Second Session

1.The conservative success in moving the Court to the right was substantively driven by political forces led by the popular and charismatic Ronald Reagan and the dynamism of the Tea Party, the right to life movement, The NRA and the increasing dedication to a conservative Court of conservative and libertarian billionaires. It is sometimes forgotten that Richard Nixon and Republicans of his era largely accepted New Deal social goals and focused primarily on perceived Democratic weakness in balancing the budget and in fighting communism both at home and abroad. As noted in the last Session this often resulted in Republican presidents appointing Justices who like Earl Warren and John Paul Stevens disappointed the hopes and expectations of many evangelicals and other conservatives and libertarians.

2. This resulted in a right-wing focus on creating a Republican judicial appointment process that would confirm justices who would put an end to liberal judicial activism. The process and strategies developed were and continue to be impressively effective. We focus on two factors that made this effort so successful- the activities of The Federalist Society and the conservative justices' adoption of the originalism/textualism theory of constitutional interpretation. This approach to constitutional interpretation enabled them to argue successfully that their willingness to overrule precedent they didn't like was based on principle, not politics or judicial overreach.

3. We will also discuss the recent cases on gerrymandering. Although conceding that the voting boundaries drawn by the state legislature were so partisan and unfair that they were probably unconstitutional, the Chief Justice asserted that the Court lacked judicial power to intervene because drawing political boundaries, however partisan or unfair, was a political not a judicial matter. Despite the Court's ruling, the North Carolina state courts were not persuaded and ruled that their election districts violated the state constitution and ordered the Legislature to create districts that provided voters more equal and fairer treatment.

Federalist Society

From Wikipedia, the free encyclopedia

The Federalist Society for Law and Public Policy Studies, most frequently called the Federalist Society, is an organization of conservatives and libertarians that advocates an interpretation of the legal system of the United States in accordance with a textualist or originalist interpretation of the U.S. Constitution. Founded in 1982, it is one of the nation's most influential legal organizations.

In January 2019, The Washington Post Magazine wrote that the Federalist Society had reached an "unprecedented peak of power and influence." Of the nine members of the Supreme Court of the United States, five (Brett Kavanaugh, Neil Gorsuch, Clarence Thomas, John Roberts, and Samuel Alito) are current or former members of the organization. Politico Magazine wrote that the Federalist Society "has become one of the most influential legal organizations in history—not only shaping law students' thinking but changing American society itself by deliberately, diligently shifting the country's judiciary to the right."

The organization, whose ideals include "checking federal power, protecting individual liberty and interpreting the Constitution according to its original meaning", plays a central role in networking and mentoring young conservative lawyers. According to Amanda Hollis-Brusky, the author of Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution, the Federalist Society "has evolved into the de facto gatekeeper for right-of-center lawyers aspiring to government jobs and federal judgeships under Republican presidents." According to William & Mary Law School professor Neil Devins and Ohio State University professor Lawrence Baum, the administrations of Ronald Reagan and George W. Bush "aimed to nominate conservative judges, and membership in the Federalist Society was a proxy for adherence to conservative ideology." The Federalist Society has played a key role in suggesting judicial nominees to President Donald Trump; it vetted President Trump's list of potential U.S. Supreme Court nominees and, as of January 2019, 25 out of 30 of President Trump's appellate court nominees were current or former members of the society.

The society is a membership organization that features a student division, a lawyers division, and a faculty division. The society currently has chapters at more than 200 United States law schools. The lawyers division comprises more than 70,000 practicing attorneys (organized as "lawyers chapters" and "practice groups" within the division) in ninety cities. The society is headquartered in Washington, D.C. Through speaking events, lectures, and other activities, it provides a forum for legal experts of opposing views to interact with members of the legal profession, the judiciary, and the legal academy.

Politico Magazine

The Federalist Society Says It's Not an Advocacy Organization. These Documents Show Otherwise.

By AMANDA HOLLIS-BRUSKY and CALVIN TERBEEK August 31, 2019

Amanda Hollis-Brusky is an associate professor of politics at Pomona College and author of Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution. Calvin TerBeek is a Ph.D. candidate in political science at the University of Chicago.

This past March, when the Federalist Society for Law and Public Policy Studies held its 37th annual national gathering for conservative law students, the lineup of speakers and panelists included an impressive number of Republican Party and conservative movement stars .All four of the conference's main panels were chaired by active Republican-appointed federal appeals court judges. Amul Thapar—a protégé of Senator Mitch McConnell who "nearly wouldn't speak" to his own father upon finding out he had voted for Barack Obama, his father said—directed one panel. Edith Jones, a long-time 5th Circuit judge considered too conservative for the Supreme Court by the George H.W. Bush administration, moderated another. Elizabeth Branch, a recent appointee of President Donald Trump to the 11th Circuit and former senior official in the George W. Bush administration, moderated the third panel, while fellow Trump appointee to the 6th Circuit John B. Nalbandian moderated the fourth. And the "keynote" was a "fireside chat" between former GOP Senator Jon Kyl and Arizona Governor Doug Ducey, a fellow Republican.

Despite what appears to be an obvious political valence, the Federalist Society and its high-profile members have long insisted the nonprofit organization does not endorse any political party "or engage in other forms of political advocacy," as its website says. The society does not deny an ideology—it calls itself a "group of conservatives and libertarians"—but it maintains that it is simply "about ideas," not legislation, politicians or policy positions.

Federalist Society documents that one of us recently unearthed, however, make this position untenable going forward. The documents, made public here for the first time, show that the society not only has held explicit ideological goals since its infancy in the early 1980s, but sought to apply those ideological goals to legal policy and political issues through the group's roundtables, symposia and conferences….
The Federalist Society was founded in 1982 as a small law student group with the goal of bringing conservative and libertarian speakers, and their ideas, to law school campuses perceived to be dismissive of these intellectual traditions. After the Federalist Society held its first national symposium at Yale Law School that year—featuring recent Reagan-appointed federal appeals court judges Bork and Antonin Scalia—Federalist Society student groups started popping up on law school campuses around the country. The organization now boasts more than 65,000 members, and most federal judgeships, clerkships and executive branch legal jobs in Republican administrations are effectively off-limits to nonmembers.

The Federalist Society's founders and conservative patrons understood early on that the battle for control of the law would not be won on campuses alone. In the January 1984 grant proposal, Meyer, then the Federalist Society's executive director, asked the conservative-leaning Smith Richardson Foundation for "seed money" to fund a new entity, a "Lawyers Division." The central goal, Meyer wrote, was "to build an effective national conservative lawyers organization." Meyer began the proposal by asserting that an alternative to "an increasingly

radicalized bar," exemplified by the American Bar Association, was now necessary because "lawyers continue to fill key positions in the modern instrumentalities of the welfare state."

The Federalist Society promised the prospective donor that the Lawyers Division would have a "dual purpose." First, to "an even greater extent than the activities of the student and faculty divisions," the new division would "educat[e] lawyers on legal developments with ideological connotations and how to deal with them." The second purpose was "the formation of groups of conservative lawyers in the major centers for the practice of law, who feel comfortable believing in, and advocating, conservative positions." The division, Meyer wrote, would mimic the style of workshops and seminars hosted by bar associations: "Unlike those events, however, the panels will also have ideological overtones, picking topics where the developments are especially good and should be encouraged, or especially bad and should be stopped." The proposal offered examples of these workshops. Seattle might focus on the problems posed by "Environmental Regulation"; in New York, "Banking Regulation"; and in Houston, "Employment Discrimination (including the question of whether reverse discrimination is even constitutional)." The proposal also mentioned the Lawyers Division potentially "making its own recommendation for judicial appointments."

Simply put, when the Federalist Society was describing its mission in private to a politically sympathetic donor, it let drop the group's public-facing fiction that it is merely a debating society for the organic development of ideas….

Asked about the document, Meyer wrote in an email to Politico Magazine that the sentences quoted from the proposal "do not even represent the gist of the proposal, let alone the Federalist Society as it has developed in the ensuing years" and that it is "silly" to treat them "as a serious source for what the Society is and does today or how the legal process, judges, and the public should understand what we do." He reiterated that the society avoids "taking positions on legal or policy issues or engaging in other forms of political advocacy"

The Lawyers Division of the Federalist Society has grown into precisely the kind of policy-focused, ideological arm that its founders envisioned in that early grant proposal. The majority of presenters at Lawyers Division events—about 60 percent, according to research by one of us—are employed outside the academy, as federal judges, analysts at policy think tanks and interest groups, litigators, government attorneys, and state and federal politicians; they work in fields that deal with real-world policy applications and, as we have witnessed at Federalist Society events, often advocate specific policy outcomes. And from 1982 to 2011, nearly every presenter, moderator and panelist at the society's national conventions for students and lawyers—its two biggest annual events—would identify as right of center politically, not just ideologically.

Federalist Society conferences, symposia and related activities have come to perform important functions for the Republican Party. Through these events, the society provides a forum for federal judges to "audition" for the Supreme Court with the goal of demonstrating they will not "drift" to the left like GOP-nominated Justices Harry Blackmun, David Souter and, to a certain extent, Chief Justice John Roberts. The auditioning function has proved (largely) successful. As has been widely noted, all five the GOP-nominated justices on the Court were active in the society before their nominations. Because membership in the Federalist Society has long been seen as a demonstration of ideological bona fides and a subscription to a package of ideas, prospective federal judges can use the group's events to signal their fealty to the movement's legal policy goals. Indeed, there is evidence that judges who are Federalist Society members are significantly more conservative on the bench than unaffiliated GOP nominees.

What's more, as one of us has shown in previous work, Federalist Society events operate as an ideological feedback loop. These meetings allow federal judges both to educate their audience of law students and attorneys and be educated—on settled understandings of conservative and libertarian legal policy (e.g., gun rights and the dangers of the administrative state) and on new or heterodox potential paths (e.g., doing away with birthright citizenship or the budding courtship of natural law and originalism). That is, these gatherings have a disciplining effect on active and potential Republican judges: Conservative judges learn what the society collectively

considers to be good decisions that “should be encouraged” and bad decisions that “should be stopped,” as envisioned in the 1984 grant proposal….

Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution

Gorsuch is an associate justice of the Supreme Court of the United States…. He has also worked as a senior official at the U.S. Department of Justice, where he helped oversee its civil litigating divisions; as a partner at a law firm; as a law professor; and as a law clerk for Justices Byron White and Anthony Kennedy.

Originalism teaches only that the Constitution’s original meaning is fixed; meanwhile, of course, new applications of that meaning will arise with new developments and new technologies. Consider a few examples. As originally understood, the term “cruel” in the Eighth Amendment’s Cruel and Unusual Punishments Clause referred (at least) to methods of execution deliberately designed to inflict pain. That never changes. But that meaning doesn’t just encompass those particular forms of torture known at the founding. It also applies to deliberate efforts to inflict a slow and painful death by laser. Take another example. As originally understood, the First Amendment protected speech. That guarantee doesn’t just apply to speech on street corners or in newspapers; it applies equally to speech on the Internet. Or consider the Fourth Amendment. As originally understood, it usually required the government to get a warrant to search a home. And that meaning applies equally whether the government seeks to conduct a search the old-fashioned way by rummaging through the place or in a more modern way by using a thermal imaging device to see inside. Whether it’s the Constitution’s prohibition on torture, its protection of speech, or its restrictions on searches, the meaning remains constant even as new applications arise.

Living constitutionalists often complain we can’t know the original understanding because the document’s too old and cryptic. Hardly. We figure out the original meaning of old and difficult texts all the time. Just ask any English professor who teaches Shakespeare or Beowulf.

I suspect the real complaint of living constitutionalists isn’t with old laws generally so much as it is with the particular terms of this old law. The Constitution is short—only about 7,500 words, including all its amendments. It doesn’t dictate much about the burning social and political questions they care about. Instead, it leaves the resolution of those matters to elections and votes and the amendment process. And it seems this is the real problem for the critics. For when it comes to the social and political questions of the day they care most about, many living constitutionalists would prefer to have philosopher-king judges swoop down from their marble palace to ordain answers rather than allow the people and their representatives to discuss, debate, and resolve them. You could even say the real complaint here is with our democracy….

Of course, some suggest that originalism leads to bad results because the results inevitably happen to be politically conservative results. Rubbish. Originalism is a theory focused on process, not on substance. It is not “Conservative” with a big C focused on politics. It is conservative in the small c sense that it seeks to conserve the meaning of the Constitution as it was written. The fact is, a good originalist judge will not hesitate to preserve, protect, and defend the Constitution’s original meaning, regardless of contemporary political consequences. Whether that means allowing protesters to burn the American flag (the First Amendment); prohibiting the government from slapping a GPS tracking device on the underside of your car without a warrant (the Fourth Amendment); or insisting that juries—not judges—should decide the facts that increase the penalty you face in a criminal case (the Sixth Amendment)….Besides, if we’re going to measure an interpretive theory by its results, consider this. Virtually the entire anti canon of constitutional law we look back upon today with regret came about when judges chose to follow their own impulses rather than follow the Constitution’s original meaning. Look, for example, at Dred Scott and Korematsu. Neither can be defended as correct in light of the Constitution’s original meaning; each depended on serious judicial invention by judges who misguidedly thought they were providing a “good” answer to a pressing social problem of the day
.
Even when it comes to more prosaic cases, leaving things to the moral imagination of judges invites trouble. Just consider the “reasonable expectation of privacy” test the Court invented in the 1960s to redefine what qualifies

as a search for Fourth Amendment purposes. Oh, it sounded nice enough. But under that judge-made doctrine, the Court has held—and I'm not making this up—that a police helicopter hovering 400 feet above your home doesn't offend a "reasonable expectation of privacy." The Court has even held that the government can snoop through materials you've entrusted to the care of third parties because, in its judgment, that, too, doesn't invade a "reasonable expectation of privacy." But who really believes that? The car you let the valet park; the medical records your doctor promised to keep confidential; the emails you sent to your closest friend. You don't have a reasonable expectation of privacy against the government in any of those things? Really?

WHAT IS OBVIOUSLY WRONG WITH THE FEDERAL JUDICIARY, YET EMINENTLY CURABLE
Richard A. Posner

Richard Posner is a judge on the U.S. Court of Appeals for the Seventh Circuit and a senior lecture at the University of Chicago Law School. This is the second part of a two-part article. The first part appeared in the winter 2016 issue of this journal. 19 Green Bag 2d 187.

The REALITY OF constitutional decision making is well summarized in – of all places – a brilliant recent law novel in which we hear an imaginary Supreme Court Justice say that if "you're a buffoon. . . and you think that every dispute should be decided according to the principle of what a bunch of dead guys would have thought about it in the eighteenth century, then yes, we decide cases according to principle. But, you know, judging really involves making the best and most pragmatic decision you can given all the circumstances. Is that a principle? Maybe. But that's not what I mean when I say that this . . . jerk insists on his principles regardless whether they might ruin some eighteen-year-old girl's life." And later in the book he says: "I never liked constitutional law. It's barely law at all, in my view. It's just politics, filtered through a few vague phrases in an old document written by people who couldn't possibly fathom what the world looks like today." Exactly so.

"Interpretation" of ancient texts and decisions is not the answer to the doubts expressed by imaginary Justice Tuttle concerning the number of cases in which the lawyers or the judges appeal to interpretation in an effort to shift responsibility for a decision to legislators, regulators, or constitution makers, interpretation is impossible because the "interpretive" issue had not been foreseen by the authors of the document to be interpreted. It thus is silly to ask whether for example the Fourth Amendment forbids electronic surveillance of suspected crooks or spies. The amendment's authors and ratifiers had no opinion on electronic surveillance because it neither existed nor was foreseen.

The Supreme Court treats the Fourth Amendment as an open sesame to judges to create rules regulating anything that could be described as a search or a seizure. The fact that the Fourth Amendment doesn't say or suggest that warrants to search or arrest are ever required (all that the amendment says with respect to warrants is that general warrants are forbidden) hasn't stopped the Supreme Court from ruling that a warrant is required to search a person's home or to arrest a person in his home. Which is fine, but illustrates the legislative role of the federal judiciary, and its hypocrisy; for the Court grounds the rule in a constitutional provision that has nothing good to say about warrants.

As in the warrant example, much of what goes by the name of interpretation in law is not an attempt to reconstruct the meaning that the author or authors of the work (the statutory phrase, the regulation, the judicial decision) being "interpreted" intended. A famous brief phrase in Keats's great poem "Ode to a Nightingale" – a phrase that F. Scott Fitzgerald appropriated for the title of one of his novels – is "tender is the night." I don't think anyone can know what Keats meant in calling night "tender," or can much care. What a poem means to a reader two hundred years after it was published depends on the reader more than on the poet. And so it is with the Constitution. And so "originalism" is nonsense, as the evidence shows and even some leading originalists come close to conceding – William Baude, for example.

In a recent article he advocates what he calls "inclusive originalism." By this he means that any judicial decision that does not violate the original meaning of the Constitution (or of an amendment to the Constitution) is originalist and therefore lawful. He is thereby enabled to describe the decision holding that there is a constitutional right to same-sex marriage as an originalist decision, even though it has no constitutional pedigree.

The Constitution is just the extreme example of the limitations of interpretation as a tool of judicial decision making. The broader problem is that issues of the scope and application of statutes constantly arise that were unforeseen by the statutes' drafters and enactors, and all a court can do is resolve them in a way that makes sense without doing violence to the legislators' clear intentions, if any are discernible.

New York Times

WASHINGTON — The Supreme Court on Thursday ruled that federal courts are powerless to hear challenges to partisan gerrymandering, the practice in which the party that controls the state legislature draws voting maps to help elect its candidates. The vote was 5 to 4, with the court's more conservative members in the majority. In a momentous decision, the court closed the door on such claims. The drafters of the Constitution, Chief Justice John G. Roberts Jr. wrote for the majority, understood that politics would play a role in drawing election districts when they gave the task to state legislatures. Judges, the chief justice said, are not entitled to second-guess lawmakers' judgments. "We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts," the chief justice wrote
.
Partisan gerrymandering is almost as old as the nation, and both parties have used it. But in recent years, as Republicans captured state legislatures around the country, they have been the primary beneficiaries. Aided by sophisticated software, they have drawn oddly shaped voting districts to favor their party's candidates. Should Democrats capture state legislatures in the next election, the ruling would allow them to employ the same tactics.
.
In an impassioned dissent delivered from the bench, Justice Elena Kagan said American democracy will suffer thanks to the court's ruling in the two consolidated cases decided Thursday, *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726. . "The practices challenged in these cases imperil our system of government," she said. "Part of the court's role in that system is to defend its foundations. None is more important than free and fair elections." She added that she was dissenting "with deep sadness." Justices Ruth Bader Ginsburg, Stephen G. Breyer and Sonia Sotomayor joined Justice Kagan's dissent.

Chief Justice Roberts did not say the current system of drawing districts is desirable as a matter of policy. "Excessive partisanship in districting leads to results that reasonably seem unjust," he wrote. "The districting plans at issue here are highly partisan, by any measure," he wrote. "The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well." The answer, he wrote, is no, as courts lack the authority and competence to decide when politics has played too large a role in redistricting. "There are no legal standards discernible in the Constitution for making such judgments," the chief justice wrote, "let alone limited and precise standards that are clear, manageable and politically neutral."
"Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution and no legal standards to limit and direct their decisions," Chief Justice Roberts wrote. Justices Clarence Thomas, Samuel A. Alito Jr., Neil M. Gorsuch and Brett M. Kavanaugh joined the majority opinion.

In dissent, Justice Kagan said the court had abdicated one of its most crucial responsibilities.
"The only way to understand the majority's opinion," she wrote, "is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights — in the face of escalating partisan manipulation whose compatibility with this nation's values and law no one defends — the majority declines to provide any remedy. For the first time in this nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply."

Adam Liptak June 27, 2019

New York Times
Opinion by the Editorial Board

Three North Carolina Judges Step In Where the Supreme Court Refuses

The Supreme Court's conservatives said gerrymandering was not a matter for courts, leaving the job of protecting democratic self-rule to state judges. Three state judges on a North Carolina trial court just did what a majority on the United States Supreme Court said was impossible only a few months ago — apply well-established legal standards to strike down some of the most egregious partisan gerrymanders in the country. The state court judges' 357-page ruling applies to the North Carolina state legislature, the General Assembly, which now has two weeks to come up with new, fairer maps for state legislative districts. It also sends a broader message to the justices in Washington, and to state judges everywhere: See? Protecting democracy from self-interested, power-hungry politicians isn't so hard after all
.
The lawsuit decided on Tuesday was the latest in a long line of litigation against North Carolina's legislative maps, which the state's Republican lawmakers have been unilaterally hacking up for the last eight years, then stitching back together to resemble not the state as it is (a hotly contested battleground) but as they would like it to be (a towering, impregnable Republican fortress). The existing maps were so effective that they helped entrench Republican majorities even when Democrats won more votes statewide. In 2018, Republican candidates for North Carolina's House of Representatives won less than 50 percent of the two-party statewide vote but walked away with 65 seats to the Democrats' 55. Republican candidates for the State Senate also won a minority of the popular vote, and still took 29 of 50 seats….

On Tuesday afternoon, the North Carolina judges — two Democrats and a Republican — agreed unanimously that they didn't need the federal Constitution to vindicate Americans' basic democratic rights. They could rely on their state's own Constitution, which guarantees, among other things, free elections, equal protection and freedom of speech and assembly — all of which they said the Republicans' maps violated. "The object of all elections is to ascertain, fairly and truthfully, the will of the people," the judges wrote, quoting the North Carolina Supreme Court. The "inescapable conclusion," they said, was that the maps "do not permit voters to freely choose their representative, but rather representatives are choosing voters based upon sophisticated partisan sorting."

The judges offered a simple and clear rejoinder to Chief Justice Roberts's warning that judges would find it impossible to avoid getting caught up in the partisan bickering over legislative mapmaking. "It is not the province of the court to pick political winners or losers," they wrote. "It is, however, most certainly the province of the court to ensure that 'future elections' in the 'courts of public opinion' are ones that freely and truthfully express the will of the people. All elections shall be free — without that guarantee, there is no remedy or relief at all." This is the central problem of partisan gerrymandering, and one that the conservative justices missed, or refused to see: When foxes guard henhouses, the hens invariably disappear.

The North Carolina judges, in contrast, aimed their sights squarely at the foxes — documenting how the Republican maps had been drawn intentionally to favor Republicans at the expense of Democrats, and noting that the lawmakers had offered no good alternative explanation for the extreme bias.
The ruling applies only to state legislative districts, but its reasoning applies equally to North Carolina's congressional districts, which are equally skewed. In the 2018 midterms, Republican candidates won a bare majority of the vote, but wound up winning 10 of the 13 seats in the House. One Republican lawmaker involved in the redistricting process explained that he and his colleagues had settled on that map only because "I do not believe it's possible to draw a map with 11 Republicans and two Democrats."

Braggadocio like that was absent on Tuesday. Only hours after the state court's decision, North Carolina Republicans folded, admitting that they had finally run into a barrier they couldn't draw their way around. In a statement that should be a finalist for the 2019 Chutzpah Award, the State Senate leader, Phil Berger, accused Democrats of trying to "game" the redistricting process, blamed the years of litigation over their maps for

harming the “legitimacy of this state’s institutions,” and sniffed that they would abide by the ruling and draw “a nonpartisan map.” The truth is they would probably have loved to appeal the ruling to the State Supreme Court and keep drawing ever more skewed maps in their favor, but they knew that with a Democratic-appointed majority on that court, their chances of victory were slim.

t least they didn’t behave like their Republican counterparts in Pennsylvania, who responded to a decision by that state’s Supreme Court tossing out their biased maps by trying to impeach the justices who issued the ruling. Partisan gerrymandering has a long and bipartisan history, and Republicans today see themselves as getting revenge for years in which Democrats were in power and drew the maps in their own favor. But mapmaking technology has advanced strikingly in the past two decades, giving politicians an unprecedented degree of control in carving up the citizenry for their own benefit.

That’s why Justice Elena Kagan pointed to partisan gerrymanders as an existential threat to democratic self-rule. In her dissent from the Supreme Court’s decision in June, she explained that gerrymandered maps “make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process.” Justice Kagan asked, “Is this how American democracy is supposed to work?” Tuesday’s decision in North Carolina was right to answer that question in the negative, and to claim a space for state courts elsewhere to intervene when partisan gerrymandering has effectively silenced huge portions of the electorate. But state courts shouldn’t have been saddled with this job in the first place. As Justice Kagan wrote in June: “What do those courts know that this court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn’t we?”