

3-31-2021

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### Recommended Citation

Robert Fisch, *Political Redistricting in the Post-Rucho Era*, 24 U.D.C. L. Rev. 4 (2021).

Available at: <https://digitalcommons.law.udc.edu/udclr/vol24/iss1/7>

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## POLITICAL REDISTRICTING IN THE POST-RUCHO ERA

Robert Fisch<sup>1</sup>

### INTRODUCTION

In January of 2011, the infamous “Snake by the Lake” was born.<sup>2</sup> Stretching along the southern coast of Lake Erie, the 9th Congressional District of Ohio covers a 120 mile-long thin strip of the state.<sup>3</sup> The district is less than one mile wide at certain locations and is considered contiguous, a state constitutional requirement for congressional districts,<sup>4</sup> only because the “snake” passes through portions of Lake Erie.<sup>5</sup> In creating the district, the Ohio Republican Party, the majority party in the state legislature at the time, drew the boundaries with the intent to limit the voting power of the Democrats in the congressional districts in northern Ohio, a process also known as political gerrymandering.<sup>6</sup> As a result, in the 2012 election, Republicans won twelve of Ohio’s sixteen congressional districts, including wins in two congressional districts previously represented by Democrats.<sup>7</sup>

Unfortunately, the actions in Ohio reflect a common practice in the United States. As U.S. Supreme Court Justice Antonin Scalia commented, “[p]olitical gerrymanders are not new to the American scene.”<sup>8</sup> In fact, allegations of gerrymandering have occurred as far back in American history as the 18th century.<sup>9</sup> However, due to the U.S. Supreme Court’s recent ruling in *Rucho v. Common Cause*, cases involving political gerrymandering can no longer be challenged in federal courts. In *Rucho*, the Supreme Court held that matters concerning political gerrymandering are outside of the scope of federal courts.<sup>10</sup> While the Court may have limited the federal judiciary’s ability to resolve political gerrymandering issues, it also provided three suggestions for alternative mea

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<sup>2</sup> *Ohio Needs New District Lines*, TOL. BLADE (May 8, 2019), <https://www.toledoblade.com/opinion/editorials/2019/05/08/draw-new-district-lines-ohio-gerrymandering/stories/20190506159>.

<sup>3</sup> *Id.*

<sup>4</sup> OHIO CONST. art. XIX, § 2.

<sup>5</sup> Marcy Kaptur, *My District Was Gerrymandered. The Damage Is Easy to Measure*, WASH. POST (May 13, 2019), [https://www.washingtonpost.com/opinions/my-district-was-gerrymandered-the-damage-is-easy-to-measure/2019/05/13/199c61e8-75b8-11e9-b7ae-390de4259661\\_story.html](https://www.washingtonpost.com/opinions/my-district-was-gerrymandered-the-damage-is-easy-to-measure/2019/05/13/199c61e8-75b8-11e9-b7ae-390de4259661_story.html).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004).

<sup>9</sup> Justin Levitt & Erika L. Wood, *A Citizen's Guide to Redistricting*, (BRENNAN CENTER FOR JUSTICE, 8 (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_CGR-2010-edition.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_CGR-2010-edition.pdf)).

<sup>10</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-7 (2019).

ns to resolve political gerrymandering: (1) the passage of a congressional bill that would grant federal courts the ability to hear gerrymandering claims; (2) state constitutional amendments prohibiting gerrymandering; and (3) independent commissions charged with drawing congressional district maps.<sup>11</sup> Of these alternatives, the use of independent commissions is the only viable option. The process by which such commissions are created, how members are selected, and the process followed by these commissions to conduct redistricting makes the use of state redistricting commissions to advise state legislatures the most realistic way to conduct redistricting in the U.S. without gerrymandering taking place.

The first section of this paper will present an overview of gerrymandering and the techniques states use when conducting it. The second section will look at the U.S. Supreme Court case *Rucho v. Common Cause* and the Court's analysis. The third section will analyze three solutions to redistricting problems suggested by the U.S. Supreme Court. Finally, this paper will look at elements of independent commissions that can create an ideal solution to the problem of political gerrymandering in the U.S.

### **Background on Gerrymandering**

Gerrymandering is the practice of manipulating the boundaries of an electoral district with the intent to favor a particular group of people.<sup>12</sup> Gerrymandering claims arise when a map is redrawn with boundaries that do not align with traditional map-drawing criteria such as geographical fairness, contiguity, and cohesiveness of municipalities.<sup>13</sup> Gerrymandering most often occurs with the redrawing of district maps following the completion of the U.S. Census.<sup>14</sup> Every ten years, during the census, the U.S. Census Bureau collects population information on all individuals living in the U.S., which it in turn sends to the states.<sup>15</sup> The individual states then use that data to redraw their district maps accordingly.<sup>16</sup> While it is required that congressional district maps must be redrawn following the receipt of U.S. Census data, state legislatures can conduct redistricting at any time.<sup>17</sup>

Typically, the state legislature in each state initiates redistricting.<sup>18</sup> While the process differs from state to state, many state legislatures create a committee of their own representatives and senators to redraw the district maps. These committees generally consist of members of both chambers of the state legislature and use the census data to update the districts accordingly.<sup>19</sup> Once the maps are redrawn, the state legislature votes on the map and presents the new map to

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<sup>11</sup> *Id.* at 2507.

<sup>12</sup> Levitt & Wood, *supra* note 9, at 7.

<sup>13</sup> *Id.* at 50-56.

<sup>14</sup> *Id.* at 16.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Justin Levitt & Michael P. McDonald, *Taking the "Re" Out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1258–59 (2007).

<sup>18</sup> *Id.* at 20.

<sup>19</sup> Two examples of states that use this process include North Carolina and Maryland. See *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 801 (M.D.N.C. 2018); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (D. Md. 2018). Forty-nine of the U.S.'s fifty states have bicameral legislatures, consisting of a state house of delegates/representatives and a state senate. Nebraska is the only state with a unicameral legislature. See Legislative Organization and Procedures, NAT'L CONFERENCE OF STATE LEGISLATURES. <https://www.ncsl.org/research/about-state-legislatures/legislative-organization-and-procedures-overview.aspx> (last visited Apr. 18, 2020).

the governor for their approval.<sup>20</sup> In general, the political party that is in the majority in the state legislature is given an advantage in the redistricting process. This is because the majority party is generally afforded the opportunity to have more control over the process and the makeup of any committee if its party controls both the state legislature and the governorship.<sup>21</sup>

There are three primary techniques used when instituting a political gerrymander: “packing,” “cracking,” and “tacking.”<sup>22</sup> Typically, a combination of these techniques is used. Packing occurs when the map is drawn to “pack” voters who are more likely to vote in a similar manner into the same district.<sup>23</sup> For example, in Ohio, packing was used to place as many Democratic voters into the 9th District as permissible, in order to increase the percentage of likely Republican voters in the other districts. Cracking occurs when the map is drawn to split an area with a high number of residents who vote in a similar manner into several neighboring districts.<sup>24</sup> Cracking was used in Ohio's 9th District to split likely voters of Republican candidates into districts surrounding the 9th District, to make those districts more likely to vote for Republican candidates. Tacking occurs when a state legislature takes a portion of a district with a particular demographic that they would like to include in the same district and draws that demographic into the district to ensure a partisan majority.<sup>25</sup> For example, a map could be redrawn to include a tiny shape of a particular area. This is typically done to keep a specific incumbent candidate's home within the district that they are representing.<sup>26</sup>

There are two main types of gerrymandering claims that the Supreme Court has previously considered: racial and political.<sup>27</sup> Racial gerrymandering occurs when a district is intentionally redrawn so that members of a particular race are placed together or split in such a way to end up in the same district. The purpose of the district being redrawn in this manner is to ensure that members grouped by a particular race vote for a particular candidate.<sup>28</sup> Political gerrymandering occurs when a district is redrawn so that members of a particular political party are placed together or split into in the same district, discriminating against members of the political party.<sup>29</sup> This again results in the member representing that district being practically assured of re-election due to their political affiliation with the majority party in the district.<sup>30</sup>

In recent decades, the Supreme Court has become more involved in political gerrymandering. Starting with *Davis v. Bandemer* in 1986, the Supreme Court determined that political gerrymandering cases were justiciable, which made such matters eligible to be heard by federal courts.<sup>31</sup> The Court observed that issues concerning political gerrymandering are issues concerning representation and stated that, since the claim concerns electing representatives, “we decline to hold that such claims are never justiciable.”<sup>32</sup> However, while the Court in *Davis* ruled

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<sup>20</sup> Levitt & Wood, *supra* note 9, at 20.

<sup>21</sup> *Id.* at 26.

<sup>22</sup> *Id.* at 57.

<sup>23</sup> *Packing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>24</sup> *Cracking*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>25</sup> Levitt & Wood, *supra* note 9, at 58.

<sup>26</sup> *Id.*

<sup>27</sup> *Vieth*, 541 U.S. at 293.

<sup>28</sup> *Shaw v. Reno*, 509 U.S. 630, 641 (1993).

<sup>29</sup> NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010, 115 (2010)

[https://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting\\_2010.pdf](https://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting_2010.pdf).

<sup>30</sup> Levitt & Woods, *supra* note 9, at 44.

<sup>31</sup> *Davis v. Bandemer*, 478 U.S. 109, 123 (1986).

<sup>32</sup> *Id.* at 124.

on the justiciability of political gerrymandering claims, it did not “draw a line in the sand” to determine whether a district has been gerrymandered to the point that it violates the Constitution. That is, the Court held off addressing what qualified as political gerrymandering and what did not.<sup>33</sup> In the decades since *Davis*, the Court continued to hear political gerrymandering cases that violated different aspects of the Constitution, without establishing a specific uniform standard that draws a clear line that determines whether a political gerrymander has “gone too far.”<sup>34</sup> This led to two separate claims brought by activists in two states: North Carolina and Maryland.

### ***Rucho v. Common Cause***

In *Rucho v. Common Cause*, the U.S. Supreme Court distinguished its ruling compared to previous holdings, ruling that political gerrymandering is outside of the scope of federal courts.<sup>35</sup> The holding stemmed from two separate political gerrymandering claims concerning congressional districts: one in North Carolina and the other in Maryland.<sup>36</sup>

### **North Carolina**

In 2016, the North Carolina Republican Party initiated a mid-decade redistricting, redrawing the congressional district map in the state.<sup>37</sup> At the time the map was drawn, Republicans held a majority of seats in the North Carolina Senate (34-16), and North Carolina House of Representatives (74-45).<sup>38</sup> As a result, Republicans had a stronger voice in conducting the redistricting process in the state.<sup>39</sup> To achieve this process, the North Carolina state legislature created a redistricting committee that consisted of members of the state legislature, chaired by members of the Republican party.<sup>40</sup> This committee differs from an independent commission because, in North Carolina, each member on the redistricting committee was a state legislator appointed by the leaders of their respective parties to help draw the map.<sup>41</sup> A total of twenty-five Republicans and twelve Democrats were selected to serve on the committee.<sup>42</sup> The redistricting committee’s suggested map added a seat to the North Carolina Republican congressional delegation.<sup>43</sup> The map gave the North Carolina Republican Party, which held control of the state legislature and, therefore, the power to draw the congressional district map, a 10-3 advantage in the state’s congressional delegation.<sup>44</sup>

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<sup>33</sup> *Id.* at 143.

<sup>34</sup> See *Cox v. Larios*, 542 U.S. 947 (2004) (holding that Georgia’s redistricting plan violated the principle of one person one vote); *League of Latin-American Citizens v. Perry*, 548 U.S. 399 (2006) (holding that a Texas redistricting plan was a political gerrymander, which violated the Equal Protection Clause and First Amendment and a racial gerrymander, which violated the Voting Rights Act of 1965).

<sup>35</sup> *Rucho*, 139 S. Ct. at 2507.

<sup>36</sup> *Rucho*, 139 S. Ct. at 2491.

<sup>37</sup> *Id.*

<sup>38</sup> *2016 State and Legislative Partisan Composition*, NAT’L CONFERENCE OF STATE LEGISLATURES, [https://www.ncsl.org/portals/1/documents/elections/Legis\\_Control\\_2016.pdf](https://www.ncsl.org/portals/1/documents/elections/Legis_Control_2016.pdf) (last visited Apr. 19, 2020).

<sup>39</sup> *Rucho*, 139 S. Ct. at 2491.

<sup>40</sup> *Id.*

<sup>41</sup> *Common Cause*, 318 F. Supp. 3d at 807.

<sup>42</sup> *Rucho*, 139 S. Ct. at 2491.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The co-chair of the redistricting committee stated that “I think electing Republicans is better than electing Democrats. So, I drew this map to help foster what I think is better for the country.” *Id.*

Common Cause (a non-profit organization), the North Carolina Democratic Party, and a number of individual voters brought the suit against the chair of the redistricting committee and other state officials alleging an unconstitutional political gerrymander.<sup>45</sup> The Middle District of North Carolina ruled that the redistricting constituted a partisan gerrymander and North Carolina officials appealed the ruling to the Supreme Court.<sup>46</sup> While the court heard the allegations in North Carolina in this matter, it was not the only instance of political gerrymandering that took place during this time.

## Maryland

Similar to North Carolina, following the 2010 census, Maryland Governor Martin O'Malley established a redistricting committee consisting of Democratic state officials appointed by the governor.<sup>47</sup> The goal of this committee was to draw a new map that reduced the number of likely Republican congressional districts to one district out of eight total districts.<sup>48</sup> Specifically, the committee focused on reducing the number of likely Republican voters in Maryland's 6th Congressional District, which had predominantly voted for Republican candidates for two decades. The committee redrew the map in such a way that reduced the number of likely Republican voters in Maryland's 6th District by 24,000 and increased the number of likely Democratic voters by 10,000.<sup>49</sup> The committee's goal was successful; the election resulted in seven Democratic congressional districts and one Republican congressional district.<sup>50</sup>

A group of Maryland voters residing in the 6th Congressional District brought suit against the Maryland State Board of Elections, alleging that they were burdened by the map and requesting that elections not be held under the map as drawn.<sup>51</sup> The District Court of Maryland ruled that the map was invalid, and must be redrawn prior to the 2020 general election, the District Court's ruling was challenged to the U.S. Supreme Court by the Maryland State Board of Elections.<sup>52</sup>

## The Court's Ruling

Overruling the lower courts in both North Carolina and Maryland, the Court, in a 5-4 decision,<sup>53</sup> ruled that political gerrymandering claims "present political questions beyond the reach of federal courts."<sup>54</sup> This is because there was no legal standard that these courts could apply to solve the problem, and no ability under the Constitution for courts to get involved in this process, due to its highly political nature.<sup>55</sup> This is because such rulings would result in the Court making decisions on a highly political process that impacts the lives of every U.S. citizen.<sup>56</sup>

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<sup>45</sup> *Rucho*, 139 S. Ct. at 2492. See also *Common Cause*, 318 F. Supp. 3d at 801.

<sup>46</sup> *Id.*

<sup>47</sup> *Benisek v. Lamone*, 348 F. Supp. 3d 493, 502 (D. Md. 2018).

<sup>48</sup> *Rucho*, 139 S. Ct. at 2492.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Benisek*, 348 F. Supp. 3d at 497.

<sup>52</sup> *Rucho*, 139 S. Ct at 2492.

<sup>53</sup> *Id.* at 2508. Majority: Roberts, joined by Thomas, Alito, Gorsuch and Kavanaugh. Dissent: Kagan, joined by Ginsburg, Breyer, and Sotomayor.

<sup>54</sup> *Id.* at 2506-2507.

<sup>55</sup> *Id.* at 2507.

<sup>56</sup> *Id.*

Making this ruling could result in continued claims filed by citizens of states each time redistricting takes place.<sup>57</sup> The process of drawing the maps in both Maryland and North Carolina is political, in that members of the state legislature are drawing maps that impact political parties throughout the state. In doing so, the majority party, who has control of the maps, is making decisions that impact the entire state. The Court made the decision that, due to this process, they should not interfere.<sup>58</sup>

### **Solutions to the Problem**

Although the Court determined that federal courts had no ability to hear political gerrymandering claims, there were other means that could be used to solve political gerrymandering matters. However, these solutions exist in a vacuum and there are pros and cons to each of the approaches. Specifically, the court suggested congressional resolutions, which would address not only gerrymandering, but the role courts have in the process as well. Other solutions rely on states and state courts to conduct the process through one of three ways: (1) state constitutional amendments, (2) ballot measures, and (3) independent commissions. The most realistic solution for this problem is to have states resolve the issue through the use of independent commissions, with limitations on the power that these commissions will have. This section will first look at congressional proposals that will allow federal courts to hear gerrymandering cases. Second, this section will look at state constitutional amendments as a solution to the problem. Finally, this section will look at independent commissions as a solution to the problem, including why the use of these commissions is the most realistic approach to solving political gerrymandering issues.

### **Congressional Proposal for Federal Courts**

While *Rucho* established that federal courts do not have a role in political gerrymandering, Congress has the ability to grant federal courts the ability to “draw a line in the sand” under Article III of the Constitution.<sup>59</sup> In its opinion in *Rucho*, the Court recognized congressional action as a potential solution to the problem of gerrymandering, noting H.R. 1 (the For the People Act) as a potential solution.<sup>60</sup> The proposed bill would establish a three-judge panel consisting of judges located in the federal judicial district in which the state’s capital is located.<sup>61</sup> The panel would be established upon the event of any of the following “triggering events”: (1) A state failing to establish a nonpartisan agency to draw their district maps (2) the state failing to appoint a select committee on redistricting; (3) a state’s select committee on redistricting failing to approve a selection pool of members in a timely fashion and (4) an independent commission failing to approve a redistricting plan in a timely fashion.<sup>62</sup>

This bill provides triggers for federal courts to get involved in political gerrymandering claims. Under this bill, federal courts would be able to resolve gerrymandering issues in their states. This solution provides for strict requirements that must be met in order for courts to intervene. Plaintiffs would be unable to continuously allege that a redistricted map violates their constitutional rights. This is because there would be strict requirements that would have to be

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> U.S. CONST. art. III § 3.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> H.R. 1, 117th Cong. (1st Sess. 2021).

met before judicial involvement can take place. As a result, courts in these states would have the ability to “draw a line in the sand” that the states in their district can follow in order to determine whether a political gerrymander has gone too far in impacting their residents.

The bill has currently passed the United States House of Representatives and is presently being considered by the United States Senate.<sup>63</sup> In order to be enacted, the bill must be passed by both chambers of Congress and signed by the President. As a result, it will be difficult to see this proposal come to fruition.

### State Constitutional Amendments

A second option that the Court discussed in *Rucho*, as a way to address political gerrymandering issues, was through state constitutional amendments.<sup>64</sup> The Court cited four examples of such amendments that are designed to limit the power that state legislatures have when redrawing districts.<sup>65</sup>

This approach prohibits state legislatures from conducting political gerrymandering while redistricting. However, the lack of courts’ ability to ensure that state legislatures are not violating state constitutional amendments makes it difficult for such amendments to be effective in solving the problem of gerrymandering. If a majority party that is drawing a map in the state legislature still wants to protect incumbent candidates of their own party, they can do so by using other methods besides partisan gerrymandering to ensure that their supported candidates win elections. For example, a state legislature could relax other standards, such as compactness and contiguity in an attempt to protect incumbents. Consequently, it is likely that lawsuits will continually arise under the map because people will continue to feel like their voice is being limited, as was seen in North Carolina and Maryland.<sup>66</sup>

Constitutional amendments will give state courts the ability to hear claims related to redistricting under the state constitutions; however, based on a lawsuit in Florida, and the response of the Florida Supreme Court, it is unlikely that they will present an ideal solution to gerrymandering problems. Florida voters passed an amendment to their state constitution prohibiting the Florida state legislature from drawing an apportionment plan with the intent of helping or hurting a political party.<sup>67</sup> A group of Florida voters brought suit in Florida Circuit Court, alleging that the map as drawn violated the Florida constitutional amendment prohibiting partisan redistricting.<sup>68</sup> The ruling was appealed to the Florida Supreme Court, which found that eight districts violated the Florida constitutional amendment and needed to be redrawn.<sup>69</sup> While the Florida Supreme Court did not order the entire map to be redrawn, it was ordered that the eight districts violating the Florida constitution be redrawn.<sup>70</sup> In its opinion, the Florida Supreme Court observed that “this is neither the first, nor likely the last, time this court must confront a

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<sup>63</sup> Actions Overview - S.1 -117th Congress (2019-2020). CONGRESS.GOV, May 11, 2021

<https://www.congress.gov/bill/116th-congress/senate-bill/949/cosponsors?searchResultViewType=expanded&KWICView=false>.

<sup>64</sup> *Rucho*, 139 S. Ct. at 2507-08.

<sup>65</sup> *Id.* (these states include Florida, Missouri, Iowa, and Delaware).

<sup>66</sup> *Id.*

<sup>67</sup> FLA. CONST. art. III, § 20. Other states with similar statutes include Missouri (Mo. Const., Art. III, § 3), Iowa (Iowa Code § 42.4(5) (2016), and Delaware (Del. Code Ann., Tit. xxix, § 804 (2017)).

<sup>68</sup> *Romo v Detzner*, No. 2012-CA-000412, 2014 WL 3797315, at \*3 (Fla.Cir.Ct. July 10, 2014)

<sup>69</sup> *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402-413. (Fla. 2015).

<sup>70</sup> *Id.*

challenge to a redistricting plan enacted by the Legislature.”<sup>71</sup> Based on this observation, state courts will continue to hear lawsuits related to political gerrymandering under state statutes.

### Independent Commissions

A third solution to political gerrymandering discussed in *Rucho* concerns independent commissions. In the context of gerrymandering, independent commissions are bodies established by an individual state to address gerrymandering issues. Generally, state legislatures appoint members to serve on these commissions. These commissions serve in three unique ways: (1) independent commissions, whose goal is to conduct redistricting, independent of their state legislatures;<sup>72</sup> (2) advisory commissions, which are not directly involved in drawing the map but, instead, provide guidance to state legislatures;<sup>73</sup> and (3) back-up commissions, which have the power to draw maps only after the state legislature has been unsuccessful in doing so.<sup>74</sup>

### How Commissions are Established

Independent commissions can be established in a number of different ways. First, Congress can direct states to establish independent commissions to help resolve gerrymandering issues through the passage of a bill. For example, in January 2021, The U.S. House of Representatives reintroduced bill H.R. 1, the For the People Act of 2021.<sup>75</sup> The bill requires all states to conduct redistricting through the use of independent commissions, provided that there is not an independent commission currently conducting the process.<sup>76</sup> If states are currently using independent commissions, they must meet certain requirements established in the bill.<sup>77</sup> This includes requirements for selection on the committee, as well as the way in which the redistricting process is carried out.<sup>78</sup>

Independent commissions have also been established by state legislatures. For example, in 1980, the Iowa state legislature passed a bill which established a process for drawing both state legislative and congressional districts.<sup>79</sup> This process transferred the redistricting process from the state legislature to the Iowa Legislative Service Bureau, which later became the Legislative Service Agency, an organization independent of the Iowa state legislature.<sup>80</sup> The goal of the state legislature in passing the bill was twofold.<sup>81</sup> The first goal was to meet with members of the public in order to obtain public input of the map and provide information about those

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<sup>71</sup> *Id.* at 415.

<sup>72</sup> Redistricting Commissions: Congressional Plans, NAT’L CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx> (last visited Apr. 19, 2020) (Arizona, Colorado, California, Hawaii, Idaho, Montana, New Jersey, and Washington).

<sup>73</sup> *Id.* (Maine, New York, Rhode Island, Utah, and Virginia).

<sup>74</sup> *Id.* (Connecticut, Indiana, and Ohio).

<sup>75</sup> All Actions H.R.1 — 116th Congress (2019-2020), CONGRESS.GOV. Mar. 14, 2019.

<https://www.congress.gov/bill/116th-congress/house-bill/1/all-actions?overview=closed&KWICView=false>.

<sup>76</sup> H.R. 1, 117th Cong. (2021).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> IOWA CODE § 42.3.

<sup>80</sup> *Id.*

<sup>81</sup> IOWA CODE § 42.6.

meetings to the Iowa state legislature.<sup>82</sup> The second goal was to provide guidance to members of the state legislature on redistricting matters that are not clearly specified in Iowa state statutes.<sup>83</sup>

Third, independent commissions can be established through ballot measures. Under this process, a measure is presented to residents of a particular state, who then vote to approve or disprove the measure. For example, in 2018, Missouri voters signed a petition putting on the ballot Amendment 1.<sup>84</sup> A part of this amendment included the creation of a position called the State Demographer, who was a neutral individual responsible for conducting redistricting.<sup>85</sup> The measure was approved by Missouri voters in November 2018.<sup>86</sup> This individual was to be responsible for drawing Missouri's congressional and state legislative district maps, and for sending them to the Missouri General Assembly for approval.<sup>87</sup> Similar to Missouri, California also used a ballot measure to establish their independent commission. Under the ballot measure that was approved by voters in 2010, the state legislature was stripped of its ability to conduct redistricting. Instead, the process was shifted to the Citizens Redistricting Commission, which was responsible for completing the process.

### Membership Makeup of Commissions

States use different methods to assign membership to independent commissions. For example, Iowa's legislative redistricting panel consists of five members.<sup>88</sup> The majority and minority parties in the Iowa state legislature each nominate two members, and the four nominated members vote on the fifth member.<sup>89</sup>

In order to serve on the California redistricting commission, an applicant must meet certain criteria. Applicants must have voted in two of the last three elections and must not have previously served as a member of the California state legislature or as a lobbyist before the California state legislature.<sup>90</sup> Additionally, members must not have made a significant contribution to a campaign of any California public official.<sup>91</sup> The California State Auditor is in

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<sup>82</sup> IOWA CODE § 42.6(3)(a).

<sup>83</sup> IOWA CODE § 42.6(3)(b).

<sup>84</sup> Certificate of Sufficiency of Petition, MISSOURI SECRETARY OF STATE, <https://www.sos.mo.gov/CMSImages/Elections/Petitions/FINAL2018IPs/2018-048.Sufficiency.pdf>. (last visited Apr. 19, 2020).

<sup>85</sup> *Rucho*, 139 S. Ct. at 2507.

<sup>86</sup> Missouri Secretary of State, State of Missouri - General Election, November 06, 2018, Official Results. (2018). <https://enrarchives.sos.mo.gov/enrnet/PickaRace.aspx>.

<sup>87</sup> *Missouri's state demographer position: Where are we and what's next?*, THE MISSOURI TIMES (Oct. 16, 2020), <https://themissouritimes.com/missouris-state-demographer-position-where-are-we-and-whats-next/> In November 2020, Missouri voters eliminated the position of nonpartisan state demographer, reverting the process back to a twenty member commission. Yurik Rudensky & Gariella Limon MISSOURI AMENDMENT 3 PASSED, WHAT DOES THAT MEAN FOR REDISTRICTING? (BRENNAN CENTER FOR JUSTICE, (2021) <https://www.brennancenter.org/our-work/research-reports/missouri-amendment-3-passed-what-does-mean-redistricting>. See MO. CONST. art. III, § 3 for the current makeup of the commission.

<sup>88</sup> IOWA CODE § 42.5(1)(b).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Prospective commission members are not permitted to make a campaign contribution of \$2,000 or more to any congressional, state or local candidate for public office in a given year. These limits were extended to members following their service to the commission.

charge of reviewing applicants to ensure that they meet the requirements to serve on the commission.<sup>92</sup>

H.R. 1 also proposes certain membership criteria for members of independent commissions. Members are selected for the commission based on pools of candidates chosen from three different groups. The first group will consist of members nominated by the political party who won the most recent election for federal statewide office (the “majority” party).<sup>93</sup> The second pool will consist of members nominated by the political party who won the second most votes in the most recent election for federal statewide office (the “minority” party).<sup>94</sup> The final pool will consist of members whose parties are not included in either of the first two categories. In order to make the determination of which political party a nominee belongs to, the nominee will be screened to determine their political background.<sup>95</sup> If the candidate does not fit into either the majority or minority party candidate pool, the candidate will be placed in the third pool. Fifteen total members will be selected from each of the three individual groups to serve on this redistricting commission, based two different timeframes.<sup>96</sup>

### Process

The process for redistricting differs by state as well. This is dependent on the role that is played by the commission in the process. The common theme among several independent commissions is their solicitation and use of public comments regarding the redistricting process and the final maps that are drawn.

When conducting redistricting, there are certain requirements that all states must meet. First, under Article I of the Constitution, all districts in a state must have an equal population.<sup>97</sup> Second, districts must comply with the Voting Rights Act of 1965. This requires that states do not discriminate against minority population groups.<sup>98</sup>

At the state level, districts must comply with requirements of geographical boundaries and compactness.<sup>99</sup> This is done by keeping cities, counties, and individual neighborhoods in the same congressional district as much as possible.<sup>100</sup> In California, it is required that when keeping neighborhoods together, the commission must consider their social and economic interests, and not any political relationship with an elected official or candidate.<sup>101</sup> In Iowa, it is required that districts not be of a particular shape when they are being drawn.<sup>102</sup>

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<sup>92</sup> CAL. CONST. art. XXI, § 2.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* The first group of six members must be appointed no later than October 1<sup>st</sup> of a year ending in zero. The second group of nine members must be appointed no later than November 15<sup>th</sup> of a year ending in zero.

<sup>97</sup> *Id.*

<sup>98</sup> *Shaw*, 509 U.S. at 641.

<sup>99</sup> CAL. CONST. art. XXI, § 2 IOWA CONST. art. III, § 34.

<sup>100</sup> IOWA CONST. art. III, § 34.

<sup>101</sup> *California Citizens Redistricting Commission. California Citizens Redistricting Commission’s Guide to Redistricting and the Public Input Hearing Process*, CALIFORNIA CITIZENS REDISTRICTING COMM’N, [https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2011/04/learnmore\\_20110419\\_guidebook.pdf](https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2011/04/learnmore_20110419_guidebook.pdf) (last visited Apr. 19, 2020).

<sup>102</sup> IOWA CODE § 42.4(4).

The work that the independent commissions perform differs by state. In Iowa, a minimum of three public hearings must be held by the commission, and the commission must summarize these meetings and provide the summary to the Iowa state legislature at the same time as the final map.<sup>103</sup> The Iowa legislature consists of two chambers, a state House of Representatives and a state Senate. Following the submission of the summary of public meetings, the state legislature has three days to consider the summary of the public meetings and vote on the map.<sup>104</sup> If the map is approved by one of the two chambers of the Iowa state legislature, it must be expedited to a vote from the other chamber.<sup>105</sup> Following the vote by the second chamber, the map is presented to the Governor of Iowa to sign into law.<sup>106</sup>

If both chambers of the Iowa state legislature fail to pass the proposed plan, a second plan must be drawn and considered by the state legislature within thirty-five days of the initial plan being rejected.<sup>107</sup> The second map must take into account the reasons provided by the rejecting party.<sup>108</sup> It is not a requirement that public input be sought with the second plan.<sup>109</sup> If the second plan fails, the process repeats a third time.<sup>110</sup> As with the second plan, the map must be drawn to correct the reasons why the previous map was rejected by the general assembly or governor, however, no public input is required.<sup>111</sup> If the Iowa state legislature cannot come to an agreement after three redistricting attempts, the Iowa Supreme Court takes over the role of drawing the map.<sup>112</sup> If the state legislature does not approve the first map submitted by the Iowa Supreme Court, the Iowa Supreme Court is given 90 days in order to draw a second map, which will be considered the final map to be used in the next congressional election.<sup>113</sup>

California also requires that there be a particular process used when conducting redistricting. Under the California constitution, it is required that when conducting redistricting, the commission must engage in an “open and transparent process enabling full public consideration of and comment on the drawing of district lines.”<sup>114</sup> Following the 2010 Census, the commission first sought public comments from various groups in both support of and in opposition to their political map, and members of the commission held public meetings throughout the state in order to solicit public opinions on the map.<sup>115</sup>

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<sup>103</sup> California Citizens Redistricting Commission, *supra* note 101.

<sup>104</sup> IOWA CODE § 42.3(1)(a).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> IOWA CODE § 42.3(2).

<sup>108</sup> *Id.*

<sup>109</sup> Ed Cook, *Legislative Guide to Redistricting in Iowa*, IOWA LEGISLATIVE SERVICES AGENCY 5 (2007). <https://www.legis.iowa.gov/docs/publications/LG/9461.pdf>.

<sup>110</sup> IOWA CODE § 42.3(3).

<sup>111</sup> IOWA CODE § 42.3(1)(a).

<sup>112</sup> IOWA CODE § 46.15. The process for selecting Supreme Court Judges in Iowa is also done through an Independent Commission, whereby candidates are chosen by the state judicial nominating commission and approved by the Iowa Governor.

<sup>113</sup> IOWA CONST. art. III, § 36.

<sup>114</sup> CAL. CONST. art. XXI, § 2.

<sup>115</sup> Notices and Agendas, Map of Regions For Input Hearings. CALIFORNIA CITIZENS REDISTRICTING COMMISSION <https://wedrawthelines.ca.gov/hearings/>. (last Accessed Apr. 19, 2020). The state was divided into nine separate regions for the purpose of grouping data.

Like in Iowa, the California Supreme Court also has a role in the redistricting process. In the event that the commission cannot come to a majority decision on the final map, the California Supreme Court takes over the process.<sup>116</sup> The California Supreme Court has the authority to appoint a panel of three special masters to adjust the boundary lines in accordance with the needed redistricting requirements.<sup>117</sup> Once the California Supreme Court assumes responsibility for the map, the panel of special masters draws the redistricted map without public input and sends the final, certified map to the California Secretary of State.<sup>118</sup>

H.R. 1 also requires state commissions to follow a specific process in completing redistricting. As a part of the process for drawing political maps, these commissions would be required to hold at least two public hearings.<sup>119</sup> The purpose of these meetings is to allow for members of the public to comment on any proposed redistricting maps.<sup>120</sup> Each commission would be required to give the public notice prior to holding the meeting and will be allowed to accept written maps from the public at these meetings.<sup>121</sup> Additionally, the commissions will be required to hold meetings at different locations throughout each state, so that members of the public will not have to travel significant distances if they choose to comment on the issue.<sup>122</sup> Once the map is finalized by the commission, the public will have thirty days to submit comments on the redistricting plan.<sup>123</sup> Following this period, the commission will then conduct a vote on whether to approve the map, which will be held in a public meeting.<sup>124</sup>

### **The Best Solution**

While it is difficult to find a solution that resolves all of the issues surrounding political gerrymandering, the use of state advisory commissions, similar to what is used in Iowa, is the best way to solve the issue. Each of the proposed solutions brings pros and cons that should be considered when drawing an ideal gerrymandering model. While an argument could be made to eliminate politics completely from gerrymandering, and have independent commissions do all of the work, it is a proposition that will be very difficult to achieve. This is because the process involves politicians and their jobs. As a result, politicians will want to have their own say in the process. However, the use of independent commissions with members appointed by both the majority and minority parties to advise state legislatures is an ideal solution to the problem. As is the case in Iowa, it is also important for the members to (1) seek significant public input in order to draw the map and (2) provide the input received by the public to the state legislature when they present their map.<sup>125</sup> Finally, it is significant to have a clear court, each individual state supreme court, to present a solution to the problem, or to appoint a special master to resolve the

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<sup>116</sup> CAL. CONST. art. XXI, § 2. At a minimum, Nine of the fifteen members constitutes a quorum. The final maps must be approved by three votes from members registered with the two largest political parties in California, and three votes from members not registered with the two largest political parties.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> H.R. 1, 117th Cong. (2021).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> IOWA CODE § 42.6(3)(b).

problem in the event that the independent commission is unable to do so, (as is the case in California).<sup>126</sup>

In selecting membership for independent commissions, it is important that the process be as nonpartisan as possible. While there will always be a political aspect to the redistricting process, it is important to ensure that those in charge of conducting the process are doing so independently, with a commission composed of citizens selected after a dedicated state agency reviews their political background, as in California.<sup>127</sup> Doing so takes the control for selecting commission members away from the state legislature, which will help to decrease the political nature of the commission, and ultimately the process. It is also a good practice to have committee members select the deciding vote in the process, as is the case in Iowa.<sup>128</sup> This is because the deciding vote is ultimately the key vote in the process, a vote that will be the determining factor in whether the work done by the commission is ultimately successful. As a result, it makes sense that members of the commission would have the ability to vote on the deciding member.

To ensure the neutrality of the commission, those who work closely with state legislatures as lobbyist should not be permitted to serve on independent commissions, as in California.<sup>129</sup> This is because of the relationship that is developed between lobbyists and public officials when they are working together. If a lobbyist is able to protect an elected official, it becomes more likely that the official will help to promote policies important to the lobbyist or donor after the redistricting is complete.

Commissions can also benefit by prohibiting former public officials from serving on a commission following their term in office. In order to have districts drawn fairly using population data, and not in a partisan manner, it is important for commissions to draw a map without the influence of former state legislators. This is because, with their inclusion on these commissions, it becomes likely that these former legislators could want to protect members of their political parties with whom they were close. By excluding members of these groups, states can ensure that members of these commissions are drawing the map to reflect accurate redistricting, and not to secure seats for their own political party.

The process that is followed by independent redistricting commissions is also important. Independent commissions should seek to have public hearings in order to solicit feedback from those who will be impacted by the map, a process that is used in both Iowa and California.<sup>130</sup> Some states draw the redistricted map without any input from the general public, which leads to lawsuits from residents that are displeased with the map. To bring about better outcomes, the state legislature must seek the participation of the general public in drawing the map. Furthermore, soliciting public input can allow for different ideas and perspectives regarding the maps to be presented. This will allow for a map that truly reflects the wishes of the electorate.

Following the solicitation of public comments, the independent commission should conduct the redistricting process, taking into account both state and federal guidelines, to ensure that all proper procedures are followed. Following this process, the independent commission should present to the state legislature the results for their approval. As is the case in Iowa, when

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<sup>126</sup> CAL. CONST. art. XXI, § 2.

<sup>127</sup> *Id.*

<sup>128</sup> IOWA CODE § 42.5(1)(b).

<sup>129</sup> CAL. CONST. art. XXI, § 2.

<sup>130</sup> CAL. CONST. art. XXI, § 2.; IOWA CODE § 42.6(3)(b).

presenting these guidelines to state legislatures, independent commissions should also share a summary of the public comments that were received.<sup>131</sup> This is significant because, first, it will ensure that the public's voice is at least heard regarding the process. If there are issues regarding a particular map that could impact the public, it is important for legislators to be aware of these issues before voting to approve or deny them. Similarly, there should be a role for state courts to play if the process is unable to be resolved. After three unsuccessful attempts, state supreme courts should get involved by appointing a special master to assist with the process, similar to the process in California.<sup>132</sup> The appointment of a special master will ensure that the process is still conducted by a third party, a step that is crucial to ensuring the independence of the process.

However, no solution is perfect, and this proposed process is not without issues. While all states are required to use data provided by the census to draw maps proportionally, others, such as North Carolina, relied on political data as well.<sup>133</sup> While the use of data is significant, in that it provides parties with the data needed to equally divide state populations, the use of certain types of data, specifically electoral data, is problematic. This is because this data can be used to protect incumbent candidates by drawing them into politically friendly districts. This could result in multiple lawsuits filed against a map, as what happened in North Carolina.

Because states are required to use population data to conduct redistricting, eliminating data completely is not an ideal solution to the problem. However, by eliminating the use of political data as a part of the process, states can have a process that focuses more on these requirements, and less on the official that is representing the individual districts. The commissions may preserve their independence if they do not attempt to protect incumbents with electoral data, similar to what happened in North Carolina.<sup>134</sup> The removal of this data will result in a process that is more politically neutral.

## Conclusion

In *Rucho*, the Court determined that gerrymandering is not a matter to be resolved by federal courts; however, the Court did suggest a number of solutions to solving the problem. This process is best left to the states. While some states have passed amendments to their state constitutions banning political gerrymandering, such amendments will result in continued lawsuits. This leaves independent commissions as the best solution to the problem. In addition to a congressional bill that would establish independent commissions, states also follow their own procedures to create independent commissions. The process by which independent commissions conduct the process is left to the states as well. The best solution is one in which independent commissions conduct several public hearings, draw the updated map, and present their findings to the state legislature for approval or rejection. If the process is unsuccessful, state supreme courts should get involved to ensure that the process is conducted timely. Finally, the process should include the lack of reliance on political data. By following these steps, states will be able to conduct redistricting in accordance with requirements that are set by federal and state regulations, and not one that is set by partisan protection.

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<sup>131</sup> IOWA CODE § 42.3(1)(a).

<sup>132</sup> CAL. CONST. art. XXI, § 2.

<sup>133</sup> *Rucho*, 139 S. Ct. at 2491.

<sup>134</sup> *Id.*