

6-25-2020

Gerrymandering: The Best Solution at Our Disposal

Ibrahim Kilic

Pepperdine University, ibrahim.kilic@pepperdine.edu

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/ppr>

Recommended Citation

Kilic, Ibrahim (2020) "Gerrymandering: The Best Solution at Our Disposal," *Pepperdine Policy Review*. Vol. 12, Article 3.

Available at: <https://digitalcommons.pepperdine.edu/ppr/vol12/iss1/3>

This Article is brought to you for free and open access by the School of Public Policy at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Policy Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Gerrymandering: The Best Solution at Our Disposal

BY IBRAHIM KILIC

ABSTRACT

Partisan redistricting effectively distorts election outcomes across the country and must be resolved to establish a true baseline for the American political landscape. Unfortunately, the unconstitutionality of partisan intent has been difficult to prove at the federal level and in many key states. Even once proven, protections against gerrymandering are difficult to enforce, as the people typically charged with that task are the same legislators approving the maps to begin with. After a review of relevant cases and protections at the federal level, this study compares states with and without independent redistricting commissions to assess their ability to protect against partisan intent in the redistricting process.

Introduction

With the next census just a few months away, now is an opportune time to review why the census matters and what impact it can have. In short, population counts determine political representation and public funding. Article 1, Section 2 of the United States Constitution apportions both representatives and taxes among the states according to their population numbers every ten years.¹ It also dictates how electoral district lines are redrawn, as they are largely required to remain relatively equal in population, among other criteria explored later, and those numbers are decided through the census. Over time, redistricting techniques have been developed to apportion representatives to favor the party in control. This study will show that overtly partisan redistricting, or gerrymandering, poses a great danger to the democratic process upon which our nation was founded. As an established practice across the country, gerrymandering enables legislators to essentially choose their voters by drawing district boundaries to favor their party. James Madison's conception of factionalism and the stalemates necessary to protect against absolute majority rule were surely not intended to become so contentious as to entrench political majorities in the states. Gerrymandering is an abridgment of voting rights, as it attempts to predetermine election outcomes by effectively limiting the representational choices to favor one party and requires further action to protect our republic.

The origins of gerrymandering stretch back to 1812, when then Massachusetts Governor, Elbridge Gerry, approved a redistricting plan with more resemblance to a vulture than a logical map of electoral boundaries. By adopting this plan and others like it, the Governor was ensuring his party's political dominance in the state. Historically, the Supreme Court declared redistricting maps with racial motivations to be unconstitutional. However, the question of whether partisan motivations are similarly unconstitutional has proven more difficult to resolve. At the heart of the matter are three questions. First, does partisan redistricting abridge the right to vote of eligible citizens? Second, is there any potential for future cases for or against gerrymandering at the federal level, and finally, are independent state redistricting commissions an effective solution? State legislatures have been historically responsible for drawing the boundaries of these electoral districts, as prescribed in Section 4 of Article 2 of the Constitution.² Thus, adequately addressing the issues requires a review of the constitutional and federal protections, before a more thorough analysis of protections in place at the state level.

To provide a stronger comparison, this study will include states with and without independent redistricting commissions. Arizona and California have well established commissions, Michigan has voted to adopt one this year, while both Florida and North Carolina lack independent commissions and have shown no intentions of implementing them. By examining the relevant laws and cases in these states, it is possible to identify which system is more resistant to partisan gerrymandering. After reviewing relevant constitutional amendments, United States Supreme Court decisions, and the substantial variance in state laws regarding voting rights and the regulation of redistricting, an independent third party is clearly needed. Though independent commissions have had a short history and more evidence is arguably needed, the rampant abuse of partisan-

¹ U.S. CONST. art. I, § 2.

² U.S. CONST. art. IV, § 2.

motivated redistricting and its consequences for voters and our democracy leave independent state commissions as the best alternative at this time.

Background

This history of constitutional voting rights protections is found in the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments. Each of these amendments added protections for certain classes against discrimination, from race, religion, and gender to poll taxes and age. These protections cover social and economic concerns, but do not directly address the specific issue of political influence in redistricting. The Civil Rights Act of 1957 and the Voting Rights Act of 1965 provided further voting rights protections, building off of existing constitutional amendments. The Civil Rights Act was instrumental in codifying the federal power to prosecute those attempting to intimidate, coerce, or otherwise abridge citizen's right to vote. The Voting Rights Act had a far greater impact, ultimately changing the dynamic between Federal and state governments in the modern era to favor federal regulation of voting standards and practices. Touted as the "act to enforce the fifteenth amendment," the Voting Rights Act of 1965 relied heavily on the Equal Protections Clause of the Fourteenth Amendment to justify its broad jurisdiction in the states.³ This reasoning, combined with the inclusion of redistricting provisions based on established discrimination categories, would serve as the foundation for gerrymandering challenges at the state and federal levels for decades. However, this past year, in *Rucho v. Common Cause*, the United States Supreme Court held that partisan gerrymandering represents a political question outside the federal courts' jurisdiction.⁴

It should be noted that there is substantial precedent for the United States Supreme Court to rule on the issue of gerrymandering. In *Wesberry v. Sanders*, the Court held that reviewing the constitutionality of congressional districts was within its jurisdiction, reversing the district court decision to ensure that "one man's vote in a congressional election is worth as much as another's."⁵ That same year in *Reynolds v. Sims*, the Court held that voting rights were "denied by debasement or dilution... in a state or federal election" and that the Equal Protections Clause was violated "by debasement of the right to vote through malapportionment."⁶ This Fourteenth Amendment defense was reinforced in *Davis v. Bandemer*, over twenty years later, as the Court held that political gerrymandering claims could be brought under Equal Protection Clause, since they presented justiciable controversies and ordered the legislature to draw a new plan.⁷ The Court even designed a discriminatory effects test, demonstrating that the potential to lose an election is not evidence enough to bring a case. However, the standard was set so high that no partisan gerrymander was found unconstitutional under the test. It was eventually thrown out in *Vieth v. Jubelirer*, which began closing the door on federal judicial review of partisan gerrymandering, but still attempted to leave the door open for future claims under the First Amendment instead of the Fourteenth. While four of the five justices in the majority

³ United States Department of Justice, History Of Federal Voting Rights Laws. (The United States Department of Justice 2017).

⁴ *Rucho v. Common Cause*, 139 S.Ct. 2482 (2019).

⁵ Beth Hladick, Redistricting and the Supreme Court: The Most Significant Cases (National Conference of State Legislatures 2019).

⁶ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁷ *Davis v. Bandemer*, 478 U.S. 109 (1986).

reiterated that such issues remained outside of the Court’s jurisdiction under the political question doctrine, Justice Kennedy offered an opportunity through the connection between voting and free speech.⁸

Despite the hope for strengthened protections and oversight of political redistricting from the federal level, the most recent United States Supreme Court ruling has effectively quashed the issue. As noted earlier, *Rucho v. Common Cause*, reaffirmed that the issue of partisan-motivated redistricting poses a political question that cannot be answered by the Court. The majority opinion provided the rationale that such an intervention would constitute an “unprecedented expansion of judicial power” and that states, “are actively addressing the issue on a number of fronts.”⁹ Active efforts included the implementation of independent redistricting commissions, outright prohibitions on partisan favoritism in state constitutions, and efforts by Congress under the powers granted in the Elections Clause under Article 1, Section 4 of the United States Constitution. However, the fact that the Fairness and Independence in Redistricting Act (2005) has been reintroduced every year since without success, in tandem with the noted lack of a “Fair Districts Amendment,” leaves the best chances for electoral guardianship with the states.¹⁰

Analysis

Arizona:

One of the most well known cases originating from the state level is *Arizona State Legislature v. Arizona Independent Redistricting Commission*, which was ultimately decided by the U.S. Supreme Court in 2015. In this case, voters amended the state’s constitution by public initiative to combat gerrymandering, shifting redistricting authority from the legislature to an independent commission, the Arizona Independent Redistricting Commission (AIRC).¹¹ The commission drew the legislative and congressional districts after the 2000 and 2010 census. Despite reports ranking Arizona’s district maps as among the most fairly drawn in the country at the time, the state legislature sued to regain control of the process in 2012.¹² They argued that the Constitution clearly reserved the power of redistricting for the legislature as it was directly related to the “manner” of holding elections, as written in the Elections Clause.¹³

The amendment to Arizona’s constitution required that all congressional and legislative districts be of equal population, compact and contiguous, preserve political subdivisions and communities of interest, and remain competitive where possible.¹⁴ It also prohibited district maps from favoring or disfavoring a particular incumbent or candidate and the use of partisan data in the redistricting process, other than testing for compliance.¹⁵ Since the AIRC had not violated any of these guidelines, it is evident that the

⁸ Beth Hladick, *Redistricting and the Supreme Court: The Most Significant Cases* (National Conference of State Legislatures 2019).

⁹ *Rucho v. Common Cause*, 139 S.Ct. 2482 (2019).

¹⁰ *Id.*

¹¹ *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015).

¹² Dustin Gardiner “Gerrymandering: Arizona Is a National Model for Fairness, but Still Faces Criticism.” *azcentral*. (The Republic 2018).

¹³ *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 135 S.Ct. 2652 (2015).

¹⁴ AZ. CONST. art IV, pt. II § 1

¹⁵ *Id.*

state legislature simply wanted to regain the power of redistricting, ostensibly to reestablish some level of partisan favoritism. The courts did not directly address the latter point, but the Supreme Court did succinctly resolve the issue of whether the independent commission was constitutionally permissible. In a classic five-four ideological split, the liberal majority found that “redistricting is a legislative function to be performed in accordance with the State’s prescriptions for lawmaking, which may include the referendum”.¹⁶ Essentially, the Court ruled that, just as the legislature has constitutionally delegated some legislative responsibility to the people through the public initiative and referendum processes, allowing the public to perform redistricting functions is similarly constitutional under the Elections Clause.

The Court also justified its ruling on the grounds that Section 2 of Title 2 of the United States Code “permits redistricting in accordance with Arizona’s initiative”.¹⁷ They noted Congress had changed the language almost a century earlier, replacing the reference to redistricting by the state “legislature” with “provided by the laws thereof.”¹⁸ This action clearly signified the acknowledgement from Congress that states, “had supplemented” the legislature’s mode of lawmaking with “a direct lawmaking role for the people,” in line with the Constitutional principle that the people are the source of powers of the government.¹⁹ The court majority’s rationale went on to state that “characteristic of the federal system . . . states retain autonomy to establish their own governmental processes.”²⁰ The implications of this statement further close the door on future federal enforcement of unconstitutional partisan gerrymandering, while simultaneously enforcing the protection of a designed remedy.

The Arizona case may appear, at first, to be a mere formality of protecting an institution already in existence. However, it is also official recognition that an independent state redistricting commission is an appropriate mechanism “to curb gerrymandering,” especially when designed “to advance the prospect that members of Congress will in fact be chosen . . . by the people of the United States.”²¹ Given the Supreme Court’s general reluctance to address the issue directly, this ruling indicated that future protections against gerrymandering would be best assured at the state level. Though there have been tests developed to probe partisan motivations, such as the efficiency gap and votes-to-seats ratio, the *Rucho v. Common Cause* ruling was almost inevitable after the Arizona case. Subsequently, the implicit loss of federal recourse was not surprising for most advocates. Regardless of public sentiment, voters in Arizona had already achieved a respectable level of nonpartisanship in their district maps according to those same measures in a Brennan Center for Justice report.²² The positive results from the combination of strong protections against gerrymandering and the implementation of an independent redistricting commission are shared by a few states. California has taken it a step further by defining the resolution process itself.

¹⁶AZ. CONST. art IV, pt. II § 1

¹⁷ *Id.*

¹⁸ 2 U.S.C. § 2a. (1929)

¹⁹ *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 135 S.Ct. 2652 (2015).

²⁰ *Id.*

²¹ *Id.*

²² Laura Rodyen & Michael Li. “EXTREME MAPS.” (Brennan Center for Justice, 2017.)

California:

Another state with a functioning independent redistricting commission is California, whose commission was created through a similar public initiative process, which amended the state constitution in 2008. The redistricting protections in California's Constitution closely mirror Arizona's, requiring that all congressional and legislative districts be of equal population, compact, contiguous and preserving of political subdivisions and communities of interest. California's Constitution also prohibits district maps from favoring or disfavoring a particular incumbent or candidate and the use of partisan data.²³ Along with the independent redistricting commission, these extensive requirements have a significant neutralizing effect of partisan redistricting, unsurprisingly close to Arizona's results.²⁴ Still, evidently independent redistricting commissions are not immune to all the problems of legislators drawing the map. When cases do arise, California provides an interesting model for resolving them.

Similar to Arizona's story, California's Citizen's Redistricting Commission (CRC) faced a legal challenge after district maps were drawn following the 2010 census. In *Radanovich v. Bowen*, a small group of California voters brought legal action against the CRC and the Secretary of State for using racial data in drawing their voting districts.²⁵ Though this analysis is focused on the issue of partisan gerrymandering, this case provides insight into the public challenges to independent commissions and the future of redistricting enforcement through state courts and constitutions. Specifically, the plaintiffs claimed the Commission had violated the "State Constitutional criteria of compactness, contiguity, and unnecessary divisions of two counties."²⁶ They argued that the intent of these maps was to preserve African-American instead of Latino representation, which is in direct violation of Section 2 of the Voting Rights Act.²⁷

There the initial propositions that created the CRC also amended the state constitution to require that the state Supreme Court have "original and exclusive jurisdiction in all proceedings in which a certified final map is challenged."²⁸ Accordingly, the plaintiffs filed a petition to challenge the maps with the California Supreme Court, but the court denied them. They then filed their complaint with the U.S. District Court for the Central District of California, which dismissed the case with prejudice.²⁹ In its ruling, the district court plainly noted that because the California state constitutional amendment granted original and exclusive jurisdiction to the California Supreme Court and the court rejected the petition, "under California law, that rejection was the final judgment on the merits."³⁰ Simply put, California's constitutional requirement that the state Supreme Court has exclusive jurisdiction serves to further limit the chances for federal oversight. Again though, the *Rucho v. Common Cause* decision has effectively formalized that limitation for partisan gerrymandering specifically.

²³ C.A. CONST. Art. 21, §2

²⁴ Laura Rodyen & Michael Li. "EXTREME MAPS." (Brennan Center for Justice, 2017.)

²⁵ *Radanovich v. Bowen*, 11-cv-09786 (2016)

²⁶ Rose Institute. "Suit filed against Redistricting Commission's maps." (The Rose Institute of State and Local Government 2011)

²⁷ *Voting Rights Act § 2 (1965)*

²⁸ *Radanovich v. Bowen*, 11-cv-09786 (2016)

²⁹ *Id.*

³⁰ *Id.*

Essentially, California built upon the Arizona model by including the state Supreme Court jurisdiction clause in its constitution and under the doctrine of res judicata, the judgment on merits of a case from the state court is final and the issue cannot be relitigated.³¹ This certainly helps simplify cases challenging the CRC, but it again provides precedent for denying challenges at the federal level, especially if the case has already been taken to the state courts. California's model has faced relatively few substantial challenges, demonstrating the effectiveness of its independent redistricting commission in combination with the accompanying protections of the state constitution and the state Supreme Court's exclusive jurisdiction of disputes. However, there are certainly other solutions being implemented across the country. Florida has similar constitutional language protecting against partisan redistricting, but the power remains with the legislature.

Florida:

Floridians voted to include their Fair Districts Amendment in the state constitution in 2010, amid truly blatant partisanship that had placed the state among the worst in the nation regarding the efficiency gap and seats-to-votes curve at the time.³² The protections implemented are extremely similar to those adopted in Arizona and California, requiring compact and contiguous boundaries that preserve political subdivisions and prohibit intentionally favoring or disfavoring a party or incumbent.³³ Despite these intentions, neither voters nor the courts have demanded the legislature transfer its powers of legislative appropriation to an independent commission. There is documented evidence and significant court challenges to partisan redistricting, which suggest this was a mistake. In response to the maps drawn after the 2010 census, a coalition of citizens and voter groups initially challenged the constitutionality of several of the districts in *League of Women Voters of Florida v. Detzner*. The trial court judge held there was unconstitutional partisan intent in the drawing of two of the districts. The judge then ordered the maps be redrawn, including any surrounding districts that may be affected.³⁴

When the case was appealed to Florida's Supreme Court, it affirmed the general finding of the trial court, noting two legal issues that "failed to give proper legal effect to its determination that the Fair Districts Amendment was violated."³⁵ The trial court was commended for their effort on a "novel challenge" to the amendment, noting the lack of precedent to guide it, but its ruling was essentially incomplete. The first issue was the determination that there was no distinction between challenging a map "produced from an unconstitutional 'process' - and a challenge to individual districts," addressing the tangible problem, but not the underlying issue.³⁶ The second issue was the "improperly deferential" standard of review applied by the trial court when it allowed the legislature to redraw the maps and subsequently approved them. Once the court found a direct violation of partisan intent in redistricting, "the burden should have shifted to the legislature to justify its

³¹ *Radanovich v. Bowen*, 11-cv-09786 (2016)

³² Laura Rodyen & Michael Li. "EXTREME MAPS." (Brennan Center for Justice, 2017.)

³³ F.L. CONST.onst. Art. III, §§ 20-21

³⁴ *League of Women Voters of Florida v. Detzner*, SC14-1905 (Florida Supreme Court 2015)

³⁵ *Id.*

³⁶ *Id.*

decisions.”³⁷ The Florida Supreme Court rejected the request to allow the map to be redrawn, or for the court to redraw the districts. While the burden of evidence does largely shift to the legislature to justify its actions, “the challengers still must identify some problem with the legislature’s chosen configuration.”³⁸ This was accomplished in five districts based on unconstitutional partisan intent and in three other districts for other reasons “or because the legislature unjustifiably rejected a less favorable configuration.”³⁹

Ultimately, the Florida Supreme Court remanded the case to the trial court while the legislature was ordered to redraw the maps for the eight challenged districts pursuant to the four guidelines set forth in the opinion. First, that the legislature is encouraged to hold all redistricting meetings where it makes decisions on new maps public and record all private meetings “for preservation.” Second, the Florida legislature “should provide a mechanism” allowing challengers to submit alternate maps along with related testimonials for consideration. It should also allow debate on the alternatives, with public review and feedback made available for any map before it is finalized. Third, the legislature should mandatorily preserve all emails and documents related to redistricting and readily provide copies to challengers upon request to avoid the lengthy and expensive discovery process plaguing historical cases. Finally, the court encouraged the legislature to publish the justifications for its chosen redistricting configurations, which will also “assist this Court in fulfilling its own solemn obligation to ensure compliance with the Florida Constitution in this unique context.”⁴⁰

As the Florida case proves, establishing protections and prohibitions in the state constitution does provide solid ground for legal challenges to gerrymandering, especially in a state with a long history of partisan practices. Foregoing an independent commission creates a much greater dependence on the courts, which may not always be as prescriptive in their rulings. The Florida Supreme Court here did take it upon itself to create guidelines to further protect against violations of the Fair Districts Amendment, but the point of the amendment was to avoid such challenges in the first place. It can still be argued that an independent redistricting commission would better protect Florida voters from partisan gerrymandering, removing the suspect legislature from the process altogether. Indeed, that is what voters in Michigan also decided in 2018, though implementation will officially begin after the 2020 census.

Michigan:

Michigan’s story is the most dramatic in terms of partisan redistricting strategy, as the facts of the case illuminated a much larger effort to entrench political majorities in several key districts. The state constitution and voting laws similarly require compact and contiguous boundaries, the preservation of political subdivisions, communities of interest, and cores of prior districts, while prohibiting intentionally favoring or disfavoring an incumbent, candidate or party, but it lacked an independent commission to provide a more neutral process for ensuring those protections.^{41,42} Taking advantage of that environment,

³⁷ *League of Women Voters of Florida v. Detzner*, SC14–1905 (Florida Supreme Court 2015).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ MI. CONST. Art. IV, § 6

⁴² MI Comp. Laws §§ 3.63, 4.261, 4.261a

the Republican State Leadership Committee (RSLC) began an initiative aptly named the “REDistricting MAjority Project” or REDMAP, with the goal of redrawing state district boundaries “to solidify conservative policymaking at the state level and maintain a Republican stronghold in the United States House of Representatives for the next decade,” according to a report from the RSLC.⁴³ The report continued to identify the impetus for this analysis when it stated, “all components of a successful congressional race... rest in congressional lines.”⁴⁴

Evidently, individual voters and voting groups agreed on the incredible importance of district boundaries, as they once again sued the state legislature in *League of Women Voters of Michigan v. Benson*.⁴⁵ This case was significant because the final ruling came from a federal district court, which proudly stated in the majority opinion that it joined “the growing chorus of federal courts that have, in recent years, held that partisan gerrymandering is unconstitutional.”⁴⁶ Unfortunately this decision would later be vacated in *Rucho v. Common Cause*, but it still serves as a strong example of the need for independent oversight of redistricting processes.

The primary issue of the case were whether or not the redistricting maps approved by the legislature after the 2010 census, or the “Enacted Plan,” violated the rights of free speech and association in the First Amendment and the Equal Protections Clause of the Fourteenth Amendment by deliberately diluting the voting power of democratic voters.⁴⁷ The affirmed violation of voters’ associative rights under the First Amendment is particularly interesting in this case, as plaintiffs argued that those rights included protection against being forced to associate in unconstitutionally gerrymandered districts. The defendants claimed they drew the Enacted Plan only to comply with the state statutes governing compactness, equal population and minimal jurisdictional breaks, but the evidence strongly suggested otherwise. A consultant for Republican lawmakers purchased voter data from the past several elections and actively used the data in software designed to create the maps, deliberately packing and cracking Democratic voter blocks to provide maximum Republican advantage.⁴⁸ The former Political Director of the Michigan Republican Party drew the state senate map using a database provided to the parties by the state government for their redistricting efforts, but also found detailed voter information and used it in his cartography.⁴⁹ The former Director of the House Republican Campaign Committee was also hired to draw the state house maps, which he did using the same political data and methods as the state senate maps.⁵⁰

The three expert witnesses, who each presented statistical analysis using techniques such as the efficiency gap to prove a Republican bias in the Enacted Plan, further persuaded the court to find that the Enacted Plan “constitutes a durable partisan gerrymander” as it also discriminated against Democratic voters across several election cycles.⁵¹ The court

⁴³ Should this cite to the report?

⁴⁴ *Id.*

⁴⁵ *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019)

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

ruling continued by stating that the doctrine of laches, which would bar plaintiffs from challenging the maps due to an “unreasonable” delay, did not apply as matter of law since the Enacted Plan “has injured, and will continue to harm, their First and Fourteenth Amendment rights”.⁵²

The court ultimately enjoined twenty-seven of the thirty-four “Challenged Districts,” ordering a special election in those districts after the 2020 census and a redraw of the maps within a few months. It also required detailed notes about who was involved, process and data used in redrawing. The court concluded its ruling by stating that if the legislature failed to do so, the court would redraw the maps in accordance with its findings by appointing a “special master” to “assist court [sic] in evaluating constitutionality of remedial legislative maps.”⁵³ The appointment of a special master to consult the court is the judicial version of an independent redistricting commission, except of course that it is made up of one, private member and is not in direct control of the redistricting process. In this case, that is for the better in terms of public accountability and it is no surprise the court left it as a last resort, but it must be difficult for Michigan voters to wait for the special elections knowing the independent redistricting commission they approved of last year could have helped prevent all of this. Given the track record of such commissions in states like Arizona and California, results suggest it will help Michigan voters rely less on the judiciary in general and the federal courts in particular after the *Rucho* decision. This crucial development has not manifested among voters in the next state with similarly contentious redistricting practices. Unlike other states with similar issues, North Carolina has still not opted for an independent commission.

North Carolina:

In the 2010 elections Republicans won majorities in both the North Carolina House and Senate for the first time since 1870, and used the census data from that year to redraw the state’s legislative districts in their favor. Unfortunately for anti-gerrymandering advocates, in North Carolina, the governor cannot veto redistricting maps. It can be argued that this lack of checks and balances directly contributed to the extreme partisan gerrymandering in the state, though it encountered several challenges in state and federal courts, including the Supreme Court.⁵⁴ Many of the redistricting protections in North Carolina law mirror those in other states in this study, with one glaring exception: the use of partisan data is allowed.^{55, 56} As astounding as this is, it is less of a surprise when one considers that many of the recent guidelines arose out of legislative committees, and were voted for almost exclusively along party lines.⁵⁷ Unexpectedly though, a recent decision from the Wake County Superior Court, found unconstitutional partisan gerrymandering despite these obstacles and without referencing federal law.

In essence, Republican legislators hired a team of consultants that drew new maps at the North Carolina Republican Party’s headquarters using software licensed by the party, and Democratic lawmakers not only did not have access to the services, they only became

⁵² *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019).

⁵³ *Id.*

⁵⁴ *Common Cause v. Lewis*, 834 S.E.2d 425 (N.C. 2019)

⁵⁵ N.C. House and Senate Plans Criteria, Sen. Comm. on Redist. & House Select Comm. on Redist., 2017

⁵⁶ N.C. Congressional Plan Criteria, Joint Select Comm. on Congressional Redist., 2016

⁵⁷ *Common Cause v. Lewis*, 834 S.E.2d 425 (N.C. 2019)

aware of the final maps once they were made public.⁵⁸ This is all after a previous court ruling struck down the 2011 maps for racial gerrymandering tied to political power, and resulted in the appointment of a special master to redraw several districts.⁵⁹ Indeed, files from the consultant proved that “the predominant goal was to maximize Republican partisan advantage” in the 2017 redistricting and some legislative defendants admitted to manipulating the redistricting process for partisan gain.⁶⁰ The North Carolina Superior Court found “no meaningful defense” because no witness denied partisan intent and the defendants lacked any substantive expert testimonials, among other findings.⁶¹

In ruling that the 2017 redistricting plans were unconstitutionally drawn for partisan gain, the court reserved its scope to the state constitution, despite ample precedent from federal rulings. As noted earlier, the *Rucho* decision, which considered North Carolina’s congressional maps, has effectively paralyzed federal enforcement of partisan gerrymandering and as this ruling came a couple months afterward it is understandable why the court would attempt to do so. The Superior Court found that the 2017 legislative map plans violated the state constitution’s Free Elections Clause by attempting to “predetermine the outcome of legislative elections for the purpose of retaining partisan power.”⁶² The court also found that the 2017 plan violated the state constitution’s Equal Protection Clause, which “provides greater protection for voting rights than its federal counterpart.”⁶³ This is largely due to the fact that North Carolina’s Equal Protection Clause protects “the fundamental right of each North Carolinian to substantially equal voting power,” and the established principle that “the right to vote on equal terms is a fundamental right.”⁶⁴ Despite the stronger protections in the state constitution, the Superior Court confirmed it applies the same test of intent, effects, and causation to prove unconstitutional redistricting and the court clearly found evidence to satisfy each stage.⁶⁵

The court also found that the 2017 legislative map plans violated the state constitution’s Freedom of Speech and Freedom of Assembly clauses ruling that, as voting is a protected form of free speech, banding together in a political party, voting for similarly aligned representatives, and applying for “redress of grievances” are protected forms of association.⁶⁶ Clearly, these protections were substantially infringed by partisan gerrymandering that systematically sought to render Democratic votes less effective. The Superior Court ruling went as far as to state that the 2017 legislative map plans “impermissibly retaliate against voters based on their exercise of free speech” and ultimately enjoined the 2017 maps in future elections, ordering the redrawing of specific county groupings.⁶⁷ The court also included new redistricting criteria for the remedial maps and rejected some of the old guidelines. The most important changes were the barring of “Election Data,” or partisan data, in drafting the remedial maps, and the

⁵⁸ *Common Cause v. Lewis*, 834 S.E.2d 425 (N.C. 2019)

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

requirement that legislative defendants and “their agents” conduct the entire redistricting process in “full public view.”⁶⁸

While this ruling provides much needed precedent for enforcing protections against partisan gerrymandering without federal oversight, there is still overwhelming evidence that the state legislature in North Carolina cannot be sufficiently trusted with redistricting powers. The state Superior Court has instituted stronger criteria for the process and the state constitution is more robust in this area than most, but an independent redistricting commission adds valuable checks and balances. It is difficult to argue that the introduction of an independent commission would adversely affect the redistricting process or the rights of voters and help reduce judicial involvement in the inherently legislative process.

Conclusion

After reviewing the relevant Constitutional amendments, federal statutes, and analyzing a variety of state examples with their respective statutes and case studies, it is apparent that partisan gerrymandering is most effectively combatted with the assistance of independent redistricting commissions. The federal courts have produced mixed opinions at best, and the recent U.S. Supreme Court decision, *Rucho v. Common Cause*, has all but shut the door on federal oversight of the matter. Thankfully, states like Arizona and California are proving that independent commissions can successfully redraw districts in a far more neutral manner, and provide a template for what such a system can look like. The Arizona model establishes a baseline, and the California model adds the element of state Supreme Court exclusive jurisdiction. Michigan is likely to follow suit by adding some unique element to the statutes governing their commission, but would do well to operate along similar lines. Despite not having independent commissions, the Florida and North Carolina cases provide an important basis for enforcing partisan gerrymandering protections at the state level through additional transparency criteria.

With a new round of redistricting from the 2020 census around the corner, it is vital to our democracy that voters in every state fight to ensure that they choose their legislators, not the other way around. State constitutional amendments are often the best place to start, but as the cases above have shown, they rarely are enough to neutralize partisan intent alone. The federal courts may rule against partisan redistricting, but as also evidenced above, they often cannot resolve the issue themselves. In order to best comprehensively protect citizens’ right to vote, a formal removal of redistricting responsibilities from state legislatures is needed until they prove impartiality in line with results from independent redistricting commissions. Regardless of a person’s preferred political ideology, distortion of our democratic process is a threat to us all. We have the tools to defend ourselves, and until better methods are discovered, it would be foolish not to employ them.

⁶⁸ *Common Cause v. Lewis*, 834 S.E.2d 425 (N.C. 2019)