MISCHIEFS OF FACTION: POLITICAL GERRYMANDERING AND A LEGISLATIVE SOLUTION

ABSTRACT

Political gerrymandering has plagued U.S. politics since the country's founding. Despite the long-standing nature of this issue and judicial recognition of the ills of political gerrymandering, the Supreme Court has yet to set a standard for judicial review of these claims.[1] This Note will discuss the history of voting, and give an overview of the case law regarding political gerrymandering and the related issues of apportionment and racial gerrymandering. Even in the face of equal protection claims, First Amendment claims, and the suggestion of a new metric–the efficiency gap–as a basis for judicial review, the Court maintains that there is no "workable judicial standard."[2] Given the Court's persistent punting of gerrymandering as a political question, it may be time to look to a solution from the legislative branch. Accordingly, this Note will also discuss redistricting commissions that various states are using to draw congressional and legislative district maps. By placing the power to draw districts in the hands of state legislatures, some of the effects of political gerrymandering–that is, giving the majority party an unfair electoral advantage–may be mitigated. States ought to approach the establishment of such commissions with caution, as a change in current Supreme Court case law regarding the definition of "legislature" in the Elections Clause (Article 1, section 4 of the Constitution) may lead to an invalidation of the commissions some states use. This Note will conclude by discussing the way Iowa has set up its redistricting commission and suggesting that other states follow suit. This Note further suggests that other states' following Iowa's example will allow election results across the United States to be closer to the true electoral will of U.S. citizens.

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1. *See* discussion *infra* Part III.C.
2. *See id.*

I. INTRODUCTION

Long before Democrats and Republicans fought for power, Federalists and Democratic-Republicans occupied the national stage, and the politics of the early republic were no less contentious than they are now.[3] One feature of the political landscape that still stands–or rather slithers about–today is the political gerrymander. Gerrymandering is defined as the "drawing of district boundaries so as to favour one's own chances in future elections."[4] The practice is named for Elbridge Gerry, who boasts an impressive resume: signer of the Declaration of Independence, delegate to the Constitutional Convention, and vice president to James Monroe.[5] While serving as Governor of Massachusetts in 1812, he gained

3. Some notable instances of such contention include Thomas Jefferson retaining a translator on the State Department payroll, in order to publish anti-federalist rhetoric, particularly aimed at Alexander Hamilton. *See From Alexander Hamilton to Edward Carrington, 26 May 1972*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-11-02-0349 [https://perma.cc/D5WK-U8LM] (quoting ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON: VOLUME XI (11) FEBRUARY 1792–JUNE 1792 426–45 (Harold C. Syrett & Jacob E. Cooke eds., 1st ed. 1966)).

Yet another example occurred in the aftermath of the Election of 1800, faced with the prospect of then President-Elect Jefferson, Hamilton led the Federalists in a caucus to determine whether the election may somehow be invalidated, by changing the method of choosing electors and then applying it retroactively. When it was remarked that such a change might lead to civil war, one in attendance replied "that a civil war would be preferable to Jefferson". RON CHERNOW, ALEXANDER HAMILTON 609 (2004) (quoting RICHARD N. ROSENFELD, AMERICAN AURORA: A DEMOCRATIC-REPUBLICAN RETURNS 785 (1997)).

4. GARRETT W. BROWN, IAIN MCLEAN & ALISTAIR MCMILLAN, THE CONCISE OXFORD DICTIONARY OF POLITICS & INTERNATIONAL RELATIONS (4th ed. 2018).

5. Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN MAG. (July 20, 2017), https://www.smithsonianmag.com/history/where-did-term-gerrymander-

infamy for signing off on the districting map caricaturized in Figure 1.

Figure 1: Massachusetts Gerrymander[6]

Not much has changed since then, with the exception of declaring racially motivated gerrymandering unconstitutional.[7] The Supreme Court has repeatedly come up with every conceivable argument to avoid taking up what have primarily been equal protection challenges to political gerrymanders.[8] The excuses are familiar, and one is as old as the Court's decision in *Marbury v. Madison.*[9] Even if questions of political gerrymanders were justiciable, the Court has claimed over the years that there is no "workable [judicial] standard" to remedy such an issue.[10]

This Note will begin with an overview of the history of the right to vote, and then conclude with a discussion on cases discussing political gerrymandering and the related issues of apportionment and racially-motivated gerrymandering. This

come-180964118/ [https://perma.cc/8RRD-VCUW].

6. *Id.*

7. Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

8. *See* discussion *infra* Part III.C.

9. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that claims of political gerrymandering constitute political questions and are therefore not justiciable).

10. *E.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2515 (2019).

Note will also discuss the importance of voting as a fundamental right and give examples from various states of a solution from the legislative branch in the form of independent redistricting commissions. The goal of creating such independent commissions was to help prevent further dilution of votes to gain political advantage at the cost of true representation of U.S. citizens' electoral desires.[11] With the 2020 Census results upcoming, redistricting efforts will once again be taken up by state legislatures. These redistricting efforts, combined with a shift in the balance of the Supreme Court with the addition of Justice Amy Coney Barrett, signal that change may be on the horizon. Perhaps the Supreme Court will not have to act as judicial cartographers as some state court judges have done, but with time and as polarization becomes more pervasive, it seems political gerrymandering will become harder for the Court to ignore.

II. A BRIEF HISTORY OF VOTING AND VOTING AS A FUNDAMENTAL RIGHT

Direct participation by citizens in U.S. government has been recognized as a vital safeguard to liberty since the country's founding, as evidenced by the push for the right to a jury in both criminal and civil cases–a unique feature of the U.S. justice system.[12] Among the many themes ringing throughout *The Federalist No. 83* essays, emphasis on the importance of institutional safeguards from corruption and the accumulation of too much government power is pervasive.[13] How are voting and participation in a jury connected? Simply put, both provide avenues for U.S. citizens to participate directly in government. In fact, trial by jury has been referred to as "the purest form of democracy in action."[14] Voting is arguably an even more substantial form of direct participation than serving as a juror because not everyone (including this author, regrettably) has served or will be called to serve as a juror, whereas every citizen over age 18 is eligible to vote.[15]

At the time of the United States' founding, the right to vote was exclusively granted to white men who paid taxes and owned property; however, it may surprise some to learn that for a brief period in the days of the early republic, women in New Jersey were allowed to vote.[16] This right was lost when in 1807, upon

11. *See* discussion *infra* Part V.

12. *See* THE FEDERALIST NO. 83 (Alexander Hamilton).

13. *See* THE FEDERALIST NOS. 10, 47 (James Madison), Nos. 69, 83 (Alexander Hamilton).

14. Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View*, 48 ARIZ. ST. L.J. 481, 485 (2016) (quoting William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006)).

15. Notwithstanding some state-level restrictions, such as those on felon voting rights.

16. Emily R. James, *A Woman's Vote: To Fear or Not to Fear*, ADVOC., Nov.–Dec. 2020, at 22, 22–24.

realizing that women were voting in large numbers for the Federalist party, Democratic-Republicans in the New Jersey legislature chose to pass a bill which "banned all women from the ballot box."[17] This bill was passed under the guise of preventing voter fraud.[18] And indeed, the right to vote has been fought for and expanded in the years since the country's founding, with the extension of the right to vote to all men via the Fifteenth Amendment in 1869, and to women in 1920 via the Nineteenth Amendment.[19]

Accordingly, the Supreme Court has held certain hurtles to voting, such as poll taxes and literacy tests, unconstitutional on equal protection grounds.[20] In addition to determining poll taxes are unconstitutional in *Harper v. Virginia State Board of Elections*, the Supreme Court emphasized that the right to vote is fundamental 'because [it is] preservative of all rights.'"[21]

> 'Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.'[22]

III. CASE LAW: ONE MAN, ONE VOTE

A. *Apportionment: The Supreme Court Enters "the Political Thicket"*[23]

Much like gerrymandering, equal protection challenges to apportionment schemes were originally punted by the Court as a political question in order to avoid entering the "political thicket."[24] It would be a little less than 20 years before the Supreme Court would choose to brave the thicket when faced with an equal protection challenge to Tennessee's apportionment of general assembly districts.[25] Plaintiffs alleged, as is typical in apportionment and gerrymandering cases, a denial of equal protection, stating the way that the legislature had divided up

17. *Id.* at 23.

18. *Id.*

19. *See* U.S. CONST. amends. XV, XIX.

20. Poll Taxes were held to be unconstitutional in *Harper v. Virginia State Board of Elections*. 383 U.S. 663 (1966). Literacy tests were held unconstitutional in *Louisiana v. United States*. 380 U.S. 145 (1965). Poll Taxes were prohibited by passage of the 24th Amendment. U.S. CONST. amend. XXIV.

21. *Harper*, 383 U.S. at 667 (quoting Reynolds v. Simms, 377 U.S. 533, 561–62 (1964)).

22. *Harper*, 383 U.S. at 667 (quoting *Reynolds*, 377 U.S. at 561–62).

23. Colegrove v. Green, 328 U.S. 549, 556 (1946).

24. *Id.*

25. Baker v. Carr, 369 U.S. 186, 187–88 (1962).

districts resulted in disproportional representation.[26] It was determined that because the Plaintiffs' claims in *Baker* clearly arise under the Constitution, the Supreme Court properly has jurisdiction over apportionment claims.[27]

Two years after *Baker*, the Court articulated the "one man, one vote" standard in *Wesberry v. Sanders*, holding under Article I, Section 2, that "Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[28] Further, Justice Hugo Black, writing for the majority, states "that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle tenaciously fought for and established at the Constitutional Convention."[29]

Around the same time *Wesberry* was decided regarding congressional districts, the Court handed down its decision in *Reynolds v. Sims*, applying the one man, one vote standard to state house legislative districts.[30] Through the application of equal protection and substantive due process, it was held that restrictions on the right to vote freely "strike at the heart of representative government" and that dilution through unequal apportionment amounts more or less to disenfranchisement.[31]

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.[32]

Then came *Lucas v. 44th General Assembly of Colorado*, which applied the law handed down in *Reynolds* to state senate districts, dictating that districts for both houses in a bicameral legislature must be apportioned "substantially" based on population.[33]

The Court set the outer limits of permissible deviation from equal population

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26. *Id.* at 193–94.
27. *Id.* at 199–200.
28. Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).
29. *Id.* at 8.
30. *See* Reynolds v. Simms, 377 U.S. 533 (1964).
31. *Id.* at 555.
32. *Id.* at 562.
33. Lucas v. Forty-Fourth Gen. Assemb., 377 U.S. 713, 734 (1964).

in districts in *Evenwel v. Abbott*, a fairly recent challenge arising from a Texas apportionment scheme.[34] The Court has previously held that a population deviation of up to 10 percent between districts is constitutionally permissible.[35] However, the Plaintiffs in *Evenwel* alleged that when counting only the voter-eligible population, a deviation of 40 percent resulted.[36] The Court was quick to reject the contention that only eligible voters should count when tabulating population for the purpose of apportionment.[37] After all, even ineligible voters are eligible for constituent services, among other rights, including equal protection.[38] In the Court's view, "constitutional history, this Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population."[39]

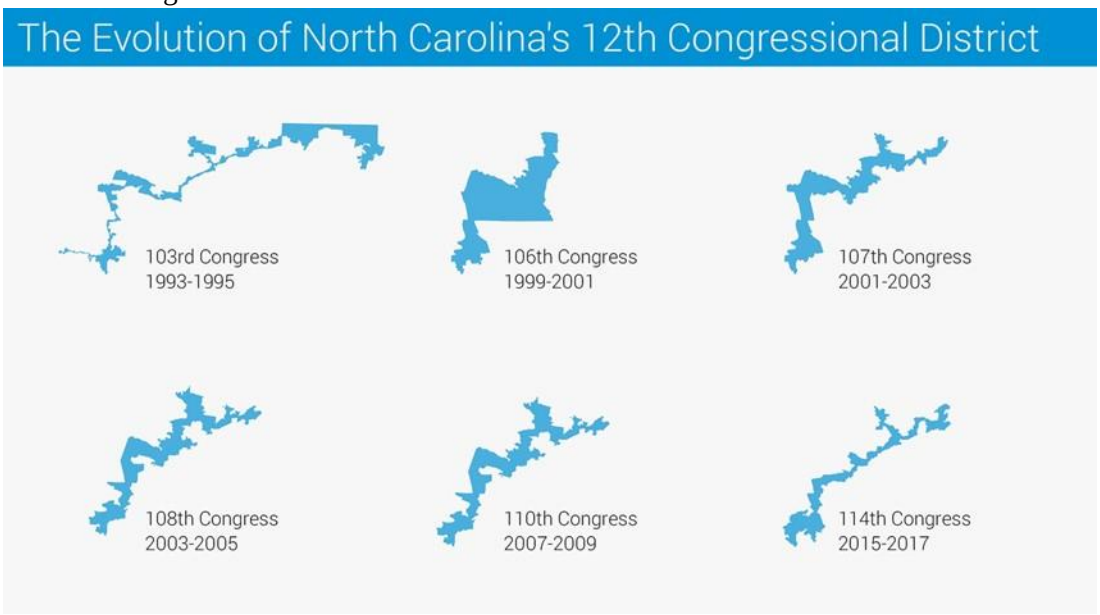
B. *Racial Gerrymandering*

The Voting Rights Act of 1965 aimed to prevent racial gerrymandering by requiring some states to gain approval from the Attorney General of the United States before enacting a new districting plan, in addition to other requirements to prevent racial discrimination in voting regulations[40] (this pre-approval requirement was overturned by the Supreme Court in *Shelby County v. Holder*) [41]. In addition to causes of action brought under the Voting Rights Act, the Equal Protection Clause of the Fourteenth Amendment has also served to invalidate racially gerrymandered maps.[42] North Carolina was one of the states which was to gain required pre-approval for their districting plan, and a challenge arose in 1993 to a plan which packed black voters into two unusually shaped districts.[43] Writing for the majority, Justice Sandra Day O'Connor discussed the two districts as having been "compared to a 'Rorschach ink blot test'' . . . and a 'bug splattered on a windshield.'"[44] What was then district 12 was described as being "approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing

34. *See* Evenwel v. Abbott, 577 U.S. 937 (2016).
35. *Id.* at 1124.
36. *Id.* at 1125.
37. *See id.* at 1125–27.
38. *Id.* at 1132.
39. *Id.* at 1123.
40. *See* 52 U.S.C. § 10304.
41. Shelby Cnty. v. Holder, 570 U.S. 529, 530 (2013).
42. "The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." Shaw v. Reno, 509 U.S. 630, 641 (1993).
43. *Id.* at 630.
44. *Id.* at 635.

areas 'until it gobbles in enough enclaves of black neighborhoods.'"[45] Figure 2shows one of the offending districts challenged in *Shaw* as it appeared in 1993 when the case was decided, and what little change it has undergone in the years following.

Figure 2: North Carolina's 12th District Over the Years[46]



The plaintiffs argued, and the Supreme Court agreed, that the districting plan was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[47] Because of this, the Court held that a racial gerrymandering challenge amounts to a valid claim under the Equal Protection Clause and is justiciable.[48] Accordingly, the plan must meet strict scrutiny–that is, it "must be narrowly tailored to further a compelling government interest."[49]

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45. *Id.* at 635–36.

46. Nic Cavell, *Gerrymandering is Even More Infuriating When You Can Actually See It*, WIRED (Jan. 8, 2016), https://www.wired.com/2016/01/gerrymandering-is-even-more-infuriating-when-you-can-actually-see-it/ [https://perma.cc/G48F-9UTV].

47. *Shaw*, 509 U.S. at 642.

48. *Id.*

49. *Id.* at 631.

A fairly recent case arose from Alabama's 2012 districting scheme wherein race was used as "predominant factor" in drawing the map–a practice prohibited by the Fourteenth Amendment unless the boundaries meet the strict scrutiny standard.[50] The Supreme Court held that under section 5 of the Voting Rights Act, a state is not required to maintain a certain percentage of minority voters in each district, but rather, the section "prohibits a covered jurisdiction from adopting any change that 'has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred candidates of choice.'"[51] Finding that minority voters had been crammed into districts such that their ability to elect their preferred candidate was rendered ineffective, the Court remanded the case for further proceedings.[52]

On the related issue of vote dilution, the Court, in *Thornburg v. Gingles*, established three factors which plaintiffs must show to constitute a vote dilution claim.[53] There must be: (1) a "geographically compact minority population sufficient to constitute a majority in a single-member district," (2) political cohesion among members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate.[54] A plaintiff must then, in turn, prove that under the totality of the circumstances, the district lines dilute the votes of the members of the minority group.[55] As evidenced from the aforementioned cases, racial gerrymandering, unlike political gerrymandering, has found numerous solutions through "judicially manageable" standards.

C. *Political Gerrymandering and the Elusive "Judicially Manageable" Standard*

The history of the Supreme Court's handling of political gerrymandering is one of avoidance by way of the political question doctrine. As Justice Antonin Scalia explained, writing for the majority in *Vieth v. Jubelirer*, "Sometimes the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[56] Despite the Court's recognition of the ills of gerrymandering, it has yet to parse out a judicial remedy.[57]

50. Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 257–58 (2015).
51. *Id.* at 275–76.
52. *Id.* at 281.
53. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).
54. *Id.* at 48–51.
55. *See id.* at 46.
56. Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).
57. "'[T]he core principle of [our] republican government,'" this Court has recognized, is "that the voters should choose their representatives, not the other way around." Rucho v. Common Cause, 139 S. Ct. 2484, 2512 (Kagan, J., dissenting) (quoting Ariz. State Leg. v. Ariz.

For a time, it had appeared that under *Davis v. Bandemer*, plaintiffs seeking relief for a gerrymandering claim may have some hope.[58] The plurality determined that gerrymandering is justiciable under the Equal Protection clause; however, the plaintiffs failed to show sufficient injury to amount to an equal protection violation.[59] Justice Byron White, writing for the plurality, contended that the results of one election were not enough to show intentional discrimination through gerrymandering, but if the violation was to be repeated, then the discrimination would become sufficiently evident to constitute a valid gerrymandering claim.[60]

This reasoning was dispensed with in *Vieth.* As Justice Scalia put it, gerrymandering existed during the founding of the United States, and the founders likewise created a solution for it–that Congress may "make or alter" under the Elections Clause(Article I, Section 4).[61] Using the political question factors set out in *Baker v. Carr*, the Court determined political gerrymandering falls under the "lack of judicially discoverable and manageable standards" category.[62] In the time between *Bandemer* and *Vieth*, challenges to political gerrymanders were brought, but to no avail.[63]

New methods to combat the ills of gerrymandering have indeed been crafted in the legislative branches of various states.[64] One such method was called into question in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, wherein Arizona, by referendum, took away the state legislature's ability to draw districts and vested that ability in an independent commission in order to prevent partisan bias from giving one party an advantage over the other.[65] The Arizona Legislature argued that this was unconstitutional because the Elections Clause explicitly places the administration of elections in the hands of state legislatures.[66] The Court upheld Arizona's independent commission, agreeing that the definition of "legislature" in Article I Section 4 may include the people, and not just elected officials, by virtue of the lawmaking power conferred upon the

Indep. Redistricting Comm'n, 576 U.S. 787 (2015)).

58. *See* Davis v. Bandemer, 478 U.S. 109 (1986).

59. *Id.* at 129–33.

60. *Id.* at 133.

61. *Vieth*, 541 U.S. at 274–75.

62. *Id.* at 277–78 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962))..

63. *See generally Vieth*, 541 U.S. at 281.

64. *See Redistricting Commissions: State Legislative Plans*, NAT'L CONF. STATE LEGS. (Apr. 30, 2021), https://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx [https://perma.cc/JE2K-AA25].

65. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 787 (2015).

66. *Id.*

people in the Arizona constitution.[67]

Three years after *Arizona Independent Redistricting Commission* the plaintiffs in *Gill v. Whitford* attempted to provide a measure comparable to the population deviations used to detect unconstitutional apportionment.[68] This measure is known as the "efficiency gap," and it places what is essentially a numerical value upon how efficiently a party is being disadvantaged by a political gerrymander.[69] This claim was unsuccessful for lack of standing.[70] The efficiency gap was not sufficient to show an individual injury required for proper standing and instead showed injury to the parties as a whole.[71] Both the Arizona and *Gill* cases will be discussed in further detail later in this paper.

More recently, the Court heard *Rucho v. Common Cause* wherein the plaintiffs brought equal protection and First Amendment claims to challenge redistricting in North Carolina and Maryland.[72] Unsurprisingly, they were stopped in their tracks, with the Court holding once again that such claims were not justiciable.[73] The First Amendment claims will be discussed in further detail in a later section of this Note, but the equal protection claims were rejected on the basis that unlike racial gerrymandering–which is "'inherently suspect'"–political gerrymandering is not inherently constitutionally impermissible.[74]

IV. THE EFFICIENCY GAP

A. *What it is and How it Works*

Nicholas O. Stephanopoulos and Eric M. McGhee offer a new metric to measure the dilutive effect of political gerrymandering.[75] Their analysis begins with the presumption that the goal is to secure as many seats as possible "given a certain number of votes."[76] Given the nature of single member districts (SMD), there will always be votes that do not contribute to victory, which Stephanopoulos and McGhee refer to as "inefficient" votes.[77] Votes cast for a losing candidate or

67. *Id.*
68. Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018).
69. *Id.* at 1920.
70. *Id.* at 1919–20.
71. *Id.*
72. Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).
73. *Id.*
74. *See id.* at 2502.
75. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 850 (2015).
76. *Id.* (emphasis omitted).
77. *Id.* at 850–51.

above the 50 percent threshold for the winning candidate are considered "wasted."[78]

What is insidious about political gerrymanders is that a party need not eliminate all inefficient votes, it simply needs to ensure less of its supporters' votes are wasted than those of the oppositions' supporters.[79] This is commonly achieved through "packing" the opposition into a single district so that its preferred candidate wins by a landslide, and "cracking" the opposition so that their supporters are spread out to the extent that their votes always fall short of a majority.[80]

The efficiency gap is calculated by taking "the difference between the parties' respective wasted votes, divided by the total number of votes cast in the election."[81] Stephanopoulos and McGhee contend that by using this metric, we can capture the effect of packing and cracking, and quantify it.[82] Further, by quantifying the effects of gerrymandering, the efficiency gap metric creates a basis for judicial review.[83] This basis is that the party practicing gerrymandering is not powerful because it enjoys greater popularity, but because it has tilted the playing field to its own advantage.[84]

B. *Judicial Response to the Efficiency Gap*

The efficiency gap had its day at the Supreme Court and was dealt a heavy blow in *Gill v. Whitford*.[85] The plaintiffs, democratic voters from Wisconsin, brought a section1983 action for violation of First Amendment rights of association and speech, as well as equal protection violations by way of packing and cracking voters into a handful of districts where they claimed victory by overwhelming margins.[86] They attempted to prove up the violation of their rights through use of the efficiency gap as a measure of how Wisconsin's districting scheme unfairly advantaged Republicans.[87] However useful to show this advantage, the metric failed to show the particularized injury necessary for a

78. *Id.* at 851.
79. *See id.*
80. *Id.*
81. *Id.*
82. *Id.* at 852.
83. *Id.*
84. *Id.* at 853.
85. *See* Gill v. Whitford, 138 S. Ct. 1916 (2018).
86. *Id.* at 1919–20..
87. *Id.* at 1924.

plaintiff to properly have standing.[88] Without doubting the math behind the metric, the Court was not convinced that the efficiency gap was the panacea that which federal judges may solve the gerrymandering problem "with just 'a pencil and paper or hand calculator.'"[89] As Chief Justice John Roberts put it:

> The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as *the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties* Yet neither the efficiency gap nor the other measures of partisan asymmetry offered by the plaintiffs are capable of telling the difference between what [the districting scheme] did to [one plaintiff] and what it did to [another plaintiff]. The single statewide measure of partisan advantage delivered by the efficiency gap *treats [the first plaintiff]and [the second plaintiff] as indistinguishable, even though their individual situations are quite different*.[90]

Despite the Court's doubt, they did not dismiss the plaintiff's claims outright, but rather remanded to give them an opportunity show the individualized injury required to show standing.[91]

Not all hope is lost for future gerrymandering claims, however. Justices Elena Kagan, Ruth Bader Ginsberg, and Sonia Sotomayor concurred with the majority, while outlining a potential path for a successful gerrymandering claim.[92] This path may be followed by way of the plaintiff's First Amendment association claims, which Justice Kagan asserts was not properly addressed by the Court.[93] Drawing from Justice Anthony Kennedy's concurrence in *Veith*, Justice Kagan reemphasizes the importance the ability of citizens in a representative democracy to "'band together' to further advance their political beliefs."[94] Disfavoring a particular group because of their "'political association,' 'participation in the electoral process,' 'voting history,' or 'expression of political views'" translates to a burden on their First Amendment associational rights.[95] Under this theory, vote

88. *Id.* at 1933.

89. *Id.* ((quoting Brief of Heather K Gerken et al. at 27, Gill v. Whitford, No. 16-1161 (Aug. 30, 2017) (citing Sam Wang, *Let Math Save Our Democracy*, N.Y. TIMES (Dec. 5, 2015), https://www.nytimes.com/2015/12/06/opinion/sunday/let-math-save-our-democracy.html)).

90. *Gill*, 138 S. Ct. at 1933. (emphasis added).

91. *Id.* at 1933–34.

92. *See id.* at 1934.

93. *Id.*

94. *Id.* at 1938 (quoting Vieth v. Jubelirer, 541 U.S. 267, 314 (2004)).

95. *Gill*, 138 S. Ct. at 1938.

dilution–which indicated injury to the party as a whole– is made distinct from the particularized injury by virtue of the aforementioned burden on First Amendment rights.[96]

Justice Kagan's concurrence does not go so far as to address the standard of review for such a claim.[97] *Rucho v. Common Cause* was heard the following term, wherein lower courts utilized a three-part test to analyze a First Amendment claim.[98] The parts of this test are as follows: 1) "proof of intent to burden individuals based on their voting history or party affiliation," 2) "an actual burden on political speech or associational rights," and 3) "a causal link between the invidious intent and actual burden."[99]

However, this test was deemed unworkable by the majority. The majority dispensed with the idea of any burden on speech outright, contending that there is nothing stopping the individuals from engaging in partisan activities and voting regardless of a plan's effect on their district.[100] Further, the plaintiffs did not offer sufficiently convincing evidence of an actual burden.[101] Quoting *Vieth*, the Court concluded "that 'a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting,' contrary to our established precedent."[102]

V. A NON-JUDICIAL SOLUTION: REDISTRICTING COMMITTEES

Given the Supreme Court's persistent disdain for various judicial solutions offered to cure partisan gerrymandering, this Note will explore solutions from the legislative branch. Over a dozen states in the Union use some form of an independent commission, as opposed to the state legislature, to draw both state and federal congressional district lines.[103] Others still have a commission which advises the state legislature in drawing lines. Yet a third category includes five states with a "back-up" commission that comes into play when the state legislature cannot come to an agreement.[104] To get an overview, this section of this Note will

96. *Id.* 1938–39.

97. Whether it would fall under the traditional levels of scrutiny, or a content-based or content-neutral framework established by the court, was addressed in Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

98. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2503–05 (2019).

99. *Id.* at 2504.

100. *Id.*

101. *Id.*

102. *Id.* at 2505 (quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004)).

103. For a complete list, *see Redistricting Commissions: State Legislative Plans*, *supra* note 64.

104. *Id.*

discuss the law in three states, one with each type: an independent commission, an advisory commission, and a back-up commission.

A. *Redistricting Commission in Various States*

1. *Arizona's Independent Redistricting Commission*

Arizona's constitution sets out the requirements for the state's independent redistricting commission.[105] Members are nominated by the Commission on Appellate Court Appointments and chosen from a pool of candidates by members of the state legislature.[106] The legislators responsible for appointing the five-member commission narrowed from a pool of twenty-fie are:

> [t]he highest ranking officer elected by the Arizona house of representatives followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate.[107]

The fifth member is chosen by the first four nominated members from the nomination pool, to serve as chair; should they fail to choose within 15 days, the Appellate Court Commission will appoint the fifth member "striving for political balance and fairness."[108]

There are some limitations on who may be appointed in order to ensure a bipartisan balance.[109] "No more than two" may be of the same political party, and "[o]f the first four members appointed, no more than two shall reside in the same county."[110] Further, each of the five members are required to be registered Arizona voters and must have been registered with the same party or stayed unaffiliated for the past three years prior to appointment.[111] The members must also be "committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process," and cannot be a candidate for office, even in local school board or county elections, and shall not have been an officer of a political party, a registered paid lobbyist, or been an officer of a candidate's campaign committee.[112]

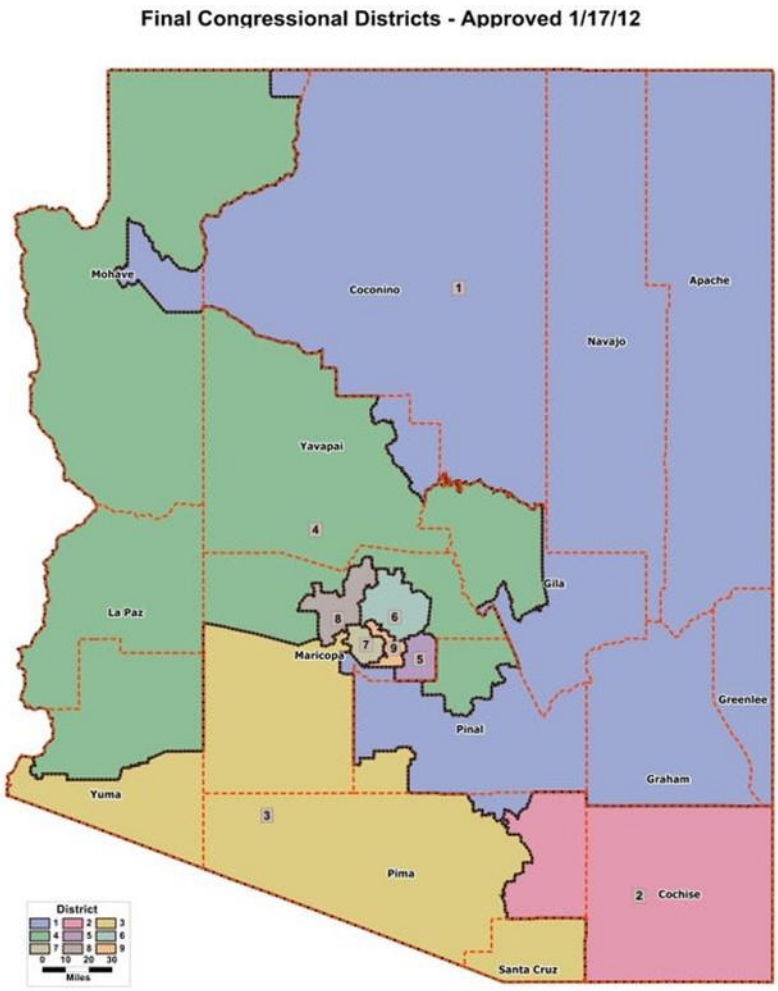
105. ARIZ. CONST. art. IV, pt. II, §§ 1(3)–(6).
106. *Id.* at §§ 1(4)–(6), (8).
107. *Id.* at § 1(6).
108. *Id.* at § 1(8).
109. *Id.* at § 1(3).
110. *Id.*
111. *Id.*
112. *Id.*

Once appointed, the committee will convene and draw the congressional and legislative districts in a "grid-like pattern."[113] The constitution also sets out parameters for deviation from the grid-like pattern, these include: compliance with the U.S. Constitution and the Voting Rights Act, equal population, compactness and contiguity, "respect communities of interest," use geographical features (such as city, town, and county boundaries) to the extent practicable.[114] Additionally, the commission is instructed to favor competitive districts, "where to do so would create no significant detriment to the other goals."[115]

When drafting the map, the commission is prohibited from using partisan data initially, but it may be used after the map is drawn to determine whether the aforementioned goals have been achieved.[116] Once a map draft is proposed, it is opened to public comment and recommendations from the Arizona legislature, but the final decision lies with the commission. The commission will certify the map to the Arizona secretary of state once complete.[117] It is not subject to an up or down vote or to veto form the state house and senate. This method of redistricting has been challenged and upheld by the Supreme Court, as will be discussed later in this section.[118]

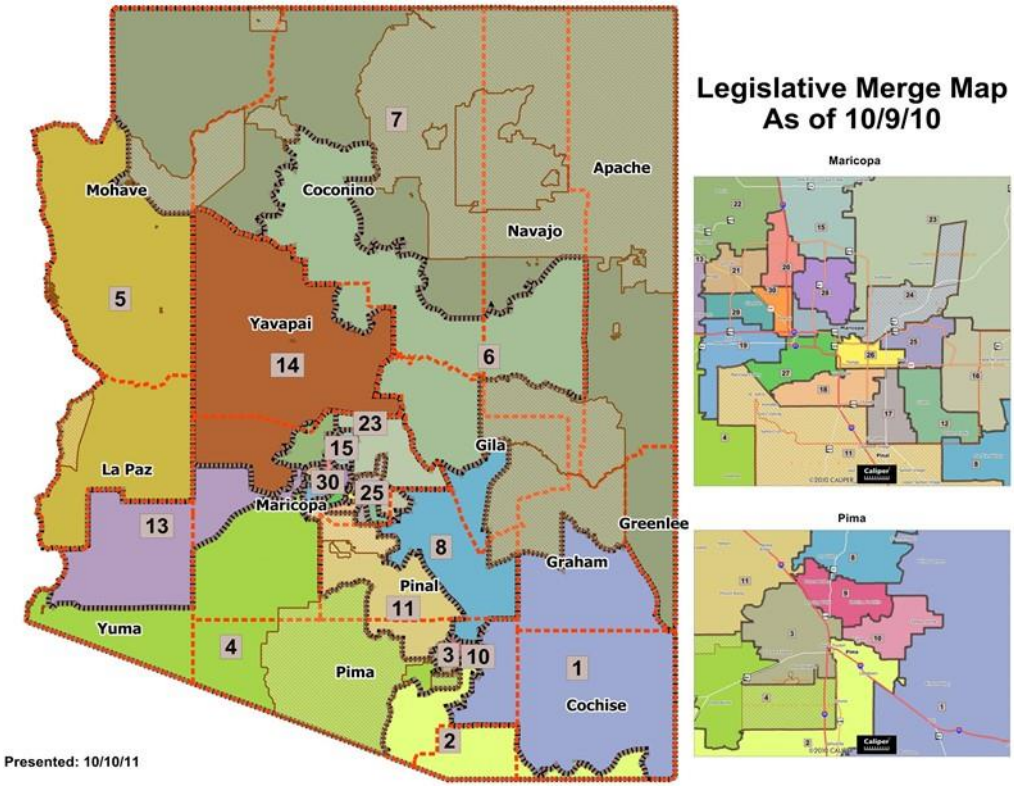
113. *Id.* at § 1(14).
114. *Id.* at §§ 1(14)(A)–(E).
115. *Id.* at § 1(14)(F).
116. *Id.* at § 1(15).
117. *Id.* at § 1(16).
118. *See* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).

Figure 3: Arizona Congressional Districts[119]



119. Ronald J. Hansen, *What Congressional District Do I Live In and Other Arizona Voting Basics*, ARIZ. REPUBLIC (Aug. 22, 2018), https://www.azcentral.com/story/news/politics/elections/2018/08/22/arizona-congressional-district-map-what-district-am/1067983002/ [https://perma.cc/D3GK-GF8H].

Figure 4: Arizona Legislative Districts[120]



2. *New York's Advisory Commission*

New York's advisory commission as it currently stands was recently amended and will commence its duties beginning this year.[121] Much like Arizona's scheme, eight members of the ten total members are chosen by majority and minority leaders of each house, with the final two members appointed by the first eight members chosen, who are not affiliated with either party.[122] There are also limits on who may be appointed. Commission members must be registered voters,

120. Justin Regan, *Proposed Amendment Would Increase State Legislators*, KNAU ARIZ. PUB. RADIO (Apr. 6, 2018), https://www.knau.org/post/proposed-amendment-would-increase-state-legislators [https://perma.cc/84YB-WR2M].

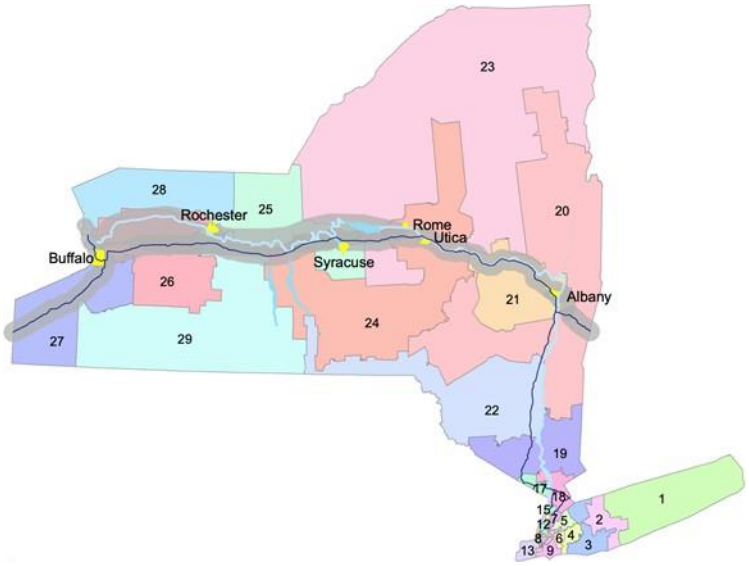
121. N.Y. CONST. art. III, § 4(b).

122. *Id.* at §§ 5-b(a)(1–6).

and cannot be or have previously been members of the state legislature or Congress, a spouse of an elected official or member of congress, a lobbyist, or political party chairman.[123] Further, the commission members are to "reflect the diversity of the residents of this state with regard race, ethnicity, gender, language, and geographic residence."[124] The commission is also required to consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission.[125]

Once the commission has devised a plan requiring a vote of at least seven to be approved the plan will go to the state legislature for approval but neither house is able to amend it, only vote the plan up or down.[126] If the first plan is not approved by at least one of the two houses, or vetoed by the governor, then the commission will be notified, and is to submit a second plan.[127] Should the second plan fail, the duty will fall to the legislature to amend the plan as necessary in accordance with the goals set forth in New York's constitution.[128] (The maps below were drawn under New York's previous scheme, left entirely up to the state legislature.)

Figure 5: New York Congressional Districts (2011)[129]



123. *Id.* at §§ 5-b(b)(1–5).
124. *Id.* at § 5-b(c).
125. *Id.*
126. *Id.* at § 4(b).
127. *Id.*
128. *Id.*
129. *Legislative Districts*, N.Y. DEP'T TRANSP., https://www.dot.ny.gov/mohawk-erie-

Figure 6: New York Assembly Districts (2011)[130]

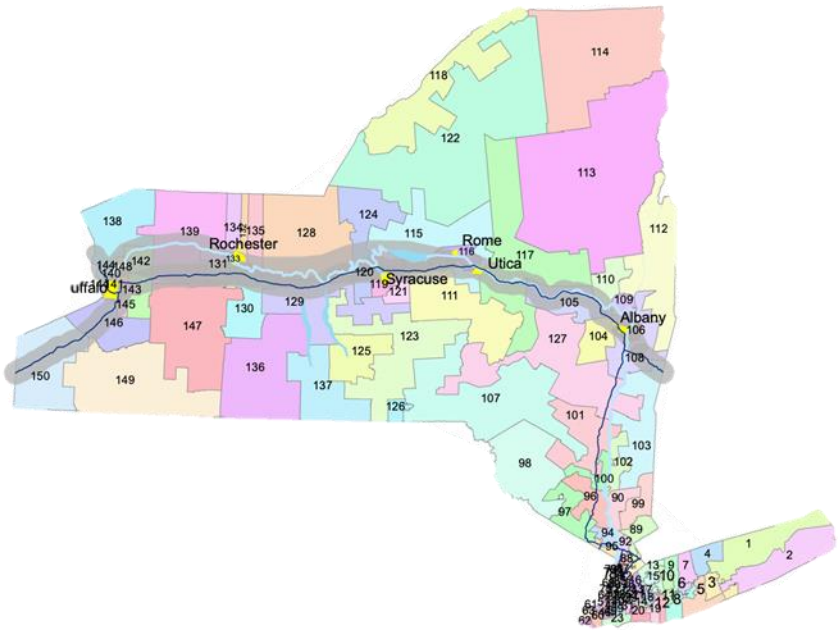
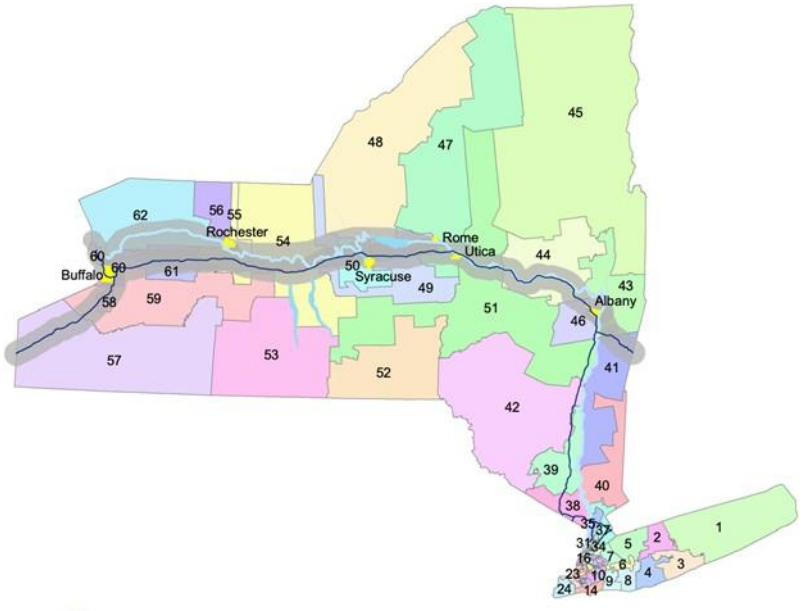


Figure 7: New York Senate Districts (2011)[131]

study/legislative [https://perma.cc/P342-JXSR].

130. *Id.*

131. *Id.*



3. *Connecticut's "Back Up" Commission*

Under Connecticut's constitution, redistricting is initially left up to the legislature.[132] An eight-person committee is chosen from among members of the general assembly by majority and minority party leadership.[133] The committee will then propose a plan, to be voted up or down by the two-thirds of the members of each house.[134] If by September 15th of the year following a census, it falls to the governor to appoint an eight-person commission with members again chosen by the majority and minority leaders in each house, and a ninth member chosen by the first eight members.[135] Notably, the Connecticut constitution also creates a cause of action in which a registered voter may compel the commission to complete the redistricting plan or correct any errors made in the plan.[136] The same subsection grants the state supreme court original jurisdiction over such claims and empowers

132. CONN. CONST. art. III, § 6(a).
133. *Id.*
134. *Id.*
135. *Id.* at § 6(b).
136. *Id.* at § 6(d).

the court to enact a plan if the redistricting commission fails to do so within a certain amount of time.[137] In fact, Connecticut's maps were enacted by the supreme court in 2012.[138]

Figure 8: Connecticut Congressional District Map[139]

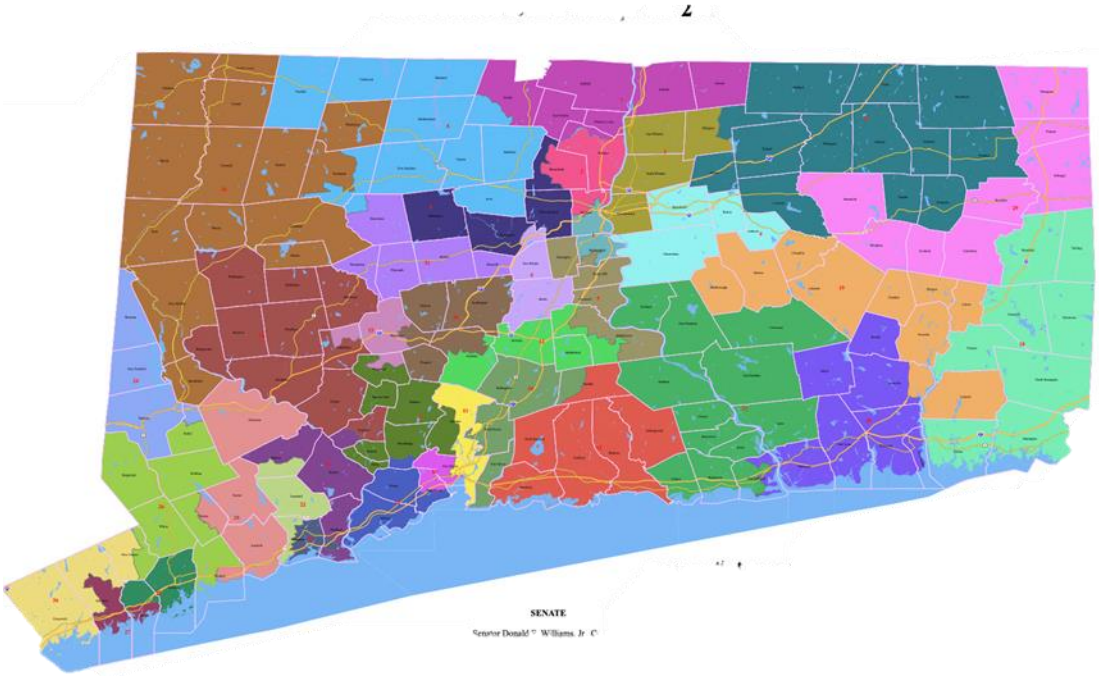
Figure 9: Connecticut Senate District Map[140]

137. *Id.*

138. *In re* Reapportionment Comm'n, 36 A.3d 661, 661 (Conn. 2012).

139. *State Congressional Redistricting Plan 2011*, CONN. GEN. ASSEMB., https://www.cga.ct.gov/red2011/documents/FinalMaps/Statewide/0116/Plot%20print%20of%20Final%20Congressional%20Districts%202011.pdf [https://perma.cc/7LXH-XKEU].

140. *State Senate Redistricting Plan*, CONN. GEN. ASSEMB., https://www.cga.ct.gov/red2011/documents/FinalMaps/Statewide/0116/Plot%20print%20of%20Final%20Senate%20Districts%202011.pdf [https://perma.cc/EXE6-ST6M].



B. *Trouble on the Horizon: The Independent State Legislature Doctrine*

The Constitution places the administration of federal elections under the purview of state legislatures: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."[141] The state of Arizona called into question the definition of "Legislature" when in 2000, voters passed a referendum to amend the state constitution and create the Arizona Independent Redistricting Commission.[142] The amendment took the state legislature's authority to draw congressional and legislative districts away from the legislature and vested it in the independent commission.[143]

In 2015, the Arizona Legislature brought a challenge to the amendment, alleging that the commission was unconstitutional because "'[t]he word 'Legislature' in Article 1, Section 4 (the Elections Clause) means [specifically and

141. U.S. CONST art. I, § 4, cl. 1.
142. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 787 (2015).
143. *Id.* at 792.

only] the representative body which makes the laws of the people."[144] In response, the commission argued that "legislature" includes the people by virtue of the lawmaking power the Arizona constitution confers on the people.[145] The Court agreed with the commission, holding that it is in fact constitutional, and the term "legislature" may encompass the lawmaking power of the people, not just the elected officials occupying the statehouse.[146]

Chief Justice Roberts, joined by Justices Scalia, Clarence Thomas, and Samuel Alito, take an originalist view of the issue and agree with the Arizona Legislature's definition.[147] The Chief Justice begins by discussing Arizona's long struggle to ratify the 17th Amendment—giving the people the power to choose Senators.[148] "What chumps!," the Chief Justice continues, "Didn't they realize that all they had to do was interpret the constitutional term 'the Legislature' to mean 'the people?'" The Court today performs such a magic trick with the Elections Clause (Art. I, section 4).[149]

In supporting a narrow reading of the word "legislature," the dissent points to numerous founding era sources, including the Federalist Papers, wherein the legislature was understood to mean "'select bodies of men"' in contrast with "'the people'" used to describe the general populous.[150] Additionally, dictionaries at the time contained definitions consistent with the idea that legislatures only included "'[t]he body of men in a state or kingdom, invested with power to make and repeal laws.'"[151] Perhaps most striking in the dissent's argument is where they point out that there are seventeen provisions in the Constitution which refer to state legislatures, each of which can only reasonably be understood to mean a "representative body."[152]

The majority reasoning in *Arizona State Legislature* relied in part on some of the Founders' consciousness of and concern about partisan gerrymandering.[153] The dissent countered with the fact that no debate existed over the definition of the word "legislature" because everyone understood it to mean a formal, elected

144. *Id.* (quoting Brief for Appellant at 37, Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, No. 13-1314 (Dec. 2, 2014)).

145. *Ariz. State Leg.*, 576 U.S. at 792.

146. *Id.* at 817.

147. *Id.* at 824 (Roberts, J., dissenting).

148. *Id.* at 824–25.

149. *Id.* at 825 (Roberts, J., dissenting).

150. *Id.* at 828.

151. *Id.*

152. *Id.* at 829.

153. *See* Nathaniel Persily et al., *When is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 696 (2016).

lawmaking body, and there was agreement even between the Federalists and anti-Federalists–that state legislatures would be in charge of the elections.[154] Further, the Independent State Legislature Doctrine compels the invalidation of state constitutional action contrary to that of the state legislature.[155]

Precedent for the Independent State Legislature Doctrine comes from the Civil War-era case, *Baldwin v. Trowbridge*, wherein the House of Representatives reviewed an 1864 Michigan congressional election.[156] The losing candidate sued, claiming that votes cast out of state by Union soldiers were invalid under the Michigan Constitution, "which required all votes to be cast within state lines."[157] The House Committee of Elections laid out the Independent State Legislature Doctrine: "[T]he Constitution gives special powers to state legislatures to regulate congressional elections; that 'Legislature' should be read literally to signify the formal lawmaking body of the state; and that therefore the legislature's federal election regulation powers operate independently of state constitutional restraints."[158]

Should this question come before the Court again, it is possible that *Arizona State Legislature* will be overturned, and a conservative majority may hold that "legislature" in the Elections Clause is defined as a "representative body" and does not include the people as a whole. An originalist reading of "legislature" could have far-reaching consequences, particularly for initiatives passed into law through use of referendums, just as Arizona's independent commission was.[159] However, there is historical precedent for the use of direct democracy.[160] It is possible that the Court may hold the conservative reading of "legislature" only applies in certain contexts.[161] Even still, changing course from the decision in *Arizona State Legislature* could result in the invalidation of multiple states' redistricting commissions and potentially many other state laws instituted by referendum.

C. *A Potential Solution: The Iowa Way*

Iowa's approach is unique among those of other states and may have

154. *Id.*
155. *Id.* at 697–98.
156. *Id.* at 697 (citing H.R. MISC. DOC. NO. 39-10, at 1–3 (1865)); *see also* Hawke v. Smith, 253 U.S. 221, 230–31 (1920).
157. Persily, *supra* note 152, at 697.
158. *Id.* at 698.
159. *See id.* at 708709.
160. *Id.* at 709.
161. *Id.*

something to teach other states in utilizing redistricting commissions.[162] It is likely to be safe from invalidation under a conservative reading of the word "legislature" in the Elections Clause because it is created by, and is part of, the Iowa Legislature, as opposed to being instituted by referendum.[163] The nonpartisan Legislative Services Agency (LSA) is responsible for obtaining and analyzing population data after each census and proposing a map of both congressional and legislative districts for approval by the state house and senate.[164] The house and senate then each take up the plan and ,in turn, the governor then has veto power after the plan passes through both houses; neither can "edit" the map, only vote it up or down in its entirety.[165] The manner of redistricting is governed by certain standards consistent with Iowa Supreme Court precedent, such as compactness, contiguity, and "as nearly equal as practicable" population.[166]

The statute specifically defines two types of compactness, the first being "length-width," requiring a district to come as close to equal distance when measuring from the northernmost to southernmost point and from the easternmost to the westernmost point.[167] The second type–"perimeter compactness,"–is defined as follows: "The compactness of a district is greatest when the distance needed to traverse the perimeter boundary of a district is as short as possible."[168] Should a challenge arise based on excessive population deviation, the burden lies with the legislature to justify "any variance in excess of one percent between the population of a district and the applicable ideal district population."[169]

Perhaps the most striking feature of the Iowa statute is an explicit prohibition of drawing the map in a way which favors any particular "political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group."[170] The LSA is also prohibited from using any of the following data: "[a]ddresses of incumbent legislators or members of Congress," "[p]olitical affiliations of registered voters," "[p]revious election results," and "[d]emographic information, other than population head counts, except as required by the

162. *See The "Iowa Model" for Redistricting*, NAT'L CONF. STATE LEGS (Mar. 25, 2021), https://www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx [https://perma.cc/4QGH-HFBW].

163. *See* IOWA CODE § 42.2 (2021).

164. *Id.* at § 42.2(3).

165. *Id.* at § 42.3.

166. *Id.* at §§ 42.4(1)(a)–(4)(b).

167. *Id.* at § 42.4(4)(a).

168. *Id.* at § 42.4(4)(b).

169. *Id.* at § 42.4(1)(c).

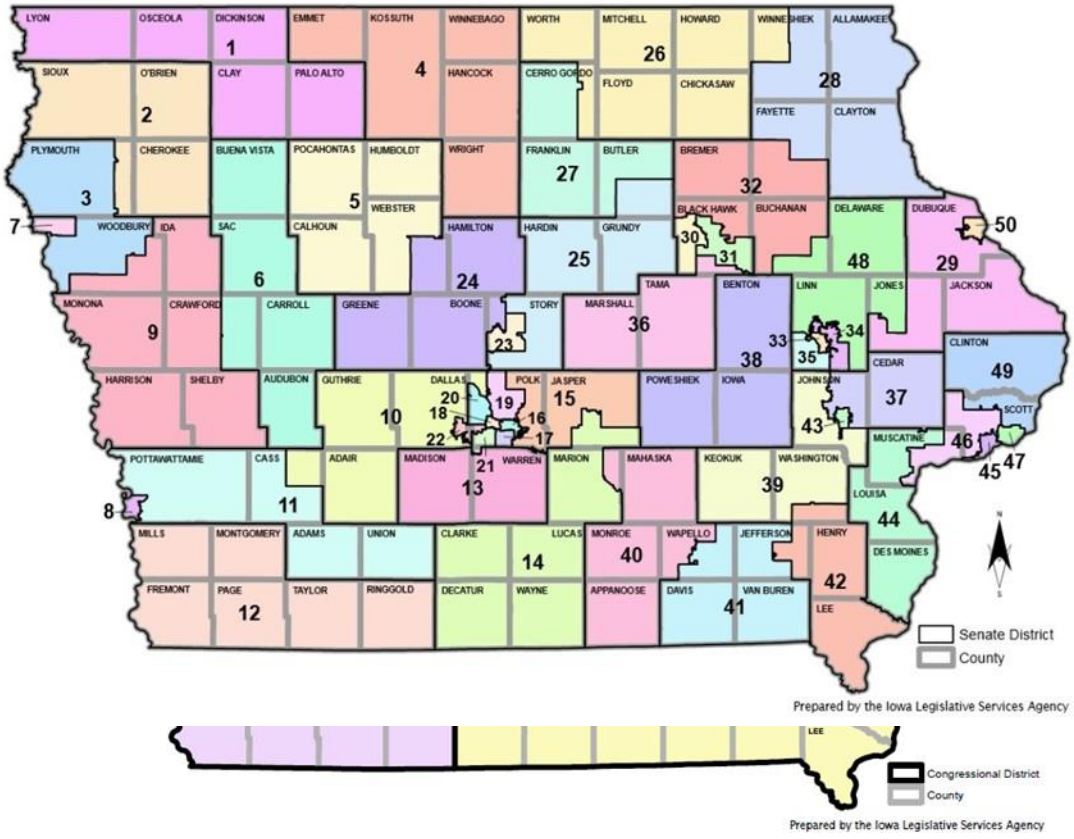
170. *Id.* at § 42.4(5).

Constitution and the laws of the United States."[171]

The result, as pictured in Figures 10 and 11 below, are district lines that, for the most part, match up with county lines and are free of excessive twists and turns.

Figure 10: Iowa Congressional Districts.[172]

Figure 11: Iowa Legislative Districts[173]



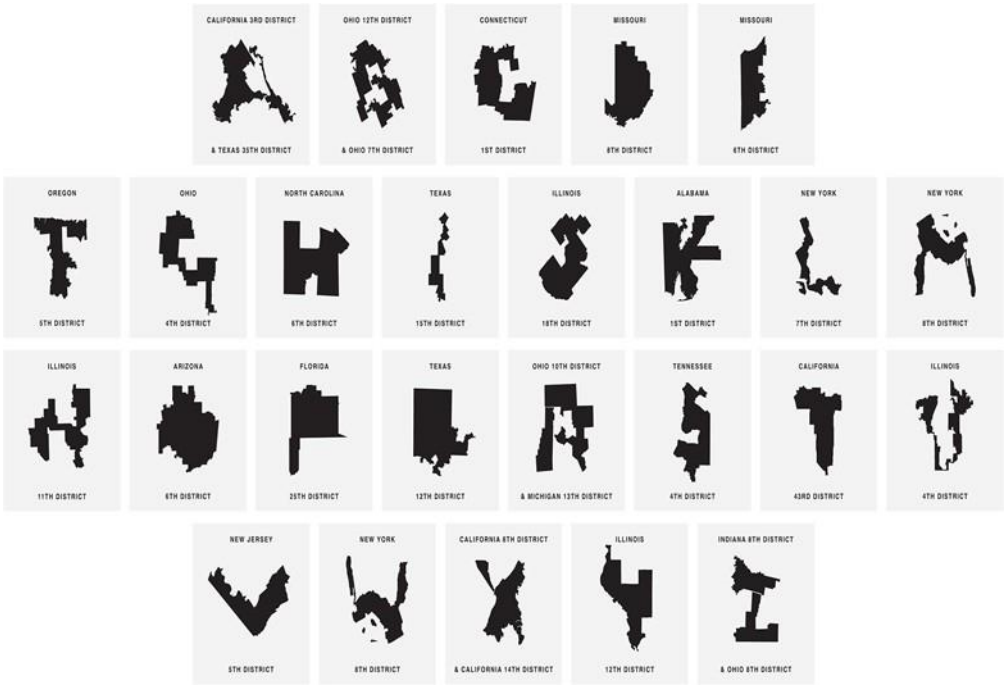
171. *Id.* at §§ 42.4(5)(a)7(d).

172. *Iowa Congressional Districts*, UNIV. IOWA OFF. GOVERNMENTAL RELS., https://govrel.uiowa.edu/federal-relations/iowa-congressional-delegation [https://perma.cc/4YEY-AZ7Y].

173. Jacob Becklund, *Where Iowa Senate Democrats See Their Openings in 2020*, IOWA STARTING LINE (May 6, 2020), https://iowastartingline.com/2020/05/06/where-iowa-senate-democrats-see-their-openings-in-2020/ [https://perma.cc/S8TX-AH4P].

For purposes of further comparison, take for example the lines in states where districting is left entirely up to the legislature. As exhibited by Figure 12, some have been drawn so creatively that they resemble letters of the alphabet.

Figure 12: The "Ugly Gerry" Font[174]



Beyond the borderline comical shapes of these districts, Figure 12 also evidences the pervasiveness of the practice across both state and political lines.[175] They are the result of the packing and cracking that is discussed in *Vieth* and numerous other cases.[176] No matter how strange the shape, the implication is the same: votes are being wasted left and right.[177] Whether other states will take cues

174. Grace Panetta, *There's a New Downloadable Font Inspired by Gerrymandered Congressional Districts*, BUS. INSIDER (Aug. 1, 2019), https://www.businessinsider.com/you-can-download-font-gerrymandered-congressional-districts-2019-8 [https://perma.cc/9VH5-F3X4].

175. *Id.*

176. *See* Vieth v. Jubelirer, 541 U.S. 267, 296 (2004).

177. *See* Panetta, *supra* note 173; *see also* Stephanopoulos, *supra* note 74.

from Iowa and the handful of other states that utilize districting commissions and follow suit remains to be seen. However, it is fairly clear from Figure 12 and from studying history that legislators will go to rather extreme lengths to stay in power.[178]

VI. CONCLUSION

As much as this Author would like to say that the gerrymander is on its last leg, it still stalks about the political landscape, alive and well; but it has taken some blows. These blows have come mainly in the lower courts and via state legislatures.[179] Without a standard from the Supreme Court to determine when political gerrymander is so egregious as to attain the level of a justiciable constitutional violation, it may be wise to look to the state legislatures for a solution. States considering the establishment of an independent commission and even those that have them now ought to approach such an undertaking with caution. Should the definition of "legislature" come into question again, as it did in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, it may lead to a change in the law, and an invalidation of the independent commissions many states are currently using.[180] Invalidation by such means may be avoided through establishing a commission through the legislative process, like Iowa has done, as opposed to establishing it by referendum, like Arizona and other states have done.[181] The political gerrymander may still be around, but the right to vote which is preservative of all other rights–cannot be burdened without consequence.[182] The establishment of nonpartisan redistricting commissions via the various individual state legislative processes may deal a definitive and perhaps even final blow to the political gerrymander.[183]

*Sonia M. Elossais**

178. *See* Panetta, *supra* note 173.

179. *See* discussion *supra* Part V.

180. *See* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 792 (2015); for a list of states and the type of commission they use, *see Redistricting Commissions: State Legislative Plans*, *supra* note 64.

181. *See Vieth*, 541 U.S. at 824; *Redistricting Commisssions: State Legislative Plans*, *supra* note 64; *see also* IOWA CODE § 42.2 (2021).

182 *Harper*, 383 U.S. at 667 (quoting Reynolds v. Simms, 377 U.S. 533, 561–62 (1964)).

183. *See* Reynolds v. Simms, 377 U.S. 533, 562 (1964).

* A special thank you to the Hon. Judge Mark W. Bennett for his mentorship, and memorable and enlightening seminar on Justice Reform and Innovation. Thank you to Professor Anthony J. Gaughan as well, for his expertise and suggestions on resources. And to my fellow

law students: “The art of reading is to skip judiciously,” Alexander Hamilton.