

# The Supreme Court's Pro-Partisanship Turn

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## INTRODUCTION

The United States Supreme Court's conservative majority has taken the Court's election jurisprudence on a pro-partisanship turn that gives political actors freer range to pass laws and enact policies that can help entrench politicians—particularly Republicans—in power and insulate them from political competition. The trend on the Supreme Court is unmistakable, whether it reflects the Court majority's cynical view that American politics is “sordid, partisan, and unfair”<sup>1</sup> or more crassly a self-interested reality of Republican-appointed Justices doing the bidding of the Republican Party.<sup>2</sup> This Article focuses not on the majority's motivations but instead upon three subtle doctrinal tools the Court has developed to further the pro-partisanship turn and allow Republican entrenchment.

These doctrinal tools take the Court much further than it went in *Rucho v. Common Cause*, the Supreme Court decision holding that federal courts cannot consider constitutional claims against partisan gerrymandering.<sup>3</sup> Indeed, this doctrinal subtlety has allowed much of this pro-partisanship turn to remain unnoticed in the broader legal community. The results nonetheless may block nonpartisan election reform and depress minority voting rights. This is especially likely in the “race or party” racial gerrymandering cases in which courts hold predominant racial motivations in redistricting are impermissible but predominant partisan motivations are permissible. Analysis of these subtle doctrinal moves not only lays bare a profound shift in the Court's election law cases that likely will hurt minority voting rights, but it also illustrates the power of Supreme Court Justices to move doctrine

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<sup>1</sup> Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Dirty Thinking About Law and Democracy in Rucho v. Common Cause*, 3 AM. CONST. SOC'Y SUP. CT. REV. 293, 297 (2019).

<sup>2</sup> Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 178 (“Running like a red thread through the Roberts Court's anti-*Carolene* decisions is perceived, and actual, partisan advantage. Both when the Court intervenes and when it stays on the sidelines, its actions are consistent with the recommendations of conservative elites. Both the Court's intrusions into, and its abstentions from, the political process also empirically benefit the Republican Party, whose Presidents appointed a majority of the sitting Justices.”).

<sup>3</sup> 139 S. Ct. 2484 (2019).

subtly while avoiding controversy that would accompany more forthright judicial declarations.<sup>4</sup>

First, as explained in Part I, Chief Justice John Roberts, sometimes in majority opinions for the Court, has exhibited real or pretextual naivete about what social scientists and, by extension, courts can know about voters' political behavior. Roberts has consistently ignored or belittled social science evidence about voting behavior in ways that give political actors freer rein to enact laws and policies in their self-interest. For example, he called political science tests of partisan gerrymandering "sociological gobbledegook"<sup>5</sup> and misrepresented as a call for proportional representation the plaintiffs' arguments in the 2019 *Rucho v. Common Cause* partisan gerrymandering case.<sup>6</sup> These arguments served as key points in his *Rucho* non-justiciability analysis. In the 2009 precursor to the 2013 *Shelby County v. Holder* case, which eliminated a key part of the Voting Rights Act,<sup>7</sup> he similarly proclaimed without justification that "[t]hings have changed in the South."<sup>8</sup>

Second, as explained in Part II, the Court's new burden-shifting "presumption of legislative good faith" has put a large thumb on the scale in favor of legislative self-interest and against findings of minority vote dilution.<sup>9</sup> Coupling the Supreme Court's 2018 voting rights decision in *Abbott v. Perez* with *Rucho*, lower courts must assume good faith even when self-interested legislators and other political actors enact laws or policies that preserve their own power.<sup>10</sup> The Court has expanded the realm of good faith to include some self-interested actions, such as what the Court in *Rucho* called "constitutional political gerrymandering."<sup>11</sup>

Third, as explained in Part III, the Court has allowed government actors to reenact laws or policies only slightly different from laws or policies that lower courts have found to be discriminatory by coming up with new, non-discriminatory reasons to support them. As in *Abbott*, the Court allowed such "animus laundering" to remove the apparent discriminatory taint of the original action while letting the government enact substantially the same

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<sup>4</sup> In this way, this Article is a follow-up to my earlier piece exploring the topic of how Supreme Court Justices move the law in subtle ways. Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012).

<sup>5</sup> Transcript of Oral Argument at 38, 40–41, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

<sup>6</sup> 139 S. Ct. at 2499.

<sup>7</sup> 570 U.S. 529, 556–57 (2013).

<sup>8</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009).

<sup>9</sup> *See Abbott v. Perez*, 138 S. Ct. 2305, 2326 n.18 (2018).

<sup>10</sup> *See id.*

<sup>11</sup> *Rucho*, 139 S. Ct. at 2497, 2499 (citing *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

policies without penalty.<sup>12</sup> The Supreme Court's recent *Department of Commerce v. New York* case concerning inclusion of a citizenship question on the 2020 census shows the length to which many of the Justices are willing to go to ignore evidence of discriminatory intent and pretext, while cleansing discriminatory taint.<sup>13</sup>

These three Supreme Court tools—willful ignorance of political reality, the presumption of legislative good faith, and animus laundering—give self-interested government actors the ability to make partisan gerrymandering, racial gerrymandering, restrictive election laws, and minority vote dilution easier.

As explained in Part IV, the combination of the presumption of good faith and animus laundering provides a path for the Court to get out of the difficult “race or party” box in the racial gerrymandering cases by having courts recast racial agendas as partisan agendas and treating these partisan agendas as constitutionally permissible.<sup>14</sup> Finally, Part V describes how the three doctrinal tools already have affected lower court cases and the arguments of litigants in key voting cases.

#### I. (FAUX?) NAIVETE

John Roberts,<sup>15</sup> the Chief Justice of the United States, regularly constructs complex legal opinions in some of the most difficult cases the Supreme Court hears. As an oral advocate before he joined the Court, Roberts's reputation was stellar. According to former Assistant to the Solicitor General Miguel Estrada, the ‘G’ in John G. Roberts stands for ‘God.’<sup>16</sup> And yet, the Chief Justice has exhibited what at first blush would appear to be a surprising lack of understanding and naivete about what social science can tell us about contemporary political behavior. The Chief Justice may well understand more than he lets on. But whether he understands political

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<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2576–77 (2019) (Thomas, J., dissenting).

<sup>14</sup> See Richard L. Hasen, *Race or Party, Party as Race, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2017–2018) [hereinafter Hasen, *Three Uneasy Approaches*].

<sup>15</sup> See generally JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* (2019) (recent insightful biography that illustrates Roberts's intellect and drive).

<sup>16</sup> Tony Mauro, *Courtside: Katyal's Path to Hogan Lovells*, NAT'L L.J., Sept. 7, 2011, [https://www.hoganlovells.com/~/\\_/media/hogan-lovells/pdf/publication/articlenl|courtside-katyals-path-to-hogan-lovells\\_pdf.pdf](https://www.hoganlovells.com/~/_/media/hogan-lovells/pdf/publication/articlenl|courtside-katyals-path-to-hogan-lovells_pdf.pdf) [<https://perma.cc/P4PH-DULH>] (“Katyal had been an intern in the solicitor general's office, and when he asked then-assistant to the SG Miguel Estrada where he should spend the next summer, Estrada replied, ‘There is only one firm for you to consider: Hogan and John G. Roberts. The g is for God.’”).

voting behavior, he has advanced facially naïve arguments about political behavior that allows greater partisanship in redistricting and elections.

This approach to politics has been most evident in the partisan gerrymandering cases, where plaintiffs have attempted to offer social science tests to separate out the most egregious forms of partisan gerrymandering that courts could police from more ordinary political give-and-take that courts have long accepted as part of the process of drawing districts containing like-minded people.<sup>17</sup>

Consider first *Gill v. Whitford*, a 2018 partisan gerrymandering case from Wisconsin.<sup>18</sup> In *Gill*, the plaintiffs tried to advance a mathematical measurement to assist courts in determining when a legislature creates unconstitutional districts. Plaintiffs relied on a measure of “wasted votes”—votes beyond the number necessary for a candidate to be elected to district office—created by Eric McGhee and Nicholas Stephanopoulos, called the “efficiency gap.”<sup>19</sup> As a Brennan Center primer explains, “the efficiency gap counts the number of votes each party wastes in an election to determine whether either party enjoyed a systematic advantage in turning votes into seats.”<sup>20</sup> The math behind the efficiency gap is not complex, and it fits within a broader set of political science measures of partisan asymmetry, all of which tend to converge in identifying the most extreme cases of asymmetry.<sup>21</sup> “Partisan symmetry holds that a district plan should treat the major parties symmetrically with respect to the conversion of votes into seats.”<sup>22</sup> If one party has a much easier time than the other party converting its votes into a larger number of seats, the plan is asymmetrical and a potential partisan gerrymander.

Importantly, the symmetry concept is not the same as a proportional representation standard. For example, proportionality in district representation would require that a party with fifty-five percent support in a state obtain fifty-five percent of the seats. A symmetry principle says that if one party with fifty-five percent of the vote can capture sixty percent of the

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<sup>17</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) (“[D]istricting inevitably is the expression of interest group politics . . .”).

<sup>18</sup> 138 S. Ct. 1916 (2018).

<sup>19</sup> *Id.* at 1924. See also Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

<sup>20</sup> Eric Petry, *How the Efficiency Gap Works*, BRENNAN CTR. FOR JUST., [https://www.brennancenter.org/sites/default/files/legal-work/How\\_the\\_Efficiency\\_Gap\\_Standard\\_Works.pdf](https://www.brennancenter.org/sites/default/files/legal-work/How_the_Efficiency_Gap_Standard_Works.pdf) [<https://perma.cc/CL7J-WEK4>] (last visited Aug. 8, 2019).

<sup>21</sup> See Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503 (2018); Gregory S. Warrington, *Quantifying Gerrymandering Using the Vote Distribution 2–4* (May 15, 2017) (unpublished manuscript), <https://arxiv.org/pdf/1705.09393.pdf> [<https://perma.cc/M6DY-NM72>].

<sup>22</sup> DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 193 (6th ed. 2017).

seats, the other party should have the same opportunity to capture sixty percent of the seats with just fifty-five percent of the vote.

Although this does not seem difficult to grasp, the Chief Justice suggested that the symmetry approach was so complex as to be unintelligible to the average person. In a colloquy at the *Gill* oral argument with plaintiffs' attorney Paul Smith, the Chief Justice questioned how a constitutional standard could be one based upon the efficiency gap (which he called "EG"):

And if you're the intelligent man on the street and the Court issues a decision, and let's say, okay, the Democrats win, and that person will say: "Well, why did the Democrats win?" And the answer is going to be because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party X votes plus party Y votes.<sup>23</sup>

Roberts continued: "And the intelligent man on the street is going to say that's a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans. And that's going to come out one case after another as these cases are brought in every state."<sup>24</sup> Roberts added: "[T]he whole point is you're taking these issues away from democracy and you're throwing them into the courts pursuant to, and it may be simply my educational background, but I can only describe as sociological gobbledygook."<sup>25</sup>

One can certainly appreciate Roberts's argument that the average person on the street might not understand the efficiency gap. But it is equally true that the average person would not understand the intricacies of even the relatively simple "one person, one vote" rule. That rule for figuring out the basic requirement of equipopulous districts for redistricting raises knotty questions, such as: what must be the denominator in drawing equally populated districts, a question still open,<sup>26</sup>—how much may a district deviate from perfect equality, an answer that depends on whether analyzing congressional<sup>27</sup> or state and local redistricting,<sup>28</sup> and what deviation from equality is permissible if the deviation exists for partisan reasons.<sup>29</sup> Given these intricacies are beyond the interest of the average person on the street,

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<sup>23</sup> Transcript of Oral Argument at 37–38, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

<sup>24</sup> *Id.* at 38.

<sup>25</sup> *Id.* at 40.

<sup>26</sup> See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016).

<sup>27</sup> See *Tenant v. Jefferson Cty. Com'n*, 567 U.S. 758, 763–64 (2012).

<sup>28</sup> See *Harris v. Arizona Ind. Redistricting Com'n*, 136 S. Ct. 1301, 1307 (2016).

<sup>29</sup> See RICHARD L. HASEN, *EXAMPLES AND EXPLANATIONS: LEGISLATION, STATUTORY INTERPRETATION, AND ELECTION LAW* 219–47 (2nd ed. 2020).

the question Chief Justice Roberts should be asking in the partisan gerrymandering context is not what the average person understands, but whether there are fair and neutral criteria that judges could apply and understand to separate out impermissible consideration of partisanship in redistricting. But he has avoided this question.

Roberts understood the efficiency gap standard well enough to use the Greek term “sigma,” and he certainly understood what plaintiffs were trying to measure with the efficiency gap standard. And yet a year later, after the Court had punted *Gill* on standing grounds,<sup>30</sup> Roberts went down the same path of ostensible ignorance and deflection when the question of the justiciability of partisan gerrymandering cases in federal courts returned in the 2019 *Rucho v. Common Cause* case from North Carolina.<sup>31</sup>

By the time *Rucho* and its companion case from Maryland, *Lamone v. Benisek*, reached the Court, plaintiffs relied little on the specific efficiency gap test from *Gill* disparaged by the Chief Justice. But plaintiffs still made symmetry arguments and focused more on the extreme nature of the gerrymanders in North Carolina and Maryland compared to other redistricting plans. North Carolina involved a state divided roughly evenly between Democrats and Republicans, but where Republican legislators drew ten of thirteen congressional districts to favor Republicans.<sup>32</sup> Maryland Democrats had to adjust one congressional district by about 10,000 votes to comply with one person, one vote standards after the 2010 census. Instead of moving only 10,000 voters, Democrats moved 360,000 (mainly Republican) voters out of the district, and moved 350,000 (mostly Democratic) voters into the district to assure that Democrats controlled another Maryland congressional district.<sup>33</sup> The *Rucho* majority acknowledged that “[t]hese cases involve blatant examples of partisanship driving districting decisions.”<sup>34</sup>

Neither the plaintiffs nor the lower courts in either case made any arguments in favor of proportional representation as the standard for judging whether there was unconstitutional partisan gerrymandering. Instead, the lower courts had converged on a standard which measured both discriminatory intent and effect in other ways.<sup>35</sup> The federal court in North Carolina

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<sup>30</sup> 138 S. Ct. 1916, 1933–34 (2018).

<sup>31</sup> See 139 S. Ct. 2484 (2019).

<sup>32</sup> *Rucho*, 139 S. Ct. at 2509–10 (Kagan, J., dissenting).

<sup>33</sup> *Id.* at 2518–19.

<sup>34</sup> *Id.* at 2505 (majority opinion).

<sup>35</sup> *Id.* at 2516 (Kagan, J., dissenting) (“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).”). Justice Kagan’s dissent discusses those cases.

found discriminatory effect based in part upon thousands of computerized redistricting simulations applying North Carolina's formal redistricting rules. Of 3,000 examined congressional maps, only the one adopted by Republican officials produced a 10-3 Republican advantage.<sup>36</sup> The lower court also found extreme partisan asymmetry in the North Carolina map when applying tests such as the efficiency gap, and the Maryland court easily concluded the congressional map diluted Republican votes.<sup>37</sup>

Roberts's response for the Court majority in *Rucho* exhibited an extraordinary amount of apparent naivete. He opened his discussion of the merits of the partisan gerrymandering claim by framing it as a choice between adopting proportional representation by judicial fiat or holding these cases simply out of the competence of the federal courts.<sup>38</sup> The opinion included

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<sup>36</sup> *Id.* at 2518. Justice Kagan elaborates:

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-of-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (*e.g.*, compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes. *Id.* (citation omitted).

<sup>37</sup> *Id.* at 2518 n.4 (“The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan's ‘partisan asymmetry.’ Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State.”) (citation omitted). As for Maryland, Justice Kagan wrote, “Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. . . . In what was once a party stronghold, Republicans now have little or no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans' votes.” *Id.* at 2518–19.

<sup>38</sup> *Id.* at 2499 (majority opinion):

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. . . . Partisan gerrymandering claims invariably sound in a desire for proportional representation. . . . The Founders certainly did not think proportional representation was required. . . . Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their

the false statement that “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation.”<sup>39</sup>

Beyond using proportional representation as a strawman, Roberts did not even *mention* the efficiency gap or partisan symmetry standards that figured heavily in *Gill* and the lower court opinion in *Rucho*. He therefore did not explain the problem with standards plaintiffs had pushed for years. He attacked an argument that did not exist and ignored the argument that did.

Roberts also rejected the argument that computer simulations could identify extreme outliers and solve what he called the “[h]ow much is too much?” problem.<sup>40</sup> In the most apparently disingenuous portion of his majority opinion, Roberts suggested that Justice Kagan, speaking for the Court’s four liberal Justices in dissent in relying upon the computer-generated evidence, offered no more than an ad hoc approach based upon a judge’s perception of fairness: “The dissent’s answer says it all: ‘This much is too much.’ That is not even trying to articulate a standard or rule.”<sup>41</sup> But Kagan was doing the opposite; hers was an appeal not to a judge’s subjective feelings but to objective evidence pointing out how much of an outlier North Carolina’s map was compared to 3,000 simulations.<sup>42</sup>

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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.

<sup>39</sup> *See id.*

<sup>40</sup> *Id.* at 2501.

<sup>41</sup> *Id.* at 2505 (citation omitted).

<sup>42</sup> *Id.* at 2521–22 (Kagan, J., dissenting). Justice Kagan criticized the majority’s argument:

The majority’s “how much is too much” critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State’s political geography and districting criteria built in) reflects “too much” partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. Even the majority acknowledges that “[t]hese cases involve blatant examples of partisanship driving districting decisions.” If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these. *Id.* (citation omitted).

Roberts made things worse by incorrectly suggesting that hard partisanship and racially polarized voting are not measurable phenomena and that everyone's vote is essentially up for grabs in each election:

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.<sup>43</sup>

If Chief Justice Roberts were right that experts could not predict how voters in districts were going to vote, we would not see the kinds of effective, durable gerrymanders like that in North Carolina or Maryland that increasingly persist, thanks to data-driven computer technology. Gerrymandering is a problem that is bound to get worse with better data and improved technology. As Justice Kagan wrote in her *Rucho* dissent:

What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, 'we the people' become sovereign no longer.<sup>44</sup>

More significantly, if we took Chief Justice Roberts's statements about the inability to predict voting behavior seriously, much of the Supreme Court's jurisprudence on Section 2 of the Voting Rights Act would collapse because it depends upon the production of empirical social science evidence about voting patterns that are necessary to prove the threshold test for vote dilution.<sup>45</sup>

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<sup>43</sup> *Id.* at 2503–04 (majority opinion); *see also id.* at 2503 (“Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time.”).

<sup>44</sup> *Id.* at 2513 (Kagan, J., dissenting).

<sup>45</sup> *See, e.g.,* Thornburg v. Gingles, 478 U.S. 30 (1986) (relying on statistical evidence of racially polarized voting as threshold factors for finding vote dilution under Section 2 of the Voting Rights Act).

Roberts's inattention to the evidence also has appeared in cases considering the constitutionality of the preclearance provision of the Voting Rights Act. In the 2009 *NAMUDNO* case, Roberts wrote, "Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."<sup>46</sup> He repeated the argument in the 2013 *Shelby County* case.<sup>47</sup> However, Justice Ruth Bader Ginsburg argued the obvious social science point in her dissent that the reason things appeared improved in the South was due to the deterrent effect of the Voting Rights Act: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."<sup>48</sup> Roberts offered no rebuttal to the key argument that one could not conclude that improved conditions would remain so with the statutory deterrent removed.

Did Chief Justice Roberts not think that the demise of preclearance would lead to actions such as Texas seeking to immediately enforce its strict voter identification law that had been put on hold because of preclearance,<sup>49</sup> or North Carolina enacting the strictest set of voting rules since the passage of the Voting Rights Act, a law which the Fourth Circuit later described as "target[ing] African Americans with almost surgical precision"?<sup>50</sup> Whatever the Chief Justice actually thought, he is modeling a naivete that will inure to the benefit of those who will pass self-interested political legislation.

## II. "CONSTITUTIONAL POLITICAL GERRYMANDERING" AND THE "PRESUMPTION OF LEGISLATIVE GOOD FAITH"

Chief Justice Roberts did more in *Rucho* than simply display an apparently naïve approach to politics. His majority opinion also blessed a sympathetic view of extreme partisan actions, one which aligns with another recent key Supreme Court case that has received much less attention than *Rucho*: *Abbott v. Perez*.<sup>51</sup> The Court in *Abbott* stressed a "presumption of

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<sup>46</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUNDO)*, 557 U.S. 193, 202 (2009).

<sup>47</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 547 (2012) ("Nearly 50 years later, things have changed dramatically.").

<sup>48</sup> *Id.* at 590 (Ginsburg, J., dissenting).

<sup>49</sup> RICHARD L. HASEN, *ELECTION MELTDOWN* 34 (2020) ("Within hours of the *Shelby County* decision, Texas announced it would immediately enforce its law requiring those wanting to vote to provide one of a limited number of types of photographic identification.").

<sup>50</sup> *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

<sup>51</sup> *See* 138 S. Ct. 2305 (2018).

legislative good faith” which will give states a freer hand to engage in partisan actions.<sup>52</sup>

*Rucho* is a much more pro-partisan opinion than Justice Scalia’s plurality opinion for four Justices in the 2004 *Vieth v. Jubelirer* case.<sup>53</sup> In *Vieth*, Justice Scalia was willing to concede that extreme partisan gerrymandering is unconstitutional;<sup>54</sup> his disagreement with the dissenters (and Justice Kennedy, the pivotal punter in the case<sup>55</sup>) was over whether there were “judicially manageable” standards for separating permissible from impermissible consideration of party in redistricting.<sup>56</sup> In *Rucho*, Chief Justice Roberts agreed with Justice Scalia on non-justiciability.<sup>57</sup> But the *Rucho* majority opinion went further, describing extreme partisan conduct as constitutionally and politically acceptable.<sup>58</sup>

In racial gerrymandering claims, it is unconstitutional for a redistricting authority to make race the predominant intent in drawing district lines without adequate justification.<sup>59</sup> Plaintiffs argued an analogous standard should apply to partisan gerrymandering. But the Chief Justice’s majority opinion in *Rucho* rejected the analogy, explaining that making partisanship the predominant intent in drawing district lines is indeed permissible and not unconstitutional: “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

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<sup>52</sup> See *id.* at 2324.

<sup>53</sup> See 541 U.S. 267, 280 (2004).

<sup>54</sup> *Id.* at 293 (plurality opinion) (“Justice Stevens says we ‘er[r] in assuming that politics is ‘an ordinary and lawful motive’” in districting—but all he brings forward to contest that is the argument that an *excessive* injection of politics is *unlawful*. So it is, and so does our opinion assume.”) (citation omitted).

<sup>55</sup> See *id.* at 306–17 (Kennedy, J., concurring).

<sup>56</sup> See *id.* at 281–306 (plurality opinion).

<sup>57</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

<sup>58</sup> I had long taken the view that partisan gerrymandering claims should be non-justiciable under the United States Constitution until a social consensus emerged about the practice’s unconstitutionality. See generally RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* (2003). In more recent years, I have come to wonder whether, despite *Rucho*, that social consensus is emerging. I also believe that the much greater efficiency in drawing durable gerrymanders thanks to technological innovation and data mining raises the stakes considerably. In any case, one might begin to police partisan gerrymandering directly so long as courts are willing to do so indirectly. See Hasen, *Three Uneasy Approaches*, *supra* note 14, at 1870 (“While I remain ambivalent, it certainly seems a more sensible approach to police partisanship in redistricting directly than to use racial gerrymandering for parties to shadowbox over these issues. The question is whether it is possible to develop judicially manageable standards to separate permissible from impermissible considerations of party in drawing district lines.”).

<sup>59</sup> *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995).

impermissible, like racial discrimination, when that permissible intent ‘predominates.’”<sup>60</sup>

Further, the *Rucho* majority opinion referred more than once to the right of states to engage in “constitutional political gerrymandering.”<sup>61</sup> Here, the Court majority performed a sleight-of-hand. The term “constitutional *political* gerrymandering” (as opposed to “constitutional *partisan* gerrymandering”) first appeared in cases in which a state had been sued for engaging in a racial gerrymander, and it defended itself by claiming it was engaged in gerrymandering for political reasons rather than racial ones.<sup>62</sup> These earlier cases did not consider the constitutionality of partisan gerrymandering by itself, but only whether there was evidence in those cases demonstrating that racial considerations predominated in drawing districting lines. In *Rucho*, the Court appeared to have recognized for the first time a constitutional right of a state to engage in partisan gerrymandering. That is a more extreme position than *Vieth*’s view that extreme gerrymanders are unconstitutional but cannot be remedied in federal court.

The *Rucho* Court also utterly rejected the idea, advanced by Professor Michael Kang,<sup>63</sup> that the Constitution prohibits political considerations in redistricting: “A partisan gerrymandering claim cannot ask for the elimination of partisanship.”<sup>64</sup> The most the Court was willing to recognize is that “[e]xcessive partisanship in districting leads to results that reasonably *seem* unjust.”<sup>65</sup> But there is much more of a thumb on the scale in favor of the constitutionality of partisan-driven election laws thanks to the Supreme Court’s opinion in *Abbott*.

*Abbott* was a 2018 Supreme Court opinion in a long-running dispute over Texas’s redistricting of its state legislative and congressional districts. Initially two three-judge panel federal courts considered lawsuits over Texas’s 2011 round of redistricting; a court in Washington, D.C. determined whether the Texas plan should be precleared under Section 5 of the Voting Rights Act,<sup>66</sup> and a court in Texas considered claims of racial gerrymandering, intentional vote dilution in violation of the Constitution, and vote dilution claims under Section 2 of the Voting Rights Act.<sup>67</sup> As the cases

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<sup>60</sup> *Rucho*, 139 S. Ct. at 2502–03.

<sup>61</sup> *See id.* at 2497, 2499.

<sup>62</sup> *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

<sup>63</sup> Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 352 (2017).

<sup>64</sup> *Rucho*, 139 S. Ct. at 2502.

<sup>65</sup> *Id.* at 2506 (emphasis added).

<sup>66</sup> *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012).

<sup>67</sup> *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011).

were pending, at the direction of the Supreme Court,<sup>68</sup> the Texas court imposed an interim remedy with new district lines—district lines which the Texas Legislature later endorsed in 2013 and that the state used in subsequent elections.

*Shelby County* eventually killed the preclearance litigation before the D.C. court, but the litigation before the three-judge federal court in Texas continued, with that court finding that both the 2011 and 2013 plans were passed with racially discriminatory intent and that some districts were the product of racial gerrymandering or violated Section 2 of the Voting Rights Act.<sup>69</sup> In finding intentional discrimination in the 2013 round of redistricting, the three-judge court found that the state did not demonstrate it had “cured any taint” of racial discrimination from the 2011 plans.<sup>70</sup>

The Supreme Court, in a 5-4 majority opinion by Justice Samuel Alito, reversed. One key factor, discussed in the next section, is the Court’s view that Texas had cleansed itself of any animus in passing the 2011 plan. The other key factor was a “presumption of legislative good faith” that the Court held should be afforded to state actions.

Citing a 1995 racial gerrymandering case, *Miller v. Johnson*, the *Abbott* Court explained that “the ‘good faith of [the] state legislature must be

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<sup>68</sup> *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018) (“The court developed those plans for use in the 2012 elections pursuant to our directions in *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam). We instructed the three-judge court to start with the plans adopted by the Texas Legislature in 2011 but to make adjustments as required by the Constitution and the Voting Rights Act. After those plans were used in 2012, the Texas Legislature enacted them (with only minor modifications) in 2013, and the plans were used again in both 2014 and 2016.”) (citation omitted).

<sup>69</sup> *Id.* at 2316–19 (describing the litigation in the lower courts).

<sup>70</sup> *Id.* at 2318. The opinion states:

In reaching these conclusions, the court pointed to the discriminatory intent allegedly harbored by the 2011 Legislature, and it attributed this same intent to the 2013 Legislature because it had failed to “engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.” The court saw “no indication that the Legislature looked to see whether any discriminatory taint remained in the plans.” And it faulted the State because it “did not accept [findings of the D.C. court] and instead appealed to the Supreme Court.” Seeing no evidence that the State had undergone “a change of heart,” the court concluded that the Legislature’s “decision to adopt the [District Court’s] plans” was a “litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities.” Finally, summarizing its analysis, the court reiterated that the 2011 Legislature’s “discriminatory taint was not removed by the [2013] Legislature’s enactment of the Court’s interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy.” *Id.* (citation omitted).

presumed.”<sup>71</sup> The *Abbott* majority concluded that the lower court erred by putting the burden on Texas to prove it was no longer engaged in intentional discrimination rather than requiring the plaintiffs to prove that Texas enacted its 2013 plan (as it had its 2011 plan) with racially discriminatory intent.<sup>72</sup> “[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.”<sup>73</sup>

The Court rejected the plaintiffs’ argument that Texas’s discriminatory conduct just two years before should have elevated the state’s burden to justify its new law: “Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs’ burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent.”<sup>74</sup>

This burden of proof argument allowed the majority to sidestep the Court’s usual rule that factual findings about discriminatory intent should not be reversed absent clear error by the district court.<sup>75</sup> The Court then offered its own view of Texas’s actions, with the new presumption favoring the state’s good faith. In Justice Alito’s telling, Texas wanted to move past the redistricting conflict, and it thought that by embracing the temporary plan put forward by the district court, it could most easily end the litigation.<sup>76</sup>

The dissent reviewed the lower court’s findings of intentional discrimination in the 2013 plan for clear error, and it found no error. Justice Sonia Sotomayor criticized the majority for “indulg[ing] Texas’[s] distorted reading of the District Court’s meticulous orders, mistakenly faulting the court for supposedly shifting the burden of proof to the State to show that it cured the taint of past discrimination, all the while ignoring the clear language and unambiguous factual findings of the orders below.”<sup>77</sup>

In response, the Court majority leaned heavily on this new presumption of legislative good faith:

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<sup>71</sup> *Id.* at 2324.

<sup>72</sup> *Id.* at 2324–25.

<sup>73</sup> *Id.* at 2324 (internal quotation marks omitted) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)).

<sup>74</sup> *Id.* at 2325.

<sup>75</sup> *See id.* at 2326.

<sup>76</sup> *Id.* at 2326–30.

<sup>77</sup> *Id.* at 2335–36 (Sotomayor, J., dissenting). The dissent also faulted the majority for “disregard[ing] the strict limits of our appellate jurisdiction and read[ing] into the District Court orders a nonexistent injunction to justify its premature intervention” and for “elid[ing] the standard of review that guides our resolution of the factual disputes in these appeals—indeed, mentioning it only in passing—and selectively pars[ing] through the facts.” *Id.*

[T]he dissent, like the District Court, refuses to heed the presumption of legislative good faith and the allocation of the burden of proving intentional discrimination. We do not dispute that the District Court purportedly found that the 2013 Legislature acted with discriminatory intent. The problem is that, in making that finding, it relied overwhelmingly on what it perceived to be the 2013 Legislature's duty to show that it had purged the bad intent of its predecessor.<sup>78</sup>

As with the *Rucho* Court's sleight of hand recognition of "constitutional political gerrymandering," the *Abbott* Court's recognition of a presumption of legislative good faith appears to have been created via distortion of an earlier racial gerrymandering case. *Miller's* reference to such a presumption was not about courts deferring to legislatures' partisan decisions generally. Instead, *Miller* explained that courts should not presume that a state engaged in *race-based* decisionmaking when accused of doing so without evidence to support the claim:

Although race-based decisionmaking is inherently suspect, *e.g.*, *Adarand*, [515 U.S. 200, 218 (1995)] (citing *Bakke*, 438 U.S., at 291 (opinion of Powell, J.)), until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed, *see id.* at 318–[ ]19 (opinion of Powell, J.).<sup>79</sup>

Note the citations here to cases involving affirmative action and race.

Justice Alito, in *Abbott*, took *Miller's* rule about courts not presuming that legislatures engaged in race-based decisionmaking—a presumption that plaintiffs can overcome with a sufficient showing of race-based decisionmaking and a presumption grounded in what the Court views as the relative rarity of race-based decisionmaking—and turned it into a rule that favors the state in *all* political cases, racial or not.<sup>80</sup>

A presumption of legislative good faith seems particularly inappropriate in the context of election laws, which are often passed with incumbency protection, self-interest, and partisanship in mind.<sup>81</sup> If there should be any

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<sup>78</sup> *Id.* at 2326 n.18 (majority opinion).

<sup>79</sup> *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

<sup>80</sup> *See Abbott v. Perez*, 138 S. Ct. 2305, 2324–25 (2018).

<sup>81</sup> *See* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 83 (2004) ("Partisan gerrymandering represents just one manifestation of the deeper structural problem of self-entrenchment that all democracies face. In principle, judicial review finds one of its quintessential justifications in checking such self-entrenchment. Courts should not be idealized as institutional guarantors against inevitable democratic pathologies, but they are the primary American institution capable under current circumstances of addressing the central structural problem of self-entrenchment.").

presumption in political cases, it should be a presumption against the state. That was the position the Supreme Court took in the 1960s in the *Kramer v. Union Free School District No. 15* case,<sup>82</sup> that a normal presumption of legislative validity should not apply in a voting case where those denied the franchise cannot participate in the choosing of the legislature passing the law. Justice Kagan echoed these concerns in her *Rucho* dissent, remarking: “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.”<sup>83</sup>

Put *Rucho* and *Abbott* together and you have the following rule: when a state is accused of acting unconstitutionally in crafting an election rule, presume the government acted in good faith. And recognize that it is not bad faith for a state to pass a law that has as its predominant purpose the promotion of its political aims and the dilution of the power of the opposing party, at least in the context of redistricting.

### III. ANIMUS LAUNDERING

The Court’s decision in *Abbott* is important not only for elevating and expanding a presumption of legislative good faith in partisan election cases. It also fits another line of cases demonstrating what attorney Joshua Matz has called “animus laundering.”<sup>84</sup> In other words, the ability of a government actor to change the rationale for a government action from a discriminatory one to something more palatable to satisfy further judicial review. Matz discussed animus laundering in the context of President Trump’s actions, including his various iterations of the “travel ban” covering predominantly Muslim countries and his ban on transgender soldiers in the military.<sup>85</sup>

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<sup>82</sup> 395 U.S. 621, 627 (1969) (“[T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections.”).

<sup>83</sup> *Rucho v. Common Cause*, 139 S. Ct., 2484, 2523 (2019) (Kagan, J., dissenting) (internal quotation marks omitted). The Justices in the *Abbott* majority have used a reverse presumption in the campaign finance cases, in which they have put forward concerns about incumbency protection as an argument *against* the constitutionality of legislative limits on money in politics. I discuss Justice Scalia’s contrasting views of the role of incumbency protection in considering partisan gerrymandering, voting rights, and campaign finance cases in Richard L. Hasen, *Keynote Address: Judging the Political and Political Judging: Justice Scalia as Case Study*, 93 CHI.-KENT L. REV. 325 (2018).

<sup>84</sup> Joshua Matz, *Trump’s Despicable Decisions Look Awfully Alike*, WASH. POST (Mar. 27, 2018), [https://www.washingtonpost.com/opinions/getting-deja-vu-on-trumps-transgender-ban-youre-not-alone/2018/03/27/4e78091e-312e-11e8-8bdd-cdb33a5eef83\\_story.html](https://www.washingtonpost.com/opinions/getting-deja-vu-on-trumps-transgender-ban-youre-not-alone/2018/03/27/4e78091e-312e-11e8-8bdd-cdb33a5eef83_story.html).

<sup>85</sup> *Id.*

Animus laundering worked well for the government in the Supreme Court's decision in the travel ban case. Courts originally struck down the bans as a form of religious discrimination against Muslims, based in part on anti-Muslim statements from President Trump, who himself dubbed the ban as a "Muslim ban."<sup>86</sup> The government tweaked the policies and enunciated purportedly new nondiscriminatory rationales to support the policies, which the government then argued eliminated any taint from the original measure. The Supreme Court accepted a new national security rationale for the third iteration of the ban.<sup>87</sup> Chief Justice Roberts's majority opinion noted the President's earlier anti-Muslim statements<sup>88</sup> but then discounted their significance: "because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification."<sup>89</sup>

The government now is trying the same animus laundering in cases challenging the ban on transgender soldiers; in early 2019, the Supreme Court—without comment—stayed lower court rulings blocking the ban on transgender soldiers in the military while the cases proceed in the lower courts but declined to hear the cases before they had been completed in the lower courts.<sup>90</sup> The government, in its petition for writ of certiorari before judgment, explicitly argued that the government's new consideration of the question of whether transgender troops could serve in the military was "independent" of President Trump's earlier discriminatory tweets purporting to ban transgender troops from serving in the military and from a 2017 memorandum.<sup>91</sup> No doubt the government will renew the laundering argument when this issue is back before the Supreme Court.

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<sup>86</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

<sup>87</sup> *Id.* at 2423 ("Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review.").

<sup>88</sup> *Id.* at 2417.

<sup>89</sup> *Id.* at 2421.

<sup>90</sup> See *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (stay order); *Trump v. Stockman*, 139 S. Ct. 950 (2019) (stay order); *Trump v. Jane Doe 2*, 139 S. Ct. 946 (2019) (denying cert. before judgment); Adam Liptak, *Supreme Court Revives Transgender Ban for Military Service*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html>.

<sup>91</sup> Petition for Writ of Certiorari Before Judgment at 24–25, *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (No. 18A625), [https://www.supremecourt.gov/DocketPDF/18/18-676/73010/20181123102318117\\_Trump%20v.%20Karnoski%20Pet..pdf](https://www.supremecourt.gov/DocketPDF/18/18-676/73010/20181123102318117_Trump%20v.%20Karnoski%20Pet..pdf) [<https://perma.cc/E4SL-QZNN>]. The petition states:

In enjoining the military from implementing the Mattis policy, the district court here failed to consider that policy on its own terms. Instead, the court characterized the Mattis policy as simply "a plan to implement" the "ban on military service by openly transgender people" that the President supposedly announced in his 2017 tweets and memorandum. But the Mattis policy would not ban military service by openly transgender people. Quite the opposite, the Mattis policy reflects the Department's conclusion that "transgender persons should *not* be

The Court has been inconsistent across the board in allowing government bodies the ability to cleanse animus. Compare its approach in the travel ban cases with its rejection of animus cleansing in the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case, where the majority latched on to the statements of two state commissioners in attributing an unconstitutional motive to the application of a state antidiscrimination law against a baker who would not bake a wedding cake for a gay couple getting married.<sup>92</sup> Finding government animus allowed the Court to avoid deciding a contentious clash between antidiscrimination law and claims of religious freedom. As Justice Ginsburg noted in her dissent, the decision to find the baker violated antidiscrimination law went through a number of layers of review aside from the review that the Court held tainted with animus.<sup>93</sup> If the Court wanted to find animus laundering in *Masterpiece Cakeshop* to approve Colorado's actions, it easily could have done so.

*Abbott* is one of two prominent recent election law cases in which the Court promoted animus laundering. As Justice Sotomayor argued persuasively and extensively in her dissent, the *Abbott* majority ignored numerous district court findings that the 2013 Texas Legislature continued to act with the same racially discriminatory intent infecting its 2011 redistricting.<sup>94</sup> The majority engaged essentially in *de novo* review of the facts to conclude that the 2013 Legislature had miraculously cured itself of the widespread discrimination which the trial court found existed just two years before (a finding the Supreme Court did not revisit).<sup>95</sup>

The other prominent Supreme Court election law case concerning animus laundering is its recent decision over the inclusion of a citizenship question on the census.<sup>96</sup> This case followed a tortured path, including the

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disqualified from service solely on account of their transgender status.” That is why the President had to “revoke” his 2017 memorandum and “any other directive [he] may have made with respect to military service by transgender individuals” to allow the military to implement the Mattis policy. That policy, moreover, reflects the exercise of Secretary Mattis’s “independent judgment,” following an “independent multi-disciplinary review” by a panel of experts. The district court erred in failing to consider the Mattis policy on its own terms. *Id.* (citation omitted).

<sup>92</sup> 138 S. Ct. 1719, 1729 (2018).

<sup>93</sup> *Id.* at 1751 (Ginsburg, J., dissenting).

<sup>94</sup> See *Abbott v. Perez*, 138 S. Ct. 2305, 2346–60 (2018) (Sotomayor, J., dissenting).

<sup>95</sup> This is not to say that a state can never enact a law for good purposes that once might have been proposed for unconstitutional ones. With enough passage of time and change in the membership of the legislative body, such reenactment seems unobjectionable. But all of these cases appear to involve a quick reenactment by essentially the same legislative body in the face of court skepticism about the constitutionality of motive.

<sup>96</sup> *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

Supreme Court's rare agreement to hear the case before the Second Circuit had considered it.<sup>97</sup>

The key question was whether the Department of Commerce, which is in charge of the Census Bureau, violated the Administrative Procedure Act by including a citizenship question on the census. The Department defended the inclusion of the question as necessary to provide data to assist the Department of Justice in defending the voting rights of Latino voters under the Voting Rights Act.

The Court held that this justification was a pretext. It noted that the evidence before the district court showed that Commerce Secretary Wilbur Ross

was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court's view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question "well before" receiving DOJ's request, and did so for reasons unknown but unrelated to the VRA.<sup>98</sup>

Chief Justice Roberts for the majority concluded:

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.<sup>99</sup>

Although neither the district court nor the Supreme Court made findings as to Secretary Ross's actual purpose, his real purpose, gleaned from documents released from a deceased Republican redistricting guru's hard drive by his estranged daughter, appeared to have been the precise opposite of what he claimed. Rather than help Latino voters, Ross's intent was to hurt

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<sup>97</sup> *Id.* at 2565.

<sup>98</sup> *Id.* at 2574.

<sup>99</sup> *Id.* at 2575.

minority voting rights.<sup>100</sup> The citizenship question could have led to an undercount of Latino voters, some of whom would be afraid to answer citizenship questions, and it could have given states the ability to draw citizen-only districts which would decrease the voting power of Latinos and Democrats. Plaintiffs have sought sanctions against the government in the district court for lying about the rationale for including the question.<sup>101</sup>

In holding that the government violated the Administrative Procedure Act by offering a pretextual reason for including a citizenship question on the census, Chief Justice Roberts was joined by the Court's four liberals. The four other conservative Justices, in a partial dissent by Justice Clarence Thomas, believed that the court should have deferred to Ross's stated reason for including the question on the census and should not have allowed any discovery to uncover Ross's actual motivations.<sup>102</sup>

But Chief Justice Roberts left the door open for animus laundering. He wrote that Secretary Ross's decision was reasonable apart from the question of pretext. In portions of the opinion joined by the conservative justices, he offered numerous reasons why the government could reasonably and constitutionally ask the citizenship question to collect relevant data.<sup>103</sup> After finding pretext, the Court ordered a remand to the agency, adding: "We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction."<sup>104</sup>

Indeed, as Matz noted, Chief Justice Roberts decided a number of constitutional and statutory issues which were unnecessary to reach given the Court's resolution of the case on pretext grounds. Matz finds that the most "plausible" rationale for this "advisory" portion of Chief Justice Roberts's opinion was that "the Chief wanted the agency to understand the scope and

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<sup>100</sup> See Michael Wines, *Deceased G.O.P. Strategist's Hard Drive Reveals New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.

<sup>101</sup> Michael Wines, *Judge is Asked to Punish Officials in Tactics in Census Question Dispute*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/us/census-citizenship-question-sanctions.html>.

<sup>102</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576–77 (2019) (Thomas, J., dissenting). The majority agreed that the district court should not have allowed discovery on Ross's motivations but considered the evidence anyway. *Id.* at 2574 (majority opinion); see also *id.* at 2595 (Breyer, J., concurring in part and dissenting in part) (joining all of Part V of Chief Justice Roberts's opinion, "except insofar as it concludes that the Secretary's decision was reasonable apart from the question of pretext").

<sup>103</sup> *Id.* at 2569–73 (majority opinion).

<sup>104</sup> *Id.* at 2576.

parameters of its own authority on remand—and wanted to define that authority in the broadest possible terms.”<sup>105</sup>

The remedial aspect of the Court’s order left open the possibility that Secretary Ross could put forward new reasons, ostensibly cleansed of the taint of pretext.<sup>106</sup> The Trump Administration came very close to offering such a new rationale, even changing lawyers in the case in preparation for a new effort to get Chief Justice Roberts and the four conservatives to accept the laundering effort.<sup>107</sup>

The Administration abandoned the effort, perhaps because Department of Justice lawyers had represented to the courts earlier that there was no additional time before census forms had to be printed.<sup>108</sup> But without that press of time, it appeared that the Chief Justice has created a path once again for the Trump Administration’s animus laundering.

#### IV. HOW THE COURT’S PRO-PARTISANSHIP TOOLS CAN ALLOW STATES TO ENGAGE IN MORE RACIAL AND PARTISAN GERRYMANDERING

The three judicial tools described so far—false naivete about politics, a presumption of legislative good faith, and the availability of animus laundering—may prove especially useful for conservative courts in redistricting and voting rights cases in the American South. The tools will allow courts to reject claims from minority voters and Democrats that voting rules helping Republicans constitute unconstitutional race discrimination, racial gerrymandering, or a violation of Section 2 of the Voting Rights Act. In a one-two punch, the tools will allow the courts to classify discrimination in these cases as political and not racial when done by Republican legislatures, then give the green light to political discrimination.

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<sup>105</sup> Joshua Matz, *Thoughts on the Chief’s Strategy in the Census Case*, TAKE CARE BLOG (July 1, 2019), <https://takecareblog.com/blog/thoughts-on-the-chief-s-strategy-in-the-census-case> [<https://perma.cc/GDR7-F33W>].

<sup>106</sup> Richard L. Hasen, *Donald Trump is Promising to Fight the Census Case. That Might Actually Work*, SLATE (June 27, 2019, 12:32 PM), <https://slate.com/news-and-politics/2019/06/john-roberts-trump-census-question-supreme-court-october.html> [<https://perma.cc/8E9P-5Y9C>]; see also Matz, *supra* note 105 (“Of course, whereas the travel ban went through several rounds of such animus-laundering before it reached the Court, the census case hadn’t do so; the Court itself therefore ordered a round of revision, in which the most blatant lies will be washed away and replaced with subtler lies.”).

<sup>107</sup> See Michael Wines, Katie Benner & Adam Liptak, *Justice Dept. to Replace Lawyers in Census Citizenship Question Case* N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/us/politics/census-citizenship-question-justice-department.html>.

<sup>108</sup> See Katie Rogers, Adam Liptak, Michael Crowley & Michael Wines, *Trump Says He Will Seek Citizenship Information from Existing Federal Records, Not the Census*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/us/politics/census-executive-action.html>.

I have written extensively elsewhere about the legal problems caused by “conjoined polarization”: the overlap of race and party preferences, particularly in the American South, with white voters overwhelmingly preferring Republican candidates and African-Americans (and to a lesser extent Latino voters) preferring Democratic candidates.<sup>109</sup> When a state draws district lines or passes a voting restriction that helps Republicans, is that race discrimination potentially in violation of the Voting Rights Act and the Constitution, or is it political discrimination, which could well be found to be permissible after cases like *Rucho*?

Courts have adopted various approaches to resolving this problem, including searching for whether race or party predominates<sup>110</sup> and treating party as a proxy for race.<sup>111</sup> With so much overlap between the categories, a search for predominant partisan or racial intent appears logically impossible,<sup>112</sup> and treating party as a proxy for race gets courts into the tricky business of accusing Republican legislators of acting with racially discriminatory intent when they pass self-interested legislation.<sup>113</sup>

The Supreme Court’s 2017 racial gerrymandering opinion in *Cooper v. Harris* appeared to adopt the “party as race” proxy approach.<sup>114</sup> *Cooper* was a precursor to the *Rucho* case holding that North Carolina engaged in racial gerrymandering in drawing two congressional districts. Justice Kagan’s opinion for the Court, joined by the Court’s other liberal Justices and Justice Thomas, upheld the lower court’s finding of racial predominance, based in part on treating party as a proxy for race.<sup>115</sup> It seems unlikely that the liberal

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<sup>109</sup> These pieces include Hasen, *Three Uneasy Approaches*, *supra* note 14; Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 71 (2014). On the term “conjoined polarization,” see Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869 (2016).

<sup>110</sup> Hasen, *Three Uneasy Approaches*, *supra* note 14, at 1843–64.

<sup>111</sup> *Id.* at 1864–75.

<sup>112</sup> *Id.* at 1863–64.

<sup>113</sup> *Id.* at 1872–75.

<sup>114</sup> See 137 S. Ct. 1455 (2017); Richard L. Hasen, *Resurrection: Cooper v. Harris and the Transformation of Racial Gerrymandering into a Voting Rights Tool*, 1 AM. CONST. SOC’Y SUP. CT. REV. 105, 124–29 (2017).

<sup>115</sup> As I explained in *Resurrection: Cooper v. Harris and the Transformation of Racial Gerrymandering into a Voting Rights Tool*:

In one *Harris* footnote, the Court declared that a plaintiff can show racial predominance “even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other political goals.” The Court explained in the second footnote that “the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.” Finally, the court in the third footnote described reasons why redistricting authorities might choose to employ race as a predominant

Justices will be able to keep Justice Thomas as a fifth vote the next time this issue arises, as his vote in *Cooper* appears to have been driven by his stated general deference to district court factual findings on racial predominance.

One potential way to deal with the “race or party” question is to subject laws favoring one political party to closer scrutiny, an approach I endorsed as avoiding difficult questions of potential race-based intent.<sup>116</sup> But *Rucho*’s rejection of partisan gerrymandering as a cognizable federal claim forecloses this option of more searching and skeptical treatment of partisan legislative motive, at least as to redistricting claims in federal court.

The newly-created Roberts Court pro-partisanship tools provide another potential way out of the “race or party” box. Faux naivete about politics, a thumb on the scale in favor of the state’s good faith, acceptance of political motives as within legislative good faith, and animus laundering will aid Republican legislatures and election officials in the South and elsewhere in crafting self-interested redistricting maps and voting rules that courts will uphold if challenged.

States may defend a redistricting plan challenged as a racial gerrymander as a purely partisan gerrymander. To deflect claims of racial motivations, expect to see more grotesque statements of naked partisan intent such as those of David Lewis of North Carolina’s General Assembly as quoted in the *Rucho* case: “We are ‘draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it[’s] possible to draw a map with 11 Republicans and 2 Democrats.’”<sup>117</sup> States will avoid using racial data, and if they use racial data,<sup>118</sup> they can try a “do over” by enacting a substantially similar plan avoiding the use of such data, such as an interim plan created by a lower court, a plan which must be

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redistricting factor. Justice Kagan offered two reasons aside from misunderstanding Voting Rights Act requirements: “[Authorities] may resort to race-based districting for ultimately political reasons, leveraging the strong correlation between race and political behavior to advance their partisan interests. Or, finally—though we hope less commonly—they may simply seek to suppress the electoral power of minority voters.”

Hasen *supra* note 114, at 124–25 (citations omitted). The quoted *Harris* footnotes are 1, 7, and 15.

<sup>116</sup> Hasen, *Three Uneasy Approaches*, *supra* note 14, at 1876–82.

<sup>117</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2510 (2019) (Kagan, J., dissenting).

<sup>118</sup> Republicans in North Carolina represented to a three-judge court they did not use racial data in drawing district lines for state legislative districts. The Hofeller files, which played a role in the census litigation, suggest that racial data may have been used. Lewis has denied the charge. Michael Wines, *Deceased Strategist’s Files Detail Republican Gerrymandering in North Carolina*, *Advocates Say*, N.Y. TIMES (Jun. 6, 2019), <https://www.nytimes.com/2019/06/06/us/north-carolina-gerrymander-republican.html>.

crafted with deference to the legislature's preferences and do no more than ostensibly correct the plan's legal infirmities.<sup>119</sup>

## V. THE THREE PRO-PARTISANSHIP TOOLS IN THE LOWER COURTS

The Court's pro-partisan doctrinal tools are already affecting lower court decisionmaking and litigant behavior. For example, a three-judge federal district court in Texas, which had been considering the legality of Texas's 2011 redistricting for nearly a decade, declined to put Texas back under federal supervision of its voting rules.<sup>120</sup> The court had the power to restore "preclearance" under Section 3(c) of the Voting Rights Act<sup>121</sup> because it had found that Texas drew district lines for the state legislature and Congress in 2011 with an intent to discriminate against African-American and Latino voters.<sup>122</sup> The court held that a finding of such discrimination in

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<sup>119</sup> See *Upham v. Seamon*, 456 U.S. 37, 39–42 (1982).

<sup>120</sup> *Perez v. Abbott*, 390 F. Supp. 3d 803, 807 (W.D. Tex. 2019) (three-judge court).

<sup>121</sup> 52 U.S.C. § 10302(c) (2019).

<sup>122</sup> *Perez*, 390 F. Supp. 3d at 814–15:

With regard to the Texas House Plan, Plan H283, the Court found that the overall plan was the product of intentional vote dilution and that it was based on "invidious discriminatory purpose." Docket no. 1365 at 83 ("The Court agrees that the overall configuration of Plan H283 is the product of intentional vote dilution" and "[t]he impact of the plan was certainly to reduce minority voting opportunity statewide, resulting in even less proportional representation for minority voters."), *id.* at 84 ("[T]he Court finds invidious discriminatory purpose underlies Plan H283."). The Court further found that districts in many counties across Texas were the product of intentional discrimination/intentional vote dilution, including El Paso County, *id.* at 27–28 ("the Court finds that mapdrawers intentionally diluted the Latino vote in violation of § 2 of the VRA and the Fourteenth Amendment with regard to HD78"); Bexar County, *id.* at 32 ("the Court finds that mapdrawers intentionally diluted the Latino vote in HD117 in violation of § 2 and the Fourteenth Amendment"); Nueces County, *id.* at 38–40 (mapdrawers intentionally eliminated HD33 in Nueces County and "offset" the loss of a Latino opportunity district by unnecessarily inflating the SSVR of an already performing district in Harris County, thus intentionally diluting Latino voting opportunity and also intentionally racially gerrymandered the remaining Nueces County districts to further undermine Latino voting strength); Hidalgo County, *id.* at 43 ("the Court finds that HD41 was drawn in part with racially discriminatory (dilutive) motive" and that "mapdrawers intentionally used race to draw the district to perform less favorably for Latinos" such that "the configuration of HD41 is racially discriminatory and constitutes intentional vote dilution in violation of § 2 and the Fourteenth Amendment"); Harris County, *id.* at 56 ("The Court finds that there is persuasive evidence of intentional vote dilution in Harris County."); Dallas County, *id.* at 66–67 ("The Court does find . . . that Plaintiffs have proven an improper use of race in western Dallas County to dilute Latino voting strength" and "intentional vote dilution in Dallas County violates § 2 and the Fourteenth Amendment."); Tarrant County, *id.* at 71 ("The Court finds that mapdrawers acted with racially

violation of the Fourteenth Amendment's Equal Protection Clause was a necessary but not sufficient condition for invoking Section 3(c) "bail in" against Texas.<sup>123</sup>

The court declined to exercise its discretion because the Supreme Court had held in *Abbott* that Texas had cleansed itself of any animus when it passed a new redistricting plan in 2013 to comply with the lower court findings of discrimination in the 2011 plan.<sup>124</sup> *Abbott* had stressed the presumption of legislative "good faith" to be accorded to state legislative enactments.<sup>125</sup> The lower court felt compelled to go no further than the Supreme Court, despite "grave concerns"<sup>126</sup> about Texas's future redistricting based upon the state's prior intentional racial discrimination.<sup>127</sup>

The Texas voting rights case is not alone. States are advancing the muscular *Abbott* version of the presumption of legislative good faith. In arguing against liability for enacting a strict voter identification law, which the trial court had found was enacted with a racially discriminatory purpose, Texas argued it should be afforded a presumption of good faith.<sup>128</sup> Maryland<sup>129</sup> and North Carolina<sup>130</sup> both relied upon the presumption of good faith in defending their partisan gerrymandering in *Rucho*, and an amicus brief supporting North Carolina's partisan gerrymandering in *Rucho* for the states of Texas, Alabama, Arkansas, Georgia, Indiana, Louisiana, Ohio, Oklahoma, South Carolina, and Utah offered an extensive argument that the Court needs to apply a presumption of legislative good faith to partisan actions.<sup>131</sup>

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discriminatory intent to dilute Latino voting strength in Tarrant County."); and Bell County, *id.* at 78 ("The Court thus finds evidence of intentional vote dilution in Bell County in violation of § 2 of the VRA and the Fourteenth Amendment.").

<sup>123</sup> *Id.* at 817–18. On bail-in generally, see Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

<sup>124</sup> *Perez*, 390 F. Supp. 3d at 820.

<sup>125</sup> *Abbott v. Perez*, 138 S. Ct. 2305, 2325–37 (2018).

<sup>126</sup> *Perez*, 390 F. Supp. 3d at 820.

<sup>127</sup> *Id.* at 821 ("Nevertheless, the Court concludes that ordering preclearance on the current record would be inappropriate, given the recent guidance from the Supreme Court and the Fifth Circuit. It is time for this round of litigation to close. *Abbott*, 138 S. Ct. at 2327 ("There is thus no need for any further prolongation of this already protracted litigation.")).

<sup>128</sup> *Veasey v. Abbott*, 888 F.3d 792, 814–15 (2018) (Graves, J., concurring in part) ("The district court was not required to apply any presumption of 'good faith' to the Texas Legislature's enactment.").

<sup>129</sup> Jurisdictional Statement at 29, *Lamone v. Benisek*, 139 S. Ct. 1316 (2019) (No. 18-726), 2018 WL 6427861.

<sup>130</sup> Reply Brief for Appellants at 20, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422), 2019 WL 1275298.

<sup>131</sup> See Brief for the States of Texas, Alabama, Arkansas, Georgia, Indiana, Louisiana, Ohio, Oklahoma, South Carolina, and Utah as Amici Curiae in Support of Appellants at 7–11, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422), 2019 WL 764207; *id.*

Similarly, in *McLemore v. Hosemann*, Mississippi government officials moved to dismiss a voting rights lawsuit brought by Mississippi voters against provisions of the Mississippi Constitution that require statewide officeholders to win not just a majority of votes in the state but also a plurality of the vote in a majority of Mississippi state house districts.<sup>132</sup> In a race where no statewide candidate satisfies both requirements, the state house simply picks the statewide winner.<sup>133</sup> Plaintiffs in *McLemore* claimed that the provision violated the Constitution and Section 2 of the Voting Rights Act because it would make it harder for African-American-preferred candidates to get elected in a state with a high degree of racially polarized voting.<sup>134</sup>

The state defendants did not contest, at least at the motion to dismiss stage, that the state initially enacted the dual provisions more than a century ago to prevent African-Americans from obtaining statewide office.<sup>135</sup> Instead they argued that Supreme Court cases including *Rucho* indicated that the *McLemore* plaintiffs could not prove they would suffer injury. Defendants quoted from Chief Justice Roberts's majority opinion in *Rucho* about the supposed inability to know in advance how voters would vote in future elections: "[Courts] cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change."<sup>136</sup> Defendants used statements like this to argue that there was no way to know

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at 7–8 ("This Court's established precedent makes clear that any unlawful-purpose analysis requires 'extraordinary caution' and faces an exacting standard: it requires the clearest proof of invidious purpose in light of the heavy presumptions of constitutionality and good faith accorded to government actions" (citing *Miller v. Johnson*, 515 U.S. 900 (1995))).

<sup>132</sup> See Memorandum of Law in Support of Motion to Dismiss for Lack of Jurisdiction and Immunity Filed by the Speaker of the Mississippi House of Representatives and the Mississippi Secretary of State, *McLemore v. Hosemann*, 414 F. Supp. 3d 876 (S.D. Miss. 2019) (No. 3:19-cv-383-DPJ-FKB). [hereinafter "*McLemore* Defendants' Memorandum"].

<sup>133</sup> MISS. CONST. art. V, §§ 140, 141, 143.

<sup>134</sup> Amended Complaint for Injunctive and Declaratory Relief at 14–15, *McLemore v. Hosemann*, 414 F. Supp. 3d 876 (S.D. Miss. 2019) (No. 3:19-cv-383-DPJ-FKB). The district court later denied a preliminary injunction but indicated the constitutional provision was likely unconstitutional. *McLemore v. Hosemann*, 414 F. Supp. 3d 876 (S.D. Miss. 2019). It then stayed the proceedings to give the legislature a chance to change the law. *Id.* (order granting stay).

<sup>135</sup> *McLemore* Defendants' Memorandum, *supra* note 132, at 1 ("Even if Plaintiffs' allegations that the challenged constitutional provisions were enacted with racial animus are true, those allegations are alone insufficient to establish a justiciable case or controversy to invoke this Court's jurisdiction.").

<sup>136</sup> *McLemore* Defendants' Memorandum, *supra* note 132, at 20 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019)).

whether the challenged Mississippi constitutional provision would actually hurt the state's African-American voters.<sup>137</sup>

The state defendants made this argument in a state where sixty-five percent of whites identify or lean Republican and seventy-six percent of African-Americans lean or identify as Democrats.<sup>138</sup> And defendants made this argument despite evidence strongly showing that split ticket voting is essentially dead in the United States,<sup>139</sup> and racially polarized voting remains strong, especially in jurisdictions like Mississippi that were once covered by the preclearance provisions of the Voting Rights Act.<sup>140</sup> Language such as Roberts's paragraph in *Rucho* provides fodder for states such as Mississippi to ignore what any decent political scientist could say about the potential effects of the law in a state with Mississippi's political conditions.<sup>141</sup>

Mississippi's arguments, if accepted by the courts, could strike a major blow against voting rights. A redistricting or voting law challenged as a violation of Section 2 of the Voting Rights Act will evoke state defenses claiming, as Mississippi has done in *McLemore*, that plaintiffs cannot prove harm given the supposed uncertainty and instability of voter preference. Lawsuits will rely as well upon a presumption of legislative good faith and

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<sup>137</sup> *Id.* (“Without allegations of past instances where the Challenged Provisions were applied in a constitutionally impermissible manner, and given the variable and diverse nature of individual voting practices, Plaintiffs['] claims are hypothetical and abstract at best and are not ripe for judicial determination.”); see also Matt Ford, *Mississippi Quotes John Roberts to Defend Its Racist Election Law*, NEW REPUBLIC (July 19, 2019), <https://newrepublic.com/article/154496/mississippi-quotes-john-roberts-defend-racist-election-law> [<https://perma.cc/56PG-RNRB>].

<sup>138</sup> See PEW RESEARCH CENTER, *Religious Landscape Study: Party Affiliation Among Adults in Mississippi by Race/Ethnicity* (2014), <https://www.pewforum.org/religious-landscape-study/compare/party-affiliation/by/racial-and-ethnic-composition/among/state/mississippi/> [<https://perma.cc/7YEH-978W>]. About twenty-two percent of whites lean Democratic and twelve percent of African-Americans lean Republican. The rest reported no leaning either way. *Id.*

<sup>139</sup> See Ed Kilgore, *2018 Midterms Offered More Proof That Split-Ticket Voting is a Thing of the Past*, N.Y. MAG INTELLIGENCER (Nov. 21, 2018), <http://nymag.com/intelligencer/2018/11/2018-midterms-split-ticket-voting.html> [<https://perma.cc/53T7-Y7DG>]; Jeff Stein, *Split Ticketing is Dead. National Parties are Now Everything*, VOX (Nov. 17, 2016), <https://www.vox.com/policy-and-politics/2016/11/17/13666192/voting-congress-presidency>.

<sup>140</sup> See Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racially Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 210 (2013).

<sup>141</sup> It is also in tension with arguments recognized by Justice Alito in his dissent in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019) about how consequential redistricting can be on politics and policy. See Richard Pildes, *Justice Alito's Dissent in Bethune-Hill II*, ELECTION L. BLOG (June 17, 2019, 9:03 AM), <https://electionlawblog.org/?p=105644> [<https://perma.cc/HVS9-633T>].

fall back on the argument that, at worst, state actors are guilty of partisan motivations, not racial ones.

Lower courts have also taken the Supreme Court's cue on animus cleansing in election cases. Consider the Fifth Circuit review of the legality of Texas's strict voter identification law, commonly known as SB 14. Plaintiffs challenged SB 14 as both unconstitutional and a violation of Section 2 of the Voting Rights Act. The trial court found that Texas engaged in intentional racial discrimination in passing the law and that the law had a discriminatory effect on minority voters.<sup>142</sup> It held SB 14 could not be implemented.<sup>143</sup> The Fifth Circuit, en banc, though divided sharply, upheld the finding that SB 14 had a discriminatory effect in violation of Section 2.<sup>144</sup> It reversed the finding of discriminatory intent, directing the district court to apply a different standard to judging discriminatory intent on remand.<sup>145</sup>

The Fifth Circuit also directed the district court to come up with an interim remedy.<sup>146</sup> The district court then allowed Texas in the interim to apply a softened version of its voter identification law,<sup>147</sup> one which allowed voters who could claim a "reasonable impediment" to obtaining one of the permissible forms of identification to file an affidavit attesting to the impediment.<sup>148</sup> Texas then enacted a new law, SB 5, based upon the trial court's interim remedy.<sup>149</sup>

The trial court on remand once again found Texas acted with discriminatory intent and blocked the law.<sup>150</sup> The Fifth Circuit reversed the finding of discriminatory intent, based upon the Texas legislature's decision to codify the trial court's interim remedy in SB 5.<sup>151</sup> The majority, in an opinion by Fifth Circuit Judge Edith Jones, found that the trial court erred in treating SB 5 as the "tainted fruit of SB 14."<sup>152</sup> It held that the district court "overlooked SB 5's improvements for disadvantaged minority voters and neither

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<sup>142</sup> *Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014). It also found the law was an unconstitutional poll tax and unconstitutionally burdened the right to vote. *Id.*

<sup>143</sup> *Id.* at 707–08.

<sup>144</sup> *Veasey v. Abbott*, 830 F.3d 216, 243–65 (5th Cir. 2016).

<sup>145</sup> *Id.* at 230–43.

<sup>146</sup> *Id.* at 243.

<sup>147</sup> On the problems with softening of voter identification laws, see Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. 100.

<sup>148</sup> *Veasey v. Abbott*, 265 F. Supp. 3d 684 (S.D. Tex. 2017) (describing order regarding agreed interim plan for elections). This order is available online at Order Regarding Agreed Interim Plan for Elections (S.D. Tex. 2016), <http://electionlawblog.org/wp-content/uploads/texas-id-order.pdf> [<https://perma.cc/VD2L-BERK>].

<sup>149</sup> S.B. 5, 85th Leg. (Tex. 2018).

<sup>150</sup> *Veasey v. Abbott*, 265 F. Supp. 3d 684, 692 (S.D. Tex. 2017), *rev'd*, 888 F.3d 792 (5th Cir. 2018).

<sup>151</sup> *Veasey*, 888 F.3d at 800–04.

<sup>152</sup> *Id.* at 801.

sought evidence on nor made any finding that the Texas legislature in 2017 intentionally discriminated when enacting SB 5.”<sup>153</sup> The Fifth Circuit further found that the district court erred in then not deferring to Texas: “Having relied on incorrect presumptions of taint and invalidity, the district court then failed to defer to the legislature’s proffered remedy.”<sup>154</sup> The Fifth Circuit held that the trial court abused its discretion in not concluding that SB 5 fully cured any problems with SB 14.

For good measure, the Fifth Circuit concluded that because it viewed Texas as having fully solved any problems with SB 14 through passage of SB 5, the district court was precluded from considering if the earlier discrimination it found in the passage of SB 14 provided a basis for subjecting Texas to renewed federal supervision of its voting rules under Section 3(c) of the Voting Rights Act.<sup>155</sup>

Judge James Graves dissented from the Fifth Circuit’s decision on the remedy, rejecting the majority’s argument that any “taint” from Texas’s initial law “was cleansed simply because a new legislature passed new legislation.”<sup>156</sup> He continued:

Nothing cuts the thread of intent here. No passage of time cuts the thread: a mere six years passed between the enactment of S.B. 14 and the enactment of S.B. 5. No intervening parties cut the thread: the voters had no say, and many of the original legislators who passed S.B. 14 were still in office to pass S.B. 5. And no statutory reenactment requirement cut the thread: the State of Texas was not required to periodically enact voter ID legislation. In fact, what happened in the interim was that two federal courts ruled that S.B. 14 had a discriminatory impact on poor and minority voters, and the district court twice ruled that S.B. 14 was passed with a discriminatory purpose.<sup>157</sup>

These examples demonstrate the effects of the three subtle doctrinal shifts supporting the Supreme Court majority’s new pro-partisanship turn. The Court’s turn is especially worrisome given political polarization in both state legislatures and the Supreme Court itself, making the Court appear complicit in efforts by Republican state actors to allow white voters to hold onto power even if the party’s political fortunes decline.

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<sup>153</sup> *Id.* at 802.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 804 (“Further, because SB 5 constitutes an effective remedy for the only deficiencies testified to in SB 14, and it essentially mirrors an agreed interim order for the same purpose, the State has acted promptly following this court’s mandate, and there is no equitable basis for subjecting Texas to ongoing federal election scrutiny under Section 3(c).”).

<sup>156</sup> *Id.* at 822 (Graves, J., concurring in part and dissenting in part).

<sup>157</sup> *Id.*

The new tools created by the Supreme Court do not mandate that courts reject racial gerrymandering claims and constitutional and Voting Rights Act challenges to redistricting and restrictive voting rules. Many lower courts will not apply these tools and they should not. Some courts, like the three-judge court in the Texas redistricting case which found racial discrimination but rejected plaintiffs' request to put Texas back under federal supervision for voting, will apply these tools out of fear of Supreme Court reversal.<sup>158</sup> For courts otherwise inclined to reject race-based challenges to redistricting and voting in the "race or party" cases, these tools will come in handy, and they certainly may be deployed by the Supreme Court as it reviews these cases going forward.

### CONCLUSION

During oral argument in the *Gill* partisan gerrymandering case, Chief Justice Roberts worried about what the "intelligent man on the street" would think if courts started striking down redistricting plans if they had a high enough score under the "efficiency gap" standard.<sup>159</sup> The Chief Justice might be better off asking what an intelligent person is going to conclude about the Supreme Court if the five Republican-appointed Justices continue to side with Republicans in redistricting and voting rights disputes by using new tools that load the dice in favor of partisan political actions.

Already there is some evidence that the Court's standing as an institution and its legitimacy is being viewed through a partisan lens during this time of intense polarization.<sup>160</sup> But the Court's recent new tools promoting partisanship in these election law cases stand to exacerbate the problem. The intelligent person on the street will be unlikely to notice the use of the tools false naivete, burden shifting, or animus laundering. But they will be able to view the consistent pro-partisanship results reached by the Court and the votes of the Justices.

Those paying enough attention will see federal courts, especially the Supreme Court, as allowing and sometimes perhaps even mandating greater politicization of election rules and redistricting. It is not simply that the Court is deferring to rough and tumble political processes in each state. The Court's *Shelby County* decision is especially important in this regard because it is not a case in which the Court simply deferred to the legislative process. Instead, it blocked legislative protection of minority voting rights in the name of protecting a new "right" of equal state sovereignty. Such

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<sup>158</sup> See *supra* notes 120–27 and accompanying text.

<sup>159</sup> Transcript of Oral Argument at 23, 37–38, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

<sup>160</sup> Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 270–72 (2019).

decisions look partisan in the narrow sense of protecting the Republican Party from political competition, whether that is the Court majority's motivation.

As the Court's conservative majority in the next few years likely reconsiders the permissibility of redistricting commissions, the results of the 2021 round of redistricting, the constitutionality of the remaining parts of the Voting Rights Act, and continued attempts by Republican legislatures to impose voting restrictions, the temptation to reach again for these tools will be great.