

POLICY ESSAY

THE ILLS OF GERRYMANDERING AND INDEPENDENT REDISTRICTING COMMISSIONS AS THE SOLUTION

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I. INTRODUCTION

There is no greater threat to a democracy than when the voters lack confidence in their political system. This is exactly what we are experiencing today. American voters have an ever-increasing feeling that political institutions do not have voters' interests at heart.¹ Multiple issues contribute to this, including the increasing influence of dark money in our elections² and the emergence of the twenty-four-hour news cycle.³ However, perhaps no other factor has contributed more to negative public perception about voting and elections than gerrymandering and its side effects. In an age of voter disillusionment with their elected officials, the term "gerrymandering" has come to represent more than the malapportionment of political districts for parti-

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¹ See generally Larry Shannon-Missal, *Americans Across Party Lines Oppose Common Gerrymandering Practices*, HARRIS POLL (Nov. 7, 2013), <https://theharrispoll.com/new-york-n-y-november-7-2013-ask-a-person-on-the-street-what-they-think-of-congress-and-you-likely-know-what-sort-of-response-youll-get-the-harris-poll-did-and-the-response-was-more-dismal/> [<https://perma.cc/PL5X-SEYL>].

² See THOMAS E. MANN — ANTHONY CORRADO, BROOKINGS INST., *PARTY POLARIZATION AND CAMPAIGN FINANCE* 6 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/Mann-and-Corrad_Party-Polarization-and-Campaign-Finance.pdf [<https://perma.cc/AF4J-U8XY>].

³ See Matt Levendusky, *Are Fox and MSNBC Polarizing America?*, WASH. POST: MONKEY CAGE (Feb. 3, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/03/are-fox-and-msnbc-polarizing-america/?utm_term=.edd9c045d88e [<https://perma.cc/GJR9-QFRA>].

san gain—it has come to represent political exceptionalism and corruption more broadly.

Gerrymandering is the practice of manipulating electoral districts to partisan advantage, securing safe seats for a party, group, or individual at the expense of others.⁴ The practice inherently disenfranchises voters. While these maps are often associated with federal congressional districts, this practice is widespread throughout all political maps: state legislatures, city councils, even school boards. While the practice has always been unpopular and widely condemned,⁵ politicians' ability to protect their own positions of power and expand their influence is too tempting for them to give up. History has shown, as I highlight in the coming pages, that state legislatures that have this power will not give it up of their own accord. Therefore, the power to redistrict must be taken from them and given to the voters. When the decisions are made to disenfranchise voters by creating safe seats for incumbents and protecting the party in power, it tears at the fabric of our democratic institutions. Democracy works best when the voters themselves lead it. However, if voters do not believe our democracy is working fairly,⁶ they will not participate.

The practice of gerrymandering is not unique to one party. President Ronald Reagan addressed the Republican Governors Club and highlighted the successful Democratic gerrymander of California's district maps, when he called for "an end to the antidemocratic and un-American practice of gerrymandering congressional districts."⁷ He continued, "The fact is, gerrymandering has become a national scandal."⁸ More than thirty years later, after the 2010 decennial census, the United States saw an unprecedented effort organized by the Republican Party, through their Redistricting Majority Project ("REDMAP") operation, to draw maps throughout the country to favor Republicans and secure their power for the next decade.⁹ This led Pres-

⁴ See Olga Pierce, Jeff Larson — Lois Beckett, *Redistricting, a Devil's Dictionary*, PROPUBLICA (Nov. 2, 2011), <https://www.propublica.org/article/redistricting-a-devils-dictionary> [<https://perma.cc/RLY2-DWUL>] ("Gerrymandering has become the term of choice for all misbehavior in redistricting, but particularly refers to districts drawn in bizarre, wandering shapes for the benefit of particular politicians.")

⁵ See Cliff Sloan — Michael Waldman, *History Frowns on Partisan Gerrymandering*, WASH. POST (Oct. 1, 2017), https://www.washingtonpost.com/opinions/history-frowns-on-partisan-gerrymandering/2017/10/01/a6795fca-a491-11e7-ade1-76d061d56efa_story.html?utm_term=.d5ebe2e0fa0e [<https://perma.cc/2DE9-CJML>].

⁶ See generally Richard Wike et al., *Globally, Broad Support for Representative and Direct Democracy*, PEW RESEARCH CTR. (2017), http://www.pewglobal.org/wp-content/uploads/sites/2/2017/10/Pew-Research-Center_Democracy-Report_2017.10.16.pdf [<https://perma.cc/AL2Q-WGRR>].

⁷ President Ronald Reagan, Remarks at the Republican Governors Club Annual Dinner (Oct. 15, 1987), <https://www.presidency.ucsb.edu/documents/remarks-the-republican-governors-club-annual-dinner> [<https://perma.cc/CE7U-GYGS>] (transcript available from the American Presidency Project).

⁸ *Id.*

⁹ See Julian E. Zelizer, *The Power that Gerrymandering Has Brought to Republicans*, WASH. POST (June 17, 2016), <https://www.washingtonpost.com/opinions/the-power-that-gerry>

ident Barack Obama, in his last State of the Union address, to say, “[W]e’ve got to end the practice of drawing our congressional districts so that politicians can pick their voters, and not the other way around.”¹⁰ He concluded, “Let a bipartisan group do it.”¹¹

Historically, partisan gerrymandering has taken two forms. The first creates districts of unequal population sizes. Since numerous Supreme Court rulings in the early 1960s establishing the one person, one vote principle, states have been required to draw congressional districts with equal population and redraw districts following the decennial census to account for any population changes.¹² Prior to these Supreme Court rulings, gerrymanders often created districts with significant population differences. Further, parties redrew some district maps multiple times within a single ten-year period to suit their own needs. Likewise, some districts remained unchanged for decades.

The second form of partisan gerrymandering, more common today, is the manipulation of district lines to ensure electoral success and to maintain the party in power. Map drawers employ two techniques, “cracking” and “packing.” Cracking a district spreads the opposition across many districts so that the majority of districts do not have a large enough population of opposition supporters to enable the opposition to viably compete in elections.¹³ Packing a district, alternatively, concentrates opposition supporters in a disproportionately low number of districts, creating safe seats for a single opponent while diluting opposition strength in the other districts.¹⁴ Because gerrymandering reduces competition by creating safe seats, politicians become more polarized, moving to their respective bases. This increased entrenchment of incumbents and parties disenfranchises voters, who as a result become disillusioned and disengaged from the political process.

Gerrymandering is not unique to the United States. Liberal democracies around the world have faced similar problems around partisan district map

mandering-has-brought-to-republicans/2016/06/17/045264ae-2903-11e6-ae4a-3cdd5fe74204_story.html [https://perma.cc/G7AB-FER8].

¹⁰ President Barack Obama, State of the Union Address (Jan. 12, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address> [https://perma.cc/3JV8-J5YX] (transcript available at The White House).

¹¹ *Id.*

¹² See *Reynolds v. Sims*, 377 U.S. 533, 567–68 (1964) (“Simply stated, 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 in other parts of the State.”); see also *Gray v. Sanders*, 372 U.S. 368, 379–81 (1963) (holding that Georgia’s county-unit system, which weighed rural votes more heavily than urban votes, violated the Equal Protection Clause); *Baker v. Carr*, 369 U.S. 186, 191–92, 206–08 (1962) (permitting challenge to a state’s failure to reapportion congressional districts and opining that dilution of voting power through malapportioned districts may violate the Equal Protection Clause).

¹³ See *Pierce*, et al., *supra* note 4.

¹⁴ See *id.*

drawing.¹⁵ Further, since its inception in the United States it has been unpopular.¹⁶ However, what is unique today is the level of sophistication that new technology has made possible, allowing map drawers to be more accurate and successful in their self-interested pursuits.¹⁷ Gerrymandering, at its core, is fundamentally unfair and unconstitutional, and its evils have been espoused since its first use.¹⁸ It is long past time for the United States to fix this injustice and bring fairer maps and more accurate representation to the voters. The best alternative, in my opinion and experience, has proven to be independent redistricting commissions.

II. HOW I GOT HERE: MY EXPERIENCE WITH REDISTRICTING AND GERRYMANDERING

I was first elected to the California State Assembly in 1998. Accordingly, my first experience in redistricting was in 2001—after the 2000 decennial census. I found this process to be very upsetting. More reminiscent of the Tammany Hall political machine than twenty-first-century governing, incumbent elected officials held private meetings behind closed doors and literally selected their own voters. Those officials prioritized political expediency and incumbency protection over any criteria that considered natural boundaries, compactness, or cohesive communities of interests.

Shortly after, I joined the Assembly Bipartisan Caucus as one of its original members. Within this caucus, I led a task force in reviewing the redistricting process to find a better alternative. I studied redistricting, reviewed proposals, and familiarized myself with existing best practices. We met with representatives from Arizona who had established an independent redistricting commission just prior to their own 2001 redistricting process. To address the problems with California's redistricting process, I tried to modify and improve upon the Arizona model and drafted legislation in the California Legislature to create an independent commission in California to implement a new, more equitable process.¹⁹

I was a Democrat in a state controlled by Democrats. My own party largely opposed the concept of independent redistricting because they expected that it would cost Democrats seats and were unwilling to give up their power over the process. Republicans also initially opposed independent redistricting because they felt that by losing their seat at the table, the party leadership would give up its leverage in protecting their incumbents. Due to

¹⁵ See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 780–86 (2013) [hereinafter Stephanopoulos, *Exceptionalism*] (discussing problems confronted by other liberal democracies prior to removing redistricting from partisan control).

¹⁶ See Sloan — Waldman, *supra* note 5.

¹⁷ See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 311 (2011).

¹⁸ See Sloan — Waldman, *supra* note 5.

¹⁹ State Assemb. 19, 2003 Gen. Assemb., Reg. Sess. (Cal.) (resolution to amend state constitution relating to redistricting).

the opposition from both sides, I was unable to move my proposal forward through the State Assembly. Only later, while serving in the California State Senate, having reintroduced the proposal in subsequent terms to bring an independent commission to California,²⁰ was I able to get the proposal passed in that body. However, the Assembly simply refused to take up the legislation. Fortunately, California has a ballot initiative process, which allows voters to bring measures directly to the ballot.²¹ It was through that process that I joined with a coalition of groups including Common Cause and the League of Women Voters, both of which used my legislation as a blueprint for their proposal for an independent redistricting commission in California. Under the leadership of Governor Arnold Schwarzenegger, signatures were collected in order to bring the proposal to the ballot. In 2010, Proposition 20 passed with support from 61 percent of voters.²² Since enacting the Citizens Redistricting Commission in California, there have been no successful court challenges to the maps.²³ Further, California has seen more competitive elections, compared to both previous years in the state as well as compared to the rate of competitive races throughout the country.²⁴

I was first elected to the United States House of Representatives in 2012. The first piece of legislation I introduced in Congress was the Let the People Draw the Lines Act,²⁵ which would have required all states to establish their own independent redistricting commissions, in order to develop their respective congressional redistricting plans. I have also co-sponsored with my colleague Brian Fitzpatrick (R-Pa.) a House resolution expressing the sense of the House of Representatives that congressional redistricting should be reformed to remove political gerrymandering.²⁶ To date, neither of these efforts have received a hearing or a vote in the House.

In 2014, states' ability to create independent redistricting commissions was challenged when the Arizona State Legislature brought a case against

²⁰ See S. Res. 3, 2005 Leg., Reg. Sess. (Cal.) (resolution to amend the State Constitution relating to redistricting); S. Res. 10, 2007 Leg., Reg. Sess. (Cal.) (resolution to amend the State Constitution relating to redistricting).

²¹ CAL. CONST. art. 2, § 8.

²² CAL. SEC'Y OF STATE, STATEMENT OF VOTE, NOVEMBER 2, 2010, GENERAL ELECTION 90 (2011), <https://elections.cdn.sos.ca.gov/sov/2010-general/complete-sov.pdf> [<https://perma.cc/FHN3-DGHN>].

²³ See, e.g., *Dewitt v. Cal. Citizens Redistricting Comm'n*, 705 F. App'x 594, 595 (9th Cir. 2017) (affirming dismissal without appointing three-judge panel because claim was "wholly insubstantial"); *Citizens for Fair Representation v. Padilla*, No. 217CV00973KJMCMK, 2018 WL 684772 (E.D. Cal. Feb. 1, 2018) (dismissing complaint with leave to amend); *Radanovich v. Bowen*, No. 211CV09786SVWPJW, 2012 WL 13012647, at *1 (C.D. Cal. Feb. 9, 2012) (dismissing complaint); *Radanovich v. Bowen*, No. S196852 (Cal. Oct. 26, 2011) (summarily dismissing petition for writ of mandate); *Vandermost v. Bowen*, No. S196493 (Cal. Oct. 26, 2011) (same).

²⁴ See ERIC MCGHEE, PUB. POL'Y INST. OF CAL., ASSESSING CALIFORNIA'S REDISTRICTING COMMISSION 14–17 (2018), <http://www.ppic.org/wp-content/uploads/r-0317emr.pdf> [<https://perma.cc/UTR3-F8EG>].

²⁵ Let the People Draw the Lines Act, H.R. 2978, 113th Cong. (2013).

²⁶ H.R. Res. 283, 115th Cong. (2017).

the Arizona Independent Redistricting Commission, claiming the United States Constitution provided authority only for a state legislature to redistrict.²⁷ This case made it to the United States Supreme Court, where I led an amicus brief filed by bipartisan Members of Congress in support of a state's right to form an independent commission to redraw political lines.²⁸ In a 5-4 decision, the Supreme Court upheld Arizona's use of an independent commission to adopt congressional districts.²⁹ This not only allowed other states to keep their independent commissions, it also set the precedent that these bodies are constitutional.

More recently, the Supreme Court had another opportunity to address the issue of partisan gerrymandering by taking up the case of *Gill v. Whitford*.³⁰ Prior to October Term 2017, Justice Ginsburg predicted that *Gill* may be the most important case that the Court would decide during that term.³¹ Previous Supreme Court decisions had broached the constitutionality of gerrymandering but failed to determine a standard as to whether a district was constitutionally drawn.³² In the end, the Supreme Court did not rule on the standard litigated in *Gill*. Instead, the Court issued a narrow ruling finding that the parties challenging the maps did not have standing.³³ *Gill*, and similar cases, are already making their way back through the federal courts³⁴ and could be reheard in the Supreme Court as soon as the next term.

I also led the bipartisan amicus brief of current and former Members of Congress in *Gill*.³⁵ Justice Kagan cited that brief in her concurring opinion, joined by Justices Ginsburg, Breyer, and Sotomayor, stating, "the evils of gerrymandering seep into the legislative process itself. Among the *amicus* briefs in this case are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences."³⁶ She continued:

²⁷ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

²⁸ Brief for Members of Congress as Amici Curiae in Support of Appellees, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (No. 13-1314).

²⁹ See *Ariz. State Legislature*, 135 S. Ct. at 2371.

³⁰ 138 S. Ct. 1916 (2018).

³¹ See Adam Liptak, *On Justice Ginsburg's Summer Docket: Blunt Talk on Big Cases*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/us/politics/ruth-bader-ginsburg.html> [<https://perma.cc/KRW3-9U2R>].

³² See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring) (noting lack of "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights"); *Davis v. Bandemer*, 478 U.S. 109, 123, 129–30 (1986) (plurality opinion) (finding justiciable challenge to allegedly gerrymandered maps but rejecting challenge to maps under the Equal Protection Clause).

³³ See *Gill*, 138 S. Ct. at 1926–34.

³⁴ See Press Release, CAMPAIGN LEGAL CTR., Amended Whitford Complaint Highlights Harm Caused by Wisconsin's Partisan Gerrymander to 40 Plaintiffs Across 34 Districts (Sept. 14, 2018) <https://campaignlegal.org/press-releases/amended-whitford-complaint-highlights-harm-caused-wisconsins-partisan-gerrymander-40> [<https://perma.cc/B8ZQ-FZKJ>].

³⁵ Brief for Bipartisan Group of Current and Former Members of Congress as Amici Curiae in Support of Appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

³⁶ *Gill*, 138 S. Ct. at 1940 (Kagan, J., concurring).

The congressional brief describes a “cascade of negative results” from excessive partisan gerrymandering: indifference to swing voters and their views; extreme political positioning designed to placate the party’s base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation’s problems.³⁷

III. HOW WE GOT HERE: A BRIEF HISTORY OF GERRYMANDERING

Partisan gerrymandering has been consistently denounced as undemocratic and unconstitutional. The vision of the Framers was for the House of Representatives to stand as the legislative body closest to the pulse of the people. To ensure this, they constructed Congress in such a way as to make the House more directly accountable to the voters through regularly-held competitive elections. Partisan gerrymandering acts as a direct threat to this foundational principle, putting a partisan barrier between elected officials and the voters. The Framers were aware of the conflict that could arise if federal elected officials were to draw their own district boundaries. For this reason, they gave the responsibility to the state legislatures. As the American colonies began to fight for their independence and debate the initial ideas surrounding self-governance, the role and scope of a government took shape. In *Common Sense*, Thomas Paine wrote:

[A]s the colony increases, the public concerns will increase likewise, and the distance at which the members may be separated, will render it too inconvenient for all of them to meet This will point out the convenience of their consenting to leave the legislative part to be managed by a select number chosen from the whole body, who are supposed to have the same concerns at stake which those have who appointed them, and who will act in the same manner as the whole body would act were they present.³⁸

John Adams, that same year, echoed Paine’s comments:

In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws: The first necessary step, then, is to depute power from the many to a few [Such a representative body] should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them. . . . Great care should be taken to . . . prevent unfair, partial, and corrupt elections.³⁹

³⁷ *Id.*

³⁸ THOMAS PAINE, *COMMON SENSE* 10 (Penguin Books 2012) (1776).

³⁹ JOHN ADAMS, *THOUGHTS ON GOVERNMENT, APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES* 8–10 (1776).

It is clear that the desire was for a representative body close to the pulse of their voters and constituents.

A decade later, after the need for a more robust federal government became clear due to the Continental Congress's lack of power and authority conferred by the Articles of Confederation,⁴⁰ the role of the legislature and its relationship to the people once again figured prominently in the discussion. Fears of congressional district manipulation and malapportionment arose as the role of the proposed House of Representatives was debated at the Constitutional Convention and sent to the states for ratification. In Massachusetts, Anti-Federalists objected to ratification because of the possibility of "making an unequal and partial division of the states into districts for the election of representatives."⁴¹ During the same debate, Anti-Federalists also raised concerns that without federal oversight and protection, representatives "will not be chosen by the people, but will be the representatives of a faction of that [s]tate."⁴² In Federalist No. 52, James Madison stated, "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people."⁴³ In Federalist No. 57 Madison wrote, "The electors are to be the great body of the people of the United States."⁴⁴ Further, he frequently repeated the point that the primary check on members of the House of Representatives was their "dependence on the people."⁴⁵ Even noted Anti-Federalist George Mason agreed. Arguing during the debates over the drafting of a new Constitution, Mason said, "The requisites in actual representation are, that the [representatives] should sympathize with their constituents; [should] think as they think, [and] feel as they feel."⁴⁶

It was the bipartisan concern for manipulation of elections that led the founders to grant Congress the authority, under Article I of the Constitution, to regulate the times, places, and manner of congressional elections.⁴⁷ The House of Representatives was to be the most democratic federal body, closest to the people. Two-year terms ensured that voters would regularly hold their representatives accountable. With the election of the president by the Electoral College and election of senators by state legislatures until the Seventeenth Amendment was ratified in 1913,⁴⁸ the House was the only federal

⁴⁰ See ARTICLES OF CONFEDERATION of 1781, art. IX.

⁴¹ DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, HELD IN THE YEAR 1788, AND WHICH FINALLY RATIFIED THE CONSTITUTION OF THE UNITED STATES 125 (Bradford K. Peirce — Charles Hale eds., William White 1856).

⁴² *Id.* at 50.

⁴³ THE FEDERALIST NO. 52, at 202 (James Madison) (Great Neck Publishing ed., 2017).

⁴⁴ THE FEDERALIST NO. 57, at 219 (James Madison) (Great Neck Publishing ed., 2017).

⁴⁵ See, e.g., *id.* at 220.

⁴⁶ JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 63 (Gaillard Hunt — James Brown Scott eds., Oxford University Press 1920) (1787).

⁴⁷ U.S. CONST. art. I, § 2.

⁴⁸ U.S. CONST. amend. XVII.

body directly elected by the people. The Framers, by constructing the House to be first and foremost accountable to its constituents, also saw it as a bulwark against the harmful effects of factional partisan control.⁴⁹ So, when politicians and political parties draw their own districts, manipulating them to select those who will vote for them, it goes counter to the intent of the Framers to have voters select their representatives in the most direct method possible.

Immediately after the idea of our democratic institution went from theory and into practice, the United States saw its first gerrymander. Historians generally identify the first gerrymander in the United States to be in 1788, during the nation's first congressional election. Patrick Henry and the Anti-Federalists controlling the Virginia House of Delegates deliberately included James Madison's home county in a congressional district that also included nearby Anti-Federalist-leaning counties. It was an attempt by Henry and his faction to cut Madison out of the newly formed House of Representatives.⁵⁰

The most iconic gerrymander, however, and the one that lends its name to the practice itself, took place in 1812, when Elbridge Gerry was serving as the Democratic-Republican Governor of Massachusetts. He signed the state legislature's redistricting proposal that included a state senate district which, to many Federalists—as well as the *Boston Gazette* newspaper and its cartoonist—resembled a salamander-like monster. The *Gazette* dubbed it the "Gerry-mander."⁵¹ The Federalists took control of the state legislature a decade later and, with the now notorious "Gerry-mander" map still fresh in the minds, passed new political districts manipulated to strongly favor the Federalists.⁵²

Regardless of the state, or which political factions were in charge, gerrymandering continued unabated throughout the eighteenth, nineteenth, and twentieth centuries. This occurred despite steps calling for equality among voters, such as the passage of the Fourteenth Amendment and its Equal Protection Clause. Formal calls continued to be made to address the issue. Future president James Garfield won his 1870 congressional race with help from a beneficial gerrymander, though he would decry the practice and call for its elimination. In a speech on the House floor he said, "It is the weak point in the theory of representative government, as now organized and administered, that a large portion of the voting people are permanently disen-

⁴⁹ See THE FEDERALIST No. 10 (James Madison).

⁵⁰ See Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 EARLY AM. STUD. 781, 782–83 (2011).

⁵¹ *The Gerry-mander, a New Species of Monster, which Monster, which Appeared in Essex South District in Jan. 1812*, BOS. GAZETTE (Mar. 16, 1812).

⁵² See Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN: ASK SMITHSONIAN (July 20, 2017), <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/#04tUUoDePbFr6dd5.99> [https://perma.cc/F9HV-AM9C].

franchised.”⁵³ In his annual address to Congress, President Benjamin Harrison called gerrymandering “political robbery” and called on Congress to take action, stating, “The power of Congress is ample to deal with this threatening and intolerable abuse.”⁵⁴

Lengthy delays in redistricting led to stark disparities in population between districts. For seventy years between 1841 and 1912, congressional district boundaries in Connecticut stayed the same.⁵⁵ Conversely, the Ohio legislature redistricted congressional districts seven times between 1878 and 1892, and after six consecutive elections at one point during this period.⁵⁶ “[A]t least one state redrew its congressional districts each year” from 1872 to 1896.⁵⁷ By 1960, Georgia’s Fifth Congressional District had 823,489 people, while the state’s Ninth District had 272,154 people, a difference of more than 550,000 people.⁵⁸ It was not until the early 1960s and a series of Supreme Court cases that voters saw their first respite from the practice of gerrymandering. In 1962, the Supreme Court heard *Baker v. Carr*,⁵⁹ challenging Tennessee’s failure to redistrict since 1901.⁶⁰ Through challenges based on the Equal Protection Clause, one person, one vote was set as precedent and the justiciability⁶¹ of such gerrymanders was established.⁶² Though the differences in population and redistricting were inconsistent and undemocratic, it was not until the Supreme Court ruled the practices unconstitutional that the practices stopped. Politicians saw population disparity between districts as a tool to maintain factional control and hurt their oppo-

⁵³ CONG. GLOBE, 41st Cong. 2d Sess. 4737 (1870) (statement of Rep. James Garfield (R-Ohio)).

⁵⁴ President Benjamin Harrison, Third Annual Message to Congress (Dec. 9, 1891), <http://www.presidency.ucsb.edu/ws/index.php?pid=29532> [<https://perma.cc/RYC7-3Y4H>] (transcript available at the American Presidency Project).

⁵⁵ See Erik J. Engstrom, *Stacking the States, Stacking the House: The Partisan Consequences of Congressional Redistricting in the 19th Century*, 100 AM. POL. SCI. REV. 419, 419 (2006).

⁵⁶ See Richard Gladden, *The Federal Constitutional Prohibition Against “Mid-Decade” Congressional Redistricting: Its State Constitutional Origins, Subsequent Development, and Tenuous Future*, 37 RUTGERS L.J. 1133, 1139 (2006).

⁵⁷ See Engstrom, *supra* note 55, at 419–20.

⁵⁸ See CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 35 (2010).

⁵⁹ 369 U.S. 186 (1962).

⁶⁰ See *Redistricting and the Supreme Court: The Most Significant Case*, NAT’L CONF. OF STATE LEGISLATURES (July 19, 2018), <http://www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx> [<https://perma.cc/WP3U-5ER9>].

⁶¹ “Justiciability refers to the types of matters that the federal courts can adjudicate. If a case is ‘nonjusticiable[]’ a federal court cannot hear it. To be justiciable, the court must not be offering an advisory opinion, the plaintiff must have standing, and the issues must be ripe but neither moot nor violative of the political question doctrine.” *Justiciability*, LEGAL INFO. INST., CORNELL L. SCH., <https://www.law.cornell.edu/wex/justiciability> [<http://perma.cc/P7V4-5VZ6>] (last visited Oct. 23, 2018).

⁶² See *Reynolds v. Sims*, 377 U.S. 533, 583–84 (1964) (requiring periodic reapportionment); see also *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (“The conception of political equality . . . can mean only one thing—one person, one vote.”); *Baker*, 369 U.S. at 237 (permitting challenge to malapportioned districts).

nents. That practice seems archaic and inequitable—like gerrymandering today. But there is no reason to believe that politicians would have proportionately apportioned districts without judicial intervention.

Seeking to eliminate discriminatory election rules, Congress passed the Voting Rights Act in 1965.⁶³ The Act ensured that states with a statistically significant number of minority voters drew districts with enough minority populations within them to allow for a minority candidate to be elected, allowing racial and ethnic minority groups to select representatives from their own communities.⁶⁴

Fractured opinions in recent Supreme Court cases such as *Davis v. Bandemer*⁶⁵ and *Vieth v. Jubelirer*⁶⁶ have generated confusion about whether partisan gerrymandering cases are justiciable and whether courts can devise manageable standards to review such claims. The lack of any meaningful resolution from Congress or the Supreme Court has resulted in continued control of the process by state political parties. This has led to attempts by voters to remove politicians from the redistricting process. Arizona voters approved the Arizona Independent Redistricting Commission in 2000⁶⁷ and California voters approved the California Citizens Redistricting Commission later that decade.⁶⁸ The year 2010 also saw the unprecedented coordination nationally by Republicans through REDMAP. Organized through the Republican State Leadership Committee, REDMAP sought to elect Republican governors and control state legislatures with the distinct goal of controlling the relevant offices in time for the next redistricting process.⁶⁹ Moreover, while Democrats did not have a national coordinated campaign, they engaged in their share of gerrymandering in states where they controlled the government.⁷⁰

While partisan gerrymandering has occurred throughout our history, it runs counter to the intentions of the Framers and has always been regarded by the public at large as disenfranchising, unconstitutional, and undemo-

⁶³ 52 U.S.C. §§ 10101, 10301–14, 10501–08, 10701–02 (2012).

⁶⁴ See 52 U.S.C. §§ 10101(a)(1), 10301 (2012); see also *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (requiring majority-minority districts under Voting Rights Act when certain criteria are met).

⁶⁵ 478 U.S. 109 (1986).

⁶⁶ 541 U.S. 267 (2004).

⁶⁷ See *About the IRC*, ARIZ. INDEP. REDISTRICTING COMM'N (last visited Oct. 13, 2018), <https://azredistricting.org/About-IRC/> [<https://perma.cc/5VCP-SNHY>].

⁶⁸ See Angelo Anchetta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. — POL'Y REV. 109, 113 (2014).

⁶⁹ See Elizabeth Kolbert, *Drawing the Line*, NEW YORKER (June 27, 2016), <https://www.newyorker.com/magazine/2016/06/27/ratfcked-the-influence-of-redistricting> [<https://perma.cc/6FC9-LDJ6>].

⁷⁰ See Dave Daley, *How Democrats Gerrymandered Their Way to Victory in Maryland*, ATLANTIC (June 25, 2017), <https://www.theatlantic.com/politics/archive/2017/06/how-deep-blue-maryland-shows-redistricting-is-broken/531492/> [<http://perma.cc/D9FK-5FQ5>]; Matt Lewis, *Democrats Hate Gerrymandering—Except When They Get to Do It*, DAILY BEAST (Apr. 2, 2018), <https://www.thedailybeast.com/democrats-hate-gerrymanderingexcept-when-they-get-to-do-it> [<http://perma.cc/MN9S-N2VU>].

cratic. Gerrymandering acts as a barrier between the people and their representatives, making politicians answerable first and foremost to their party, not their voters.

IV. HOW WE ARE IMPACTED: THE ISSUES WITH GERRYMANDERING

Designing political districts that are in keeping with traditional redistricting principles would create districts with shared concerns and interests.⁷¹ Having a coherent district built on the principle that the representative is elected to serve the constituency emboldens and empowers the community to participate in the electoral process. Protecting political parties and incumbents motivates district mapmakers in many states. There is a positive correlation between the statewide partisan advantage, as measured by the efficiency gap,⁷² and a single party's control of a state government.⁷³ Gerrymandered districts lead to a lack of competitive elections, more polarized elected officials, and a disengaged constituency.⁷⁴ By putting a barrier between representatives and their constituents, gerrymandering makes representatives more responsive to political factions and special interests than to their constituents and voters. As shown in the previous Section, such results run counter to the system of government designed and envisioned by the founders, in which the power rested in the people. Gerrymandering has flipped this system around, allowing politicians and political parties to select the voters who will vote in their elections.

By drawing districts to remove the likelihood of a competitive election, gerrymandering creates safe seats. Done across a state through “cracking” and “packing,” the party drawing the maps tries to secure their majority, ensuring party leadership in a statehouse and congressional delegation. Maps carved out to maximize the number of registered and likely voters for a specific party minimize the chances for turnover and secure the dominance of a single party or candidate. As a result, over the last thirty years the United States has seen the number of competitive congressional elections decrease as the number of safe seats has increased.⁷⁵

A party that has manipulated political districts to create enough safe seats to protect its majority removes its accountability to the people.⁷⁶ Mak-

⁷¹ See Stephanopoulos, *Exceptionalism*, *supra* note 15, at 812.

⁷² See Nicholas O. Stephanopoulos — Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2014) (defining the efficiency gap as a “measure of partisan symmetry” that “represents the difference between the parties’ respective wasted votes in an election, divided by the total number of votes cast”).

⁷³ See Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. — MARY L. REV. 2115, 2118–20 (2018).

⁷⁴ See *id.*

⁷⁵ See Pildes, *supra* note 17, 312.

⁷⁶ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 605–06 (2002); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 259 (2006).

ing politicians more accountable to their party than the voters shifts representatives to the ideological poles⁷⁷—diminishing any chance for bipartisan cooperation and compromise and making the party whip more important than the community advocate. Politicians who do not have to face a competitive general election see only two challenges to keeping their positions: alienating party leadership or a primary challenger from within the party. Either of these can pull a representative toward his or her party's base. State partisan gerrymanders have been shown to “dramatically influence the representational distortion of House delegations.”⁷⁸ Further, individual politicians in gerrymandered seats “tend to fall further from the ideological center than do politicians who have to reach out to voters from both parties to get elected.”⁷⁹ While redistricting is up to state legislatures, the process is directly influenced by the national political parties and their leadership.⁸⁰ There are also examples of political parties using redistricting as a way to keep members in step with party leadership. Recent examples include Republicans threatening to draw members such as Representatives Jim Jordan (R-Ohio) and Justin Amash (R-Mich.) out of their seats.⁸¹ Both representatives are members of the Freedom Caucus, who have been known to counter Republican party leadership. As another example, in 2000 current Rep. Hakeem Jeffries (D-N.Y.) challenged, and was narrowly defeated by, an incumbent Democratic state assemblyman.⁸² In response, the New York State Democratic Party redrew the assembly district where Jeffries lived to carve out the block containing his home, thus preventing Jeffries from challenging the incumbent again.⁸³

The reduction of competition that results from gerrymandering is severe and results in fewer opportunities for voters to exercise their right to act as a check on their representatives. Safe seats draw fewer qualified opposition candidates, if they attract any challenger at all.⁸⁴ The nonpartisan voting-

⁷⁷ See Stephanopoulos, *supra* note 73, at 2147.

⁷⁸ *Id.* at 2144.

⁷⁹ Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1068 (2005).

⁸⁰ See Todd Ruger, *Fiercest Fight of the Midterms May Be the One for Maps*, ROLL CALL (May 10, 2018), <https://www.rollcall.com/news/politics/midterm-fight-maps-redistricting> [<https://perma.cc/G38D-JYQF>].

⁸¹ See, e.g., Cameron Joseph, *Jordan in Redistricting Crosshairs After Bucking Boehner*, HILL (July 28, 2011), <http://thehill.com/blogs/ballot-box/house-races/174211-jordan-in-redistricting-crosshairs-after-bucking-boehner> [<https://perma.cc/2FHW-SABN>]; Jonathan Oosting, *Amash: Partisan Redistricting an “Ugly” Process*, DETROIT NEWS (Oct. 3, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/10/03/justin-amash-gerrymandering-ugly-process/1511884002/> [<https://perma.cc/6KN9-NZEW>]; see also Justin Amash (@justinamash), TWITTER (May 25, 2017, 7:17 PM), <https://twitter.com/justinamash/status/867415399889072128> [<https://perma.cc/EM9X-PZG4>].

⁸² See Doug Israel, *Why Gerrymandering Must Go*, GOTHAM GAZETTE (Feb. 14, 2005), <http://www.gothamgazette.com/open-government/2744-why-gerrymandering-must-go> [<http://perma.cc/UL3N-PTGP>].

⁸³ See *id.*

⁸⁴ See *Dubious Democracy*, FAIRVOTE, http://www.fairvote.org/dubious_democracy [<https://perma.cc/FHJ4-F6Y3>] (last visited Oct. 14, 2018).

rights organization FairVote reports that the 2016 House of Representatives elections saw landslide⁸⁵ victories in roughly 74 percent of races nationwide, with approximately 15 percent of races being uncontested altogether.⁸⁶ Further, only eight incumbents lost in the 2016 general election, out of 387 incumbents challenged,⁸⁷ despite Congress as a whole having an approval rating of 19 percent at the time.⁸⁸

Without a meaningful choice in electoral competition, the voters' voices are diminished. Between 2009 and 2016 Gallup found a steep decline in the percentage of Americans who have confidence in the honesty of our nation's elections.⁸⁹ In just these seven years, voter trust fell from 59% to 30%.⁹⁰ Further, Gallup found that those lacking faith in our electoral system rose from 40% to 69%.⁹¹ When constituents are gerrymandered into a district where their voices are not heard by their representatives and their votes do not count at the ballot box, they will stop participating in the process. And democracy fails when citizens fail to turn out.

All of the negative ramifications attributed to partisan gerrymandering previously discussed are exacerbated by the increasingly sophisticated tools at the political mapmakers' disposal today. Advances in technology and the emergence of big data have allowed gerrymanders to be more accurate and aggressive. The process of gerrymandering has evolved from an art to a science, allowing for a smaller margin of error. Politicians have ceased enlisting the help of cartographers when redistricting and now employ analytic consultants.⁹² While state parties historically had to balance incumbent protection with seat maximization, technological advances have allowed mapmakers to "engineer so much advantage that it is possible to satisfy both of these goals."⁹³ Computer technology "has enabled the practice of this dark art with increasing precision and success."⁹⁴ A study by the Brennan Center for Justice showed that historically the effectiveness of a gerryman-

⁸⁵ See *Dubious Democracy 1982-2010, Glossary*, FAIRVOTE, <http://archive3.fairvote.org/research-and-analysis/congressional-elections/dubious-democracy/dubious-democracy-1982-2010/glossary-2010/> [<https://perma.cc/M6AT-HN5P>] (last visited Oct. 15, 2018) (defining landslide as an electoral win by more than 20% and less than 40% of the vote on a percentage points basis).

⁸⁶ See FAIRVOTE, *supra* note 84.

⁸⁷ *Id.*

⁸⁸ *Congress and the Public*, GALLUP (Sept. 12, 2018), <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/4CRH-FS3F>].

⁸⁹ See Justin McCarthy — Jon Clifton, *Update: Americans' Confidence in Voting, Elections*, GALLUP (Nov. 1, 2016), <https://news.gallup.com/poll/196976/update-americans-confidence-voting-election.aspx> [<https://perma.cc/DK4L-B9HR>].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/> [<https://perma.cc/A939-9SEP>].

⁹³ ANTHONY J. MCGANN ET AL., *GERRYMANDERING, THE SUPREME COURT AND THE CONSTITUTIONAL REVOLUTION OF 2004* 87 (2016).

⁹⁴ Pildes, *supra* note 17 (discussing role of computer technology in district mapping).

der would diminish over time, due to population shifts and incumbents retiring.⁹⁵ However, today, “mapmakers now know a lot more about voters.”⁹⁶ Gerrymanders are “becoming much more effective and pernicious”⁹⁷ as technology has allowed more sophisticated and durable maps. If a party can draw lines with such accuracy that it can confidently control a majority of districts for the next decade, the party can ensure it is in power the next time that lines are drawn. That extended control secures its power not only for this decade but also the next.

V. HOW WE FIX IT: THE SOLUTION TO GERRYMANDERING

As I stated in the Introduction, when serving in the California State Legislature, I closely reviewed the best possible solutions to gerrymandering and my thinking quickly coalesced behind the idea of independent commissions. Arizona had paved the way in the United States and had offered tangible success. Today, most liberal democracies in the world have moved past political redistricting to some form of commission.⁹⁸ Unconstrained political redistricting regularly benefits a single political party at the expense of fair or accurate representation and to the detriment of our democratic institutions. Independent redistricting commissions are currently the best tool that voters have to mitigate political influence and the negative effects of gerrymandering. States that allow their legislatures to control the redistricting process are more likely to have “higher partisan bias, lower electoral responsiveness, and reduced public confidence in the electoral system,” compared to other countries or states with independent commissions.⁹⁹

The people also recognize these facts. A 2013 Harris Poll found that 64 percent of total respondents believe that redrawing districts is often used to take power away from voters.¹⁰⁰ Further, the same poll found that 71 percent thought that those who benefit from redrawing districts should not have a say in the process.¹⁰¹ The preferred alternative, by an overwhelming margin, was an independent commission.¹⁰² A 2017 bipartisan poll conducted on behalf of the Campaign Legal Center showed similar overwhelming support nationally for removing partisan bias from redistricting, with 73 percent of

⁹⁵ See Michael Li — Thomas Wolf, *Supreme Court Has Historic Chance to End Extreme Gerrymandering*, BRENNAN CTR. FOR JUSTICE (June 21, 2017), <https://www.brennancenter.org/blog/supreme-court-has-historic-chance-end-extreme-gerrymandering> [https://perma.cc/M7ZZ-KH7E].

⁹⁶ Newkirk, *supra* note 92.

⁹⁷ See Li — Wolf, *supra* note 95.

⁹⁸ See Stephanopoulos, *Exceptionalism*, *supra* note 15, at 772 (discussing the use of commissions in the redistricting process).

⁹⁹ *Id.* at 769, 790.

¹⁰⁰ See HARRIS POLL, *supra* note 1.

¹⁰¹ *Id.*

¹⁰² *Id.*

respondents saying they would support limitations, even if it meant their preferred political party would win fewer seats.¹⁰³

This issue is not unique to the United States system. Most liberal democracies have faced similar issues in the past, with gerrymandering existing in one form or another for many centuries.¹⁰⁴ While some individual states in the United States have adopted independent commissions, the U.S. system as a whole remains an outlier among liberal democracies by allowing its political actors to control their own redistricting, which most states in the Union still do.¹⁰⁵ Most other countries leave redistricting to commissions.¹⁰⁶ Redistricting commissions in Canada, Japan, and the United Kingdom are composed of members appointed by politicians and the commissions' final plans require legislative approval.¹⁰⁷ In contrast, redistricting commissions in Australia and New Zealand are entirely autonomous, with nonpartisan commissioners.¹⁰⁸ They do not require approval from a court or legislative body.¹⁰⁹ France has the most similar system to the United States: their parliamentary government is also comprised of single-member districts, although their districts are drawn at the federal level by the executive branch and reviewed by a constitutional council.¹¹⁰ Further, research into the French parliamentary redistricting process has concluded the level of partisan bias there to be "minuscule."¹¹¹

Overwhelming trends show voter dissatisfaction with Congress and its increasing polarization and an ever-increasing desire to see independent commissions replace self-benefitting politicians in the redistricting process. So why have we not seen more states adopt commissions? As I mentioned earlier, politicians and political parties are self-serving and will not give up power or influence easily. Congress—through the power vested in it by the Elections Clause in Article I of the Constitution—may regulate the times, places, and manner of congressional elections, and could compel states to draw congressional districts using independent commissions.¹¹² Such legisla-

¹⁰³ See Memorandum from Lake Research Partners — WPA Research on Partisan Redistricting—New Bipartisan Nat'l Poll 3 (Sept. 11, 2017), [https://campaignlegal.org/sites/default/files/memo.CLCPartisanRedistricting_FINAL_2.09082017%20\(002\).pdf](https://campaignlegal.org/sites/default/files/memo.CLCPartisanRedistricting_FINAL_2.09082017%20(002).pdf) [https://perma.cc/AT5N-7VJA] (national survey commissioned by the Campaign Legal Center).

¹⁰⁴ See Stephanopoulos, *Exceptionalism*, *supra* note 15, at 780–86.

¹⁰⁵ See *id.* at 780.

¹⁰⁶ See Andrew Prokop, *Gerrymandering, Explained: How Do Other Countries Handle Redistricting?*, Vox (May 15, 2015), <https://www.vox.com/cards/gerrymandering-explained/how-do-other-countries-handle-redistricting> [https://perma.cc/JC3T-SH8U].

¹⁰⁷ See Stephanopoulos, *Exceptionalism*, *supra* note 13, at 783–84.

¹⁰⁸ See *id.* at 784.

¹⁰⁹ See *id.*

¹¹⁰ See Prokop, *supra* note 106.

¹¹¹ See Bernard Grofman — German Feierherd, *The U.S. Could Be Free of Gerrymandering. Here's How Other Countries Do Redistricting*, WASH. POST: MONKEY CAGE (Aug. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/07/the-supreme-court-will-soon-consider-gerrymandering-heres-how-changes-in-redistricting-could-reduce-it/?utm_term=.4141e8c17115 [https://perma.cc/V87A-AE65].

¹¹² See U.S. CONST. art. 1, § 2, cl. 3.

tion requires support from many of the same politicians who directly benefit from gerrymandering themselves or fear what may happen if they no longer had a seat at the table. As stated in the Introduction, when I was in the California State Legislature, initially I could not get a vote in the assembly to create a redistricting commission. The first piece of legislation I introduced when I arrived in Congress, the Let the People Draw the Lines Act, never received a vote in the House of Representatives. Neither has my bipartisan resolution expressing the sense of the House that congressional redistricting should be reformed to prevent political gerrymandering.

Likewise, I previously highlighted that partisan gerrymandering is counter to the Framers' intent and is unconstitutional. Because politicians abused the process to benefit one faction over another, it was the Supreme Court that had to put limits on malapportioned districts by establishing that new lines must be drawn every decade.¹¹³ The Court has also ruled racial gerrymandering unconstitutional unless narrowly tailored to meet a compelling governmental interest.¹¹⁴ They have yet to rule partisan gerrymandering unconstitutional or even put barriers to limit extreme partisan gerrymandering. Justice Kennedy's retirement after the last term jeopardizes the potential for judicial intervention in the short-term.¹¹⁵

This leaves state-level change as the best hope for movement on this issue. As in Arizona and California, the change must come from the people. Twenty-four states have some form of voter initiative or ballot referendum process, with fourteen states having a direct initiative process.¹¹⁶ Currently, there are grassroots efforts in Arkansas, Michigan, Missouri, Oklahoma, Utah,¹¹⁷ and other states to bring some form of redistricting change to their states through their respective initiative processes. Further, there have been recent successful grassroots efforts by coalitions of local advocates to bring change to the ballot through their local state legislatures.¹¹⁸

¹¹³ See *Reynolds v. Sims*, 377 U.S. 533, 567–68 (1964) (requiring equal apportionment in state legislative districts); see also *Gray v. Sanders*, 372 U.S. 368, 380–81 (1963) (establishing the standard of one person, one vote for legislative representation); *Baker v. Carr*, 369 U.S. 186, 191–92, 206–08 (1962) (holding that federal courts could determine redistricting questions).

¹¹⁴ See *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (holding that redistricting based on race should be subject to strict scrutiny under the Equal Protection Clause).

¹¹⁵ See Michael Wines, *Kennedy's Retirement Could Threaten Efforts to End Partisan Gerrymandering*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/kennedy-scouts-gerrymandering.html> [<https://perma.cc/P4BU-EQW4>].

¹¹⁶ See *Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [<https://perma.cc/NCM5-FQHF>].

¹¹⁷ See Alexis Farmer — Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, BRENNAN CTR. FOR JUSTICE (Oct. 12, 2018), <https://www.brennancenter.org/analysis/current-citizen-efforts-reform-redistricting> [<https://perma.cc/CRR4-ZLPP>].

¹¹⁸ See Andrew Prokop, *Ohio's Gerrymandering Reform Was Just Approved by the State's Voters*, VOX (May 8, 2018), <https://www.vox.com/2018/5/7/17302388/ohio-issue-1-gerrymandering-redistricting> [<https://perma.cc/6544-DFJ>]; *Colorado Redistricting Resolutions Head to the Ballot*, NBC NEWS 9 (May 7, 2018), <https://www.9news.com/article/news/local/politics/>

In the United States, Arizona and California have been national leaders in successfully removing gerrymandering from their redistricting processes and serve as models for others.¹¹⁹ Provisions governing both the Arizona Independent Redistricting Commission and the California Citizens Redistricting Commission are similar: both seek to build representative constituencies that incorporate traditional redistricting principles while minimizing partisan drivers and political influence over the process. I believe that they serve as the current best practice and a model from which other states can build.

Arizona's commission is made up of five members, with no more than two members of any one political party.¹²⁰ No member may have recently held or been involved in political office. Building on this, California, to ensure that there was no partisan influence, increased its number of commissioners to fourteen. Five commissioners come from the largest political party, five from the second largest, and four from neither of those two parties. The chair must be appointed from the last group. In addition, California commissioners are prohibited from participating in overt political activity.¹²¹ Both states' commissions require that all of their meetings be transparent and open to the public, with ample opportunities for public input.¹²² The proposed maps for each must be publicly displayed and available for public comment before final adoption.¹²³ Final adoption of the maps must include a majority from each group of commissioners.¹²⁴

Both commissions must comply with federal requirements, such as equally apportioned districts and the Voting Rights Act; additionally, both must consider specified criteria in their map drawing including communities of interest, geographic contiguity, existing local government boundaries, and compactness.¹²⁵ District lines that are drawn to incorporate communities of interest, follow natural geographic features, and consider existing county lines "are linked to higher voter participation, more effective representation, and . . . lower legislative polarization" compared to those that are drawn to pursue a partisan advantage.¹²⁶ Redistricting criteria serve not only to deter gerrymandering, but also to build a coherent political and geographic community that can be represented effectively. University of Chicago Law School professor, gerrymandering scholar, and co-creator of the efficiency

colorado-redistricting-resolutions-head-to-the-ballot/73-549670538 [https://perma.cc/NV4S-8HZX].

¹¹⁹ Kim Soffen, *Independently Drawn Districts Have Proved to Be More Competitive*, N.Y. TIMES: UPSHOT (July 1, 2015), <https://www.nytimes.com/2015/07/02/upshot/independently-drawn-districts-have-proved-to-be-more-competitive.html> [https://perma.cc/6UMQ-5XRM].

¹²⁰ See ARIZ. CONST., art. IV, pt. 2, § 1.

¹²¹ See CAL. CONST., art. XXI, § 2(c)(2).

¹²² See ARIZ. CONST., art. IV, pt. 2, § 1; CAL. CONST., art. XXI, § 2(c)(2).

¹²³ See ARIZ. CONST., art. IV, pt. 2, § 1; CAL. CONST., art. XXI, § 2(c)(2).

¹²⁴ See ARIZ. CONST., art. IV, pt. 2, § 1; CAL. CONST., art. XXI, § 2(c)(2).

¹²⁵ See ARIZ. CONST., art. IV, pt. 2, § 1; CAL. CONST., art. XXI, § 2(c)(2).

¹²⁶ Stephanopoulos, *Exceptionalism*, *supra* note 15, at 806.

gap theory Nicholas O. Stephanopoulos stated, “The rules for how districts are drawn shape constituencies’ internal complexions, which in turn shape the makeup of the legislature as a whole—and thus the very character of representative democracy.”¹²⁷

Lastly, both California and Arizona explicitly remove any consideration of an incumbent’s residence, requiring that the place of residence of any incumbent or political candidate not be considered when drawing the maps.¹²⁸ Further, resident party registration and voting history data are also excluded from consideration in drawing maps in California.¹²⁹ In Arizona, the commission must consider district competitiveness.¹³⁰ Accordingly, party registration information is initially withheld from the commission and then incorporated before final approval.¹³¹ In a partisan redistricting process controlled by the state legislature, securing party power and incumbent protection are the two primary goals. In California, however, they are not to be considered at all. In Arizona, incumbent residence information is not to be considered, while voter registration information is only to be considered when seeking greater competition. Additionally, Idaho,¹³² Iowa,¹³³ and Montana¹³⁴ also ban consideration of an incumbent’s home and limit the use of political data.

VI. CONCLUSION

If the practice of gerrymandering is allowed to continue unfettered in many states, as we see today, the next round of redistricting after the 2020 decennial census will likely be the worst ever experienced. Both political parties—Democrats and Republicans—will be emboldened by the indecisiveness and inaction of the Supreme Court and Congress. Looking ahead to 2020 and beyond, Republicans have re-launched their REDMAP operation. They continue to seek victories for Republicans in governorships and in state legislatures, in part in order to maximize their ability to control redistricting efforts in 2020.¹³⁵ Likewise, in response to the Republicans’ previous success with REDMAP, Democrats—not to be caught off guard again—have put forward their own effort with the National Democratic Redistricting Committee (“NDRC”), led by former Obama administration Attorney General

¹²⁷ *Id.* at 814.

¹²⁸ *See* ARIZ. CONST., art. IV, pt. 2, § 1; CAL. CONST., art. XXI, § 2(c)(2).

¹²⁹ *See* CAL. CONST., art. XXI, § 2(c)(2).

¹³⁰ *See* ARIZ. CONST., art. IV, pt. 2, § 1.

¹³¹ *See id.*

¹³² Idaho Code Ann. § 72-1506(1), (8) (West 2018).

¹³³ Iowa Code Ann. § 42.4(5) (West 2018).

¹³⁴ Mont. Code Ann. § 5-1-115(3) (West 2018). *But cf.* *Wheat v. Brown*, 85 P.3d 765, 771 (Mont. 2004) (invalidating similar restrictions on redistricting commission under state constitution); *Brown v. Mont. Districting — Apportionment Comm’n*, No. ADV 2003-72, slip op. at ¶¶ 15, 20 (Mont. Dist. Ct. July 2, 2003) (same).

¹³⁵ *See* Ruger, *supra* note 80.

Eric Holder. While built to help Democratic statewide and state-legislative efforts, particularly in the lead up to 2020, the NDRC states that their mission is to “ensure the next round of redistricting is fair and that maps reflect the will of the voters.”¹³⁶ Concerns have been raised that this is simply a Democratic BLUEMAP operation.¹³⁷

Further, there are concerns with ongoing efforts by the Trump administration to undermine the upcoming decennial census. Earlier this year the administration announced its decision to include a citizenship-status question in the 2020 census questionnaire.¹³⁸ While many states have sued the administration for this policy shift, challenging it as unconstitutional,¹³⁹ there is a chance that the next census will see lower participation as a result of the administration’s efforts.¹⁴⁰ The census governs the allocation of representatives, electoral votes, and government funding. Lower participation and a resulting undercount in the census will result in malapportionment in congressional seats for states, as well as risking federal funding in communities.¹⁴¹ Under the Constitution, congressional districts are based on total population and not voters or voting-eligible persons. Undercounting immigrants or minority communities could have disastrous consequences on state congressional allocation figures.¹⁴²

Partisan gerrymandering historically has been unpopular and criticized as an undemocratic, unconstitutional practice. It is long past time for the practice to end. As shown above, there are multiple ways to put checks and limits on political map drawers or simply remove politicians from the process altogether and implement independent commissions. Voters and grassroots advocates working at the state level have had the most recent success in response to inaction from Congress and the Supreme Court. By working together, collecting signatures, and getting measures on local and state ballots, advocates and everyday voters have successfully brought independent redistricting commissions to states like Arizona and California, where politi-

¹³⁶ *About the NDRC*, NAT’L DEMOCRATIC REDISTRICTING COMM., <https://democraticredistricting.com/about/> [<https://perma.cc/V5QX-JQP4>].

¹³⁷ See Daley, *supra* note 70.

¹³⁸ See Michael Wines, *New Emails Show Push by Trump Officials to Add Citizenship Question to Census*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/us/census-citizenship-question.html> [<https://perma.cc/X86J-SN9L>].

¹³⁹ Michael Wines — Emily Baumgaertner, *At Least Twelve States to Sue Trump Administration Over Census Citizenship Question*, N.Y. TIMES (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/us/census-citizenship-question.html> [<https://perma.cc/H2D2-2NCG>].

¹⁴⁰ See Jay Michaelson, *2020 Census Citizenship Question Is All About Voter Suppression*, DAILY BEAST (Mar. 27, 2018), <https://www.thedailybeast.com/2020-census-citizenship-question-is-all-about-voter-suppression> [<https://perma.cc/UU4-U3SA>].

¹⁴¹ Kriston Capps, *Mapping the Threat of a Census Disaster in 2020*, CITYLAB (Mar. 30, 2018), <https://www.citylab.com/equity/2018/03/mapping-the-threat-of-a-census-disaster/556814/> [<https://perma.cc/3GYG-SGDH>].

¹⁴² See WILLIAM H. FREY, BROOKINGS INST., *THESE ARE THE GROUPS MOST LIKELY TO STOP PARTICIPATING IN THE U.S. CENSUS* (Apr. 6, 2018), <https://www.brookings.edu/blog/the-avenue/2018/04/06/these-are-the-groups-most-likely-to-stop-participating-in-the-us-census/> [<https://perma.cc/MM9J-YRKA>].

cians no longer draw their own districts to prioritize incumbent protection and party power at the expense of communities of interest and disenfranchising voters. We must make our democracy work again. We need fair maps. We need independent commissions.

