AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Judicial Power and Constitutional Authority: Constitutional Litigation

**Rucho v. Common Cause**, \_\_\_ U.S. \_\_\_ (2019)

*Robert Rucho was Republican member of the North Carolina state legislature who successfully commissioned a congressional district map that would enable Republicans to control ten of the thirteen state congressional seats, even when state voters split their ballots evenly between Democrats and Republicans. After the Republican majority in the state legislature approved the plan, Common Cause, a public interest group dedicated to “good government” filed a lawsuit claiming that the partisan gerrymander violate the equal protection clause of the Fourteenth Amendment and the First Amendment rights of state Democrats, as those rights were incorporated by the due process clause of the Fourteenth Amendment. A federal district court initially declared that North Carolina had engaged in an unconstitutional gerrymander and came to the same conclusion after the case was remanded for consideration of standing issues after* Gill v. Whitford *(2018)*. *Rucho appealed to the Supreme Court of the United States*.

 *The Supreme Court consolidated the North Carolina case with a similar case arising in Maryland,* Lamone v. Benisek *(2018). As in North Carolina, the state legislature had openly engaged in a partisan gerrymander, in this case to flip a traditionally Republican congressional district into a safe Democratic district. As in North Carolina, the local federal district court had twice ruled that state legislative officials had engaged in an unconstitutional partisan gerrymander.*

 *The Supreme Court, by a 5-4 vote, reversed the decision of the lower federal courts. Chief Justice Roberts ruled that partisan gerrymanders raised non-justiciable political questions. All the justices agreed that the state legislatures had engaged in a partisan gerrymander and that partisan gerrymandering has severe democratic costs. Why does Roberts nevertheless reach the conclusion that the Supreme Court cannot declare partisan gerrymanders unconstitutional? Roberts observes that no judicial standards exist for determining whether an unconstitutional partisan gerrymander exists. Does Justice Elena Kagan’s dissent adequately demonstrate judicial standards? Do constitutional standards exist? What are the differences between judicial and constitutional standards? The justices in the* Rucho *majority have no difficulty declaring racial gerrymandering unconstitutional. Is there a constitutional difference between racial and partisan gerrymandering or is this just politics? Are there non-judicial solutions to concerns about partisan gerrymandering?*

Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I841bc48f98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48f98b711e9b8aeecdeb6661cf4) delivered the opinion of the Court.

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Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” We have understood that limitation to mean that federal courts can address only questions “historically viewed as capable of resolution through the judicial process.” Chief Justice Marshall famously wrote that it is “the province and duty of the judicial department to say what the law is.” *Marbury v. Madison* (1803). Sometimes, however, “the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” In such a case the claim is said to present a “political question” and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction. Among the political question cases the Court has identified are those that lack “judicially discoverable and manageable standards for resolving [them].”

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The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress, while giving Congress the power to “make or alter” any such regulations. . . . Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be “composed of contiguous territory” in “an attempt to forbid the practice of the gerrymander.” . . .

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. . . . At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

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Partisan gerrymandering claims have proved . . . difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, “a jurisdiction may engage in constitutional political gerrymandering.” To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities. The “central problem” is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is “determining when political gerrymandering has gone too far.”

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In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy’s counsel in [*Vieth*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004373924&pubNum=0000780&originatingDoc=I841bc48f98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. Jubelirer* (2004): Any standard for resolving such claims must be grounded in a “limited and precise rationale” and be “clear, manageable, and politically neutral.” An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, “[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States.” As noted, the question is one of degree: How to “provid[e] a standard for deciding how much partisan dominance is too muchAnd it is vital in such circumstances that the Court act only in accord with especially clear standards: . . . If federal courts are to “inject [themselves] into the most heated partisan issues” by adjudicating partisan gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from “constitutional political gerrymandering.”

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. . . . But such a claim is based on a “norm that does not exist” in our electoral system—“statewide elections for representatives along party lines.” Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or “general ticket” elections. Such States typically sent single-party delegations to Congress. . . .

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. . . . The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of “unfairness” in any winner-take-all system. . . . On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its “appropriate” share of “safe” seats.. . . Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party. Or perhaps fairness should be measured by adherence to “traditional” districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the “natural political geography” of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. . . .

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. . . . And it is only after determining how to define fairness that you can even begin to answer the determinative question: “How much is too much?” . . .

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Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. . . . More fundamentally, “vote dilution” in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in Gill, “this Court is not responsible for vindicating generalized partisan preferences. . . .

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. . . . Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

. . . The District Court’s “predominant intent” prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a “predominant intent” inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. . . . But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent “predominates.”

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution “is likely to persist” to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. But “[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections ... invites ‘findings’ on matters as to which neither judges nor anyone else can have any confidence.” . . .

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. . . [T]there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district. . . . The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far. . . . [T]hese cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no “clear” and “manageable” way of distinguishing permissible from impermissible partisan motivation. . . .

The dissent proposes using a State’s own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. . . . As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent’s proposed constitutional test is indeterminate and arbitrary. Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much. . . .

The dissent argues that there are other instances in law where matters of degree are left to the courts. . . . But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. . . . Common experience gives content to terms such as “substantial risk” or “substantial harm,” but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. . . .

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Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles” does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. . . .

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Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I841bc48f98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48f98b711e9b8aeecdeb6661cf4), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I841bc48f98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48f98b711e9b8aeecdeb6661cf4), Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I841bc48f98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48f98b711e9b8aeecdeb6661cf4), and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I841bc48f98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48f98b711e9b8aeecdeb6661cf4) join, dissenting.

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

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

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“Governments,” the Declaration of Independence states, “deriv[e] their just Powers from the Consent of the Governed.” . . . If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. . . .Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. . . . And partisan gerrymandering can make it meaningless. . . . By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer.

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Yes, partisan gerrymandering goes back to the Republic’s earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today’s gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today’s world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. . . . The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. . . .

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Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren’t bad enough). It violates individuals’ constitutional rights as well. . . . Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others. A mapmaker draws district lines to “pack” and “crack” voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map.

That practice implicates the Fourteenth Amendment’s Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, “guarantees the opportunity for equal participation by all voters in the election” of legislators. *Reynolds v. Sims* (1964). And that opportunity “can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to “disfavored treatment”—again, counting their votes for less—precisely because of “their voting history [and] their expression of political views. And added to that strictly personal harm is an associational one. Representative democracy is “unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views.” By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness.

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The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. I’ll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

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

. . . . As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials’ “predominant purpose” in drawing a district’s lines was to “entrench [their party] in power” by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by “substantially” diluting their votesAnd third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map.

Turn now to the test’s application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. . . . North Carolina’s redistricting committee used “Partisan Advantage” as an official criterion for drawing district lines. And from the first to the last, that committee’s chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that “electing Republicans is better than electing Democrats.” For their part, Maryland’s Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. . . .

. . . [T]he majority says that state officials’ intent to entrench their party in power is perfectly “permissible,” even when it is the predominant factor in drawing district lines. Ante, at ––––. But that is wrong. True enough, that the intent to inject “political considerations” into districting may not raise any constitutional concerns. . . . But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. . . .

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. . . . Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan’s effects mostly by relying on what might be called the “extreme outlier approach.” . . . The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State’s physical and political geography and meet its declared districting criteria, except for partisan gain. . . . We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other. We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State’s actual plan falls on the spectrum—at or near the median or way out on one of the tails? . . . Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State’s map was an out-out-out-outlier. , , ,

. . . . The majority claims all these findings are mere “prognostications” about the future, in which no one “can have any confidence.” But the courts below did not gaze into crystal balls, as the majority tries to suggest. . . . They did not bet America’s future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

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Contrary to the majority’s suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. . . . Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn’t been intent on partisan gain. . . . The thousands of randomly generated maps I’ve mentioned formed the core of the plaintiffs’ case that the North Carolina plan was an “extreme[ ] outlier.” . . . [T]he assemblage of maps, reflecting the characteristics and judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. Not as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

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. . . . Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State’s districting decisions. . . .

The majority’s “how much is too much” critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State’s political geography and districting criteria built in) reflects “too much” partisanship. . . . And if the majority thought that approach too case-specific, it could have used the lower courts’ general standard—focusing on “predominant” purpose and “substantial” effects—without fear of indeterminacy. . . . And contrary to the majority’s suggestion, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

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

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This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians’ districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that “our oath and our office require no less.” Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. “For here, politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms. Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

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