁴ *Shelby Cnty.*, 580, 591 (Ginsburg, J., dissenting); *Nw. Austin Mun. Util. Dist.*, 557 U.S. at 204.

¹²⁵ *Shelby Cnty.*, 570 U.S. 556–57.

¹²⁶ *Id.* at 550.

gerrymandering has gone too far.”¹²⁷ Its resolution would require “a limited and precise standard that is judicially discernable and manageable,”¹²⁸ and the Court can identify no such standard.¹²⁹ On the way to reaching this conclusion, Chief Justice Roberts poses a host of what he calls “unanswerable” questions, identifying hypothetical features of potential cases for which neither the majority nor the dissent have a clear answer.¹³⁰ Where would the line be? What should we count? How will we know when we have enough?

Roberts has used this rhetorical move before, making the perfect the enemy of the good as a way of resisting recognition of a constitutional claim. His most ostentatious use of the technique came in *Caperton v. Massey*,¹³¹ in which he dissented from the Court’s holding that due process required a state supreme court justice to recuse himself from a case in which a corporate officer of one of the parties had made massive donations to his campaign. Justice Kennedy’s majority opinion did not articulate a precise test for determining when a campaign contribution triggers a recusal obligation,¹³² emphasizing instead the “extraordinary” and “extreme” nature of the situation before the Court.¹³³ The Chief Justice critiqued the majority’s failure “to provide clear, workable guidance for future cases[,]”¹³⁴ then proceeded to emphasize the point by providing a list of forty questions (“only a few uncertainties that quickly come to mind”) left unresolved by the majority.¹³⁵

Yet, for all this, it is not difficult to find instances in which Roberts has been content to draw upon indistinct lines without answering questions akin to those he raises in *Rucho* and *Caperton*. For example, in *National Federation of Independent Business v. Sebelius*,¹³⁶ in considering the claim that the Medicaid expansion included in the Affordable Care Act involved an unconstitutional coercive exercise of the spending power, Chief Justice Roberts was willing to conclude that Congress had crossed a conditional spending line that was very difficult to discern and never before crossed.¹³⁷ Just as in *Rucho*, *Sebelius* involved a situation in which the Court in preceding cases had regarded the claim as justiciable, but had never struck

¹²⁷ *Rucho*, 139 S. Ct. at 2497 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)).

¹²⁸ *Id.* at 2502.

¹²⁹ *Id.* at 2497, 2506.

¹³⁰ *Id.* at 2504–05.

¹³¹ 556 U.S. 868 (2009).

¹³² “We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” *Id.* at 884.

¹³³ *Id.* at 887.

¹³⁴ *Id.* at 893 (Roberts, C.J., dissenting).

¹³⁵ *Id.* at 898.

¹³⁶ 567 U.S. 519 (2012).

¹³⁷ *Id.* at 575–88.

down an instance of conditional spending. Just as in *Rucho*, *Sebelius* involved what the Court characterized as an extreme case—not simply an inducement for states to act, but rather “a gun to the head.”¹³⁸ Past cases had “not attempt[ed] to ‘fix the outermost line’ where persuasion gives way to coercion.”¹³⁹ This time that was sufficient for the Chief Justice: “We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.”¹⁴⁰ How much is too much? This much.

*Gundy v. United States*¹⁴¹ provides another example. Chief Justice Roberts did not write for himself, but he joined Justice Gorsuch in advocating for a rejuvenation of the nondelegation doctrine, which has gone effectively unenforced due largely to the difficulties involved in formulating a test for determining when a delegation has gone too far.¹⁴² As we demonstrated in the preceding subpart, *Shelby County* provides a final point of contrast. There are undoubtedly questions of degree involved in determining whether there is an adequate fit between the current burdens imposed by legislation and the current needs that justify it, and there must be some point at which that fit is insufficient to sustain congressional action. The same holds for intrusions on the issues of equal sovereignty and federalism, but *Shelby County* provides no definitive clues as to the location of the applicable thresholds and it shows little concern about the resulting uncertainty.

The more general point is this: There undoubtedly are legitimate reasons for the Justices to worry about the effects of extensive judicial involvement in the drawing of district lines. But it does not follow from that concern alone that partisan gerrymandering ought to be shielded entirely from judicial review. The questions of degree presented by the prospect of intervention in gerrymandering exist in nearly every corner of constitutional law. The political branches routinely draw upon decidedly non-legal factors in exercising their powers, yet the Court reacts not by categorically insulating those decisions from review but rather by reviewing them under deferential standards.

4. *The Problem Is Too Difficult/Multi-Faceted*

A related, but distinct, concern involves the nature of the judgment calls that a court must make in adjudicating a claim. A simple, one-dimensional question of degree presents one sort of problem; a polycentric issue with multiple interacting parts presents another. Assessing a partisan gerrymander entails making not just a binary judgment regarding the appropriateness of an entire map, but perhaps also subsequent

¹³⁸ *Id.* at 581.

¹³⁹ *Id.* at 585.

¹⁴⁰ *Id.*

¹⁴¹ 139 S. Ct. 2116 (2019).

¹⁴² “[T]he Constitution’s nondelegation norm goes essentially unenforced. The most cogent explanation includes considerations of judicial manageability: the Supreme Court has felt unable to devise a meaningful test that would yield both predictable and practically acceptable results.” Fallon, *supra* note 14, at 1302–03 (footnote omitted).

determinations regarding how the lines on the map must be adjusted in light of that overall assessment. The multidimensional nature of the problem presented by partisan gerrymandering appears primarily in the Court's discussion of the difficulties of assessing fairness. In the Court's estimation, any claim of partisan gerrymandering "inevitably ask[s] the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end."¹⁴³ "Fairness," the Court observes, could be measured by reference to the number of competitive districts, to the number of safe seats, to traditional districting criteria such as geography and existing political lines, or something else.¹⁴⁴ The resulting determination would be "unmoored" and beyond judicial competence.¹⁴⁵ The Court also briefly discusses the remedial problems presented, noting, by way of example, that a court analyzing a claim by resort to traditional districting criteria would be required "to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow."¹⁴⁶

Framed in that way, the conclusion that districting is beyond judicial competence has intuitive appeal. Mapmaking is no part of the law school curriculum, and a court confronted with the task of determining what the "correct" districting map looks like would rightly be concerned about its competence to do so.¹⁴⁷ So viewed, partisan gerrymandering presents a classic polycentric problem. Adjusting one district within a state has immediate implications for at least one other district, and compensating adjustments to that second district could easily radiate outward until the entire map is in question. Each adjustment has, to use Fuller's phrasing, "complex repercussions."¹⁴⁸

Such concerns animated Justice Frankfurter in *Colegrove v. Green*,¹⁴⁹ which concerned a challenge to congressional districts in Illinois. Frankfurter's concern was that "no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid."¹⁵⁰ Otherwise the Court would find itself pulling at strands of a web, attempting to find some new equilibrium within a complex, interacting pattern. Likewise, Roberts's rationale implicitly

¹⁴³ *Rucho*, 139 S. Ct. at 2499.

¹⁴⁴ *Id.* at 2499–2500.

¹⁴⁵ *Id.* at 2500 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)). "[F]ederal courts are not equipped to apportion political power as a matter of fairness . . ." *Id.* at 2499.

¹⁴⁶ *Id.* at 2501.

¹⁴⁷ *Id.* at 2503–04 ("[A]sking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.").

¹⁴⁸ Fuller, *supra* note 47, at 394.

¹⁴⁹ 328 U.S. 549 (1946).

¹⁵⁰ *Id.* at 553.

touches on all of the practical desiderata that Fallon identifies. The *Rucho* opinion characterizes the judgments involved as political, which can be viewed as a claim that they require reliance on “distinctions for which conceptual resources are lacking” and thus lack analytical bite.¹⁵¹ The list of questions left unresolved by the *Rucho* dissent¹⁵² forms the centerpiece of its claim that no test could generate clear results across the likely range of cases.¹⁵³ Additionally, as noted above, a concern about remedies underlies the analysis generally.¹⁵⁴

But that is not the only way to approach the problem. Because “[t]here are polycentric elements in almost all problems submitted to adjudication,”¹⁵⁵ a specific dispute’s perceived amenability to being resolved by a court will often be a matter of framing. Rather than viewing the problem of partisan gerrymandering as one requiring courts to draw lines on maps, one could instead conceive of it as requiring courts to mark the boundaries of mapmakers’ discretion.¹⁵⁶ “Discretion” is, of course, a slippery concept,¹⁵⁷ but it is one brought to bear in situations where an initial decision maker must make highly contextual decisions, often involving the weighing of factors according to a situational logic that cannot be spelled out in advance or articulated with much specificity. The parameters of that discretion can often be discerned only in retrospect via the examination of cases where it was deemed to be abused or properly exercised.

The point, as Fuller noted, is that a problem’s polycentric dimensions can be worked out over time, especially given sufficient underlying consensus on the norms that should govern resolution. As Fuller observed, courts often deal with such polycentric problems when faced with questions concerning federalism.¹⁵⁸ The same is true for the separation of powers. Both types of cases require courts to make judgments about, and potentially to intervene in, a complex web of arrangements. An adjustment to the balance of power between the federal government and the states can have implications for the balance of power among the branches of the federal government and vice-versa. As noted above, there is no text in the Constitution speaking directly to either doctrine, and, to the extent that there are limited, precise, and manageable standards of the sort contemplated by the *Rucho* majority, they have been developed by the Court through a

¹⁵¹ See *supra* note 39.

¹⁵² *Rucho*, 139 S. Ct. at 2505.

¹⁵³ See *supra* notes 40 and 41.

¹⁵⁴ See *supra* note 42.

¹⁵⁵ Fuller, *supra* note 47, at 397.

¹⁵⁶ One reading of *Rucho* is that it leaves some space for such an approach to develop. See Benjamin Plener Cover, *Rucho for Minimalists*, 71 MERCER L. REV. 695, 696 (2020) (arguing that *Rucho* “leaves unaddressed ‘non-allocative’ claims, those that define harm and remedy without reference to the votes-seats relationship”).

¹⁵⁷ See, e.g., 3 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 15.08 (4th ed. 2010) (discussing the concept of discretion).

¹⁵⁸ See *supra* Section I.B.

common-law process. In the situation presented in *Seila Law*,¹⁵⁹ for example, Congress's decision to restrict the President's ability to remove the director of the CFPB was likely the product of a calculus in which it set other features of the Bureau's operating structure in ways that it would have adjusted had it known it was unable to insulate the director. Given the seeming agreement among the Justices in both *Vieth* and *Rucho* that the gerrymandering in question was unconstitutionally excessive, it seems reasonable to imagine that discernable constraints on mapmakers' discretion could emerge over time even with "this much is too much" as a starting point.

Shelby County likewise provides a window into the relationship between framing and perceived polycentrism. Congress, in first passing and then reauthorizing the Voting Rights Act, undoubtedly made and then updated evaluations of both the burdens imposed by the Act and the needs addressed. On that conception of the case, Congress engaged in a periodic nationwide assessment of voting rights, which presumably encompassed consideration of the Act's framework as it then existed, including the degree to which it burdened federalism and the equal sovereignty of states. When Congress's relation to the Voting Rights Act is viewed in this way, it was the framing of the question before the Court, rather than the underlying dynamic, that brought the case outside the realm of polycentrism. In other words, the Court regarded the issue in binary terms—Congress either exceeded or did not exceed its power—and it felt no obligation to make the Act constitutional; to provide Congress with any precise guidance concerning where the line of constitutionality is;¹⁶⁰ or to encourage Congress to prioritize and strike a balance among federalism, equal sovereignty, and voting rights. Congress, if so inclined, will simply have to take another run at the VRA and later find out whether the Court regards the effort as constitutional.

5. *The Need to Make Political Calculations*

A persistent theme in the *Rucho* opinion is that adjudication of partisan gerrymandering would necessarily entangle the judiciary in what are inherently partisan disputes. It would require "courts to make their own political judgment about how much representation particular political parties *deserve*,"¹⁶¹ and to "reallocate political power between the two major

¹⁵⁹ 140 S. Ct. 2183 (2020).

¹⁶⁰ One component of the *Shelby County* rationale came in response to the government's argument that Congress identified the jurisdictions to be covered by the Act and only then reverse-engineered the formula that would lead to such coverage. *Shelby Cnty. v. Holder*, 570 U.S. 529, 551 (2013). Chief Justice Roberts's opinion rejects this approach because it "does not even attempt to demonstrate the continued relevance of the formula to the problem it targets." *Id.* at 552. In outline form, of course, that process parallels the result-driven gerrymandering process in *Rucho*—in North Carolina the Republicans came up with a desired result in terms of the allocation of seats in Congress and then came up with a map that would produce it.

¹⁶¹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (emphasis in original).

political parties.”¹⁶² While not fully set out, one imagines the concern to have two facets. First, that any ability to consider such disputes would present too great a temptation for judges to engage in improperly motivated decision-making, in the sense that it would be too easy for judges to allow their personal political preferences to affect their application of the law. Second, that the public would perceive that improperly motivated decision-making to be taking place, regardless of whether it actually was.

The goals of avoiding that temptation and that perception are laudable. One imagines the Court’s strategy in *Rucho* of entertaining claims relating to gerrymandering in two states—one in which the districts were drawn by Republicans, and the other by Democrats—as an effort to further the perception, and perhaps foster the reality, of unbiased decision-making.¹⁶³ Whether that gambit was successful is another matter. Many observers regarded it as a partisan win for Republicans.¹⁶⁴

A point commonly made in discussions of the political question doctrine is that courts decide questions with obvious political ramifications all the time. Here, too, *Shelby County* stands in contrast to *Rucho*. The *Shelby County* Court intervened in the political balance of power in a situation presenting the temptation of and creating the perception of partiality. That dynamic is unavoidable, as is the widespread perception, whether entirely accurate or not, that the Justices are either conservatives or liberals and that they cast their votes accordingly. As a result, it may be that, as Martin Redish has suggested, the political question doctrine is concerned too much with the image of the judiciary and too little with ensuring that the constitutional system more broadly functions as it should.¹⁶⁵

III. POSSIBLE EXPLANATIONS

Our goal in this Essay is to assess whether Chief Justice Roberts’s behavior in *Rucho* appears to exhibit the same constraint by rules, standards, and principles that he extols in his opinion for the Court.¹⁶⁶ The best evidence that it does would be his consistent reliance on the same rules, standards, and principles across a range of cases and contexts. As we have demonstrated above, however, the reasons that Roberts offers in *Rucho* are not reasons that he consistently offers as compelling whether taken

¹⁶² *Id.* at 2507.

¹⁶³ “It may be that increasing evidence that the Court is being viewed as political has made the Chief Justice more determined to at least sometimes cast votes that send an important message that he very much wants sent: just because a group of Justices were all appointed by presidents of the same party does not mean they will always vote the same way.” Brianne J. Gorod, *John Roberts and Constitutional Law*, 38 CARDOZO L. REV. 551, 554 (2016).

¹⁶⁴ See *supra* note 7.

¹⁶⁵ “The approach examines only the impact of decision on the judiciary itself; as long as the judiciary’s adherence to principle is maintained, no problems are thought to exist.” Redish, *supra* note 28, at 1049.

¹⁶⁶ See *Rucho*, 139 S. Ct. at 2507 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278, 279 (2004)).

individually or, as the contrast with *Shelby County* suggests, as a package. He instead appears willing to overlook them, and even act contrary to them, in addressing different constitutional questions. But does that necessarily mean that he is acting improperly? This Part explores potential explanations for his behavior, some of which are benign and some of which are not. We do not claim to present a complete taxonomy of possible explanations for the apparently contradictory nature of his justifications and his behavior, nor do we purport to have located its true wellsprings, but we seek instead simply to explore the most likely alternatives.

A. *Inarticulable Standards*

One of us has elsewhere endorsed the proposition that judges often—and legitimately—draw upon reasons and intuitions that can properly be regarded as legal even though they are not things that can be fully captured in words.¹⁶⁷ Stated somewhat differently, professional acculturation produces shared understandings, including understandings about the proper nature and scope of the judicial role. Richard Fallon has likewise characterized constitutional law as such an endeavor, “constituted by the shared understandings, expectations, and intentions of those who accept the constitutional order and participate in constitutional argument and adjudicative practices.”¹⁶⁸ Fallon’s study of the manageable standards prong of the political question doctrine revealed that it resolves to what are ultimately contextual judgments about the costs and benefits of adjudication in specific contexts.¹⁶⁹ Taken together, these insights suggest an explanation for the apparent inconsistencies in Chief Justice Roberts’s behavior. On that view, he reached in good faith the conclusion that somehow—whether as a matter of the costs and benefits, of the degree, of their unique combination, or otherwise—the factors present in political gerrymandering cases hold no prospect of being amenable to principled adjudication in any form and that this unarticulated set of reasons therefore differentiates those cases from most other constitutional disputes.

That is certainly a possibility. It’s not difficult to imagine that one could instinctually regard the assessment of the constitutionality of lines on a map as different from the process of reviewing whether Congress had the power to pass a specific piece of legislation. Nor is it difficult to conclude that one could hold that view without being quite sure what the nature of the distinction is and therefore being unwilling to commit to a specific test for identifying similar distinctions. Such beliefs—as an exercise of “situation

¹⁶⁷ Chad M. Oldfather, *Aesthetic Judging and the Constitution (Or, Why Supreme Court Justices Are Less like Umpires and More like Figure-Skating Judges)*, 72 FLA. L. REV. 391, 401–02 (2020).

¹⁶⁸ RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 88 (2018).

¹⁶⁹ See *supra* notes 35–46 and accompanying text.

sense”¹⁷⁰ or “I know it when I see it,”¹⁷¹ depending on whether one means the characterization to be pejorative—can, in many observers’ eyes, constitute appropriate justifications for the exercise of judicial power. Belief in the legitimacy of inarticulable justifications does not, however, solve the problem of *Rucho*, in part because *Rucho* flamboyantly advances a vision of the judicial role inconsistent with such justifications. Recall its sneering dismissal of Justice Kagan’s suggestion that “[t]his much [gerrymandering] is too much,” arguing that she was “not even trying to articulate a standard or rule.”¹⁷² And consider it further in light of the opinion’s apparently opportunistic deployment of the components of its rationale. Placed against the backdrop of Roberts’s opinions in other cases, *Rucho* appears not to be an example of principled resort to situation sense or the type of judicial behavior it extols, but rather decision by fiat.

B. *Bounded Rationality*

The Justices, like anyone else, are subject to cognitive limitations; they are, in Herbert Simon’s classic phrasing, boundedly rational,¹⁷³ and, as a result fall short of perfect rationality in their behavior. One might accordingly construct a story about the Chief Justice’s approach as one in which he simply takes cases as he finds them, that he is more of a technician than someone drawn to overarching theory and as such is disinclined to think beyond the doctrinal categories presented in a given case. On that view, neither the contrast between *Rucho* and *Shelby County* nor the larger disconnect between *Rucho* and a vision of the Court’s role grounded in footnote four of *United States v. Carolene Products*¹⁷⁴ ought to be regarded as surprising. *Rucho* emerged out of a line of cases in which the Court openly struggled with the question of how (and whether) to approach claims relating to partisan gerrymandering.¹⁷⁵ The analytical path had been marked; the alternative routes from the fork at which the Court found itself explored; and the Chief Justice saw no need for further investigation.¹⁷⁶ The cases presented a choice between going with a large body of opinions questioning justiciability or with the counterpart body supporting justiciability, the latter of which would have required crafting a justiciable standard. Given that

¹⁷⁰ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 214 (1960) (describing the concept as an amalgam of “ways and attitudes which are much more and better felt and done than they are said”).

¹⁷¹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹⁷² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2505 (2019).

¹⁷³ HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* 19 (1983).

¹⁷⁴ See generally Stephanopoulos, *supra* note 8 (characterizing *Rucho* as squarely contrary to Footnote Four’s vision of the Court’s role in facilitating democratic processes).

¹⁷⁵ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (overturning *Bandemer* and declining to adjudicate political gerrymandering claims).

¹⁷⁶ For an exploration of path dependency in constitutional law, see generally Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903 (2005).

none of the principal briefs in *Rucho* even cited *Shelby County* and that the few cites to it in amicus briefs were incidental,¹⁷⁷ it should come as no surprise that neither Chief Justice Roberts nor his law clerks would think to contrast the reasoning in the two cases. After all, the idea apparently did not occur to Justice Kagan or her law clerks either.

The process of offering conflicting rationales can snowball from there. Once one has reached a decision, it is natural to emphasize reasons that support that decision and to minimize those that do not.¹⁷⁸ Dan Simon has drawn on this insight to explore the phenomenon he calls “judicial overstating:” “Judges . . . convey remarkably high levels of certainty in their decisions. Opinions persistently portray the chosen decision as singularly correct and as determined inevitably by the legal materials, leaving little room for judicial discretion.”¹⁷⁹ Despite the difficulty of the questions addressed, Roberts’s opinions are written in the register of the very effective advocate that he was. This one-sidedness, as Simon wryly notes, “takes a toll on the integrity of the discourse,”¹⁸⁰ especially when contrasted with the equally confident but diametrically opposed reasoning Roberts offers in other cases. Moreover, the very model of adjudication that he relies on in concluding that partisan gerrymandering is a political question contemplates a judiciary that is neutral and reactive rather than one that assumes an advocate’s posture.¹⁸¹ Psychological phenomena may accordingly explain the disconnect we have identified, but they do not justify them.

C. *Passive Virtues*

Might one nonetheless construct a story featuring judicial restraint? The Chief Justice, after all, opened his confirmation hearings by articulating a passive vision of his and the Court’s role.¹⁸² He opens *Rucho* by framing the question presented as “whether the courts below appropriately exercised judicial power.”¹⁸³ He closes with the observation, “No one can accuse this Court of having a crabbed view of the reach of its competence,”¹⁸⁴ before concluding that partisan gerrymandering—because it cannot be adjudicated according to law—is beyond that reach.¹⁸⁵ There is no law to govern the

¹⁷⁷ See, e.g., Brief of the Lawyers’ Committee for Civil Rights Under Law as Amicus Curiae in Support of Appellees at 1, *Rucho*, 139 S. Ct. 2484 (No. 18-422) (citing *Shelby* only in a list of voting rights cases that the Lawyers’ Committee has worked on).

¹⁷⁸ See Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 86–87 (1998) (explaining the psychological processes involved in judicial opinion writing).

¹⁷⁹ Dan Simon & Nicholas Scurich, *Judicial Overstating*, 88 CHI.-KENT L. REV. 411, 414 (2013).

¹⁸⁰ *Id.* at 418–19.

¹⁸¹ Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 139–42 (2005).

¹⁸² See *Transcript: Day One of the Roberts Hearings*, WASH. POST (Sept. 13, 2005, 12:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html>.

¹⁸³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

¹⁸⁴ *Id.* at 2508.

¹⁸⁵ *Id.* at 2506–07.

resolution of these disputes, the reasoning states,¹⁸⁶ thus judges will necessarily be—or at least appear to be—deciding based on their own partisan biases. Roberts made this point during the oral argument in *Gill v. Whitford*,¹⁸⁷—the case in which he infamously characterized the plaintiffs’ proposed “efficiency gap” test as “sociological gobbledygook”¹⁸⁸—positing that “the intelligent man on the street” would regard the Court’s decisions as a product of the fact that “the Supreme Court preferred the Democrats over the Republicans.”¹⁸⁹ Michael Seidman makes a related argument in defending *Rucho*’s result from a progressive perspective, arguing that to hold partisan gerrymandering claims justiciable would be “turning the question over to nine unelected and unrepresentative judges who are part of an institution that has pretty consistently defended the most regressive forces in our society.”¹⁹⁰

The desire to avoid the appearance of partisanship may be a plausible account of *Rucho*, but as Nicholas Stephanopoulos explains, it’s not an account that holds across Roberts’s decision-making.¹⁹¹ Once again, *Shelby County*, in which the Court engaged in just the sort of judicial intervention in a partisan dispute that *Rucho* claims is beyond the appropriate bounds of the judicial role, stands as a point of contrast. And as the preceding subpart notes, *Rucho*’s confident rhetoric is arguably not the work of a restrained court.

There is another sense in which *Rucho* itself can be regarded as violating a norm of judicial restraint. As Roberts’s opinion acknowledges, in *Davis v. Bandemer*, “[a] majority of the Court agreed that the case was justiciable.”¹⁹² And as Justice Stevens noted in his dissent in *Vieth v. Jubelirer*, a majority of the Justices in that case disagreed with the plurality’s conclusion that partisan gerrymandering claims are not justiciable.¹⁹³ Yet, in the Court’s two partisan gerrymandering cases preceding *Rucho*, the Chief Justice did not acknowledge that consecutive majorities had supported the conclusion that such claims were, or could be, justiciable, but rather portrayed the issue first as a “question[] which has divided the Court,”¹⁹⁴ and then as “unresolved.”¹⁹⁵ *Rucho* draws on those cases to set up the question of

¹⁸⁶ *Id.* at 2507.

¹⁸⁷ 138 S. Ct. 1916 (2018).

¹⁸⁸ Philip Rocco, *Justice Roberts Said Political Science Is ‘Sociological Gobbledygook.’ Here’s Why He Said It, and Why He’s Mistaken*, WASH. POST (Oct. 4, 2017, 3:10 PM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/04/justice-roberts-said-political-science-is-sociological-gobbledygook-heres-why-he-said-it-and-why-hes-mistaken/>.

¹⁸⁹ *Frustrated Supreme Court Looks for a Solution to Partisan Gerrymandering* NPR (Mar. 28, 2018, 5:00 AM), <https://www.npr.org/transcripts/596220408>.

¹⁹⁰ Seidman, *supra* note 8, at 11.

¹⁹¹ Stephanopoulos, *supra* note 8, at 171–72.

¹⁹² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

¹⁹³ 541 U.S. 267, 317 (2004) (Stevens, J., dissenting).

¹⁹⁴ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 492–93 (2006) (Roberts, C.J., concurring in part, concurring in the judgment, and dissenting in part).

¹⁹⁵ *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

justiciability and thereby enables the Court to complete its overruling of *Bandemer* without acknowledging that it had done so, much less engaging in any direct analysis of whether it was appropriate to do so.¹⁹⁶ Elsewhere, by contrast, Roberts has asserted that the overruling of precedent is an extraordinary action requiring “special justification.”¹⁹⁷ The upshot is by now familiar. Viewed in isolation, a concern with the Court as an institution seems a plausible explanation for *Rucho*. It seems less so when viewed in a larger context.

D. *Additudinalism/Strategic Decision-Making*

The final possibility we consider is simply that the Chief Justice is acting in the manner suggested by the attitudinal model—that is, his vote is motivated by ideological rather than legal reasons. In the most basic version of the story, the Chief Justice’s proffered rationales are no different from those provided by more nakedly political actors, who routinely act out of expediency to make present resort to principles that conflict with those they have invoked in the past.¹⁹⁸ A second version would draw on the strategic model. On that view, Roberts’s motivation would encompass not simply his policy preferences, but also his need to get votes from at least four other Justices. This view, too, regards the justifications as cynically offered.

The cynical conclusion is certainly the one that Nicholas Stephanopoulos draws. Speaking generally about the Court and its cases relating to the political process, he claims:

[T]he 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.¹⁹⁹

¹⁹⁶ For a discussion of Roberts’s use of this technique more generally, see Barry Friedman & Dahlia Lithwick, *Watch as We Make This Law Disappear: How the Roberts Court Disguises Its Conservatism*, SLATE (Oct. 3, 2010, 9:38 PM), <https://slate.com/news-and-politics/2010/10/how-the-roberts-court-disguises-its-conservatism.html>.

¹⁹⁷ “This Court does not overturn its precedents lightly.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). “Departing from the doctrine of *stare decisis* is an ‘exceptional action’ demanding ‘special justification.’” *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (2018) (Roberts, C.J., dissenting).

¹⁹⁸ “[H]ypocrisy, though inherently unattractive, is also more or less inevitable in most political settings, and in liberal democratic societies it is practically ubiquitous.” DAVID RUNCIMAN, *POLITICAL HYPOCRISY: THE MASK OF POWER, FROM HOBBS TO ORWELL AND BEYOND* 1 (2008). For a thoughtful and thorough exploration of judicial hypocrisy, see generally Todd E. Pettys, *Judging Hypocrisy*, 70 EMORY L.J. 251 (2020).

¹⁹⁹ Stephanopoulos, *supra* note 8, at 180.

Rick Hasen similarly characterizes the Court as having taken a “pro-partisanship turn” that functions to “allow Republican [party] entrenchment.”²⁰⁰ This story is broadly consistent with the Chief Justice’s professional history, which includes clerkships with Judge Henry Friendly and Justice William Rehnquist, as well as service in both the Reagan and George H.W. Bush administrations.²⁰¹

One might alternatively imagine Roberts’s motivations to be more abstract, and, in that form, they might take more- or less-pernicious forms. Among the more pernicious views, one might posit that the Chief Justice harbors a general hostility to voting rights, which in turn provides the thread running through both *Rucho* and *Shelby County*.²⁰² A less pernicious take would center on Roberts’s affinity for federalism.²⁰³ On this view, he prefers to provide relatively more autonomy for states, but was blocked from basing the *Rucho* decision on those grounds simply because federalism forms no part of the political question doctrine.²⁰⁴

The specific form that any of this family of justifications might take is not important for our purposes. All stand in contrast to and conflict with the vision of the judiciary and of legitimate judicial conduct that purports to be at the heart of *Rucho*’s rationale. Consideration of *Rucho* in light of Chief Justice Roberts’s opinions more broadly does not refute, and may even strongly suggest, the conclusion that some version of an attitudinal or strategic explanation of his behavior is the most parsimonious.

CONCLUSION

One characterization of the conflict between the majority and dissent in *Rucho* is that it pitted a majority concerned about the potential hit to the Court’s perceived legitimacy that would flow from intervention in the political process against a dissent willing to risk that hit in order to achieve

²⁰⁰ Richard L. Hasen, *The Supreme Court’s Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 50 (2020).

²⁰¹ See Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1219–28 (2010).

²⁰² Ian Millhiser contends that Roberts has “worked his entire career to undermine voting rights.” Ian Millhiser, *Chief Justice Roberts’s Lifelong Crusade Against Voting Rights, Explained*, VOX (Sept. 18, 2020, 8:00 AM), <https://www.vox.com/21211880/supreme-court-chief-justice-john-roberts-voting-rights-act-election-2020>. See also David Schultz, *Voting Rights and the 2020 Election: A New Judicial Federalism for the Right to Vote*, 104 MINN. L. REV. HEADNOTES 41, 42–43 (2020) (“The Roberts Court has demonstrated a clear pattern of hostility toward promoting the integrity of elections and voting rights. In addition to striking down the regulation of money in politics in just about every case before it, it has also upheld voter identification laws, struck down the formula for section five of the VRA and effectively gutted its preclearance provision, and declared that partisan gerrymanders are nonjusticiable issues for the federal courts.” (footnotes omitted)).

²⁰³ See Kiel Brennan-Marquez, *The Philosophy and Jurisprudence of Chief Justice Roberts*, 2014 UTAH L. REV. 137, 179–82 (exploring the Chief Justice’s commitment to federalism).

²⁰⁴ There is at least some question as to whether the political question doctrine ought to be regarded as being as rooted in separation of powers as *Baker v. Carr* suggests. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538–39 (1966).

the greater good of protecting the integrity of democracy.²⁰⁵ If that characterization is correct, then our analysis suggests that the bargain Chief Justice Roberts struck in the short term, properly viewed, came at some cost to its (and his) perceived legitimacy over the longer term. The effort to avoid the appearance of acting out of expediency itself appears to have been undertaken out of expediency, and the effort to appear principled appears to have been unprincipled. There is no consensus about the extent to which judges should (or even can) be sincere in their reason-giving.²⁰⁶ The stark contrasts in the Chief Justice's rationales from one case to the next call into question even his basic commitment to the ideal.

We ultimately make no claims about the ultimate nature or sources of Chief Justice Roberts's decision in *Rucho* or more generally. Nor do we contend that every apparent tension we have identified among the opinions he has authored is unresolvable. It may well be that there are appropriate grounds on which to reach the conclusion that partisan gerrymandering claims are nonjusticiable and to distinguish the disclaimer of judicial power in *Rucho* from the exercise of judicial power in *Shelby County*.

Our concern instead is with the existence and extent of these apparent tensions and contradictions, coupled with the Chief Justice's lack of effort even to acknowledge that existence, let alone to offer his resolutions. The very things the Chief Justice emphasized as necessary ingredients to the legitimate exercise of judicial power—rules, standards, and principles—are the very things that are absent. The opinion provides no guides as to how to determine when the factors it relies on compel judicial abdication and when they instead counsel in favor of deferential review. Its articulated justifications stand in significant tension, if not outright contradiction, with those offered in *Shelby County*. The distinctions, if they exist, must be rooted in factors left unstated and that are perhaps incapable of being reduced to precise verbal formulation. That is not necessarily problematic. But in a decision that purports to turn on the need for rationality and reasoned distinction, it is, at best, deeply ironic.

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²⁰⁵ Fallon, *supra* note 56, at 1505.

²⁰⁶ Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 987–90 (2008).