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The “Whip Hand”: Congress’s Elections Clause Power as the Last Hope for Redistricting Reform After *Rucho*

Kevin Wender
Fordham University School of Law

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THE “WHIP HAND”: CONGRESS’S ELECTIONS CLAUSE POWER AS THE LAST HOPE FOR REDISTRICTING REFORM AFTER *RUCHO*

Kevin Wender*

*Redistricting activists have long argued that partisan gerrymandering poses a fundamental threat to American democracy. These concerns have become particularly acute as increasingly sophisticated technologies have enabled legislators to draw highly gerrymandered maps that powerfully entrench partisan advantage. Despite these concerns, the U.S. Supreme Court, in the 2019 case of *Rucho v. Common Cause*, declared partisan gerrymandering to be a political issue outside the purview of the federal courts. The decision dealt a major blow to redistricting activists who, for over fifty years, had hoped that the Court would intervene to combat the drawing of electoral districts for partisan gain.*

*This Note examines and evaluates the possible avenues for comprehensive redistricting reform in the aftermath of *Rucho*. While recognizing some recent successes, this Note analyzes how state-level redistricting remedies face significant constitutional and political barriers that would likely prevent comprehensive reform. Furthermore, this Note argues that the Elections Clause gives Congress strong constitutional authority to enact nationwide anti-gerrymandering legislation, and that this power under the Elections Clause represents the last hope for achieving comprehensive redistricting reform. Finally, this Note proposes legislation that would require states to adopt independent redistricting commissions for congressional elections while allowing states to choose their own criteria and electoral priorities to govern the redistricting process.*

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INTRODUCTION

Asheville, North Carolina, a small college town of approximately 90,000 people, is a relatively liberal enclave in a relatively conservative and rural part of North Carolina.¹ As a result of this roughly even Republican-Democrat split, Western North Carolina’s Eleventh Congressional District was historically one of the most competitive congressional districts in the South, frequently flipping between Democratic and Republican

1. See Joanna Walters, *Gerrymander 5K: Run Highlights Absurdity of Republican Redistricting*, GUARDIAN (Nov. 5, 2017, 7:00 AM), <https://www.theguardian.com/us-news/2017/nov/05/gerrymander-5k-run-asheville-north-carolina-republicans> [<https://perma.cc/T9C5-K99J>].

representatives.² The toss-up nature of the district meant that it was often represented by politically moderate candidates, such as Heath Shuler, a former NFL quarterback and fiscally conservative, centrist Democrat who represented the district beginning in 2007.³ However, the competitive nature of the Eleventh Congressional District dramatically changed in 2011, when the Republican-controlled state legislature redrew North Carolina’s congressional districts.⁴ The result was that Asheville was divided into two congressional districts, with some of its residents lumped into the Tenth Congressional District and the rest in the Eleventh.⁵ The new districts dramatically split Asheville, such that a section of the newly formed congressional boundary bisected dormitories at the University of North Carolina Asheville, meaning that students living on different sides of the same dorm now had different representatives in Congress.⁶

The two redrawn congressional districts both included large amounts of rural, conservative voters who greatly outnumbered progressive voters in Asheville.⁷ Overnight, state legislators transformed the Eleventh District from a toss-up district to an overwhelmingly conservative one.⁸ In 2012, Shuler was unseated by Mark Meadows, one of the most conservative members of the House of Representatives and the future chair of the staunchly conservative House Freedom Caucus.⁹ This practice of dispersing voters of one political party into several congressional districts in order to dilute their voting power has become a commonplace redistricting practice across state legislatures in the United States.¹⁰ Furthermore, increasingly sophisticated technologies have ushered in a new era of extreme partisan

2. See Richard Fausset, *With No Supreme Court End to Gerrymandering, Will States Make It More Extreme?*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/supreme-court-gerrymandering-north-carolina.html> [<https://perma.cc/5X7B-ED6P>].

3. See *id.*

4. See *id.*

5. Walters, *supra* note 1. North Carolina’s map for congressional districts remains subject to ongoing litigation and legislative debate. In September, a North Carolina state court struck down the gerrymandered map as violating the state’s constitution. See *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *112 (N.C. Super. Ct. Sept. 3, 2019). In response, the Republican-led North Carolina Senate approved a new, slightly less gerrymandered map. However, North Carolina Democrats plan to challenge the map in court again. See Brian Murphy, *North Carolina Lawmakers OK New 2020 Congressional Maps. Now It’s Up to the Courts.*, NEWS & OBSERVER (Nov. 15, 2019, 3:45 PM), <https://www.newsobserver.com/news/politics-government/article237398119.html> [<https://perma.cc/7XVF-5CAY>].

6. Fausset, *supra* note 2.

7. See *id.*

8. See *id.*

9. See Jane C. Timm, *They’re Still Drawing Crazy-Looking Districts. Can’t It Be Stopped?*, NBC NEWS (Sept. 22, 2017, 2:26 PM), <https://www.nbcnews.com/politics/elections/they-re-still-drawing-crazy-looking-districts-can-t-it-n803051> [<https://perma.cc/T2JK-J3QP>].

10. See J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL’Y REV. 543, 544 (2010); see also Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. TIMES MAG. (Aug. 29, 2017), <https://www.nytimes.com/2017/08/29/magazine/the-new-front-in-the-gerrymandering-wars-democracy-vs-math.html> [<https://perma.cc/U8J9-ATPQ>].

gerrymandering by enabling legislators to draw hyperfocused maps that split individual neighborhoods, blocks, and homes.¹¹

These kinds of extreme partisan gerrymanders have had a corrosive effect on American democracy by decreasing competitive elections, entrenching partisan power in a way that is unrepresentative of the electorate, and diluting the franchise of a large number of voters solely because of their party affiliation.¹² These concerns are more pressing than ever with the U.S. Supreme Court's decision in *Rucho v. Common Cause*,¹³ which declared partisan gerrymandering to be a nonjusticiable political question and thereby effectively foreclosed the federal judiciary as an avenue for achieving redistricting reform.¹⁴

This Note will evaluate the options for comprehensive redistricting reform in the aftermath of *Rucho*. Part I of this Note provides an overview of redistricting and partisan gerrymandering, including the evolution of the Supreme Court's partisan gerrymandering jurisprudence. Part II details the possible options for redistricting reform after *Rucho* and the political and constitutional barriers that each option faces. Finally, Part III argues that Congress's power to enact nationwide election law under the Elections Clause is the only remedy that can achieve comprehensive redistricting reform, and it proposes legislation that would require states to adopt independent redistricting commissions for congressional elections.

I. PARTISAN GERRYMANDERING: A PRIMER

Part I of this Note provides background on the redistricting process and the history of partisan gerrymandering. Part I.A discusses the constitutional standards for legislative redistricting. Part I.B addresses the mechanics of partisan gerrymandering and how partisan gerrymandering undermines democratic values. Part I.C summarizes the evolution of the Supreme Court's partisan gerrymandering jurisprudence, culminating with the Court's recent holding in *Rucho* that partisan gerrymandering claims are nonjusticiable political questions.

A. Legislative Districting

The Constitution requires Congress to conduct an "actual Enumeration" every ten years to determine the population of the United States.¹⁵ Based on

11. Hebert & Jenkins, *supra* note 10, at 552; *see also* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2512–13 (2019) (Kagan, J., dissenting) ("These are not your grandfather's—let alone the Framers'—gerrymanders.").

12. *See* Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2145–47 (2018); *see also* Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 ELECTION L.J. 453, 457–58 (2017) (analyzing partisan gerrymandering and the ideological skew of state legislatures).

13. 139 S. Ct. 2484 (2019).

14. *See id.* at 2506–07; *see also infra* Part I.C.2 (discussing the facts and holding of *Rucho*).

15. U.S. CONST. art. I, § 2, cl. 3.

the results of the decennial census, Congress then reapportions the number of seats in the House of Representatives, with each state entitled to at least one representative.¹⁶ In most states, state legislators are then responsible for drawing new congressional and state legislative district maps that reflect state-level population shifts over the past decade.¹⁷ These new maps must contain districts with roughly equal populations in order to satisfy the “one person, one vote” requirement of the Equal Protection Clause.¹⁸ Additionally, new maps must satisfy minority representation requirements outlined in section 2 of the Voting Rights Act of 1965 (VRA).¹⁹

B. Partisan Gerrymandering

This section provides an overview of how legislators create partisan gerrymanders and how they have recently utilized new mapping technologies to draw increasingly precise and effective gerrymanders. Furthermore, this section discusses the various ways in which partisan gerrymandering undermines democratic values.

1. The Rise of Extreme Partisan Gerrymandering

Partisan gerrymandering occurs when a majority party in a state legislature manipulates the boundaries of electoral districts to maximize partisan advantage.²⁰ A party in control of the redistricting process can entrench its own power by ensuring the election or reelection of its own members while decreasing the political safety of party opponents.²¹ This is done by “packing,” moving voters from the opposition party into only a few districts, or “cracking,” splitting a population that would otherwise produce a majority into minority portions in other districts.²² Partisan gerrymandering results in

16. *Id.* amend. XIV, § 2, cl. 1 (“Representatives shall be apportioned among the several States according to their respective numbers . . .”); *see also id.* art. I, § 2, cl. 3 (“The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . .”).

17. *See* L. PAIGE WHITAKER, CONG. RESEARCH SERV., R44798, CONGRESSIONAL REDISTRICTING LAW: BACKGROUND AND RECENT COURT RULINGS 2 (2017), <https://crsreports.congress.gov/product/pdf/R/R44798> [<https://perma.cc/823Z-X853>].

18. *See Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

19. *See* 52 U.S.C. §§ 10301, 10303(f) (2018); *see also Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (establishing a three-pronged test for vote dilution under section 2 of the VRA). Until 2013, the Court construed section 5 of the VRA to require states covered under section 4(b) of the VRA to obtain approval and preclearance for any proposed change to a voting law, including changes to redistricting maps. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 905–06 (1995). To obtain preclearance, a state covered under section 4(b) had the burden of proving that the proposed map had neither the purpose nor effect of denying or abridging the right to vote on account of race or color. *See* 52 U.S.C. § 10304. In 2013, the Court invalidated sections 4(b) and 5, holding that the application of the coverage formula violated the fundamental principle of equal sovereignty among the states without justification. *See Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

20. Hebert & Jenkins, *supra* note 10, at 544.

21. *See id.*

22. *See id.*

a large number of uncompetitive “safe” districts for the representatives of the party in control of the redistricting process.²³

Partisan gerrymandering’s roots in American politics can be traced to the early nineteenth century.²⁴ However, the emergence of sophisticated mapping and data aggregation technologies has led to a recent escalation in the frequency and effectiveness of partisan gerrymandering, while also nearly guaranteeing compliance with the “one person, one vote” requirement of the Equal Protection Clause and the minority representation requirements of the VRA.²⁵ These new technological tools were at the heart of the Redistricting Majority Project (REDMAP), an aggressive campaign of sophisticated gerrymandering that the Republican National Committee (RNC) implemented in advance of the round of redistricting following the 2010 census.²⁶ REDMAP was enormously successful, helping Republicans achieve new gerrymandered majorities in Michigan, North Carolina, Ohio, Pennsylvania, and Wisconsin.²⁷ More importantly, REDMAP initiated a new era of American politics where partisan gerrymandering has now become a multimillion-dollar enterprise with armies of lawyers, consultants, and data scientists all working to maximize partisan advantage for both parties by weaponizing the redistricting process.²⁸

2. How Partisan Gerrymandering Corrodes Democracy

Extreme partisan gerrymandering raises key questions about democracy as gerrymandered districts lead to less competitive elections, more polarized elected officials, and decreased rates of voter registration and participation.²⁹ Another consequence of partisan gerrymandering is that the ideological views of legislators are deeply unrepresentative of the electorate that they claim to represent.³⁰ For example, at a statewide level, North Carolina is a toss-up, “purple” state with highly contested elections and an almost even split of Democratic and Republican voters.³¹ However, North Carolina

23. Bazelon, *supra* note 10.

24. The term “gerrymandering” was coined in 1812 after the governor of Massachusetts, Elbridge Gerry, created a salamander-shaped electoral district to maintain majority control. See Michael Wines, *What Is Gerrymandering?: And Why Did the Supreme Court Rule on It?*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html> [<https://perma.cc/P8SM-M5TR>].

25. Hebert & Jenkins, *supra* note 10, at 552.

26. See generally DAVID DALEY, *RATF**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA’S DEMOCRACY* (2016) (documenting the origin and implementation of REDMAP throughout the United States).

27. See David Daley, *How the GOP Made Your Vote Useless*, DAILY BEAST (Oct. 7, 2017), <https://www.thedailybeast.com/how-gop-gerrymandering-made-your-democratic-vote-useless> [<https://perma.cc/4ZKK-HUV5>].

28. 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/8JCA-WX5G>].

29. Stephanopoulos, *supra* note 12, at 2118–20.

30. See *supra* note 12 and accompanying text.

31. See Thomas Wolf & Peter Miller, *How Gerrymandering Kept Democrats from Winning Even More Seats Tuesday*, WASH. POST (Nov. 8, 2018),

Republicans were able to secure supermajorities in the state legislature, as well as a nearly untouchable 10-3 advantage in the state’s congressional delegation by securing unilateral control over the map-drawing process before the last round of redistricting in 2010.³² Despite the politically moderate makeup of the state’s electorate, North Carolina Republicans capitalized on their resulting statewide political domination to enact some of the most extreme conservative legislation in the United States, including the Public Facilities Privacy & Security Act (commonly known as “House Bill 2”), which overturned local LGBTQ antidiscrimination statutes and prohibited transgender individuals from using bathrooms and locker rooms that aligned with their gender identities in public schools and government buildings.³³

The overall result of partisan gerrymandering is that gerrymandered maps that entrench Democratic power produce state and federal congressional delegations that are significantly more liberal than their states’ electorate.³⁴ Conversely, gerrymandered maps that entrench Republican power produce delegations that are significantly more conservative than their states’ electorate.³⁵ In short, partisan gerrymandering poses a threat to a fundamental aspect of democracy, “that the voters should choose their representatives, not the other way around.”³⁶ These democratic concerns are particularly acute now that the Supreme Court has upheld the constitutionality of extreme partisan gerrymandering by declaring partisan gerrymandering to be a nonjusticiable political question.³⁷

C. *The “Political Thicket”: The Supreme Court’s Partisan Gerrymandering Jurisprudence*

In 1946, Justice Felix Frankfurter referred to redistricting as a “political thicket” that federal courts would do well to avoid.³⁸ Despite Justice Frankfurter’s warning, the Supreme Court struggled for over fifty years to

<https://www.washingtonpost.com/outlook/2018/11/08/how-gerrymandering-kept-democrats-winning-even-more-seats-tuesday/> [<https://perma.cc/H9GZ-KE54>].

32. *See* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509–10 (2019) (Kagan, J., dissenting).

33. 2016 N.C. Sess. Laws 12 (repealed 2017); *see also* Ella Nilsen, *North Carolina’s Extreme Gerrymandering Could Save the House Republican Majority*, VOX (May 8, 2018, 11:00 AM), <https://www.vox.com/policy-and-politics/2018/5/8/17271766/north-carolina-gerrymandering-2018-midterms-partisan-redistricting> [<https://perma.cc/W2YA-5ZZ7>]. After widespread outcry from national business leaders and lawmakers, the Act was eventually repealed under Democratic Governor Roy Cooper.

34. Stephanopoulos, *supra* note 12, at 2120.

35. *See id.*

36. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015) (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005)).

37. *See infra* Part I.C.2 (discussing the facts and holding of *Rucho*).

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

develop a standard for adjudicating partisan gerrymandering claims.³⁹ This section provides an overview of the Court's adjudication of constitutional challenges to the apportionment of legislative districts, which culminated in 2019 with the landmark case of *Rucho v. Common Cause*.⁴⁰

1. The Search for a “Judicially Discoverable and Manageable Standard”—
from *Baker* to *LULAC*

The Supreme Court began to develop constitutional requirements for the drawing of congressional and state legislative district maps during the “reapportionment revolution” of the 1960s.⁴¹ In *Baker v. Carr*,⁴² Tennessee voters argued that the use of a district map that apportioned representatives according to sixty-year-old demographic data from the 1900 federal census, regardless of the substantial shifts in Tennessee's population, violated their Fourteenth Amendment equal protection rights “by virtue of the debasement of their votes.”⁴³ The Court held that the equal protection right against vote dilution asserted by the plaintiffs was justiciable under the Fourteenth Amendment.⁴⁴ Writing for the majority, Justice William Brennan explained that justiciability exists where “the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.”⁴⁵ Shortly after *Baker*, the Court elaborated on the meaning of an equal protection right against vote dilution, holding that congressional and state legislative districts must be equal in population under the “one person, one vote” standard.⁴⁶

Despite the promise of the Court's reapportionment revolution, the Court has never struck down a district map as an unconstitutional partisan gerrymander.⁴⁷ For over three decades, the Court failed to agree on a “judicially discoverable and manageable standard” for the adjudication of partisan gerrymandering claims before finally holding that partisan gerrymandering claims are nonjusticiable political questions outside the Court's jurisdiction.⁴⁸

39. See, e.g., *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 420 (2006); *Davis v. Bandemer*, 478 U.S. 109, 185 n.25 (1986) (Powell, J., concurring); *Baker v. Carr*, 369 U.S. 186, 198 (1962).

40. 139 S. Ct. 2484 (2019).

41. See Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 757 (2004).

42. 369 U.S. 186 (1962).

43. *Id.* at 193–95.

44. See *id.* at 237.

45. *Id.* at 198.

46. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

47. See Adam Liptak, *Justices to Hear Major Challenge to Partisan Gerrymandering*, N.Y. TIMES (June 19, 2017), <https://nytimes.com/2017/06/19/us/politics/justices-to-hear-major-challenge-to-partisan-gerrymandering.html> [<https://perma.cc/ZYS8-F3U8>].

48. See *infra* notes 49–62, 78–80 and accompanying text.

In *Davis v. Bandemer*,⁴⁹ the Supreme Court held that claims of unconstitutional partisan gerrymandering were justiciable under the Equal Protection Clause and subject to the one-person, one-vote principle.⁵⁰ However, the Court disagreed on the adoption of a manageable standard for adjudicating such claims.⁵¹ Justice Byron White, in a plurality opinion, wrote that in order to prevail in a partisan gerrymandering claim, plaintiffs must prove that a district map was drawn with the intent to discriminate against a political group and that the map actually had a discriminatory effect against that group.⁵² Justice White specified that unconstitutionality only occurs when elections are arranged in a manner that will “consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”⁵³ Justice Sandra Day O’Connor’s concurring opinion rejected the plurality’s intent-effect standard and contended that partisan gerrymandering claims were nonjusticiable.⁵⁴

The Supreme Court revisited the justiciability of partisan gerrymandering claims in 2004 in *Vieth v. Jubelirer*.⁵⁵ Echoing Justice O’Connor’s *Bandemer* concurrence, the four-justice *Vieth* plurality would have overruled *Bandemer* and held that political gerrymandering claims are not justiciable because “no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”⁵⁶ However, Justice Anthony Kennedy’s fifth vote for the decision to dismiss kept the promise of justiciability for partisan gerrymandering claims alive.⁵⁷ In his concurrence, Justice Kennedy refused to endorse a constitutional standard for the adjudication of partisan gerrymandering claims but also declined to declare that partisan gerrymandering claims are nonjusticiable.⁵⁸ Justice Kennedy contended that the fact that an appropriate standard had not yet emerged did not necessarily mean that no standard could emerge in the future.⁵⁹ Just two years later, in *League of United Latin American Citizens v. Perry (LULAC)*,⁶⁰ Justice Kennedy again declined to either endorse a constitutional standard for partisan gerrymandering claims or declare partisan gerrymandering to be a

49. 478 U.S. 109 (1986).

50. *See id.* at 123–25.

51. *See id.* at 185 n.25 (Powell, J., concurring).

52. *See id.* at 127 (plurality opinion).

53. *Id.* at 132.

54. *See id.* at 147 (O’Connor, J., concurring) (“The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment.”).

55. 541 U.S. 267 (2004).

56. *Id.* at 281.

57. *See LULAC*, 548 U.S. 399, 420 (2006); *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring); *see also* Adam Liptak & Michael D. Shear, *Kennedy’s Vote Is in Play on Voting Maps Warped by Politics*, N.Y. TIMES (Oct. 3, 2017), <https://nytimes.com/2017/10/03/us/politics/gerrymandering-supreme-court-wisconsin.html> [<https://perma.cc/ZMX5-AR3M>].

58. *See Vieth*, 541 U.S. at 317 (Kennedy, J., concurring).

59. *See id.*

60. 548 U.S. 399 (2006).

nonjusticiable political question.⁶¹ As in *Vieth*, Justice Kennedy still believed that it was possible for the Court to identify a workable test that could determine when an electoral map crossed over from lawful partisanship to excessive partisanship.⁶²

2. *Rucho v. Common Cause*: The Supreme Court Closes the Door

Justice Kennedy, whose fifth vote in *Vieth* and *LULAC* kept alive the possibility of a judicial remedy for partisan gerrymandering, retired in 2018. With Justice Kennedy replaced by Justice Brett Kavanaugh, the Court finally ended decades of uncertainty on partisan gerrymandering with its decision in *Rucho v. Common Cause*.⁶³ In *Rucho*, the Court considered whether congressional maps in North Carolina and Maryland were unconstitutional partisan gerrymanders.⁶⁴ In North Carolina, the Republican-controlled state legislature adopted a heavily gerrymandered map that strongly favored North Carolina Republicans in the round of redistricting following the 2010 census.⁶⁵ Soon afterwards, in *Cooper v. Harris*,⁶⁶ the Court struck down the map as an unconstitutional racial gerrymander.⁶⁷ In drawing a new map, the Republican heads of the state's redistricting committee hired Thomas Hofeller and instructed him to create an even more GOP-friendly map—by explicitly focusing on partisanship instead of race.⁶⁸ Using sophisticated mapping software and detailed precinct-level election results to predict voting behavior, Hofeller drew district boundaries that he believed would ensure the continuous election of ten Republican congressmen.⁶⁹ The new map worked exactly as planned. In 2016, Republican congressional candidates won ten of North Carolina's thirteen congressional seats, despite only receiving 53 percent of the statewide vote.⁷⁰

A similar series of events unfolded in Maryland's redistricting process, except this time Democrats, not Republicans, adopted a heavily gerrymandered map that entrenched political power.⁷¹ Historically, Maryland's eight-person congressional delegation consisted of two or three Republicans and five or six Democrats.⁷² However, after the 2010 census, Maryland Democratic leaders, who had total control of the state's government, decided to manipulate district lines to maximize political

61. *See id.* at 420.

62. *See id.*

63. 139 S. Ct. 2484 (2019).

64. *Id.* at 2491.

65. *Id.* at 2509–10 (Kagan, J., dissenting).

66. 137 S. Ct. 1455 (2017).

67. *See id.* at 1481–82; *see also Rucho*, 139 S. Ct. at 2510 (Kagan, J., dissenting).

68. *Rucho*, 139 S. Ct. at 2509–10 (Kagan, J., dissenting) (quoting Representative David Lewis, cochair of the North Carolina redistricting committee, who stated, “I think electing Republicans is better than electing Democrats” and “I drew this map to help foster what I think is better for the country”).

69. *See id.* at 2510.

70. *See id.*

71. *See id.* at 2510–11.

72. *See id.* at 2510.

control at the expense of Republicans.⁷³ Democratic Governor Martin O’Malley appointed Congressman Steny Hoyer, a self-described “serial gerrymanderer,” to spearhead the Maryland redistricting process.⁷⁴ Using similar mapping technologies to those Hofeller utilized in North Carolina, Maryland Democrats produced a new map that they believed would produce seven Democratic seats and protect all Democratic incumbents.⁷⁵ As in North Carolina, the gerrymander worked exactly as planned, with Democrats winning seven of eight congressional seats despite only receiving 65 percent of the statewide congressional vote.⁷⁶

Voting rights organizations and voters sued North Carolina and Maryland, alleging that the states’ maps for congressional districts constituted impermissible partisan gerrymanders.⁷⁷ In a 5-4 decision, the Court dismissed the plaintiffs’ claims, holding that partisan gerrymandering claims are not justiciable because they present a political question beyond the reach of federal courts.⁷⁸ In the majority opinion, Chief Justice John Roberts acknowledged that, while federal courts can “resolve a variety of questions surrounding districting,” it is beyond their power and competence to decide when partisan gerrymandering goes too far.⁷⁹ Therefore, in the absence of any “limited and precise standard” for adjudicating partisan gerrymandering claims, the Court concluded that federal courts cannot resolve issues related to partisan gerrymandering.⁸⁰

II. POSSIBLE OPTIONS FOR REDISTRICTING REFORM AFTER *RUCHO*

In support of the Court’s ruling in *Rucho*, Chief Justice Roberts highlighted three possible alternatives for redistricting reform—state courts, the creation of independent redistricting commissions at the state level, and congressional legislation.⁸¹ Part II details these possible options for redistricting reform in the aftermath of *Rucho*. This Part will address how the state-level gerrymandering remedies have political and constitutional barriers that would prevent systemic redistricting reform. Part II.A discusses the adjudication of partisan gerrymandering claims by state courts. Part II.B discusses the creation of state independent redistricting commissions through

73. *See id.*

74. *Id.* at 2510–11.

75. *See id.* at 2511 (quoting Maryland Senate President Thomas Miller, who stated, “In the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity”).

76. *See id.*

77. *See id.* at 2491 (majority opinion).

78. *See id.* at 2506–07.

79. *Id.* at 2496, 2505. While *Rucho* foreclosed the possibility of federal courts adjudicating claims of *partisan* gerrymandering, claims of *racial* gerrymandering brought under the Fourteenth Amendment and section 5 of the VRA remain justiciable. *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265–66 (2015) (holding that racial gerrymandering claims against a state apply to the boundaries of individual districts and not the state as an undifferentiated whole).

80. *Rucho*, 139 S. Ct. at 2502, 2505 (“Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not?”).

81. *Id.* at 2507–08.

bipartisan legislation and direct voter referendums. Part II.C discusses Congress's authority to regulate federal elections under the Elections Clause, as well as several proposals for congressional anti-gerrymandering legislation.

A. State Courts

Opponents of partisan gerrymandering have had some limited success in striking down gerrymandered maps in state courts in Florida, North Carolina, and Pennsylvania as violating their respective state's constitutions.⁸² For example, the Supreme Court of Florida struck down the state legislature's congressional districting plan as violating the "Fair Districts Amendment" to the Florida Constitution.⁸³ Despite some limited victories in state courts for partisan gerrymandering plaintiffs, further success in state courts will likely be difficult to achieve unless a state constitution contains similar provisions through which a redistricting claim might be pursued.⁸⁴ While partisan gerrymandering plaintiffs in Florida were able to pursue a claim through the state's Fair Districts Amendment, most states do not have specific constitutional provisions aimed at promoting fair representation.⁸⁵

Furthermore, even if a state has a constitutional provision that is relevant to redistricting, success in state courts also requires that state supreme court judges are willing to rule against partisan gerrymandering. This is especially problematic because state supreme court judges face some form of election in thirty-eight of the fifty states.⁸⁶ In these states, it is very unlikely that partisan gerrymandering plaintiffs will receive favorable rulings since

82. See *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *112 (N.C. Super. Ct. Sept. 3, 2019); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018). In an ironic turn of events, Thomas Hofeller—one of the main architects of REDMAP and the creator of North Carolina's gerrymandered map—was the source of key evidence in the North Carolina case. Following Hofeller's death in 2018, his estranged daughter, Stephanie Hofeller, discovered a hard drive of her father's work that contained a trove of documents related to Hofeller's redistricting work. Stephanie Hofeller turned the files over to attorneys for Common Cause who were representing the plaintiffs in state court. In finding a violation of the state's constitution, the court cited Hofeller's files as proof that Republicans drew district maps with the clear intention to minimize the voting power of Democratic voters. See Mark Joseph Stern, *North Carolina Court Strikes Down Gerrymander, Citing Smoking Gun Evidence in the Hofeller Files*, SLATE (Sept. 3, 2019, 6:48 PM), <https://www.slate.com/news-and-politics/2019/09/north-carolina-court-strikes-down-partisan-gerrymander-hofeller.html> [<https://perma.cc/E36Q-Y4SQ>]. Hofeller's files were also central to the legal battle over adding a citizenship question to the 2020 census and the Supreme Court's ruling that the Justice Department provided a pretextual explanation by claiming that the citizenship question was needed to assist in the enforcement of the VRA. See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

83. See *Detzner*, 172 So. 3d at 415–16.

84. See *Rucho*, 139 S. Ct. at 2524 n.6 (Kagan, J., dissenting).

85. See *id.*

86. See Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 469 (2010); see also Noah Feldman, *Gerrymandering Is a Cancer State Courts Can't Cure*, BLOOMBERG OPINION (Sept. 5, 2019, 11:10 AM), <https://www.bloomberg.com/opinion/articles/2019-09-05/n-c-court-s-anti-gerrymandering-rule-is-a-poor-consolation-prize> [<https://perma.cc/ZNP6-9TEH>].

elected judges are political actors who may often benefit from partisan gerrymandering.⁸⁷

Finally, even if plaintiffs succeed in convincing state judges to strike down gerrymandered maps as violating that state’s constitution, state courts will likely be unable to fundamentally change the state’s map-drawing process as courts may only strike down the most extremely gerrymandered maps.⁸⁸ For example, after a state court in North Carolina struck down state legislative districts as discriminating against Democrats in violation of the state constitution, the state’s Republican-led legislature created new legislative districts that were only slightly less gerrymandered.⁸⁹

B. Independent Redistricting Commissions

In light of *Rucho* and the difficulties of ending gerrymandering through state courts, many states are turning to independent redistricting commissions (IRCs) as the most promising avenue for curbing partisan gerrymandering.⁹⁰ This section provides a brief overview of how states implement and regulate IRCs and the various political and constitutional challenges that state IRCs face.

1. Background

State legislators have historically had the authority to draw electoral districts and this remains true in most states.⁹¹ However, an increasing number of states are transferring the map-drawing authority from legislators to nonpartisan IRCs.⁹² These commissions attempt to curb partisan gerrymandering by insulating the redistricting process from the political branches and giving the power over redistricting to an independent

87. See Devins & Mansker, *supra* note 86, at 469–70; see also Amy Gardner et al., *Redistricting Activists Brace for Wall of Inaction as Battle Moves to States*, WASH. POST (Nov. 13, 2019), <https://www.washingtonpost.com/politics/2019/11/12/redistricting-activists-brace-wall-inaction-battle-moves-states/> [<https://perma.cc/X3ES-LF4W>] (“State courts are elected and they have a partisan tilt, and it tends to be the same as the legislature in most places.”).

88. See Sam Wang, *North Carolina’s New House Plan Still Has at Least Half the Partisan Skew of the Gerrymandered Map*, PRINCETON ELECTION CONSORTIUM (Sept. 14, 2019, 3:31 PM), <http://election.princeton.edu/2019/09/14/north-carolinas-new-house-plan-contains-over-half-as-much-partisanship-as-the-original-gerrymander/> [<https://perma.cc/TDQ4-M8UA>].

89. See *id.*

90. See Richard H. Pildes, *Redistricting Reform and the 2018 Elections*, HARV. L. REV. BLOG (Oct. 26, 2018), <https://blog.harvardlawreview.org/redistricting-reform-and-the-2018-elections/> [<https://perma.cc/9PR6-FXA9>]. But see Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1841–42 (2012) (arguing that IRCs cannot totally eliminate the inevitable partisan controversies associated with political line drawing).

91. See ROYCE CROCKER, CONG. RESEARCH SERV., R42831, CONGRESSIONAL REDISTRICTING: AN OVERVIEW 16 (2012), <https://fas.org/sgp/crs/misc/R42831.pdf> [<https://perma.cc/4MNT-T9PC>].

92. Pildes, *supra* note 90; see also Sara N. Nordstrand, Note, *The “Unwelcome Obligation”*: Why Neither State nor Federal Courts Should Draw District Lines, 86 FORDHAM L. REV. 1997, 2024–25 (2018).

commission.⁹³ IRCs can either be created through bipartisan legislation that delegates the legislature's map-drawing authority to an IRC or through direct voter referendums.⁹⁴

In both existing and proposed IRCs, there is a large degree of variability in the structure, design, and operation of IRCs.⁹⁵ IRCs also use a number of different approaches and criteria to guide the members of the commissions during the map-drawing process.⁹⁶ However, broadly, states have taken two basic approaches on how to instruct IRCs to create fair maps. The first approach used by states is to either prioritize or limit the map-drawing criteria to nonpartisan political considerations.⁹⁷ For example, California's IRC is guided by criteria—established by referendum—that electoral districts be contiguous, compact, and regular in shape and respect local political boundaries and communities of interest to the furthest extent possible.⁹⁸

The second approach used by states explicitly focuses on achieving certain political outcomes, such that districts are drawn to promote competitive elections and each political party receives about the same percentage of seats as the percentage of votes it received.⁹⁹ For example, Missouri's recently approved IRC is instructed by statute to design legislative districts “in a manner that achieves both partisan fairness and, secondarily, competitiveness.”¹⁰⁰ The statute explains that “[p]artisan fairness’ means parties shall be able to translate their popular support into legislative representation with approximately equal efficiency” and that “[c]ompetitiveness’ means that parties’ legislative representation shall be substantially and similarly responsive to shifts in the electorate’s preferences.”¹⁰¹

Some states have employed a mix of the nonpartisan and partisan approaches.¹⁰² For example, Utah's IRC is instructed to create districts “following natural and geographic features, boundaries, and barriers” to the greatest extent possible.¹⁰³ The Utah commission is also instructed not to

93. See David Gartner, *Arizona State Legislature v. Arizona Independent Redistricting Commission and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551, 552 (2019).

94. See *Creation of Redistricting Commissions*, NAT'L CONF. ST. LEGISLATURES (Apr. 6, 2018), www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx [https://perma.cc/7XZ8-Z9JG]; Laurence Morel, *Referendum*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 501, 501 (Michael Rosenfeld & András Sajó eds., 2012) (“The referendum is a device of direct democracy by which the people are asked to vote directly on an issue or policy. It differs from an election, which is a vote to elect persons who will make decisions *on behalf of* the people . . .”).

95. Pildes, *supra* note 90.

96. Compare CAL. CONST. art. XXI, § 2(c)(2), with MO. CONST. art. III, § 3(c)(1)(b).

97. Pildes, *supra* note 90.

98. CAL. CONST. art. XXI, § 2(c)(2).

99. Pildes, *supra* note 90.

100. MO. CONST. art. III, § 3(c)(1)(b).

101. *Id.*

102. See, e.g., MICH. CONST. art. IV, § 13; UTAH CODE ANN. § 20A-19-103 (LexisNexis 2020).

103. UTAH CODE ANN. § 20A-19-103(2).

“divide districts in a manner that purposefully or unduly favors or disfavors . . . any political party.”¹⁰⁴

2. Recent Successes

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,¹⁰⁵ the Supreme Court upheld the constitutionality of IRCs created by voter referendums.¹⁰⁶ Since *Arizona State Legislature*, many states have passed direct voter referendums that create IRCs, and several other bipartisan measures are underway to fix the map-drawing process ahead of the next round of redistricting in 2021.¹⁰⁷ In the 2018 midterm election cycle, voters created IRCs through direct referendums in Colorado, Michigan, Missouri, and Utah.¹⁰⁸ Furthermore, in light of *Rucho* and the lack of other viable avenues to curb gerrymandering, reformers and advocacy organizations aiming to create fair electoral maps have identified the creation of IRCs at the state level as one of the most promising avenues for redistricting reform.¹⁰⁹

However, despite some of the recent successes in creating IRCs at the state level, IRCs face significant political and constitutional barriers that make them an unlikely avenue for achieving nationwide redistricting reform.

3. Political Barriers

The most significant recent efforts to create IRCs at the state level have been accomplished through direct voter initiatives.¹¹⁰ However, creating IRCs through direct voter initiatives is an inherently limited remedy for achieving nationwide redistricting reform, as only twenty-four states have the ability to pass legislation or constitutional amendments through direct voter referendums.¹¹¹

104. *Id.* § 20A-19-103(3).

105. 135 S. Ct. 2652 (2015).

106. *Id.* at 2659, 2677; *see also infra* notes 120–24 and accompanying text (discussing the Court’s opinion in *Arizona State Legislature*).

107. Pildes, *supra* note 90.

108. *See* Mark Joseph Stern, *The 2018 Election Was a Body Blow to Partisan Gerrymandering*, SLATE (Nov. 7, 2018, 1:39 PM), <https://www.slate.com/news-and-politics/2018/11/partisan-gerrymandering-2018-election-michigan-colorado.html> [<https://perma.cc/UB79-TVVZ>].

109. *See, e.g.*, Thomas Wolf, *Gerrymandering Symposium: Supreme Court Confirms That It Will Not Save Our Maps, Only Voters Can*, SCOTUSBLOG (June 28, 2019, 3:08 PM), <https://www.scotusblog.com/2019/06/gerrymandering-symposium-supreme-court-confirms-that-it-will-not-save-our-maps-only-voters-can/> [<https://perma.cc/48M6-B5A6>].

110. *See* Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/citizen-and-legislative-efforts-reform-redistricting-2018> [<https://perma.cc/5PP6-DPWY>].

111. *See* Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 695 (2010). For a chart of states with direct voter initiatives and referendums, *see Initiative and Referendum States*, NAT’L CONF. ST. LEGISLATURES, www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx [<https://perma.cc/EM4X-KEUL>] (last visited Mar. 17, 2020).

In states without direct voter referendums, IRCs can only be created through bipartisan legislation that delegates the legislature's map-drawing authority to an IRC.¹¹² Yet, the creation of IRCs through bipartisan legislation is a near impossibility in gerrymandered legislatures.¹¹³ This is because many elected representatives maintain their offices through partisan gerrymandering and therefore have an incentive to perpetuate the practice.¹¹⁴ Furthermore, because gerrymandering blunts voters' preferences, anti-gerrymandering voters would need to win a large supermajority of the vote to undo a gerrymandered legislature.¹¹⁵ In other words, once a legislature is gerrymandered, the introduction of bipartisan legislation creating IRCs is highly unlikely, given that IRCs undermine partisan gerrymandering's chief aim of entrenching partisan advantage.

The difficulty of creating IRCs through bipartisan legislation is highlighted by the fact that states that have created IRCs through direct referendums have only been able to do so in the face of intense opposition by state legislators.¹¹⁶ For example, in Missouri, where voters recently approved a referendum that would turn redistricting over to an independent state demographer, members of the state legislature have already introduced legislation that would repeal the referendum.¹¹⁷ The experience in Missouri highlights how states that establish IRCs through direct referendum would likely be unable to do the same thing if the issue is left to the traditional legislative process.¹¹⁸

4. Uncertain Constitutional Status

In addition to various political barriers, it is also unclear whether the Supreme Court will continue to uphold the constitutionality of IRCs created through direct referendums.¹¹⁹ While the Court upheld the constitutionality of IRCs created by voter referendums in *Arizona State Legislature*, it did so

112. Hebert & Jenkins, *supra* note 10, at 557.

113. *See id.*

114. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523–24 (2019) (Kagan, J., dissenting).

115. *See, e.g.*, Maggie Astor & K. K. Rebecca Lai, *What's Stronger Than a Blue Wave?: Gerrymandered Districts*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/interactive/2018/11/29/us/politics/north-carolina-gerrymandering.html> [https://perma.cc/B8T5-374T]; Jeff Stein, *Gerrymandering Means Democrats Are Playing a Rigged Game—in Georgia and Everywhere Else*, VOX (Apr. 18, 2017, 11:35 AM), <https://www.vox.com/policy-and-politics/2017/4/18/15325842/georgia-democrats-gerrymandering-ossoff> [https://perma.cc/T4WG-ETDG].

116. *See* Nicholas O. Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 380–81 (2007) (arguing that IRCs created by referendums are well suited to combat gerrymandering because they allow voters to bypass the self-interested politicians who typically oppose efforts at redistricting reform).

117. *See* H.R.J. Res. 48, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

118. Hebert & Jenkins, *supra* note 10, at 557; Stephanopoulos, *supra* note 116, at 380–81.

119. *See* Richard L. Hasen, *The Supreme Court Could Make Gerrymandering Worse*, ATLANTIC (Jan. 7, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/supreme-court-will-rule-gerrymandering-md-and-nc/579550/> [https://perma.cc/BAB2-BAUS] (discussing the possibility that the Court may prevent the creation of state IRCs through direct referendums by overruling *Arizona State Legislature*).

by a narrow 5-4 majority and the now retired Justice Kennedy provided the fifth vote for the majority.¹²⁰ At issue in *Arizona State Legislature* was whether the term “the legislature” in the U.S. Constitution’s Elections Clause precluded a state’s people from creating an IRC by direct referendum that operated independently of a state’s legislature.¹²¹ The Court concluded that the original public meaning of the Elections Clause and the Court’s own precedent supported interpreting the Clause as encompassing a state’s entire legislative process and not merely its legislative body.¹²² Furthermore, the Court explained that a state’s entire legislative process includes the people acting through the initiative process—through which the people can create IRCs.¹²³ In a sharply worded dissent, Chief Justice Roberts criticized the majority, writing that their interpretation of the Elections Clause was “a magic trick . . . [that] has no basis in the text, structure, or history of the Constitution.”¹²⁴

Given the changed composition of the Court after the retirement of Justice Kennedy and Chief Justice Roberts’s vigorous disagreement with the *Arizona State Legislature* decision, it is unclear whether the Court will continue to uphold the constitutionality of IRCs created by direct referendums.¹²⁵ This major constitutional uncertainty, as well as the various political barriers discussed above, makes it unlikely that IRCs created at the state level can achieve comprehensive redistricting reform.¹²⁶

C. Congressional Legislation

Congress has broad constitutional authority pursuant to the Elections Clause to enact voting legislation and regulate federal congressional elections.¹²⁷ Records from the ratification debates show that the framers understood the Elections Clause as giving Congress the ultimate authority to regulate federal elections and that this broad grant of power was necessary to

120. *See* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2657 (2015).

121. *See id.* at 2659.

122. *See id.* at 2666–68.

123. *See id.*

124. *Id.* at 2677–78 (Roberts, C.J., dissenting).

125. Hasen, *supra* note 119; *see also* Leah Litman, *Republicans Say the First Amendment Protects the Right to Gerrymander*, SLATE (Aug. 5, 2019, 1:11 PM), <https://www.slate.com/news-and-politics/2019/08/michigan-partisan-gerrymander-lawsuit.html> [<https://perma.cc/X8SK-WRZ2>] (discussing a First Amendment challenge to the recently approved IRC in Michigan).

126. *But see* Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania (2018)*, 17 ELECTION L.J. 264, 282–84 (2018) (asserting that the Pennsylvania Supreme Court’s approach of striking down partisan gerrymandering under a clause in its state constitution that requires elections be “free and equal” can be applied to other potential partisan gerrymandering challenges brought under state constitutions containing similar language).

127. The Elections Clause reads in full: “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 Place of chusing Senators.” U.S. CONST. art. I, § 4.

prevent partisan manipulation by the states.¹²⁸ Furthermore, contemporary and historical Supreme Court doctrine has reaffirmed Congress's unusually far-reaching constitutional authority to enact election law and clarified that this authority encompasses legislation setting how states must draw political maps for federal congressional elections.¹²⁹

1. The Ratification Debates and the Original Public Understanding of the Elections Clause

Records from the debates during the Constitutional Convention support the proposition that the framers intended the Elections Clause to protect federal elections from instances of state impropriety or inaction, which may include partisan gerrymandering.¹³⁰ During the ratification debates at the 1787 Constitutional Convention in Philadelphia, some delegates objected to Congress's wide-ranging authority under the proposed Elections Clause.¹³¹ Most notably, Charles Pinckney and John Rutledge moved to completely remove Congress's oversight power from the Elections Clause.¹³² Many delegates spoke against the Pinckney-Rutledge motion, arguing that electoral oversight is an essential power of a national government.¹³³ In an extended speech, James Madison defended congressional electoral oversight as a necessary check on partisan manipulation of the election process by the states.¹³⁴ Following Madison's comments, the delegates declined to adopt the Pinckney-Rutledge motion and even inserted additional language to allow Congress to both make and alter election regulations.¹³⁵

The congressional oversight power in the Elections Clause remained a subject of debate during the state ratification conventions.¹³⁶ Anti-federalists feared that Congress's power under the Elections Clause would infringe on states' rights and create too great a consolidation of federal power.¹³⁷ Echoing Madison's comments at the Philadelphia convention, Federalists responded that the oversight power was necessary to counter state legislatures set on undermining fair representation through measures like

128. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240–41 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS]; see also MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 340–42 (2016).

129. See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013); *Vieth v. Jubelirer*, 541 U.S. 267, 276–77 (2004); *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

130. See FARRAND'S RECORDS, *supra* note 128, at 240–41; see also Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1061–62 (2005) (arguing that the framers intended the Elections Clause to be a limitation on the ability of state legislatures to manipulate the outcomes of congressional elections).

131. Greene, *supra* note 130, at 1031–33.

132. See *id.*; see also *Vieth*, 541 U.S. at 275.

133. Greene, *supra* note 130, at 1031–33.

134. “[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.” FARRAND'S RECORDS, *supra* note 128, at 240–41.

135. Greene, *supra* note 130, at 1031–33.

136. See *id.*; see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019).

137. Greene, *supra* note 130, at 1031–33.

malapportionment.¹³⁸ For example, in Massachusetts, delegates referenced recent efforts by the Rhode Island legislature to deprive developing population centers of their proper electoral weight as evidence that the congressional oversight power was needed to preserve the will of a majority of the people.¹³⁹

The framers could not foresee the rise of the national two-party system or how sophisticated mapping software could make it relatively easy to entrench partisan power. However, the records from the ratification debates clearly show that the founders understood the Elections Clause as giving Congress the power to regulate federal elections, especially when Congress exercises this power in response to partisan manipulation by the states.

2. Judicial Interpretation of the Elections Clause

The Supreme Court’s case law has reaffirmed Congress’s comprehensive and wide-ranging authority to regulate federal elections under the Elections Clause.¹⁴⁰ While the Elections Clause gives Congress wide-ranging power to regulate the redistricting of federal congressional districts, this power does not extend to the regulation of state legislative districts.¹⁴¹

The Court has consistently interpreted the Elections Clause as giving Congress wide-ranging power to regulate the redistricting of federal congressional districts.¹⁴² For example, in *Arizona v. Inter Tribal Council of Arizona, Inc.*,¹⁴³ Justice Antonin Scalia—writing for a majority that included Chief Justice Roberts—held that “Times, Places, and Manner . . . are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections.’”¹⁴⁴ Furthermore, Justice Scalia explained that federal election regulations supersede any inconsistent state regulations because Congress’s power to regulate federal elections under the Elections Clause is “paramount, and may be exercised at any time, and to any extent which it deems expedient.”¹⁴⁵ In *Vieth v. Jubelirer*,¹⁴⁶ Justice Scalia, writing for a plurality that included Justice Clarence Thomas, reiterated his view of a far-reaching power under the Elections Clause, holding that the Elections Clause gives Congress the power to create a complete code for federal

138. KLARMAN, *supra* note 128, at 340–42.

139. Greene, *supra* note 130, at 1038–39.

140. *See supra* note 129 and accompanying text.

141. *See Ex parte Siebold*, 100 U.S. 371, 393 (1879); *United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981). This Note proposes the regulation of congressional redistricting. As a result, the regulation of purely state elections is ultimately outside the scope of this Note, but for further research on alternative sources of congressional power to regulate state elections, see Conner Johnston, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post-Shelby County*, 62 UCLA L. REV. 236, 239 (2015).

142. *See supra* note 129 and accompanying text.

143. 570 U.S. 1 (2013).

144. *Id.* at 8–9 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

145. *Id.* at 9; *see also Ex parte Siebold*, 100 U.S. at 384 (“When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to ‘make or alter.’”).

146. 541 U.S. 267 (2004).

elections, including the authority to regulate redistricting and prevent partisan gerrymandering.¹⁴⁷

Justice Scalia's contemporary view of an extensive Elections Clause power is consistent with the Court's historical interpretation of the Elections Clause.¹⁴⁸ In *Smiley v. Holm*,¹⁴⁹ the Court interpreted the "Times, Places and Manner" of elections broadly to include all policies necessary "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."¹⁵⁰ Specifically, the Court held that Congress's power under the Elections Clause includes the authority to enact a "complete code" for federal elections and that this code can include laws related to "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."¹⁵¹

The Court's Elections Clause jurisprudence has also reinforced the proposition that Congress's power to regulate federal elections is an essential plenary authority over the states.¹⁵² Finally, the Court has also held that the Elections Clause is unique in the power it affords Congress to displace state law and that this power essentially functions as a congressional veto, to be used at Congress's discretion, over state election laws.¹⁵³ For example, in *Foster v. Love*,¹⁵⁴ the Court explained that it is "well settled" that Congress has the authority under the Elections Clause to "override state regulations" by creating comprehensive rules for federal elections that are binding on the states.¹⁵⁵

Constitutional sources of congressional legislative power are typically limited by federalism constraints, such as the anticommandeering principle and the Court's preemption doctrine.¹⁵⁶ However, the Court has held that Congress's legislative power under the Elections Clause is not limited by these standard federalism constraints.¹⁵⁷ For example, in *Inter Tribal*, Justice Scalia held that the Court's preemption doctrine—which protects state sovereignty by presuming that Congress does not intend to preempt state law

147. *Id.* at 276–77 ("The power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant.").

148. *See Foster v. Love*, 522 U.S. 67, 69 (1997); *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

149. 285 U.S. 355 (1932).

150. *Id.* at 366.

151. *Id.*

152. *See, e.g., Cook v. Gralike*, 531 U.S. 510, 523–24 (2001); *see also* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 16 (2007).

153. *See* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2218 (2018); *see also* Johnston, *supra* note 141, at 239.

154. 522 U.S. 67 (1997).

155. *Id.* at 69 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–33 (1995)).

156. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992).

157. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14–15 (2013); *see also* Tolson, *supra* note 153, at 2218.

unless it says so clearly—does not apply to legislation enacted under the Elections Clause.¹⁵⁸ Justice Scalia explained that the Elections Clause was designed to allow Congress to preempt state law as “the power the Elections Clause confers is none other than the power to pre-empt.”¹⁵⁹

Lower federal courts have also interpreted the Elections Clause as granting Congress broad authority to preempt state law in order to regulate federal elections.¹⁶⁰ In cases challenging the constitutionality of the National Voter Registration Act of 1993 (NVRA), lower courts consistently held that Congress’s Elections Clause authority exceeds its Commerce Clause authority, which is limited by standard federalism constraints.¹⁶¹ For example, in *Ass’n of Community Organizations for Reform Now (ACORN) v. Edgar*,¹⁶² the Seventh Circuit rejected an argument that Congress could not force Illinois to administer the NVRA.¹⁶³ In support of the court’s decision, Judge Richard Posner explained that, in the context of the Elections Clause, “Congress was given the whip hand” to enact federal election legislation and compel states to administer its provisions.¹⁶⁴

3. Legislative Proposals

Congress has made several attempts to use its far-reaching “whip hand” authority under the Elections Clause to address partisan gerrymandering.¹⁶⁵ In 2010, congressional Democrats introduced the Congressional Redistricting Formula Act, which would have required states to follow redistricting standards of compactness, contiguity, and respect for political subdivisions.¹⁶⁶ The Act also would have prohibited the establishment of congressional districts that were drawn “with the major purpose of diluting the voting strength of any person, or group, including any political party,” except when necessary to comply with the VRA.¹⁶⁷

Another example of proposed federal anti-gerrymandering legislation is the Fairness and Independence in Redistricting Act of 2005.¹⁶⁸ This bill would require every state to establish an IRC to adopt redistricting plans.¹⁶⁹

158. *Inter Tribal*, 570 U.S. at 14–15.

159. *Id.* at 14.

160. *See, e.g.*, *United States v. Slone*, 411 F.3d 643, 648–50 (6th Cir. 2005) (upholding a federal statute criminalizing vote-buying based on the broad powers conferred by the Elections Clause).

161. *See Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (distinguishing Congress’s broad powers pursuant to the Elections Clause from its more limited powers under the Commerce Clause); *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836–37 (6th Cir. 1997) (noting that unlike the Spending Clause, the Elections Clause explicitly grants Congress the power to force states to adopt federal regulations).

162. 56 F.3d 791 (1995).

163. *Id.* at 794.

164. *Id.*

165. *See, e.g.*, H.R. 1, 116th Cong. (2019); H.R. 6250, 111th Cong. § 2(b) (2010); H.R. 2642, 109th Cong. § 3(a) (2005).

166. H.R. 6250 § 2(b).

167. *Id.*

168. H.R. 2642.

169. *Id.* § 3(a).

The bill also set forth criteria for IRCs to use, such as compactness, contiguity, and population equality, and prohibited consideration of voting history, political party affiliation, or incumbent representative's residence.¹⁷⁰

Most recently, congressional Democrats introduced the For the People Act of 2019.¹⁷¹ Among other things, the bill would require states to adopt fifteen-member IRCs that would draw congressional districts and establish certain redistricting criteria, including the protection of communities of interest.¹⁷² On March 8, 2019, the House of Representatives passed the bill along partisan lines.¹⁷³ However, Senate Majority Leader Mitch McConnell has indicated that he will not allow a vote on the bill, effectively killing the bill's chances of becoming law.¹⁷⁴

Partisan gerrymandering and electoral reform have also been important issues in the 2020 Democratic Party presidential primaries, with several candidates already releasing plans to combat gerrymandering.¹⁷⁵ For example, Democratic presidential candidate Senator Elizabeth Warren released a plan that would require states to use IRCs to draw federal congressional districts and provide monetary incentives for states to use IRCs to draw state congressional districts.¹⁷⁶

As noted by Justice Elena Kagan in her *Rucho* dissent, what all of these proposals have in common is that they are merely proposals, not laws.¹⁷⁷ Because politicians who benefit from partisan gerrymandering "maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight."¹⁷⁸ However, the House's recent ability to pass the For the People Act of 2019 suggests that the political barriers to enacting a federal anti-gerrymandering law may not be so steep. Furthermore, unlike the creation of state IRCs by direct referendum, the creation of IRCs by congressional anti-gerrymandering legislation is on far more solid constitutional ground because Congress has a unique repository of power to regulate federal elections under the Elections Clause.¹⁷⁹

170. *Id.* § 4(b).

171. H.R. 1, 116th Cong. (2019).

172. *Id.* § 2411.

173. See Miles Parks, *House Passes Extensive Election and Campaign Finance Overhaul Bill*, NPR (Mar. 8, 2019, 11:32 AM), <https://www.npr.org/2019/03/08/701455283/house-passes-extensive-election-and-campaign-finance-overhaul-bill> [<https://perma.cc/YMU4-836T>].

174. See *id.*

175. See Maggie Astor, *Voting Rights Were Already a Big 2020 Issue. Then Came the Gerrymandering Ruling.*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/politics/supreme-court-gerrymandering-democrats.html> [<https://perma.cc/M7TU-SV3M>].

176. Elizabeth Warren, *My Plan to Strengthen Our Democracy*, MEDIUM (June 25, 2019), <https://medium.com/@teamwarren/my-plan-to-strengthen-our-democracy-6867ec1bcd3c> [<https://perma.cc/JUT9-YFFQ>].

177. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2524 (2019) (Kagan, J., dissenting).

178. *Id.*

179. See *supra* note 129 and accompanying text; see also Greene, *supra* note 130, at 1031–33; Tolson, *supra* note 153, at 2218.

III. A PROPOSAL FOR COMPREHENSIVE REDISTRICTING REFORM

This Part argues that congressional legislation is the only pathway to achieve comprehensive and nationwide redistricting reform. Citing the Elections Clause’s unique place in the constitutional scheme, as well as the lack of alternatives at the state level, Part III.A argues that Congress’s authority to enact anti-gerrymandering legislation is likely the only remaining hope for comprehensive redistricting reform. This Part also argues that Congress should use its far-reaching authority under the Elections Clause to enact legislation that requires states to adopt IRCs for congressional redistricting. Part III.B discusses the federalism concerns that would result from this type of legislation and argues that the flexible and diverse criteria of IRCs can help alleviate these federalism concerns by giving states wide discretion in choosing their own versions of what constitutes a “fair” map.

A. Congressional Legislation as the Last Hope for Redistricting Reform

Partisan gerrymandering poses a fundamental threat to American democracy.¹⁸⁰ Entrenching partisan power through partisan gerrymandering corrodes democracy by decreasing competitive elections, permitting the election of representatives that are unrepresentative of the electorate, and diluting the franchise of a large number of voters solely because of their party affiliation.¹⁸¹ These concerns are more pressing than ever after the Supreme Court’s decision in *Rucho*, which declared partisan gerrymandering to be a nonjusticiable political question and effectively foreclosed the federal judiciary as an avenue for achieving redistricting reform.¹⁸² Despite some limited successes, state courts are also unlikely to be an avenue for comprehensive redistricting reform.¹⁸³ Some states, particularly those that have created IRCs through direct voter referendums, have been able to mitigate the democratic harms imposed by partisan gerrymandering by removing elected representatives from the redistricting process.¹⁸⁴ However, as discussed above, the creation of IRCs at the state level faces constitutional and political barriers that would likely prevent systemic redistricting reform.¹⁸⁵

So what options are left for reformers seeking to end the pervasive practice of partisan gerrymandering in U.S. politics? Congress’s authority under the Elections Clause is the last hope for comprehensive redistricting reform. Federal legislation that compels states to adopt IRCs for federal elections would help promote fair representation at a national level by removing self-interested elected representatives from the redistricting process.¹⁸⁶

180. Stephanopoulos, *supra* note 12, at 2118–20.

181. *Id.*

182. *See supra* notes 77–80 and accompanying text.

183. *See supra* notes 86–88 and accompanying text.

184. *See supra* Part II.B.2.

185. *See supra* Parts II.B.3–4.

186. Gartner, *supra* note 93, at 563; *see also* Michael Li, *Five Ways H.R. 1 Would Transform Redistricting*, BRENNAN CTR. FOR JUST. (June 19, 2019), <https://www.brennancenter.org/our-work/reports-publications/five-ways-hr-1-would-transform-redistricting>.

Furthermore, unlike for state-level remedies, there is a strong constitutional basis for this type of federal action.¹⁸⁷ During the Constitution's ratification debates, the founders envisioned that the Elections Clause would provide Congress with a necessary tool to prevent the states from unfairly manipulating the electoral process through practices like extreme partisan gerrymandering.¹⁸⁸ Finally, the founders' view of Congress having a far-reaching plenary power over the states to prevent unfair manipulation of the electoral process has been reaffirmed by over one hundred years of Elections Clause jurisprudence.¹⁸⁹

The Elections Clause is not only an affirmative grant of power to the federal government that allows Congress to legislate irrespective of state sovereignty but also one that empowers Congress to aggressively police state action to protect the fundamental right to vote.¹⁹⁰ The Court has held that Congress's Elections Clause authority is neither constrained by the preemption doctrine nor limited by the anticommandeering principle, which prevents the federal government from commandeering state officers to administer federal law.¹⁹¹ The Elections Clause empowers Congress to "conscript state agencies" to carry out its election priorities and it "explicitly grants Congress the authority to force states to alter their regulations regarding federal regulations."¹⁹² Given the Elections Clause's unique place in the constitutional scheme, as well as the lack of better alternatives at the state level, Congress's authority under the Elections Clause is likely the only remaining hope for comprehensive redistricting reform.

B. Federalism Concerns and a Legislative Compromise

The drawing of electoral districts has historically been a core function of state government.¹⁹³ Therefore, while federal legislation that requires state adoption of IRCs has the strong potential to serve as a comprehensive remedy for partisan gerrymandering, it also poses potential federalism concerns as this proposed legislation would constitute a significant shift of power from the states to the federal government. In response to the passage of the For the People Act of 2019 in the House of Representatives, the Heritage Foundation, a conservative think tank, released a report arguing that legislation that requires states to adopt IRCs is unconstitutional because it strips away the ability of states to make their own decisions about

www.brennancenter.org/our-work/analysis-opinion/five-ways-hr-1-would-transform-redistricting [<https://perma.cc/A8YB-9T8R>].

187. *See supra* note 129 and accompanying text; *see also* Greene, *supra* note 130, at 1031–33; Tolson, *supra* note 153, at 2218.

188. Greene, *supra* note 130, at 1031–33.

189. *See supra* Part II.C.2.

190. Tolson, *supra* note 153, at 2218.

191. *See supra* notes 157–60 and accompanying text.

192. *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836–37 (6th Cir. 1997).

193. *See supra* note 91.

redistricting.¹⁹⁴ Indeed, given that the Court’s expanded Eleventh Amendment jurisprudence carves out a protected zone for state power under the Commerce Clause,¹⁹⁵ there is a possibility that the current Supreme Court could break with long-standing Elections Clause precedent and strike down federal legislation requiring states to adopt IRCs.

However, these federalism concerns can be partially alleviated by allowing states to have significant discretion in the mandates that they give to their respective IRCs. State IRCs currently use a number of different approaches and criteria to guide IRC members during the map-drawing process.¹⁹⁶ For example, states like California prioritize nonpartisan political considerations, like creating regularly shaped districts and preserving local communities of interest.¹⁹⁷ Other state IRCs, like the recently approved IRC in Missouri, prioritize certain political outcomes, such as competitive elections and proportional representation.¹⁹⁸ Legislation that requires states to adopt IRCs, while also permitting states to choose their own redistricting criteria, would allow states to continue to have a substantive role in the redistricting process. This kind of legislative compromise could alleviate federalism concerns without compromising the independent nature of IRCs that makes IRCs an effective remedy for partisan gerrymandering.

CONCLUSION

While *Rucho* dealt a major blow to redistricting activists, the Court’s decision did not “condemn complaints about districting to echo into a void.”¹⁹⁹ Nonetheless, with the Court foreclosing partisan gerrymandering claims from the federal judiciary and with only limited state-level redistricting remedies available, redistricting advocates have a difficult task ahead. Despite these barriers, there still remains a pathway to achieve comprehensive redistricting reform.

This Note proposes that Congress should exercise its far-reaching Elections Clause power to enact national legislation that compels states to adopt IRCs for federal elections, while allowing states to choose their own redistricting criteria to guide their respective IRCs. Calling for states to continue to have a substantive role in the redistricting process can alleviate federalism concerns, while also strengthening American democracy and

194. *The Facts About H.R. 1—the For the People Act of 2019*, HERITAGE FOUND. (Feb. 1, 2019), https://www.heritage.org/sites/default/files/2019-02/FS_182_0.pdf [<https://perma.cc/L54P-2HLW>].

195. *See, e.g.,* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (limiting Congress’s power to abrogate state immunity in the Age Discrimination in Employment Act of 1967); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (“Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”).

196. *See supra* Part II.

197. *See supra* notes 97–98.

198. *See supra* notes 99–101.

199. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

promoting fair representation at a national level by removing self-interested elected representatives from the redistricting process.