RUCHO V. COMMON CAUSE: THE GOVERNMENT GAME OF HOT POTATO

ABSTRACT

Since America's founding, legislators have used the drawing of district maps to manipulate the number of registered voters from each party that are counted in individual voting districts. This practice—now known as partisan gerrymandering—results in one party maximizing its chances to win as many districts in the state as possible. Ultimately, partisan gerrymandering has the potential to make voting meaningless. Yet, when the Supreme Court was faced with how to resolve the issue of partisan gerrymandering in *Rucho v. Common Cause*, it tossed the issue like a "hot potato." Through the political question doctrine, the Court held that it could not find a standard by which to decide the case. The Court then tossed the problem to state legislatures and state courts—the gerrymanderers themselves—to resolve. Long term, the solution to partisan gerrymandering is to create independent commissions charged with the task of drawing district maps. However, until independent commissions are the norm, it is critical the Supreme Court faces partisan gerrymandering head on, prohibiting at least the most severe cases of gerrymandering where there is an intent to keep one party in power at the expense of voter choice.

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INTRODUCTION

The U.S. Supreme Court has made the issue of partisan gerrymandering into a game of "hot potato" between the different branches of government. Partisan gerrymandering is the manipulation of the number of constituents from a given party or group in individual districts through the drawing of district maps, resulting in one party maximizing its chances to win as many districts in the state as possible.[1] Throughout the twentieth century, the Supreme Court regulated the issue of partisan gerrymandering.[2] At the beginning of the twenty-first century, the Court tossed partisan gerrymandering to Congress to resolve.[3] Congress, unable to resolve partisan gerrymandering, tossed partisan gerrymandering immediately back to the Supreme Court.[4]

Most recently, in *Rucho v. Common Cause*,[5] the U.S. Supreme Court used the "political question" doctrine to avoid deciding a case regarding partisan gerrymandering practices, passing the hot potato off to state legislatures and state courts.[6] The Court claimed that there was no judicially manageable standard by which it could decide the case and, further, that it is the job of state legislatures, and not the Supreme Court, to make necessary changes when partisan gerrymandering goes too far.[7]

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1. Robert Colton, *Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering*, 86 FORDHAM L. REV. 1303, 1305 (2017).
2. Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (holding for the first time that partisan gerrymandering claims are nonjusticiable political questions).
3. *Id.* at 276–77.
4. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (discussing the many attempts by Congress to resolve partisan gerrymandering through legislation).
5. 139 S. Ct. 2484 (2019).
6. *See id.* at 2506, 2508.
7. *Id.* at 2502, 2507–08.

Although the Supreme Court has passed partisan gerrymandering off to state legislatures and state courts, two large questions remain: First, is there a judicially manageable standard by which the Court could resolve partisan gerrymandering? And second, if the Court cannot address partisan gerrymandering, then are the state legislatures, state courts, or Congress equipped to fix it?

This Comment argues that the U.S. Supreme Court improperly used the political question doctrine to avoid proscribing partisan gerrymandering. The Supreme Court is the only forum that is capable of prohibiting the practice of partisan gerrymandering because Congress and state legislatures are the "gerrymanderers themselves."[8] The Court ought to prohibit partisan gerrymandering in cases where there is a clear intent to use redistricting maps to influence one party's power over the other.

This Comment will show that (1) the U.S. Supreme Court avoided proscribing partisan gerrymandering on the flimsy grounding of the political question doctrine; (2) the Supreme Court should have adopted a standard which looks at whether there is a predominant intent to manipulate districts to maximize one party's power over the other; and (3) independent redistricting commissions are the solution to partisan gerrymandering moving forward.

I. BACKGROUND

To understand the decision of the U.S. Supreme Court in *Rucho*, this Part addresses the history and precedent surrounding the political question doctrine and partisan gerrymandering.

A. The Political Question Doctrine

The Supreme Court's power of appellate review arose from *Marbury v. Madison*.[9] In *Marbury*, the Supreme Court examined Article III of the Constitution,[10] which states that the Court shall have appellate jurisdiction over "all Cases, in Law and Equity, arising under this Constitution."[11] The Supreme Court in *Marbury* found that this established the Court's jurisdiction to determine constitutional issues.[12] Article III also establishes that the Court has appellate jurisdiction over cases decided by lower courts.[13] However, in the years since *Marbury*, the Court has determined that there are limitations on its power of appellate review that are also derived from Article III.[14] Additionally, the Court has recog-

8. *Id.* at 2505.
9. 5 U.S. 137 (1803).
10. *Id.* at 147.
11. U.S. CONST. art. III, § 2.
12. *Marbury*, 5 U.S. at 147.
13. *Id.*
14. Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 RUTGERS U. L. REV. 1309, 1316 (2017).

nized that the separation of powers principle places limitations on the Court's appellate jurisdiction.[15] These doctrines are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[16] The Court uses the term "justiciability" to describe these limitations; justiciability is "a collection of concepts that limit the circumstances under which it is appropriate—or even constitutionally possible—to exercise judicial power."[17]

For example, one such justiciability principle grounded in Article III is the requirement that parties have standing.[18] Standing requires plaintiffs to have personally suffered an injury that is "fairly traceable" to the conduct of the defendants in the case.[19] The Court has reasoned that a party does not have standing in a proceeding where the party sues over someone else's injury because there is no assurance the Court can resolve the issue at hand when the party that was injured is not present.[20]

In *Marbury*, the Court explained another justiciability principle, which courts now refer to as the political question doctrine.[21] The Court stated:

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.[22]

Since *Marbury*, the Court has expanded the political question doctrine. In *Baker v. Carr*,[23] the most prominent political question doctrine case in recent history, the Court outlined the specific circumstances under which the Court could utilize the political question doctrine.[24] *Baker* described six factors for courts to consider when determining whether a dispute is a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving" the case; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "an unusual need for unquestioning adherence to a political decision already made"; (5) "the potentiality of embarrassment from multifarious pronounce-

15. Allen v. Wright, 468 U.S. 737, 750 (1984) (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)).
16. *Id.*
17. Landau, *supra* note 14, at 1311.
18. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471–72 (1982).
19. *Id.* at 472.
20. *Id.* at 472–73.
21. Marbury v. Madison, 5 U.S. 137, 166, 170 (1803).
22. *Id.* at 166.
23. 369 U.S. 186 (1962).
24. *Id.* at 217.

ments by various departments on one question"; or (6) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."[25] The Court made clear that "[u]nless one of these formulations is inextricable from the case at bar, *there should be no dismissal for nonjusticiability on the ground of a political question's presence*."[26]

Even though *Baker* set out what appeared to be a clear test for which cases the political question doctrine ought to apply to, there has been little to no clarification on how the test ought to be applied.[27] Therefore, there is a significant amount of confusion regarding how the political question doctrine should be analyzed.[28] What has been made clear though is the fact that just because a case has "political overtones" or seeks protection of a political right does not mean that it involves a political question.[29]

Generally, the specific categories outlined in *Baker* have been broken down into two main groups of cases: (1) cases which are deemed a political question because a different branch of government should resolve the issue, and (2) cases where the U.S. Supreme Court lacks an appropriate standard by which to decide the case.[30] In 1969, the Supreme Court decided *Powell v. McCormack*,[31] a case involving whether Congress had the power to deny membership to elected officials based on their qualifications.[32] The political question doctrine did not apply because the "Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote."[33]

Similarly, in *I.N.S. v. Chadha*,[34] the U.S. Supreme Court addressed whether the political question doctrine applied to a challenge against a provision of the Immigration and Nationality Act.[35] The Act gives one chamber of Congress the power to overturn the Executive Branch's decision to allow a "deportable alien to remain in the United States."[36] The Court held that while Article I of the Constitution vests the power "[t]o

25. *Id.*
26. *Id.* (emphasis added).
27. Kimberly Breedon, *Remedial Problems at the Intersection of the Political Question Doctrine, the Standing Doctrine, and the Doctrine of Equitable Discretion*, 34 OHIO N. U. L. REV. 523, 524 (2008).
28. *See id.*
29. *See* I.N.S. v. Chadha, 462 U.S. 919, 942–43 (1983); *Baker*, 369 U.S. at 209.
30. Doug Linder, *Constitutional Limitations on the Judicial Power: The Political Questions Doctrine*, EXPLORING CONST. CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/politicalquestions.html (last visited Oct. 18, 2020).
31. 395 U.S. 486 (1969).
32. *Id.* at 547–48.
33. *Id.* at 548.
34. 462 U.S. 919 (1983).
35. *Id.* at 923.
36. *Id.*

establish a uniform Rule of Naturalization"[37] in Congress, this does not bar the plaintiff from challenging a statute made under that power.[38] If the Court had deemed this case a nonjusticiable political question, then every case challenging a congressional statute would be nonreviewable by the Court.[39] The Court specifically noted that "[q]uestions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."[40]

In contrast, in *Nixon v. United States*,[41] the U.S. Supreme Court found that the Senate's authority with regard to impeachments and impeachment proceedings is a political question that the Supreme Court does not have authority over.[42] In *Nixon*, the petitioner was a former Chief Judge of the United States District Court for the Southern District of Mississippi.[43] The Court found that Article I, Section 3, Clause 6 of the Constitution created "a textually demonstrable constitutional commitment of the issue [of his impeachment] to a coordinate political department."[44]

B. Partisan Gerrymandering

Every ten years after the latest census data is released, states are legally required to create districts that break up their population into equal-sized groups, or groups that are as close to equal as possible.[45] The number of districts the state creates is determined by the allocation of U.S. House of Representatives seats and the number of state legislature seats that state has.[46]

In 1812, the then-Governor of Massachusetts, Elbridge Gerry, redrew the districting lines of his state in a unique pattern.[47] A staff member at the *Boston Gazette* commented on the issue and stated that the pattern drawn by Governor Gerry resembled a salamander, thus the birth of the term gerrymander.[48] However, the practice of gerrymandering goes back even further in history as "[t]he practice was known in the

37. U.S. CONST. art. I, § 8.
38. *Chadha*, 462 U.S. at 940–42.
39. *Id.* at 941.
40. *Id.* at 944 (internal quotations omitted) (quoting Cohens v. Virginia, 19 U.S. 264, 404 (1821).
41. 506 U.S. 224 (1993).
42. *Id.* at 226.
43. *Id.*
44. *Id.* at 228–29, 238.
45. Aaron Blake, *Redistricting, Explained*, WASH. POST (June 1, 2011), https://www.washingtonpost.com/politics/redistricting-explained/2011/05/27/AGWsFNGH_story.html.
46. *Id.*
47. Colton, *supra* note 1, at 1304.
48. *Id.*

Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution."[49]

At its simplest level, gerrymandering is the manipulation of the number of constituents from a given party or group in each district through the drawing of district maps, resulting in one party winning as many districts in the state as possible.[50] There are two main methods by which parties gerrymander districts: "packing" and "cracking."[51] Packing occurs when as many individuals as possible from one party or group are placed in the same district in an attempt to dilute their votes in other districts.[52] Cracking occurs when individuals from the same party or group are spread out across as many districts as possible to dilute their vote in each individual district.[53] Figure 1 below illustrates the various ways in which districting lines can theoretically be drawn in a given district.

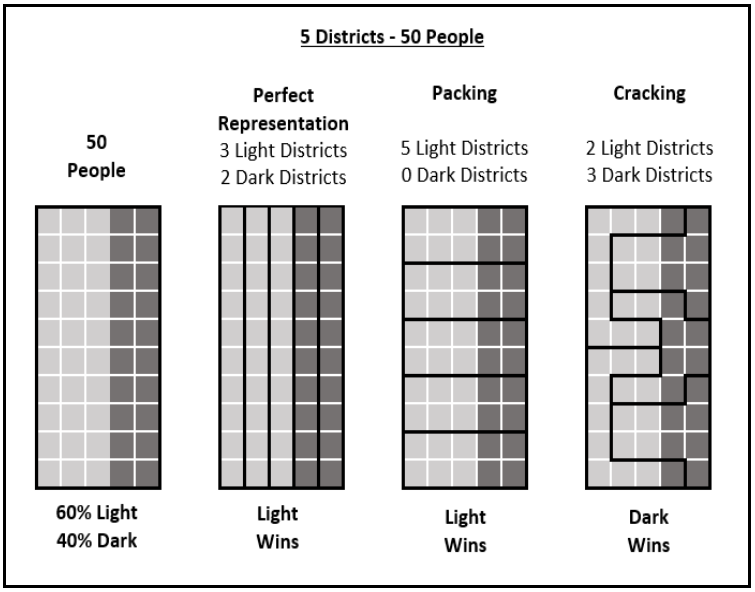

FIGURE 1: *Packing and Cracking*[54]

The U.S. Supreme Court has previously held that some types of gerrymandering are reviewable by the Court.[55] The two most prominent

49. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (citing Vieth v. Jubelirer, 541 U.S. 267, 274 (2004)).
50. Colton, *supra* note 1, at 1305.
51. *Id.*
52. *Id.*
53. *Id.*
54. *See* Christopher Ingraham, *This Is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST (Mar. 1, 2015, 7:06 AM MST), https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/ (titles adapted from original).
55. Rucho v. Common Cause, 139 S. Ct. 2484, 2487 (2019).

methods of gerrymandering are racial and partisan gerrymandering.[56] Racial gerrymandering, the drawing of district lines based on the race of constituents in each district, presents a "constitutional issue[] that can be addressed by the federal courts."[57] In contrast, partisan gerrymandering—the drawing of district lines based on the political parties of constituents in each district—has been much harder for federal courts to adjudicate.[58] The U.S. Supreme Court has noted that while it is clearly a constitutional violation to discriminate based on race, some amount of partisan gerrymandering is unavoidable.[59] Thus, the question surrounding partisan gerrymandering is one of degree rather than an outright ban, as with racial gerrymandering claims.[60] This is partly because it is nearly impossible to achieve the perfect representation depicted in Figure 1 above, and therefore, some amount of partisan gerrymandering must be permissible.[61]

To determine the permissible degree of partisan gerrymandering, courts must examine the harm partisan gerrymandering creates. Partisan gerrymandering, when taken past an allowable amount, is harmful because it defies the "one-person, one-vote" principle established in *Reynolds v. Sims*.[62] The U.S. Supreme Court established the one-person, one-vote principle, holding that "one person's vote must be counted equally with those of all other voters in a State."[63] By drawing district lines using either the packing or cracking method, individual votes are either strengthened or diluted, thereby giving those votes more or less power than each person's one-vote should have.[64] The harm of partisan gerrymandering is that "it inverts the democratic process, artificially constrains voter choice, distorts election outcomes, and minimizes the legitimacy of the democratic order."[65] Further, many have argued that partisan gerrymandering produces the same harms as racial gerrymandering in states where racial minorities primarily vote Democratic.[66] Thus, if a legislature engages in partisan gerrymandering to maximize Republican control in that state, the harm is the dilution of a majority of Democratic

56. *See id.* at 2496–97; *see also* Colton, *supra* note 1, at 1307.
57. *Rucho*, 139 S. Ct. at 2488 (citing Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960)).
58. *Id.*
59. *Id.* at 2496–98.
60. *Id.* at 2498.
61. *Id.* at 2497 (quoting Hunt v. Cromartie, 526 U.S. 541, 551 (1999)).
62. Allison J. Riggs & Anita S. Earls, *"The Only Clear Limitation on Improper Districting Practices": Using the One-Person, One-Vote Principle to Combat Partisan Gerrymandering*, 12 DUKE J. CONST. L. & PUB. POL'Y 23, 23–24 (2017); 377 U.S. 533 (1964).
63. *Reynolds*, 377 U.S. at 560.
64. *Id.* at 562.
65. Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 616 (2007).
66. Olga Pierce & Kate Rabinowitz, *'Partisan' Gerrymandering Is Still About Race*, PROPUBLICA (Oct. 9, 2017, 6:48 PM), https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race.

votes and, consequentially, the dilution of a majority of racial minority votes.[67]

Federal and state legislatures have attempted to combat the harms of partisan gerrymandering since the founding of our country.[68] The Elections Clause[69] was drafted in part to address the issue of gerrymandering.[70] The Elections Clause gives state legislatures the authority to establish the "[t]imes, [p]laces and [m]anner of holding [e]lections" for congressional seats and gives Congress the power to "make or alter" those regulations.[71] Further, every Congress has introduced legislation to combat partisan gerrymandering, yet no legislation has been signed into law.[72]

While racial gerrymandering jurisprudence has a long history, the first partisan gerrymandering case was not brought to the U.S. Supreme Court until 1973 in *Gaffney v. Cummings*.[73] The Court found that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment."[74] However, the Court also made note that "it has become apparent that the larger variations from substantial equality are too great to be justified by any state interest so far suggested."[75] Therefore, while *Gaffney* rejected claims of partisan gerrymandering where a slight deviation in equality exists, it left the door open for the Court to invalidate districting maps that created larger inequalities.[76] The Court concluded that districting maps employed "to minimize or cancel out the voting strength of racial or political elements of the voting population" would be unacceptable under the Constitution.[77]

In 1983, Justice Stevens echoed the idea that the purpose behind a districting map matters while writing his concurrence in a racial gerrymandering case.[78] He noted that,

> When a State adopts rules . . . defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic,

67. *Id.*
68. Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019).
69. U.S. CONST. art. I, § 4, cl. 1.
70. *Rucho*, 139 S. Ct. at 2487–88.
71. U.S. CONST. art. I, § 4, cl. 1.
72. *Rucho*, 139 S. Ct. at 2508.
73. 412 U.S. 735 (1973).
74. *Id.* at 745 (citing Reynolds v. Sims, 377 U.S. 533, 563–69 (1964)).
75. *Id.* at 744.
76. *Id.* at 744–45.
77. *Id.* at 751 (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).
78. Karcher v. Daggett, 462 U.S. 725, 748 (1983) (citing *Reynolds*, 377 U.S. at 565–66).

> religious, economic, or political . . . they violate the constitutional guarantee of equal protection.[79]

In 1986, the Court first addressed the intersection of justiciability and partisan gerrymandering claims in *Davis v. Bandemer*.[80] In *Davis*, the Court examined a challenge to a districting map in Indiana.[81] The Court in *Davis* found justiciability—shooting down claims that the political question doctrine barred the Court from deciding the case—but struggled with what standard to apply.[82] The majority found that intention to gerrymander alone was not enough to warrant invalidating a districting map, holding that there must be intent and actual disadvantage.[83] Importantly, the Court emphasized that "[t]he mere fact that there is no likely arithmetic presumption, such as the 'one person, one vote' rule, in the present context does not compel a conclusion that the claims presented here are nonjusticiable."[84]

Justice Powell, concurring in part and dissenting in part, suggested that the Court should look at "the nature of the legislative procedures by which the challenged redistricting was accomplished and the intent behind the redistricting; the shapes of the districts and their conformity with political subdivision boundaries; and 'evidence concerning population disparities and statistics tending to show vote dilution.'" [85] Following *Davis*, the U.S. Supreme Court fell silent on the issue of partisan gerrymandering for nearly twenty years.

In 2004, the Court found reason to readdress the issue of partisan gerrymandering in *Vieth v. Jubelirer*.[86] In *Vieth*, Pennsylvania Democrats challenged a districting map they claimed ignored districting criteria to favor Republican candidates.[87] The Court held—for the first time—that there was no judicially manageable standard by which it could decide the case, and therefore, the case was nonjusticiable under the political question doctrine.[88]

The Court left the door open, however, for a standard to emerge which would make partisan gerrymandering claims justiciable. Justice Kennedy's concurrence explained that "all possibility of judicial relief should not be foreclosed in cases such as this because a limited and precise rationale may yet be found to correct an established constitutional

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79. *Id.* (citation omitted).
80. 478 U.S. 109, 113 (1986).
81. *Id.*
82. *Id.* at 137–39.
83. *Id.* at 143.
84. *Id.* at 110.
85. *Id.* at 138.
86. 541 U.S. 267, 271–72 (2004).
87. *Id.* at 272–73.
88. *Id.* at 305–06.

violation."[89] After *Vieth*, the search began for a standard that would allow the U.S. Supreme Court to resolve partisan gerrymandering cases.

In 2006, a potential case to establish such a standard emerged in *League of United Latin American Citizens v. Perry*,[90] a challenge to a Texas redistricting map.[91] The Court again applied the political question doctrine to avoid deciding the issue of partisan gerrymandering.[92] However, Justice Stevens, joined in his dissent by Justice Breyer, noted that, "[t]his is a suit in which it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander."[93] Therefore, the door was still left slightly ajar for a potential standard to emerge that would overcome the bar of the political question doctrine.[94]

Then in 2018, Wisconsin Democrats filed suit regarding their state's redistricting maps in *Gill v. Whitford*.[95] There was evidence that the redistricting maps utilized both packing and cracking methods.[96] The U.S. Supreme Court, however, evaded the issue of the political question doctrine by remanding the case based on a different justiciability doctrine: standing.[97] The Court found that the plaintiffs in the case needed to prove they lived in a packed or cracked district, not merely that such districts existed, in order to bring suit.[98] Thus the Court found yet another way to elude partisan gerrymandering and avoid the issue of the political question doctrine altogether.[99] Not long after though the Court was faced with another case, *Rucho*, which would force it to examine partisan gerrymandering and the political question doctrine once more.

II. *RUCHO V. COMMON CAUSE*

A. Facts of the Case

In *Rucho*, the U.S. Supreme Court consolidated two lawsuits brought by plaintiffs from North Carolina and Maryland respectively.[100] Plaintiffs from both states claimed that the congressional districting maps in their state constituted unconstitutional partisan gerrymandering.[101] The Supreme Court described both maps as "highly partisan, by any meas-

89. *Id.* at 269.
90. 548 U.S. 399 (2006).
91. *Id.* at 416–17.
92. *Id.* at 414.
93. *Id.* at 447 (Stevens, J., dissenting).
94. *See id.*
95. 138 S. Ct. 1916, 1922–23 (2018).
96. *Id.* at 1924.
97. *Id.* at 1933–34.
98. *Id.* at 1934.
99. *See id.*
100. Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019).
101. *Id.*

ure."[102] While creating North Carolina's new redistricting maps, "[t]he Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats."[103] The chair of the redistricting committee even stated that "electing Republicans is better than electing Democrats."[104] The only reason that the map was drawn with any Democratic districts was because the redistricting committee believed that it was impossible to draw the map with less than three Democratic districts.[105] However, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates."[106] Using the newly drawn map, Republicans won ten of the thirteen districts in North Carolina.[107]

Similarly, in Maryland, then-Governor Martin O'Malley appointed a self-described "serial gerrymanderer" as the advisor to the redistricting committee in 2011.[108] During the lower court trial regarding the constitutionality of the resulting district maps, the Governor of Maryland admitted that his goal was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican."[109] Governor O'Malley intended to accomplish this goal by changing the composition of one particular district—the Sixth District—from Republican to Democrat.[110] Maryland's new plan shifted 66,000 Republicans out of the Sixth District and moved 24,000 Democrats into the Sixth District.[111] A Democrat has held the Sixth District congressional seat since the 2011 redistricting.[112]

B. Procedural History

In *Common Cause v. Rucho*,[113] the United States District Court for the Middle District of North Carolina unanimously found in favor of the plaintiffs.[114] Following a four-day trial, the panel of judges ruled that the redistricting maps violated Article I of the Constitution, the Equal Protection Clause, and the First Amendment (with one judge dissenting on the issue of the First Amendment).[115] The district court relied on a "predominant intent" analysis in which it asked whether the predominant purpose of the mapmakers was to decrease the power of one party while

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 2493.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. 318 F. Supp. 3d 777, 799 (M.D.N.C. 2018).
114. *Rucho*, 139 S. Ct. at 2492.
115. *Id.*

reinforcing the power of another.[116] The court also required the plaintiffs to show that the vote dilution created by packing or cracking, or both, was likely to "persist in subsequent elections."[117]

Finally, the district court shifted the burden to the defendants to prove that there was a legitimate purpose for the partisan gerrymandering that occurred.[118] Because the plaintiffs met the first two burdens and the defendants were unable to provide a legitimate purpose for the redistricting layout, the court ruled in favor of the plaintiffs.[119] The defendants then appealed directly to the Supreme Court.[120] While this appeal was pending, the U.S. Supreme Court ruled on a different partisan gerrymandering case, *Gill*, in which the Court found that the plaintiffs lacked standing because they did not prove that they lived in a packed or cracked district.[121]

Following the ruling on *Gill*, the Supreme Court remanded *Rucho* back to the district court.[122] The district court affirmed its earlier ruling in which it found standing and ruled that the North Carolina redistricting maps violated the Equal Protection Clause.[123] The court based its ruling on the fact that the "predominant intent [of the redistricting maps] was to discriminate against voters who supported or were likely to support non-Republican candidates and entrench Republican candidates."[124] The court again found that the redistricting maps also violated the First Amendment (with one judge dissenting) and the Elections Clause.[125]

In *Benisek v. Lamone*,[126] the United States District Court for the District of Maryland granted summary judgment to the plaintiffs.[127] The district court found that the claims were justiciable and that the redistricting map violated the First Amendment.[128] The court "permanently enjoined the State from using the 2011 [p]lan and ordered it to promptly adopt a new plan for the 2020 election."[129]

C. Opinion of the Court

Chief Justice Roberts authored the majority opinion.[130] Justices Thomas, Alito, Gorsuch, and Kavanaugh joined in the majority opin-

116. *Id.* at 2502.
117. *Id.*
118. *Id.*
119. *Id.* at 2492.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. Common Cause v. Rucho, 318 F. Supp. 3d 777, 883–84 (M.D.N.C. 2018).
125. *Rucho*, 139 S. Ct. at 2493.
126. 348 F. Supp. 3d 493, 497 (D. Md. 2018).
127. *Rucho*, 139 S. Ct. at 2494.
128. *Id.* at 2492–93.
129. *Id.* at 2493 (citing *Benisek*, 348 F. Supp. 3d at 525).
130. *Id.* at 2490.

ion.[131] The majority began its analysis in *Rucho* by discussing the cases and controversies limitation that Article III of the Constitution places on the U.S. Supreme Court's jurisdiction.[132] The Court noted that its previous ruling in *Gill* left open the issue of whether partisan gerrymandering claims are justiciable.[133] After discussing the partisan gerrymandering precedent, Justice Roberts reviewed the difficulties that the Supreme Court has faced in deciding partisan gerrymandering cases compared to racial gerrymandering cases.[134] The majority specifically noted that "[t]he 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'"[135]

After examining precedent, Chief Justice Roberts analyzed whether there was a judicially manageable standard that could be applied in this circumstance.[136] He emphasized that "[a]ny standard must be 'grounded in "limited and precise rationale" and be "clear, manageable, and politically neutral."'"[137] The majority highlighted that the Court must be cautious in developing a standard for partisan gerrymandering because drawing and controlling districting maps is a "critical and traditional part of politics."[138] The Court found that the basis for partisan gerrymandering claims is an assumption that proportional representation is fair and that when districting maps depart from proportionality they become "suspect."[139] However, according to the majority, nothing in the Constitution requires proportionality.[140] Further, "[t]he Founders certainly did not think proportional representation was required."[141]

After determining that proportional representation is not required by the Constitution, the Court considered and rejected "fairness" as a possible judicially manageable standard, stating "it is not even clear what fairness looks like in this context."[142] The majority found that (1) adherence to maintaining political subdivisions; (2) keeping communities of interest together; (3) cracking and packing; or (4) protecting incumbents could all be different means of measuring whether districting maps are fair.[143] Further, Chief Justice Roberts noted that "[d]eciding

131. *Id.*
132. *Id.* at 2493–99.
133. *Id.* at 2494.
134. *Id.* at 2497.
135. *Id.* (quoting Vieth v. Jubelirer, 541 U.S. 267, 296 (2004) (plurality opinion)).
136. *Id.* at 2498–99.
137. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 269–70).
138. *Id.* (quoting Davis v. Bandemer, 478 U.S. 109, 145 (1986)).
139. *Id.* at 2499 (quoting *Davis*, 478 U.S. at 159).
140. *Id.* (quoting *Davis*, 478 U.S. at 130).
141. *Id.*
142. *Id.* at 2499–500.
143. *Id.* at 2500.

among . . . different visions of fairness . . . poses basic questions that are political, not legal."[144]

The majority struck down the idea that the one-person, one-vote rule applies to partisan gerrymandering cases, stating that the rule "does not extend to political parties."[145] The Court found that the rule only ensures that each person has an "equal say" in the election of representatives, not that each party must have proportional representation in relation to the number of its registered voters.[146] The majority went a step further to find that the standards used in racial gerrymandering cases could not be applied to partisan gerrymandering cases: "Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship."[147]

The majority rejected the "predominant intent" test utilized by the district court in *Rucho* because the standard was borrowed from racial gerrymandering case analysis.[148] According to the Court, this test could not be applied to partisan gerrymandering cases because a determination that lines were drawn on districting maps based on political parties does not make the map unconstitutional, like it does in racial gerrymandering cases.[149] The Court noted that "[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'"[150]

The Court further disagreed with the second prong of the district court's test in *Rucho*, finding that it would be far too difficult for judges to "forecast" which party would win in future elections and even harder for judges to predict the margin of victory for that winner.[151] The Court argued that in order to determine whether packing and cracking persist, a court must be able to predict a margin of victory in each election.[152] Further, the Court struck down modern forecasting technology as a means to overcome the barrier.[153]

Finally, the Court found that requiring consideration of whether there was a "legitimate purpose" for the specific districting map other than partisan advantage was repetitive and failed to add anything new to

144. *Id.*
145. *Id.* at 2501.
146. *Id.*
147. *Id.* at 2502.
148. *Id.* at 2502–03.
149. *Id.* at 2503.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

the analysis.[154] The Court struck down the First Amendment as a means of providing a test for partisan gerrymandering because under the First Amendment "any level of partisanship in districting would constitute an infringement of their First Amendment rights."[155] Chief Justice Roberts explained that while the cases at issue here are clear examples of when partisanship drove the making of districting maps, the First Amendment cannot distinguish between some unavoidable partisanship in mapping and an unacceptable level of partisanship.[156]

Next, the Court struck down the concept of using each individual state's districting criteria as a measurement of when partisanship in districting maps has gone too far because the criteria would vary so greatly from state to state.[157] Further, the Court found that it would be illogical for the standard of unconstitutional partisan gerrymandering to be defined and created by the "gerrymanderers themselves."[158] The Court also struck down the argument that Article I, Section 2 of the Constitution and the Elections Clause provide a basis for a partisan gerrymandering claim.[159]

After concluding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts[,]"[160] the Court discussed what it believed to be the best possible way to address partisan gerrymandering.[161] First, the Court noted that state supreme courts should be heavily involved in addressing this issue.[162] Moreover, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" in the map-making process.[163] One such form of legislation could include the creation of independent commissions which would be designated as the drawers of districting maps.[164] Some states have already legislated the need for mapmakers to use "traditional districting criteria," while other states have outright prohibited partisan gerrymandering.[165]

Further, according to the majority, federal legislation is also attempting to address this issue: "The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts."[166] An additional example of

154. *Id.* at 2504.
155. *Id.*
156. *Id.* at 2505.
157. *Id.*
158. *Id.*
159. *Id.* at 2506.
160. *Id.* at 2506–07.
161. *Id.* at 2507.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 2508.

such legislation is the Fairness and Independence in Redistricting Act,[167] which was first introduced in 2005 and "has been reintroduced in every Congress since."[168] The Act would require states to establish independent redistricting commissions rather than place redistricting in the hands of state legislatures.[169] The Court ended its analysis by noting that it was not expressing views about any of these proposals but, rather, sought to show the different avenues that could be used to address partisan gerrymandering other than the federal court system.[170]

D. Justice Kagan's Dissent

Justice Kagan authored the dissent and Justices Ginsburg, Breyer, and Sotomayor joined.[171] The dissent began by stating that "this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities."[172] Justice Kagan went on to find that "[t]he partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives."[173] In fact, the dissent noted, courts around the country have created many judicially manageable standards for deciding partisan gerrymandering cases.[174]

The dissent then analyzed the reasons that partisan gerrymandering is uniquely nefarious in the American democratic system.[175] Primarily, partisan gerrymandering can make elections meaningless by keeping parties in power regardless of voter preference.[176] Further, technology and forecasting tools make gerrymandering much more menacing than it was at the founding of the country.[177] As Justice Kagan pointed out, "[t]hese are not your grandfather's—let alone the Framer's—gerrymanders."[178] Moreover, this type of partisan gerrymandering "subverts democracy" and "violates individuals' constitutional rights."[179]

The dissent found that, contrary to what the majority decided, partisan gerrymandering of this type implicates the Equal Protection Clause of the Fourteenth Amendment and the First Amendment.[180] As Justice Kennedy explained in *Vieth*, "[i]f districters declared that they were

167. H.R. 2642, 109th Cong. §1 (2005).
168. *Rucho*, 139 S. Ct. at 2508.
169. *Id.*
170. *Id.*
171. *Id.* at 2509 (Kagan, J., dissenting).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 2512.
176. *Id.*
177. *Id.* at 2512–13.
178. *Id.* at 2513.
179. *Id.*
180. *Id.* at 2514.

drawing a map 'so as most to burden [the votes of] Party X's' supporters, it would violate the Equal Protection Clause."[181] Moreover, Justices have long agreed that "extreme partisan gerrymandering . . . violates the Constitution."[182] However, the dissent conceded that "[r]espect for state legislative process . . . counsels intervention in only egregious cases."[183]

The biggest challenge the dissent posed to the majority's decision was that "[w]hat [the majority] says can't be done has been done. Over the past several years, federal courts across the country . . . have largely converged on a standard for adjudicating partisan gerrymandering claims."[184] The dissent laid out the test used by the lower courts in this case.[185] The three-part test examines (1) intent, (2) effects, and (3) causation.[186] Justice Kagan argued that the test presents a "limited and precise rationale" by which the majority could have adjudicated the claim.[187] As the dissent noted, the test "looks utterly ordinary. It is the sort of thing courts work with every day."[188]

The dissent applied the test to the North Carolina and Maryland cases.[189] It noted that as to the first prong, intent, the majority did not "contest the lower courts' findings; how could it?"[190] Further, "[i]t cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution."[191]

For the second prong, the majority insisted that it would not be possible to accurately predict election outcomes.[192] The dissent noted that the majority ignored the extensive data that the plaintiffs in the North Carolina case offered.[193] The North Carolina plaintiffs produced over 3,000 districting maps which all showed that the map created in the 2016 plan was a clear outlier, or as Justice Kagan put it, an "out-out-out-outlier."[194] The lower courts' findings about the future effect of the redistricting maps were "evidence-based, data-based, [and] statistics-based."[195] The states in both cases did not compare the redis-

181. *Id.* (quoting Vieth v. Jubelirer, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring)).
182. *Id.* at 2514–15 (citing *Vieth*, 541 U.S. at 293).
183. *Id.* at 2516.
184. *Id.* (citing Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 994 (S.D. Ohio 2019); League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867, 912 (E.D. Mich. 2019)).
185. *Id.*
186. *Id.*
187. *Id.*; *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).
188. *Rucho*, 139 S. Ct. at 2516–17 (Kagan, J., dissenting).
189. *Id.* at 2517.
190. *Id.*
191. *Id.*
192. *Id.* at 2503 (majority opinion).
193. *Id.* at 2517 (Kagan, J., dissenting).
194. *Id.* at 2518.
195. *Id.* at 2519.

tricting maps to ideal maps but, rather, to what maps would have looked like had they been drawn without the intention of creating partisan gain.[196] At the very least, Justice Kagan noted, the majority could have set the line for "too much partisan gerrymandering" here, where the majority openly admitted that "[t]hese cases involve blatant examples of partisanship driving districting decisions."[197]

Justice Kagan further noted that the claim that legislation could resolve this issue was ill-founded because "[t]he politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight."[198] Moreover, the idea that state courts should resolve this issue relied on the assumption that they have a standard through which they can determine when partisan gerrymandering goes too far.[199] If the state courts can apply judicially manageable standards regarding partisan gerrymandering, then why not the U.S. Supreme Court?[200] Justice Kagan ended the dissent by noting that "[o]f all times to abandon the Court's duty to declare the law, this was not the one."[201]

III. ANALYSIS

The U.S. Supreme Court improperly used the political question doctrine to avoid prescribing partisan gerrymandering. The Supreme Court is the only forum that is capable of prohibiting the practice of partisan gerrymandering because state and federal legislatures are the "gerrymanderers themselves."[202] The Court ought to prohibit partisan gerrymandering in cases where there is a predominant intent to manipulate redistricting maps to influence one party's power over the other.

This analysis will show that (1) the U.S. Supreme Court avoided proscribing partisan gerrymandering on the flimsy grounding of the political question doctrine; (2) the Court should have adopted a standard which looks at whether there is a predominant intent to manipulate districts to maximize one party's power over the other; and (3) independent redistricting commissions are the immediate solution to partisan gerrymandering.

196. *Id.* at 2520.
197. *Id.* at 2521–22.
198. *Id.* at 2523–24.
199. *Id.* at 2524.
200. *Id.*
201. *Id.* at 2525.
202. *Id.* at 2505 (majority opinion).

A. The U.S. Supreme Court Avoided Proscribing Partisan Gerrymandering on the Flimsy Grounding of the Political Question Doctrine

The U.S. Supreme Court avoided proscribing partisan gerrymandering using the political question doctrine. The political question doctrine was a flimsy grounding upon which to make this decision because (1) the political question doctrine should not be touted as a tool for the Supreme Court to avoid ruling on difficult issues; (2) the political question doctrine is itself a nonjudicially manageable standard; and (3) if a judicially manageable standard existed in 1986,[203] then it exists now.

1. The Political Question Doctrine Should Not Be Touted as a Tool to Avoid Ruling on Difficult Issues

There are two categories of political question doctrine cases from those listed in *Baker* that the Court actively employs.[204] Either there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department," or there is "a lack of judicially discoverable and manageable standards."[205] *Nixon* illustrated that it is rare for the Court to employ the political question doctrine in any form, and even when it does, it is more likely to be because the Constitution dictates that the issue should be decided by another branch of government, not that there is a lack of judicially manageable standards.[206]

In fact, partisan gerrymandering cases, and cases involving similar issues, are the only line of cases in which the Court has used the political question doctrine solely because of a lack of judicially manageable standards.[207] The nonpartisan gerrymandering cases in which the Court has employed the lack of a judicially manageable standard doctrine are *Coleman v. Miller*,[208] a case involving the Child Labor Amendment,[209] and *Colegrove v. Green*,[210] a state vote-dilution case.[211]

In *Coleman*, however, the Court made abundantly clear that a large part of its decision was based on the fact that it is Congress's job to decide the issue, not the Court's—a principle that clearly could have been argued on the textual basis of Article V of the Constitution.[212] *Colegrove*,

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203. Davis v. Bandemer, 478 U.S. 109, 122–25 (1986) (citing Baker v. Carr, 369 U.S. 186, 226 (1962)).

204. Linder, *supra* note 30.

205. *Id.*

206. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 271–73 (2002).

207. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 237–38 (1993) (quoting *Baker*, 369 U.S. at 211); I.N.S. v. Chadha, 462 U.S. 919, 942 (1983); Powell v. McCormack, 395 U.S. 486, 549 (1969) (quoting *Baker*, 369 U.S. at 217); *Baker*, 369 U.S. at 226; Barkow, *supra* note 206, at 268–73.

208. 307 U.S. 433 (1939).

209. *Id.* at 464.

210. 329 U.S. 549 (1946).

211. *Id.* at 550–51.

212. U.S. CONST. art. V; Barkow, *supra* 206, at 260.

in addressing vote dilution, presented a very similar question to partisan gerrymandering to the Court.[213] Therefore, the only cases in which the Court solely based its decisions on a lack of a judicially manageable standard remain those involving issues around vote dilution and partisan gerrymandering.[214]

2. The Political Question Doctrine Is Itself a Nonjudicially Manageable Standard

When the U.S. Supreme Court employs the political question doctrine in the case of commitment to another branch of government, it must have a constitutional basis for deciding such an issue.[215] However, in the case of a lack of a judicially manageable standard, the Supreme Court does not need any textual basis for its decision, as was evidenced in *Rucho*.[216] This allows the Court to wield the political question doctrine as it sees fit, without any barriers or limitations.[217] Ironically, this is the exact reason the Court cites as to why it is unable to decide partisan gerrymandering cases.[218] As the majority in *Rucho* notes, "the Constitution provides no basis whatever to guide the exercise of judicial discretion [in partisan gerrymandering cases]."[219] The majority further states that "'[j]udicial action must be governed by *standard*, by *rule*,' and must be . . . found in the Constitution or laws."[220] By its own logic, the Court should not be able to decide a case without "standard[s]" or "rule[s]" governing its decision.[221] Using a doctrine without any standard to govern its application to claim that there is no judicially manageable standard goes against the Court's own reasoning.

Still, the Court utilized the political question doctrine and, specifically, the lack of a judicially manageable standard principle—neither of which are found in the Constitution or other laws—to decide *Rucho*.[222] Because the Court is in the business of making judicially manageable standards, it is circular for it to state that it cannot decide a case because

213. Barkow, *supra* 206, at 260–61.
214. *Id.*
215. Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . .").
216. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (stating that the only requirement for this type of political question is that there are no "judicially discoverable and manageable standards" to decide a case by, meaning there is no inherent constitutional basis for this form of political question).
217. Barkow, *supra* note 206, at 258 (arguing that the political question doctrine is merely a tool of abstention for the Court).
218. *See Rucho*, 139 S. Ct. at 2506.
219. *Id.*
220. *Id.* at 2507 (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).
221. *Id.*
222. *Id.* at 2508.

there is no such standard.[223] Therefore, until the Court decides a partisan gerrymandering case and establishes such a standard, no standard will exist, and the Court will never be able to decide a case regarding partisan gerrymandering.[224] Even more damaging, the hope of change in the realm of partisan gerrymandering will lie stagnant.[225]

3. If a Judicially Manageable Standard Existed in 1986, Then It Exists Now

The Supreme Court has previously found judicially manageable standards for deciding partisan gerrymandering cases. Moreover, "the discovery of judicially manageable standards has never controlled the U.S. Supreme Court's prior decisions to venture into the field of politics."[226] In fact, in *Reynolds*—the case that established the one-person, one-vote rule—the Court had no problem overlooking the lack of a judicially manageable standard in the status quo in order to create the one-person, one-vote rule.[227] In *Reynolds*, "the apparent lack of a judicially manageable standard did not pose any kind of barrier for [J]ustices willing to get to the heart of the case."[228] In fact, "there is very little principled distinction between what [the Court] did in *Reynolds* and what it refuses to do in the political gerrymandering area."[229]

Even more striking, the Court had no problem overlooking the lack of a judicially manageable standard in previous partisan gerrymandering cases and, further, found that there were such standards.[230] The Court in *Davis* held that the partisan gerrymandering issue presented failed to exhibit the characteristics of a nonjusticiable political question and that there were judicially discernible and manageable standards to apply.[231] If there were judicially manageable standards present in 1986 when *Davis* was decided, then presumably, the standards exist today.[232] Yet, the Court gives no explanation for the leap in analysis that occurred between 1986 and 2004 when *Vieth* first decided that partisan gerrymandering cases were nonjusticiable.[233] The only explanation for this shift is that the

223. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1313–14 (2006) (arguing that without a judicially manageable standard to enforce a right, the right does not exist).

224. *See id.*

225. *See id.*; *see also* discussion *infra* Section III.C (arguing the Supreme Court is the only forum capable of resolving partisan gerrymandering because state and federal legislatures are the "gerrymanderers themselves").

226. Luis Fuentes-Rohwer, *Who's Afraid of the Hated Political Gerrymander?*, 104 KY. L.J. 561, 562 (2015–2016).

227. *Id.* at 568.

228. *Id.* at 571.

229. *Id.* at 572.

230. Davis v. Bandemer, 478 U.S. 109, 123, 143 (1986).

231. *Id.* at 110, 122.

232. Robert A. Koch, *A Wolf in Sheep's Clothing:* Gaffney *and the Improper Role of Politics in the Districting Process*, 39 U. MICH. J.L. REFORM 99, 116–17 (2005).

233. Vieth v. Jubelirer, 541 U.S. 267, 305 (2004).

Court no longer wanted to decide partisan gerrymandering cases.[234] "The Court does not regulate political gerrymanderers because it lacks the will to do so[,]" not because it lacks the power to do so.[235]

B. The Court Should Have Adopted a Standard Which Looks at Whether There Is a Predominant Intent to Manipulate Districts to Maximize One Party's Power Over the Other

Whenever the U.S. Supreme Court discusses whether there is a judicially manageable standard for resolving partisan gerrymandering cases, the Court is careful to look to Justice Kennedy's analysis in *Vieth*.[236] First, Justice Kennedy noted that a partisan gerrymandering standard "must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'"[237] Further, "[a] determination that a partisan gerrymanderer violates the law must rest . . . on a conclusion that the classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."[238]

Therefore, any proposed standards for the Court to adopt should follow Justice Kennedy's guidelines. Ultimately, (1) there are existing judicially manageable standards the U.S. Supreme Court could have applied in *Rucho*; (2) the ideal standard for the Supreme Court to apply in partisan gerrymandering cases is one which looks to whether there was a predominant intent to maximize one party's political power over the other; and (3) intent ought to be measured using principles borrowed from the Equal Protection Doctrine.

1. There Are Existing Judicially Manageable Standards the U.S. Supreme Court Could Have Applied in *Rucho*

The majority limited the realm of judicially manageable standards to two main categories: fairness standards or proportionality standards.[239] However, there are many standards that fall in between the two that would provide the exact rationale the Supreme Court claims it would need to decide this case.[240] Alongside the dissent, other articles have argued that the Supreme Court already has a number of existing principles that it could apply to partisan gerrymandering cases which would create judicially manageable standards.[241] The Court outright rejected racial gerrymandering tests because racial gerrymandering was "inherently suspect."[242] However, contrary to the Court's assertion, racial gerryman-

234. Fuentes-Rohwer, *supra* note 226, at 578.
235. *Id.*
236. Rucho v. Common Cause, 139 S. Ct. 2484, 2498 (2019).
237. *Id.* (quoting *Vieth*, 541 U.S. at 306–08).
238. *Vieth*, 541 U.S. at 307.
239. *Rucho*, 139 S. Ct. at 2499–500.
240. *See* Charles, *supra* note 65, at 671–75.
241. *Id.*
242. *Rucho*, 139 S. Ct. at 2502.

dering cases can provide judicially manageable standards because the standards measure manipulation in districting, not just racism.[243] These standards include the "bizarre shape test" employed in *Shaw v. Reno*.[244] The bizarre shape test uses the shape of the districting lines to determine whether there was intent to draw the lines based on partisanship: "[The] *Shaw v. Reno* standard, find[s] a claim under the Equal Protection Clause when 'redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate [partisan considerations] for purposes of voting."[245]

Another example of such standards is the "presumption of unconstitutionality," which the Court employed in *Reynolds*.[246] Under this standard, the Court would presume a districting map to be unconstitutional if it was not redrawn every ten years.[247] The reasoning behind this presumption is that census data is likely no longer accurate after ten years, and therefore, the districting maps are unlikely to still match the makeup of a given district after ten years.[248] While these tests do not provide perfect means of measuring partisan gerrymandering, they have one essential element in common: intent.[249]

2. The Ideal Standard for the Court to Apply in Partisan Gerrymandering Cases Is One Which Looks to Whether There Was a Predominant Intent to Maximize One Party's Political Power Over the Other

While other standards have all wrestled with intent as an element of a proposed judicially manageable standard for partisan gerrymandering, this Comment argues that the only element that matters is intent and, further, that an intent standard is the ideal standard for the Court to have adopted in *Rucho*. As Justice Kennedy explained in *Vieth*, "[i]f districters declared that they were drawing a map 'so as to burden [the votes of] Party X's' supporters, it would violate the Equal Protection Clause."[250]

The majority in *Rucho* spent a total of five sentences eliminating the predominant intent standard developed by the plaintiffs in the case.[251]

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243. Charles, *supra* note 65, at 664.

244. 509 U.S. 630, 655–56 (1993); *see also* Charles, *supra* note 65, at 672–73.

245. Koch, *supra* note 232, at 116.

246. Reynolds v. Sims, 377 U.S. 533, 583–85 (1964); Charles, *supra* note 65, at 672.

247. Charles, *supra* note 65, at 672 (citing *Reynolds*, 377 U.S. at 583–84); *see also* Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 464–85 (1993) (proposing additional tests including neutrality and symmetry and random districting); John Barrow, *A Way Out of the Political Thicket: The Simple Solution to Partisan Gerrymandering*, 55 HARV. J. ON LEGIS. 1, 17–18 (2018) (arguing that the best standard is maximum achievable neutrality).

248. Charles, *supra* note 65, at 671–72.

249. Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 354 (2017).

250. Rucho v. Common Cause, 139 S. Ct. 2484, 2514 (2019) (quoting Vieth v. Jubelirer, 541 U.S. 267, 312 (2004)).

251. *Id.* at 2502–03.

The majority's issue with the standard was that it was borrowed from racial gerrymandering cases.[252] Further, the Court found that "[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'"[253] Yet, the Court gives no reasons to support this assertion.[254] In fact, this assertion completely contradicts the Court's statement in *Reynolds*, in which the Court found that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State."[255] Therefore, unless the Court sought to overrule *Reynolds*—which there is no evidence of it doing—the Justices cannot push aside their own ruling that a predominant intent to maximize one party's power over the other in districting maps is unconstitutional.[256]

The remainder of the majority's analysis, and the bulk of its analysis regarding the test proposed by the plaintiffs in the case and the dissent, dissects the "effects" element of the test.[257] However, this Comment argues that there is no need for a separate effects element within the test for unconstitutional partisan gerrymandering. A predominant intent to maximize one party's power over another party through redistricting maps is enough to show unconstitutionality. Further, the effects element is encompassed into many proposed "intent tests." "It cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution."[258] The first and most difficult aspect of an intent element is determining how to measure intent.[259]

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252. *Id.*
253. *Id.* at 2503.
254. *Id.* at 2502–03.
255. Reynolds v. Sims, 377 U.S. 533, 568 (1964).
256. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362–63 (2010) (holding that only the Supreme Court can overrule its own decisions and that "our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error").
257. *Rucho*, 139 S. Ct. at 2502–04.
258. *Id.* at 2517 (Kagan, J., dissenting).
259. *See* Ethan Weiss, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693, 709, 717–18 (2013). As an important note, the U.S. Supreme Court would not have had to apply any special measures to determine whether there was a predominant intent to maximize one party's political power over another in *Rucho*. The majority in *Rucho* did not contest the lower court's finding of discriminatory intent because "[t]hese cases involve blatant examples of partisanship driving districting decisions." *Rucho*, 139 S. Ct. at 2505. Therefore, the following analysis would only need to be applied in the cases where intent is less obvious than in *Rucho*.

3. Courts Ought to Measure Intent Using the *Arlington Heights* Test

The U.S. Supreme Court has wrestled with the concept of intent in cases involving violations of the Equal Protection Clause.[260] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[261] the Supreme Court built a test to determine when there is an intent to discriminate based on race.[262] The test in *Arlington Heights* begins with the question of whether the action in question "bears more heavily on one race than another."[263] If the answer to the first question is unclear, the Court must examine the "historical background of the decision."[264] Further, the Court can also examine the "specific sequence of events leading up to the challenged decision."[265] Finally, the "legislative or administrative history may be highly relevant."[266]

The *Arlington Heights* test could easily be adapted to partisan gerrymandering cases.[267] The test would look to (1) whether the districting maps bear more heavily on one political party over another; (2) the historical background of the mapmaking; (3) the specific sequence of events leading up to the mapmaking; and (4) the legislative and administrative history behind the mapmaking.[268] This test would account for cases in which the intent to maximize one party's political power over another is clear and for cases in which the intent is shown by the map itself or by the process of making the map.[269]

Though the *Arlington Heights* test measures intent, it also incorporates a measurement of effect.[270] In the partisan gerrymandering context, the test would first examine whether one districting map bears more heavily on one political party than the other.[271] Therefore, even if legislatures successfully bury explicit evidence of intent, the Court could take into account that the resulting maps place a heavier burden on one political party.[272] Severe partisan gerrymandering will often be enough to show intent.[273] In contrast, even if the redistricting maps do not burden one party more than the other in any significant way, if there is strong enough evidence of intent in other forms—such as the mapmaking process—then individuals with an intent to engage in partisan gerrymander-

260. Weiss, *supra* note 259, at 721–22.
261. 429 U.S. 252 (1977).
262. *Id.* at 266–67.
263. *Id.* at 266 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).
264. *Id.* at 266–67.
265. *Id.* at 267.
266. *Id.* at 268.
267. Weiss, *supra* note 259, at 722.
268. *Arlington Heights*, 429 U.S. at 267–68.
269. *See id.* at 266–68.
270. *Id.*
271. *Id.* at 266.
272. *See id.*
273. *See id.*

ing could still be held accountable for manipulating districting maps.[274] Redistricting maps are unique from other challenged actions in that they are redrawn every ten years.[275] Thus, if a state legislature—or certain legislators—intend to engage in partisan gerrymandering but fail, it is likely that they—or their successors—will attempt to engage in partisan gerrymandering again in ten years.[276] Therefore, even if vote dilution did not occur in one election, it is nearly guaranteed that there will be dilution in the next election if the attempt to partisan gerrymander goes unpunished.[277]

Because the U.S. Supreme Court has established the *Arlington Heights* test as a judicially manageable standard, it meets the criteria laid out by Justice Kennedy.[278] The standard is "grounded in a 'limited and precise rationale'"[279] because it is grounded in the reasoning that intent can be shown not only through disparate treatment and obvious intent but also through the actions that lead up to the mapmaking itself.[280] Further, the test creates a "clear, manageable, and politically neutral" standard because it does not measure whether there was any partisanship in the mapmaking, but rather whether there is evidence that the predominant intent in the mapmaking was to maximize one party's political power over the other.[281]

In the majority opinion in *Rucho*, Chief Justice Roberts stated that he was unsure what fairness means in the context of partisan gerrymandering.[282] The Court overlooked the fact that the amount of partisan gerrymandering should not be the measure of unconstitutionality.[283] The measure of unconstitutionality ought to lie in whether there was an intent to manipulate one party's political power over the other in the drawing of redistricting maps.[284] The *Arlington Heights* test provides the Court with a judicially manageable standard to decide partisan gerrymandering cases.[285]

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274. *See id.* at 266–68.

275. Blake, *supra* note 45.

276. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019) (when legislators are willing to openly admit that "electing Republicans is better than electing Democrats" those individuals are likely going to continue to attempt to engage in partisan gerrymandering until they are punished for their actions).

277. *See id.*

278. *Arlington Heights*, 429 U.S. at 268 ("The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.").

279. *Rucho*, 139 S. Ct. at 2498 (quoting Vieth v. Jubelirer, 541 U.S. 267, 306–08 (2004)).

280. *Arlington Heights*, 429 U.S. at 266–68.

281. *Rucho*, 139 S. Ct. at 2498 (quoting *Vieth*, 541 U.S. at 306–08).

282. *Id.* at 2500.

283. *Arlington Heights*, 429 U.S. at 265–66 ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.").

284. *See id.*

285. *See id.* at 268.

Just as race-based violations of the Equal Protection Clause are subject to strict scrutiny,[286] maps that are shown through the *Arlington Heights* test to have been created with an intent to partisan gerrymander should also be subject to strict scrutiny. Thus, in order for the map to survive, legislatures would have to be able to show that the way the map was drawn was narrowly tailored to serve a compelling government interest.[287] Few—if any—maps will pass strict scrutiny as it "is based on a presumption of distrust, to be rebutted only in the extreme cases."[288] Further, it is highly unlikely that any legislature will be able to produce a compelling government interest for partisan gerrymandering; however, there is no need to foreclose that possibility.[289] Thus, challenged districting maps ought to be examined using the *Arlington Heights* test to measure intent, and where intent is found to be present, the map should be subject to strict scrutiny.

C. State Legislatures, State Judiciaries, and Federal Legislatures Cannot Be the Resolution When They Are the Problem

As the majority in *Rucho* found, it would be illogical for the standard of unconstitutional partisan gerrymandering to be defined and created by the "gerrymanderers themselves."[290] The Court ended its analysis by stating that there are other options to resolve gerrymandering outside of requiring the Court to exercise jurisdiction over the issue.[291] The primary option the Supreme Court proposed is that state courts ought to be enforcing state legislation which protects against gerrymandering.[292] Secondarily, the Court proposed that the federal legislature ought to create laws that protect against partisan gerrymandering.[293] Both options, however, place the power to police partisan gerrymandering back into the hands of the "gerrymanderers themselves."[294]

Even willing state legislatures may be unable to solve the problem of partisan gerrymandering through legislation. In 2019, the New Hampshire state legislature passed a bipartisan bill that would have created an

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286. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

287. *Id.*

288. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 78 (1996).

289. John Sides & Eric McGhee, *Gerrymandering Isn't Evil: Why Independent Redistricting Won't Save Us From Political Gridlock*, POLITICO (June 30, 2015), https://www.politico.com/magazine/story/2015/06/could-gerrymandering-be-good-for-democracy-119581 (arguing that strangely shaped districts are not always indicative of malfeasance and in some cases may be an attempt to create fairness).

290. Rucho v. Common Cause, 139 S. Ct. 2484, 2505 (2019).

291. *Id.* at 2507–08.

292. *Id.* at 2507.

293. *Id.* at 2508.

294. *See id.* at 2505.

independent commission.[295] For the past eleven state elections, Republicans have won 10%–15% more seats than they likely would have won with a neutral—rather than partisan gerrymandered—districting map.[296] The bill provided that the state legislature would still approve the maps, but it would no longer be involved in the map-drawing process.[297] However, New Hampshire's governor, Chris Sununu, vetoed the bill in August 2019.[298] Thus, even states that overcome the hurdle of passing bipartisan legislation to address partisan gerrymandering will often be unable to address the issue due to a governor's choice to exercise veto power.

Even willing state legislatures that successfully pass legislation policing the issue of partisan gerrymandering are often unable to implement the legislation effectively. This dilemma is illustrated in a recent case in Michigan, *League of Woman Voters of Michigan v. Benson*.[299] In *Benson*, Democrats in Michigan sued over Michigan's 2011 districting maps, accusing the Republican majority legislature of packing and cracking.[300] Importantly, prior to the making of the 2011 districting maps, Michigan passed a statute that dictated that mapmakers tasked with redistricting use a specific set of criteria, the "Apol criteria"[301]:

> The Apol criteria contain a hierarchical set of requirements and provide, among other things, that districts be contiguous, contain either a population within 5% of the ideal district size (for the Senate and House districts) or exactly equal population (for the congressional districts), and minimize county and municipal breaks.[302]

Further, the statute provided that the Apol criteria were the only criteria that could be used in the making of the redistricting maps.[303] Yet, the federal district court found that "[t]he evidence points to only one conclusion: partisan considerations played a central role in every aspect of the redistricting process."[304]

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295. Jane C. Timm, *New Hampshire Governor Vetoes Bipartisan Bill to Ward Off Gerrymandering*, NBC NEWS (Aug. 9, 2019, 5:30 PM), https://www.nbcnews.com/politics/2020-election/new-hampshire-governor-vetoes-bipartisan-bill-ward-gerrymandering-n1041001 (explaining that the independent commission would have been composed of five Democrats, five Republicans, and five unaffiliated individuals to draw the state's redistricting maps).

296. *Id.* (quoting Dan Barrick et al., *As New Hampshire Shifts to a Swing State, Why Do Legislative Lines Still Favor Republicans?*, NHPR (Apr. 20, 2016), https://www.nhpr.org/post/new-hampshire-shifts-swing-state-why-do-legislative-lines-still-favor-republicans#stream/0).

297. *Id.*

298. *Id.*

299. 373 F. Supp. 3d 867, 884 (E.D. Mich. 2019).

300. *Id.* at 879 (explaining that the Democrats in Michigan sued the Secretary of State and various Republican politicians intervened as parties).

301. *Id.* at 884.

302. *Id.* (citing Mich. Comp. Laws § 3.63 (Senate and House districts); Mich. Comp. Laws § 4.261 (congressional districts)).

303. *Id.*

304. *Id.*

The committee tasked with creating the redistricting maps went so far as to name the project "Project REDMAP."[305] Advanced computer programs were used to maximize the power of the Republican Party over the Democratic Party in Michigan's maps.[306] There was significant evidence of an intent to maximize the Republican Party's power in the making of the maps.[307] Moreover, evidence that the mapmakers met in secret and used personal rather than official email accounts showed that the mapmakers knew that their actions were in violation of the state.[308]

The partisan advantage created by the maps persisted all the way into Michigan's 2018 state legislature elections, in which,

> Democrats earned approximately 55.8% of the vote in [state] congressional elections but gained only 50% of the [state] congressional seats; 52.6% of the vote in the [state] House but only 47% of the [state] House seats, and over 50% of the vote in the [state] Senate but only 42% of the [state] Senate seats.[309]

In April 2019, the federal district court exercised jurisdiction and held that twenty-seven out of thirty-four districts "violate[d] [the p]laintiffs' First and Fourteenth Amendment rights by diluting the weight of their votes."[310] The court further ordered the state to redraw the maps.[311] The Michigan Democrats appealed the case to the U.S. Supreme Court.[312]

The Michigan case is noteworthy in two ways. First, the willingness of parties that are redistricting to ignore state statutes entirely.[313] Second, the fact that the case was brought directly to a federal court, an action that will no longer be permissible following the ruling in *Rucho*.[314] If state statutes and laws are going to be readily ignored by those making redistricting maps, then the U.S. Supreme Court cannot argue that state legislation is the appropriate avenue for resolving partisan gerrymandering cases. There must be an identifiable standard regarding unconstitutionality that federal courts can apply to hold states that create gerrymandered districting maps accountable with more than a flimsy state statute.[315] By proscribing gerrymandering in cases where there is an intent to maximize one party's political power over the other, the U.S. Supreme

305. *Id.* at 882.
306. *Id.* at 884–85.
307. *Id.* at 886–87.
308. *Id.* at 887.
309. *Id.* at 892–93.
310. *Id.* at 960.
311. *Id.*
312. Chatfield v. League of Women Voters of Mich., 139 S. Ct. 2636, 2636 (2019).
313. *Benson*, 373 F. Supp. 3d at 947.
314. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).
315. Weiss, *supra* note 259, at 706.

Court creates a clear bar that applies evenly to all states and is enforceable at the highest level.

Many have argued that state courts not only are an acceptable avenue for policing partisan gerrymandering but that they are the best avenue for doing so.[316] Those arguments are correct that there are examples of state courts successfully enforcing state legislation which bars partisan gerrymandering.[317] However, even if the U.S. Supreme Court chooses to exercise jurisdiction, the few states with existing legislation will still be able to utilize state courts to enforce that legislation. The cases that ought to concern the Supreme Court are those that are not resolved at the state level and require further intervention by the federal courts. As the dissent noted, the Supreme Court ought to have no hesitation about intervening in the extreme cases, like in *Rucho*, where intent is not in question.[318]

The final avenue that the U.S. Supreme Court proposed as a potential means of solving partisan gerrymandering outside of the Supreme Court is the federal legislature.[319] The inadequacy of this option is evident in the majority's own opinion, in which it states that "[d]ozens of . . . bills have been introduced to limit reliance on political considerations in redistricting," but none of the bills have been passed.[320] Further, the Fairness and Independence in Redistricting Act, which was first introduced in 2005, has never been enacted though it "has been reintroduced in every Congress since."[321] The majority in *Rucho* is unable to cite a single instance in which a federal bill related to limits on political considerations in partisan gerrymandering has been made into law.[322]

While state legislatures, state judiciaries, and federal legislatures remain potential avenues by which solutions to partisan gerrymandering can be attempted, the fact that situations such as that in New Hampshire and cases such as *Benson* exist is direct evidence of the continued necessity for federal court intervention in partisan gerrymandering.

D. Independent Commissions: A Realistic Alternative

Given the current makeup of the U.S. Supreme Court and the Court's repeated resistance to addressing partisan gerrymandering, it is unlikely that *Rucho* will be revisited anytime soon.[323] As long as the po-

316. Taylor Larson & Joshua A. Duden, *Breaking the Ballot Box: A Pathway to Greater Success in Addressing Political Gerrymandering Through State Courts*, 22 CUNY L. REV. 104, 113 (2019).

317. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 766–67 (Pa. 2018).

318. *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting).

319. *Id.* at 2508 (majority opinion).

320. *Id.*

321. *Id.*

322. *Id.*

323. Vordman Carlisle Traywick, III, *Back to the Drawing Board: Redistricting 2020*, S.C. LAW., Sept. 2019, at 52, 53 ("[T]he Court washed its hands of partisan gerrymandering claims once and for all.").

litical question doctrine exists and is used as a legitimate tool for avoiding deciding controversial issues, the Court will be able to avoid addressing partisan gerrymandering.[324] Thus, convincing the Court to adopt the *Arlington Heights* test in the gerrymandering context is an ideal, long-term goal, but the immense and irreparable harm of gerrymandering precipitates immediate action. While federal courts are a necessary mechanism for proscribing partisan gerrymandering, there ought to be a way to stop partisan gerrymandering from occurring in the first place. A prominent theory arose in the last decade that the solution to gerrymandering lies in states giving power to independent third parties or commissions to draw districting maps.[325]

In the status quo, states most often place redistricting in the hands of the members of the state legislature.[326] A redistricting commission, in contrast, is composed of individuals not on the state legislature.[327] States have previously proposed versions of these commissions that are either nonpartisan, bipartisan, or entirely independent.[328] Independent commissions are unique in that they must be composed of individuals who are neither legislators nor current public officials.[329] Independent commissions are created through state legislation and voter initiatives.[330]

Legislative approval of an independent commission's redistricting plan is not required.[331] Courts, and specifically federal courts, retain the ability to declare a map created by an independent commission unconstitutional or invalid due to partisan gerrymandering.[332] Because independent commissions are designed to be independent of the state legislature, they "enact less partisan plans."[333] Arizona and California have passed laws creating independent commissions such as the ones proposed here.[334] Virginia also recently passed a bill which creates an independent commission.[335] Currently, independent commissions are charged with redistricting in thirteen states.[336] Thus far, states that have created independent commissions have successfully lowered the margin of victory in elections, an indication that the maps did not skew districting too far one

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324. Barkow, *supra* note 206, at 258.
325. Harvard Law Review Association, *Redistricting–Partisan Gerrymandering*, 120 HARV. L. REV. 243, 250 (2006).
326. Sara N. Nordstrand, *The "Unwelcome Obligation": Why Neither State nor Federal Courts Should Draw District Lines*, 86 FORDHAM L. REV. 1997, 2024–25 (2018).
327. *Id.* at 2025.
328. *Id.*
329. *Id.*
330. *Id.* at 2026.
331. *Id.* at 2025.
332. *Id.*
333. *Id.*
334. *Id.*
335. Tim Lau, *A Bipartisan Win for Redistricting Reform in Virginia*, BRENNAN CTR. FOR JUST. (Feb. 26, 2019), https://www.brennancenter.org/blog/bipartisan-win-redistricting-reform-virginia.
336. Nordstrand, *supra* note 326, at 2026.

way or the other.[337] For example, the creation of an independent commission in Arizona has been successful at limiting partisan gerrymandering with an average margin of victory that is 28% lower than the rest of the country as a whole.[338]

The way in which commissioners on independent commissions are chosen is determined by the specific statute that created the independent commission.[339] In this area, partisanship can be reintroduced into the system in potentially negative ways when legislative officials play pivotal roles in the process.[340] For example, "under the Arizona State Constitution, the state commission on appellate court appointments establishes a pool of citizen-candidates . . . . From the pool of twenty-five, legislative party officials appoint four . . . members, who, in turn, appoint the fifth member—the chair."[341] Even in states that require commissions to be composed of an equal number of Republicans and Democrats, as well as one independent member, partisanship can create conflict.[342]

In Colorado, the Republican Party claimed that the independent member of the commission was not actually independent because he had sided with the map created by the Democratic members of the commission, rather than the map created by the Republicans.[343] Additionally, rumors had circulated that he had attended a fundraiser for President Obama.[344] In response, the independent member pointed to the fact that the chairman of the Republican Party had recommended his appointment.[345] Thus, "partisan balance does not necessarily create partisan comity."[346] Even in light of independent commissions' failure to remove partisanship from the process, independent commissions still combat the current system of state legislators drawing the maps through which the legislators themselves are reelected.[347]

The model followed by Colorado—commissions composed of an equal number of Republicans and Democrats and one independent member—is the most common model used across the country.[348] Some have

337. Kim Soffen, *Independently Drawn Districts Have Proved to Be More Competitive*, N.Y. TIMES (July 1, 2015), https://www.nytimes.com/2015/07/02/upshot/independently-drawn-districts-have-proved-to-be-more-competitive.html.

338. *Id.*

339. Nordstrand, *supra* note 326, at 2026.

340. *Id.*

341. *Id.*

342. Josh Goodman, *Why Redistricting Commissions Aren't Immune from Politics*, PEW: STATELINE (Jan. 27, 2012), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/01/27/why-redistricting-commissions-arent-immune-from-politics.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *See id.*; *see also* Nordstrand, *supra* note 326, at 2027.

348. Ryan P. Bates, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 350 (2005).

coined it the "tie-breaker commission" model.[349] The members for each major party are chosen by the majority and minority leaders of both parties in the state legislature.[350] This model, though far from perfect, is the "theoretically most sound" model that we currently have.[351] Thus, states ought to implement the tie-breaker model for independent commissions. The next question is how to go about ensuring implementation in every state.

The biggest challenge independent commissions face is that the people who must enact these commissions—individual state legislators—are the people engaging in partisan gerrymandering.[352] Thus, states with persistent partisan gerrymandering are the least likely to put an independent commission in place.[353] Because partisan gerrymandering keeps politicians in power, they are not incentivized to put in place measures—like independent commissions—that are designed to halt gerrymandering.[354] Further, even in states where commissions are put in place, the commissions are far from uniform from state to state.[355]

In response to this problem, some have suggested that Congress should pass legislation compelling states to implement independent commissions through the Elections Clause.[356] Others have argued that the federal government should provide the funding for independent commissions, ensuring some oversight at the federal level.[357] These types of federal reform would create consistency across states and force state legislatures to adopt independent commissions.[358] However, as the large number of states that have not created independent commissions illustrates, national consensus has yet to be achieved.[359] Thus, federal reform is likely not feasible in the near future.[360]

In the absence of federal action, though, initiatives by citizens of each state could inspire a national movement.[361] For example, in 2018,

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349. *Id.*
350. *Id.*
351. *Id.*
352. Brett Neely & Sean McMinn, *Voters Rejected Gerrymandering in 2018, But Some Lawmakers Try to Hold Power*, NPR (Dec. 28, 2018, 5:00 AM), https://www.npr.org/2018/12/28/675763553/voters-rejected-gerrymandering-in-2018-but-some-lawmakers-try-to-hold-power ("[P]oliticians want to keep . . . redistricting to themselves.").
353. *Id.*
354. *Id.*
355. Lillian V. Smith, *Recreating the "Ritual Carving": Why Congress Should Fund Independent Redistricting Commissions and End Partisan Gerrymandering*, 80 BROOK. L. REV. 1641, 1666–67 (2015).
356. Alan S. Lowenthal, *The Ills of Gerrymandering and Independent Redistricting Commissions as the Solution*, 56 HARV. J. ON LEGIS. 1, 16 (2019).
357. Smith, *supra* note 355, at 1667.
358. *Id.*
359. Bates, *supra* note 348, at 357.
360. *See id.*
361. David Gartner, Arizona State Legislature v. Arizona Independent Redistricting Commission *and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551, 579 (2019).

redistricting commissions were created through citizen ballot initiatives in Colorado, Missouri, Utah, and Michigan.[362] These commissions came out of an increased momentum surrounding independent commissions in the wake of *Gill*.[363] Therefore, it is highly likely that the decision in *Rucho* will spark citizens' interest in creating independent commissions once again.[364]

Independent redistricting commissions are particularly powerful at halting partisan gerrymandering practices because "they stop the cycle of representatives elected through gerrymandered district plans from electing new representatives to maintain a political majority."[365] Chief Justice Roberts highlighted in *Rucho* that one of the challenges with finding a standard for partisan gerrymandering claims is that districting is inherently partisan and even fair maps will involve some level of partisanship.[366] Independent commissions, thus, curb the ability for legislators to use districting for their own gain, while preserving the "political character" of districting.[367] Further, a likely outcome of independent commissions is a reduction in voter apathy born out of the perception that an individual's vote does not matter due to partisan gerrymandering.[368] Although far from perfect, independent commissions are the best tool currently available to combat the harms of partisan gerrymandering.[369]

CONCLUSION

Ideally, all states would create independent commissions to draw their redistricting maps, either through federal reform or individual ballot initiatives. However, it is vital that the U.S. Supreme Court and other federal courts maintain the power to proscribe partisan gerrymandering in cases where there is a predominant intent to maximize one party's political power over another. This authority will ensure that partisan gerrymandering is halted, rather than passed from one part of the government to the next like a hot potato.

Rebekah Nickel[*]

362. *Id.* at 580.
363. *Id.*
364. *See id.*
365. Nordstrand, *supra* note 326, at 2027.
366. Rucho v. Common Cause, 139 S. Ct. 2484, 2505 (2019).
367. Bates, *supra* note 348, at 352.
368. *Id.* at 353.
369. Lowenthal, *supra* note 356, at 15.

* J.D. Candidate 2021, University of Denver Sturm College of Law. I would like to thank Professor Alan Chen whose Constitutional law class was the inspiration for this Comment and who provided expert guidance and feedback. I would also like to thank each member of the *Denver Law Review* who reviewed and refined this Comment. Above all, I would like to thank my parents, Tim and Lindsay, and my husband, Zack, for being my greatest advocates and the best support system I could ask for.