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The Consent of the Governed

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Abstract

The Consent of the Governed is a Kolbe Fellowship project investigating gerrymandering through the lens of mathematics, Supreme Court litigation, and the potential for redistricting reform. It was produced as a five-episode podcast during the summer of 2020; this paper is the transcription of the podcast script. The project begins with an analysis of the impact of gerrymandering on the composition of the current U.S. House of Representatives. It then investigates the arguments and stories of Supreme Court gerrymandering cases in the past twenty years within their political contexts, with a focus on the Court's reaction to different mathematical methods to measure partisan gerrymandering. The project also looks at the potential for state-level redistricting reform, including through state supreme court litigation and citizen-led ballot initiatives.

Listen to the podcast.

Keywords

Gerrymandering, redistricting, House of Representatives, Supreme Court, democracy

Disciplines

American Politics | Election Law | Mathematics

Comments

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The Consent of the Governed

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Part I: The Gerry-mander, REDMAP, and How to Win an Election Without Really Trying

Gerrymandering is the process of redrawing a Congressional or state legislative map in order to advantage a political party or protect an incumbent politician from being removed from power. The Constitution mandates that there be a reallocation of seats in the House of Representatives every ten years, which coincides with the Census (Article 1, Section 2). The Census records the population statistics for each state, and as state populations change, so too must the number of seats each state receives in the House of Representatives. In the upcoming 2020 reallocation, for example, states like New York, Alabama, and Pennsylvania are projected to lose 1 or more seats, while states such as Texas, Florida, and Colorado are projected to gain seats.[1]

In addition to affecting the balance of power between states, the reallocation demands that all states redistrict with now-updated Census data; as districts within a state must have (roughly) equal populations, as stipulated by a series of Supreme Court cases in the 1960s,[2] the new Census data forces all states to redraw their lines, even if the total number of districts in a state stays the same. Thus, every decade new maps must be produced across the nation, providing an opportunity for partisan interests to determine the political trajectory for (at least) the next decade, until another round of reapportionment forces the production of new maps.

In 31 states, the state legislature draws the Congressional district lines; additionally (and ironically), in 30 states, the state legislature draws their own district lines.[3] Thus, in the majority of states, the redistricting process is controlled by partisan interests, and this truth is reflected in the Congressional delegations from states in which the districts are controlled by state legislatures.[4] Comparing a study from the Brennan Center for Justice by Laura Royden and

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[1] Brianna Cea, "Potential Shifts in Political Power After the 2020 Census," *Brennan Center for Justice*, March 27, 2018, https://www.brennancenter.org/our-work/research-reports/potential-shifts-political-power-after-2020-census.
[2] Micah Altman and Michael McDonald, "Equal Population," *Public Mapping Project*, accessed December 3, 2020, http://www.publicmapping.org/what-is-redistricting/redistricting-criteria-equal-population. (See *Wesberry v Sanders* and *Reynolds v Sims*)
[3] "Who Draws the Maps? Legislative and Congressional Redistricting," *Brennan Center for Justice*, January 30, 2019, https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting.
[4] Daniel McGlone, "Here's a Map of Every State Legislator in 2019," *Azavea*, February 12, 2019. https://www.azavea.com/blog/2019/02/12/2019-legislator-map/; "Post Election 2019 State & Legislative Partisan Composition," National Conference of State Legislatures, November 22, 2019, https://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2019_Post-Election%20Nov%2022nd.pdf.

Michael Li entitled *Extreme Maps* to my own data, in states where the Congressional redistricting process was completely controlled by Republicans in 2011, in the last election, in 2018, there were 28 more Republican Representatives than would be proportional to their share of the vote.[5] In states where redistricting was under sole Democratic control in 2011, in 2018 Democrats netted 5 extra seats relative to their share of the vote. One reason for this is that in 2011, the most recent redistricting year, Republicans had sole control over the redistricting process in 16 states while Democrats enjoyed that power in only 6 states.

Partisan Gerrymandering has had an incredible affect on the partisan composition of Congress in the past decade, since the 2011 redistricting. In the past four election cycles—2012, 2014, 2016, and 2018—Republicans, who had sole control over redistricting in many more states than Democrats following their wave election in 2010, have netted a total of 70 more seats than would be proportional to their vote share, adjusting for equal voter turnout across districts. Without adjusting for voter turnout, and just taking the nationwide House of Representatives popular vote, Republicans have received 46 more seats than their vote share would translate to under a proportional system. The distinction between adjusting for voter turnout and using the national House popular vote is the difference between a single-member district system, like the current American institution, mandating proportionality and a nationwide proportional system, which is much less feasible in the context of our 250-year old republic; thus, the net 70 extra Republican seats is the more representative measure of the impact Gerrymandering has had on the composition of the House in the last decade.

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Gerrymandering has been an American issue since this nation's inception. Even before Elbridge Gerry's eponymous Gerrymander, in 1788 Patrick Henry redistricted the Virginia Congressional map to pit James Madison against James Monroe.[6] Henry, an anti-Federalist, sought to undermine Madison's accelerating political career by forcing him to run against the popular Monroe. Despite the Gerrymander, Madison won all the same. Thus, the first Gerrymander, rather than being a product of Elbridge Gerry, seems, as William Rives wrote in the first major biography of James Madison in 1859, *"to have been first put in practice, though ineffectually, by*

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[5] Laura Royden and Michael Li, "Extreme Maps," *Brennan Center for Justice*, May 9, 2017, https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme%20Maps%205.16_0.pdf; "Who Draws the Lines?" All About Redistricting, accessed December 3, 2020, https://redistricting.lls.edu/who.php.

[6] Thomas Rogers Hunter, "The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting," *Early American Studies: An Interdisciplinary Journal* 9, no. 3 (2011): 781-820, doi:10.1353/eam.2011.0023; David Daley, *Rat F**ked: Why Your Vote Doesn't Count* (New York: Liveright Publishing, 2019), xviii.

the great Virginia orator and tribune [Patrick Henry], against Mr. Madison in the first election of representatives under the Constitution."[7]

The legacy of Gerrymandering extends, therefore, from the first American election to our most recent, and continues to become an institution, rather than an exception.

The more widely recognized origin story of Gerrymandering is Massachusetts Governor Elbridge Gerry's infamous 1812 state senate map, which was designed to preserve the Democratic-Republican—Gerry's party's—legislative majority. The new state senate map looked so wild that one district, the Essex South District, included parts of 12 counties. Federalists seized on the odd shape of the district, and a cartoonist drew wings on the district, called it the Gerry-mander (as it somewhat resembled a salamander), and published it in the *Boston Gazette*. Despite the media attention, Gerry was much more successful at packing and cracking the Federalist opposition than Patrick Henry had been. According to David Daley's 2017 book *Rat F**ked*, *"the Federalists won 51,766 votes that year and elected 11 senators, while Gerry's party won 50,164 votes but 29 senators.*"[8]

The history of Patrick Henry's and Elbridge Gerry's Gerrymanders goes to show that Gerrymandering is by no means a new problem facing our democracy—and it really is an obstacle for American democratic expression. However, in the past 30 years—and especially in the last decade—partisan Gerrymandering has become an especially pertinent obstacle, not just for Democrats, for whom the Gerrymandering bells have primarily tolled, but for all citizens who seek representation in "the people's house." Gerrymandering is, ultimately, as many editorial boards at large publications have remarked, a way for politicians to pick their voters, rather than voters choosing their representatives.[9]

Additionally, Gerrymandering is by no means—or should not be—a partisan issue for voters; though the vast majority of Gerrymandered states today were redistricted by Republicans, this is primarily a product of the fact that the vast majority of states were controlled by Republicans in 2011, the most recent redistricting year. In 2011, 26 state legislatures were under sole Republican control, while only 17 state legislatures were under sole Democratic control.[10] It should also be

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[7] William C. Rives, *History of the Life and Times of James Madison*, 3 vols. (Boston: Little, Brown, 1859-1868), 2:655n1.
[8] Daley, *Rat F**ked*, xviii.
[9] New York Times Editorial Board, "Politicians Can Pick Their Voters, Thanks to the Supreme Court," *New York Times*, June 27, 2019, https://www.nytimes.com/2019/06/27/opinion/gerrymandering-supreme-court.html; Wayne Dawkins, "In America, voters don't pick their politicians. Politicians pick their voters," *The Guardian*, October 9, 2014, https://www.theguardian.com/commentisfree/2014/oct/09/virginia-gerrymandering-voting-rights-act-black-voters.
[10] "State Partisan Composition," National Conference of State Legislatures, November 8, 2020, https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx.

noted that in a much higher portion of those Democratically-controlled states (relative to Republican-controlled states) the state legislature did not have power over the redistricting process, as this was delegated to independent commissions, political commissions, or the courts.[11] Regardless, there are still some states that have Democratic Gerrymanders, the prime examples being Massachusetts and Maryland.

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In the United States today we have the greatest and most severe Gerrymandering problem in modern history. Though the problem did not begin in 2008 (it began, perhaps, in 1788), 2008 is a good starting point for understanding our current predicament. 2008 was an incredible Democratic wave election: Barack Obama was elected the first African-American president of the United States, and, frankly, it wasn't even close.[12] Obama won 365 Electoral Votes to John McCain's 173, with Obama flipping North Carolina, Florida, Virginia, Colorado, New Mexico, Nevada, Ohio, Indiana, and Iowa.[13] Obama came within a hair of also flipping Missouri and Montana. Democrats picked up 7 governorships and 8 senate seats, and held onto senate seats in deep red states such as Montana, South Dakota, Arkansas, Louisiana, and West Virginia. Finally, Democrats rounded out the landslide with 21 pickups in the House of Representatives, giving them 257 seats compared with Republicans' 178.

The 2008 election stunned Republicans: the editor of *National Review*, Rich Lowry, said of the 2008 election, *"It's a bad thing for the Republicans when you drill down into these states. It's like, where did all the Republicans go? Did they all move to Utah?*"[14]

Some of the most important elections, however, were generally overlooked, as they still are: the elections for state legislatures and the gubernatorial races. As I mentioned earlier, in the majority of states, the redistricting process is controlled by the state legislature, often with gubernatorial oversight. In 2008, the Democrats had majorities in most state legislatures, controlling 28 state senates and 32 state houses.[15] This continued a trend from the 2006 election, as Democrats gained majorities in 4 state legislatures in 2006 and gained another 4 in 2008. Despite the importance of state legislative elections—they are important for many reasons, among them being control over the Congressional redistricting process—both voters and the political parties

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[11] "Who Draws the Maps?" *Brennan Center for Justice*
[12] "Election Results 2008," *New York Times*, December 9, 2008, https://www.nytimes.com/elections/2008/results/president/map.html.
[13] "2004 Presidential General Election Results," U.S. Election Atlas, accessed December 3, 2020, https://uselectionatlas.org/RESULTS/national.php?year=2004.
[14] Daley, *Rat F**ked*, xviii.
[15] "2009 State and Legislative Partisan Composition," National Conference of State Legislatures, January 26, 2009, https://www.ncsl.org/documents/statevote/LegisControl_2009.pdf.

paid little attention to these unglamorous races. The 2008 legislative races fell where they may, and little party money was spent on legislative elections, campaign funds being directed instead to the Presidential, U.S. Senate, and House of Representatives races.

After the stunning Republican defeat in 2008, the Republican Party regrouped and came up with a strategy to take back power in 2010 and beyond. The plan was, at the same time, both ingenious and terrible for American democracy. It was called REDMAP, which stood for Redistricting Majority Project. The idea was to invest heavily in competitive state legislative races in the upcoming 2010 election, to take control of the redistricting process in as many states as possible, and to Gerrymander Congressional maps across the United States. The goal was not just to take back the House in 2010, but to maintain a majority in the legislative body for the next decade at least.

Working in the GOP's favor going into 2010 was, first, the fact that the president's party generally loses seats in the House of Representatives in midterm elections.[16] Second, was the *Citizens United* ruling, which essentially allowed for unlimited "dark money" to pour into party coffers from corporations and Super PACs.[17] Third, the Democratic canary in the coal mine was the surprise election of Republican Scott Brown, who succeeded Ted Kennedy, the "liberal lion of the Senate," as Senator of Massachusetts.[18] Brown's election broke the Democratic supermajority in the Senate, severely hinduring President Obama's push for universal health care.[19] And fourth, Democratic strategy did not focus on state legislatures like the Republican REDMAP did, and the Democrats did not fight for many of the critical state-level seats that Republicans targeted.

Karl Rove, the Former White House Deputy Chief of Staff for President George W. Bush, described REDMAP bluntly in the *Wall Street Journal*:

"There are 18 state legislative chambers that have four or fewer seats separating the two parties that are important for redistricting. Seven of these are controlled by Republicans and the other 11 are controlled by Democrats, including the lower houses in Ohio, Wisconsin, Indiana and Pennsylvania. Republican strategists are focused on 107 seats in 16 states. Winning these seats would give them control of drawing district lines for nearly 190 congressional seats."[20]

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[16] Jeffrey M. Jones, "Midterm Seat Loss Averages 37 for Unpopular Presidents," *Gallup*, September 12, 2018, https://news.gallup.com/poll/242093/midterm-seat-loss-averages-unpopular-presidents.aspx.
[17] Daley, *Rat F**ked*, xv.
[18] Michael Cooper, "G.O.P. Senate Victory Stuns Democrats," *New York Times*, January 19, 2010, https://www.nytimes.com/2010/01/20/us/politics/20election.html.
[19] Daley, *Rat F**ked*, xvi.
[20] Karl Rove, "The GOP Targets State Legislatures," *Wall Street Journal*, March 4, 2010, https://www.wsj.com/articles/SB10001424052748703862704575099670689398044.

David Daley put it well in *RatF**ked*:

"The assertion is so bold, yet so sensical, that one does not know whether to stand back and admire the audaciousness, indict the Democrats for gross negligence and lack of imagination, or simply howl over the undemocraticness of it all."[21]

REDMAP worked. Republicans flipped 3 state senates and 6 state houses in 7 states by spending about $8.2 million.[22] That's about as much money as was spent on a single U.S. House election, the race for the Michigan 7th district, in 2010.[23] Republican control over redistricting in those same 7 states has netted Republicans 50 seats over the past four elections relative to their portion of the vote. REDMAP has proven to be incredibly consequential and effective, maintaining a Republican majority in the House of Representatives through the 2012, 2014, and 2016 elections, despite Democrats receiving a majority of the popular vote in House elections in 2012.

REDMAP had its limits, however, and a series of Gerrymandering court cases throughout the 2010s slightly eroded Republican Gerrymanders. By 2016, three states—Florida, Texas, and Virginia—had had their Republican-Gerrymandered maps modified by courts, losing Republicans 2 House seats between 2014 and 2016, when the maps where redrawn.

The most significant victory for anti-Gerrymandering advocates in recent years came on January 22, 2018, when the Pennsylvania Supreme Court struck down the 2011 Republican legislature-drawn Congressional map, deeming it an unconstitutional partisan Gerrymander under the Pennsylvania Constitution.[24] The case, *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, was unlike other cases brought by anti-Gerrymandering groups in that it attempted to prove partisan Gerrymandering unconstitutional under state constitution rather than the U.S. Constitution—I'll discuss Supreme Court Gerrymandering cases more later. The Pennsylvania Supreme Court found partisan Gerrymandering unconstitutional under Article I, Section 5 of the Pennsylvania Constitution, which reads: "*Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.*"[25]

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[21] Daley, *Rat F**ked*, xvii.
[22] Ibid, xix.
[23] T. W. Farnam and Nathaniel Vaughn Kelso, "Races with spending reported by interest groups," *Washington Post*, 2010, https://www.washingtonpost.com/wp-srv/politics/campaign/2010/spending/race_list.html.
[24] "League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania," Brennan Center for Justice, October 29, 2018, https://www.brennancenter.org/our-work/court-cases/league-women-voters-pennsylvania-v-commonwealth-pennsylvania.
[25] Jonathan Lai, "The legal team in the Pa. gerrymandering case set their sights on N.C. They just won again," *The Philadelphia Inquirer*, September 4, 2019, https://www.inquirer.com/politics/pennsylvania/nc-gerrymandering-case-used-pa-model-20190904.html.

The court ordered that the legislature draw new maps before the 2018 midterm election, but the new maps were vetoed by Governor Tom Wolf, a Democrat, and the courts decided to draw the maps themselves. The new, court-drawn maps eliminated the Republican Gerrymander, and Democrats, who had previously held only 5 of Pennsylvania's 18 Congressional seats (despite receiving about 48.1% of the House popular vote in 2016),[26] now control 9 of Pennsylvania's 18 Congressional seats (having received about 53.9% of the House popular vote in 2018).[27]

REDMAP was limited by the courts to some extent, but it would still require a Democratic wave election at near-2008 levels in order for control of the House of Representatives to flip—in a kind of miracle for the Democratic Party, 2018 was just that. 2018 was a blue wave, though the Democratic resurgence was limited to a very great extent by REDMAP. In 2018, Democrats received about 54.4% of the national House popular vote and 235 seats in the House.[28] In contrast, in 2008, before REDMAP, Democrats received roughly 55.5% of the national House popular vote and 257 seats.[29] In other words, though Democrats received only 1.1% less of the 2018 vote share compared to 2008, they won 22 fewer seats in 2018 than they won in 2008, which represents about 5.1% of the seats in the House. Had Democrats translated their vote share to Representatives at the same rate they did in 2008, Democrats would have won 17 more seats, which would have put them at 252 seats in the House. Even in the bluest of elections, Gerrymandering has limited Democratic representation in the House of Representatives.

For Democrats, ending Gerrymandering should be the priority—it should be a centerpiece of national strategy and party platform. The Democratic Party got lucky in 2018, and taking the House proves that the party still has not just energy in it, but also the support of a majority of voters. But the state-level races that enabled REDMAP in the first place should be even more concerning for the Democratic Party; once the 2020 elections are through, state legislatures in a majority of states will be drawing the lines for the next decade, and retaking state governments is going to be an uphill battle for Democrats. The reason for this is, as you may have already guessed, Gerrymandering: in 2011, when the Congressional lines were redrawn, so were state legislative lines, in many cases by the same state legislators who would run for reelection in the new map. In 2018, one consequence of extreme Republican Gerrymandering at the state house level was that in three states—Pennsylvania, North Carolina, and Michigan—Democrats

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[26] This includes simulated House elections for the Pennsylvania 3rd, 13th, and 18th districts, as these districts were uncontested in 2016.
[27] This includes a simulated House election for the Pennsylvania 18th district, which was uncontested in 2018.
[28] "U.S. House Election Results 2018." *New York Times*, May 15, 2019. https://www.nytimes.com/interactive/2018/11/06/us/elections/results-house-elections.html.
[29] "Election Results 2008," *New York Times*.

received a majority of votes (54%, 53%, and 51%, respectively) but Republicans won control of the legislature.[30]

In *RatF**ked*, by David Daley, Norman Ornstein, political scientist and scholar at the conservative American Enterprise Institute, said, "*[REDMAP] means basically that the whole constitutional notion of the House as a mirror of popular views comes into jeopardy… Now, I don't believe the idea that a majority of the nationwide popular vote should automatically translate to a majority of the seats. But the idea that almost nothing happens when you have a broad public expressing its disfavor with the party in power and it doesn't do anything? That's not good.*"[31]

[30] Christopher Ingraham, "In at least three states, Republicans lost the popular vote but won the House," *Washington Post*, November 13, 2018, https://www.washingtonpost.com/business/2018/11/13/least-three-states-republicans-lost-popular-vote-won-house/.
[31] Daley, *Rat F**ked*, xxii.

Part II: The Judicial Problem

In 1986, the U.S. Supreme Court ruled in *Davis v. Bandemer* that partisan Gerrymandering cases were justiciable, meaning that they could be brought before courts.[32] However, no functional definition of Gerrymandering was established: in fact, the criterion required for a map to be ruled a Gerrymander were so rigorous that no map was deemed a partisan Gerrymander in federal court between 1986 and 2004.[33] Additionally, *Bandemer* did not, by any means, determine partisan Gerrymandering to be unconstitutional. The Indiana General Assembly map, which was challenged in *Bandemer*, had awarded 57 of 100 seats to Republicans despite Republicans receiving only about 48.1% of statewide votes. Though the Supreme Court ruled that the case was justiciable, they did not strike down the map as an unconstitutional partisan Gerrymander.

Racial Gerrymandering, in contrast, is unconstitutional, as established by the Voting Rights Act of 1965 and backed up by a series of Supreme Court cases in the past thirty years.[34] It should be noted, however, that the Voting Rights Act has since been essentially gutted by the Supreme Court;[35] nevertheless, the language on racial Gerrymandering and minority-majority districts remains somewhat strong, though the same cannot be said, of course, for federal oversight of state-run elections.[36]

Regardless, in 2004, the issue of partisan Gerrymandering and its justiciability was again brought before the Supreme Court in *Vieth v. Jubelirer*. In *Vieth*, the plaintiffs were three registered Democrats in Pennsylvania, who charged that the Pennsylvania General Assembly, which at the time was controlled by Republicans, had committed an unconstitutionally partisan Gerrymander against Democrats in the 2001 Congressional redistricting.[37]

Though the plurality of the court—Scalia, Rehnquist, O'Connor, and Thomas—found partisan Gerrymandering to be nonjusticiable, they did not garner a majority; Justice Kennedy joined the plurality only in ruling against the specific anti-Gerrymandering plaintiffs in *Vieth* and did not join the plurality in overturning *Davis v. Bandemer*.[38]

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[32] Davis v. Bandemer, 478 U.S. 109 (1986).
[33] Nicholas Stephanopoulos and Eric McGhee, "Partisan Gerrymandering and the Efficiency Gap," *University of Chicago Law Review* 82 (2015): 832–833, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457468.
[34] For cases relating to racial Gerrymandering, see Shaw v. Reno, 509 U.S. 630 (1993), Bush v. Vera, 517 U.S. 952 (1996), Shelby County v. Holder, no. 12-96, 570 U.S. 529 (2013), Cooper v. Harris, no. 15-1262, 581 U.S. __, 137 S. Ct. 1455 (2017).
[35] See Shelby County v. Holder, no. 12-96, 570 U.S. 529 (2013).
[36] See Alabama Legislative Black Caucus v. Alabama, no. 13-895, 575 U.S. __, 135 S. Ct. 1257 (2015), Cooper v. Harris, no. 15-1262, 581 U.S. __, 137 S. Ct. 1455 (2017).
[37] "Vieth v. Jubelirer," *Brennan Center for Justice*, April 28, 2004, https://www.brennancenter.org/our-work/court-cases/vieth-v-jubelirer.
[38] Vieth v. Jubelirer, 541 U.S. 306, 1 (2004) (Kennedy, J., concurring): "While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is

Vieth did, however, reject essentially every conceived standard to measure Gerrymandering developed before 2004. To demonstrate how substantial that rejection was, here's a list of methods to measure Gerrymandering that *Vieth* basically eliminated, as described in *Partisan Gerrymandering and the Efficiency Gap* by Nicholas Stephanopoulos and Eric McGhee:

"*Both the Bandemer plurality's approach and that of Justice Powell were judicially unmanageable, in the Vieth plurality's view. So too was the appellant's proposal of (1) predominant partisan intent, (2) systematic packing and cracking of a party's voters, and (3) a party's inability to translate a majority of votes into a majority of seats. And so too were Justice Stevens's intent-based tests, Justice Souter's elaborate five-part framework focused on disregard for traditional districting principles, and Justice Breyer's minority entrenchment standard.*"[39]

However, Justice Kennedy did leave the door open for a possible standard for Gerrymandering to emerge in the future. Two years later, in 2006, *League of United Latin American Citizens (LULAC) v. Perry* once again introduced the questions of partisan Gerrymandering justiciability and workable standards for Gerrymandering.[40] *LULAC* dealt with the aptly named issue of "re-redistricting": in 2003, the Texas legislature re-drew the maps despite it not being a decennial redistricting year.[41] The Texas congressional maps had previously been court-drawn, and had favored Republicans slightly. Following the 2003 re-redistricting, the maps greatly advantaged Republicans, and they picked up five congressional seats in the 2004 election.

A similar re-redistricting had occurred in Colorado the same year, and Colorado Attorney General Ken Salazar had filed suit against Colorado Secretary of State Donetta Davidson. The Colorado Supreme Court ruled in Salazar's favor, striking down the new maps as a violation of the Colorado Constitution. However, as *Salazar v. Davidson* struck down the re-redistricting under state constitution, the precedent did not directly translate to *LULAC*, as the plaintiffs argued that the new Texas maps violated the U.S. Constitution.[42]

The plaintiffs in *LULAC* utilized partisan symmetry measures to argue that the new Texas maps were Gerrymandered. Partisan bias, a kind of partisan symmetry measurement method, compares a party's seat share to their statewide vote share, estimating the outcome (in terms of seats) if the

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necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."

[39] Stephanopoulos and McGhee, "Partisan Gerrymandering," 841–842.

[40] League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006).

[41] "LULAC v. Perry (Sup. Ct. consolidated cases) Session v. Perry (E.D. Tex.)," Brennan Center for Justice, June 28, 2006, https://www.brennancenter.org/our-work/court-cases/lulac-v-perry-sup-ct-consolidated-cases-session-v-perry-ed-tex.

[42] People Ex Rel. Salazar v. Davidson 79 P.3d 1221 (2003).

party had received 50% of the statewide vote. The difference between the percentage of seats a party would receive in a hypothetical election in which the aggregate vote is split between two parties and 50% is the partisan bias of a map.[43] For example, if there are two parties in a state—Party A and Party B—and Party A receives only 45% of the seats while capturing 50% of the statewide vote, the map has a 5% partisan bias in favor of Party B.

In *LULAC*, Justice Stevens was the most adamant advocate of partisan symmetry, but the other three liberal justices—Souter, Ginsberg, and Breyer—and Justice Kennedy did express some interest.[44] However, Justice Kennedy did have some problems with partisan symmetry, problems that he hinted might be addressed in future methods to measure Gerrymandering.[45]

Justice Kennedy had four main concerns with partisan symmetry. First, he was concerned with the "uniform partisan swing" assumption. Uniform partisan swing is the assumption that, for calculating a hypothetical election (in the case of partisan symmetry, a hypothetical election with a 50/50 statewide vote split), the vote share would change by the same amount in every district. In other words, it is the idea that between elections, there is the same "swing" in every district. For example, as Stephanopoulos and McGhee described in *Partisan Gerrymandering and the Efficiency Gap*, "*if Democrats received 45 percent of the vote in a state, and a researcher wanted to know how many seats they would have won if they had received 50 percent, the researcher would simply add 5 percentage points to the actual Democratic vote share in each district.*"[46]

Kennedy's problem with uniform partisan swing was that it makes assumptions that are often inaccurate and unfounded. A district's swing may be influenced by any number of factors uniform partisan swing doesn't take into account, such as the candidates themselves—their incumbency, their politics, their record, etc.—or the political geography of the state—the number of swing and independent voters varies greatly between urban, suburban, and rural districts.[47]

Kennedy's second objection to partisan symmetry, which directly relates to the first, was: "*Even assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.*"[48] These hypothetical elections result from the use of the assumption of uniform partisan swing.

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[43] Bernard Grofman and Gary King, "The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry," *Election Law Journal* 2, no. 1 (2007): 2–35, https://gking.harvard.edu/files/jp.pdf.
[44] Stephanopoulos and McGhee, "Partisan Gerrymandering," 844.
[45] Ibid, 845–846.
[46] Ibid, 845 note 83.
[47] Ibid, 845, 859–860.
[48] League of United Latin American Citizens v. Perry, 548 U.S. 399, 13 (2006) (Kennedy, J.).

Third, Kennedy questioned where the threshold of partisan bias should be, above which a plan would be considered unconstitutional. Neither the plaintiffs nor any of the amicus briefs addressed the threshold, which, in retrospect, seems to be something of a gross oversight on the part of anti-Gerrymandering advocates. Kennedy sought a well-established threshold which would provide the court with a clear definition of an unconstitutional partisan Gerrymander—the plaintiffs in *LULAC* did not provide this.[49]

Fourth, and finally, Justice Kennedy wrote that partisan symmetry alone could not persuade a court to strike down a map. Instead, asymmetry could provide one perspective on a map, among other measures and considerations. Thus he wrote:

"Without altogether discounting its utility in redistricting planning and litigation, we conclude asymmetry alone is not a reliable measure of unconstitutional partisanship."[50]

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In 2018, a trio of high-profile Gerrymandering cases were argued before the Supreme Court. The first, *Lamone v. Benisek*, dealt with the Maryland congressional map drawn in 2011 by the Democratic Maryland General Assembly.[51] The second, *Rucho v. Common Cause*, regarded the remedial 2016 North Carolina congressional map, which was introduced by the Republican-controlled state legislature after the previous map was struck down as an unconstitutional racial Gerrymander.[52] The third case, *Gill v. Whitford*, was about the Wisconsin state house plan that was enacted in 2011 by the Republican-controlled state legislature.[53]

In *Lamone v. Benisek*, the conservative wing of the Supreme Court—Roberts, Thomas, Alito, Gorsuch, and Kavanaugh—formed the majority opinion and ruled that, contrary to *Davis v. Bandemer*, partisan Gerrymandering is nonjusticiable, a serious blow to anti-Gerrymandering advocates hoping for a strong nationwide ruling on the constitutionality of Gerrymandering. The reason for the ruling, as described in an article from the Brennan Center for Justice, was:

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[49] Stephanopoulos and McGhee, "Partisan Gerrymandering," 845–846.
[50] League of United Latin American Citizens v. Perry, 548 U.S. 399, 13 (2206) (Kennedy, J.).
[51] "Lamone v. Benisek," Brennan Center for Justice, July 29, 2019, https://www.brennancenter.org/our-work/court-cases/lamone-v-benisek.
[52] "Rucho v. Common Cause," Brennan Center for Justice, August 1, 2019, https://www.brennancenter.org/our-work/court-cases/rucho-v-common-cause.
[53] "Gill v. Whitford," Brennan Center for Justice, July 3, 2019, https://www.brennancenter.org/our-work/court-cases/gill-v-whitford.

"In the Supreme Court's 5-4 opinion in the cases out of North Carolina and Maryland, Chief Justice John Roberts explained that the federal courts cannot hear partisan gerrymandering cases because there are no "discernable and manageable standards" with which to identify when these gerrymanders are unconstitutional."[54]

Following the rulings on *Lamone v. Benisek* and *Rucho v. Common Cause*, *Gill v. Whitford* was dismissed by the Supreme Court on July 2nd, 2019.[55]

In the trio of cases, the plaintiffs used the Efficiency Gap, a method to measure Gerrymandering, as evidence of partisan Gerrymandering, among other mathematical tools.[56] However, the Efficiency Gap was dismissed by the majority in *Lamone*, *Rucho*, and *Gill* and by Chief Justice Roberts, who said of the Efficiency Gap, *"I can only describe [it] as sociological gobbledygook.*"

The Efficiency Gap is not sociological gobbledygook. In *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, the recent anti-Gerrymandering success in the Pennsylvania Supreme Court that struck down and replaced the state's Republican-Gerrymandered Congressional map, George Washington University political scientist Christopher Warshaw used the Efficiency Gap as a Gerrymandering measure before the court.[57] The Efficiency Gap was used in conjunction with other measures to persuade the court, possibly producing a model to fight Gerrymanders under other state constitutions.

This model was used again in *Common Cause v. Lewis* last year. That case concerned, yet again, the Republican-drawn North Carolina congressional map. However, this time the maps were successfully struck down and redrawn by the North Carolina Supreme Court, which ruled in the plaintiff's favor on state constitution grounds.[58] The new map is now in place and will be used in the 2020 House elections. Again, the Efficiency Gap was used by the plaintiff as evidence of partisan Gerrymandering, furthering the continued importance of the Efficiency Gap in state and federal-level court rulings on Gerrymandering.

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[54] Yurij Rudensky and Annie Lo, "Supreme Court Refuses to Stop Partisan Gerrymandering," *Brennan Center for Justice*, June 27, 2019, https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-refuses-stop-partisan-gerrymandering.
[55] Brennan Center for Justice, "Gill v. Whitford."
[56] Garrett Epps, "The Supreme Court's Choice on Partisan Gerrymandering," *The Atlantic*, March 28, 2018, https://www.theatlantic.com/politics/archive/2018/03/the-supreme-courts-choice-on-partisan-gerrymandering/556661/.
[57] Issie Lapowski, "The Geeks Who Put a Stop to Pennsylvania's Partisan Gerrymandering," *Wired*, February 20, 2018, https://www.wired.com/story/pennsylvania-partisan-gerrymandering-experts/.
[58] Will Doran, "After maps struck down in NC gerrymandering lawsuit, top Republican leader won't appeal," *The News & Observer*, September 3, 2019, https://www.newsobserver.com/news/politics-government/article234668747.html.

The Efficiency Gap has been touted by the anti-Gerrymandering movement as a solution to judicial calls for a better method to calculate Gerrymandering, if not at the federal level, then at least at the state level. But the Efficiency Gap has some serious problems, and other, more effective solutions are available.

2. Wasted Votes

The Efficiency Gap and a Solution to Gerrymandering

Part I: Breaking a Quorum

In 2000, prior to the 2001 nationwide redistricting, the Texas congressional delegation was comprised of 18 Democrats and 12 Republicans, slightly favoring Democrats, who had received approximately the same 48% of the statewide House popular vote as Republicans. In 2001, the Republican-controlled legislature attempted to redraw the lines and Gerrymander the congressional map to disadvantage Democrats. However, this effort ultimately failed, as the new maps did not pass the state legislature, and the courts stepped in and drew the maps themselves.[59] In the 2002 House elections, Democrats won in 17 of Texas's 32 districts, despite losing the statewide House popular vote. The Republican legislature, seeing its failure in the 2002 elections, decided to redistrict the congressional map yet again, despite it not being a decennial redistricting year.

Texas Republicans made redistricting a priority primarily because the U.S. House was fairly close between Democrats and Republicans, with Democrats holding 204 seats to Republicans' 229. If Democrats did well in the next House elections in 2004, they could take the House and derail President Bush's policy agenda. In a predominantly Republican state like Texas, the legislature reasoned, seats were far more vulnerable, especially if entrenched Democratic incumbents could be removed by a Gerrymander.[60]

Under the guidance of U.S. House Majority Leader Tom DeLay, Republicans drew up a map that would ensure a Republican-majority congressional delegation. In *How Democracies Die*, authors Steve Levitsky and Daniel Ziblatt wrote: *"The new map left six Democratic congressmen especially vulnerable. The Plan was pure hardball. As one analyst posited, it "was as partisan as the Republicans thought the law would allow."*[61]

Democrats in the Texas state legislature, desperate to stop the Gerrymander, turned to Jim Dunnam, the chairman of the State House Democratic Caucus. Malcolm Gladwell interviewed Dunnam in Season 3, Episode 1 of his eclectic podcast, *Revisionist History*.[62] In the interview,

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[59] Ed Lavandera, "Texas House paralyzed by Democratic walkout," *CNN*, May 19, 2003, https://www.cnn.com/2003/ALLPOLITICS/05/13/texas.legislature/.
[60] Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishing Group, 2018), 154.
[61] Ibid.
[62] Malcolm Gladwell, "Divide and Conquer," *Revisionist History*, May 16, 2018, audio, http://revisionisthistory.com/episodes/21-divide-and-conquer.

Dunnam said, *"I had members coming up to me and say, 'You know, Jim, you've got to do something,' and I was like, 'What are we going to do?' I said, 'Well, we can bust the quorum.'"*

The Texas Assembly is comprised of 150 representatives; at the time, 88 of those were Republicans and 62 were Democrats.[63] A quorum in the Assembly is 100, so Dunnam organized for 50 Democrats (as well as himself) to flee to nearby Oklahoma, as the Speaker of the House could issue arrest warrants for the insurgent Democratic legislators while they were still in the state.

Again, here's Gladwell: *"Dunnam hires buses, gets everyone to meet at a hotel in Austin, does a headcount; 50 plus himself. Doesn't tell anyone where they're headed or when they're coming back; need to know basis only. It's an undercover operation.*
Monday comes and when the Republicans are ready for their triumphant vote, they suddenly realize they don't have a quorum. They launch a manhunt for the missing Democrats…"[64]

The Republicans were shocked and aggravated by the Democratic exodus, with Republican Governor Rick Perry calling the maneuver *"cowardly and childish."* Texas Republican Chairwoman Sue Weddington said of the Democrats who were now holed up in Oklahoma, *"They may believe they are clever, but the majority of Texans see them as childish."*[65] Republicans were so frustrated in their search for the missing Democrats that, according to a CNN article, *"In Austin, Republicans exhibited a deck of cards bearing the lawmakers' pictures—similar to those issued to U.S. troops to help identify fugitive Iraqi leaders—and milk cartons bearing the images of the missing lawmakers."*[66]

After four days of self-imposed exile in middle-of-nowhere Oklahoma, the Texas House retracted the redistricting bill. The Democratic victory was short-lived, however, as Governor Rick Perry called a special legislative session that summer, and the Democrats were caught too unaware to organize another walkout. When the bill was introduced in the state senate, Levitsky and Ziblatt described in *How Democracies Die*: *"The Democrats, following the precedent of their House colleagues, tried to thwart the bill in absentia by boarding a plane and flying to Albuquerque, New Mexico. They remained there for more than a month, until Senator John Whitmire (soon to be known as "Quitmire") gave in and returned to Austin."*[67] Whitmire's surrender effectively signaled the end of the 2003 Democratic legislative rebellion, and the congressional lines were redrawn.

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[63] Lavandera, "Texas House."
[64] Gladwell, "Divide and Conquer."
[65] Lavandera, "Texas House."
[66] Ibid.
[67] Levitsky and Ziblatt, *How Democracies Die*, 154.

The new map succeeded in what it was designed to do: turn the map red, regardless of—or despite—the will of the people. In the 2004 elections, Republicans flipped 6 seats in Texas, winning 21 of Texas's 32 congressional seats—that represents about 65.6% of the Texas congressional delegation, despite the GOP receiving only 57.7% of the statewide House popular vote. Sixteen years later, the Texas congressional delegation looks remarkably similar: Texas is now represented by 13 Democrats and 23 Republicans, despite Democrats' vote share increasing from 39.0% in 2004 to 47.1% in 2018.[68]

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Following the 2003 Texas re-redistricting, *LULAC* (the *League of United Latin American Citizens*) filed suit against then-Texas governor Rick Perry. The case eventually reached the Supreme Court in 2006. I talked about *LULAC v. Perry* in part 1 of *The Consent of the Governed*, but it is worth discussing further, as it paved the way for future partisan gerrymandering cases and the introduction of the efficiency gap. Additionally, the story behind *LULAC* demonstrates the visceral nature of the gerrymandering issue and its importance for American democracy.

LULAC relied on partisan bias measures to prove the presence of partisan gerrymandering, and argued, primarily, that the new map violated the Equal Protection Clause of the Fourteenth Amendment, as well as the First Amendment. The majority of the court expressed interest in partisan bias but ruled that the Texas redistricting did not violate the Constitution. Furthermore, it ruled that, as long as states redistricted at least once every decade, they could re-redistrict as much as they wanted. The court did, however, order the Texas 23rd District to be redrawn, as they determined it to be an unconstitutional racial gerrymander, violating the Voting Rights Act.

LULAC is significant not for the specifics of the Texas redistricting case, but because Supreme Court Justice Kennedy, along with the 4 liberal justices, hinted that they might be open to ruling on the constitutionality of partisan gerrymandering in the future. Two years earlier, in the *Vieth* ruling, Justice Kennedy had expressed this openness: *"[N]ew technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties."*[69]

However, Kennedy would only rule if the plaintiffs utilized a measure of gerrymandering that was superior to partisan bias in four key areas. First, it could not rely on the assumption of uniform partisan swing; second, it could not use hypothetical elections; third, it must have a set

[68] "U.S. House Election Results 2018," *New York Times*.
[69] Vieth v. Jubelirer, 541 U.S. 306, 8 (2004) (Kennedy, J., concurring).

threshold of unconstitutionality, which was based on historic election data; and fourth, it must be used in conjunction with other comprehensive measures of gerrymandering.[70]

[70] Stephanopoulos and McGhee, "Partisan Gerrymandering," 845–846.

Part II: The Efficiency Gap

The efficiency gap, a measure of partisan gerrymandering introduced in *Partisan Gerrymandering and the Efficiency Gap* by Nicholas Stephanopoulos and Eric McGhee in 2015, was a product of *LULAC* in that it hoped to address Kennedy's four requirements and to pave the way for a definitive Supreme Court ruling on the constitutionality of partisan gerrymandering. It functioned as a calculation of each party's wasted votes across a state, reasoning that a gerrymandering party would attempt, in the redrawing of district lines, to make the opposition party waste more votes than the gerrymandering party.[71] As Stephanopoulos and McGhee put it: *"A gerrymander is simply a district plan that results in one party wasting many more votes than its adversary."*[72]

Again, Stephanopoulos and McGhee: *"'Inefficient' [wasted] votes are those that do not directly contribute to victory. Thus, any vote for a losing candidate is wasted by definition, but so too is any vote beyond the 50 percent threshold needed (in a two-candidate race) to win a seat."*[73] This reflects the two primary tactics employed in the gerrymander of a map: "packing" and "cracking." Packing refers to the packing of opposition-party voters into as few districts as possible, in which opposition candidates easily win with extremely high margins. Packing large populations of opposition voters dilutes the ability of opposition voters to elect candidates of their choice in the rest of the map, and the remaining opposition can then be "cracked" across the remaining districts, further diluting opposition-voters' power. For example, in the current Maryland congressional map, Republican voters are packed into the 1st District, such that Republicans consistently win in the district with a 20-point or higher margin. In the rest of the state, Republican voting power is cracked, and in 2018, Republicans averaged only about 27.9% of the vote in the other 7 districts, adjusting for voter turnout. The goal of a gerrymander, as demonstrated by Maryland's current Democratic gerrymander, is to waste less votes than the other party by packing and cracking the opposition vote into oblivion.

The efficiency gap calculates the wasted votes for each party by district, first, and, second, translates that data into a simple, elegant number. The total number of wasted votes for each party in a state is calculated, and that is then compared to the number of seats each party won in that state. Stephanopoulos and McGhee defined the efficiency gap as *"the difference between the parties' respective wasted votes, divided by the total number of votes cast in an election."*[74] The

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[71] Eric Petry, "How the Efficiency Gap Works," *Brennan Center for Justice*, https://www.brennancenter.org/sites/default/files/legal-work/How_the_Efficiency_Gap_Standard_Works.pdf.
[72] Stephanopoulos and McGhee, "Partisan Gerrymandering," 850.
[73] Ibid, 850–851.
[74] Ibid, 851.

number produced by the calculations is a percentage, which, in the case of congressional elections, is then translated into a partisan advantage in terms of congressional seats.

Put into practice, the efficiency gap reveals the vast scope and depth of partisan gerrymandering across the country. In *Extreme Maps* by Michael Li and Laura Royden, an analysis using the efficiency gap found that *"three states had a gap of at least two seats—the standard for presumptive unconstitutionality proposed by Stephanopolous and McGhee—in every election since 2012: Michigan, North Carolina, and Pennsylvania. Republicans had sole control of the map-drawing processes in all three states, and all of the seat gaps favor Republicans."*[75] The Brennan Center study, however, calculated only efficiency gaps for states with six or more districts, as Stephanopolous and McGhee recommend for using the efficiency gap.[76]

In my own research, I calculated the efficiency gap for all states (including states with less than six districts), going back to 2012 and including the 2018 midterm elections. I found that there are currently six Republican gerrymanders—Arkansas, Georgia, Michigan, North Carolina, Ohio, and Wisconsin—and two Democratic gerrymanders—Connecticut and Massachusetts. Arkansas and Connecticut were not included in the Brennan Center report because they both have less than six congressional districts—Arkansas has four and Connecticut five.[77] Seven other states—Alabama, Indiana, Kansas, Missouri, New York, Pennsylvania, and Texas—had an efficiency gap of greater than two congressional seats in favor of Republicans at some point in the last four election cycles but were disqualified from being deemed gerrymanders because of the results of sensitivity tests.

Sensitivity testing, as described by Stephanopoulos and McGhee, is designed to measure the strength of gerrymanders in the face of large vote shifts between parties. Because the efficiency gap of a plan can change dramatically between elections depending on election results, it is important to measure map shifts both over time and in the face of large voter shifts. Thus, Stephanopoulos and McGhee argue that a map should be invalidated only if its efficiency gap exceeds the two-seat threshold at some point in its lifetime *and* the map never favors the opposition party if the vote shifts by 7.5% in favor of either party.[78]

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The appeal of the efficiency gap is, above all, its simplicity: it captures in a single, tidy number all the "packing" and "cracking" that goes into a partisan gerrymander. On a fundamental level,

[75] Royden and Li, "Extreme Maps," 6.
[76] Ibid, 17.
[77] Ibid, 22.
[78] Stephanopoulos and McGhee, "Partisan Gerrymandering," 889.

it expresses the incredible harm that gerrymandering produces. Again, here's Stephanopoulos and McGhee: *"After voters have decided which party they support—based on whatever criteria they choose, including the attractiveness of each party's policy agenda—the votes cast by supporters of the gerrymandering party translate more effectively into representation and policy than do those cast by the opposing party's supporters. The gerrymandering party enjoys a political advantage not because of its greater popularity, but rather because of the configuration of district lines. The parties do not compete on a level playing field."*[79]

Mathematically, the efficiency gap does have some benefits, and the measure generally fulfills all four of Kennedy's criteria established in *LULAC*. First, the efficiency gap does not utilize the assumption of uniform partisan swing; in fact, it relies almost completely on actual election results, and translates real-world data into a gerrymandering calculation, thus fulfilling Kennedy's second requirement. Partisan bias, in contrast, requires the formation of a hypothetical scenario in which the parties split the statewide vote equally. Occasionally, this hypothetical vote shift can produce a counterintuitive result where seats are hypothetically given to the real-world losing party—this phenomenon is called the "counterfactual window."[80] It is manifestly impossible for the efficiency gap to produce the "counterfactual window."

The efficiency gap succeeds in Kennedy's third criterion because the two-seat threshold of unconstitutionality for congressional redistricting is not arbitrary; on the contrary, the threshold was determined using historical election data from the 1960s through the 2010s. From Stephanopoulos and McGhee: *"A gap of two or more seats placed a plan in the worst 14 percent of all plans in this era, roughly 1.5 standard deviations from the mean… A two-seat gap therefore indicates that a district plan is gerrymandered to an unusual extent and that the gerrymandering has an unusually large impact on the makeup of the House as a whole."*[81]

Kennedy's fourth criterion has more to do with the legal strategy of anti-gerrymandering plaintiffs (their use of the efficiency gap in conjunction with other gerrymandering measures) than with the efficiency gap itself, but Stephanopoulos and McGhee recognize that other strategies should also be used to build a strong case: *"Of course, a mere assertion that a large efficiency gap followed inexorably from the application of a legitimate state policy would fail to rebut the presumption of unconstitutionality. A state would have to present concrete proof that its objectives could not have been realized to the same extent had it devised a plan with a smaller gap."*[82]

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[79] Ibid, 852–853.
[80] Ibid, 861.
[81] Ibid, 888.
[82] Ibid, 893.

The efficiency gap also excels in its historic assessment of gerrymandering over the past 50 years. In states with eight or more congressional districts, the net efficiency gap from 1972 to 2012 is remarkably close to zero.[83] This functions as a solid foundation that modern gerrymanders can be measured against; it also further credits Stephanopoulos and McGhee's two congressional seat threshold.

Additionally, the efficiency gap does not utilize proportionality as a baseline to measure a gerrymander against. This is a benefit in court, more than anything, as the Supreme Court has been reluctant—if not opposed—to striking down maps where the plaintiff so much as mentions proportionality. The Supreme Court stated in the *Davis v. Bandemer* plurality opinion that *"the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination."*[84] The efficiency gap's implied ideal relationship between seat and vote share is not proportional. From Stephanopoulos and McGhee: *"Each additional percentage point of vote share for a party should result in an extra two percentage points of seat share."*[85] Stephanopoulos and McGhee explain this disparity as a "winner's bonus."

Finally, the cross-election sensitivity testing, in addition to further narrowing the field of candidate gerrymanders, can be used as a measure in itself. The ability of a plan to entrench incumbents despite the will of the voters is directly measured by sensitivity testing.

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However, though the efficiency gap checks most of the right boxes, it has many problems that, though not entirely disqualifying the use of the efficiency gap, recommend the measure play a secondary role in gerrymandering jurisprudence. Its problems are, in fact, so great that if adopted as the national gerrymandering standard, it would strike down some maps that are fair and maintain some maps that are not.

Kennedy's second and third requirements are violated by the efficiency gap when you take into account uncontested races and sensitivity testing. When using the efficiency gap, uncontested elections—in which only one of the two major parties fields a candidate—can throw off the statewide calculation because it gives an unfair representation of party vote split in a district. For example, in a district that would have a 60%–40% split between Party A and Party B if they both

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[83] Ibid, 869–870.
[84] Mira Bernstein and Moon Duchin, "A Formula Goes to Court," *Notices of the American Mathematical Society* 64, no. 9 (May 2017): 1–6, https://www.researchgate.net/publication/317284235_A_Formula_Goes_to_Court_Partisan_Gerrymandering_and_the_Efficiency_Gap.
[85] Stephanopoulos and McGhee, "Partisan Gerrymandering," 854.

fielded a candidate, if only Party A fields a candidate, it looks like 100% of the vote goes to Party A. This can greatly distort the efficiency gap statewide.

In order to adjust for uncontested elections, political scientists input hypothetical election results in uncontested districts: *"We strongly discourage analysts from either dropping uncontested races from the computation or treating them as if they produced unanimous support for a party."* [86] This can be done in a variety of ways: in my analysis I used past House and presidential election data, as well as the Cook Political Report's Partisan Voter Index, which measures district-level partisan lean. These uncontested races are, put simply, hypothetical elections. Benjamin Plener Cover wrote in *Quantifying Partisan Gerrymandering*, a study published in the *Stanford Law Review*: *"The efficiency gap may be particularly appealing—especially to Justice Kennedy—because it relies upon directly observed election data rather than hypothetical results. But if calculating the gap requires imputing hypothetical results, and if the size of the gap depends in substantial part on which method an analyst selects, the gap is less of a straightforward measure of real-world data."*[87]

Additionally, the critical sensitivity testing also violates Kennedy's second and third criteria because statewide vote shares must be shifted to gauge the strength of gerrymanders. The result of the shift is a kind of hypothetical election.

The efficiency gap is also somewhat problematic in solving Kennedy's third requirement (that of establishing a workable threshold of unconstitutionality) because the two-congressional-seat threshold discounts gerrymanders in states with less than eight seats. Twenty-nine states (a majority) have fewer than eight congressional seats, comprising a total of 98 seats in the House, and writing them off as impossible to gerrymander is both factually wrong and democratically harmful. Wendy Tam Cho wrote in *Measuring Partisan Fairness*, an essay published in the *University of Pennsylvania Law Review*: *"In their analysis, Stephanopoulos and McGhee limit their study to states with at least eight congressional districts… [T]his reduces the volatility that arises with smaller state delegations. A general measure of partisan fairness should, however, work for any size delegation [...] If the efficiency gap calculation is not viable for any size delegation, this is indicative of underlying measurement issues."*[88]

One of the major problems with the efficiency gap, outside of Justice Kennedy's requirements established in *LULAC*, is that it discounts individual district results—and the competitiveness of

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[86] Ibid, 867.
[87] Benjamin Plener Cover, "Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal," *Stanford Law Review* (2018): 1188, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019540.
[88] Wendy K. Tam Cho, "Measuring Partisan Fairness," *University of Pennsylvania Law Review Online* 166, no. 17 (2017): 20 note 10, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1198&context=penn_law_review_online.

those races—in favor of a statewide measure. The efficiency gap does not account for the competitiveness of district-level elections and can register close races as extremely biased in favor of a party: *"EG behaves very erratically if there are districts with competitive races, because a genuinely close outcome will produce lopsided vote wastage, but it is unpredictable which side this falls on."*[89] For example, if Party A receives 52 votes and Party B receives 48 votes in a district (a close election by any standard), the efficiency gap calculates that Party A wastes 2 votes and Party B wastes all 48 of its votes. This produces an efficiency gap in the district of 0.46 congressional seats in favor of Party A, despite the election being within 4%.

In wave election years, in which the vast majority of competitive elections are won by one party, the statewide efficiency gap can be skewed to a very great extent. In 2018, for example, New Jersey dramatically shifted toward Democrats in House elections, flipping four Republican seats. All three competitive seats in the state elected Democrats (I define competitive races as elections in which the winning candidate's margin was 10% or less). Because all competitive races went blue, however, the efficiency gap produced a 3.81 congressional seat advantage for Democrats statewide. In non-wave elections, New Jersey generally splits its competitive elections equally between Democrats and Republicans; this is reflected in its efficiency gap across 2016, 2014, and 2012, which averaged 1.22 congressional seats in favor of *Republicans*. Competitiveness is a critical measure in understanding the responsiveness of a map—the efficiency gap generally fails in this understanding.

Compounding the efficiency gap's inability to register competitiveness is the uncommon but possible scenario of the "bipartisan gerrymander." The bipartisan gerrymander, as described by Tam Cho, is *"where the two parties, majority and minority, join forces to create a sweetheart deal where both parties are protected in safe seats, thereby preserving the status quo via non-competitive elections. Bipartisan gerrymanders, while usually not biasing one party over the other, lack responsiveness to the electorate."*[90] The efficiency gap ultimately does not measure responsiveness, only the net wasted votes across a state; if both parties work together to waste many more votes statewide, and there are approximately the same number of wasted votes for both parties, the efficiency gap will register the map as fair, despite individual voter power being essentially diluted into nonexistence.

Stephanopoulos and McGhee's response to these problems is sensitivity testing, but, as mentioned earlier, this requires the input of hypothetical election results. Thus, the efficiency gap does not circumvent the problems that plagued partisan symmetry methods when brought before courts.

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[89] Bernstein and Duchin, "A Formula Goes to Court," 1022.
[90] Tam Cho, "Measuring Partisan Fairness," 33.

The efficiency gap can also produce counterintuitive results, especially in districts in which one party wins by a landslide. If the vote is split 75%–25% between parties, the efficiency gap of the district will be zero, even though the district may have been heavily gerrymandered in favor of the winning party. Additionally, if a party wins with more than 75% of the vote in a district, the efficiency gap will be in favor of the *losing* party.[91] Though Stephanopoulos and McGhee recognize this problem, they argue that it is so rare that *"this is not a problem that is especially relevant to real-world redistricting."*[92] That is not what I find; for example, in the 2018 midterm elections, in New York there were six congressional districts where Democrats won with greater than 75% of the vote.[93] Additionally, there were six uncontested races won by Democrats, and though Democrats flipped three competitive seats, the efficiency gap produces a 3.80 congressional seat bias in favor of *Republicans* statewide—this is primarily a result of the counterintuitive efficiency gap in districts won by Democrats with greater than 75% of the vote.

The sensitivity testing prescribed by Stephanopoulos and McGhee can also be problematic. The procedure to conduct the sensitivity testing is vague, the Stephanopoulos paper reading: *"We suggest shifting the actual election results by percentages derived from historical data—up to 7.5 percent in each direction for congressional plans."*[94] This indefinite language can lead different efficiency gap analysis to different results. Moreover, shifting statewide vote shares by up to 7.5% can lead to unrealistic results; besides, finding a reasonable vote shift for a state leads further and further down the road of hypothetical elections, which the efficiency gap is supposed to avoid altogether. Ultimately, if conducting sensitivity testing is so critical for calculating the efficiency gap, one could simply create a measure of gerrymandering that is just the sensitivity testing component of the efficiency gap, with some adjustments; in fact, this new measure would be almost mathematically equivalent to *partisan bias*.

Another problem with the efficiency gap is its rejection of proportionality. The efficiency gap's disproportionality may be a benefit in the court system, as it has continued to reject proportionality as a gerrymandering standard, but I see little reason for a standard to be disproportionate. In actuality, any gerrymandering measure must be measured against *something*, and the efficiency gap, while not being measured against proportionality, is measured against an implied ideal seat distribution. The efficiency gap, as Stephanopoulos and McGhee wrote, *"is a measure of undeserved seat share: the proportion of seats a party receives that it would <u>not</u> have received under a plan with equal wasted votes."*[95] Adjusting for these undeserved seats produces an odd and counterintuitive seat distribution: in 2018, the efficiency gap has an implied ideal

[91] Bernstein and Duchin, "A Formula Goes to Court," 1022.
[92] Stephanopoulos and McGhee, "Partisan Gerrymandering," 864.
[93] "U.S. House Election Results 2018," *New York Times*.
[94] Stephanopoulos and McGhee, "Partisan Gerrymandering," 889.
[95] Ibid, 854.

distribution of 268 Democratic and 167 Republican representatives. Some states' distributions look somewhat reasonable, such as Colorado's 4 Democrats and 3 Republicans, while others do not, like New York's 25 Democrats and 2 Republicans.

In addition to the efficiency gap's implied ideal seat distribution, the efficiency gap actually penalizes proportionality, instead relying on double-proportionality. According to Stephanopoulos and McGhee, again, *"Each additional percentage point of vote share for a party should result in an extra two percentage points of seat share."*[96] Not only is this counterintuitive and unjustified, it is anti-democratic; there is no reason seats should not be allocated proportional to votes across a state.[97] Indeed, politicians are far more responsive to the preferences of their constituents if individual voter power is increased rather than diluted; this is only possible if each vote, regardless of political geography or any number of other factors, has the power to remove or maintain politicians, which, in turn, is only enabled by some degree of proportionality. Double-proportionality, as utilized in the efficiency gap, is meaningless and arbitrary—though, I admit, it may have its advantages in court.[98]

There are a number of other problems with the efficiency gap—such as its inability to take into account political geography, its nongranularity, and its conflation of wasted votes cast for winning and losing parties—but these seem far more trivial than the issue of proportionality.[99]

Finally, though the efficiency gap claims to be simple and comprehensible—a reduction of the complexities of gerrymandering to, as Stephanopoulos and McGhee claim, a *"single tidy number"*—it is far from that.[100] It both oversimplifies gerrymandering and is far more complex than it initially seems to be. Political scientist Moon Duchin wrote, *"Gerrymandering is a fundamentally multidimensional problem, so it is manifestly impossible to convert that into a single number without a loss of information that is bound to produce many false positives or false negatives for gerrymandering."*[101]

At the same time, with the efficiency gap requiring sensitivity testing, hypothetical elections to replace uncontested races, and the compiling of historic election data to determine the threshold of unconstitutionality and the degree of hypothetical vote shifts for sensitivity testing, the calculation of the efficiency gap is anything but simple. Additionally, it fails to be comprehensive, omitting election results in 98 seats in states with fewer than eight districts.

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[96] Ibid.
[97] Bernstein and Duchin, "A Formula Goes to Court," 1022.
[98] Ibid, 1023.
[99] Sam Kean, "The Flaw in America's 'Holy Grail' Against Gerrymandering," *The Atlantic*, January 26, 2018, https://www.theatlantic.com/science/archive/2018/01/efficiency-gap-gerrymandering/551492/.
[100] Stephanopoulos and McGhee, "Partisan Gerrymandering," 831.
[101] Kean, "The Flaw in America's 'Holy Grail' Against Gerrymandering."

Part III: The Future of the Efficiency Gap

Despite its many failures, the efficiency gap remains one of the most judicially workable standards of gerrymandering out there today. It passes, to some extent, Kennedy's requirements in *LULAC* and, for a time, was heralded by political scientists as one of the best hopes to fight partisan gerrymandering. For a time.

When the efficiency gap was first tested in court, in the *Whitford v. Gill* ruling, it failed… sort of. The question of the constitutionality of partisan gerrymandering was unanswered: the case was dismissed on its standing, as the only voter who testified, William Whitford, a Democrat, did not live in a district that had been heavily gerrymandered against Democrats and could not prove that they had suffered an "injury in fact."[102] This technicality allowed the court to kick the can down the road for another year.[103]

Time and again, the Supreme Court has refused the opportunity to definitively put its weight against partisan gerrymandering. The court did not completely condemn the efficiency gap as a measure, but it did state its preference of district-level, rather than state-level, measures, as it is easier to gauge the violation of individual voters' constitutional rights at the district-level.[104] However, the court *did* leave the door open for the efficiency gap to be used in conjunction with other gerrymandering measures in future cases.

The reluctance of the Supreme Court to rule against partisan gerrymandering could not come at a more inopportune time: redistricting technology is only becoming more powerful, and diluting voter power is no longer something that can be accomplished only by master cartographers—on the contrary, anyone can draw a map from their living room in a matter of hours.

In the 2004 *Vieth* ruling, the Supreme Court called gerrymandering an *"unanswerable question."* [105] Though the efficiency gap has its (many) flaws, it is something of a workable standard—admittedly one that needs a lot of work. And there are other, more effective methods

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[102] Barry C. Burden and David T. Canon, "The Supreme Court decided not to decide Wisconsin's gerrymandering case. But here's why it will be back," *Washington Post*, June 19, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/19/the-supreme-court-decided-not-to-decide-wisconsins-gerrymandering-case-but-heres-why-it-will-be-back/; Adam Liptak, "Supreme Court Avoids an Answer on Partisan Gerrymandering," *New York Times*, June 18, 2018, https://www.nytimes.com/2018/06/18/us/politics/supreme-court-wisconsin-maryland-gerrymander-vote.html.

[103] Garrett Epps, "The Supreme Court Would Prefer Not To," *The Atlantic*, June 18, 2018, https://www.theatlantic.com/ideas/archive/2018/06/supreme-court-gill-v-whitford/563075/.

[104] Mark Rush, "The Efficiency Gap After Gill v. Whitford," *Social Science Quarterly* 101, no. 1 (January 2020): 57, https://onlinelibrary.wiley.com/doi/full/10.1111/ssqu.12742.

[105] Erica Klarreich, "Gerrymandering Is Illegal, but Only Mathematicians Can Prove It," *Wired*, April 16, 2017, https://www.wired.com/2017/04/gerrymandering-illegal-mathematicians-can-prove/.

to measure gerrymandering available. But the court has dismissed taking action on partisan gerrymandering apparently because it is too much work to find a functional standard to measure gerrymandering (Chief Justice John Roberts described the efficiency gap as *"sociological gobbledygook"* in *Gill v. Whitford*, and Justice Neil Gorsuch compared it to his favorite steak rub).[106] But partisan gerrymandering remains a serious threat to American democracy, despite the court, and even if the court dismisses another hundred methods to measure gerrymandering, voting power will still be diluted unjustly.

In *Bandemer v. Davis*, the Supreme Court ruled that partisan gerrymandering is unconstitutional if extreme enough. Since that ruling in 1986, anti-gerrymandering advocates have been trying to prove that it *is* extreme enough, without much success. My response is, in the words of Wendy Tam Cho, *"If you're never going to declare a partisan gerrymander, what is it that's unconstitutional?"*[107]

[106] Epps, "The Supreme Court Would Prefer Not To."
[107] Klarreich, "Gerrymandering Is Illegal."

3. A Workable Standard

Statistical Outlier Analysis and the Solution to Gerrymandering

Part I: Authoritarian States

Thomas Hofeller, *"the master of the modern gerrymander,"* died in August 2018, leaving behind a trove of secret files, emails, studies, spreadsheets, and other documents relating to Republican gerrymanders and the Trump Administration's 2019 attempt to add a citizenship question to the 2020 Census.[108] Described in the *New York Times* as the *"Michelangelo of gerrymandering,"* Hofeller was a top Republican political strategist, who had played a large role in Republican gerrymanders and political maps across the country—in Arizona, Florida, Maryland, Mississippi, Missouri, North Carolina, Ohio, Tennessee, Texas, and Virginia—in the past decade, and was an advocate for adding a citizenship question to the Census in order to dilute Democratic representation by under-counting immigrants.[109]

The files were discovered by Thomas Hofeller's estranged daughter, Stephanie Hofeller, who learned of her father's death in September 2018 when she randomly searched for her father's name online and found an obituary posted a month prior.[110] She drove to her parents' home in Raleigh, North Carolina and visited Kathleen Hofeller, her mother. There Stephanie found a plastic bag with 18 USB thumb drives and 4 external hard drives, which contained about 75,000 files, including family pictures and the documents pertaining to gerrymandering and the Census question.[111] According to an NPR article: *"Before Stephanie arrived at her parents' apartment, her father's business partner, Dale Oldham, had removed a laptop and a desktop computer with Hofeller's work files, Stephanie said her mother told her. 'Dale got all the good stuff,' Stephanie told attorneys."*[112]

Stephanie Hofeller got in contact with Common Cause, a nonprofit government watchdog group, to search for a lawyer to represent her mother, and mentioned the files in passing. At the same

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[108] David Daley, "The Secret Files of the Master of Modern Republican Gerrymandering," *The New Yorker*, September 6, 2019, https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering.
[109] Michael Wines, "Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question," *New York Times*, May 30, 2019, https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html; Hansi Lo Wang, "Deceased GOP Strategist's Daughter Makes Files Public That Republicans Wanted Sealed," *NPR*, January 5, 2020, https://www.npr.org/2020/01/05/785672201/deceased-gop-strategists-daughter-makes-files-public-that-republicans-wanted-sea.
[110] Wang, "Deceased GOP Strategist's Daughter."
[111] Wines, "Deceased G.O.P. Strategist's Hard Drives."
[112] Wang, "Deceased GOP Strategist's Daughter."

time, Common Cause had recently filed suit in North Carolina state court against the Republican-gerrymandered congressional map, and the 75,000-file stache documenting Thomas Hofeller's construction of that same congressional map piqued their interest. The law firm representing Common Cause in the suit, Arnold & Porter (which, coincidentally, was also representing private plaintiffs pro bono in Federal District Court in Manhattan in the suit against the potential citizenship question), subpoenaed the Hofeller files.[113]

Geographic Strategies, Thomas Hofeller's company, attempted to prevent the publication of the Hofeller files, which Stephanie made available online in January 2020, because Geographic Strategies argues that the files contain "trade secrets."[114] These challenges, as well as the fear of the files being destroyed, prompted Stephanie to send copies of the files to the *New York Times*, the *New Yorker*, and other news organizations, and many other publications have since reported on them.

One irony revealed in the Hofeller files is that Hofeller emphasized discretion and email security in a presentation for legislators and congressional map–drawers, saying *"emails are the tool of the devil"* and *"treat every statement and document as if it was going to appear on the FRONT PAGE of your local newspaper."* Of course, Hofeller's files have now appeared in the *New York Times* and the *New Yorker*—hardly discrete platforms for Republican gerrymandering secrets.

In 2015, the files reveal, Hofeller was hired by the *Washington Free Beacon*, a conservative publication, to conduct a study of the potential impact of drawing legislative and congressional maps based on voting-age population, rather than total population.[115]

As written by David Daley in the *New Yorker*: *"Mr. Hofeller's exhaustive analysis of Texas state legislative districts concluded that such maps 'would be advantageous to Republicans and non-Hispanic whites,' and would dilute the political power of the state's Hispanics. The reason, he wrote, was that the maps would exclude traditionally Democratic Hispanics and their children from the population count. That would force Democratic districts to expand to meet the Constitution's one person, one vote requirement. In turn, that would translate into fewer districts in traditionally Democratic areas, and a new opportunity for Republican mapmakers to create even stronger gerrymanders. The strategy carried a fatal flaw, however: the detailed citizenship data that was needed to draw the maps did not exist."i*[116]

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[113] Wines, "Deceased G.O.P. Strategist's Hard Drives."
[114] Wang, "Deceased GOP Strategist's Daughter."
[115] Daley, "The Secret Files."
[116] Ibid.

The solution, Hofeller argued, was a citizenship question in the 2020 Census. In 2016, Hofeller and Dale Oldham, his business partner who took Hofeller's laptop and desktop after his death, got in contact with then-president-elect Trump's transition team and Mark Neuman, who was managing the Census transition and became an advisor to Commerce Secretary Wilbur Ross.[117]

In November 2019, the House Oversight and Reform Committee released text messages and emails between Neuman, Hoffeler, and Oldham revealing that the three were designing the language of a Census citizenship question with the goal of undercounting immigrants and diluting Democratic voting power in August 2017. Included in the released documents was a letter from the Justice Department to the Census Bureau that stated the question was necessary to guarantee *"compliance with the requirements of the Voting Rights Act and its application in legislative redistricting."*[118] As the addition of a citizenship question would likely undercount minority groups, this reasoning is, at best, malicious.

In another email to Hofeller, Neuman dismisses the idea of using the American Community Service (ACS) data as a source for voting-age population statistics. The ACS is a standard annual Census survey; I used it for voting-age population in my hypothetical election simulations to calculate efficiency gaps and found it completely suitable—but I digress.

The Hofeller files were used in the suit against the Census citizenship question as proof of partisan intent behind the question and evidence that there is no other substantive argument to add the question other than helping Republicans at the ballot box.

In May 2019, a Justice Department spokesman stated that the 2015 Hofeller study *"played no role in the Department's December 2017 request to reinstate a citizenship question to the 2020 decennial census."*[119] That "reinstating" refers to the last time a census citizenship question was considered—in 1950.[120] Additionally, the Justice Department's argument that Hofeller had no role in the formulation of the census question is dead wrong. From the *New York Time*s: *"In their court filings… lawyers for the plaintiffs said that 'many striking similarities' between Mr. Hofeller's study and the department's request for a citizenship question indicated that the study was an important source document for the Justice Department's request."*[121] To top off the blatant partisanship in the drive to add the citizenship question, the *New York Times*, again,

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[117] Tara Bahrampour, "New evidence shows contact between Trump official and Republican redistricting expert over census citizenship question," *Washington Post*, November 12, 2019, https://wapo.st/33HUWZ0.
[118] Ibid.
[119] Tara Bahrampour and Robert Barnes, "Despite Trump administration denials, new evidence suggests census citizenship question was crafted to benefit white Republicans," *Washington Post*, May 30, 2019, https://wapo.st/36ElBaP.
[120] Bahrampour, "New evidence shows contact."
[121] Wines, "Deceased G.O.P. Strategist's Hard Drives."

wrote: *"The filing also says flatly that [assistant attorney general for civil rights] Mr. Gore and Mr. Neuman 'falsely testified' under oath about the Justice Department's actions on the citizenship question."*[122]

The Supreme Court, in *Department of Commerce v. New York*, did not buy the Commerce Department's argument that the question was necessary to fulfill requirements established in the Voting Rights Act and remanded the case to the district court.[123] The Trump Administration later dropped the question.

The Hofeller files also revealed Thomas Hofeller's role in the 2016 North Carolina Republican gerrymander. The gerrymander was one of the worst in the nation, if not in American history (the map was struck down last year as a violation of the state constitution). The 2016 map was a partisan gerrymander introduced by the Republican-controlled legislature as a replacement for the 2011 Republican-drawn map, as that map had been struck down as an unconstitutional racial gerrymander. The 2016 map was, to put it mildly, extreme: the congressional delegation in 2018 was comprised of 3 Democrats and 10 Republicans, even though Democrats received a majority of votes cast in House elections.[124]

In order to draw the incredibly effective gerrymander, Thomas Hofeller compiled a database of voter registration, gender, race, likely partisan lean, and addresses (down to the residence hall) of 23,100 North Carolina college students, many attending historically black colleges and universities like North Carolina A&T State University. According to the *New Yorker*: *"Some spreadsheets have more than fifty different fields with precise racial, gender, and geographic details on thousands of college voters."*[125]

This intricate data collection paired well with North Carolina's 2013 voter-I.D. law, which reduced the number of eligible voter-I.D.s, especially hindering ballot access for minority groups and students, limited early voting, and ended same-day voter registration. Hofeller was involved in the defense of the voter-I.D. law when the North Carolina N.A.A.C.P. challenged it in court. The result of this was described, again, in the *New Yorker*: *"Perhaps one of the clearest and ugliest gerrymanders in North Carolina—or in the entire nation—is the congressional-district line that cuts in half the nation's largest historically black college, North Carolina A&T State University, in Greensboro. The district line divided this majority minority campus—and the city—so precisely that it all but guarantees it will be represented in Congress by two Republicans*

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[122] Ibid.
[123] Adam Liptak, "Supreme Court Leaves Census Question on Citizenship in Doubt," *New York Times*, June 27, 2019, https://www.nytimes.com/2019/06/27/us/politics/census-citizenship-question-supreme-court.html.
[124] "U.S. House Election Results 2018," *New York Times*.
[125] Daley, "The Secret Files."

for years to come."[126] All of Hofeller's gerrymandering and Census work was bankrolled by the Republican Party with the explicit intent to disenfranchise Democratic voters.

. . .

The problem of rampant partisan gerrymandering in North Carolina is furthered by other authoritarian tendencies in the state's government. In 2016, Democrat Roy Cooper edged out incumbent Republican Pat McCrory in the North Carolina gubernatorial election, defeating McCrory by about 0.2% of the statewide vote.[127] However, in Cooper's lame duck period, the North Carolina legislature (which was—and is—Republican-controlled and Republican-gerrymandered) convened for a special legislative session to strip powers from the governor before he took office. According to *Ratf**ked* by David Daley, the legislature, among other changes to the state constitution, *"...reworked those county election boards so that both parties shared control. Except they wouldn't actually share power. Democrats would govern them in odd years, Republicans in even ones. Statewide elections, of course, are only held in even years."*[128]

The 2016 North Carolina legislative coup foreshadowed similar events in Wisconsin and Michigan in 2018, when Democrats Tony Evers and Gretchen Whitmer, respectively, defeated incumbent Republican Governors.[129] In both states, the Republican legislature convened for a special session and again took power from the governors' offices before the elected Democrats assumed power.[130] Two of those states—North Carolina and Michigan—have an efficiency gap over the proposed 2-congressional seat threshold of unconstitutionality in favor of Republicans—3.52 and 2.29, respectively—and the third state—Wisconsin—has an efficiency gap of 1.42 in favor of Republicans, high enough, in my opinion, to still be considered a gerrymander.

On top of the extreme partisan gerrymandering and legislative coup-ing that has taken place in North Carolina in the past five years, there have also been accounts of election fraud, the most notable being in the 2018 congressional election in North Carolina's 9th district. There, according to an NPR article, Republican political operative Leslie McCrae Dowless was *"...the*

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[126] Ibid.
[127] "2016 Presidential Election Results," *New York Times*, August 7, 2019, https://www.nytimes.com/elections/2016/results/president.
[128] Daley, *Rat F**ked*, 228.
[129] "Governor Election Results 2018," *New York Times*, May 15, 2019, https://www.nytimes.com/interactive/2018/11/06/us/elections/results-governor-elections.html.
[130] Russell Berman, "The Republicans' Midwest 'Power Grab,'" *The Atlantic*, December 4, 2018, https://www.theatlantic.com/politics/archive/2018/12/gop-power-grab-wisconsin-and-michigan/577246/; Jake Johnson, "'Stand Up, Fight Back!'" *Common Dreams*, December 12, 2018, https://www.commondreams.org/news/2018/12/12/stand-fight-back-protestors-storm-capitol-michigan-gop-moves-ahead-lame-duck-coup.

alleged ringleader in a scheme instructing his co-conspirators to sign certifications that falsely stated they had seen a voter vote by absentee ballot, and improperly mailing in absentee ballots for someone who had not mailed it themselves."[131]

All of these gross violations of North Carolinians voting rights and authoritarian undermining of election process point to the fact that, as the Electoral Integrity Project found, North Carolina is *"no longer considered to be a fully functioning democracy."*[132] The Electoral Integrity Project is a Harvard University research project studying the integrity and responsiveness of governments around the world. University of North Carolina professor Andrew Reynolds used the Electoral Integrity Project's criteria to measure how democratic and representative the North Carolina government was. According to *RatF**ked*, North Carolina *"earned a failing grade with an overall electoral-integrity score of 58 out of 100 for 2016. That score, he wrote, 'places us alongside authoritarian states and pseudo-democracies like Cuba, Indonesia, and Sierra Leone.' [...] When the professor measured the integrity of the district boundaries, he found something he almost could not believe: North Carolina earned a 7 out of 100. That's not only the worst rigged-district ranking for any state in the country, but the 'worst entity in the world ever analyzed by the Electoral Integrity Project.'"*[133]

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So why did I just spend 1,980 words discussing the Hofeller files and democracy—or the lack thereof—in North Carolina? Well, first, gerrymandering is part of a much larger crisis of democracy in America; to improve our election system, we need to eliminate gerrymandering as well as make the ballot box more accessible in a number of ways including expanding mail-in voting, ending voter-I.D. laws, and implementing automatic voter registration, among others. Second, partisan gerrymandering harms people. For voters in North Carolina, there is little incentive to cast a ballot, as the district lines predetermine election victors. That mis-representation harms voters by not reflecting their actual policy preferences. And third, the problem of partisan gerrymandering is really bad, North Carolina probably being the most authoritarian, anti-democratic state in the union.

Having described the dire extent of the gerrymandering problem in North Carolina, I want to turn away from that state for the time being, and look at another potential solution for the Supreme

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[131] Richard Gonzales, "North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud," *NPR*, July 30, 2019, https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.
[132] Carol Anderson, *One Person, No Vote* (New York: Bloomsbury Publishing, 2019), 97.
[133] Daley, *Rat F**ked*, 226.

Court's request for a "workable standard" that has played a large role in recent judicial deliberations on the North Carolina congressional map—statistical outlier analysis.

Part II: Random Walks

In part 2, I discussed the efficiency gap—how it functions, its benefits and drawbacks, and its role in gerrymandering litigation going forward. In *Gill v. Whitford*, the efficiency gap failed to compel the court to rule on the constitutionality of partisan gerrymandering, and the measure was relegated to a secondary role in the future, only acting as a small piece of evidence in a larger set of measures. Statistical outlier analysis took the efficiency gap's place in *Rucho v. Common Cause* and other state constitution suits. The method, in my opinion, is a far better measure of gerrymandering, and has greater potential to act as a "workable standard" in court.

Statistical outlier analysis is superior to the efficiency gap in its complexity; while the efficiency gap advertises itself as a *"single tidy number,"* statistical outlier analysis recognizes the fundamental intricacy of voting and, by extension, democracy.[134] Furthermore, the one-dimensionality of the efficiency gap is its undoing in valuing competitiveness, reflecting the long-term stability of gerrymandered plans, disregarding gerrymandering in small-congressional district states, conflating winning and losing wasted votes, and idealizing 75-25 district and state vote splits.

Indeed, no gerrymandering measure can perfectly capture the nuance of the democratic voting process. As mathematician Moon Duchin said in an interview with *Quanta Magazine* this year, *"We fundamentally don't know how to and should not try to turn the whole complicated picture of representative democracy and its ideals into an objective function… no objective function really captures the complexity of what we're trying to do when we vote."*[135] What this means for gerrymandering measurement is, as Jonathan Mattingly and Christy Vaughn wrote in a study entitled *Redistricting and the Will of the People*, *"The 'will of the people' is not a single election outcome but rather a distribution of possible outcomes."*[136]

The essential question that statistical outlier analysis seeks to answer is: What would a congressional district map look like if partisanship had not had a role in the drawing of district lines? To this end, the method simulates tens of thousands, million, even billions of congressional maps, modeling for state-determined redistricting criteria and controlling for Supreme Court–mandated population equality, and produces a curve describing the probability of state maps to produce different partisan outcomes. This is then compared to the map under scrutiny to determine if it is a statistical outlier and is therefore a partisan gerrymander.

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[134] Stephanopoulos and McGhee, "Partisan Gerrymandering," 831.
[135] Steven Strogatz, "Moon Duchin on Fair Voting and Random Walks," *Quanta Magazine*, April 7, 2020, https://www.quantamagazine.org/moon-duchin-on-fair-voting-and-random-walks-20200407/.
[136] Jonathan C. Mattingly and Christy Vaughn, "Redistricting and the Will of the People," *arXiv* (October 29, 2014): 1, https://arxiv.org/pdf/1410.8796.pdf.

In state redistricting, the most basic unit to construct a map is the precinct, though this can be further broken down with more intricate, detailed data. In my home state of Colorado, there are currently 3,219 precincts. In the 2016 presidential election, there were 170,850 precincts in the entire United States.[137] Precincts can then be divided into trillions and trillions of different possible maps; mathematician Moon Duchin wrote in an article for *Scientific American*, *"By the time you get to a grid of nine-by-nine, there are more than 700 trillion solutions for equinumerous rook partitions, and even a high-performance computer needs a week to count them all."*[138] Incredibly, mathematicians have yet to calculate the number of possible maps in a simple six-by-six grid split into two districts where the districts *do not* have to be equal-sized, as it would take a computer over a week to calculate the number of possible maps. When approaching the number of precincts in a state, Duchin said in an interview, *"we're probably looking at the google range, by which I mean 10 to the 100."*[139] This far exceeds the number of atoms in the universe, which is between 10^{78} and 10^{82} (Mattingly & Vaughn, 11). To state the obvious, this far exceeds Justice Alito's suspicion that, in drawing the lines, there's *"maybe dozens, maybe hundred, maybe even thousands of ways."*[140]

There are so many possible plans that it would be near-impossible to calculate all the possible maps in a state, so political scientists and mathematicians use Markov Chain Monte Carlo, which is a method to take a random sampling of maps that is representative of the universe of possible maps—this universe of possible maps is called an ensemble of maps.[141] Markov Chain Monte Carlo is essentially a random walk through a map; imagine you're standing at one point on the edge of a precinct and walk along the edge of the precinct until another precinct's border intersects the edge you're walking along. You then have a choice to continue along your current path to the next vertex or to turn and walk along the edge of the intersecting precinct. Markov Chain Monte Carlo is a mathematical way to simulate this decision-making on a much larger scale, finding a sampling of the ensemble of maps.[142]

Rather than producing a completely random ensemble of maps, however, mathematicians input criteria to influence the probabilities of following different precinct edges and turning—or not turning—at intersections.[143] There are a few federally mandated criteria for drawing district lines including population equality between districts (for example, you cannot have one district with a

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[137] "2016 Presidential Election Results," *New York Times*.
[138] Moon Duchin, "Geometry v. Gerrymandering," *Scientific American*, November 2018, http://www.cencomfut.com/ScientificAmerican1118-48.pdf.
[139] Strogatz, "Moon Duchin on Fair Voting."
[140] Ibid.
[141] Moon Duchin, "Gerrymandering Metrics: How to Measure? What's the Baseline?" *arXiv* (January 6, 2018): 4. https://arxiv.org/pdf/1801.02064.pdf.
[142] Duchin, "Geometry v. Gerrymandering."
[143] Duchin, "Gerrymandering Metrics," 4.

population of 100,000 and another with a population of 150,000), district contiguity, and there must be, to some extent, minority opportunity to be elected and represented (as mandated by the Voting Rights Act of 1965).[144] Other redistricting criteria are set by state laws and constitutions, such as Iowa's emphasis on keeping counties together and Arizona's mandate to prioritize creating competitive districts, and these can also be worked into the Markov Chain Monte Carlo calculation.[145]

Once political scientists and mathematicians are satisfied with the number of maps they have simulated (for example, in *Rucho v. Common Cause*, the plaintiffs simulated 24,518 maps), they can then lay them out on a curve revealing the probability of maps following state and federal redistricting criteria to produce different partisan outcomes using real-world votes.[146] The map under scrutiny is then compared to the curve of probable maps to determine if it is a statistical outlier. For example, if the average Democratic seats in an ensemble of maps for a state is 10, and in 90% of simulations, Democrats received between 7 and 12 seats, but under the current maps Democrats only receive 4 seats, the map is probably an outlier and, therein, a Republican gerrymander.

There is no set threshold for outliers to be declared gerrymanders, but this is not as great a detractor for using the method as it may appear. Fundamentally, statistical outlier analysis is descriptive of maps relative to the most probable, nonpartisan map rather than it being prescriptive of maps being gerrymanders. No single measure can perfectly capture the complexities of voting or gerrymandering, but the statistical outlier method effectively indicates when partisan intent may have played a role in the drawing of a map. The method shows when there is something wrong with a map that cannot simply be explained away as a result of state political geography or attempting to succeed in state or federal criteria, as geography and criteria are both built into the Markov Chain Monte Carlo.

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Statistical outlier analysis has been used in gerrymandering litigation in, most recently, *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, which was the successful challenge to the Republican-gerrymandered Pennsylvania congressional map ruled illegal under the state constitution. Additionally, statistical outlier analysis was used by plaintiffs in *Rucho v. Common Cause*, the unsuccessful suit against the Republican-gerrymandered North Carolina congressional map, which was brought before the Supreme Court in 2018—*Rucho* challenged the same map that Thomas Hofeller helped draw.

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[144] Strogatz, "Moon Duchin on Fair Voting."
[145] Duchin, "Gerrymandering Metrics," 5.
[146] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 20 (2019) (Kagan, J., dissenting).

In *League of Women Voters of Pennsylvania*, the Republican legislature-drawn congressional map was thrown out by the state supreme court after a statistical outlier analysis by mathematician Jowei Chen. According to a *New York Times* article, *"In the view of the majority of the Pennsylvania Supreme Court, 'perhaps the most compelling evidence' that Republicans sacrificed traditional redistricting criteria for partisan gain was a political scientist's [Jowei Chen's] simulation of 500 possible congressional maps."*[147]

After the old map was discarded by the court, both the legislature and Democratic Governor Tom Wolf proposed replacement maps. Mathematician Moon Duchin ran a statistical outlier analysis of the new plans for the governor and found that *"there is less than a 0.1% chance that the Turzai-Scarnati plan [the plan drawn by the Republican-controlled legislature] was drawn in a non-partisan way."*[148] Additionally, the report found that *"the GOV [governor's] plan does not meet even the looser standard for statistical significance, and in fact when it exhibits any partisan skew, it is not skewed in the Democratic-favoring direction."*[149]

The political geography of Pennsylvania implicitly favors Republicans because Democrats are highly concentrated in large urban centers in Philadelphia and Pittsburgh and many other Democrats live in small and medium-sized cities that are surrounded by heavily-Republican rural areas such as State College, Erie, York, and Lancaster. It is difficult for these cities to be represented by a Democrat, even if the district lines are drawn without partisan intent. Duchin's statistical outlier analysis reflects this: *"The full range of possibilities I encountered in trillions of trials against recent [state] Senate vote geography was 4 to 10 seats for Democrats [out of 18], but the 5-seat outcome is relatively rare and the 4-seat outcome is vanishingly rare."*[150]

In Duchin's analysis, she used two different methods of Markov Chain Monte Carlo: a simple and a weighted random walk.[151] The simple random walk took into account federally mandated redistricting requirements, such as contiguity and population equality, but ignored normative state and federal criteria, such as compactness and minimizing county splits (county splitting is when a county is split into multiple districts even though its population is large enough to minimize splitting). The weighted random walk, on the other hand, *did* take into account normative criteria and limited cross-district population deviation.

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[147] Nate Cohn, "Hundreds of Simulated Maps Show How Well Democrats Fared in Pennsylvania," *New York Times*, February 26, 2018, https://www.nytimes.com/2018/02/26/upshot/democrats-did-better-than-on-hundreds-of-simulated-pennsylvania-maps.html.
[148] Moon Duchin, "Outlier analysis for Pennsylvania congressional redistricting," (February 2018): 1, https://mggg.org/uploads/md-report.pdf.
[149] Ibid, 4.
[150] Ibid, 3.
[151] Ibid, 2.

Duchin also made maintaining communities of interest a priority in her weighted random walk, treating her defined "geoclusters" (cities, neighborhoods, and geographic areas) similar to counties, in that the algorithm probabilistically prefers to take random walks which do not split communities of interest.[152] By doing so, Duchin argues that minority opportunity is protected as minority-majority communities of interest are less likely to be split.

Finally, Duchin measured the resulting probability curves and was able to compare her produced maps to the proposed and current maps using two traditional gerrymandering measures: mean-median difference (which is a form of partisan bias measure) and the efficiency gap. She found the legislature's proposed replacement map to be a gerrymander, and the Pennsylvania Supreme Court threw out the Republican map again and drew their own map. The new map was not a gerrymander, and in the 2018 midterm elections, Democrats received 9 of the state's 18 seats, roughly mirroring their 53.9% statewide vote share.

The new, court-drawn map, however, is very favorable to Democrats: under the new map, Democrats received more congressional seats than they would have under any of the 500 randomly drawn maps in Chen's analysis used in *League of Women Voters of Pennsylvania*.[153] That being said, the new map is not a statistical outlier, and satisfies traditional, nonpartisan redistricting criteria. According to an *Upshot* analysis: *"The new Pennsylvania map… meets every standard nonpartisan criteria. It's compact, minimizes county or municipal splits and preserves communities of interest. But it consistently makes subtle choices that suggest that partisan balance may have been an important consideration."*[154] The decision to roughly match proportionality is significant in that it is a unique choice among states, but it is not a reflection on the statistical outlier method in itself, the method generally recommending a more favorable map for Republicans. Regardless, the new map still slightly favors Republicans.

. . .

Statistical outlier analyses of North Carolina, similar to that of Pennsylvania, reveal extreme Republican gerrymanders. In 2014, mathematicians Jonathan Mattingly and Christy Vaughn published one such analysis, revealing that, in a sampling of 100 maps in their ensemble, in no map did Democrats receive 4 or less of North Carolina's 13 congressional seats, and Democrats

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[152] Ibid, 10.
[153] Cohn, "Hundreds of Simulated Maps."
[154] Nate Cohn, Matthew Bloch, and Kevin Quealy, "The New Pennsylvania Congressional Map, District by District," *New York Times*, February 19, 2018, https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html.

averaged 7.6 Democratic seats.[155] At the time, Democrats held only 3 congressional seats in the state.[156]

It should be noted that North Carolina's congressional map was changed in 2016 after it was ruled an unconstitutional racial gerrymander. However, Mattingly & Vaughn's findings hold true with the redrawn map because, although the new map visually looked a lot better, it produced similar results and remained heavily Republican-gerrymandered.

In the study, two different methods were used to produce ensembles of maps: "Long Period" and "Short Period." The Short Period method produced more maps, but was less restricted by the inputted state and federal redistricting criteria, while the Long Period was more precise but had a narrower ensemble.[157] The two methods had similar results, determining that a random nonpartisan map drawn to some extent within the confines of state and federal criteria would produce approximately 7 Democratic seats, with the Long Period method giving Democrats slightly more seats than the Short Period method.[158]

[155] Mattingly and Vaughn, "Redistricting and the Will of the People," 3.
[156] "House Election Results 2014," *New York Times*, December 17, 2014, https://www.nytimes.com/elections/2014/results/house.
[157] Mattingly and Vaughn, "Redistricting and the Will of the People," 4.
[158] Ibid, 5.

Part III: A Workable Standard

The greatest advantage of statistical outlier analysis over the efficiency gap, partisan bias, and other gerrymandering measures is that it clearly does not use proportionality as a baseline. Instead, rather than comparing a map's current partisan distribution to a proportional seat allocation, statistical outlier analysis reveals what a map would look like had there been no partisan intent in the redistricting process.

In *Rucho v. Common Cause* in 2018, Jowei Chen, who had run a simulation for *League of Women Voters of Pennsylvania*, did a statistical outlier analysis of North Carolina's congressional map, and that formed the core of the plaintiffs allegations that the Republican-controlled legislature had committed a partisan gerrymander. Justice Kagan remarked on the fact that statistical outlier analysis did not rely on proportionality in its determination of gerrymanders in oral arguments for *Rucho*: *"What's quite interesting about the statistical analysis in this case is that quite a lot of it does not run off a proportional representation benchmark. In other words, all the computer simulations, all the 25,000 maps… really do take the political geography of the state as a given. So… if Democrats are clustered and Republicans aren't, that's in the program. And all the other redistricting requirements or preferences, like contiguity, like following natural boundaries, that's all in the program. So… the benchmark is not proportional representation. The benchmark is the natural political geography of the state, plus all the districting criteria, except for partisanship. And if you run those maps, right, what did you get? You got 24,000 maps and this—and 99 percent of them, 99 plus percent of them, were on one side of the map that was picked here."*[159]

Another advantage of statistical outlier analysis is that it gives legislatures some (limited) wiggle room in the redistricting process, allowing the drawing of a range of maps with a range of outcomes. This preserves the Constitutionally described role of the legislative branch and state governments in the drawing of district lines, while giving the judicial branch a much-needed role in overseeing the legislative branch in the redistricting process.

Additionally, statistical outlier analysis does not require any kind of hypothetical elections, a problem inherent to both partisan bias and the efficiency gap. All the data is sourced from real-world elections, and in the case of uncontested races, party registration and prior election data can be used in the affected precincts. Ultimately, the confluence of the benefits of statistical outlier analysis makes it, as Justice Breyer put it in *Rucho* oral arguments, *"absolutely a workable standard."*[160]

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[159] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ (2019) (Kagan, J., oral arguments, 22:43).
[160] Ibid, Breyer, J., 21:17.

4. The People Are Sovereign

Rucho v. Common Cause and the Future of Gerrymandering

Part I: Statistical Outlier Analysis Goes to Court

In 2018, the Supreme Court dismissed *Gill* on standing, finding that the grounds on which the plaintiff's case were built were insufficient in proving that they had suffered an "injury in fact."[161] In *Gill*, the plaintiffs challenged the 2011 Republican-gerrymandered Wisconsin state legislative map. The plaintiff, William Whitford, primarily used the "one person, one vote" principle to build his case—one person, one vote was established in the 1960s in *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims*. In *Gill v. Whitford*, the plaintiffs argued that one person, one vote had been violated by the Republican gerrymander because it constituted a form of vote dilution, making votes for Republicans more meaningful than votes cast for Democratic candidates. However, as Justice Elena Kagan wrote in a concurrence, *"To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been 'contract[ed].' Wesberry, 376 U. S., at 7. And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked."*[162]

Whitford, however, did not live in a district that was proved to have been either packed or cracked, and, in fact, Whitford's district, Wisconsin's 76th Assembly District, regularly produced Democratic victories with more than 80% of the vote. Additionally, the "ideal" replacement map proposed by the plaintiffs produced similar results in Whitford's district: a Democratic vote share of about 82%. The plaintiffs argument was then, as William Whitford said, *"[t]he only practical way to accomplish my policy objectives is to get a majority of Democrats in the Assembly and the Senate ideally in order to get the legislative product I prefer."*[163]

This argument is problematic, as plaintiffs must prove that an individual's constitutional rights were violated before the Supreme Court, and Whitford failed to do so; the Supreme Court ruled unanimously that the plaintiffs did not have standing.

In her *Gill* concurrence, however, Justice Kagan outlined a path forward for partisan gerrymandering litigation. She proposed that rather than building cases on one person, one vote and the Fourteenth Amendment, plaintiffs should use freedom of association under the First

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[161] Burden and Canon, "The Supreme Court decided not to decide."
[162] Gill v. Whitford, 585 U.S. ___, 4 (2018) (Kagan, J., concurring).
[163] Gill v. Whitford, 585 U.S. ___, 5 (2018) (Robert, J.).

Amendment.[164] Established by a series of Supreme Court cases in the 1950s and 1960s regarding southern states' efforts to limit N.A.A.C.P. membership, freedom of association is the right to associate oneself with social, political, and religious groups as a form of freedom of speech, without government limiting the ability of citizens to associate.[165] The advantage of using freedom of association in partisan gerrymandering litigation is that it does not rely on individual voters' rights to the extent that one person, one vote does; instead, groups of citizens from across states can file suit together, as associations. This allows plaintiffs to more freely use statewide gerrymandering metrics, rather than being confined to district-by-district measures that are less effective and fewer and farther between.[166]

Following *Gill*, District Courts in both *Lamone v. Benisek* and *Rucho v. Common Cause* found partisan gerrymandering justiciable under the First Amendment, finding the plaintiffs' freedom of association argument persuasive.[167] In addition to freedom of association, plaintiffs claimed that partisan gerrymandering violated the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, §2, of the Constitution.[168]

In the first of the 2019 Supreme Court cases, *Lamone v. Benisek*, three Republican voters in Maryland alleged that the state's 2011 congressional map was an unconstitutional partisan gerrymander. The map had been drawn by the Democratic-controlled state legislature and then-Democratic governor Martin O'Malley.[169] O'Malley formed a Redistricting Advisory Committee led by Congressman Steny Hoyer, who has described himself as a *"serial gerrymanderer."*[170] Hoyer's goal was to increase Democrats' share of the Maryland congressional delegation from 6 seats to 7, out of a total of 8, as well as to draw a map that Maryland's congressional delegation would approve of (essentially meaning that Hoyer had to protect all incumbent Democratic congressmen). Hoyer and Eric Hawkins, a mapmaker hired by the Democrats, decided to attempt to flip Maryland's Sixth District, which had been represented by a Republican for nearly two decades.[171] Hawkins redrew the Sixth District so that the number of registered Republicans in the district was decreased by 66,000 and the number of Democrats increased by 24,000, making it a safe Democratic district.[172] After the map was drawn by Hawkins using many of the same methods employed by Thomas Hofeller in North Carolina, the

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[164] Gill v. Whitford, 585 U.S. ___ (2018) (Kagan, J., concurring).
[165] "Right of Association," *Legal Information Institute*, accessed December 3, 2020, https://www.law.cornell.edu/constitution-conan/amendment-1/right-of-association.
[166] Burden and Canon, "The Supreme Court decided not to decide."
[167] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 25 (2019) (Robert, J.).
[168] Ibid, 1.
[169] Ibid, 5.
[170] Benisek v. Lamone, 585 U.S. ____ (2018).
[171] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ , 5 (2019) (Robert, J.); Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 5 (2019) (Kagan, J., dissenting).
[172] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 6 (2019) (Kagan,J., dissenting).

map was adopted on party-line votes in both the Redistricting Advisory Committee and the General Assembly.[173]

In Justice Kagan's dissent in *Rucho v. Common Cause* (*Lamone* and *Rucho* were ruled on jointly by the Supreme Court), she wrote: *"Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats—including the once-reliably-Republican Sixth District."*[174]

The second 2019 Supreme Court case, *Rucho v. Common Cause*, was a suit brought against then-Republican Senator Bob Rucho, who was the chairman of the North Carolina Senate Redistricting Committee, by Common Cause, a nonpartisan government reform group, as well as the League of Women Voters of North Carolina. The two reform groups filed separate suits against Rucho in 2016, when the congressional map was redrawn, but their cases were consolidated in District Court.

In 2016, the North Carolina congressional map was ruled an unconstitutional racial gerrymander by the Supreme Court in *Cooper v. Harris*, and the state legislature was ordered to redraw the map.[175] The Republican-controlled legislature proposed a replacement map that was drawn in large part by Thomas Hofeller, his business associate Dale Oldham, and their company, Geographic Strategies. Hofeller's map was presented to the Joint Redistricting Committee, which was chaired by Rucho, by Republican Representative David Lewis in an extra session of the General Assembly.[176] The Joint Redistricting Committee was comprised of both Democratic and Republican senators and representatives, though Republicans held a large majority of seats on the committee.

Addressing Rucho, Lewis said, *"As we are allowed to consider political data in the drawing of the maps, I would propose that to the extent possible, the map drawers create a map which is perhaps likely to elect 10 Republicans and 3 Democrats. I acknowledge freely that this would be a political gerrymander, which is not against the law."*[177]

Later, Senator Floyd McKissick, a Democrat and the Deputy Minority Leader, questioned Hofeller's map's proposed partisan seat allocation—10 Republicans and 3 Democrats—given the

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[173] Ibid.
[174] Ibid, 6–7.
[175] Cooper v. Harris, 581 U.S. ___ (2017).
[176] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ (2019), Joint Appendix Volume II, JA 308, https://www.supremecourt.gov/DocketPDF/18/18-422/87664/20190208135437079_18-422%20JA%20Vol%202.pdf.
[177] Ibid, Rep. Lewis, JA 308.

fact that statewide party registration was roughly equal between Democrats and Republicans.[178] McKissick received a frank and telling answer from Lewis: *"I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."*[179] Again, the map passed out of the Joint Redistricting Committee along party lines, as it did when the full General Assembly voted on it.

Rucho v. Common Cause was first decided by a three-judge panel in the District Court of the Middle District of North Carolina, which ruled 2–1 in Common Cause's favor. This was then appealed to the Supreme Court by the defendant. However, when *Rucho v. Common Cause* first reached the Supreme Court in 2018 in conjunction with *Lamone v. Benisek*, the Supreme Court waited to rule until they decided *Gill v. Whitford*. Both *Rucho* and *Lamone* were then vacated and remanded by the Court.[180] The two cases clawed their way back up to the Supreme Court a year later, in 2019, and were consolidated and ruled on jointly that year.

Learning from *Gill v. Whitford*, plaintiffs in *Rucho* and *Lamone* followed Kagan's instructions outlined in her *Gill* dissent, arguing their case on First Amendment grounds.[181] Additionally, the *Rucho* plaintiffs brought a new mathematic tool to definitively prove the presence of partisan gerrymanders: statistical outlier analysis. Common Cause primarily used two analyses to prove their case: one from University of Michigan professor Jowei Chen and one from Duke University professor Jonathan Mattingly.

Mattingly described the process of determining if the Republican legislature-drawn map was, in fact, an outlier and, therefore, a gerrymander in lower court in October 2017: *"...we generated a large number, over 24,000 maps, that adhered to [...] the nonpartisan redistricting criteria laid out in House Bill 92. Then we took each of those maps, and we took the actual vote count from the 2012 or the 2016 elections, and we saw what outcome that map would produce, and then we tabulated all of those statistics, the outcomes of each [...] of those elections, as well as the partisan makeup of each of the districts, and then we used that to provide a background against which we could evaluate the Judges maps or the 2012 maps or the 2016 maps."*[182]

Mattingly's study, along with Chen's, clearly described Hofeller's and the Republicans' congressional map as an extreme partisan gerrymander, as described in the Brief for Common

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[178] Ibid, Sen. McKissick, JA 310.
[179] Ibid, Rep. Lewis, JA 310.
[180] Adam Liptak and Alan Blinder, "Supreme Court Temporarily Blocks North Carolina Gerrymandering Ruling," *New York Times*, January 18, 2018, https://www.nytimes.com/2018/01/18/us/politics/supreme-court-north-carolina-gerrymandering.html.
[181] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 1 (2019) (Roberts, J.).
[182] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ (2019), Joint Appendix Volume II, JA 364–365.

Cause Appellees: *"Dr. Chen generated 3,000 alternative maps, under which the composition of North Carolina's delegation formed a bell curve [...], mostly split 7–6 or 6–7… None of the 3,000 maps yielded a Republican advantage as great as the 10–3 split of the 2016 Plan… Dr. Mattingly, meanwhile, generated over 24,000 alternative maps using traditional nonpartisan criteria. Fewer than 0.7% of them resulted in a Republican advantage as lopsided as 10–3. Thus, on a statewide basis, the 2016 Plan was literally off the charts—an 'extreme statistical outlier' that could not be explained by reference to traditional districting criteria."*[183]

However, despite the improvement in gerrymandering measures between *Gill* and *Rucho*, one variable proved to be salient in the ruling: the retirement of Justice Anthony Kennedy in 2018.[184] Before *Rucho*, Kennedy had indicated an openness to ruling on partisan gerrymandering in *Vieth v. Jubelirer* and *LULAC v. Perry* in the 2000s if the plaintiff presented their case with a better measure of gerrymandering than partisan bias. For a number of reasons, many reform groups and plaintiffs turned to the efficiency gap, but, as *Gill v. Whitford* was dismissed on standing, Justice Kennedy never definitively weighed in on the efficiency gap or the constitutionality of partisan gerrymandering. Justice Kennedy stepped down in the interlude between *Gill* and *Rucho* and President Trump appointed Justice Brett Kavanaugh to Kennedy's seat in the Court. Setting aside the controversy surrounding Justice Kavanaugh's appointment, Kavanaugh has since proven himself to be an obstacle, rather than an ally, to redistricting reform, and plaintiffs in *Rucho* and *Lamone* were forced to focus instead on convincing Chief Justice John Roberts to act as the swing vote on gerrymandering litigation. Roberts has not performed this role.

In *Rucho v. Common Cause*, the Supreme Court decided that both the plaintiff's constitutional argument and statistical outlier analysis as a measure of gerrymandering were insufficient to declare partisan gerrymandering unconstitutional; in fact, the majority opinion determined the issue to be nonjusticiable, meaning that federal courts could not rule on gerrymandering—now and forever (or at least until a future Supreme Court ruling overturns *Rucho*).

The consequences of the *Rucho* ruling cannot be understated. In an NPR interview, Loyola Law School professor Justin Levitt said, *"We are in Mad Max territory now; there are no rules. I think you'll see more legislators in more states taking up the mantle of extreme partisan aggression against people who disagree with them."*[185] Additionally, *Rucho* has already been used as precedent in a number of cases which also threaten the integrity of our democracy. For example, in April of this year, as the first wave of the Coronavirus pandemic was forcing many

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[183] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ (2019), Brief for *Common Cause* Appellees, 13–14.
[184] Nina Totenberg, Domenico Montanaro, and Miles Parks, "Supreme Court Rules Partisan Gerrymandering Is Beyond The Reach Of Federal Courts," *NPR*, June 27, 2019, https://www.npr.org/2019/06/27/731847977/supreme-court-rules-partisan-gerrymandering-is-beyond-the-reach-of-federal-court.
[185] Ibid.

states to issue stay-at-home orders, the Democratic Party attempted to delay, through a gubernatorial executive order, Wisconsin's primary election so that voters would not have to stand in line waiting to cast ballots, risking spreading the virus.[186] However, the Republican Party challenged this delay, and in *Republican National Committee v. Democratic National Committee*, the Supreme Court ruled 5–4 (with the conservative wing forming the majority) that the election would proceed regardless of the pandemic.[187] The legal precedent in the ruling was, in large part, *Rucho*, as that case established a much-reduced role for the judicial branch in overseeing elections, regardless of the role of partisanship in the voting process. The fight over the 2020 Wisconsin primary election is but a preview of what could come with *Rucho* on the books.

[186] Carter Hanson, "Holding Elections During a Pandemic is Undemocratic," *Medium*, April 7, 2020, https://medium.com/@chanson7908/holding-elections-during-a-pandemic-is-undemocratic-9666942df472.
[187] Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer, "What's behind the fight over Wisconsin's primary? The Supreme Court's gerrymandering ruling," *Washington Post*, April 21, 2020, https://www.washingtonpost.com/politics/2020/04/21/republicans-democrats-fought-over-holding-wisconsins-election-thats-because-supreme-court-wont-rule-against-partisan-gerrymandering/.

Part II: The Province and Duty of the Judicial Department

Both the majority opinion and Justice Kagan's dissent (which was joined by justices Breyer, Ginsberg, and Sotomayor) in *Rucho v. Common Cause* built their arguments from the same passage, written by Chief Justice John Marshall, from *Marbury v. Madison*, the 1803 Supreme Court case that established the role of the judiciary in overseeing the constitutionality of the law: *"It is emphatically the province and duty of the judicial department to say what the law is."*[188]

From this foundation, the majority in *Rucho*, led by Chief Justice Roberts and joined by justices Alito, Gorsuch, Kavanaugh, and Thomas, argued that sometimes—as they believed was the case in *Rucho*—it is the duty of the judiciary to say what is outside of their jurisdiction—to leave the election process to the legislative branch without oversight.[189] The majority, however, recognized the presence of extreme partisan gerrymanders in Maryland and North Carolina, as well as conceded their near-constitutional or constitutional dimensions, writing: *"The districting plans at issue here are highly partisan by any measure."*[190] One wonders whether if the *measure* of gerrymandering is, therefore, at issue for the majority to the extent that they will claim it to be—but I digress.

Despite this recognition, the majority was not compelled by the plaintiffs' Fourteenth Amendment, First Amendment, or Elections Clause arguments. The first issue raised by the majority related to the statistical outlier analysis method itself, rather than any of the plaintiffs constitutionality arguments: the majority claimed that statistical outlier analysis, like partisan bias and the efficiency gap, relied on a baseline of proportional representation to measure itself against, or at least implied such a baseline. The majority argued that statistical outlier analysis, because it sorts maps along a curve according to partisan outcome, did not improve on prior gerrymandering measures, and, therefore, *"partisan gerrymandering claims invariably sound in a desire for proportional representation."*[191] Furthermore, because proportionality is not a constitutional requirement for the drawing of district lines, the majority ruled that partisan gerrymanders are nonjusticiable, overturning the precedent of *Davis v. Bandemer*.

The objection that statistical outlier analysis uses proportionality as a baseline reflects an acute misunderstanding—whether intentional or not—of the functions of the method in measuring partisan gerrymanders on the part of the Court's conservative majority. As I said last chapter, *"Fundamentally, statistical outlier analysis is descriptive of maps relative to the most probable,*

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[188] Marbury v. Madison, 1 Cranch 137, 177 (1803).
[189] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 34 (2019) (Roberts, J.).
[190] Charles Fried, "A Day of Sorrow for American Democracy," *The Atlantic*, July 3, 2019, https://www.theatlantic.com/ideas/archive/2019/07/rucho-v-common-cause-occasion-sorrow/593227/.
[191] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 16 (2019) (Roberts, J.).

nonpartisan map rather than it being prescriptive of maps being gerrymanders." In partisan gerrymandering litigation, the variable under scrutiny in the redistricting process is, perhaps unsurprisingly, partisan intent. Statistical outlier analysis is a method to mathematically prove the presence of partisan intent in maps, by comparing a map that has had a suit brought against it to the random average of maps for that state accounting for state and federal criteria.

In *Rucho* oral arguments, advocate for the appellants (the anti-reform defendants) Paul D. Clement stated that the plaintiffs were really arguing that the problem was *"a lack of proportional representation."*[192] This assertion misses the mark, though it related more to the constitutionality of ruling on partisan gerrymandering than statistical outlier analysis. Justice Sotomayor responded: *"...all of the tests that they're (the plaintiffs) proposing and that the district court looked at didn't talk about proportional representation. It looked at only the opportunity to elect. An opportunity is different."*[193] Sotomayor's response has some problems from a judicial perspective: the opportunity to elect may imply a standard of competitiveness, as voters in noncompetitive districts arguably do not have a substantial opportunity to elect—although the same is certainly true of voters in gerrymandered districts as well. Competitiveness as a standard remains a political, rather than a legal question.

Instead of an opportunity to elect, statistical outlier analysis is a tool to isolate partisan intent, and this approach, in my opinion, is far more effective than opportunity to elect in determining the constitutionality of maps. Justice Kagan was right in her dissent that statistical outlier analysis *"essentially answers the question: In a state with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?"*[194] The ensemble of reasonable maps generated through the statistical outlier method give courts a set of "comparators," as Justice Kagan dubbed, which provide both the means to identify partisan gerrymanders and the set of rigorous tests that delineate the threshold of extremity required for judicial action. In other words, unlike the majority's fear, the method gives courts a procedure: maps are acceptable, regardless of their partisan outcome, as long as they fall within a range and are not so extreme as to have been crafted with predominant partisan intent.[195] As Justice Kagan stated in *Rucho* oral arguments: *"...the state can do whatever it wants, it can depart from proportional representation however much it wants to, however much the natural features of the state would suggest, it can come up with something that's not proportional representation at all. What it can't do is deviate from that based on partisan considerations."*[196]

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[192] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ (2019) (Clement, oral arguments, 6:27).
[193] Ibid, Sotomayor, J., 6:36.
[194] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 19 note 3 (2019) (Kagan, J., dissenting).
[195] Ibid, 22–23.
[196] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ (2019) (Kagan, J., oral arguments, 59:20).

In *Rucho* specifically, the North Carolina congressional map was so extreme an outlier that only partisan intent could possibly have been the predominant objective in the redistricting process. Statistical outlier analysis proves this not by enforcing a baseline of proportionality, but by isolating the variable of partisan intent by generating an ensemble of other possible maps, all following state and federal criteria, which were not drawn with the explicit goal of maximizing the number of Republicans elected to Congress. Why do we know partisan intent was the predominant factor in drawing the North Carolina congressional map? Because, as advocate for Common Cause Emmet Bondurant said in oral argument, *"You cannot possibly explain the 10/3 advantage based on political geography, democratic clustering, the application of independent redistricting principles, or pure chance."*[197] When maps are gerrymandered to the extent that the North Carolina congressional map was, the law should recognize that, as professor Charles Fried wrote in *The Atlantic*, *"enough is enough."*[198]

The second objection raised by the *Rucho* majority opinion is that they saw the threshold of unconstitutionality as arbitrary.[199] The threshold problem was brought up in *Vieth v. Jubelirer*, in Justice Antonin Scalia's plurality opinion, which described it as *"the original unanswerable question."*[200] The majority argues that the plaintiffs—and Justice Kagan's dissent—have no discernable standard or threshold, no procedure for future partisan gerrymandering litigation, but the majority missed the point: statistical outlier analysis is descriptive, not prescriptive, and in the case of the 2016 North Carolina congressional map, it describes a clear and extreme partisan gerrymander. In *Rucho*, the 2016 congressional map was, according to Justice Kagan's dissent, *"The absolute worst of 3,001 possible maps;"* not only that, there is testimony (which I quoted earlier) from prominent North Carolina Republicans declaring their partisan intent.[201] Setting the evidence aside, the majority opinion itself recognized the partisan intent behind the drawing of the map. *"How much is too much?"* wrote Justice Kagan. *"This much is too much."*[202]

Partisan gerrymandering is an example of a recognized violation of individual voters' rights, which the majority of the Supreme Court apparently believes is not its responsibility—it is a set of rights that the judiciary believes it cannot protect. This is not how justice should function in a democracy. The majority believes they cannot say what the law is because it is too difficult to find a threshold; the simple solution is to set a threshold—which is exactly what district courts did in both *Rucho* and *Lamone*.[203] Judicial tests are commonplace, and have already been utilized

[197] Ibid, Bondurant, 34:41.
[198] Fried, "A Day of Sorrow for American Democracy."
[199] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 28 (2019) (Roberts, J.).
[200] Vieth v. Jubelirer, 541 U.S. 267, 296–297 (2004) (plurality opinion).
[201] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 26 (2019) (Kagan, J., dissenting).
[202] Ibid.
[203] Ibid, 27.

in partisan gerrymandering litigation. The discussion of where the threshold should be is important, but the North Carolina map under scrutiny in *Rucho* is so extreme a gerrymander that any conceivable threshold would determine the map to be unconstitutional. As such, the Court has vindicated the most extreme gerrymander in modern U.S. history because there is no set threshold of unconstitutionality when, in fact, any threshold would find the map unconstitutional. The absurdity of the majority's threshold argument—that either there is a set threshold or all gerrymanders are vindicated—is described in analogy by professor Fried in *The Atlantic*: *"If one cannot say how many hairs a man may have to still count as bald, there are no bald men."*[204] If the role of the Supreme Court is to protect the constitutional rights of citizens, in *Rucho* they failed, with terrible consequences for both the institution of American democracy and the voices—and votes—of the American people.

The third objection in the majority opinion is something I like to call the judicial floodgates argument. The majority first questions the constitutional—and constitutionally-intended—role of the judiciary in overseeing elections, recalling the initial question of justiciability: *"The question here is whether there is an 'appropriate role for the Federal Judiciary' in remedying the problem of partisan gerrymandering—whether such claims are claims of <u>legal</u> right, resolvable to <u>legal</u> principles, or political questions that must find their resolution elsewhere."*[205] The majority does not believe the judiciary has a constitutional responsibility to oversee elections and prosecute gerrymandering litigation, primarily drawing this reasoning from constitutional originalism (or the intent of the founders).[206]

The majority then argues that, because there is no constitutionally-mandated role for the federal judiciary in gerrymandering litigation, and because there is no set threshold or procedure for unconstitutionality, if they were to rule in the plaintiffs' favor, it would unleash a flood of challenges to maps across the country. The majority opinion cites a passage from Justice Kennedy's concurrence in *Vieth v. Jubelirer* which says: *"The correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process."*[207]

The problem with this argument is that there <u>is</u> a clear procedure established by the plaintiffs in *Rucho*. The district courts in both *Rucho* and *Lamone* used a judicial test comprised of three parts: first, plaintiffs had to prove predominant partisan intent.[208] Second, plaintiffs must prove that this intent translated into a tangible effect in the form of vote dilution. And third, defendants

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[204] Fried, "A Day of Sorrow for American Democracy."
[205] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 7 (2019) (Roberts, J.).
[206] Ibid, 11.
[207] Ibid, 15; Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).
[208] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 16 (2019) (Kagan, J., dissenting).

have the opportunity to attempt to prove that another motivation—other than partisan intent—was predominant in the redistricting process. As advocate for Common Cause Emmet Bondurant said in oral argument: *"This is a standard that can be understood. That is a standard that legislators will obey. And that is a standard that will reduce, not increase, litigation."*[209]

In fact, the opposite of what the majority argued is already happening: the *Rucho* ruling has increased gerrymandering and election law litigation, causing its own judicial floodgates.[210] This has come in the form of cases like *Republican National Committee v. Democratic National Committee* in Wisconsin this year.[211]

The majority's fourth argument is based on, as I have termed it, judicial laziness. Finding a threshold and establishing a procedure is difficult so, as Justice Kagan wrote in her dissent, *"The whole thing is impossible, the majority concludes."*[212] Except a threshold and a procedure, again, has already been establish by the district courts.[213] In *Rucho* oral arguments, this judicial laziness surfaced in the form of Justice Gorsuch's search for an alternative to judicial action. He brought up Colorado, his—and my—home state, and our passage of a pair of ballot initiatives in 2018 that established independent redistricting commissions for legislative and congressional redistricting, effectively ending gerrymandering in Colorado.[214] He then calls into question the actual extent of gerrymandering and if it can be solved through more ballot initiatives.

Unfortunately, Colorado may be the exception, rather than the rule. Many states do not have a ballot initiative process as effective or comprehensive as Colorado's. In oral argument, Bondurant said, *"The vast majority of states east of the Mississippi, including specifically North Carolina, do not have citizen initiative… You can only amend the constitution with the approval of the legislature, in proposing an amendment that gets to the ballot and is then ratified. And that is not an effective remedy. And the states in which you have independent redistricting commissions are states in which those commissions were adopted over the dead bodies of the legislators by citizen initiative, passed overwhelmingly by the citizens and in the face of legislative opposition."*[215]

The greater issue with judicial laziness is that partisan gerrymandering litigation is, ultimately, the responsibility of the courts—not the responsibility of a few ballot initiatives to gradually

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[209] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ (2019) (Bondurant, oral arguments, 52:45).
[210] Charles and Fuentes-Rohwer, "What's behind the fight over Wisconsin's primary?"
[211] Republican National Committee v. Democratic National Committee, 589 U. S. ____ (2020).
[212] Rucho v. Common Cause, No. 18-422, 588 U.S. ___, 22 (2019) (Kagan, J., dissenting).
[213] Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer, "SCOTUS's Ruling on Gerrymandering Endangers U.S. Democracy," *Time*, July 11, 2019, https://time.com/5623638/scotuss-ruling-on-gerrymandering-endangers-us-democracy/.
[214] Rucho v. Common Cause, No. 18-422, 588 U.S. ___ (2019) (Gorsuch, J., oral arguments, 12:06).
[215] Ibid, Bondurant, 43:28.

claw back citizen power. The objections raised by Gorsuch—that someone else can fix the problem for the judiciary—is a tactic that muddies the legal water and intentionally misses the point. As advocate for League of Women Voters of North Carolina Allison Riggs said in oral arguments, *"Other options don't relieve this Court of its duty to vindicate constitutional rights."*[216]

[216] Ibid, Riggs, 1:06:53.

Part III: Sovereign no Longer

More than anything, it is the legal philosophy of the majority in *Rucho v. Common Cause* that disturbs me. The United States deifies its founders like no other democracy; Washington, Jefferson, Adams, and Madison loom over American history like Alexander the Great to the Romans and the Ptolemies—we seem to be forever in their shadow.

The title of this project is taken from a line of the *Declaration of Independence* that reflects the sentiment that compelled the establishment and still compels the perfection of our union: *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed…"*

No constitution, being born of imperfect compromise between imperfect men, is completely exceptional; nor is any nation, being the flawed reflection and manifestation of people, who, in their infinite nuances and complexities, are neither good nor bad—they are simply human.

The Founders understood this; they understood that posterity would never forgive them for many un—and ill—resolved problems, and they knew they could not construct a nation that was above perfection. Nor did they seek to create that perfect union; their true aim was to enable the benevolent influence of time in a free republic. Their objective was to give posterity the benefit of hindsight; progress, that liberating evolution, was their true aim, as it is only enabled by the maintenance of democratic government and the ready participation of its citizens in its exercise.

Gerrymandering is a crisis of democracy, hindering political evolution and realization by removing the voice of the citizen in their just representation and giving that power to a handful of partisan cartographers. What the founders intended for the redistricting process is ultimately beside the point: the truest respect given to the founders is progress, and no issue calls for substantial reform and action like partisan gerrymandering.

The definition and purpose of democracy is in elections and, more than that, meaningful elections.[217] Timothy Snyder wrote in his book *The Road to Unfreedom*: *"Democracies die when people cease to believe that voting matters. The question is not whether elections are held, but whether they are free and fair. If so, democracy produces a sense of time, an expectation of the future that calms the present. The meaning of each democratic election is promise of the next one… In this way, democracy transforms human fallibility into political predictability, and helps*

[217] Carter Hanson, "Truth Against the Total State," *The Pensive Anchor*, March 27, 2020, audio, https://pensiveanchor.podbean.com/e/season-2-episode-2-truth-against-the-total-state/.

us to experience time as movement forward into a future over which we have some influence. If we come to believe that elections are simply a repetitive ritual of support, democracy loses its meaning."[218]

Gerrymandering denies American citizens their most essential right: to participate in meaningful, free, and fair elections. It is the emphatic duty of the federal judiciary and the Supreme Court to say that the law is against gerrymandering, and to protect this right as the fundamental pillar of our democratic society.

[218] Timothy Snyder, *The Road to Unfreedom* (New York: Tim Duggan Books, 2018), 249.

5. The Value of Democracy

Independent Redistricting Commissions as a Solution for Partisan Gerrymandering

Part 1: The Nuclear Option

On November 1, 2011, the Arizona State Senate voted 21–6 along party lines to remove Colleen Coyle Mathis from the state's independent redistricting commission.[219] Mathis had been the chairwoman and the sole independent member of the five-member committee appointed to redraw the state's congressional and legislative district maps following the 2010 Census.[220] The impeachment of Chairwoman Mathis, prior to it's initiation, had been known as *"the nuclear option"* in the long-running battle between the Arizona Independent Redistricting Commission and the Republican-controlled state government, and talk of impeachment had generally been dismissed by Democrats as *"saber rattling."*[221] Only a month before the State Senate voted to impeach Mathis, then-Governor Jan Brewer, also a Republican, had called the congressional map produced by the commission *"simply gerrymandering at its worst."*[222]

The vote in the state Senate followed Governor Brewer's initiation of the impeachment process on October 26, 2011, when she sent a letter of grievances to Chairwoman Mathis. In the letter, Governor Brewer accused Chairwoman Mathis of committing *"substantial neglect of duty and gross misconduct in office while serving on the Independent Redistricting Commission."* Her justification to impeach was based on the criteria that Mathis had used in the new congressional maps proposed by the Independent Redistricting Commission (also known as the IRC). Brewer criticized Mathis's prioritization of competitiveness in the commission's redistricting of the Arizona congressional map. Additionally, Brewer asserted that the IRC had *"violated constitutional requirements"* by engaging in gerrymandering practices such as breaking up communities of interest without regard for compactness and contiguity, as well as making the creation of three districts along the southern border a redistricting goal. The impeachment

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[219] Alex Isenstadt, "Arizona redistricting chief impeached," *Politico*, November 1, 2011, https://www.politico.com/story/2011/11/arizona-redistricting-chief-impeached-067408.
[220] Siddhartha Mahanta, "Jan Brewer Goes Nuclear on the Arizona Redistricting Commission," *Mother Jones*, October 27, 2011, https://www.motherjones.com/politics/2011/10/jan-brewer-goes-nuclear-redistricting-commission/.
[221] Abby Livingston, "Arizona Governor Starts Impeachment Process Against Redistricting Panel," *Roll Call*, October 26, 2011, https://www.rollcall.com/2011/10/26/arizona-governor-starts-impeachment-process-against-redistricting-panel/.
[222] Ibid.

ostensibly targeted all five commissioners, though the removal of Chairwoman Mathis was the Republican-controlled state government's primary objective.[223]

The impeachment was immediately condemned by Arizona Democrats. According to an article from *Roll Call* published October 26, 2011: *"Arizona Democratic Party Executive Director Luis Heredia described the governor as 'drunk with power,' calling the move 'a brazen power grab that would rival any in Arizona history.'"*[224] Additionally, according to a *Politico* article from November 1: *"Andrei Cherny, chairman of the Arizona Democratic Party, called the impeachment vote 'a historic abuse of power without parallel in modern American history.'"*[225]

Despite Democrats' objections, the impeachment went through without difficulty, and Colleen Mathis was removed from her position as chairwoman of the IRC on November 1, 2011.

[223] Ibid.
[224] Ibid.
[225] Isenstadt, "Arizona redistricting chief impeached."

Part II: Keeping Politics Out of It

The Arizona Independent Redistricting Commission began in 2001, after a ballot initiative, Proposition 106 (also known as *"Fair Districts, Fair Elections"*), passed with 56% of the statewide vote a year earlier, in 2000.[226] Proposition 106 was put on the ballot by a group of voters across party lines, including Republicans, Democrats, and unaffiliated voters.[227] It amended the state constitution and shifted power over the redistricting process from the state legislature and the governor to a five-member citizen commission, which was comprised of two Democrats, two Republicans, and one independent.[228] This partisan composition roughly matched the state electorate, which had a roughly even split of registered Republicans, Democrats, and unaffiliated voters.[229]

Colleen Coyle Mathis, who was eventually impeached from the IRC in November 2011, first became involved in the commission in 2010, when she stumbled across a pamphlet published by the IRC that called for applications for the independent seat on the commission.[230] She applied and was selected to become the sole independent on the commission, also making her the chairperson and the crucial deciding vote.

Almost immediately after taking office, Chairwoman Mathis came under attack from both Republican voters and politicians. The battle over the Arizona IRC came at the tail end of the Tea Party Movement, which was a conservative grassroots movement begun in 2009 that was a reaction to the election of President Barack Obama, his handling of the Great Recession, and the passage of the Affordable Care Act.[231] When Mathis voted often with the two Democratic members of the commission, many Tea Party activists and other Republicans accused Mathis of being a secret Democrat, sabotaging the nonpartisan mission of the IRC.

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[226] Galen Druke, "Want Competitive Elections? So Did Arizona. Then The Screaming Started," *FiveThirtyEight*, December 21, 2017, audio, 6:27, https://fivethirtyeight.com/features/want-competitive-elections-so-did-arizona-then-the-screaming-started/.
[227] Ibid, 5:48.
[228] Colleen Mathis, Daniel Moskowitz, and Benjamin Schneer, "The Arizona Independent Redistricting Commission: One State's Model for Gerrymandering Reform," *Harvard Kennedy School* (September 2019): 3, https://www.hks.harvard.edu/publications/arizona-independent-redistricting-commission-one-states-model-gerrymandering-reform#citation.
[229] Nina Totenberg, "Supreme Court To Weigh Power Of Redistricting Commissions," *NPR*, March 2, 2015, https://www.npr.org/2015/03/02/389573352/supreme-court-to-weigh-power-of-redistricting-commissions.
[230] Matt Vasilogambros, "The Tumultuous Life of an Independent Redistricting Commissioner," *Pew Charitable Trusts*, November 26, 2019, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/11/26/the-tumultuous-life-of-an-independent-redistricting-commissioner.
[231] Chris Good, "On Social Issues, Tea Partiers Are Not Libertarians," *The Atlantic*, October 6, 2010, https://www.theatlantic.com/politics/archive/2010/10/on-social-issues-tea-partiers-are-not-libertarians/64169/.

At the same time as conservative-leaning voters were becoming increasingly suspicious of—and angry at—Mathis, the IRC attempted to become more transparent and responsive to public input. Mathis described this outreach effort in a paper she co-authored with Daniel Moskowitz and Benjamin Schneer and was published by the Harvard Kennedy School of Government in September 2019: *"Before a single line was drawn, the commission embarked on a 'listening tour,' where commissioners traveled the state to host 23 public hearings exclusively held to obtain input on what the redistricting criteria set forth in the state constitution meant to Arizona citizens. Then, during the line-drawing phase, the commission provided time for public comment at all of its business meetings... Finally, once the commission completed drawing draft maps, the commissioners again traveled around the state to 30 towns and cities to gather feedback on their work. Ultimately, the commission received more than 7,400 items of public input along with 224 maps suggested by the public..."*[232] The feedback from the public informed the final drawing of the lines and directed the commission throughout the entire redistricting process.

However, many of the public hearings did not go as expected. Tea Party activists descended on them and attacked Mathis for her perceived Democratic bias. According to an article published by the Associated Press in November 2019, *"At a public meeting of the panel at Pima Community College on a scorching hot June afternoon in 2011, one person after another berated Mathis. The speakers were angry about what they thought were Democratic-leaning decisions, including the hiring of a mapping consultant with ties to President Barack Obama's first presidential campaign."*[233]

Here's one Arizonan who attended the public hearing at Pima Community College in June 2011: *"So slanted have your votes been against Republicans, that there is no question what the goal of this commission is. But what can we expect when the independent is not really an independent? She's married to an activist Democrat."*[234]

Here's another activist: *"You know, I thought this commission was supposed to be non-partisan. Damn it, you can't get any more partisan than this!"*[235]

The Republican outrage directed at the IRC in June 2011 was fueled by the commission's hiring of a mapping consultant firm that had worked for Democrats in the past. Additionally, Republicans were concerned with Mathis's husband, Christopher Mathis, who was a life-long Republican but had recently been working for a Democratic candidate for a state legislative seat.

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[232] Mathis, Moskowitz, and Schneer, "The Arizona Independent Redistricting Commission," 4–5.
[233] Vasilogambros, "The Tumultuous Life of an Independent Redistricting Commissioner."
[234] Druke, "Want Competitive Elections? So Did Arizona," 1:36–1:48.
[235] Ibid, 2:43–2:53.

[236] Colleen Mathis dismissed the Republican insinuation that her husband's politics determined her actions as a part of the commission. From the *Associated Press*: *"She found it insulting and sexist that critics couldn't separate her husband's work from hers. She made her decisions based on what she felt was right, she said, and what was required of her by law, including provisions that emphasized competitive districts that put the commission at odds with Republicans in power."*[237]

At this point in the map-drawing process, Mathis also received criticism from the two Republican members of the IRC. In an interview in 2019, Scott Day Freeman, one of those Republicans, said the congressional and legislative maps, as well as (what he perceived to be) a lack of transparency in the redrawing, were *"constitutionally suspect."*[238]

Chairwoman Mathis began to receive death threats. According to the *Arizona Republic*, after lawsuits were filed against the IRC, *"The panel's office was also broken into and their computers stolen (no suspects were ever arrested in that incident)."*[239] Colleen and Christopher Mathis put plywood boards on their windows and installed floor bolts on their door to secure themselves against any violence directed at them by far-right extremists.[240] When asked about the plywood boards on the *FiveThirtyEight Politics* Podcast, Colleen Mathis said, *"We just felt kind of like it would be nice to be able to sleep at night and not worry that somebody was looking in the window or going to do anything."*[241] Sometimes, Mathis stayed at friends' and neighbors' houses when her own home became too dangerous. Around this time, Mathis also met with FBI agents to discuss threats to her life.

That July, Republican state Senator Frank Atenori said of the ongoing legal battle between the Republican-controlled state government and the IRC, *"The gun is loaded and it's just figuring out what target to point it at and when to pull the trigger."*[242]

This comment was particularly distasteful at the time, given the fact that U.S. Representative Gabby Giffords had been shot in the head at a constituent event in a grocery store parking lot in Tucson only six months earlier.[243] Giffords survived the shooting, but six others, including a

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[236] Vasilogambros, "The Tumultuous Life of an Independent Redistricting Commissioner."
[237] Ibid.
[238] Ibid.
[239] Justin Gardiner, "Gerrymandering: Arizona is a national model for fairness, but still faces criticism," *The Arizona Republic*, April 24, 2018, https://www.azcentral.com/story/news/politics/elections/2018/04/24/gerrymandering-arizona-national-model-maps-among-least-skewed-united-states/463496002/.
[240] Vasilogambros, "The Tumultuous Life of an Independent Redistricting Commissioner."
[241] Druke, "Want Competitive Elections? So Did Arizona."
[242] Vasilogambros, "The Tumultuous Life of an Independent Redistricting Commissioner."
[243] Marc Lacey and David M. Herszenhorn, "In Attack's Wake, Political Repercussions," *New York Times*, January 8, 2011, https://www.nytimes.com/2011/01/09/us/politics/09giffords.html.

federal district court chief judge and a nine-year-old girl, did not. Senator Atenori later said that he was using *"military analogies"* that were not meant to be a threat.[244]

Needless to say, the Arizona Independent Redistricting Commission did not exactly succeed in removing politics from the redistricting process. The simple truth is that the drawing of district lines is going to be political, no matter who does the drawing. Said Chairwoman Mathis, *"You just can't take politics out of it."*[245]

In redistricting, the composition of Congress and state legislatures is at stake, meaning that both Democratic and Republican politicians are invested in the partisan composition of maps produced by redistricting commissions—including independent commissions. Justin Levitt, associate dean of Loyola Law School in Los Angeles, California, said that the Arizona IRC was controversial *"because political leaders in the state have tried to make it very controversial."*[246] Furthermore, said Levitt, *"She (Mathis) was the chair of the commission that the prevailing party didn't appreciate. The commission put their heads down and did the job citizens told them to do."*[247]

The IRC eventually produced a redrawn congressional map for the state, which further upset Republicans. The partisan composition of the map was four solid Republican districts, two solid Democratic districts, and three tossup seats.[248]

Keep in mind, Arizona leans Republican, but only slightly: in the 2016 presidential election, Donald Trump won the state by only 3.5%, receiving 48.1% of statewide votes compared to Hillary Clinton's 44.6%.[249] More recently, however, Arizona has shifted slightly to the left: in the 2018 race for Arizona's open Senate seat (following the death of Senator John McCain), Democrat Kyrsten Sinema defeated Republican Martha McSally by 2.4%, with Sinema receiving 50% of votes and McSally receiving 47.6%.[250] Additionally, as of August 28, 2020, Joe Biden has a 4.3% lead in the polls in Arizona over Donald Trump.[251]

Given that context, the map drawn by the IRC and Chairwoman Mathis in 2011 was fairly egalitarian, favoring neither party substantially more than the other. Republicans need to win only in one of the three swing districts in order to have a majority of the state's Congressional

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[244] Vasilogambros, "The Tumultuous Life of an Independent Redistricting Commissioner."
[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] Totenberg, "Supreme Court To Weigh Power Of Redistricting Commissions."
[249] "2016 Presidential Election Results," *New York Times*.
[250] "U.S. House Election Results 2018," *New York Times*.
[251] "Who's ahead in Arizona?" *FiveThirtyEight*, December 4, 2020, https://projects.fivethirtyeight.com/polls/president-general/arizona/.

seats, while Democrats need to win all three tossup districts. This reflects Arizona's slight Republican tilt while maximizing the number of swing districts, which produce representatives that are more responsive to the demands of constituents than those from solid blue or red districts. Since the new Arizona Congressional map was drawn in 2011, Republicans have held a majority of the congressional delegation twice—following the 2014[252] and 2016[253] elections—and Democrats twice—following the 2012[254] and 2018[255] elections. This roughly matches the partisan voting shifts in Arizona in the past decade.

Mathis's IRC was unique in its prioritization of drawing competitive districts. In fact, as Galen Druke, host of the *FiveThirtyEight* podcast *The Gerrymandering Project*, said, *"Arizona is the only state in the country that requires officials to draw competitive districts when making political maps."*[256] The practice of valuing competitiveness as much as other redistricting criteria such as compactness and minority representation began, to some extent, with Chairwoman Mathis. Said Mathis: *"Some of the most competitive races in the country are in Arizona now, and I attribute that directly to the commission's work."*[257]

Mathis's drive to produce competitive districts came from her interpretation of the Arizona Constitution's mandate for the IRC. In the state Constitution, six criteria are established for the drawing of congressional and legislative district lines: (1) redistricting must comply with the U.S. Constitution and the Voting Rights Act, (2) districts must have roughly equal populations, (3) districts are to be relatively compact and must be contiguous, (4) communities of interest must be maintained, (5) redistricting must be informed by the state's physical and human geography, and (6) competitive districts must be drawn when possible.[258] This sixth criterion, described in Article 4, Part 2, Section 1 of the Arizona Constitution, reads *"To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals."*[259] Until Mathis took office, this sixth criterion was largely ignored in the redistricting process. Her map achieves this mandate, creating three competitive districts, while also succeeding in the other five criteria: it complies with the Constitution and the Voting Rights Act; it maintains population equality across districts; all districts are contiguous, and it scores decidedly middle-of-the-road in terms of compactness,[260] scoring as less compact than

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[252] "House Election Results 2014," *New York Times*.
[253] "2016 Presidential Election Results," *New York Times*.
[254] "Election 2012: House Map," *New York Times*, November 29, 2012, https://www.nytimes.com/elections/2012/results/house.html.
[255] "U.S. House Election Results 2018," *New York Times*.
[256] Druke, "Want Competitive Elections? So Did Arizona," 3:43–3:49.
[257] Totenberg, "Supreme Court To Weigh Power Of Redistricting Commissions."
[258] Arizona Constitution, Article 4, Part 2, Section 1
[259] Ibid.
[260] "Redrawing the Map on Redistricting 2012," Azavea, accessed December 4, 2020, https://s3.amazonaws.com/s3.azavea.com/com.redistrictingthenation/pdfs/Redistricting_The_Nation_Addendum.pdf.

states like New York but more compact than states like Missouri, using a common compactness measured called the Polsby-Popper Index; it maintains communities of interest; and it is drawn in accordance with state geography.

In truth, Mathis's and the IRC's maps were manifestly reasonable. So, too, was Mathis's cartographic philosophy: the Arizona Constitution clearly delineates competitiveness at the same level as other redistricting criteria.

Part III: The Legislature vs. the People

Two weeks after the Arizona State Senate voted along party lines to remove Mathis from her position as chairwoman of the IRC, Mathis went to the Arizona Supreme Court to argue that there was no sufficient justification for her removal.[261] She was represented by former Arizona Chief Justice Thomas Zlaket who said before the court that if Mathis lost her case, the IRC *"becomes a joke, a laughable joke subject to manipulation by the very people that the commission was designed to insulate from."*[262] Following the two-hour proceedings, the court unanimously overturned the impeachment.[263]

Republicans, dissatisfied with the ruling, took Mathis to federal court, and the suit eventually landed in the U.S. Supreme Court in 2015. The case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[264] revolved around Article 1, Section 4 of the U.S. Constitution, which states, *"[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof."*

The appellants, the Republican-controlled state legislature, argued that, as Paul Clement, who represented the legislature before the Supreme Court, said in oral arguments, *"when the Framers used the word 'legislature' they meant the word 'legislature.'"*[265] Side note: I mentioned Paul Clement last chapter, as he also represented the appellants in *Rucho v. Common Cause*.

In other words, the appellants argued that when the Founders wrote the word "legislature," they intended for state legislatures to have sole control over the redistricting process. A ballot initiative creating an independent redistricting commission that was not supervised or directed by the legislature, and that was created without the legislature's approval, is, therefore, unconstitutional. The consequences of a Supreme Court ruling in favor of the appellants cannot be understated. Arizona is—both today and back in 2015—not the only state with an independent redistricting commission—far from it. A ruling in favor of the appellants would most likely put a halt to independent redistricting commissions, at the time affecting the drawing of 152 districts (or about a third of Congress).[266]

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[261] Arizona Independent Redistricting Commission v. Brewer, 229 Ariz. 347 (2012).
[262] Vasilogambros, "The Tumultuous Life of an Independent Redistricting Commissioner."
[263] Totenberg, "Supreme Court To Weigh Power Of Redistricting Commissions."
[264] Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015).
[265] Totenberg, "Supreme Court To Weigh Power Of Redistricting Commissions."
[266] Jessica Taylor, "One-Third Of Congressional Districts Could Be Affected By Supreme Court Ruling," *NPR*, June 28, 2015, https://www.npr.org/sections/itsallpolitics/2015/06/28/417530683/one-third-of-congressional-districts-could-be-affected-by-supreme-court-ruling.

In oral arguments, advocate for the appellants Paul Clement narrowed his definition of "legislature" as used in the Constitution, to mean, as he said, state legislatures, and that the drawing of congressional and legislative maps should be completely within the discretion of state representatives and state senators.

In contrast, the plaintiffs, represented by Seth Waxman, argued that such a narrow definition of "legislature" was, in actuality, counter to the intention of the Constitution and its Framers.[267] In oral arguments, Waxman said that when the Framers established the Constitution, *"it was understood that 'legislature' meant the body that makes the law."*[268] The plaintiffs used Article 4, Part 1, Section 1 of the Arizona Constitution to support the claim that this "body" that comprises the legislature includes the people in its definition: *"The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature."*[269] Thus, the people of Arizona *do* have the power to pass ballot initiatives that amend the state constitution and change the role of the state legislature in the redistricting process.

Clement counterred that the plaintiffs draw a false equivalent between the people and the legislature. The Constitution recognizes that they are clearly separate entities, and delegates the drawing of district lines solely to the legislature—not to the people.[270] Waxman responded simply and effectively: *"The gravamen of [the legislature's] suit is that the people 'usurped' the power of a legislative body that they themselves created."*[271] Waxman is right, American democracy is founded on the essential concept that the people ultimately hold the power and form governments to provide them with security and sustenance, thus establishing society. The people created the legislatures, and, therefore, they have the right to amend its powers.

The Supreme Court ruled 5–4 in favor of the plaintiffs in a victory for the Independent Redistricting Commission. Justice Ruth Bader Ginsburg wrote the majority opinion and was joined by justices Breyer, Kennedy, and Sotomayor. On the flip side of the ruling, justices Alito, Roberts, Scalia, and Thomas dissented.

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[267] Garrett Epps, "Government of the Legislature, by the Legislature, for the Legislature," *The Atlantic*, March 2, 2015, https://www.theatlantic.com/politics/archive/2015/03/government-of-the-legislature-by-the-legislature-for-the-legislature/386600/.
[268] Ibid.
[269] Arizona Constitution, Article 4, Part 1, Section 1
[270] Epps, "Government of the Legislature."
[271] Ibid.

Ginsburg's opinion affirms the right of state's to have referenda and ballot initiative processes that amend state constitutions, even if changes relate to federal elections:[272] *"It is characteristic of our federal system, that states retain authority to establish their own governmental processes and to serve as laboratories for experiment in democratic governance. We resist reading the Election Clause to single out federal elections as the one area in which states may not use citizen initiatives as an alternative legislative process. The framers may not have imagined the modern initiative process one in which the people of a state exercise legislative authority on an equal footing with the authority of an institutional legislature but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of government power."*[273]

A year later, the maps produced by Mathis and the Arizona IRC were affirmed unanimously by the Supreme Court based on the precedent of *Arizona State Legislature v. Arizona Independent Redistricting Commission*.

The success of reformers in this pair of cases essentially means that, as Wendy Weiser, director of the Democracy Program at the Brennan Center for Justice, said, *"The Constitution is not a barrier to states who want to address the problem of partisan gerrymandering."*[274]

. . .

The importance of the Arizona IRC case is twofold: first, it affirmed the right of the people to form completely nonpolitical and independent redistrict commissions by ballot initiative; and second, it allowed for the prioritization of creating competitive races in congressional and legislative redistricting.

Last chapter, I discussed *Rucho v. Common Cause*, the 2018 Supreme Court case that essentially shut the door on judicial resolutions to partisan gerrymandering. While the Supreme Court shunned its constitutional duty to protect the right of citizens to participate in meaningful elections, *Rucho* did not affect or alter the role that independent redistricting commissions play in many states. As a result of *Rucho*, IRCs are now one of the best means to combat partisan gerrymandering in the United States. In her 2019 Harvard Kennedy School of Government

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[272] Thomas E. Mann, "Arizona State Legislature v. Arizona Independent Redistricting Commission, et al," *Brookings*, June 29, 2015, https://www.brookings.edu/blog/fixgov/2015/06/29/arizona-state-legislature-v-arizona-independent-redistricting-commission-et-al/.
[273] "Arizona State Legislature v. Arizona Independent Redistricting Commission," opinion announcements, Oyez, accessed December 4, 2020, audio, 7:12, https://www.oyez.org/cases/2014/13-1314.
[274] Bill Chappell, "Supreme Court Backs Arizona's Redistricting Commission Targeting Gridlock," *NPR*, June 29, 2015, https://www.npr.org/sections/thetwo-way/2015/06/29/418521823/supreme-court-backs-arizonas-redistricting-commission-targeting-gridlock.

paper, Colleen Mathis wrote, *"[...] after the Rucho decision, independent redistricting commissions represent perhaps the most viable means to combat partisan gerrymandering."*[275]

The ruling opened the door for independent redistricting commissions to be established across the country through ballot initiatives. Since the Arizona State Legislature ruling, four states—Colorado, Michigan, Missouri, and Utah—have amended their constitutions to remove redistricting power from state legislatures and give that power to nonpartisan, independent commissions.[276] In three of those four states, initiatives passed with more than 60% support; in the fourth state, Utah, the initiative barely passed, with only 50.3% support. Those states are joined by Ohio, whose constitution was amended by an initiative that was allowed on the ballot by the state legislature, after a tougher initiative was expected to pass. Those five states—Ohio, Colorado, Michigan, Missouri, and Utah—have a total of 49 representatives, which means that in the last four years, about 11.3% of the U.S. House has been un-gerrymandered through ballot initiatives.

Despite the recent successes in redistricting reform through the institution of independent redistricting commissions, this approach to reform is limited by the fact that only twenty-six states allow for ballot initiative processes.[277] In states like Pennsylvania, the only way the state constitution can be amended is through the state legislature, which is nearly impossible because the very problem that requires amending the state constitution for its resolution (partisan gerrymandering) is the same problem that keeps the majority of the state legislature comfortably in power. In many cases, asking the legislature to eliminate gerrymandering is, essentially, asking them to forfeit their majority and, often, their seat in the legislature. Gerrymandering is a truly nonpartisan institution, meaning that the majority party, regardless of its ideology, nearly always tries to protect it. It is the quintessence of the refrain that power acts upon the powerful: it transforms the majority party into the gerrymandering party. Therefore, if there is to be a resolution to partisan gerrymandering, it must exist outside of the world of partisan politics. In lieu of a Supreme Court ruling, the solution is in either ballot initiatives and the establishment of IRCs or gerrymandering suits brought before state supreme courts using state constitutions, rather than the U.S. Constitution, as legal foundation.

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[275] Mathis, Moskowitz, and Schneer, "The Arizona Independent Redistricting Commission," 1.
[276] Michael Wines, "Drive Against Gerrymandering Finds New Life in Ballot Initiatives," *New York Times*, July 23, 2018, https://www.nytimes.com/2018/07/23/us/gerrymandering-states.html.
[277] Ibid.

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