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### Institutional Loyalty and the Design of Partisan Gerrymandering Adjudication in the Federal Courts

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**INSTITUTIONAL LOYALTY AND THE  
DESIGN OF PARTISAN  
GERRYMANDERING ADJUDICATION IN  
THE FEDERAL COURTS**

**Michael E. Solimine \***

ABSTRACT: In 2019 the Supreme Court held in *Rucho v. Common Cause* that challenges in federal court to partisan gerrymandering were nonjusticiable political questions. Writing for the 5-4 majority, Chief Justice John Roberts expressed concern that frequently deciding such cases would politicize the Court itself. Such expressions seem to fit well within the characterization of the Chief Justice as an

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institutionalist concerned with the legitimacy and reputation of the federal courts. This article addresses how the unique design and procedures of gerrymandering litigation in federal courts ought to inform such institutional loyalty arguments. Those features include that such cases are litigated before three-judge district courts, with a direct, mandatory appeal available to the Supreme Court. Large numbers of amicus curiae briefs by individuals and organizations with partisan leanings have also characterized such litigation in the Supreme Court. The article argues that these unique features themselves should be given greater emphasis in assessing whether Chief Justice Roberts; institutionalist concerns are well-founded.

#### INTRODUCTION

In 2019 the United States Supreme Court held in *Rucho v. Common Cause*<sup>1</sup> that partisan gerrymandering claims brought in federal court were nonjusticiable political questions. The case was highly publicized and resulted in a much discussed 5-4 decision, with Chief Justice John Roberts writing for the majority, and Justice Elena Kagan writing for the dissenters. Doctrinal analysis has focused on the Court's application of the venerable political question doctrine.<sup>2</sup> In addition, the result was frequently analyzed in largely ideological or partisan terms,<sup>3</sup> since all Justices appointed by Republican Presidents made up the majority, while all Justices in the dissent had been appointed by Democratic Presidents.

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<sup>1</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

<sup>2</sup> See, e.g., Case Comment, *Article III – Justiciability – Political Question Doctrine – Rucho v. Common Cause*, 133 HARV. L. REV. 252 (2019) (discussing the political question doctrine after *Rucho*).

<sup>3</sup> See, e.g., Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 Geo. L.J. Online 51 (2020) (arguing that the Supreme Court's recent decisions look partisan); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 Sup. Ct. Rev. 111 (same).

Another focus of the commentary was the Court's concern with the effect of adjudicating such cases on the perceived partisanship and legitimacy of the Court itself. The Court, after canvassing the various proposed ways to identify unlawful partisan gerrymanders, and finding that they "pose[d] basic questions that are political, not legal,"<sup>4</sup> expressed concern that the plaintiffs were seeking "an unprecedented expansion of judicial power... into one of the most intensely partisan aspects of American political life."<sup>5</sup> "That intervention," the Court continued, "would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting."<sup>6</sup> This concern accords with the frequent characterization of the Chief Justice as an institutionalist, concerned with maintaining as much as possible the putatively nonpartisan nature and perception of the Court.<sup>7</sup>

Recently David Fontana and Aziz Z. Huq have mapped out how judges and other public officials make decisions based, in whole or

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<sup>4</sup> *Rucho*, 139 S. Ct. at 2500.

<sup>5</sup> *Id.* at 2507.

<sup>6</sup> *Id.*

<sup>7</sup> See Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2243 (2019) (book review) (discussing the widespread assumption that the Chief Justice "reportedly switched his vote on the individual mandate [in the Obamacare case, *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)] in order to safeguard the Supreme Court's reputation.") (footnote omitted). See also Peter Baker, *Trump, in India, Demands 2 Liberal Justices Recuse Themselves From His Cases*, N.Y. TIMES, Feb. 26, 2020, archived at <https://perma.cc/5JVG-UF8Q> (recounting how Roberts stated that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges," responding to criticism of an "Obama judge" by President Trump) (internal quotes omitted); Jeannie Suk Gersen, *The Supreme Court Confronts Trump's Challenge to the Separation of Powers*, THE NEW YORKER, May 2, 2020, archived at <https://perma.cc/3L3Q-38SA> ("For those at the top of the judicial branch, there is a motivation that is greater than partisanship: the desire to retain the perception of legitimacy that is most crucial to maintenance of its power."); Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, THE ATLANTIC, July 13, 2020, archived at <https://perma.cc/U5YN-RCVF> (stating that Roberts "would make it his highest priority to protect the Court's institutional legitimacy.").

in part, on such institutional loyalties.<sup>8</sup> The “behavior of federal officials,” they argue, “cannot always be explained simply by partisan or ideological motives.”<sup>9</sup> Instead, it can sometimes be attributed to an official’s “psychological proclivity” to act in a way that the official perceives to be in the best interest of her home institution.<sup>10</sup> These loyalties, they continue, are not ends in themselves: “[r]ather, they play a foundational role in sometimes helping, and sometimes hindering, the realization of otherwise normatively desirable constitutional ends.”<sup>11</sup> Normatively, some notion of that loyalty is justifiable as an implicit, if not explicit, component of the separation of powers, as originally conceived by the Framers to be “a central dynamo of branch autonomy and healthy interbranch friction.”<sup>12</sup> Again referring to Chief Justice Roberts, Fontana and Huq say that in some of his decisions, “[s]tandard ideological or attitudinal models of judicial behavior do not offer straightforward explanation[s]” for his votes.<sup>13</sup> Institutional loyalty can also be deployed to explain, at least in part, Roberts’ concern with what he would consider to be the perceived politicization of the federal judiciary were it to frequently decide partisan gerrymandering cases.<sup>14</sup>

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<sup>8</sup> David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1 (2018).

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 8.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 3 (referring to, among other things, arguments by James Madison in *The Federalist* 51). See also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2318 (2006) (making similar arguments).

<sup>13</sup> Fontana & Huq, *supra* note 8, at 6. They are particularly referencing his vote in the 2012 Obamacare case. *Id.* at 5-6.

<sup>14</sup> See, e.g., David Cole, *Keeping Up Appearances*, N.Y. REV. BOOKS, Aug. 15, 2019, at 18-19 (“And while there is much to criticize in Robert’s gerrymandering decision . . . , the strongest prudential argument in his favor is the risk that, if courts start reviewing such claims, they would be dragged into the partisan muck.”)

That explanation seems to carry considerable force, but in this Article I go a step further, and explore how the unique design and procedures of federal court litigation of these claims affected the institutional loyalty that apparently concerned the Chief Justice. To make the same point in a slightly different way, I borrow from Richard Pildes' distinction between courts using institutional formalism and institutional realism.<sup>15</sup> In the former, a court analyzes an institution at a "high level of abstraction and generality" in constitutional and public law.<sup>16</sup> In contrast, doctrine that engages in realism "penetrate[s] the institutional black box" to take into account "how these institutions actually function in, and over, time."<sup>17</sup> My aim here is not to engage in doctrinal analysis as such. Instead, I will focus on and unpack the black box of the federal court adjudicative system itself, to better understand and evaluate how institutional loyalty came to play a role in the disposition of *Rucho*.

The Article proceeds as follows. Part I addresses the three-judge district court, with its unusual mechanism of direct appeals to the Supreme Court, which is the required forum for adjudication of apportionment and gerrymandering claims, partisan, racial, or otherwise. This Part considers the history of that court; the implications of Congress restricting in 1976 the jurisdiction of that court to only apportionment claims; and whether the direct appeal option should be considered as restricting the percolation of appeals to the Court or otherwise unduly negatively impacting adjudication at the Court itself. Part II of the Article will focus on how the legal

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<sup>15</sup> Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* Relevant to the present topic, Pildes gives as an example of institutional realism the federal courts, in the reapportionment revolution in the 1960s, at least implicitly taking into account the fact that until that time, many state legislatures failed to redraw malapportioned legislative districts. *Id.* at 36-37.

profession, interest groups, and the other branches of government sought to influence the Court's decision in *Rucho*, and prior similar cases, especially through the use of amicus curiae briefs.<sup>18</sup> The conclusion considers the implication of Parts I and II for possible future adjudication of partisan gerrymandering claims, and proposes that the institutional concerns in the context arguably relied upon by some members of the Court themselves be reexamined.

### I. THE THREE-JUDGE DISTRICT COURT AND DIRECT APPEALS OF PARTISAN GERRYMANDERING SUITS

*Rucho v. Common Cause*<sup>19</sup> decided two direct appeals from separate three-judge district court decisions. One held that Congressional districts drawn by the Republican-controlled state legislature in North Carolina unlawfully favored the Republican party.<sup>20</sup> The other held that Congressional districts drawn by a Democratic-controlled state legislature in Maryland unlawfully favored the Democratic party.<sup>21</sup> The Supreme Court remanded both cases without reaching the merits, and ordered that they be dismissed for lack of jurisdiction.<sup>22</sup>

#### A. THE THREE-JUDGE DISTRICT COURT AND ITS DISCONTENTS

The culmination of the litigation in *Rucho* builds on the rich and colorful history of the three-judge district court in the federal system. Congress created the court in 1910<sup>23</sup> as a reaction to the then-

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<sup>18</sup> See Fontana & Huq, *supra* note 8, at 9.

<sup>19</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

<sup>20</sup> *Common Cause v. Rucho*, 279 F. Supp.3d 587 (M.D.N.C. 2018) (three-judge court).

<sup>21</sup> *Lamone v. Benisek*, 348 F. Supp.3d 493 (D. Md. 2018) (three-judge court).

<sup>22</sup> *Rucho*, 139 S. Ct. at 2508.

<sup>23</sup> Act of June 19, 1910 § 266, 36 Stat. 1100.

controversial decision of *Ex parte Young*,<sup>24</sup> which made it easier for corporations to sue in federal court to seek injunctions against the enforcement of Progressive Era legislation. Congress required that rather than the usual litigation before a single district judge with normal appellate review thereafter, when such injunctive relief was sought against state statutes for constitutional violations, a three-judge trial court was convened, consisting of the district judge before whom the suit was filed, and two other judges (at least one of whom must be a circuit judge) appointed by the Chief Judge of the Circuit. A direct appeal of that court's decision could be had to the Supreme Court. The rationale for the court was that such suits were considered especially controversial and important, and that they would be better adjudicated, and therefore better accepted by the public, if decided by three judges rather than one. The direct appeal mechanism was meant to ensure accelerated review by the Supreme Court.<sup>25</sup>

While originally framed as a brake against a purportedly activist federal judiciary holding state laws unconstitutional, this rationale was turned on its head by litigators four decades later. During the 1950s and 60s, some litigators in civil rights cases, particularly though not only in southern states, found three-judge district courts to be more hospitable to their actions as compared to district judges

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<sup>24</sup> *Ex parte Young*, 209 U.S. 123 (1908).

<sup>25</sup> For further discussions of the establishment and early history of the three-judge district court, see OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE*, 1888-1910, at 211-20 (1993) (Holmes Devise History of the Supreme Court); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 184-85 (2009); Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 111-18 (2008) [hereinafter Solimine, *Congress*]. Congress expanded the jurisdiction of the court in 1937 to include constitutional challenges by civil plaintiffs to federal statutes, Solimine, *supra*, at 124-25, and still later vested a three-judge district court in the District of Columbia with exclusive jurisdiction to hear declaratory judgment actions by certain state and local governments affected by the preclearance provisions of the Voting Rights Act of 1965. *Id.* at 132-33.

acting alone. They also favored the prospect of direct appeals to the relatively friendly confines of the Warren Court.<sup>26</sup> Coincidentally or not, large numbers of three-judge district courts were convened each year in the 1960s and 70s (up to over 300 a year in the latter decade),<sup>27</sup> a function largely of increased civil rights litigation.<sup>28</sup>

While favored by some civil rights litigators, at the same time the three-judge district court fell out of favor in other quarters. A formidable array of critics marshalled several arguments in favor of limiting the jurisdiction of, or simply abolishing, the court. Prominent federal judges, lawyers and academics found it awkwardly and administratively burdensome to assemble three judges to hear a case that, as they saw it, could and should be decided by a single judge, with normal appellate review thereafter.<sup>29</sup> The

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<sup>26</sup> On the increased targeting of three-judge district courts by civil rights litigators, see Solimine, *Congress*, *supra* note 25, at 126-31.

<sup>27</sup> Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REF. 79, 137 (1996) (tbl.1) (data drawn from the Annual Reports of the Administration office of the United States Courts documenting sharp increase in three-judge district court hearings from 1964 to 1977, especially in civil rights and reapportionment cases) [hereinafter Solimine, *Voting Rights*].

<sup>28</sup> On the increase in civil rights litigation in this period, brought by interest groups (e.g., the ACLU and NAACP), increasingly numbers of lawyers, and facilitated by changes in substantive and procedural law, see SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 5 (2010); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 279-85 (1989); Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1991-2000 (2004).

<sup>29</sup> See, e.g., AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, 316-21 (1969) (arguing that federalism concerns that motivated the establishment of the court were no longer paramount, and that the court should be abolished for constitutional challenges to federal statutes, but left intact for such challenges to state statutes, albeit only when requested by the defendant) [hereinafter ALI STUDY]; FED. JUD. CTR., *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT*, 57 F.R.D. 573, 596-99 (1972) (Freund Report); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964) (arguing against a general rule for three judge panels in constitutional

Supreme Court overtly criticized the burgeoning direct appeals from the courts as an unnecessary exception to the usual certiorari process.<sup>30</sup> Responding to these criticisms, in the 1970s the Senate and House Judiciary Committee began considering legislation to limit or eliminate the court. The proposals encountered little resistance, other than from the NAACP, which argued that the court was still necessary because of the possible parochialism of federal judges sitting alone, particularly in sensitive civil rights cases. Those arguments were rejected, and the debate was framed almost exclusively in terms of non-ideological administrative efficiency, deferring to the expertise of the proponents.<sup>31</sup> Legislation abolishing the three-judge district court, with one exception, passed in 1976.<sup>32</sup>

The exception is relevant to this Article. It states that the court still must be convened for constitutional challenges to the “apportionment” of Congressional districts or statewide legislative bodies.<sup>33</sup> The rationale for this exception is not clear. Some stalwart critics of the three-judge district court nonetheless allowed that the periodic court challenges to the decennial redrawing of legislative districts, necessitated by the Reapportionment Revolution initiated by *Baker v. Carr*,<sup>34</sup> was a potential source of notable friction between

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litigation). See generally Solimine, *Congress*, *supra* note 25, at 137-40 (discussing views of judges, academics and lawyers).

<sup>30</sup> See, e.g., *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98-99 (1974) (criticizing the direct appeals process as serving no real policy objective); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (same). See generally Solimine, *Congress*, *supra* note 25, at 135-37, 139-41 (discussing views of the Justices).

<sup>31</sup> Solimine, *Congress*, *supra* note 25, at 141-48 (discussion of legislative activity in the 1970s, including opposition by the NAACP). See also Carolyn Shapiro, *Docket Control, Mandatory Jurisdiction, and the Supreme Court's Failure in Rucho v. Common Cause*, 2020 Wis. L. Rev. 301, 309-13 (overview of the legislative background to the reapportionment exception) [hereinafter Shapiro, *Docket Control*].

<sup>32</sup> Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

<sup>33</sup> 28 U.S.C. § 2284(a).

<sup>34</sup> 369 U.S. 186 (1962).

federal judges and state officials.<sup>35</sup> The American Law Institute (ALI) argued that in these instances the “moral authority of a federal court order is likely to be maximized if the result cannot be laid to the prejudices or political ambitions of a single district judge.”<sup>36</sup> No less than iconic federal appellate judges Henry Friendly and J. Skelly Wright, while endorsing the abolishment of the court, similarly supported a reapportionment exception, given what they saw as the importance of these cases, their legal and factual complexity that would benefit from three judges at trial, and the necessity of “public acceptance” of the decisions.<sup>37</sup>

The official legislative history does not shed much light on these arguments. In addressing the exception, it refers in an unelaborated way to the “importance” of reapportionment cases.<sup>38</sup> But we can reasonably infer that members of Congress perceived that *Baker* and

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<sup>35</sup> See, e.g., Case Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646, 1660 (1963) (explaining how reapportionment altered court dynamics). See generally Solimine, *Congress*, *supra* note 25, at 144-45 (same).

<sup>36</sup> ALI STUDY, *supra* note 29, at 320. It continues: “In matters of such great public moment, the burden on the federal judicial system that a three-judge court creates is outweighed by the beneficial effect it has on federal-state relations.” *Id.*

<sup>37</sup> Solimine, *Congress*, *supra* note 25, at 142 (summarizing Congressional testimony of Judges Friendly and Wright). My account of the rationale for the apportionment exception particularly benefits from the insights, both at the time in print, and more recently by correspondence, of Michael J. Mullen, who from 1971 to 1976 served as the Deputy Counsel to the Senate Judiciary Committee, and later as counsel to Sen. Phillip Hart (D-MI), and was closely involved in the hearings for and the drafting of the legislation that culminated in the 1976 Act. See Michael J. Mullen, *Improving Judicial Administration by Repealing the Requirements of the Three-Judge District Court*, 20 CATH. LAW. 372 (1974). With regard to Judges Friendly and Wright, see Email from Michael Mullen, Sr. to Michael E. Solimine, Feb. 12, 2018, 3:27 PM (on file with author) (“From everything I saw and heard, the primary motivation for preserving three-judge courts in reapportionment litigation in both the Senate and the House was that such cases ‘were qualitatively more important and more difficult than other public law cases...’ The blessing of liberal Judge Wright and judicially conservative Judge Friendly simply sealed the deal.”) (quoting Solimine, *Congress*, *supra* note 25, at 145.).

<sup>38</sup> Solimine, *Congress*, *supra* note 25, at 144 (quoting Judiciary Committee reports that accompanied passage of the legislation).

its one-person-one-vote progeny, while uncontroversial today (as even the Chief Justice seemed to concede in *Rucho*),<sup>39</sup> were still a sore point in some quarters only fourteen years after that decision.<sup>40</sup> Also, the Congressional supporters of the legislation appeared to share the ALI's concern with the perception of the partisan affiliation of single district judges playing, rightly or not, an outside role in the perception of the holdings of these cases. The drafters also appeared to assume that the exception would be a narrow one, and not be the source of a large number of direct appeals to the Supreme Court.<sup>41</sup>

Chief Justice Roberts' concern with the perceived politicization of the federal judiciary presumably includes lower court judges.<sup>42</sup> What is the record in that regard since 1976? As Table 1 indicates,<sup>43</sup> reapportionment cases before three-judge courts have regularly been convened in fairly large numbers in the first few years of each of the past two decades, due to the decennial redrawing of legislative districts due to the Census. These courts have had to decide constitutional challenges to the redistricting, as well as associated

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<sup>39</sup> *Rucho*, 139 S. Ct. at 2501 ("But the one-person, one-vote rule is relatively easy to administer as a matter of math.").

<sup>40</sup> See Solimine, *Congress*, *supra* note 25, at 145 (outlining the controversy about *Baker* after it was decided.).

<sup>41</sup> *Id.* See also email from Michael Mullen, Sr. to Michael E. Solimine, July 18, 2019, 10:01PM (on file with author) (noting that there was concern, absent retention of the three-judge district court, a single judge's decision "might be skewed if a case heard by a single judge picked by lottery in a multi-judge US district court [either a very liberal or very conservative district judge]—so a State's new Congressional map would or might reflect a role of the dice.") (brackets in original) [hereinafter Mullen, 2019 email].

<sup>42</sup> Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. (forthcoming 2021), archived at <https://perma.cc/Y43N-5446> (discussing how changes in Supreme Court doctrine may increase focus on lower federal court judges when implanting that doctrine, which in turn may concentrate political and interest group pressure on the composition of the lower courts, though not specifically addressing Chief Justice Roberts' views).

<sup>43</sup> Tables are provided at the end of this article.

Voting Rights Act (VRA) claim.<sup>44</sup> Have these cases been characterized by partisan decision-making? That issue plays out on several dimensions.

First consider how the Chief Judges of the Circuits constitute the three-judge panels. One survey of the Chief Judges conducted twenty-five years ago suggested that neutral principles of judicial administration (if judges were from the state in question, their workload, etc.) were the predominate reasons for selection, though on at least some occasions partisan balance was also taken into account.<sup>45</sup> In practice, most three-judge panels did not consist solely of jurists appointed by Presidents from one party.<sup>46</sup> More recent studies have largely confirmed the conclusion that Chief Judges do not appear to be overtly stacking three-judge district courts with

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<sup>44</sup> While three-judge district courts cannot be convened to hear VRA claims alone, *Chestnut v. Merrill*, 356 F. Supp.3d 1351 (N.D. Ala. 2019), they can decide the latter issues when they are pendent or supplemental to constitutional claims. Solimine, *Voting Rights*, *supra* note 27, at 96; *Thomas v. Bryant*, 938 F.3d 134, 144–48 (5th Cir. 2019). For examples, see *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>45</sup> Solimine, *Voting Rights*, *supra* note 27, at 113.

<sup>46</sup> *Id.* at 140 (tbl.5). Judge Friendly, no fan of the three-judge district court, nonetheless argued that a mixed partisan balance among its members should be *required*. *Id.* at 135.

jurists of like partisan persuasion, using the rough proxy<sup>47</sup> of the same party of the appointing President.<sup>48</sup>

To be sure, the apparent lack of overt stacking does not alone mean that three-judge district courts (or at least two members thereof) are not acting in partisan ways, or are not perceived to be so. The subject is difficult to study, since it is not always clear to judges how much any given redistricting map under review will help or hurt the fortunes of a political party.<sup>49</sup> This in turn makes it difficult to measure how any given three-judge panel, or individual members thereof, are voting to supposedly advance the partisan interests of the party of the President that appointed them.<sup>50</sup> That said, consider

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<sup>47</sup> It is a rough proxy, since Presidents typically appoint a small number of judges associated the other political party, and relatedly some judges (especially for the district courts) are from the other party where one or both Senators from a state are from the other party, and by tradition Presidents have typically (though not always) shown deference to Senatorial input in this regard. Students of federal judicial behavior have attempted to account for such complexities by using more subtle proxies for partisanship, other than the party of the appointing President, such as the “common-space” scores of Senators from the state of the appointment, which measure the partisanship of those officials. *See, e.g.,* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007) (explaining how a variety of methods for assessing partisanship of government officials, including judges, work).

<sup>48</sup> *See* Stephen L. Wasby, Naming Judges: Three-Judge District Courts in Redistricting 7, 34 (2018) (manuscript on file with author) (study of 127 cases from the 1990, 2000, and 2010 redistricting rounds, concluding that Chief Judges are not overall stacking panels with judges appointed by Presidents of the same party as they).

<sup>49</sup> The posited difficulty of prediction suggested in the text may now be anachronistic in many instances, given the ability of map-drawers using sophisticated statistical techniques to identify like-minded voters and create legislative district lines accordingly. *See* Michal Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL’Y 70 (2010) (outlining, among other things, the potential issues with predicting the results of redistricting); *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

<sup>50</sup> For studies of decision-making by three-judge district courts that grapple with these methodological problems, *see* Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995) (study of decisions from 1964 to 1983); Mark Jonathan McKenzie, *The Influence*

as a small case study the partisan composition and results of three-judge partisan gerrymandering district court decisions from 2016 to 2019. In all five cases there was a mixed partisan balance, and in all five the plaintiffs prevailed, with unanimous decisions in three of the five.<sup>51</sup>

It is nonetheless difficult to conclude that these three-judge district courts were acting in partisan ways, or perceived as doing so, as feared by Chief Justice Roberts. On the other hand, perhaps these decisions (and prior ones going back to *Baker v. Carr*) would have been perceived as *more* political had they *not* been litigated before three-judge district courts.

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*of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 POL. RES. Q. 799 (2012) (study of decisions from 1981 to 2007); Jordan Carr Peterson, *The Mask of Neutrality: Judicial Partisan Calculation and Legislative Redistricting*, 41 LAW & POL'Y 336 (2019) (study of federal and state decisions from 2000 to 2012). The availability of direct review to the Supreme Court, further discussed *infra*, to a degree can be considered a potential restraint on the alleged politicized decision-making by members of the three-judge court, at least to the extent those judges take into account the possibility of review and reversal by the Court. See Maxwell Mak & Andrew H. Sidman, *Separate Opinion Writing Under Mandatory Jurisdiction: Three-Judge District Court Panels and the Voting Rights Act*, 17 J. EMPIRICAL LEG. STUD. 116, 122-23 (2020); Solimine, *Voting Rights*, *supra* note 27, at 109.

<sup>51</sup> The three unanimous decisions and their judges (with R and D representing a judge appointed by a Republican or Democratic President, respectively) were *Benisek v. Lamone*, 348 F. Supp.3d 493 (D. Md. 2018) (three-judge court) (Niemeyer (R), Bredar (D), and Russell (D)); *A. Philip Randolph Inst. v. Householder*, 373 F. Supp.3d 978 (S.D. Ohio 2019) (three-judge court) (Moore (D), Black (D), and Watson (R)); and *League of Women Voters v. Benson*, 373 F. Supp. 867 (E.D. Mich. 2019) (three-judge court) (Clay (D), Hood (D), and Quist (R)). The two nonunanimous decisions were *Gill v. Whitford*, 218 F. Supp.3d 837 (W.D. Wis. 2016) (three-judge court) (Ripple (R) and Crabb (D) in majority, Griesbach (R) in dissent), and *Common Cause v. Rucho*, 318 F. Supp.3d 777 (D. Md. 2018) (three-judge court) (Wynn (D) and Britt (D) in majority, and Osteen (R) in a partial dissent). Only the last case was strictly on party lines, using the proxy of the party of the appointing President. Information on the appointing Presidents is available at <https://www.fjc.gov/history/judges>. All of the cases but *Benisek* involved gerrymanders drawn by Republican dominated legislatures.

And perhaps *Rucho* should have given weight to the Congressional determination in 1976 that apportionment cases, including those involving partisan gerrymanders, should continue to be litigated in three-judge district courts. At first this may seem irrelevant, since the political question doctrine inquiry seems purely one for the Supreme Court itself to make.<sup>52</sup> But one can argue that the 1976 Act is an implicit Congressional judgment that gerrymanders are in effect *not* political questions, since Congress left intact a separate and special Article III tribunal to hear them. I am not arguing that the 1976 Act displaces the political question doctrine criteria, only that the Court's application of those criteria could have been informed, in this instance, by the existing institutional structure.<sup>53</sup> Put another way, the analysis of the *Rucho* majority seems

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<sup>52</sup> The political question doctrine cases, and the considerable scholarly literature on point, seem to say little if anything about how jurisdictional statutes (or lack thereof) might bear on the presence or absence of a political question. For a rare example of the Court obliquely addressing this issue, see *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (Scalia, J.) (plurality) (suggesting in that political question inquiry does not depend on "whatever Congress chooses to assign" to the federal courts.) (emphasis in original). Martin Redish, a critic of the judicial abstention doctrines on the ground that they improperly contravene Congressional statutes which vest jurisdiction in federal courts, see Martin H. Redish, *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984), has allowed that "[t]heoretically, ... the same argument could be made against the political question doctrine." Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1045 n.78 (1985). For an overview of the literature responding to Redish on judicial abstention, regarding whether and to what extent Congressional statutes can be read to permit the decline of jurisdiction, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1105-06 (7th ed. 2015).

<sup>53</sup> Cf. Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 434-35 (2019) (arguing that "Congress has made the policy decision to leave intact the three-judge district court, with its unusual direct appeal, for reapportionment" cases, and the Court should respect that policy choice in interpreting and applying the direct appeal mechanism). To be sure, redistricting and resulting litigation has changed from the 1970s to the present, and gerrymandering done on an explicitly partisan basis is a relatively recent

largely an exercise in institutional formalism. Applying the political question criteria through the lens of institutional realism could have led the Court to consider the history of the litigation of gerrymandering cases, political and otherwise, in the lower federal courts. That could have informed its analysis of the judicially manageable standards prong of the doctrine.

#### B. DIRECT APPEALS OF THREE-JUDGE DISTRICT COURT DECISIONS

Another unique feature of litigation before three-judge district courts troubled Chief Justice Roberts and may have affected his decision in *Rucho*. As already noted, the 1910 legislation provided for direct appeals of three-judge district court decisions to the Supreme Court to permit prompt resolution of important cases involving the constitutionality of state (and later federal) laws. This was not changed by the 1976 legislation. In no less than three recent oral

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phenomenon. See Nicholas O. Stephanopoulos, *The Dance of Partisanship and Districting*, 13 HARV. L. & POL'Y REV. 507 (2019). See also Mullen, 2019 email, *supra* note 41 (the drafters of the 1976 Act "did not foresee the subsequent developments in reapportionment activities of the States and the 'weaponizing' of gerrymandering. I do not recall any such worries or discussion along those lines.") But reapportionment litigation has been controversial and contentious in all of its iterations, and the Congressional judgment in 1976 in my view should carry some weight before divesting federal courts of only one type of that litigation.

Professor Shapiro makes the point even more strongly:

The history [of the reapportionment exception] demonstrates, however, that to the extent that some Justices believed that the Court's mandatory jurisdiction was a reason not to find partisan gerrymandering claims justiciable, they had it exactly backwards. The mandatory jurisdiction is both a sign of the significance that Congress has placed on reapportionment litigation and a reminder that the Court does not alone control its jurisdiction.

Shapiro, *Docket Control*, *supra* note 31, at 313 (footnote omitted).

arguments of direct appeals of partisan gerrymandering cases, the Chief Justice and other Justices have openly expressed concerns about the effect of direct appeals in these cases.<sup>54</sup> For example, during oral argument in *Gill v. Whitford*, the Chief Justice argued that if partisan gerrymandering suits are

allowed to proceed, there will naturally be a lot of these claims raised around the country....And every one of them will come here for a decision on the merits. These cases are not within our discretionary jurisdiction. They're the mandatory jurisdiction. We will have to decide in every case whether the Democrats win or the Republicans win. So it's going to be a problem here across the board....And the intelligent man on the street is going to say...[that 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. And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.<sup>55</sup>

Similar concerns were expressed by the Chief Justice during oral argument in *Shapiro v. McManus*, where he added that the direct appeals would not allow the Court to permit an issue to percolate in the lower courts, as it does with cases that come to the Court on

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<sup>54</sup> Earlier the Chief Justice expressed very similar concerns regarding the then-frequent direct appeals from three-judge district courts regarding the constitutionality of various provisions of the Bipartisan Campaign Reform Act. Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but With Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1621-22 (2016).

<sup>55</sup> Transcript of Oral Argument at 36-38, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

discretionary writs of certiorari.<sup>56</sup> Not oblivious to these concerns, Paul Clement, the former Solicitor General who was now the attorney of record for the defendants in *Rucho*, brought up the issue on his own during oral argument.<sup>57</sup>

Are the concerns about direct appeals raised by the Chief Justice well-taken? At oral argument in *Rucho*, Justice Ruth Bader Ginsburg argued that the same concerns were raised in the wake of the one-person-one-vote cases at the outset of the Reapportionment Revolution, that courts would be “flooded with cases and they’ll never be able to get out of it. That’s not what happened.”<sup>58</sup> It’s not clear if Justice Ginsburg was referring to the convening of three-judge district courts, or direct appeals resulting therefrom, or both, but either way she is correct. There were a large number of cases filed in the wake of *Baker v. Carr* and other Supreme Court decisions, but they were fairly quickly resolved, given the relative ease of judicial application of the one-person-one-vote rule, and the flood abated by the late 1960s.<sup>59</sup>

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<sup>56</sup> Transcript of Oral Argument at 38, *Shapiro v. McManus*, 136 S. Ct. 450 (2016) (No. 14-990). The Court in *Gill* remanded for further proceedings to permit the plaintiffs to properly demonstrate that they had standing to bring suit. The suit was pending in the district court when *Rucho* was decided. The Court in *Shapiro*, an earlier iteration of the *Benisek* case that was decided in *Rucho*, held that a three-judge district court had to be convened to decide the threshold question of whether a partisan gerrymandering claim had been properly pleaded. Josh Douglas and I filed an amicus curiae brief in *Shapiro* arguing for the result the Court reached.

<sup>57</sup> Transcript of Oral Argument at 35, *Rucho v. Common Cause*, 139 S. Ct. 2482 (No. 18-422).

<sup>58</sup> *Id.* at 36.

<sup>59</sup> Walter Olson, *The Ghost Ship of Gerrymandering Law*, 2017-2018 CATO SUP. CT. REV. 59, 68; Michael E. Solimine, *Congress, the Solicitor General, and the Path of Reapportionment Litigation*, 62 CASE W. RES. L. REV. 1109, 1136 (2012) [hereinafter Solimine, *Reapportionment*]; See also RICHARD C. CORTNER, THE APPORTIONMENT CASES 192 & n.1 (1970) (pointing out that in the wake of six one-person-one-vote cases, from six states, decided by the Supreme Court in 1964, the Court disposed of nine direct appeals from other states by summary orders, without oral argument).

On the other hand, it's not clear what fate would be in store had *Rucho* gone the other way. By many accounts, redistricting for Congress and state legislatures had been particularly partisan in the wake of the 2010 census,<sup>60</sup> and this would seem to portend a large number of suits with resulting direct appeals. It would seem that many such cases could not be as easily disposed as the one-person-one-vote cases fifty years ago, given the difficulties of formulating a judicial standard to determine how much partisan gerrymandering is too much, a point heavily emphasized by the majority in *Rucho*.<sup>61</sup>

Perhaps that fear can be overstated. The Chief Justice earlier expressed concerns that direct appeals would prevent helpful percolation of this very issue. In spite of that, one can argue that percolation of judicial standards on this topic *had* in effect taken place. As the *Rucho* majority itself acknowledged, the Court itself had been grappling with partisan gerrymandering decisions as far back as the 1970s, with several cases before the most recent ones.<sup>62</sup> Even in the most recent iteration, no less than five three-judge district courts, after trials, issued decisions addressing at length the proper standards to apply, with the courts then applying those very standards,<sup>63</sup> a point emphasized by Justice Elena Kagan in her *Rucho* dissent.<sup>64</sup> Objectively determining the benefits of percolation is a

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<sup>60</sup> See, e.g., Richard L. Engstrom, *Partisan Gerrymandering: Weeds in the Political Thicket*, 101 SOC. SCI. Q. 23, 26 (2019); Stephanopoulos, *supra* note 3, at 179-80.

<sup>61</sup> *Rucho*, 139 S. Ct. at 2499-2506.

<sup>62</sup> *Id.* at 2497-98 (discussing *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006)). For further discussion of these cases, see Engstrom, *supra* note 60; Olson, *supra* note 59.

<sup>63</sup> See cases cited in note 51 *supra*.

<sup>64</sup> *Rucho*, 139 S. Ct. at 2516-17 (Kagan, J., dissenting). *But see Vieth*, 541 U.S. at 280-83 (plurality) (surveying three-judge district court decisions applying *Bandemer* and finding them not helpful in developing standards to adjudicate partisan gerrymandering).

difficult task,<sup>65</sup> but to the extent it is beneficial, it seems to have taken place even in this regime of direct appeals.<sup>66</sup>

Another aspect of the Chief Justice's reticence about direct appeals is largely of the Court's own making. Recall that Chief Justice Roberts said every such appeal comes to the Court for a "decision on the merits."<sup>67</sup> That is true, but it requires some explanation. The Court's long-standing practice, almost from the inception of direct appeals from three-judge district courts over 100 years ago, is to dispose of all such appeals in a way that resembles the certiorari process. For many and indeed most such appeals, the Court will simply summarily affirm, with a brief order and no explanatory opinion. Presumably this is because the Court is satisfied with the lower court's resolution of the case. Otherwise, the Court will set the appeal for full briefing and oral argument, and issue an explanatory decision, as it does with cases where certiorari is granted.<sup>68</sup>

Hence a summary disposition of a direct appeal and a denial of certiorari might seem very similar. But there is one crucial difference: the Court has long stated that denials of certiorari are not entitled to any precedential weight, by lower courts or on the Court itself.<sup>69</sup> In contrast, since the 1970s the Court has held that even summary affirmances of direct appeals *are* entitled to be treated to *some* degree

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<sup>65</sup> There is a large literature critiquing the putative benefits of percolation. See Seth Davis & Michael Coenen, *Percolation's Value*, 73 STAN. L. REV. (forthcoming) (manuscript on file with author); Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CON. L. 115, 143-48 (2014) [hereinafter *Specialized Courts*].

<sup>66</sup> Solimine, *Specialized Courts*, *supra* note 65, at 146-47 (discussing how some percolation can exist even with direct appeals, using litigation from three-judge district courts deciding challenges to various provisions of the Bipartisan Campaign Reform Act of 2002 as an example).

<sup>67</sup> See note 55 *supra*.

<sup>68</sup> STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 4-74-4-87 (11th ed. 2019) [hereinafter SHAPIRO, SUPREME COURT PRACTICE].

<sup>69</sup> *Id.* at 4-80-4-81.

as precedent, at least for cases that are substantially similar, though not as much as for fully articulated decisions.<sup>70</sup> This might suggest to the Chief Justice that had *Rucho* gone the other way, the Court could not easily have used summary affirmances (or reversals) to dispose of the predicted flood of direct appeals. Knowing that even summary dispositions have precedential effect, the Court would presumably have to devote time to carefully examine each such appeal.

A related concern is that given the lack of intermediate appellate review, the Court itself needs to undertake the task in the first instance of reviewing the record before the three-judge district court. Normally the findings of fact would be subject to deferential, clearly-erroneous review,<sup>71</sup> but the Court itself has suggested that in these situations less deferential review is appropriate given the lack of an intermediate court.<sup>72</sup> Presumably this more rigorous review, if undertaken conscientiously, places yet another burden on the Court, largely absent in other cases.<sup>73</sup>

Josh Douglas and I have suggested a way to deal with the problems associated with direct review, if problems they are. We acknowledge that certiorari and direct appeals are not and should not be identical; the Court is “under some obligation to resolve a

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<sup>70</sup> *Id.*

<sup>71</sup> Fed. R. Civ. P. 52(a)(6).

<sup>72</sup> *Easley v. Cromartie*, 532 U.S. 234, 243 (2001). Subsequently the Court seems to have backed away from the *Easley* analysis, and has held that in this context “clear error” review is appropriate, which appears to be close if not identical to the Rule 52(a)(6) standard. *Cooper v. Harris*, 137 S. Ct. 1455, 1464-65 (2017); *id.* at 1485-86 (Thomas, J., concurring).

<sup>73</sup> For further discussion of the standards of appellate review in this context, see Melissa L. Saunders, *A Cautionary Tale: Hunt v. Cromartie and the Next Generation of Shaw Litigation*, 1 ELECTION L.J. 173 (2002); Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 787-88 (2007).

[direct appeal] on the merits.”<sup>74</sup> Some appeals could be set for full briefing and argument, with an explanatory decision to follow. Still other appeals could be disposed of with a brief explanation, which could be given such precedential weight as is warranted.<sup>75</sup> And the Court could still use summary dispositions, but rather than continue the current confusing practice of giving cryptic, usually one-line orders with some (but not full) precedential effect, the Court could simply not give them precedential effect at all. These options would permit the Court to rationally deal with direct appeals, whether they appear in a flood or a trickle or somewhere in-between.<sup>76</sup>

Problems with direct appeals are exacerbated by the Court’s shrunken docket (i.e., the cases decided on the merits) in the past two decades. It is not clear why the docket has shrunken to about 75 to 80 from almost double that number as recently as the 1970s. At least part of the reason is likely the significant restriction of the jurisdiction of the three-judge district court, and related statutory eliminations of mandatory (direct) appeals.<sup>77</sup> One perhaps unintended consequence

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<sup>74</sup> Douglas & Solimine, *supra* note 53, at 424 (footnote omitted). Congress’ very use of the word “appeal,” see 28 U.S.C. § 1253, suggests that “the losing party may obtain review on the merits by a higher court as of right, not merely a discretionary determination as to whether the higher court will consider the case.” SHAPIRO, *SUPREME COURT PRACTICE*, *supra* note 65, at 4-74–4-75.

<sup>75</sup> The Court has issued brief explanations for some summary affirmances of direct appeals, going as far back as the 1920s. Douglas & Solimine, *supra* note 53, at 432 & n.122. For a recent example, see *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (*per curiam*) (in direct appeal of racial gerrymandering case, providing several pages of explanation while summarily affirming in part and reversing in part).

<sup>76</sup> Douglas & Solimine, *supra* note 53, at 431-38.

<sup>77</sup> For discussion, see Michael Heise et al., *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court’s Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1567, 1573-74, 1583 (2020); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 408-12; Kenneth Moffett et al., *Strategic Behavior and Variation in the Supreme Court’s Caseload Over Time*, 37 JUST. SYS. J. 20, 33 (2016); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1278-79 (2012).

of the smaller docket is that it has elevated the perceived importance of, and controversy attached to, the cases that manage to reach the docket.<sup>78</sup> As Table 2 indicates, the Court has decided few direct appeals from district courts (almost all of them being from three-judge courts) in the past ten years, only several each Term. Still, the specter of a flood of direct appeals dominating a smallish docket may have haunted the Chief Justice in *Rucho*. That predicted flood may have been less startling if the Court had a larger docket each Term.

## II. THE SOCIAL NETWORK OF PARTISAN GERRYMANDERING IN THE SUPREME COURT

Fontana and Huq also argue that institutional loyalty should be viewed in the context of “wider social networks...that police adherence to institutional norms while at the same time providing legitimation and public support.”<sup>79</sup> “Such networks,” they continue, “are particularly robust in respect to the Article III judiciary...The chief justice, and the Court as a whole, is embedded in a larger social network of commentators, think tanks, scholars, and lawyers, largely located inside the Beltway.”<sup>80</sup> A full survey of those factors as they apply to *Rucho* is beyond the scope of this Article.<sup>81</sup> Instead I will focus on one factor, widely followed in legal circles and presumed by many to have some influence on the Justices: the number,

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<sup>78</sup> Charles Gardner Geyh, *Considering Reconsidering Judicial Independence*, 168 U. PA. L. REV. ONLINE 35, 42-43 (2019).

<sup>79</sup> Fontana & Huq, *supra* note 8, at 63.

<sup>80</sup> *Id.* (footnote omitted).

<sup>81</sup> For discussion of related factors, see Hasen, *supra* note 54, at 1618-23 (discussing strategy of litigants when using mandatory appeal provisions); Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563 (2013) (critique of power litigants have in the resolution of redistricting litigation).

authorship and arguments raised by amicus curiae briefs in the Court.

A. AMICUS CURIAE BRIEFS IN THE SUPREME COURT

Amicus curiae, or friend-of-the-court, briefs, have a long history in the Supreme Court and other courts. As the name suggests, these briefs were used to bring relatively objective information and arguments to a court's attention, not necessarily to support a given side—in the twentieth century, however, most such briefs came to overtly support one of the parties. In the last couple of decades of the last century, the number of amicus briefs filed in the Supreme Court began to rise, such that now almost all cases have at least one such brief filed, with high-profile cases having scores filed.<sup>82</sup>

The Justices themselves have apparently been cognizant of and indeed contributed to this trend, by citing and relying upon these briefs in their opinions.<sup>83</sup> The Justices, it has been argued, rely on such briefs to gauge public opinion in general and elite attitudes in particular.<sup>84</sup> A variety of reasons account for the rise in the number of and apparent influence of amicus briefs in the Supreme Court. These include the Court's policies of liberally granting leave for the filing of such briefs; more interest groups following Court decisions and filing briefs; an apparently rising perception of the importance of Court decisions, perhaps one accentuated by the Court's smaller docket; and express efforts by the parties to suits where review is

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<sup>82</sup> The classic account of the change in the orientation of amicus briefs is Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *YALE L.J.* 694 (1963). For an overview of the now large scholarly literature on amicus briefs, see Paul M. Collins, Jr., *The Use of Amicus Briefs*, 14 *ANN. REV. L. & SOC. SCI.* 219 (2018).

<sup>83</sup> See Paul M. Collins, Jr., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (2008); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Briefs on the Supreme Court*, 148 *U. PA. L. REV.* 743 (2000).

<sup>84</sup> Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *GEO. L.J.* 1515, 1566-68 (2010).

granted to encourage outside groups to file amicus briefs in their favor.<sup>85</sup>

These trends have continued unabated in the Roberts Court. For example, in the 2018-19 Term in which *Rucho* was handed down, more than 700 amicus briefs were filed, including in almost all of the cases decided on the merits, and one or more amicus briefs were cited in over half of the decisions.<sup>86</sup> As in past years, the Court frequently cited and seemed to give particular weight to amicus briefs filed by the Solicitor General of the United States and state attorneys general, both of whom are permitted by Court rule to file such briefs in any case, without needing the permission of the Court or of the parties.<sup>87</sup> Indeed, now that so many amicus briefs have been filed for so long, some argue that “their power as an explanatory variable” of apparent influence on judicial decisions has been reduced.<sup>88</sup>

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<sup>85</sup> For discussion of these factors, see Collins, *supra* note 82, at 220-24; Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901 (2016).

<sup>86</sup> Anthony J. Franze & R. Reeves Anderson, *A Calm but Impressive 2018-19 Term for ‘Friends of the Court’*, NAT’L L.J., Nov. 28, 2019, archived at <https://perma.cc/8UHN-X6E5>. Indeed, if “anything, friends of the court were quieter in 2018-19 than in recent terms, which have seen a record number of briefs and the highest level of amicus participation in history.” *Id.* For his part, Chief Justice Roberts cited amicus briefs in an average of 39% percent of his majority opinions, and 36% of his concurring or dissenting opinions. *Id.*

<sup>87</sup> Sp. Ct. R. 37.4. On the influence of these briefs, see Kayla S. Canelo, *State Coalitions, Informational Signals, and Success as Amicus Curiae at the U.S. Supreme Court*, 20 ST. POL. & POL’Y Q. 108 (2020); Franze & Anderson, *supra* note 86; Richard L. Pacelle Jr. et al., *The Influence of the Solicitor General as Amicus Curiae on the Roberts Court, 2005-2014: A Research Note*, 38 JUS. SYS. J. 202 (2017).

<sup>88</sup> Richard L. Pacelle, Jr. et al., *Assessing the Influence of Amicus Curiae Briefs on the Roberts Court*, 99 SOC. SCI. Q. 1253, 1263 (2018) (study of amicus briefs filed in 2005 through 2014 Terms).

B. AMICUS CURIAE BRIEFS AND *RUCHO*

Thirty-nine amicus briefs were filed in *Rucho*,<sup>89</sup> far below the record numbers of such briefs that other high-profile case had attracted in recent Terms. Ten were filed in support of the defendant, twenty-six in favor of the plaintiff, and two in favor of neither side.<sup>90</sup> Nicholas Stephanopoulos has emphasized that conservative or Republican entities or state officials were the only ones that advocated for the result reached in *Rucho*,<sup>91</sup> which is true, but liberal/Democratic and conservative/Republican dichotomies characterize most amicus briefs filed in a given case. As Stephanopoulos points out, a variety of conservative organizations or Republican party-linked committees or entities filed in favor of the defendants, as well as ten Red States (to use modern parlance) joining in one brief.<sup>92</sup> In a similar fashion, the amici supporting the plaintiffs were mostly law professors, political scientists, interest groups (e.g.,

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<sup>89</sup> See the listing of briefs at [scotusblog.com/case-files/cases/rucho-v-common-cause/](https://scotusblog.com/case-files/cases/rucho-v-common-cause/). In the companion case of *Lamone v. Benisek*, 22 amicus briefs were filed, see [scotusblog.com/case-files/cases/lamone-v-benisek/](https://scotusblog.com/case-files/cases/lamone-v-benisek/), most of which were cross filed for *Rucho*, and the reverse was true as well. For simplicity sake I will focus on the briefs filed in *Rucho*.

<sup>90</sup> For a summary of the arguments made by the briefs, see Brennan Center for Justice, Annotated Guide to Amicus Briefs in *Rucho v. Common Cause*, archived at <https://perma.cc/QCD6-FF3G>.

<sup>91</sup> Stephanopoulos, *supra* note 3, at 178-79.

<sup>92</sup> The States mentioned here and below all had Republican, or Democratic, state attorneys general, respectively. Almost always the state attorney general, usually separately elected, will decide whether or not the state files or joins in an amicus brief, rather than the governor or the state legislature, who may be of the other party. This can cause problems in characterizing a State amicus as representing a particular political party. See Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 384-85 (2012) [hereinafter Solimine, *State Amici*].

the ACLU and NAACP Legal Defense & Educational Fund), and 21 Blue States and the District of Columbia joining in one brief.<sup>93</sup>

At least two briefs supporting the plaintiffs had a bipartisan flavor. One was by the former Republican governor of California, Arnold Schwarzenegger, and the current Republican governor of Maryland, Larry Hogan. Another was by a self-described bipartisan group of past and current members of the U.S. House of Representatives.

Perhaps more surprising however, given the high-profile nature and political valence of the case, was one potential amicus brief that *was not* filed: that of the Solicitor General. The Supreme Court has a long history of soliciting input from the Solicitor General as an amicus, given the positions acknowledged and long-standing expertise, with the Court deferring to his or her views on a variety of issues, no matter the party of the President.<sup>94</sup> Relevant to this Article, it is frequently said that the amicus brief filed by the Kennedy Administration in support of the plaintiffs in *Baker v. Carr* played a significant role in the majority's holding that the suit was not barred by the political question doctrine.<sup>95</sup> Solicitor Generals of both Democratic and Republican Administrations have since frequently filed amicus briefs in subsequent redistricting cases involving one-

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<sup>93</sup> As a matter of convenience, I acknowledge making broad generalizations here. For example, not all liberals or conservatives, however one may define those terms, are necessarily affiliated with the Democratic or Republican parties, respectively. Nonetheless, the generalizations make the point about the political or partisan orientation of many of the amicus briefs filed.

<sup>94</sup> RYAN C. BLACK & RYAN J. OWEN, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* (2012); Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. ST. L.J. 1183 (2013) [hereinafter Solimine, *Solicitor General*].

<sup>95</sup> Solimine, *Reapportionment*, *supra* note 59, at 1121-22 (referring to many sources that attribute influence to the filing of the brief and to Solicitor General Archibald Cox's oral argument, but noting that the brief was not cited in any of the opinions).

person-one-vote or race,<sup>96</sup> but they have conspicuously *not* done so in partisan gerrymandering cases.<sup>97</sup> The reasons are not clear; one recent account suggests that the decision has not been fully addressed by any Solicitor General, other than relying on the notion that the federal interest justifying amicus intervention in these cases is attenuated.<sup>98</sup> Another relevant factor might be that Solicitor Generals of both parties felt that partisan gerrymandering claims are politically taboo, and better left alone.<sup>99</sup>

What role did these amicus briefs play in *Rucho*? In this or any other case, we cannot be sure. Simply because one or more amicus briefs are cited in the opinion does not necessarily mean that they were particularly influential. Likewise, even if the brief is not cited, the Solicitor General's support for one position and arguments may have influenced the Justices and the scope of doctrine.<sup>100</sup> With those caveats, it might seem that the amicus briefs did not have much influence. For the majority, Chief Justice Roberts briefly cited two such briefs while discussing what he saw as the too-vague liability standards advanced by plaintiffs.<sup>101</sup> Justice Kagan's dissent similarly cited two amicus briefs on what standards were appropriate,<sup>102</sup> but

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<sup>96</sup> *Id.* at 1125-28.

<sup>97</sup> *Id.* at 1128 n.101. In the *LULAC* case, *supra* note 62, the Solicitor General did file an amicus brief, but on the issue of the Voting Rights Act, and not on partisan gerrymandering. *Id.*

<sup>98</sup> Darcy Covert & A.J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Oral Argument*, VAND. L. REV. (forthcoming), archived at <https://perma.cc/RCG6-BVSX>. Covert and Wang interviewed attorneys at the Office of the Solicitor General, one of whom noted that the Attorney General had been a party to one of the racial gerrymandering cases (*Shaw v. Reno*, 509 U.S. 630 (1993)), and the office has continued to participate as amicus in those cases, even though "the federal government now does not really have a role." *Id.*

<sup>99</sup> Solimine, *Reapportionment*, *supra* note 59, at 1128 & n.101.

<sup>100</sup> Solimine, *Solicitor General*, *supra* note 94, at 1191-94.

<sup>101</sup> *Rucho*, 139 S. Ct. at 2500.

<sup>102</sup> *Id.* at 2518-19 (Kagan, J., dissenting). See also *id.* at 2525 (citing amicus brief filed in *Gill v. Whitford*).

also the brief by the bipartisan legislators on what they deemed the negative effects of partisan gerrymandering.<sup>103</sup>

Or it might be said that these briefs influenced the Court all too well. Since the Justices voted in *Rucho* on what was perceived in some quarters as strictly along partisan and ideologically lines themselves, it might be considered a reflection, as Stephanopoulos argued, of the Justices following ideologically elite opinions that mirrored their own. This latter view is bolstered by the fact that most of the briefs fell on what can be perceived as conventional conservative/liberal lines. Had there been more bipartisan briefs, or had the briefs, bipartisan or not, overwhelmingly supported one side, perhaps the result might had been different. Such a larger and politically heterogeneous filing of state amici could have signaled to the Court that partisan gerrymandering suits would be a welcome bipartisan solution.<sup>104</sup> It is noteworthy that 31 States participated as amici, but only along strictly partisan lines,<sup>105</sup> and that the Solicitor General did not participate.<sup>106</sup> Or perhaps the ideological effect of the amicus

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<sup>103</sup> *Id.* at 2525.

<sup>104</sup> See Lucia Manzi & Matthew E.K. Hall, *Friends You Can Trust: A Signaling Theory of Interest Group Litigation Before the Supreme Court*, 51 LAW & SOC'Y REV. 704, 709-11 (2017); Solimine, *State Amici*, *supra* note 92, at 391-93. *But see* Canelo, *supra* note 87, at 120 (study of state amici briefs filed in Supreme Court from 1960 to 2013 did not show that ideologically heterogeneous briefs were more influential).

<sup>105</sup> See also Lisa F. Grumet, *Hidden Nondefense: Partisanship in State Attorneys General Amicus Briefs and the Need for Transparency*, 87 FORDHAM L. REV. 1859, 1865-67 (2019) (pointing out that a total of 33 states filed two amicus briefs in *Whitford v. Gill*, with all the Republican-associated states filing one brief supporting defendants, and all Democratic-associated states filing the other brief supporting the plaintiffs).

<sup>106</sup> It may or not be relevant that a few months after *Rucho* was decided, Attorney General William P. Barr, in a speech at an annual meeting of the Federalist Society, supported the holding. See William P. Barr, *The Role of the Executive*, 43 HARV. J. L. & PUB. POL'Y 605, 625 (2020) (footnote omitted) ("And just last term, the Supreme Court appropriately shut the door to claims that otherwise-lawful redistricting can violate the Constitution if the legislators who drew the lines were actually motivated by political partisanship.").

briefs is overstated, and that the Court as a whole now has some amicus curiae fatigue.<sup>107</sup>

#### CONCLUSION

This Article has critiqued *Rucho* from an institutional loyalty perspective, focusing on whether Chief Justice Robert's opinion for the majority can be explained, at least in part, as his effort to protect, as he saw it, the Supreme Court and other federal courts from the perception of being political actors.<sup>108</sup> Yet it is not too difficult to engage in effectively the mirror image of that critique had the decision gone the other way. Recall that partisan gerrymanders drawn by Democratic and Republican legislatures in separate states were before the Court, seemingly giving the Court a golden opportunity to act in a perceptible even-handed manner. If a majority of the Court had held instead that partisan gerrymandering suits are not nonjusticiable political questions, precisely to regulate excessive partisanship in American government, then it is possible that the Court would now be hailed as a savior. In this scenario, a bipartisan majority of the Court would have intervened, in a case involving gerrymanders drawn by both political parties, to limit largely Republican-led gerrymandering after the 2010 census.<sup>109</sup> That is

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<sup>107</sup> While the Chief Justice has cited amicus briefs at a similar rate to other Justices, see Franze & Anderson, note 86 *supra*, in other cases he has expressed some skepticism about heavy reliance on such briefs. Michael E. Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151, 159 (2016).

<sup>108</sup> See generally Cassandra Burke Robertson, *Judicial Impartiality In a Partisan Era*, 70 FLA. L. REV. 739 (2018). It is also worth noting that that "even the public's confidence in the Supreme Court, which it has traditionally revered, has declined significantly since the 1980s and is now under 40%." Peter H. Schuck, *Some Sources of Our Political Discontents*, NAT'L AFFAIRS, Winter 2020, at 119, 126.

<sup>109</sup> Cf. Charles & Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 267-75 (2018) (urging Court to decide case this way, prior to the decision). A similar dynamic arguably occurred in another case, decided on the same day as *Rucho*,

essentially what happened in *Baker v. Carr* and the subsequent one-person-one-vote cases of the 1960s, which were highly controversial in some quarters at the time, but rapidly came to be accepted by most popular and elite opinion alike.<sup>110</sup>

But that counterfactual is just that. Assuming the Chief Justice was drawing on, if only subconsciously, norms of institutional loyalty as he perceived them, should he be applauded or criticized? Fontana and Huq observe that “[i]nstitutional loyalties within the federal judiciary might be supposed an unfettered good insofar as” they support independence from the other branches, thus enhancing the separation of powers.<sup>111</sup> But they question whether that assumption is always correct. For purposes of this Article, it is telling that they label as a “vivid display of an institutional loyalty at work” the successful lobbying efforts of Chief Justice William Howard Taft and other members of the Court to convince Congress to pass the Judges’ Bill in 1925, giving the Court discretionary, certiorari jurisdiction over most of its docket.<sup>112</sup>

“Yet it is far from clear,” they continue, “that the fruits of the discretion achieved by Taft and other advocates for the institutional judiciary necessarily promote useful constitutional ends.”<sup>113</sup> Vesting such enormous discretion in a Court to almost completely control its own agenda in a virtually unchecked manner places enormous

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when the Chief Justice authored a majority opinion upholding a challenge to the insertion of a question about citizenship in the Census. See *Dep’t of Commerce v. New York*, 139 S.Ct. 2552 (2019).

<sup>110</sup> Olson, *supra* note 59, at 68; Solimine, *Reapportionment*, *supra* note 56, at 1114-17. The small number of modern critics of *Baker v. Carr* include Justices Clarence Thomas and Samuel Alito. *Id.* at 116-17 n.39.

<sup>111</sup> Fontana & Huq, *supra* note 8, at 72.

<sup>112</sup> *Id.* at 72-73.

<sup>113</sup> *Id.* at 73.

power in a very small number of jurists.<sup>114</sup> “Judicial self-regard”<sup>115</sup> does not necessarily lead to proper constitutional ends. The Court’s “institutional interest in stanching the flow of certain kinds of litigation,”<sup>116</sup> such as partisan gerrymandering cases, deserves independent examination, even if one concedes that the Court (or some members thereof) were following institutional loyalty as they perceived it.

It is no small irony that the direct appeals from three-judge district courts were a conspicuous exception to the considerable discretion vested in the Supreme Court by the Judges’ Bill.<sup>117</sup> But as this Article has demonstrated, some of the unique features of modern reapportionment litigation in the federal courts was at least implicitly used by the Court to justify not hearing partisan gerrymandering suits. If one agrees with the result in *Rucho*, then institutional loyalty can provide satisfying descriptive and normative justifications, though if one advocates those suits should not be barred by the political question doctrine, those same justifications prove woefully inadequate.

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<sup>114</sup> Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1708-10 (2000); see also Matthew J. Franck, *The Problem of Judicial Supremacy*, NAT’L AFFAIRS, Spring 2016, at 137, 147-49 (echoing Hartnett’s points about the certiorari process versus mandatory direct appeals, but not discussing reapportionment cases).

<sup>115</sup> Fontana & Huq, *supra* note 8, at 74.

<sup>116</sup> *Id.* at 73 (emphasis in original; footnote omitted).

<sup>117</sup> Chief Justice Taft was apparently ambivalent about that exception. He variously urged that all cases be governed by certiorari, but also appeared to be able to tolerate direct appeals from three-judge district courts, since those were limited to constitutional issues. Hartnett, *supra* note 114, at 1661; Solimine, *Congress*, *supra* note 25, at 124 n.116.

<b>TABLE 1</b>				
<b>THREE-JUDGE DISTRICT COURT HEARINGS 1999-2018</b>				
<b>YEAR</b>	<b>CIVIL RIGHTS</b>	<b>REAPPORTIONMENT</b>	<b>OTHER</b>	<b>TOTAL</b>
1999	6	3	2	11
2000	3	3	0	6
2001	4	8	0	12
2002	11	27	7	45
2003	5	2	4	11
2004	1	3	2	6
2005	6	4	0	10
2006	7	2	4	13
2007	4	1	8	13
2008	4	1	11	16
2009	3	1	3	7
2010	10	1	0	11
2011	9	11	0	20
2012	13	19	3	35
2013	2	2	2	6
2014	5	6	0	11
2015	2	4	2	8
2016	4	3	0	7
2017	2	7	0	9
2018	0	11	0	11

Sources: Table S-18 of the 2003, 2008, 2013 and 2018 Annual Reports of the Director of the Administrative Office of the United States Courts.

<b>TABLE 2</b>			
<b>DIRECT APPEALS FROM DISTRICT COURTS ON SUPREME COURT'S MERITS DOCKET, 2009-2018 TERMS</b>			
<b>TERM</b>	<b>FULL OPINION</b>	<b>MEMORANDUM ORDER</b>	<b>TOTAL</b>
2009	2	1	3
2010	1	1	2
2011	1	3	4
2012	1	4	5
2013	1	1	2
2014	2	1	3
2015	3	0	3
2016	3	3	6
2017	4	0	4
2018	2	0	2

Source: Totals compiled from Table II of *The Statistics* in the November issues of the HARVARD LAW REVIEW. 124 Harv. L. Rev. 420 (2010)(2009 Term); 125 Harv. L. Rev. 317 (2011)(2010 Term); 126 Harv. L. Rev. 397 (2012)(2011 Term); 127 Harv. L. Rev. 418 (2013)(2012 Term); 128 Harv. L. Rev. 411 (2014)(2013 Term); 129 Harv. L. Rev. 391 (2015)(2014 Term); 130 Harv. L. Rev. 516 (2016)(2015 Term); 131 Harv. L. Rev. 412 (2017)(2016 Term); 132 Harv. L. Rev. 457 (2018)(2017 Term); 133 Harv. L. Rev. 422 (2019)(2018 Term).