

GERRYMANDERING AND THE MEANDERING OF OUR DEMOCRATIC PRINCIPLES: COMBATING PARTISAN GERRYMANDERING AFTER *RUCHO*

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INTRODUCTION

In perhaps the most well-known presidential speech in our nation's history, Abraham Lincoln declared the fundamental American principle that the United States is a nation "of the people, by the people, [and] for the people."¹ More than one hundred fifty years later, this principle is under siege by the scourge of partisan gerrymandering, and recently, the fight against it has become even more complex. In June 2019, the United States Supreme Court announced a landmark decision regarding partisan gerrymandering. Consolidating two cases, *Rucho v. Common Cause* and *Lamone v. Benisek*, the majority concluded that although partisan gerrymandering is "incompatible with democratic principles" . . . partisan gerrymandering claims present political questions beyond the reach of federal courts.² The decision effectively closed the door on partisan gerrymandering claims in federal courts once and for all, leaving the remedy for this issue unknown. With a new round of redistricting set to occur after the 2020 census, addressing partisan gerrymandering has become even more pressing, and without a solution, the United States risks an expansion of this crisis. This Note seeks to lay out what the United States' options are after *Rucho* and how the nation can curb the proliferation of partisan gerrymandering.

Part I of this Note will briefly discuss the key terms for understanding partisan gerrymandering's practical implementation and its origins in the United States. Part II will provide further analysis of Supreme Court jurisprudence regarding partisan gerrymandering, culminating with the Court's recent ruling in *Rucho v. Common Cause*. Part III will explore the effects of gerrymandering and how those effects have led to the current American political discourse. Part IV will address possible remedies and methods to combat partisan gerrymandering, thus ensuring free and fair elections.

¹ Abraham Lincoln, President, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863).

² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (citation omitted).

I. HISTORY AND KEY TERMS

A. THE KEY TERMS FOR UNDERSTANDING PARTISAN GERRYMANDERING: PACKING, CRACKING, HIJACKING, KIDNAPPING, AND THE EFFICIENCY GAP

Partisan gerrymandering is the “drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.”³ Put simply, it is the intentional manipulation of district boundaries to discriminate against a group of voters based on their political affiliation or views.⁴ This is typically accomplished by using two different techniques: packing and cracking. Packing occurs when mapmakers concentrate one party’s supporters into one or a few districts.⁵ This creates legislative districts with an overwhelming majority of one party’s supporters, decreasing that party’s chances of winning in other districts.⁶ Cracking occurs when mapmakers divide an opposing party’s supporters among multiple districts so that they chronically fall short of a majority in each one and are unable to elect a candidate of their choice.⁷ These tactics are typically used in conjunction; the opposing party’s supporters are “packed” into one or a few districts and “cracked” from others, leading to predictable electoral outcomes.⁸ In essence, packing and cracking vastly increase the likelihood that the party who drew the legislative districts will reliably win certain districts, while containing the opposing party to those they have predetermined. Partisan gerrymandering is also frequently used to protect or harm political incumbents. For instance, in a process known as “hijacking,” a district is drawn specifically to separate an incumbent from their long-time constituency in order to make them face reelection in a district with a less favorable partisan makeup.⁹ A further common partisan gerrymander, known as “kidnapping,” occurs when two incumbents are gerrymandered into the same district, forcing them to face off against one another for the single remaining seat.¹⁰ Both major political parties use all of these tactics across the nation in an effort to maintain political power and influence.

In 2015, Nicholas Stephanopoulos, Professor at the University of Chicago Law School, and Eric McGhee, Research Fellow at the Public Policy Institute of California, developed a new standard for measuring partisan gerrymandering they called the efficiency gap. The efficiency gap measures the number of votes which are wasted by each party during an election to determine whether either party had an advantage in that election due to partisan gerrymandering.¹¹ More thoroughly, the efficiency gap:

³ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 791 (2015).

⁴ *Id.* at 791 n.1.

⁵ *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018).

⁶ *See id.*

⁷ *See id.*

⁸ M. Christopher Freeman, Jr., Note, *Partisan Gerrymandering and Georgia: Red, White, and Blue or Just Red and Blue?*, 35 GA. ST. U.L. REV. 487, 492–93 (2019).

⁹ Ruth Greenwood et al., *Designing Independent Redistricting Commissions*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/sites/default/files/Designing%20Independent%20Redistricting%20Commissions.pdf> (last visited Sept. 14, 2020).

¹⁰ *Id.*

¹¹ Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2015).

[R]epresents the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail. Large numbers of votes commonly are cast for losing candidates as a result of the time-honored gerrymandering technique of “cracking.” Likewise, excessive votes often are cast for winning candidates thanks to the equally age-old mechanism of “packing.” The efficiency gap essentially aggregates all of a district plan's cracking and packing choices into a single tidy number.¹²

Therefore, a positive efficiency gap indicates that the party benefits from a partisan gerrymander, whereas a negative efficiency gap indicates that a party is harmed by a partisan gerrymander.¹³ The authors recommend an efficiency gap maximum of two seats for congressional district plans (percentages converted into the number of seats gained or lost) and an 8 percent threshold for state legislature plans.¹⁴ Anything beyond these thresholds would then be presumptively unconstitutional.¹⁵ To be clear, this framework has not been adopted by the Supreme Court, and it is likely not the silver bullet to expose all gerrymandering. For instance, the efficiency gap does not account for traditional redistricting principles such as contiguity or compactness.¹⁶ However, the framework does provide a useful methodology for analyzing the severity of partisan gerrymandering across legislative districts.

Using this framework, the efficiency gaps for congressional districts and state legislative districts have clearly steadily risen over the last forty years and are reaching new heights each year tested.¹⁷ Further, based on the efficiency gap, the severity and scope of today's gerrymandering in the United States are undoubtedly historically unprecedented.¹⁸ Action must be taken to correct these gaps as soon as possible.

B. THE HISTORY OF PARTISAN GERRYMANDERING IN THE UNITED STATES

Partisan gerrymandering is by no means a modern phenomenon. The practice of drawing district lines to favor one's party is nearly as old as the nation itself and even predates Congress.¹⁹ As the Chief Justice John Roberts himself noted, “Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification

¹² *Id.* at 834.

¹³ *Id.* at 853.

¹⁴ *Id.* at 837.

¹⁵ *Id.*

¹⁶ See Brief of Amici Curiae Jud. Watch, Inc. and Allied Educ. Found. in Support of Appellants at 3–4, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

¹⁷ Stephanopoulos & McGhee, *supra* note 11, at 836.

¹⁸ *Id.*

¹⁹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019); Erick Trickey, *Where Did the Term “Gerrymander” Come From?*, SMITHSONIAN (July 2017), <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/>.

of the Constitution.”²⁰ In 1788, Patrick Henry famously convinced the Virginia General Assembly to redraw the Fifth Congressional District, forcing James Madison to face off against another man who would one day become president: James Monroe.²¹ The tactic was ultimately unsuccessful, as Madison won reelection; nonetheless, partisan gerrymandering had appeared in American politics in a prominent manner. The term “gerrymander” itself was coined in 1812 when the election for the state Senate in Massachusetts produced questionable results.²² Despite the popular vote being nearly evenly split between the Democratic-Republican Party and the Federalist Party, the Democratic-Republicans won twenty-nine of the forty seats up for election.²³ The cause became apparent at once. The previous year, the state’s governor Elbridge Gerry²⁴ approved the redrawing of electoral districts to favor the Democratic-Republicans and limit the Federalists’ voting power.²⁵ Local political cartoonists quickly jumped at the chance to vilify Governor Gerry for his actions. They depicted the district as a monster resembling a salamander—or, in their words, a “Gerry-mander.”²⁶ Thus, the term entered the popular vernacular and, more importantly, the act of manipulating district boundaries to enhance a party’s power came to the forefront of American politics—and has remained there to this day.

In modern times, partisan gerrymandering has become more pervasive. The proliferation of advanced technology and increased partisanship across the nation have made gerrymandering increasingly easier, with mapmakers able to precisely pull in voters down to the city block.²⁷ However, advances in technology are only one of the reasons partisan gerrymandering has flourished over the last few decades. America’s increased partisanship has also abetted the spread of partisan gerrymandering. Stephanopoulos, expert in election law and cocreator of the efficiency gap framework, argues that from 1960 to 1980, “voters and politicians were both startlingly nonpartisan. Many voters split their tickets to back different parties’ candidates, changed their votes from one election to another . . . [and] [o]fficeholders . . . were remarkably fluid in their partisan and ideological allegiances. They often bucked their parties and espoused moderate positions”²⁸ Most of the litigation during this period centered around racial gerrymandering, the manipulating of district boundaries to pack or crack based on the ethnicity of voters.²⁹ During this period courts simply did not intervene in partisan

²⁰ *Rucho*, 139 S. Ct. at 2494.

²¹ Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), <https://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/>.

²² *See id.*; Freeman, *supra* note 8, at 487.

²³ Freeman, *supra* note 8, at 487.

²⁴ *See id.* While Elbridge Gerry is today only remembered for this early political act, he was a rather important historical figure in the United States. He was a signer of the Declaration of Independence, he refused to sign the Constitution because it did not include a Bill of Rights, and he later served as Vice President under James Madison—the very man whose political career was nearly ended years earlier by Patrick Henry’s early ‘gerrymander.’ *See id.*

²⁵ *Id.*

²⁶ *Id.* at 487–88.

²⁷ *See* Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC, (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/>.

²⁸ Nicholas O. Stephanopoulos, *The Dance of Partisanship and Districting*, 13 HARV. L. & POL’Y REV. 507, 509 (2019).

²⁹ *Id.* at 511.

gerrymanders, often because most were “mild and ephemeral.”³⁰ However, in the 1990s, “partisanship of the American political system steadily intensified, and has now reached unprecedented heights.”³¹ In fact, the 115th Congress featured the largest inter-party gap, a measure of political-ideological differences, ever recorded.³² Fewer voters in the 2010s call themselves moderates than in the 1970s and 1980s, and the ideological distance between the average Democrat and the average Republican has statistically doubled.³³ As the United States has become more partisan and technology has made the actual process easier, gerrymandering has begun to run rampant, directly influencing elections across the nation at almost every level of government.

II. THE SUPREME COURT’S HISTORICAL AND CURRENT STANCE ON PARTISAN GERRYMANDERING

A. HISTORICAL SUPREME COURT GERRYMANDERING JURISPRUDENCE

The proliferation in partisan gerrymandering has also been coupled with a Supreme Court increasingly complacent when faced with policing such partisan tactics. Beginning in the early 1960s, the Supreme Court began to take a more active role in policing gerrymandering, especially when it was utilized to marginalize ethnic minorities.³⁴ In 1960, a unanimous Court decided *Gomillion v. Lightfoot*, a Fifteenth Amendment case rooted in the unconstitutional manipulation of an electoral district to disenfranchise African Americans from elections.³⁵ The state of Alabama had changed what was a square-shaped electoral district into a “strangely irregular twenty-eight-sided figure,” with the specific intent of disenfranchising African Americans.³⁶ Two years later in, *Baker v. Carr*, the Court held that claims of legislative apportionment and redistricting presented justiciable questions, thus allowing federal courts to rule on redistricting cases for the first time.³⁷ Throughout the 1970s, 80s, and 90s, the Supreme Court ruled on a host of legislative apportionment and redistricting claims, often refining sections of the Voting Rights Act of 1964 or striking down racial gerrymanders.³⁸ In 1986, the Supreme Court held for the first time in *Davis v. Bandemer* that partisan gerrymandering claims in particular were properly justiciable under the Equal Protection Clause.³⁹ However, the Court was unable to settle on a standard to apply to such cases. In a plurality opinion, the justices argued that there must be intentional discrimination against a political group with an actual discriminatory effect.⁴⁰ In 2001, a pivotal turning point occurred when the Court ruled in *Easley v. Cromartie*. The Court ruled that

³⁰ *Id.* at 521.

³¹ *Id.* at 509.

³² *Id.* at 522.

³³ *Id.* at 521–22.

³⁴ *Id.* at 509–10.

³⁵ *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 346–48 (1960).

³⁶ *Id.* at 341.

³⁷ *Baker v. Carr*, 369 U.S. 186, 266 (1962).

³⁸ See Stephanopoulos, *supra* note 28, at 510–11, 516–17.

³⁹ *Davis v. Bandemer*, 478 U.S. 109, 143 (1986).

⁴⁰ *Id.* at 141–42.

partisanship was a valid defense to a charge of racial gerrymandering, stating that litigants must prove that “race rather than politics predominantly explains [a district’s] boundaries.”⁴¹ Thus, the Court signaled that when faced with a charge of impermissible racial gerrymandering, litigants could legitimately claim in defense that it was partisanship, rather than race, that was the motivating factor behind the gerrymander. This decision sent a clear signal to political parties that federal courts were not eager to police partisan gerrymandering, and that gerrymandering for political purposes was an acceptable exercise of government power, setting the stage for the Court’s decision in *Rucho*.⁴²

B. CURRENT SUPREME COURT STANCE: *RUCHO V. COMMON CAUSE*

The procedural background of *Rucho* stems from voters in North Carolina and Maryland challenging their states’ congressional districting maps as unconstitutional partisan gerrymanders. The Maryland plaintiffs complained that their state’s districting plan discriminated against Republican voters, and the North Carolina plaintiffs that their state’s districting plan discriminated against Democratic voters.⁴³ In Maryland, a Democrat-controlled state legislature and Democratic governor enacted a plan to redraw a reliably Republican district so that the district would elect a Democratic delegate instead.⁴⁴ The plan was enacted via a strict party-line vote, as Republicans realized the consequences of the plan and fought to stop its passing.⁴⁵ Overall, the plan reduced the districts’ total number of registered Republicans by about 66,000 and increased the number of registered Democrats by about 24,000.⁴⁶ Prior to the plan, Maryland had regularly sent six Democrats and two Republicans to the House of Representatives.⁴⁷ Since the plan’s enactment, the targeted district has exclusively elected a Democratic representative, and Maryland now reliably sends seven Democrats and one Republican to the House of Representatives.⁴⁸ The partisan gerrymander in Maryland proved to be highly effective, and the Republican party and Republican voters have seen a decrease in their ability to influence Congress.

The plaintiffs in North Carolina, a state with a sordid history of partisan gerrymandering, faced a similar scenario. The Republican-dominated legislature set out to create a districting plan that would reliably send ten Republicans and three Democrats to the House of Representatives.⁴⁹ When

⁴¹ *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (alteration in original).

⁴² Stephanopoulos, *supra* note 28, at 527–28. Interestingly, the decision in *Cromartie* concerned the same congressional district, the North Carolina 12th, that would be the subject of the *Rucho* litigation some eighteen years later. The North Carolina 12th Congressional District has made numerous appearances in Supreme Court jurisprudence, starting with the Court’s seminal racial gerrymandering case *Shaw v. Reno*, 509 U.S. 630 (1993). The district also appeared before the Court in *Cooper v. Harris*, 137 S. Ct. 1455 (2017) in which Justice Kagan noted that it was the fifth time the district had appeared before the Supreme Court. *Id.* at 1472. Without the North Carolina 12th Congressional District, there may be little Supreme Court caselaw on this subject.

⁴³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

⁴⁴ *Id.* at 2493.

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 2510 (Kagan, J., dissenting).

⁴⁸ *Id.* at 2511.

⁴⁹ *Id.* at 2510.

asked why this ratio was selected, one of the Republicans chairing the redistricting committee stated the reason was that he did not believe it was possible to draw a map with eleven Republicans and two Democrats.⁵⁰ The Democrats complained about the plan, pointing out that Democratic candidates consistently receive a majority of votes on a statewide basis, but still only receive about 23 percent of the congressional seats.⁵¹ Nonetheless, the plan was enacted against the complaints of the Democrats. The plan has worked quite effectively; in the 2016 and 2018 elections, the Republican Party won ten of North Carolina's congressional seats while the Democratic Party won three, the exact goal of the partisan gerrymander.⁵²

In both cases, the district court ruled in favor of the plaintiffs, considering the partisan gerrymanders to be unconstitutional.⁵³ The appeals were both sent directly to the Supreme Court, which consolidated the cases into one ruling. The Court fully acknowledged that “the districting plans at issue [were] highly partisan, by any measure,”⁵⁴ but stated that it must first be determined whether federal courts have jurisdiction over partisan gerrymandering claims.⁵⁵ In foreshadowing their ultimate conclusion, the Court repeated the constitutional principle that some claims are nonjusticiable because they present political questions, or issues entrusted to one of the politically accountable branches of government, and thus are outside the Court's competence.⁵⁶ The Court ultimately ruled in a 5-4 decision that partisan gerrymandering claims did present political questions beyond the reach of federal courts, effectively closing the door on future claims in federal court once and for all.⁵⁷ The Court's refusal to weigh in on partisan gerrymandering is not necessarily a shift in stance, as the Court has always been apprehensive about such claims. However, it is a major ruling which has highly consequential effects on our democracy. The fact remains that partisan gerrymandering is a palpable issue across the United States, and something must be done to correct it.

III. CAUSES AND EFFECTS OF PARTISAN GERRYMANDERING

The causes of partisan gerrymandering stem from self-interested partisans. Control over the districting process by political operatives substantially benefits the party in charge of districting.⁵⁸ When a single party controls the districting process, the party has the motive and opportunity to enact a redistricting plan that “benefits it and disadvantages its opponent.”⁵⁹ Once partisan gerrymandering occurs, the party in charge of redistricting can increase their influence, decrease their opponent's influence, and solidify

⁵⁰ *Id.*

⁵¹ *See id.* at 2510.

⁵² *Id.* (discussing how the North Carolina 13th was initially not filled due to election fraud but was eventually filled by a Republican).

⁵³ *Id.* at 2493 (majority opinion).

⁵⁴ *Id.* at 2491.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2506–07.

⁵⁷ *Id.*

⁵⁸ Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2119 (2018).

⁵⁹ *Id.* at 2121.

their position in power for years, if not an entire decade.⁶⁰ Further, for individual incumbents, partisan gerrymandering can effectively eliminate the chances they lose their seats in a general election, meaning they only need to truly defend their seat during their party's primary.⁶¹ For a politician or political party eager to stay in power and spread their ideological influence, partisan gerrymandering is undeniably lucrative.

Nonetheless, the selfish causes of partisan gerrymandering lead to numerous harmful effects, not only for political parties and their operatives but also for the people and our republican form of government. Partisan gerrymandering has five primary effects: (1) political parties and their candidates become more polarized, inhibiting bipartisan cooperation; (2) the quality and quantity of individuals running for public office substantially decrease in gerrymandered districts; (3) political fundraising, voter turnout, and voter faith in elections substantially decrease in gerrymandered districts; (4) changes in votes do not correlate with a change in the partisan makeup of state legislatures and the House of Representatives; and (5) legislators from gerrymandered districts tend to become less responsive to the will of the public.

A. INCREASED POLARIZATION AMONG POLITICAL PARTIES AND THEIR CANDIDATES

When a district undergoes a partisan gerrymander, one of the most prominent effects is the increased polarization of elected officials. Imagine a scenario in which a district is gerrymandered to be reliably Republican so that the general election becomes a mere formality because the Democratic candidate can seldom capture the district. When this occurs, the emphasis of that district will almost certainly shift to the Republican primary, because whoever wins the primary will almost always win the general election.⁶² In these circumstances, power shifts from the general public to a smaller set of "base voters" whose views, in this instance, will typically be further to the ideological right than most of the general public.⁶³ Consequently, this means the Republican incumbent in this gerrymandered district will have to take positions further to the ideological right or risk losing in the Republican primary.⁶⁴ As a result, "[a] [m]ember in a 'safe' [gerrymandered] district has strong incentives to appeal to . . . highly partisan primary voters," because they alone typically hold the key to the member's reelection.⁶⁵ Representatives of both parties from gerrymandered districts are pressured into taking more ideological views, resulting in more polarized representatives who will be less willing to cooperate with the opposing party

⁶⁰ See *id.* at 2121–22.

⁶¹ *Why Do Politicians Gerrymander?*, ECONOMIST: THE ECONOMIST EXPLAINS (Oct. 27, 2013), <https://www.economist.com/the-economist-explains/2013/10/27/why-do-politicians-gerrymander>; see also Brief for Bipartisan Grp. of Current and Former Members of the House of Representatives as Amici Curiae in Support of Appellees at 5–6, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422, 18-726) [hereinafter Bipartisan Brief].

⁶² See Amici Curiae Bipartisan Grp. of 65 Current and Former St. Legislators in Support of Appellees at 6–7, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

⁶³ See G. Alan Tarr & Robert F. Williams, *Eighteenth Annual Issue on State Constitutional Law: Introduction*, 37 RUTGERS L.J. 877, 878 (2006).

⁶⁴ See *id.*

⁶⁵ Bipartisan Brief, *supra* note 61, at 14.

for fear of not being conservative or liberal enough to win a primary.⁶⁶ In both state legislative districts and congressional districts where gerrymandering occurs, the ideological midpoint for Republicans and Democrats, a measure of how partisan elected officials are, is further to the right and left, respectively.⁶⁷ This reasonably leads to the conclusion that partisan gerrymandering plays at least some role in the increase in partisanship in the United States that we have seen in the last forty years. Further, it is clear that partisan gerrymandering harms bipartisan cooperation.

B. DECREASED QUALITY AND QUANTITY OF INDIVIDUALS RUNNING FOR PUBLIC OFFICE IN GERRYMANDERED DISTRICTS

Another negative effect of partisan gerrymandering is that the party that is disadvantaged by a partisan gerrymander experiences a substantial decrease in the quality and quantity of individuals running for public office, further reducing their chances of winning within the district. These difficulties “ravag[e]” the disadvantaged party, “placing [it] at an enduring electoral disadvantage” and leaving it with fewer qualified individuals that want to run for office.⁶⁸ In a comprehensive data analysis of all states with more than six congressional seats, it was shown across all models that when partisan gerrymanders in favor of the Democratic Party occur, Democrats consistently field higher quality candidates than Republicans, and vice versa.⁶⁹ The reasoning is clear: if you are a potential “high-quality” candidate in a district which has little hope of electing a member of your party due to a partisan gerrymander, there is little incentive to spend the time, money, and energy it requires to run for office when losing may tarnish your future political prospects.⁷⁰ These potential high-quality candidates may instead decide not to run at all or, in some instances, leave the district.⁷¹ Thus, partisan gerrymandering not only disadvantages a party numerically, but it also discourages high-quality candidates from running for office at all.

C. DECREASED POLITICAL FUNDRAISING, VOTER TURNOUT, AND OVERALL VOTER FAITH IN ELECTIONS IN GERRYMANDERED DISTRICTS

A third negative effect of partisan gerrymandering is that the disadvantaged party suffers a decrease in fundraising while the district, as a whole, experiences a decrease in voter turnout and faith in elections. Turning

⁶⁶ See Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1068 (2005); see also Michael Barbaro, *A Plan to End Partisan Gerrymandering*, N.Y. TIMES: THE DAILY (July 29, 2019), <https://www.nytimes.com/2019/07/29/podcasts/the-daily/gerrymandering-2020-election-eric-holder.html?showTranscript=1>.

⁶⁷ See Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 ELECTION L.J. 453, 457–58 (2017); see also Stephanopoulos, *supra* note 58, at 2144.

⁶⁸ Gill v. Whitford, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring).

⁶⁹ Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, SOC. SCI. RESEARCH NETWORK 16 (Nov. 24, 2019), <https://ssrn.com/abstract=3330695>.

⁷⁰ *Id.* at 1, 3, 5.

⁷¹ See *id.* at 5–6.

first to fundraising, when partisan gerrymandering occurs, the disadvantaged party has clear and apparent issues in fundraising.⁷² The reasoning is intuitive: if you are a donor in a district where your party has effectively been gerrymandered out of contention, there is little incentive to donate to a campaign that has little chance of success.⁷³ This only reinforces the party's inability to compete for an already unlikely seat.

Additionally, voter turnout substantially decreases in gerrymandered districts. The reasoning for this result is twofold. First, the minority party's supporters often perceive their votes as less effective than they otherwise would be in non-gerrymandered districts and decide not to vote at all.⁷⁴ Simultaneously, members of the majority party feel their votes are "extraneous for candidates bound to prevail anyway," and thus decide not to vote because they feel their party will win regardless of their individual vote.⁷⁵ Second, voter turnout in gerrymandered districts is lower because those voters who are moved from another district to create the gerrymandered district are significantly less willing to vote for unfamiliar incumbents.⁷⁶

Lastly, gerrymandering decreases voters' confidence in elections and disillusiones them from the government as a whole. Since gerrymandering results in one party reliably being the minority regardless of their share of the vote, the elections "appear[] so clearly predetermined as to make the election a formality," leading voters to feel that "their votes are inconsequential."⁷⁷ As a result, "voters feel left out of the conversation entirely," become disillusioned with the government, and lose faith in the integrity of our republican system.⁷⁸ For instance, a Gallup Poll in 2016 found that "between 2009 and 2016, the percentage of Americans who have 'high confidence' in the 'honesty of elections' tumbled from 59 percent to 30 percent, while those lacking faith rose from 40 percent to 69 percent."⁷⁹ Voters in gerrymandered districts often feel that their votes are "hollow gestures" and quickly lose faith in the fairness of elections.⁸⁰ Political fundraising, voter turnout, and overall voter faith in elections substantially decrease in gerrymandered districts.

D. LACK OF CORRELATION BETWEEN VOTES AND THE PARTISAN MAKEUP OF STATE LEGISLATURES AND THE HOUSE OF REPRESENTATIVES

A reoccurring effect of gerrymandered districts is that results are "baked in," or, in other words, "over a wide range of elections changes in votes do not lead to changes in the partisan makeup of the representatives elected."⁸¹

⁷² See *id.* at 17–21.

⁷³ See *id.* at 6.

⁷⁴ *Id.* at 7.

⁷⁵ *Id.*

⁷⁶ *Id.* at 6.

⁷⁷ Bipartisan Brief, *supra* note 61, at 22 n.39.

⁷⁸ Bipartisan Brief, *supra* note 61, at 23.

⁷⁹ Bipartisan Brief, *supra* note 61, at 23.

⁸⁰ Bipartisan Brief, *supra* note 61, at 22.

⁸¹ Jonathan Mattingly, *The Fix is In: The Votes Don't Matter*, QUANTIFYING GERRYMANDERING (June 6, 2019), <https://sites.duke.edu/quantifyinggerrymandering/2019/06/26/the-fix-is-in-the-votes-dont-matter/>.

Consequently, if the majority party in a gerrymandered district loses support among voters, this does not result in the loss of seats in the House of Representatives or state legislatures.⁸² The “baking in” of elections has tangible effects which can shift control of power both within states and within Congress. After the 2010 redistricting, the effects of partisan gerrymandering have largely, but not exclusively, benefitted the Republican party.⁸³ For instance, gerrymandering after the 2010 round of redistricting accounted for twenty-six to thirty-seven extra Republican seats in 2012, four to nineteen extra seats in 2014, and seventeen to twenty-nine extra seats in 2016.⁸⁴ This proved to be highly consequential, as Democrats needed seventeen more seats in 2012 and twenty-four more seats in 2016 to gain a majority in Congress, both falling within the range of seats won by Republicans due to partisan gerrymandering.⁸⁵ This is not accidental and the overall theme is clear: the “eleven most skewed states all ha[ve] map-drawing processes controlled solely by one party.”⁸⁶ In Michigan, for example, it was determined that the Democratic Party needed more than 58 percent of the statewide vote to win a majority of the state’s congressional delegation.⁸⁷ While an 8 percent differential may not seem massive, it is enough to substantially decrease the likelihood that the Democratic Party could ever capture the majority in the state’s congressional delegation. Further, if changes in votes do not result in a change of representation, “the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all.”⁸⁸ Overall, partisan gerrymandering leads to elections with outcomes that do not accurately represent the will of the voters.

E. LESS RESPONSIVENESS BY LEGISLATORS TO THE WILL OF THE PEOPLE IN GERRYMANDERED DISTRICTS

Another substantial effect of partisan gerrymandering is that as districts become less competitive due to partisan gerrymandering, the elected officials from these districts tend to be less responsive to the will of the general public.⁸⁹ Imagine the following scenario: a gerrymandered district is created to contain 75 percent Democratic voters, and 25 percent Republican voters. However, some event occurs, and public sentiment turns so that 20 percent of the former Democratic voters are now in favor of the Republican candidate. The district will likely still fall to the Democrats, 55 percent to 45 percent. Thus, despite a huge swing in political preferences by the voters,

⁸² *Id.*

⁸³ Michael Li & Laura Royden, *Extreme Maps*, BRENNAN CTR. FOR JUST. 1 (May 9, 2017), <https://www.brennancenter.org/our-work/research-reports/extreme-maps>.

⁸⁴ *Id.* at 8.

⁸⁵ *Id.*

⁸⁶ *Id.* at 9.

⁸⁷ Brian O’Neill, *The Case for Federal Anti-Gerrymandering Legislation*, 38 U. MICH. J.L. REFORM 683, 684 (2005).

⁸⁸ *Veith v. Jubelirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting).

⁸⁹ Douglas J. Amy, *How Proportional Representation Would Finally Solve Our Redistricting and Gerrymandering Problems*, FAIRVOTE, https://www.fairvote.org/how_proportional_representation_would_finally (last visited Sept. 14, 2020).

there is no change in the partisan makeup of the district and likely no change in the stance of the representative.⁹⁰ The reoccurring theme shows itself once again; the representative has little incentive to change their viewpoint if they do not face any real threat of losing their seat.⁹¹ This is more than simply an imagined scenario. There are dozens of issues in which public sentiment changes rapidly, but representatives are slow to change their stance on the issue. Take, for instance, the rapid change in views on gay marriage and the legalization of marijuana that has occurred in the last decade and the slow responsiveness of elected officials on these issues.⁹²

David Wells, a leading expert on reapportionment and redistricting summarized this issue quite effectively:

Gerrymandering invariably inflates the number of safe districts. Barring a successful primary challenge, the individual incumbent is virtually assured of continued reelection for as long as he or she cares to hold the seat. This has the effect of insulating the legislative body against the consequences of changing sentiments and circumstances, for gerrymandering has provided the individual legislator, the legislative leadership, and the legislature as a whole with rather strong guarantees of continued office and power. The political . . . composition of the legislature has been effectively frozen for a decade, and changes are possible only within a limited, narrow range. The representation system, because it has been made less politically sensitive and therefore less responsive, has thus been rendered less able to perform its most fundamental task – the translation of public sentiment into public policy as accurately as possible.⁹³

Thus, the last primary effect of gerrymandering is that elected officials are less likely to perform their basic duty of turning the will of the people into legislation.

IV. HOW TO COMBAT PARTISAN GERRYMANDERING WITHOUT ASSISTANCE FROM FEDERAL COURTS

Although partisan gerrymandering is pervasive and abundant across the United States, the solution has become unclear in light of the Supreme Court's decision in *Rucho v. Common Cause*. However, there are ways to rectify this issue. Admittedly, none of them are perfect. But with redistricting already underway after the 2020 census, the states and their citizens can use a combination of these methods to address this issue before further damage is done.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *Attitudes on Same-Sex Marriage*, PEW RES. CTR. (May 14, 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>; see also Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/>.

⁹³ Amy, *supra* note 89.

States and their citizens have four realistic options to combat partisan gerrymandering. First, Congress can pass federal legislation to curb partisan gerrymandering once and for all. Unfortunately, given the current political climate of American politics and the inherent self-interest politicians and their parties have in continuing to gerrymander, this is, at best, unlikely.⁹⁴ Second, plaintiffs can bring claims in state court in an effort to force their states to redraw partisan-gerrymandered districts. This method has been successful in some instances and is a truly viable option for many states. However, it is simply not applicable across all fifty states. Third, states can create independent, nonpartisan redistricting commissions to take the power to redistrict out of the hands of political operatives with gerrymandering motives and place it into the hands of individuals without a vested interest in redistricting. However, some frameworks for independent redistricting commissions are more effective than others, and for states without direct ballot measures or where gerrymandering keeps one party in power, this solution can be out of reach. Lastly, citizens, states, and commiserate organizations can utilize a strategy I refer to as “Electorate Galvanization” to pressure representatives, inform voters on the harms and proliferation of gerrymandering, and spur voters to action.

A. PASS FEDERAL LEGISLATION TO CURB THE USE OF PARTISAN GERRYMANDERING

The Elections Clause of the United States Constitution, Article I, Section 4, Clause 1, is clear that the times, places, and manner of holding congressional elections be prescribed by each state, but that Congress may at any time make or alter such laws.⁹⁵ Thus, constitutionally speaking, Congress has the clear power to regulate congressional elections to curb partisan gerrymandering across the nation. In March 2019, the House of Representatives passed H.R. 1, which contained several comprehensive methods to make the redistricting process more conducive to our democratic principles.⁹⁶ Firstly, the bill would require all states to use independent commissions, consisting of equal numbers of Democrats, Republicans, and Independents, to draw congressional districts.⁹⁷ These commissions would then send their plans to state legislatures which would be barred from passing any plan along party lines. This means that, in order for the map to become the law, a certain number of votes from both parties would be required.⁹⁸ The bill also expressly bans partisan gerrymandering and provides for a mandatory waiting period during which the public can review the redistricting plans and provide comments on them via public forums.⁹⁹

⁹⁴ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523–24 (Kagan, J. dissenting). See generally Aaron Blake, *Gridlock in Congress? It's Probably Even Worse Than You Think*, WASH. POST (May 29, 2014, 5:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/gridlock-in-congress-its-probably-even-worse-than-you-think/>.

⁹⁵ U.S. CONST. art. I, § 4, cl. 1.

⁹⁶ Michael Li, *Five Ways H.R.1 would Transform Redistricting*, BRENNAN CTR. FOR JUST. (June 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/five-ways-hr-1-would-transform-redistricting>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

Opponents of the bill have accused H.R. 1 of being a “massive federal government takeover that would undermine the integrity of our elections.”¹⁰⁰ While H.R. 1 seems to address many of the issues of partisan gerrymandering, it highlights the fundamental flaw with this approach: it passed the House strictly along party lines, with 234 Democrats voting in favor of the bill and 193 Republicans voting against the bill.¹⁰¹ Since 2005, many such bills aimed at curbing partisan gerrymandering have been introduced in Congress.¹⁰² However, not a single bill aimed at curbing partisan gerrymandering has passed Congress.¹⁰³ The chances one will in the near future are quite low.

The reasoning for Congress’s likely inability to pass federal anti-partisan gerrymandering legislation is twofold. First, the politicians and parties who reap the benefits of partisan gerrymandering are unlikely to address an issue that benefits a large number of them. As shown above, it is in their own self-interest to continue to gerrymander. Politicians in gerrymandered districts face weaker competition from the opposing party and, in general, have much safer seats. If a politician maintains office through a partisan gerrymander, the chances they suddenly turn around and push for legislative reform are nil.¹⁰⁴ Unless there is some outside pressure, it appears unlikely that many of these elected officials will act against their own self-interest.

Second, Congress has become increasingly partisan, with tribalism deeply entrenched in both houses, and increasingly deadlocked, unable or unwilling to pass meaningful legislation. This increased tribalism and general stalemate make the chances of congressional legislation addressing partisan gerrymandering quite low. In fact, a recent study showed that congressional gridlock has doubled since 1950, with “75 percent of salient issues [on Washington’s agenda subject to legislative] gridlock.”¹⁰⁵ Further, even those bills that are considered to have had “successful” outcomes might not have been deemed successful by prior Congresses. For instance, many of the recent spending and funding bills that were made into law are in fact short term fixes punted to a year or two down the line, only to be battled over again because the long-term issues were not addressed in the bills.¹⁰⁶ Effectively, the deadlock estimation is likely underestimating the true level of legislative stalemate, further decreasing the likelihood Congress will be able to pass comprehensive gerrymandering legislation.¹⁰⁷

It is often argued that a switch to a proportional system of representation, rather than the winner-take-all format currently in place, is the best method for bringing an end to partisan gerrymandering. Under a proportional form of representation, legislative bodies are formed that reflect the overall

¹⁰⁰ Mike DeBonis & John Wagner, *House Democrats Pass H.R.1, Their Answer to Draining the Swamp*, WASH. POST (Mar. 8, 2019, 5:23 PM), https://www.washingtonpost.com/powerpost/house-democrats-prepare-to-pass-hr-1-their-answer-to-draining-the-swamp/2019/03/08/740f6b48-415b-11e9-9361-301ffb5bd5e6_story.html (quoting House Minority Leader Kevin McCarthy).

¹⁰¹ *Id.*

¹⁰² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523–24 (Kagan, J., dissenting).

¹⁰³ *Id.* at 2524.

¹⁰⁴ *Id.*

¹⁰⁵ Blake, *supra* note 94.

¹⁰⁶ Sarah Binder, *Polarized We Govern?*, BROOKINGS INST.: CTR. FOR EFFECTIVE PUB. MGMT. 10, (May 2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRevTableRev.pdf.

¹⁰⁷ *Id.*

support for each political party.¹⁰⁸ Thus, receiving 60 percent of the votes would garner a party 60 percent of the open seats available that legislative term. This is opposed to the United States' current framework of single member, winner-take-all elections in which a loss with 49 percent of the vote garners zero seats.¹⁰⁹ In theory, proportional representation would in fact remedy many of the issues inherent to partisan gerrymandering and could eliminate it as we know it.¹¹⁰ Furthermore, proportional representation would save time and money that go toward yearly redistricting litigation costs.¹¹¹ In Chicago alone, litigation stemming from the districts drawn after the 1990 census cost the city government \$8 million.¹¹² Nonetheless, the Supreme Court has been clear that the Constitution does not require proportional representation.¹¹³ Therefore, the decision would fall to Congress, which does not seem to be up to the challenge of completely revolutionizing our representational system any time soon.

Although federal legislation seems to be an excellent tool for combating partisan gerrymandering, it appears to be unrealistic and unattainable given the current American political discourse.

B. BRING PARTISAN GERRYMANDERING CLAIMS IN STATE COURT RATHER THAN FEDERAL COURT

The second option citizens have to combat partisan gerrymandering in light of the Supreme Court's decision in *Rucho* is to bring their claims in state court, under state constitutions, as opposed to federal courts. This option has the potential to be successful for two major reasons. First, litigants can base their arguments on legal provisions that are broader than the First and Fourteenth Amendments, the most common provisions used to combat partisan gerrymandering in federal courts.¹¹⁴ For instance, most state constitutions explicitly guarantee the right to vote. This could, in theory, provide a path for some form of vote dilution claim as a result of a partisan gerrymander.¹¹⁵ Second, litigants can avoid removal to federal courts, which, after *Rucho*, will be bound to dismiss partisan gerrymandering claims.¹¹⁶

This method has already proven successful on several occasions. For instance, Pennsylvania has long been a state plagued by partisan gerrymandering to the benefit of the Republican Party.¹¹⁷ In fact, despite

¹⁰⁸ Amy, *supra* note 89.

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).

¹¹⁴ Samuel S. H. Wang, Richard F. Ober, Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, PRINCETON ELECTION CONSORTIUM 5 (Feb. 15, 2019), <http://election.princeton.edu/2019/02/15/laboratories-of-democracy-reform-state-constitutions-and-partisan-gerrymandering/>.

¹¹⁵ Ben Williams, *If SCOTUS Refuses to Act on Partisan Gerrymandering, State Supreme Courts Offer a Path to Reform*, SLATE (Mar. 29, 2019, 1:04 PM), <https://slate.com/news-and-politics/2019/03/partisan-gerrymandering-state-supreme-court-constitutions.html>.

¹¹⁶ *Id.*

¹¹⁷ *See generally* Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania (2018)*, 17 ELECTION L.J. 268 (2018).

garnering 44 percent and 51 percent of the statewide vote in congressional elections in 2012, 2014, and 2016, Democrats only captured 28 percent of the state's congressional seats in each election.¹¹⁸ Consequently, voters in Pennsylvania brought a lawsuit in state court claiming that the congressional districting plan violated the Free & Fair Elections Clause of the Commonwealth's constitution.¹¹⁹ The Pennsylvania Supreme Court struck down the congressional maps as unconstitutional and enjoined the map for the 2018 elections, eventually releasing their own congressional map when the Republican-controlled legislature's remedial plan was found to be insufficient.¹²⁰ As a result, partisan gerrymandering was effectively reduced. In the November 2018 election, a 55 percent Democratic and 45 percent Republican statewide congressional vote led to a 9-9 congressional seat split.¹²¹ The new districting plan in Pennsylvania erased any partisan advantage for the Republican party, leading to five Democratic districts, seven Republican districts, and six tossup districts.¹²²

Another example can be found in Florida, where, in 2010, the voters added a "Fair Districts Amendment" to the state constitution that forbids the Florida Legislature from drawing a redistricting plan or individual district with the "intent to favor or disfavor a political party or an incumbent."¹²³ This amendment has proven to be effective, as it was used by the Florida Supreme Court to strike down the entire state senate plan in 2012 and strike down several congressional districts as unconstitutional partisan gerrymanders in 2015.¹²⁴ Another surprising example is North Carolina, one of the very subjects of the *Rucho* litigation. As of this writing, a North Carolina state court ruled that the state cannot proceed with the 2020 House primaries under its current congressional districting map because the Democratic Party would likely "prove the districts violate the state constitution . . ."¹²⁵ Thus, litigants looking to challenge their state's electoral districts as partisan gerrymanders can bring claims in state courts under state constitutions with a fair chance of success, as shown by Pennsylvania, Florida, and recently, North Carolina.

The biggest flaw with this approach is that it simply is not applicable across every state. Many state courts tend to be deferential toward their legislatures and, thus, are unwilling to intervene in what they deem to be a political act.¹²⁶ Further, some state court judges win their positions in partisan elections. Those who do may be unwilling to rule in a manner that may harm their party or, worse, cause their own reelection to become more difficult.¹²⁷

¹¹⁸ Wang, Ober & Williams, *supra* note 114, at 4.

¹¹⁹ *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, BRENNAN CTR. FOR JUST.: COURT CASE TRACKER (Oct. 29, 2018), <https://www.brennancenter.org/our-work/court-cases/league-women-voters-pennsylvania-v-commonwealth-pennsylvania>.

¹²⁰ *Id.*

¹²¹ Wang, Ober & Williams, *supra* note 114, at 5.

¹²² Sam Wang, *Introducing the New Pennsylvania Congressional Map*, PRINCETON ELECTION CONSORTIUM (Feb. 19, 2018, 3:20 AM), <http://election.princeton.edu/2018/02/19/introducing-the-new-pennsylvania-congressional-map>.

¹²³ Grofman & Cervas, *supra* note 117, at 265.

¹²⁴ *Id.*

¹²⁵ Steven Shepard & Ally Mutnick, *Court Freezes North Carolina Gerrymandered Map*, POLITICO (Oct. 28, 2019, 6:51 PM), <https://www.politico.com/news/2019/10/28/court-north-carolina-gerrymandering-060677>.

¹²⁶ Williams, *supra* note 115.

¹²⁷ *Id.*

Additionally, even when state court claims are successful, like in North Carolina, the state legislature can simply draw a new map “replac[ing] one partisan gerrymander with a new one.”¹²⁸ Lastly, states such as Maryland, Ohio, and Wisconsin, often regarded as among the worst partisan gerrymanderers, do not have “free and equal” election clauses in their state constitutions, making it difficult to bring a claim like the successful one in Pennsylvania.¹²⁹ Thus, while this may be a solution for some states, alone it is likely insufficient to stem the tide against partisan gerrymandering.

C. ESTABLISH INDEPENDENT REDISTRICTING COMMISSIONS

The third option states have is to create Independent Redistricting Commissions (“IRCs”). As noted, traditionally, the power to redistrict state legislative and congressional districts is vested in individual state legislatures. The creation of IRCs removes the authority for drawing legislative districts from politicians and “hand[s] it over” to independent groups consisting of non-partisan individuals who do not hold public office.¹³⁰ This is a solution directly noted by Chief Justice Roberts in his majority opinion in *Rucho*.¹³¹ Several states have already adopted this model, with nearly half a dozen doing so in 2018 alone.¹³² Of the states that have adopted IRCs, nine have created commissions whose primary responsibility is drawing state and congressional maps.¹³³ An additional six have created commissions that may advise and assist the legislature in drawing districts, and two more states have commissions that serve as a failsafe, only drawing districts if the legislatures fail to agree on a plan.¹³⁴

The benefits of these IRCs are numerous. First, IRCs take the power to redistrict away from partisan actors with an incentive to gerrymander as to maintain or expand their influence, and they place the power to redistrict in the hands of nonpartisan, or bipartisan, bodies with little incentive or ability to gerrymander.¹³⁵ For instance, in California, the state’s IRC is comprised of fourteen members: “five who are registered with the largest political party . . . five who are registered with the second largest political party . . . and four who are not registered with either of the two largest political parties”¹³⁶ Second, IRCs foster and create more competitive districts in which incumbents cannot rely on primary voters to maintain their legislative seats and thus must appeal to a broader spectrum of voters with more moderate viewpoints.¹³⁷ More simply, “when politicians face the risk of losing their

¹²⁸ Ally Mutnick, *Democrats Vow Court Fight to Block New N.C. Congressional Map*, POLITICO (Nov. 15, 2019, 4:48 PM), <https://www.politico.com/news/2019/11/15/democrats-vow-court-fight-to-block-new-nc-congressional-map-071193>.

¹²⁹ Grofman & Cervas, *supra* note 117, at 283.

¹³⁰ Colleen Mathis et al., *The Arizona Independent Redistricting Commission: One State’s Model for Gerrymandering Reform*, HARV. KENNEDY SCH. 1 (Sept. 2019), https://ash.harvard.edu/files/ash/files/az_redistricting_policy_brief.pdf.

¹³¹ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019).

¹³² *Redistricting Commissions: Congressional Plans*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 18, 2019), www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Mathis et al., *supra* note 130, at 1.

¹³⁶ CAL. CONST. art. XXI, § 2(c)(2).

¹³⁷ See Mathis et al., *supra* note 130, at 2, 10.

seats, they may be both more responsive to the preferences of more of their constituents and more likely to pursue bipartisan solutions.”¹³⁸ In fact, states that enact IRCs consistently show increases in competition among all levels of legislative elections. For instance, in Arizona, the district plan selected by the state’s IRC was, on average, more competitive than any legislative or court-drawn plan since 1972.¹³⁹ In California, the state’s IRC has consistently produced more competitive races across all three legislative bodies as compared to the state’s 2001 district plan drawn by the partisan legislature.¹⁴⁰ Third, IRCs contribute to higher levels of compactness, or rather, how expansive the district is from its center, promoting partisan fairness in elections and reducing the representational harms that come with misshapen and expansive districts.¹⁴¹ For instance, Arizona’s geographic distribution of population makes it particularly challenging to draw compact districts of equal population.¹⁴² Even so, the state’s IRC has been able to draw more compact districts than other states with similar numbers of congressional seats.¹⁴³ Lastly, IRCs have been proven to reduce the overall partisanship of representatives and reduce partisan voting behavior in state legislatures and Congress.¹⁴⁴ In fact, a recent study on the level of partisanship across five states that implemented IRCs showed that “at the 99 percent confidence level . . . the degree of partisanship in the aggregate meaningfully declined after the introduction of relatively independent redistricting.”¹⁴⁵ Overall, IRCs promote fair elections by taking the districting process out of the hands of state legislators with incentive to gerrymander and providing states with a real option to reduce partisan gerrymandering and its many negative effects.

Nonetheless, IRCs alone are an imperfect solution to the problem of partisan gerrymandering. The first concern with IRCs is that their constitutionality is anything but guaranteed. In *Arizona Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), the Court found such commissions to be constitutional. However, this was a close 5-4 decision, with Chief Justice Roberts authoring a highly critical dissent.¹⁴⁶ Now that the Court’s composition leans more conservative, there is a legitimate chance that the Court will revisit this issue and deem IRCs unconstitutional in the future. Although it would be rather disingenuous of the Chief Justice to, on the one hand, support IRCs in his *Rucho* opinion and, on the other, strike down such arrangements as unconstitutional, it seems that the constitutionality of IRCs is likely to be revisited sometime soon, and there is a risk the Court will change course. With more and more states implementing the IRC framework, there are bound to be more constitutional

¹³⁸ *Id.* at 10.

¹³⁹ *Id.* at 7.

¹⁴⁰ Eric McGhee, *Assessing California’s Redistricting Commission: Effects on Partisan Fairness and Competitiveness*, PUB. POL’Y INST. OF CAL. 17 (Mar. 2018), <https://www.ppic.org/wp-content/uploads/r-0317emr.pdf>.

¹⁴¹ Mathis et al., *supra* note 130, at 2.

¹⁴² *Id.* at 12.

¹⁴³ *Id.*

¹⁴⁴ David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 VILL. L. REV. 57, 83–84 (2009).

¹⁴⁵ *Id.* at 83.

¹⁴⁶ See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824–28 (2015) (Roberts, C.J., dissenting) (“The Court’s position has no basis in the text, structure, or history of the Constitution, and it contradicts precedents from both Congress and this Court.”).

challenges as state legislators try to maintain their districting power. In fact, multiple lawsuits challenging the constitutionality of state IRCs are currently underway in Michigan and Oklahoma.¹⁴⁷ It is worth noting that Michigan only recently implemented an IRC framework, and Oklahoma has yet to even vote on such a measure.¹⁴⁸

Further, another serious flaw with IRCs is that they are not politically attainable for most states, especially those with the worst records on gerrymandering. IRCs in the United States are generally the result of direct democracy, such as referenda and ballot initiatives.¹⁴⁹ In fact, redistricting commissions are twice as common in states with constitutional or statutory initiatives.¹⁵⁰ For instance, in 2018, four of the five states that amended their constitutions to create IRCs were the direct result of ballot initiatives, and the fifth was the result of an indirect initiative statute.¹⁵¹ However, only twenty-four states currently allow for direct initiatives, forcing over half the states to try creating IRCs through their legislatures, which oftentimes have little incentive or initiative to give up their power to redistrict. If a majority party in a state is using gerrymandering to maintain and expand its power, it is unlikely that an IRC will be created without a ballot initiative. For instance, in Wisconsin, a state with no direct democracy initiative, 72 percent of voters prefer that redistricting be entrusted to an IRC.¹⁵² Nonetheless, the state government has been unable or unwilling to pass an amendment to the state's constitution to create an IRC.¹⁵³ This is a curious stance given the fact that Wisconsin is statistically one of the worst partisan gerrymanderers in the nation.¹⁵⁴ In the 2018 elections, the Republican Party only received 44.7 percent of the statewide votes but received 64.6 percent of state house seats.¹⁵⁵ Further, even if there is bipartisan support within a state's legislature, those who benefit the most from partisan gerrymanders may not be willing to give up their power. For instance, in New Hampshire, the governor recently vetoed bipartisan legislation that would have created an IRC to draw the state's legislative, congressional, and executive council district maps.¹⁵⁶ Although IRCs can be quite effective at combating partisan gerrymandering and should be implemented where possible, they are not yet a politically attainable option for a substantial portion of the nation.

¹⁴⁷ Michael Li, et al., *The State of Redistricting Litigation*, BRENNAN CTR. FOR JUST. (last updated Mar. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/state-redistricting-litigation>; Carmen Forman, *Redistricting Petition Faces New Legal Challenges*, OKLAHOMAN (Feb. 29, 2020, 1:05 AM), <https://oklahoman.com/article/5656189/redistricting-petition-faces-new-legal-challenges>.

¹⁴⁸ *Id.*

¹⁴⁹ David Gartner, *Arizona State Legislature v. Arizona Independent Redistricting Commission and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551, 555, 558 (2019).

¹⁵⁰ *Id.* at 559.

¹⁵¹ *Id.* at 580; Lee Drutman, *One Big Winner Last Night: Political Reform*, VOX (Nov. 7, 2018, 4:57 PM), <https://www.vox.com/polyarchy/2018/11/7/18072204/2018-midterms-political-reform-winner>.

¹⁵² Gartner, *supra* note 149, at 579.

¹⁵³ *See id.*

¹⁵⁴ Christian R. Grose et al., *The Worst Partisan Gerrymanderers in U.S. State Legislatures*, USC SCHWARZENEGGER INST. 2, <http://schwarzeneggerinstitute.com/theworstpartisangerrymanders> (last visited Oct. 12, 2020).

¹⁵⁵ *Id.* at 3.

¹⁵⁶ Justin Wise, *GOP Governor Vetoes New Hampshire Bill to Create Independent Redistricting Commission*, HILL (Aug. 11, 2019, 1:07 PM), <https://thehill.com/homenews/state-watch/457026-new-hampshire-gop-governor-vetoes-bill-to-create-independent>.

The last flaw with IRCs is that some are more effective than others at preventing the negative effects of partisan gerrymandering. Further, no two states are exactly the same, meaning the most effective IRCs must be tailored to fit the individual needs and realities of each state in which they reside.¹⁵⁷ When creating a commission, the state must decide how much power the IRC will be given over the redistricting process. Clearly, this impacts the effectiveness of the IRC as a whole. Of the existing IRCs, currently there are three basic categories of power delegated to the commissions. The first, and most beneficial for combatting partisan gerrymandering, are commissions that have full authority to draw and approve the final map without need for approval by the state's legislature or governor.¹⁵⁸ For instance, this is the model utilized in Arizona.¹⁵⁹ Second, there are IRCs that serve as an advisory board. The IRC has the authority only to design an ideal map that can be used as a comparison to determine the fairness of the legislature's map.¹⁶⁰ While not ideal, this framework can discourage politicians from gerrymandering and provide courts with guidance in determining whether a challenged map violates state or federal law.¹⁶¹ Third, several states have created IRCs that have authority to draw maps, but the legislature and/or governor maintain authority to approve, reject, or amend the plan.¹⁶² Obviously, this IRC framework is still susceptible to manipulation by "self-interested elected officials."¹⁶³ For instance, in Iowa, if the state's IRC plan is rejected by the legislature three times, the legislature has the authority to then draw their own map.¹⁶⁴ While an IRC under the legislative approval format may still provide some benefit, it still leaves open the possibility that elected officials will use partisan gerrymandering.

Further, the effectiveness of IRCs can also be hampered by how their commissioners or members are selected or who these individuals are. In some state IRC frameworks, members of the commission are elected officials, typically members of the state legislature or the state executive branch. For instance, the pseudo-IRC in Arkansas is made up of several commissioners including the Governor, the Secretary of State, and the state's Attorney General.¹⁶⁵ Clearly, this can be problematic as these officials still have self-interested motives to gerrymander.¹⁶⁶ In fact, despite having legislative districts drawn by this three-member panel, Arkansas has the eighth worst state legislative gerrymanders in the entire nation.¹⁶⁷ Plainly, the effectiveness of an IRC is highly correlated with who constitutes its membership. For IRCs to truly have the intended effect of curtailing partisan gerrymandering, it is essential that the members of the commission are not elected officials. States typically adopt an IRC framework in which elected officials constitute the commission's membership because the legislature is unwilling to fully relinquish its power over the redistricting process and,

¹⁵⁷ Greenwood et al., *supra* note 9, at 2.

¹⁵⁸ *See id.* at 11.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 10–12.

¹⁶¹ *See id.* at 11.

¹⁶² *Id.* at 12.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ ARK. CONST. art. 8, § 1.

¹⁶⁶ Greenwood et al., *supra* note 9, at 14.

¹⁶⁷ Grose et al., *supra* note 154, at 2.

thus, its ability to gerrymander.¹⁶⁸ While IRC frameworks that include elected officials can sometimes be a step in the right direction, they still provide partisans with enough influence to effectively gerrymander on behalf of their party.

IRCs can be highly effective at curtailing partisan gerrymandering. However, they are an imperfect solution. Nonetheless, provided they are politically attainable within a state and implemented correctly, they provide a very real pathway to stemming the tide against partisan gerrymandering.

D. PRESSURE UNWILLING REPRESENTATIVES FOR CHANGE THROUGH “ELECTORATE GALVANIZATION”

The last measure citizens can use to combat partisan gerrymandering is, on its face, somewhat indeterminate and may require the most work from average Americans. However, for states with hostile state courts and no ability to create an IRC, the only chance at curbing partisan gerrymandering is through grassroots movements I refer to here as “Electorate Galvanization.” This process includes informing the electorate about the realities of partisan gerrymandering, partnering with commiserate organizations and universities to pressure representatives, gathering data on gerrymandering and its proliferation throughout the nation, and generally galvanizing voters to combat partisan gerrymandering. This approach may be the only way for many states to stem the tide against partisan gerrymandering.

Throughout United States history, Electorate Galvanization has been utilized as a catalyst for change when the nation is faced with issues the government is unable or unwilling to rectify. The civil rights movement of the mid-twentieth century is a prime example. Although famous for its iconic leaders, the movement would have been moot if not for the tireless effort of average Americans protesting and forming organizations to place pressure on reluctant partisan officials.¹⁶⁹ Additionally, during the AIDS crisis of the 1980s and 1990s, grassroots organizations like ACT UP were formed by average citizens in response to the government’s ignorance toward the HIV/AIDS crisis.¹⁷⁰ The organization mobilized thousands of Americans to pressure state and federal officials, and it ultimately succeeded in bringing about massive changes in attitudes toward HIV/AIDS and overall accessibility to treatment for those suffering from the diseases.¹⁷¹

Further, Electorate Galvanization has already proven to be successful in the fight against gerrymandering. A primary example can be found in Michigan. In 2016, a local woman named Katie Fahey posted on her Facebook account that she would like to combat partisan gerrymandering.¹⁷²

¹⁶⁸ Greenwood et al., *supra* note 9, at 13.

¹⁶⁹ See generally Robert J. Norrell, *Grass Roots Civil Rights*, 72 VA. Q. REV. 4 (1996).

¹⁷⁰ Nurith Aizenman, *The Other Side of Anger: How to Demand a Medical Breakthrough: Lessons from the AIDS Fight*, NAT’L PUB. RADIO (Feb. 9, 2019, 7:38 AM), <https://www.npr.org/sections/health-shots/2019/02/09/689924838/how-to-demand-a-medical-breakthrough-lessons-from-the-aids-fight>.

¹⁷¹ *Id.*

¹⁷² Erick Trickey, *A Grassroots Call to Ban Gerrymandering*, ATLANTIC (Sept. 23, 2018), <https://www.theatlantic.com/politics/archive/2018/09/a-grassroots-movement-in-michigan-has-gerrymandering-in-the-crosshairs/570949/>.

Several months later, this post led to an organic movement of Americans concerned about the proliferation of partisan gerrymandering and the creation of an organization called Voters Not Politicians.¹⁷³ The organization held thirty-three town-hall meetings in thirty-three days all across Michigan, speaking to thousands of voters about partisan gerrymandering and how to combat it.¹⁷⁴ The group eventually garnered enough support to place their proposal for an IRC on the ballot, and the measure was eventually added to the state's constitution in 2018.¹⁷⁵ Electorate Galvanization methods have proven successful in other states as well. Another grassroots organization created and run by average Pennsylvanians, called Fair Fight PA, reached thousands of voters within their state and helped bring about 67 percent public support for the formation of an IRC.¹⁷⁶ Electorate Galvanization can pressure representatives to oppose gerrymandering as well. This was the case in Asheville, Tennessee, where the local members of the community banded together and swung the city council vote against racial gerrymandering.¹⁷⁷ Further, Electorate Galvanization can be used to pass fair elections amendments, such as the one to Florida's state constitution, which has proven to be highly successful at reducing partisan gerrymandering.

Other examples of Electorate Galvanization include the work of former Attorney General Eric Holder's National Democratic Redistricting Committee, an organization dedicated to combating partisan gerrymandering across the nation and bringing the issue to the forefront of American politics.¹⁷⁸ The organization also launched a movement called Redistricting U to train volunteers on how to combat partisan gerrymandering in their communities.¹⁷⁹ Moreover, the nation's top universities have entered the fight to galvanize young Americans in the fight against partisan gerrymandering. The Princeton Gerrymandering Project is dedicated to inspiring young people to enter the fight against partisan gerrymandering and enables youth activists to call for change across the nation.¹⁸⁰ A similar organization called the Redistricting Values Discovery Project, founded at the University of Pennsylvania's Wharton School, fosters and utilizes public discussions on gerrymandering to elicit Americans' values on gerrymandering, using the collected data to select "good" districting plans.¹⁸¹ The Brennan Center for Justice at New York University Law School has also provided a wealth of data and academic literature to raise awareness and combat partisan

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Gartner, *supra* note 149, at 581.

¹⁷⁶ Jonathan Lai, *These Six Charts Tell You How Pa. Voters Feel About Gerrymandering (Spoiler: They Oppose It)*, PHILA. INQUIRER (Oct. 10, 2019), <https://www.inquirer.com/politics/pennsylvania/pa-voters-gerrymandering-poll-20191010.html>.

¹⁷⁷ David Forbes, *How Grassroots Power Defeated a Racist Gerrymander in Asheville*, SCALAWAG (Nov. 4, 2019), <https://www.scalawagmagazine.org/2019/11/how-grassroots-power-defeated-a-racist-gerrymander-in-asheville/>.

¹⁷⁸ Barbaro, *supra* note 66.

¹⁷⁹ Alexa Díaz, *Obama Takes on Partisan Gerrymandering with New Initiative*, L.A. TIMES (Aug. 27, 2019, 12:34 PM), <https://www.latimes.com/politics/story/2019-08-27/obama-partisan-gerrymandering-redistricting-u-initiative>.

¹⁸⁰ See PRINCETON GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu> (last visited Sept. 19, 2020).

¹⁸¹ *How to End Partisan Gerrymandering: Get the Public Involved*, U. PA.: KNOWLEDGE@WHARTON (July 2, 2019), <https://knowledge.wharton.upenn.edu/article/where-will-the-supreme-courts-gerrymandering-non-ruling-mean/>.

gerrymandering.¹⁸² Additionally, members of both major political parties are active in calling for an end to partisan gerrymandering. Former Republican House Speaker Newt Gingrich claimed that partisan gerrymandering can only lead to a “downward spiral of isolation,” in which the real loser of this political chess match is the American people.¹⁸³ Dozens of former and current elected officials from both political parties signed on to briefs calling for the curtailing of gerrymandering in *Rucho v. Common Cause* as well as numerous other Supreme Court cases.¹⁸⁴ There have even been politically secure governors in states dominated by their own party who have called for an end to partisan gerrymandering, despite the fact that such arrangements would likely disadvantage themselves and their parties.¹⁸⁵

Electorate Galvanization is not new. In fact, it is likely the bedrock from which all major change has occurred in this nation. In a 2019 poll, 63 percent of overall respondents had unfavorable views of gerrymandering, while another 32 percent claimed that they were not informed enough on the issue to have an opinion.¹⁸⁶ Thus, nearly one third of Americans are not even aware that partisan gerrymandering is a salient issue. If Electorate Galvanization is used to tap into those with unfavorable views of gerrymandering and inform those who have no opinion, states can push for changes to their own constitutions or enact new legislation that explicitly bans partisan gerrymandering. Electorate Galvanization can, in essence, gerrymander partisanship out of redistricting.

CONCLUSION

It would be rather easy to dismiss partisan gerrymandering as “politics as usual.” It has occurred since our nation’s founding, and it is utilized by both major political parties in many different states. However, just because partisan gerrymandering is commonplace in American history does not mean it has to be a part of America’s future. With the Court’s recent ruling in *Rucho v. Common Cause*, the possibility that the federal judiciary will right the wrong of partisan gerrymandering is likely gone. However, the negative effects of partisan gerrymandering are too apparent to ignore. It is clear that partisan gerrymandering leads to political parties and their candidates becoming more polarized, inhibiting bipartisan cooperation. The quality and quantity of individuals running for public office substantially decrease in gerrymandered districts. Political fundraising, voter turnout, and voter faith in elections substantially decrease in gerrymandered districts. Further, changes in votes do not correlate with a change in the partisan makeup of state legislatures and the House of Representatives. Lastly, legislators from gerrymandered districts tend to become less responsive to the will of the public—unable to perform their most basic function as elected officials.

¹⁸² See *Gerrymandering & Fair Representation*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/gerrymandering-fair-representation> (last visited Oct. 18, 2020).

¹⁸³ Oedel et al., *supra* note 144, at 63–64.

¹⁸⁴ See generally Bipartisan Brief, *supra* note 61, at 5–6.

¹⁸⁵ Oedel et al., *supra* note 144, at 64.

¹⁸⁶ *Americans Are Unified Against Partisan Gerrymandering*, BRENNAN CTR. FOR JUST. (Mar. 15, 2019), <https://www.brennancenter.org/our-work/research-reports/americans-are-united-against-partisan-gerrymandering>.

Even though the Supreme Court has punted this issue, the states and their citizens are not without options to stop further proliferation of partisan gerrymandering. If Americans pressure their representatives to pass federal legislation to combat partisan gerrymandering, continue to bring claims in state courts, push for the creation of IRCs, and utilize Electorate Galvanization, the United States may be able to stop further propagation of partisan gerrymandering. With a new round of redistricting set to occur after the result of the 2020 census, the stakes are quite high. The increased polarization of American politics and shifting racial and gender demographics may tempt partisan officials to gerrymander in order to maintain or take control. This is not the fault of one singular party—both the Democratic and Republican Parties are guilty of exploiting partisan gerrymandering for their own gains. Regardless of political affiliation, partisan gerrymandering is inherently wrong and harmful to our republican form of government. We must tackle partisan gerrymandering once and for all and ensure that the United States remains a nation of, for, and by the people and not of, for, and by partisan gerrymanderers.