



The Supreme Court's Role in Undermining American Democracy



The time has come to talk about what the Supreme Court is doing to American democracy. For more than half a century—roughly during the second half of the last century—the Court played a pivotal role as a protector of democracy. Then came the Roberts Court, with the arrival of Chief Justice Roberts and Justice Alito in 2005. The Roberts Court has turned on our democracy, choosing in every important case to reach results undermining popular sovereignty and equal voting rights. This behavior has accelerated and become increasingly extreme with the arrival of Justices Gorsuch, Kavanaugh, and Barrett. The Court has greenlit laws that make it harder to vote, especially for people of color, the poor, and the young, and permitted unbridled gerrymandering to entrench political factions unable to win majority approval. At the same time, the Roberts Court has invalidated or critically weakened laws designed to protect voting rights and reduce the undue influence of money in politics. These decisions, taken together, form a stark and troubling pattern of distorting democracy at every opportunity.

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Introduction¹

The Supreme Court's attitude toward American democracy has varied during different historical eras. For nearly a century after the Civil War, the Court was generally unwilling to hear challenges to the myriad restrictions placed on Black Americans' right to vote in the Jim Crow South. The Court abdicated its duty to review and remedy such unconstitutional restrictions on the right to vote. That nonresponse, in turn, turned the Fifteenth Amendment into a dead letter and enabled states to disenfranchise eligible Black voters for decades.

The Court entered a new phase with the Civil Rights Movement. In a series of decisions between 1962 and 1964, the Supreme Court, led by Chief Justice Earl Warren, affirmed that the right to vote is paramount in our constitutional democracy, that it includes a constitutional guarantee of one-person-one-vote, and that courts can and must remedy violations of this right. A year later, Congress enacted the Voting Rights Act of 1965 to revive and enforce the guarantees of the Fourteenth and Fifteenth Amendment. In the following decades, the Supreme Court enforced those laws, striking down not only the more direct voting restrictions of the Jim Crow era but also emerging indirect tactics to suppress and dilute minority votes. The Warren Court's jurisprudence undeniably fostered a more inclusive and representative American democracy,² and even as voting rights and campaign finance law began shifting in troubling ways, the core of that jurisprudence mostly survived the Burger (1969-1986) and Rehnquist (1986-2005) eras.³

Unfortunately, the Supreme Court's relationship to democracy has shifted dramatically in recent years. Under the leadership of Chief Justice John Roberts, the Supreme Court has spent the last two decades systematically dismantling federal voting rights protections and campaign finance laws while enabling states to restrict the franchise and distort electoral outcomes with remarkable zeal. The pace of this upheaval has accelerated since 2017 with the additions of Justices Gorsuch, Kavanaugh, and Barrett. And in its first term, the Roberts Court's new supermajority has demonstrated a ready willingness to overturn precedent and discard long recognized constitutional rights, so we can expect changes in democracy law to be as extreme as they are quick to come.

In this report, we focus on the ways in which decisions of the Roberts Court in the areas of voting rights, partisan gerrymandering, and campaign finance have already contributed to significant democratic backsliding in the United States.⁴ We describe how these decisions have upheld laws making it harder to vote and permitted unbridled gerrymandering to entrench incumbent political power. We also describe how these decisions weakened laws designed to protect voting rights and reduce the influence of money in politics. We conclude that these decisions together have served to entrench the interests of political incumbents and economic elites at the expense of American voters, and especially voters of color.

¹ This Report was previously released with the title "The Supreme Court's Role in the Degradation of U.S. Democracy." We have changed the title, without substantive changes, in order to avoid potential confusion with a recent prominent law review article on a similar subject.

² The term "American democracy" is used as shorthand for our system of constitutional federal representative democracy. See Eugene Volokh, *Is the United States of America a republic or a democracy?*, Wash. Post (May 13, 2015, 2:43 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/13/is-the-united-states-of-america-a-republic-or-a-democracy>.

³ The Rehnquist Court's (in)famously anti-democratic decision in *Bush v. Gore*, 531 U.S. 98 (2000), certainly set the stage for the many more anti-democratic decisions to come under the Roberts Court. See *infra* note 93.

⁴ For a broader discussion of the Court's democracy-related jurisprudence, see Michael J. Klarman, *Forward: The Degradation of American Democracy—and the Court*, 134 Harv. L. Rev. 1 (2020), <https://harvardlawreview.org/2020/11/the-degradation-of-american-democracy-and-the-court>.

This report also critically examines the Court’s rationales for these decisions. We find that in deciding these cases, the Roberts Court has routinely failed to give proper weight to the principles of representation and political equality enshrined in the U.S. Constitution. The Court’s decisions are also wildly inconsistent in their application of judicial and interpretive principles, displaying selective application of judicial restraint and deference, devotion to text, and respect for precedent. It is difficult to pinpoint *any* principled and legitimate through-line in these decisions, leaving an explanatory vacuum that does damage to the Court’s legitimacy.

This report proceeds in three parts. Part I describes the Supreme Court’s role in reviewing laws concerning the democratic process under established principles of judicial review. Part II chronicles the Roberts Court’s landmark cases—and important cases yet to be decided—in the areas of voting rights, partisan gerrymandering, and campaign finance. Part III concludes with a brief reflection on the overall effect of these cases on American democracy and the Court’s legitimacy.

Part I: The Role of the Supreme Court in American Democracy

The Supreme Court’s decisions have an extraordinary impact on American life. This influence derives from the Court’s power of judicial review, a principle first established in the landmark 1803 decision *Marbury v. Madison*. In widely cited language, the Court declared “[i]t is emphatically the province and duty of the judicial department to say what the law is” and strike down laws that it finds violate the Constitution.⁵ The exercise of judicial review, the Court opined, is the “the very essence of judicial duty.”⁶

In carrying out its duty of judicial review, the Court sometimes exercises restraint, deferring in varying degrees to Congress, the President, and state legislatures. During the century after the Civil War, however, the Court took judicial restraint to harmful extremes, refusing to review, and thus effectively approving, the draconian voting restrictions targeting Black Americans in the Jim Crow South.⁷ There were numerous challenges to the disenfranchisement schemes of that era, but the Court refused to hear them or otherwise viewed the schemes as permissible under its unfaithful reading of the Fifteenth Amendment.⁸ One example of this is the 1903 decision in *Giles v. Harris*, where the Court admitted outright that even if racist Jim Crow restrictions on voter registration violated the Fifteenth Amendment, the Court simply could not or would not remedy such “political wrongs.”⁹

However, in the 1960s, the Supreme Court, led by Chief Justice Earl Warren, assumed a more active posture in reviewing laws that concern the franchise because the right to vote is not only fundamental but “preservative of all rights.”¹⁰ As the Warren Court opined in 1964 in *Wesberry v. Sanders*:

[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must

⁵ *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

⁶ *Id.* at 178.

⁷ See, e.g., *Williams v. Mississippi*, 170 U.S. 213, 225 (1898).

⁸ See Michael J. Klarman, *The Plessy Era*, 1998 Sup. Ct. Rev. 303, 303-04.

⁹ *Giles v. Harris*, 189 U.S. 475, 486 (1903). See also *Giles v. Teasley*, 193 U.S. 146 (1904). See generally Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295, 297 (2000) (“*Giles* permits the virtual elimination of black citizens from political participation in the South.”); Pamela S. Karlan, *From Logic to Experience*, 83 Geo. L.J. 1, 2 (1994) (“*Giles v. Harris* . . . gave Southern racists a green light to disenfranchise black citizens.”).

¹⁰ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[T]he Court referred to ‘the political franchise of voting’ as ‘a fundamental political right, because preservative of all rights.’” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))).

live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.¹¹

The Court thus committed to “carefully and meticulously scrutiniz[e]” any alleged infringement on the right to vote.¹² This close judicial scrutiny was necessary not only in reviewing restraints on ballot access¹³ but also more indirect schemes that make some votes count for less than others, such as gerrymandered districts, at-large elections, and annexations.¹⁴ As suggested in its famous *Carolene Products* footnote four, the Court applies more “exacting judicial scrutiny”¹⁵ to laws that restrict the political process because a political process in which “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out” cannot just fix itself.¹⁶ In its landmark 1962 decision in *Baker v. Carr*, the Court rejected arguments that these issues are nonjusticiable political questions to be resolved in the political process.¹⁷ And in the decades that followed, the Court closely scrutinized and struck down laws that violated the Constitution’s guarantees of equal voting rights.¹⁸

At the same time, when reviewing federal laws designed to enforce these constitutional guarantees, a power expressly granted to Congress, the Court deferred to congressional judgment.¹⁹ For example, in *South Carolina v. Katzenbach*, the Court upheld several provisions of the Voting Rights Act of 1965 (VRA) because they were “appropriate means” of enforcing the Fifteenth Amendment.²⁰ During this time, the Court also upheld key campaign finance regulations in the Federal Election Campaign Act (FECA)²¹ and state bans on corporate independent expenditures²² as legitimate regulations under the First Amendment, recognizing at the time that money should not be allowed to unduly distort the electoral process.

In sum, the Supreme Court had since the 1960s staked out a fundamentally democracy-protective role in reviewing laws that concern the democratic process. It exercised the duty of judicial review largely in accordance with the principles of representative democracy and political equality that pervade the Constitution. And it recognized that the Constitution’s text—with no less than five distinct amendments protecting the right to vote²³ and a clause guaranteeing a republican form of government²⁴—is centrally concerned with preserving a

¹¹ *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

¹² *Reynolds*, 377 U.S. at 562.

¹³ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding Virginia’s poll tax was unconstitutional).

¹⁴ *Reynolds*, 377 U.S. at 562; *Wesberry*, 376 U.S. at 8 (“To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government.”).

¹⁵ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁶ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 117, 120 (1980). See *id.* at 117 (“[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.”); *id.* at 120 (“We cannot trust the ins to decide who stays out, and it is therefore incumbent on courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one.”). See also Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 Sup. Ct. Rev. 111, 119-20; Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. Colo. L. Rev. 923, 931 (2001).

¹⁷ *Baker v. Carr*, 369 U.S. 186, 209, 237 (1962).

¹⁸ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966); *Harper*, 383 U.S. at 670; *Thornburg v. Gingles*, 478 U.S. 30 (1986).

¹⁹ See *Katzenbach*, 383 U.S. at 324; *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966); *Oregon v. Mitchell*, 400 U.S. 112, 117-19 (1970).

²⁰ *Katzenbach*, 383 U.S. at 308.

²¹ *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam).

²² *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 659-60 (1990) (recognizing as compelling the state’s interest in limiting the “corrosive and distorting effects” of corporate independent expenditures on the political process, overruled by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010)).

²³ See *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 567 n.2 (2013) (Ginsburg, J., dissenting) (“The Constitution uses the words ‘right to vote’ in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.”).

²⁴ U.S. Const. art. IV, § 4.

system in which all citizens act as political equals to elect their representatives.²⁵ The Roberts Court has dramatically departed from this paradigm.

Part II: The Roberts Court's Democracy Decisions

A. Voting Rights

The Roberts Court's assault on voting rights is consistent and multifaceted. The Court's decisions in this arena have dismantled the protections of the Voting Rights Act, ignoring Congress's constitutional prerogative to enforce the right to vote free from racial discrimination. They have eroded the fundamental right to vote protected by the Fourteenth Amendment and afforded deference to illusory government interests, such as the myth of widespread voter fraud. And most recently, the Court has used its shadow docket to deprive voters of relief from restrictive voting laws and dilutive district maps in election years, even when they win timely relief in lower courts.

We begin with *Shelby County v. Holder* (2013), which inflicted more damage on democracy more swiftly than any other decision of the Roberts Court. In *Shelby County*, the Court struck down the VRA's coverage formula used to identify states subject to "preclearance," gutting one of the most consequential and effective exercises of congressional power in American history.²⁶ Preclearance required that jurisdictions covered by the formula—jurisdictions with acute histories of political disenfranchisement along racial lines—receive approval from the Department of Justice or a three-judge District Court in the District of Columbia before implementing a new voting law or practice.²⁷ Writing for the majority, Chief Justice Roberts reasoned that the coverage formula, focusing attention primarily on the states of the Deep South, was no longer justified by "current needs," despite Congress's determination that it was still necessary.²⁸

The Court's reasoning had glaring flaws. It failed to mention, let alone apply, the proper standard of review for laws designed to enforce the Fifteenth Amendment.²⁹ That standard, supplied by *South Carolina v. Katzenbach*, is highly deferential: Congress may "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."³⁰ Instead, the Court sidestepped the Fifteenth Amendment entirely and invoked a "fundamental principle of equal sovereignty," holding that the coverage formula could not treat states differently because such disparate treatment was not sufficiently justified.³¹ But the Court's newly minted equal sovereignty standard lacks any basis in constitutional text or precedent. As Justice Ginsburg noted in her dissent, *Katzenbach* made clear that the equal sovereignty doctrine applied *only* to the terms for admitting new states and "*not* to the remedies for local evils which have subsequently appeared."³² And even if it were appropriate

²⁵ See *Reynolds*, 377 U.S. at 558 ("The conception of political equality from the Declaration of Independence . . . to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)))

²⁶ *Shelby Cty.*, 570 U.S. at 550-51.

²⁷ *Id.* at 562 (Ginsburg, J., dissenting).

²⁸ *Id.* at 551; see also *id.* at 557 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.")

²⁹ See *id.* at 567-68 (Ginsburg, J., dissenting).

³⁰ *Id.* at 568 (Ginsburg, J., dissenting) (quoting *Katzenbach*, 383 U.S. at 324); see also *id.* at 566 ("When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.") (Ginsburg, J., dissenting).

³¹ *Id.* at 542, 544.

³² *Id.* at 587 (Ginsburg, J., dissenting) (emphasis added). Justice Ginsburg also noted that the most recent case to discuss the equal sovereignty doctrine in this context, *Northwest Austin Utility District v. Holder*, 557 U.S. 193, 202 (2009), which formed the basis for the majority opinions entire analysis, did so only in dicta and did not overturn *Katzenbach*. *Id.* at 587-88.

to apply a principle of equal sovereignty, that principle could not justify the Court’s conclusion. As the extensive congressional record showed, one obvious “current need” justifying the coverage formula was that it was *working* to prevent retrogression in covered states.³³ Discarding the preclearance formula was, as Justice Ginsburg famously put it, “like throwing away your umbrella in a rainstorm because you are not getting wet.”³⁴

Shelby County opened the floodgates to new laws making it harder for people of color to register and vote. With a green light from the Court, previously covered jurisdictions quickly enacted, and still years later continue to pass, laws and policies strictly requiring photo ID, limiting early voting, same-day registration, and pre-registration; ending voter registration drives, severely restricting third-party voter engagement efforts; closing or shortening the hours for polling locations; and drawing election districts that dilute the voting power of communities of color.³⁵ Few if any of these retrogressive measures would have gone into effect if the Court had not gone out of its way to defang preclearance.

The Chief Justice in *Shelby County* assured voters that they could still rely on Section 2 of the VRA, which provides a “nationwide ban on racial discrimination in voting,”³⁶ but the Court has since severely weakened that protection and may be on the verge of invalidating it. Section 2 prohibits any standard, practice, or procedure of any jurisdiction that denies or abridges the right to vote on account of race or color. It is enforced through conventional lawsuits. In 1982, Congress amended Section 2 to clarify that it applies not only to voting laws that intend to deny or abridge the right to vote on account of race or color but also neutral laws that have that *result*.³⁷ The amendment also made clear that Section 2 allows lawsuits to challenge not only direct restraints on the right to “participate in the political process” (i.e. vote denial claims) but also electoral systems and apportionment schemes that provide people of color “less opportunity than other members of the electorate . . . to elect representatives of their choice” (i.e. vote dilution claims).³⁸

But in *Brnovich v. Democratic National Committee* (2021), the Roberts Court cut off Section 2’s power at the knees, at least as it applies to vote denial claims. The Court upheld two Arizona policies that the lower appellate court found discriminated against people of color.³⁹ And in so doing, the Court added five new “guideposts” to assess future vote-denial claims, making it harder for voters of color to bring and win these lawsuits.⁴⁰ The majority’s guideposts were: (1) the size of the burden imposed by a challenged voting rule, (2) whether the rule has been long been a standard practice or at least since 1982 when Section 2 was amended, (3) the size of any disparity in a rule’s impact on different racial or ethnic groups, (4) the opportunities provided by the State’s entire system of voting, such as alternative means of voting, and (5) the strength of the state’s interest served by the rule, with particular deference to asserted interests in

³³ *Id.* at 590 (Ginsburg, J., dissenting).

³⁴ *Id.*

³⁵ *Democracy Diminished: State and Local Threats to Voting Post Shelby County v. Holder*, NAACP Legal Defense Fund (Oct. 6, 2021), https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf; *The Effects of Shelby County v. Holder*, Brennan Center for Justice (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>; Rob Arthur & Allison McCann, *How the Gutting of the Voting Rights Act Led to Hundreds of Closed Polls*, Vice News (Oct. 16, 2018), https://news.vice.com/en_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls; *Democracy Diverted: Polling Place Closures and the Right to Vote*, Leadership Conference Education Fund (Sept. 2019), <https://civilrights.org/democracy-diverted/>.

³⁶ *Shelby Cty.*, 570 U.S. at 557-8.

³⁷ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. See generally Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715 (1983) (describing the Congressional considerations and reasoning for the changed standard during the 1982 reauthorization process).

³⁸ Section 2 of the VRA is now codified, as amended, at 52 U.S.C. § 10301.

³⁹ *Brnovich v. Democratic Nat’l Committee*, 141 S. Ct. 2321, 2333-34 (2021).

⁴⁰ *Id.* at 2338.

preventing fraud.⁴¹ Each guidepost tips the scale in favor of the state and against voters of color.⁴²

As Justice Kagan noted in dissent, the guideposts find no support in the text of Section 2.⁴³ In fact, they are completely at odds with Congress's "broad intent," made manifest by its "broad text," to ensure that voters of color "can access the electoral system as easily as whites."⁴⁴ Justice Kagan admonished the majority for creating "extra-textual exceptions and considerations to sap the Act's strength" because it is apparent that "[n]o matter what Congress wanted, the majority has other ideas."⁴⁵

It is difficult to read *Brnovich* any other way, especially in light of *Shelby County*. These two decisions occupy what Justice Kagan has called a "law-free zone,"⁴⁶ with one opinion untethered from the relevant statutory text, the other unmoored from the constitution, and both disregarding decades of precedent. With such lawless reasoning, *Shelby County* and *Brnovich* lay bare the Roberts Court's antipathy toward the VRA's democracy-protective mission.

Unfortunately, it seems highly likely that the Court intends to weaken the VRA and what is left of Section 2 even further. In an act of obvious judicial activism, two Justices in *Brnovich* invited the argument that Section 2 lacks an implied private cause of action, despite half a century of private judicial enforcement.⁴⁷ One lower court has already taken them up on this invitation.⁴⁸

The Court has also decided to review two redistricting cases next term, *Merrill v. Milligan* and *Ardoin v. Robinson*, imperiling Section 2's protections against racial vote dilution. In *Merrill*, a three-judge district court, composed of jurists from across the ideological spectrum, unanimously ruled that Alabama's congressional redistricting map dilutes Black votes in violation of Section 2 because it packs Black voters into one majority-Black district when two could feasibly be drawn.⁴⁹ The district court in *Ardoin* came to a similar conclusion as to Louisiana's congressional map, a conclusion that the Fifth Circuit endorsed.⁵⁰ After straightforward applications of governing Section 2 precedent, both lower courts ordered the states to draw new congressional districts before the 2022 elections. But in both cases, the Supreme Court granted stays (leaving the racially dilutive maps in place) and opted to review the merits (even though no party had asked the Court to do so).⁵¹ Chief Justice Roberts, though he dissented from the grant of a stay in *Merrill*, expressed his interest in reviewing the merits of the case to "resolve" supposed "uncertainties arising under [*Thornburg v. Gingles*]," a

⁴¹ *Id.* at 2338-40.

⁴² Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, *The Atlantic* (July 8, 2021) ("These factors are intended to, and will, protect the states against many Section 2 lawsuits. They will make Section 2 claims less likely to be filed by plaintiffs, and more likely to be lost when they are.")

⁴³ *Brnovich*, 141 S. Ct. at 2361 (Kagan, J., dissenting) ("The majority's opinion mostly inhabits a law-free zone. It congratulates itself in advance for giving Section 2's text 'careful consideration.' And then it leaves that language almost wholly behind.")

⁴⁴ *Id.* at 2356, 2361 (Kagan, J., dissenting).

⁴⁵ *Id.* at 2372-73 (Kagan, J., dissenting).

⁴⁶ *Id.* at 2361 (Kagan, J., dissenting).

⁴⁷ *Id.* at 2350 (Gorsuch, J., concurring).

⁴⁸ *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 4:21-CV-01239-LPR, 2022 WL 496908, at *14 (E.D. Ark. Feb. 17, 2022) (concluding Section 2 lacks a private right of action).

⁴⁹ See *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819 (N.D. Ala. Jan. 24, 2022).

⁵⁰ *Robinson v. Ardoin*, No. CV 22-211-SDD-SDJ, 2022 WL 2012389 (M.D. La. June 6, 2022); *Robinson v. Ardoin*, 37 F.4th 208 (5th Cir. 2022) (finding defendants unlikely to succeed on the merits and denying stay application).

⁵¹ *Merrill v. Milligan*, 142 S. Ct. 879 (2022); *Ardoin v. Robinson*, No. (21A814), 2022 WL 2312680 (U.S. June 28, 2022).

case that has been applied consistently by federal courts for decades to protect minority voters from vote dilution.⁵²

The Court made its agenda even clearer in *Wisconsin Legislature v. Wisconsin Elections Commission* (2022), where it summarily reversed a decision of the Wisconsin Supreme Court selecting a new legislative district map after the political branches of that state had deadlocked and failed to pass a map.⁵³ The Wisconsin Court selected the Democratic Governor's proposed map in part because it contained one more district that would likely select a candidate preferred by Black voters than other submissions.⁵⁴ The Supreme Court's reversal was based on the proposition that a decision to create a majority-minority district in that part of Milwaukee triggered strict scrutiny and required a compelling justification, while a decision to create a white-controlled district in the same place apparently would have triggered no such scrutiny.⁵⁵ It thus seems clear that the Court is heading toward a ruling next year in *Merrill* and *Ardoin* that will nullify or at least weaken Section 2's mandate to prioritize equitable representation for minority voters in those parts of the country where there are high levels of racially polarized voting against Black-preferred candidates and where it is possible to draw majority-Black districts to try to counteract that polarization.

Aside from dismantling the Voting Rights Act piece by piece, the Roberts Court has also made it more difficult for voters to challenge laws that impose undue burdens on their fundamental right to vote in violation of the Fourteenth Amendment. In *Crawford v. Marion County Election Board* (2008), the Court rejected one such challenge in upholding Indiana's law requiring voters to present government-issued photo ID at the polls.⁵⁶ Justice Stevens, writing for one three-member plurality, reasoned that plaintiffs had not presented enough evidence to show the law's severe burden on certain groups (the elderly, unhoused, and indigent) to invalidate the law on its face.⁵⁷ The other three-member plurality would have applied even more deferential review because, in their view, the burden of photo ID was slight for most, even if more severe for some.⁵⁸ Most troublingly, however, six Justices accepted the state's baseless assertion that voter fraud justified the law, even though "the record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history."⁵⁹ This was, as scholars have noted, the Court's first real embrace of the voter fraud myth, and it "provided a roadmap for jurisdictions to follow to ensure that their voting-related restrictions evade searching review."⁶⁰ More than a decade later, the myth has successfully neutralized enough voting rights lawsuits that the Court in *Brnovich* wrote it into the VRA as a permanent guidepost.⁶¹ And, of course, others have transformed the myth into the Big Lie, which nearly broke a presidential election.⁶²

Finally, the Court's recent decisions made from its shadow docket in cases like *Republican National Committee v. Democratic National Committee* (2020) and the aforementioned

⁵² *Merrill*, 142 S. Ct. at 883 (Roberts, J., dissenting); see also Dahlia Lithwick, *The Supreme Court Wants You to Believe Voting Rights Are Too Complicated. They're Not*, *Slate* (Feb. 15, 2022), <https://slate.com/news-and-politics/2022/02/merrill-v-milligan-section-2-voting-rights-act-racial-redistricting-supreme-court.html>.

⁵³ *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1251 (2022).

⁵⁴ *Id.* at 1248.

⁵⁵ *Id.* at 1251.

⁵⁶ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008).

⁵⁷ *Id.* at 202 (rejecting the facial challenge but leaving open the possibility of an as-applied challenge).

⁵⁸ *Id.* at 204-05 (Scalia, J., concurring).

⁵⁹ *Id.* at 194.

⁶⁰ Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 *Sup. Ct. Rev.* 213, 231.

⁶¹ *Brnovich*, 141 S. Ct. at 2340.

⁶² See, e.g., Melissa Block, *The clear and present danger of Trump's enduring 'Big Lie'*, *NPR* (Dec. 23, 2021), <https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election>.

Merrill v. Milligan demonstrate yet another way in which the Roberts Court has made it more difficult for voters to enforce their rights. In these cases, and others,⁶³ the Court has often relied on the so-called *Purcell* principle to stay orders by lower courts requiring states to end discriminatory or unlawful voting practices before elections. The *Purcell* principle comes from a per curiam decision expressing the uncontroversial idea that courts should refrain from ordering changes to voting rules and procedures on the eve of an election if the order unduly risks causing voter confusion or incentivizing voters to refrain from participating.⁶⁴ In *Republican National Committee*, on the literal eve of the Wisconsin 2020 primary election, the Court stayed a district court order issued days beforehand extending the deadlines for voters to request and submit absentee ballots due to the risk of gathering amid COVID-19.⁶⁵ Ironically, the Court justified its extremely late intrusion into the election by casting *Purcell* as applicable to lower federal courts, even though the Court's stay order would cause the massive confusion and disenfranchisement *Purcell* sought to avoid.⁶⁶

Likewise, in *Merrill*, the Court blocked a three-judge district court's unanimous ruling that Section 2 required Alabama to draw a congressional map in which Black people would make up majorities in two of seven districts. In a meticulous 225-page opinion issued days after an expedited seven-day hearing, the district court ordered the state to redraw its congressional map.⁶⁷ Despite the state's admission that it could do so in time for the primary election months away, the Supreme Court stayed the order. In his concurrence, Justice Kavanaugh explained that *Purcell* compelled a stay.⁶⁸ But applying *Purcell* made no sense. The congressional map being challenged was brand new, drawn based on new decennial census data, and had never been used; thus, there was no status quo to disrupt. Furthermore, the Court's *Purcell* reasoning arrived in a decision in the beginning of February when the corresponding primary election was not scheduled until May.⁶⁹ To say that the district court's ruling came too late is to say that *all* new maps passed in this decade's redistricting must be allowed to be used in 2022, regardless of how flagrantly illegal they may be.

While the Court has used *Purcell* to block lower court injunctions protecting the right to vote, it has also *declined* to apply the rule when doing so would help voters avoid disenfranchisement, chaos, and confusion. For example, in *Raysor v. DeSantis* (2020), the Court allowed the Eleventh Circuit to change the voting eligibility rules for nearly one million Floridians with prior felony convictions just days before the state's voter registration deadline.⁷⁰ At issue in the case was Florida's pay-to-vote scheme requiring people with prior felony convictions to pay all outstanding fines, fees, and restitution before regaining the right to vote. The district court ruled the scheme an unconstitutional poll tax and a violation of equal protection as applied to individuals who are unable to pay, and had preliminarily enjoined the law for several months before issuing its final decision. After the appeals court issued its stay, the *Raysor* plaintiffs asked the Supreme Court to lift it, citing the confusion likely to be generated by the stay among already registered voters and those who had already applied for

⁶³ See, e.g., *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (staying a lower court decision ordering the Alabama Secretary of State to lift a ban on curbside voting during the COVID-19 pandemic).

⁶⁴ *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

⁶⁵ *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020).

⁶⁶ *Id.* at 1207.

⁶⁷ See *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819 (N.D. Ala. Jan. 24, 2022), cert. granted before judgment sub nom. *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

⁶⁸ *Merrill*, 142 S. Ct. 879, 880-81.

⁶⁹ *Id.* at 888 (Kagan, J., dissenting).

⁷⁰ *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020).

and potentially received an absentee ballot. In an almost wordless order on its shadow docket, the Court denied the application. In dissent, Justice Sotomayor noted that she would have lifted the stay in part on *Purcell* grounds, adding that the Court's selective application of the principle "continues a trend of condoning disenfranchisement."⁷¹

The Court's recent misuse of its shadow docket proves hollow yet another assurance from Chief Justice Roberts in *Shelby County*, that "injunctive relief is available in appropriate cases to block voting laws from going into effect."⁷² Like the rest of the Roberts Court's voting rights decisions, these cases represent how far the Court is willing to stray from established law to limit the remedies available to voters harmed by racially discriminatory and needlessly burdensome voting laws.

B. Partisan Gerrymandering

While the Roberts Court's voting rights decisions have actively facilitated vote suppression and dilution, the Court's partisan gerrymandering jurisprudence is a story of deliberate abdication, but to the same end.

Partisan gerrymandering is the practice of drawing electoral district lines to favor voters of one political party over another.⁷³ Mapmakers do this by "packing" voters likely to support the disfavored party into relatively few super-majority districts and "cracking" the rest across many districts where they will be unable to elect candidates of their choice. The practice is as old as the Republic, but big data and sophisticated mapping software have made it easier to draw partisan gerrymanders so precise and extreme that even major shifts in voters' preferences cannot shake loose the advantaged party's hold on power. In 2011, for example, Republican-controlled legislatures around the country drew some of the most extreme partisan gerrymanders in American history, securing super-majorities even in states where Democrats sometimes received more than 50 percent of the votes.⁷⁴

These extreme partisan gerrymanders do not just offend basic principles of representative government; they also violate the Constitution. But recognizing that the Constitution tolerates *some* political motivation in redistricting, the Court has never agreed on a standard for assessing when partisan gerrymanders rise to the level of unconstitutionality. For example, in *Vieth v. Jubelirer* (2004), all nine Justices acknowledged that an extreme partisan gerrymander violates the Constitution. But the Justices could not coalesce around a standard for drawing the constitutional line.⁷⁵ Four of them said this job was so difficult that a challenge to a partisan gerrymander should be treated as a non-justiciable political question. Four other Justices would have held that the Pennsylvania congressional map at issue was unconstitutional. But Justice Kennedy determined that while he could not identify a workable standard in 2004, it did not mean that "none will emerge in the future."⁷⁶ He proved to be

⁷¹ *Id.* at 2603 (Sotomayor, J., dissenting).

⁷² *Shelby Cty.*, 570 U.S. at 537.

⁷³ The Constitution commits the process of redistricting after each decennial census to states' legislative discretion; some states have placed this power in independent or quasi-independent commissions while others leave it to self-interested legislators. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015); Campaign Legal Center, *Designing Independent Redistricting Commissions*, https://campaignlegal.org/sites/default/files/2018-07/Designing_IRC_Report2_FINAL_Print.pdf.

⁷⁴ A good example is Wisconsin, where the Assembly map drawn in 2011 gave the Republicans well over 60 percent of the seats even in years when a majority of the votes cast for Assembly candidates in the state favored Democrats. See *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). This is not to say that Democratic-controlled states have not also gerrymandered in the last decade. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493 (2019) (describing the Maryland congressional map).

⁷⁵ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

⁷⁶ *Id.* at 311 (Kennedy, J., concurring).

correct; following the 2010 gerrymandering season, legal scholars, mathematicians, and social scientists devised numerous straightforward metrics to measure the extent of partisan bias and to identify the most extreme and unconstitutional cases.⁷⁷

In *Rucho v. Common Cause* (2019), the Roberts Court closed the door on any attempt to remedy even the most extreme partisan gerrymanders in federal court.⁷⁸ While the Court acknowledged that partisan gerrymanders are “incompatible with democratic principles” and can be unconstitutional,⁷⁹ it held that partisan gerrymandering claims present non-justiciable “political questions beyond the reach of federal courts.”⁸⁰ The Court’s rationale for withholding review of these claims was that it lacked a manageable standard for resolving them.⁸¹ The Court reasoned that because some degree of partisan gerrymandering is within constitutional bounds, it had no way to determine when partisan gerrymandering had gone too far.⁸²

As Justice Kagan indicated in her dissent, the majority’s opinion was divorced from both precedent and reality. “For the first time ever,” she wrote, “this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.”⁸³ Indeed, the Supreme Court had never before identified a non-justiciable political question on the sole basis that it could not settle on a standard. In the seminal one-person-one-vote cases, the Court rejected arguments that the political question doctrine barred court review of any question that demanded an answer on how much vote dilution is too much.⁸⁴ In those cases, the Court drew a line—as courts do—to distinguish between permissible levels of population deviation among electoral districts and impermissibly high deviations that result in unconstitutional vote dilution. Unlike now, the Court of that time recognized that if it could draw a line, then it must, to remedy manifest and unconstitutional unfairness in the political process.

The *Rucho* decision also ignored the reality that there are several reliable measures of partisan gerrymandering, any or all of which could serve as the basis for a judicially manageable standard. As Justice Kagan pointed out, state and lower federal courts were already “coalesc[ing] around” a standard that focused on the unconstitutional harm of vote dilution arising from these gerrymanders.⁸⁵ That standard, well known to courts, generally asked plaintiffs to show purpose (that map-drawers predominantly intended to entrench their party in power) and effect (that the lines substantially diluted their votes), and if those elements were met, the state could provide a legitimate, non-partisan justification for drawing lines as it did.⁸⁶

Toward the end of its *Rucho* opinion, the Court justified its abdication with a passing reference to itself as an “unelected and politically unaccountable branch” of government.⁸⁷ Such a counter-majoritarian body, wrote Chief Justice Roberts, could not take “license to reallocate

⁷⁷ See, e.g., Nicholas O. Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, Election L.J. Vol. 6, No. 1 (2007); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, Election L.J. Vol. 15, No. 4 (2015); Gregory S. Warrington, *Quantifying Gerrymandering Using Vote Distribution*, Election L.J.: Rules, Pol., & Poly, Vol. 17, No. 1 (2018).

⁷⁸ *Rucho v. Common Cause*, 139 S. Ct. 2848, 2504 (2019).

⁷⁹ *Id.* at 2505-06 (acknowledging the existence of unconstitutional partisan gerrymandering).

⁸⁰ *Id.* at 2506-07.

⁸¹ *Id.* at 2498-99.

⁸² *Id.* at 2497.

⁸³ *Id.* at 2509 (Kagan, J., dissenting).

⁸⁴ *Baker*, 369 U.S. at 186; *Reynolds*, 377 U.S. at 533.

⁸⁵ *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

⁸⁶ *Id.* at 2516.

⁸⁷ *Id.* at 2507 (majority opinion).

political power between the two major parties” without clear rules and standards.⁸⁸ Justice Kagan pointed out that the Court could have limited its involvement to only the most extreme cases simply “by requiring plaintiffs to make difficult showings” as to purpose and effect.⁸⁹ Evenhandedly adjudicating vote dilution claims, including partisan gerrymandering claims, is doable and falls squarely within the Court’s tradition of democracy-reinforcing review. But abandoning judicial review and leaving voters without federal remedies for unconstitutional vote dilution—that is the real counter-majoritarian move.⁹⁰

As a consolation, the *Rucho* majority assured us that it does not “condone excessive partisan gerrymandering” and that the problem can still be addressed in state courts.⁹¹ “Provisions in state statutes and state constitutions,” Chief Justice Roberts wrote, “can provide standards and guidance for state courts to apply.”⁹²

But in deciding to hear *Moore v. Harper*, the Roberts Court may now be poised to renege on this assurance too.⁹³ The specific issue in *Moore* is whether the North Carolina Supreme Court has authority to review and strike down the state’s congressional district map as a partisan gerrymander in violation of certain state constitutional standards. The central focus of the case will be to what extent the Court adopts a fringe legal concept known as the “independent state legislature” (ISL) theory. The ISL theory claims that state legislatures have ultimate power under the U.S. Constitution to regulate federal elections, without checks by any other state officials or review by state courts for violations of state constitutions.⁹⁴

The few proponents of the ISL theory are wrong: the text and original meaning of “Legislature,” as used in the Elections and Electors Clauses of the U.S. Constitution, refer to a state’s legislative power *as created and defined* by its state constitution.⁹⁵ The ISL theory is also dangerous.⁹⁶ It would allow state legislatures to partisan gerrymander without *any* court review, call into question the constitutionality of independent redistricting commissions, and permit state legislatures to pass restrictive or unfair election laws without recourse in state courts. In short, the ISL theory would upend American democracy, and yet at least four sitting Justices have expressed an openness to it.⁹⁷

⁸⁸ *Id.*

⁸⁹ *Id.* at 2516 (Kagan, J., dissenting).

⁹⁰ See, e.g., Pam Karlan, *The New Countermajoritarian Difficulty*, 109 Cal. L. Rev. 2323, 2349-52 (2020); Nicholas O. Stephanopoulos, *The Anti-Caroline Court*, 2019 Sup. Ct. Rev. 111, 113.

⁹¹ *Rucho*, 139 S. Ct. at 2507.

⁹² *Id.*

⁹³ See Order List: 597 U.S. (June 30, 2022), https://www.supremecourt.gov/orders/courtorders/063022zor_5he6.pdf.

⁹⁴ The ISL theory has roots in Justice Rehnquist’s concurrence in *Bush v. Gore*, joined by Justices Thomas and Scalia, which argued for reversal of the Florida Supreme Court’s recount order because it infringed on the state legislature’s exclusive authority to regulate presidential elections. See *Bush v. Gore*, 531 U.S. 98, 111-22 (2000) (Rehnquist, J., concurring). See generally Ethan Herenstein & Thomas Wolf, *The Independent State Legislature Theory, Explained*, Brennan Center for Justice (June 30, 2022), <https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained>; Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 Calif. L. Rev. 2381, 2388-90 (2021); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 8 (2020).

⁹⁵ See Helen White, *The Independent State Legislature Theory Should Horrify Supreme Court’s Originalists*, Just Security (June 30, 2022), <https://www.justsecurity.org/81990/the-independent-state-legislature-theory-should-horrify-supreme-courts-originalists/>; Michael Weingartner, *Liquidating the Independent State Legislature Theory*, Harv. J. L. & Pol’y (forthcoming), <https://ssrn.com/abstract=4044138>; Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. ___ (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755; Vikram David Amar, (Yet) Another Reason ISL Theory is Wrong About the Meaning of the Term State “Legislature”: The Constitution’s References to the Federal Counterpart—“Congress”, Verdict (June 30, 2022), <https://verdict.justia.com/2022/06/30/yet-another-reason-isl-theory-is-wrong-about-the-meaning-of-the-term-state-legislature-the-constitutions-references-to-the-federal-counterpart-congress>.

⁹⁶ Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 Mich. State L. Rev. ___ (2022) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4041062.

⁹⁷ See *Moore v. Harper*, 142 S. Ct. 1089, 1089-90 (2022) (Alito, J., dissenting from denial of application for stay); *Republican Party of Penn. v. DeGraffenreid*, 141 S. Ct. 732 (2021) (Thomas, J., dissenting from denial of certiorari); *Democratic Nat’l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 29, 34 n.1 (2020) (Gorsuch, J., concurring) (Kavanaugh, J., concurring).

C. Campaign Finance

The Roberts Court's treatment of campaign finance regulations has also done considerable damage to American elections. The dependence of political candidates on wealthy special interests makes elected officials responsive to their large donors rather than to the American people. And the tremendous power of moneyed interests in politics threatens the right of everyday Americans to participate in the political process by drowning out their voices. The Roberts Court's decisions have limited our government's ability to address these problems.

The Court's decision in *Citizens United v. Federal Election Commission* (2010) is a prime example. In *Citizens United*, the Court overturned the federal ban on corporations and unions making independent expenditures and financing electioneering communications.⁹⁸ Bans on corporate and union campaign spending had existed in some form since the passage of the Taft-Hartley Act of 1947.⁹⁹ They reflected a longstanding public concern that excessive corporate campaign spending enables corporations to dominate and thereby distort the political process, an interest which the Court deemed compelling in an earlier case upholding similar bans enacted by states.¹⁰⁰ *Citizens United* overruled that case, holding that the First Amendment did not permit limitations on corporate political spending for any reason other than to prevent corruption or its appearance.¹⁰¹ The Court also narrowed the scope of the anticorruption interest to encompass only quid pro quo corruption and not other types of corruption like purchases of influence over or access to elected officials.¹⁰² Because the bans at issue concerned *independent* expenditures (not coordinated with any candidate), the Court held they could not be justified by an interest in curbing quid pro quo corruption.¹⁰³

The *Citizens United* decision gave corporations and unions the green light to spend unlimited money on campaigns. Perhaps more importantly, it also led to the creation of super PACs, or independent expenditure-only committees, which have enabled relatively few wealthy mega-donors to anonymously pool enormous sums of money to influence elections.¹⁰⁴ Super PACs spent more than \$2.1 billion in the 2020 election cycle.¹⁰⁵ *Citizens United* also facilitated the rise of dark money spent through nonprofits that are not required to disclose their donors.¹⁰⁶

The impact of *Citizens United* was felt widely by the time the Court decided to weaken contribution limits in *McCutcheon v. Federal Election Commission* (2014).¹⁰⁷ In that case, the Court struck down the federal aggregate limits on how much an individual can contribute in a two-year election cycle.¹⁰⁸ These limits were enacted to prevent wealthy individuals from getting around base contribution limits by giving to multiple political committees. In 1976, the Supreme Court in *Buckley v. Valeo* had found aggregate limits constitutional.¹⁰⁹ But in

⁹⁸ *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

⁹⁹ Joseph E. Sandler, *Federal Campaign Act of 1971 (1971)*, The First Amendment Encyclopedia (2009), <https://www.mtsu.edu/first-amendment/article/1078/federal-election-campaign-act-of-1971>.

¹⁰⁰ See *Austin*, 494 U.S. at 660.

¹⁰¹ *Citizens United*, 558 U.S. at 365.

¹⁰² *Id.* at 359.

¹⁰³ *Id.* at 361.

¹⁰⁴ Tim Lau, *Citizens United Explained*, Brennan Center for Justice (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>.

¹⁰⁵ *2020 Outside Spending, by Super PAC*, Open Secrets, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2020&chrt=V&disp=O&type=S>.

¹⁰⁶ Tim Lau, *Citizens United Explained*, Brennan Center for Justice (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>.

¹⁰⁷ Campaign contributions from Super PACs increased from \$62,641,448 in 2010, when *Citizens United* was decided, to \$345,110,359 in 2014, when *McCutcheon* was decided. *2010 Outside Spending, by Super PAC*, Open Secrets,

<https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S>; *2014 Outside Spending, by Super PAC*, Open Secrets, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=S>.

¹⁰⁸ *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014).

¹⁰⁹ *Id.* at 198-99.

McCutcheon, the Court intensely scrutinized the law and found it “far too speculative” that someone might “contribute massive amounts of money” to multiple entities to evade base contribution limits.¹¹⁰ Justice Breyer’s dissent noted the thin evidentiary record in the case and chided the majority for itself speculating about whether donors would likely exploit the loophole closed by the aggregate limit.¹¹¹ He also noted that questions regarding the need for aggregate limits and their fit with anticorruption goals are best left to Congress to resolve.¹¹² In reality, the evasion of base contribution limits that five Justices deemed too speculative and improbable began in the very next election following the decision.¹¹³

Finally, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* (2011) is perhaps the most perplexing of the Roberts Court’s campaign finance decisions. The case concerned the constitutionality of a provision in Arizona’s public financing program that provided participating candidates with additional funds if a non-participating opponent or outside group spent above a certain threshold.¹¹⁴ The Court held the “matching funds provision” unconstitutional on grounds that it burdened political speech of non-participating candidates and did not serve a compelling interest.¹¹⁵

The “burden” identified by the Court was that the matching funds provision could make non-participating candidates hesitate before spending money above a point at which it would trigger additional public funds for their opponent.¹¹⁶ But, as Justice Kagan suggested in dissent, this vague pressure cannot be fairly characterized as a burden or restriction on free speech.¹¹⁷ The provision was a speech *subsidy* and therefore produced *more* speech and *more* competitive campaigning, not less.¹¹⁸ In other words, it served the core purpose of the First Amendment to “foster a healthy, vibrant political system full of robust discussion and debate.”¹¹⁹

The majority went on to hold that the law did not serve a compelling interest, finding the state’s anticorruption rationale unconvincing and any interest in “leveling the playing field” anathema to the First Amendment.¹²⁰ But in *Buckley* the Court recognized that public financing programs served to reduce corruption.¹²¹ Insofar as the matching funds provision preserved the integrity and viability of the program by ensuring publicly financed candidates could compete with privately financed candidates, it too served that same interest.

In sum, the Court’s major campaign finance decisions have all landed on the side of moneyed interests and those seeking to spend money in the political process. The Court is extremely sensitive to any perceived burden in this regard—so much that it will engage in mental gymnastics to find a speech burden in a speech subsidy. This sensitivity stands in contrast to the Court’s relative blindness to the very real and often severe burdens voters face participating in American democracy.

¹¹⁰ *Id.* at 210.

¹¹¹ *Id.* at 285-59 (Breyer, J., dissenting).

¹¹² *Id.* at 259 (Breyer, J., dissenting).

¹¹³ Lawrence M. Noble, *Supreme Court, Meet Reality*, Campaign Legal Center (Jan. 5, 2016), <https://campaignlegal.org/update/supreme-court-meet-reality>.

¹¹⁴ *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

¹¹⁵ *Id.* at 747.

¹¹⁶ *Id.* at 737.

¹¹⁷ *Id.* at 764 (Kagan, J., dissenting).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 757.

¹²⁰ *Id.* at 748-49.

¹²¹ *Buckley*, 424 U.S. at 96 (finding that Congress has a significant interest in eliminating “improper influence of large private contributions”).

Part III: The Impact of the Roberts Court on American Democracy

The Roberts Court's decisions together have contributed to the recent decline of American representative democracy. Its decisions in *Shelby County* and *Brnovich* gutted the most powerful provisions of the Voting Rights Act, hamstringing Congress's noble efforts to deliver on the promise of the Fifteenth Amendment. These and other decisions have made it easier for states to enact restrictive voting laws and draw electoral maps that dilute votes based on race and political party, and at the same time, harder or impossible for voters to challenge them in court. Finally, the Court has transformed the myth of voter fraud into a free pass to enact burdensome and discriminatory voting rules, while narrowing the acceptable justifications to rein in the distorting influence of money in elections. All of the Roberts Court's decisions have also led to greater political polarization.

As far as explanation, the Court's decisions chronicled here lack any coherent and principled through-line. The decisions cannot be explained, for example, by a principled commitment to judicial restraint. That interest could explain why the Court in *Rucho* decided not to venture further into the political thicket. But it cannot explain the Court's ready willingness to strike down democracy-reinforcing acts of Congress in *Shelby County*, *Citizens United*, and *McCutcheon*. It could explain the Court's uniform deference to legislatures when they assert a need for discriminatory or burdensome voting rules to combat voter fraud. But it cannot explain the Court's refusal to afford the same deference when legislatures see a need to regulate money in politics to combat corruption and its appearance. Nor can these decisions be explained by a devotion to text, not with the addition of extra-textual factors in *Brnovich* or the failure to consider the Fifteenth Amendment in *Shelby County*. And certainly these decisions cannot be explained by an abiding respect for precedent, not with *Citizens United* and *Rucho* both overruling key precedents.

The lack of a unifying theory for the Roberts Court's democracy jurisprudence leaves an explanatory void that does damage to the Court's legitimacy. It leaves room to wonder whether the Roberts Court is guided in this realm not by some coherent judicial philosophy but by other motivations. Some have, for example, pointed to the consistent partisan make-up of the winners of these decisions—including where partisan amici fall on opposite sides of the “v”—as an indication that the outcomes may simply reflect loyalty of the Justices to the party or ideology of the President who appointed them.¹²² Another theory is that members of the current majority are simply averse to an egalitarian, participatory democracy in which every eligible citizen votes.¹²³ Indeed, the losing party in every one of the Court's decisions discussed here are American voters, particularly voters of color and those from marginalized backgrounds.

Speculation about the Justices' subjective motivations, especially as they relate to democracy itself, does no favors to the Court's current public perception problem. A June Gallop poll

¹²² See, e.g., Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 Sup. Ct. Rev. 111; Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 Geo. L.J. 50 (2020).

¹²³ See Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 St. Louis U. L.J. (2020). See also Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 Calif. L. Rev. 2381, 2388 (describing the current posture of the Court as premising the right to vote on “deservedness and privilege rather than its status as a fundamental right”).

reported public confidence in the Supreme Court at 25 percent, a historic low.¹²⁴ In a May 2022 Quinnipiac poll, a staggering 61 percent of registered voters said they believe the Supreme Court is mainly motivated by politics rather than law.¹²⁵ And more than half of registered voters, 52 percent, reported that they disapproved of the way the Court is handling its job, with 37 percent approving and 14 percent not expressing an opinion.¹²⁶ By contrast, in 2003, the Court's disapproval rating was only 28 percent, with 56 percent approving and 17 percent not expressing an opinion.¹²⁷ The President's Commission on the Supreme Court acknowledged that the Court's role in democracy and its perceived legitimacy are key factors in the debates surrounding court reform.¹²⁸ In recent public statements, the Justices themselves have also acknowledged the problem.¹²⁹

Conclusion

In sum, the Supreme Court's decisions on voting rights, partisan gerrymandering, and campaign finance have done, and continue to do, damage to voters, American democracy generally, and to the legitimacy of the Supreme Court itself. As we've noted, the Court's new supermajority appears poised to speed along on this anti-democratic trajectory, with cases like *Merrill v. Milligan* and *Moore v. Harper* on the Court's docket for next term.

The question now is: What is to be done? Better lawyering by advocates for democracy is not the solution. The examples cited here show that this Court acts with determination to undermine democracy, even when its stated reasons for doing so are made out of whole cloth and utterly unpersuasive. When one branch of the federal government has gone this far astray, the only solution is a firm application of the "checks and balances" the Framers designed to prevent such abuses of power. Indeed, the Court's consistent undermining of American democracy is a quintessential example of why our Constitution leaves no single actor or institution immune from correction.

Congress must step up. It has the constitutional authority to correct many—though not all—of the Court's most egregious anti-democratic rulings. Congress has authority over the size, jurisdiction, and other particulars of how the Supreme Court and the federal court system is structured. The Framers also gave Congress the power to check the Court in other ways, such as changing the number of Justices and setting term limits. It is beyond the scope of this report to map out a specific program of congressional action in response to the Roberts Court's anti-democratic crusade, but serious, consistent, and substantial legislative effort to restore American democracy is the only remedy we have left.

¹²⁴ Jeffrey M. Jones, Confidence in U.S. Supreme Court Sinks to Historic Low (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx?utm_source=Democracy+Collaborative+at+ReThink+Media&utm_campaign=ad3e234a93-EMAIL_CAMPAIGN_2019_09_03_03_17_COPY_01&utm_medium=email&utm_term=0_3e305aa083-ad3e234a93-391789105.

¹²⁵ Quinnipiac University, *National Trend Information*, at 16 (May 18, 2022), https://poll.qu.edu/images/polling/us/us05182022_trends_uirc64.pdf.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Final Report of the Presidential Commission on the Supreme Court of the United States (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

¹²⁹ See, e.g., Zoe Tillman, *The Justices Are Having An Open Fight About The Legitimacy Of The Supreme Court*, BuzzFeed News (Dec. 1, 2021), <https://www.buzzfeednews.com/article/zoetillman/supreme-court-legitimacy-abortion-rights>; Devin Dwyer, *Justice Sotomayor sees 'unprecedented' threat to Supreme Court confirmation battles*, ABC News (Feb. 10, 2022), <https://abcnews.go.com/Politics/justice-sotomayor-sees-unprecedented-threat-scotus-confirmation-battles/story?id=82798225>; Ian Millhiser, *Kagan warns that the Supreme Court's legitimacy is in danger*, ThinkProgress (Sept. 17, 2018), <https://www.buzzfeednews.com/article/zoetillman/supreme-court-legitimacy-abortion-rights>; Andrew Chung, *U.S. Supreme Court not politicized, says Chief Justice Roberts*, Reuters (Sept. 24, 2019), <https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-supreme-court-not-politicized-says-chief-justice-roberts-idUSKBN1WA08F>; Gorsuch says *US Supreme Court not split on partisan lines*, AP News (Sept. 21, 2019), <https://apnews.com/article/876e78b3231d4513ae89aa65bb15af82>; Mary Ramsey, *Justice Amy Coney Barrett argues US Supreme Court isn't 'a bunch of partisan hacks'*, Louisville Courier Journal (Sept. 12, 2021), <https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2021/09/12/justice-amy-coney-barrett-supreme-court-decisions-arent-political/8310849002>.