

FREE AND EQUAL ELECTIONS: A NEW STATE CONSTITUTIONALISM FOR PARTISAN GERRYMANDERING

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INTRODUCTION

Increased partisanship, single-party control of state governments, and the rise of technology and “Big Data” have allowed mapmakers to draw legislative district maps—both congressional and for state legislatures—that are uncompetitive and skewed in favor of one party.¹ The resulting “extreme partisan gerrymandering” has left states like North Carolina, a traditionally purple state with contested statewide elections, with lasting effects on the partisan composition of its elected officials.²

On June 27, 2019, the Supreme Court handed down its opinion in *Rucho v. Common Cause*, a set of consolidated cases arising out of partisan gerrymandering claims in North Carolina and Maryland.³ The Court held that partisan gerrymandering claims are nonjusticiable in federal court because they present a “political question” beyond judicial competences, deciding there is no “limited and precise standard” for evaluating such claims that is “judicially discernible and manageable.”⁴ The decision effectively shut the door on the justiciability of partisan gerrymandering in federal courts, leaving advocates to search for alternative judicial paths.⁵

In the wake of *Rucho*, state courts may be the most viable path forward in partisan gerrymandering litigation. Several state courts have already seen successful challenges to partisan gerrymanders. In North Carolina⁶ and Pennsylvania,⁷ state courts struck down gerrymandered state maps under the state constitutions’ Free Elections Clauses. These clauses, found within many state

1. Michael Li & Annie Lo, *What Is Extreme Gerrymandering?*, BRENNAN CTR. FOR JUST. (Mar. 22, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/what-extreme-gerrymandering> [<https://perma.cc/ED2B-VMQN>].

2. *Id.*

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

4. *Id.* at 2502.

5. Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html> (on file with the *Columbia Human Rights Law Review*) (“[T]he court closed the door on [partisan gerrymandering] claims.”).

6. *Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56 (2019).

7. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

constitutions, generally require that elections be “free,” “equal,” or “open.”⁸

This Note argues that following *Rucho*, challengers to partisan gerrymanders should bring claims in state court under explicit prohibitions on partisan gerrymandering where they are available, and where not, under state constitutions’ Free Elections Clauses. Part I describes the phenomenon of “extreme partisan gerrymandering” and its consequences. Part II discusses the Supreme Court’s ruling in *Rucho v. Common Cause*, and how it has left redistricting litigants without legal recourse in federal courts. Part III argues that the solution to the problem wrought by *Rucho* is for voting rights advocates to bring claims in state court, particularly under state constitutions’ Free Elections Clauses.

I. PARTISAN GERRYMANDERING AND ITS CONSEQUENCES

The U.S. Constitution provides for the reapportionment of the House of Representatives and requires the redrawing of congressional and state legislative districts every ten years following the census.⁹ There are two distinct elements to the problem of congressional redistricting: 1) apportionment, which concerns the number of congressional seats a state holds; and 2) redistricting, which concerns the method by which the district boundaries within each state are drawn.¹⁰ While apportionment is within Congress’ purview, redistricting has always been left to state legislatures.¹¹

Partisan gerrymandering falls within this latter category of redistricting, dealing with the question of what factors states are permitted to consider when drawing legislative districts. Redistricting is by no means an apolitical process; on the contrary,

8. See *infra* Section III.C.

9. U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct taxes shall be apportioned among the several States . . . according to their respective Numbers The actual Enumeration shall be made . . . within every subsequent term of ten years”).

10. DAVID BUTLER, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PRINCIPLES 17 (1992).

11. U.S. CONST. art. I, § 2, cl. 3; BUTLER, *supra* note 10, at 24. The only federal statutory limitation on redistricting in place today is the requirement that all congressional districts elect a single member. 2 U.S.C. § 2c (2000); Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 331 n.1 (2007).

scholars have identified it as “the bitterest, crudest, most partisan, most divisive issue” confronted by legislators.¹² In a partisan gerrymandering scheme, the party which controls redistricting aims to redraw the district map to maximize its share of seats.¹³ Partisan gerrymanders do not exist solely where a certain area happens to possess a natural partisan advantage, but where the redistricting process results in “the contorting of districts beyond all reason save political gain.”¹⁴ In other words, the goal is to redraw the borders of legislative districts such that the party in control of redistricting wins as many seats as possible.¹⁵

This Part presents the relevant background on partisan gerrymandering in the United States. Section I.A describes the current state of “extreme partisan gerrymandering,”¹⁶ and Section I.B lays out its consequences for voting rights, highlighting the pressing need for a solution.

A. “Extreme Partisan Gerrymandering”: From the Framers to Today

Partisan gerrymandering “is nothing new”;¹⁷ during the first congressional elections, the Federalists accused Patrick Henry’s Anti-Federalists of being “motivated by extreme partisanship” in the

12. Richard L. Engstrom, *The Post-2000 Round of Redistricting: An Entangled Thicket Within the Federal System*, 32 PUBLIUS 51, 52 (2002) (quoting Sam Attlesley, “David and Goliath Both Drive Pickup Trucks: Gramm, Morales Duel over Who’s the Underdog,” *Dallas Morning News*, 7 July 1996, p. 44A).

13. JONATHAN WINBURN, *THE REALITIES OF REDISTRICTING: FOLLOWING THE RULES AND LIMITING GERRYMANDERING IN STATE LEGISLATIVE REDISTRICTING* 13 (2008).

14. Robert Draper, *The League of Dangerous Mapmakers*, THE ATLANTIC (Oct. 2012), <https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/> [<https://perma.cc/7FHT-N59J>].

15. Michael Wines, *What Is Gerrymandering? And Why Did the Supreme Court Rule on It?*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html> (on file with the *Columbia Human Rights Law Review*).

16. See Li & Lo, *supra* note 1.

17. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019); see also *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004); ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 462 (1968) (quipping that “all districting is gerrymandering”).

drawing of Virginia's first congressional district.¹⁸ However, the twenty-first century has seen a compounding of the problem.¹⁹ Thanks to the rise of technology and "Big Data," modern mapmakers can easily draw district maps that suppress competition and favor one party.²⁰ Technological advances, combined with increased partisanship, single-party control of state governments, and a "growing flood of money" into the redistricting process have facilitated the emergence of "extreme partisan gerrymandering,"²¹ wherein political parties entrench unrepresentative majorities for a decade at a time.

While gerrymandering has been "a recurring theme throughout American history," it increased in saliency after the 2010 congressional elections.²² Republicans' historic wins in state legislatures, championed by the Republican State Leadership Committee,²³ allowed them to control the decennial redistricting

18. Thomas Rogers Hunter, *The First Gerrymander? Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 EARLY AM. STUDIES 781, 811 (2011).

19. Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1416 (2020) ("[M]odern gerrymandering is even more severe than that of the nineteenth century, now aided by computer technology and rich new data never before available to re-districters.").

20. Li & Lo, *supra* note 1; Engstrom, *supra* note 12, at 53 (describing the use of technology to enhance the effectiveness of gerrymanders at the end of the twentieth century). However, the accessibility of mapmaking software has also led individuals to be able to recognize and challenge unfair gerrymanders where they occur. See Graeme Earle, *Political Machines: The Role of Software in Enabling and Detecting Partisan Gerrymandering Under the Whitford Standard*, 19 N.C.J.L. & TECH. 67, 91–92 (2017) (discussing technology's ability both to create and detect extreme partisan gerrymanders).

21. LAURA ROYDEN & MICHAEL LI, EXTREME MAPS 3 (2017); see also Olga Pierce et al., *The Hidden Hands in Redistricting: Corporations and Other Powerful Interests*, PROPUBLICA (Sept. 23, 2011), <https://www.propublica.org/article/hidden-hands-in-redistricting-corporations-special-interests> [<https://perma.cc/RJ9L-HU24>] (discussing the influence of special interest groups in the redistricting process).

22. David A. Graham, *John Roberts Says Partisan Gerrymandering Is Not His Problem*, THE ATLANTIC (June 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/partisan-gerrymandering-supreme-court-north-carolina/592741/> [<https://perma.cc/ZXS2-YWPJ>].

23. Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, THE ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/> [<https://perma.cc/XW45-YUB4>]; see generally DAVID DALEY, RATF**CKED (2016) (discussing the Republican State Leadership Committee's REDMAP scheme).

process in those states.²⁴ An Associated Press analysis found that partisan gerrymanders facilitated by the 2010 redistricting process may have allowed congressional Republicans to win about sixteen more U.S. House seats in the 2018 midterm elections than would have been expected given their average vote share.²⁵ The same analysis found that the structural advantage retained by Republicans in state legislative elections may have helped the party retain control of up to seven legislative chambers that may otherwise have been won by Democrats in the 2018 midterms.²⁶ However, the problem of partisan gerrymandering is not exclusive to one political party or the other. Post-2010, both Republicans and Democrats set out to draw maps favoring their own parties, with efforts to achieve extreme Democratic gerrymanders in Illinois and New Jersey, among other states.²⁷

The Supreme Court's decision in *Rucho v. Common Cause* itself dealt with two particularly egregious examples of partisan gerrymandering from both political parties in North Carolina and

24. Graham, *supra* note 22.

25. David A. Lieb, *GOP Won More Seats in 2018 Than Suggested by Vote Share*, ASSOCIATED PRESS (Mar. 21, 2019), <https://apnews.com/9fd72a4c1c5742aead977ee27815d776> [<https://perma.cc/CW32-GY4D>]. The study measured the effect of gerrymandering using the “efficiency gap” standard, which looks at the number of “wasted votes” in a given state’s elections. See Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 884 (2015); ROYDEN & LI, *supra* note 21, at 4 (describing the efficiency gap standard).

26. Lieb, *supra* note 25.

27. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (challenging maps in North Carolina and Maryland that allegedly favor Democrats and Republicans, respectively); *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (challenging a map that allegedly favored Republicans in Wisconsin). Democratic redistricting plans in Illinois and New Jersey have also been criticized as partisan gerrymanders. See Nick Corasaniti, *Democrats in New Jersey Have a Firm Grip on Power. They Want Even More.*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/nyregion/redistricting-new-jersey-democrats-republicans.html> (on file with the *Columbia Human Rights Law Review*) (“Democratic lawmakers in New Jersey . . . are seeking to make Republicans a permanent minority”); Rick Pearson, *Democrats Release Legislative Redistricting Maps*, CHI. TRIB. (May 19, 2011), https://newsblogs.chicagotribune.com/clout_st/2011/05/democrats-release-legislative-redistricting-maps.html [<https://perma.cc/77FC-QLSY>] (describing Illinois Democrats’ districting proposal as “likely to keep Republicans as the minority party in the General Assembly for another decade”).

Maryland.²⁸ Though traditionally purple at the statewide level, North Carolina has seen Republicans secure supermajorities in the state legislature, as well as a ten-to-three advantage in its congressional delegation, as a result of gerrymandered maps.²⁹ Representative David Lewis explicitly proposed “draw[ing] the maps to give a partisan advantage to 10 Republicans and three Democrats . . . because I do not believe it’s possible to draw a map with 11 Republicans and two Democrats.”³⁰ In Maryland, Democratic efforts to flip the reliably red sixth congressional district created a district that was almost non-contiguous, exiled almost seventy thousand Republicans from the district, and did not represent the sort of community of interest traditionally meant to be preserved in the redistricting process.³¹ Then-Governor Martin O’Malley said of the redistricting process, “Part of my intent was to create a map that, all things being legal and equal, would, nonetheless, be more likely to elect more Democrats rather than less.”³²

B. The Consequences of Partisan Gerrymandering

Partisan gerrymandering, through its dilution of citizens’ voting power, has a direct and detrimental effect on the right to

28. See generally *Rucho*, 139 S. Ct. at 2484 (challenging two congressional district maps, one in North Carolina allegedly favoring Republicans and one in Maryland allegedly favoring Democrats).

29. See Li & Lo, *supra* note 1.

30. Adam Liptak, *Partisan Gerrymandering Returns to a Transformed Supreme Court*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/us/politics/gerrymandering-supreme-court.html> (on file with the *Columbia Human Rights Law Review*).

31. Ari Berman, *Five Myths About Gerrymandering*, WASH. POST (Mar. 8, 2018), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-gerrymandering/2018/03/08/f9d1a230-2241-11e8-badd-7c9f29a55815_story.html (on file with the *Columbia Human Rights Law Review*); Peter Miller, *Maryland’s Extreme Gerrymander*, BRENNAN CTR. FOR JUST. (Mar. 7, 2019), <https://www.brennancenter.org/our-work/research-reports/marylands-extreme-gerrymander> [https://perma.cc/DDB9-FSSG]. For a discussion of traditional redistricting principles, see WINBURN, *supra* note 13, at 28–31; BUTLER, *supra* note 10, at 66–82.

32. Berman, *supra* note 31. Though Democrats never received more than 65% of the statewide congressional vote, they won seven of eight available seats in Maryland’s congressional delegation in each following election due to the gerrymandered map. *Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting).

vote.³³ The problem of gerrymandering is not a minor one either; it “effectively disenfranchis[es] millions of Americans” by devaluing their votes.³⁴ The effect of gerrymandering on the worth of individuals’ votes is illustrated by the state of the U.S. House of Representatives (“the House”). While many different models exist for measuring the effect of partisan gerrymandering on total seat share in the House,³⁵ one model found that during the 2012, 2014, and 2016 elections, unfairly drawn congressional districts shifted, on average, fifty-nine seats.³⁶ This means that for every election, fifty-nine politicians that would likely not have been elected based on statewide support for their party nevertheless won due to district lines drawn in their favor. The average congressional district’s population is just above seven-hundred-thousand;³⁷ a total shift of fifty-nine seats is thus approximately equal to representation for forty-two-million people, and represents more than the total number of House seats held by the twenty-three least populated states combined.³⁸ This

33. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

34. Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CTR. FOR AM. PROGRESS (Oct. 1, 2019), <https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering/> [https://perma.cc/FX8Q-W6LP]; see also Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1271 (2016) (explaining that litigants bring cases because gerrymandering results in elected officials unrepresentative of the population).

35. See, e.g., Tausanovitch, *supra* note 34 (using partisan hold on seat compared to statewide partisanship share); Lieb, *supra* note 25 (using the efficiency gap standard to measure “wasted votes”); Wang, *supra* note 34, at 1306 (using number of excess votes, lopsided outcomes, and reliable wins to evaluate partisan gerrymanders); William T. Adler & Ella Koeze, *One Way to Spot a Partisan Gerrymander*, FIVETHIRTYEIGHT (July 9, 2019), <https://projects.fivethirtyeight.com/partisan-gerrymandering-north-carolina/> [https://perma.cc/QZ2M-HB42] (looking at the “number of seats a party would have won in a hypothetical election in which the vote was evenly split between Republicans and Democrats”).

36. Tausanovitch, *supra* note 34.

37. U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT: 2010 CENSUS BRIEFS 1 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [https://perma.cc/5YDC-NYV9].

38. According to U.S. Census Bureau data, the 23 least populated states together hold 60 seats in the U.S. House of Representatives. *2018 National and State Population Estimates*, U.S. CENSUS BUREAU tbl.1 (NST-EST2018-01: Annual Estimates of the Resident Population for the United States, Regions,

estimate does not even begin to take into account the impact of partisan gerrymandering on state legislatures, where the consequences for future elections could be even more dire.³⁹ Gerrymandering renders the votes of millions wasted, assaulting the foundational principle of American democracy that citizens are entitled to representation.

The effect of partisan gerrymandering is to “deprive citizens of . . . [the right] to choose their political representatives,” and “promote[] partisanship above the respect for the popular will.”⁴⁰ With the status quo effectively quashing the congressional representation of approximately forty-two-million Americans, gerrymandering’s harmful impact on voting rights is clear.

II. LACK OF AVAILABILITY OF FEDERAL SOLUTIONS TO PARTISAN GERRYMANDERING

Partisan gerrymandering is an increasingly dire problem in need of a solution, particularly given the upcoming redistricting process in 2021. Fair districting advocates have in the past turned to federal litigation as an avenue for striking down unfair partisan gerrymanders,⁴¹ but the Supreme Court’s decision in *Rucho v. Common Cause* closed off the possibility of such challenges being heard in federal court. This Part discusses the ramifications of the Court’s decision in *Rucho* and the barriers to legislative redistricting reform. It argues that judicial challenges to partisan gerrymanders

States, and Puerto Rico: April 1, 2010 to July 1, 2018) (Dec. 19, 2018), <https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html> [<https://perma.cc/4JA4-LASR>]; Kristin D. Burnett, *Congressional Apportionment: 2010 Census Briefs*, U.S. CENSUS BUREAU (Nov. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [<https://perma.cc/NR6Y-9MJY>].

39. See *infra* note 63 and accompanying text.

40. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting); Complaint at 2, *Whitford v. Nichol*, 151 F. Supp. 3d 918 (W.D. Wis. 2015) (No. 3:15-cv-00421-bbc) (arguing partisan gerrymandering “causes policies to be enacted that do not accurately reflect the public will”).

41. See, e.g., *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *League of Women Voters of Mich. v. Benson*, 373 F.Supp.3d 867, 912 (E.D. Mich. 2019); *Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56 (2019); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018). These constitute only a small sampling of the partisan gerrymandering claims to have been brought.

are an essential component of reform, and that advocates must find a way to litigate such claims notwithstanding *Rucho*.

A. The State of Partisan Gerrymandering Litigation Pre- and Post-*Rucho*

The decision in *Rucho* cemented the worst fears of fair districting advocates regarding partisan gerrymandering claims. The Supreme Court's jurisprudence on partisan gerrymandering pre-*Rucho* was largely inconclusive as to the justiciability of such claims.⁴² In 2019, though, the Supreme Court made a definitive ruling on the justiciability of partisan gerrymandering claims in *Rucho v. Common Cause*.

The case arose out of two joined cases of extreme partisan gerrymandering in North Carolina and Maryland,⁴³ where state redistricting authorities redrew congressional districts to maximize the number of seats held by Republicans and Democrats, respectively. The district courts in both the North Carolina and Maryland cases held the maps at issue unconstitutional.⁴⁴

42. See BUTLER, *supra* note 10, at 66–82. While the Court decided that partisan gerrymandering claims were justiciable under the Equal Protection Clause in *Davis v. Bandemer*, 478 U.S. 109, 143 (1986), the debate was left unsettled, with no consensus among the Justices on the appropriate standard by which to evaluate such claims. See *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (ruling on a challenge to Pennsylvania's congressional map). Most recently, the court sidestepped the question entirely, remanding a gerrymandering case for lack of standing without reaching the justiciability question. *Gill*, 138 S. Ct. at 1929 (remanding a challenge to Wisconsin's state maps for lack of standing).

43. See *supra* notes 32–36 for a discussion of the facts of the redistricting schemes in North Carolina and Maryland at issue in *Rucho*.

44. Both courts found violations of the First Amendment. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 923 (M.D.N.C. 2018); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 520 (D. Md. 2018). For a discussion of First Amendment challenges to partisan gerrymanders, compare JoAnn D. Kamuf, Note, "*Should I Stay or Should I Go?*": *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 *FORDHAM L. REV.* 163, 209–10 (2005) (arguing the First Amendment presents a viable path forward in redistricting litigation) with Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 *CORNELL J. L. & PUB. POL'Y* 397, 407–10 (2005) ("[U]ltimately, the First Amendment argument fails."). The North Carolina court additionally found violations of the Equal Protection Clause of the Fourteenth Amendment and the Elections Clause of Article I of the Constitution. *Rucho*, 318 F. Supp. 3d at 935, 941.

Rather than asking for a more precise standard by which to evaluate gerrymanders, as in *Vieth v. Jubelirer*,⁴⁵ or dismissing the case on other grounds, as in *Gill v. Whitford*,⁴⁶ the Supreme Court took an entirely different tack. Writing for the majority, Chief Justice Roberts held that while the Court “does not condone excessive partisan gerrymandering,”⁴⁷ such claims are beyond the reach of the federal courts, presenting nonjusticiable political questions that must be solved through the political process.⁴⁸

The Court went on to suggest that despite its ruling, partisan gerrymandering was not a problem without a solution, and that would-be litigants should look to legislative reform at the state and local levels.⁴⁹ Despite this nod to voting rights reformers, the decision was highly contested within the Court’s membership—Justice Kagan, joined in dissent by Justices Ginsburg, Breyer, and Sotomayor, described the majority opinion as “abandon[ing] the Court’s duty to declare the law.”⁵⁰ While this disagreement among the Justices may indicate an unstable ruling and the potential for reexamination in the future, for the time being, the Court’s failure to act on partisan gerrymandering has major implications for the future of redistricting reform.

B. *Rucho*’s Implications for Reform & Redistricting

The implications of shutting the door to partisan gerrymandering claims in federal court are particularly pressing in view of the upcoming 2021 redistricting. Given the changes wrought by *Rucho*, reformers must adapt their strategies to better fit the post-*Rucho* landscape.

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

46. *Gill*, 138 S. Ct. at 1929.

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

48. *Id.* It is established Supreme Court practice to declare questions nonjusticiable when a decision would present an unlawful intrusion of the judiciary into the realm of politics. *See Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”); *Vieth*, 541 U.S. at 277 (“Sometimes, however . . . the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches”).

49. *Rucho*, 139 S. Ct. at 2507.

50. *Id.* at 2525 (Kagan, J., dissenting).

The most immediate effect of the judgment in *Rucho* is to prevent voters living in gerrymandered districts, whose votes have been wasted, from finding federal judicial recourse. Already, the Court's ruling in *Rucho* has wiped out similar federal challenges to partisan gerrymanders arising out of Michigan,⁵¹ Ohio,⁵² and Wisconsin.⁵³

The decision also has the potential to embolden state legislatures and would-be gerrymanderers to “continue to push the envelope and craft seats for their respective parties with the aid of increasingly sophisticated computer mapping tools.”⁵⁴ Knowing that its district maps can no longer be struck down in federal court, each party will likely face incentives to “eat-or-be-eaten”—to step up its gerrymandering game, or be outmaneuvered by the other party.⁵⁵

Finally, the Court's implicit sanction of partisan gerrymandering has the potential to give legal cover to racially biased gerrymanders, which often overlap with partisan gerrymanders but are justiciable in federal court under the Equal Protection Clause.⁵⁶

51. *Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429, 429 (2019) (vacating, in light of *Rucho*, the judgment of a Michigan federal court that invalidated Michigan's congressional and state legislative maps as unconstitutional partisan gerrymanders).

52. *Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102, 102 (2019) (vacating, in light of *Rucho*, the judgment of an Ohio federal court that invalidated Ohio's congressional plan as an unconstitutional partisan gerrymander).

53. *Whitford v. Gill*, 402 F. Supp. 3d 529, 531 (W.D. Wis. 2019) (noting that the parties moved to dismiss the challenge to Wisconsin's State Assembly map for lack of jurisdiction following the Supreme Court's decision in *Rucho*). In all three of these cases, the maps at issue had been ruled unconstitutional partisan gerrymanders by the district courts.

54. Richard Fausset, *With No Supreme Court End to Gerrymandering, Will States Make It More Extreme?*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/supreme-court-gerrymandering-north-carolina.html> (on file with the *Columbia Human Rights Law Review*).

55. Michael Wines, *Why the Supreme Court's Rulings Have Profound Implications for American Politics*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/supreme-court-gerrymandering-census.html> (on file with the *Columbia Human Rights Law Review*) (“The decision will almost certainly force Democrats, who control 14 statehouses, to reconsider their belated crusade against gerrymandered maps and begin drawing their own”).

56. *See Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (stating that the Equal Protection Clause “prevents a state, in the absence of ‘sufficient justification,’ from ‘separating its citizens into different voting districts on the

In states like North Carolina, where much of the Democratic vote comes from minority voters, lawmakers may attempt to disguise racial gerrymanders as partisan gerrymanders in order to gain legal protection.⁵⁷ Statements like those of Representative David Lewis⁵⁸ or Governor Martin O'Malley,⁵⁹ proclaiming partisan intent in the redistricting process, may be used as proof that redistricting schemes were based solely on partisanship—making their constitutionality nonjusticiable—rather than race, which would leave the schemes vulnerable to challenges in federal court.⁶⁰

Rucho's consequences are even more pressing given the upcoming redistricting following the 2020 census. The Court has left state legislatures free to draw maps favoring the party in power, without any concern of a judge striking their maps down in federal court.⁶¹ Without much time to implement legislative reforms, and without a federal judicial remedy, the parties in power in various states have the opportunity to ensure “political dominance for the next decade.”⁶² This is especially egregious where state legislatures are concerned. State legislative elections determine which parties hold the power to draw state district lines, and are often themselves run using unfairly drawn maps.⁶³ In a state like North Carolina,

basis of race” (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017)).

57. Richard L. Hasen, *The Gerrymandering Decision Drags the Supreme Court Further into the Mud*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html> (on file with the *Columbia Human Rights Law Review*).

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

59. See *supra* note 32 and accompanying text.

60. See *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1340 (S.D. Fla. 2002) (involving a state legislature defending against an allegation of racial gerrymandering by stipulating its intent in drawing districts was to advantage Republican incumbents and candidates).

61. Galen Druke, *Partisan Gerrymandering Isn't the Supreme Court's Problem Anymore*, FIVETHIRTYEIGHT (June 27, 2019), <https://fivethirtyeight.com/features/partisan-gerrymandering-isnt-the-supreme-courts-problem-anymore/> [<https://perma.cc/T3B3-MLRC>].

62. Wines, *supra* note 55.

63. David Lieb & Dan Sewell, *High Court Rules Gerrymandering Claims Beyond Reach of Federal Judges*, REALCLEARPOLITICS (June 28, 2019), https://www.realclearpolitics.com/articles/2019/06/28/high_court_rules_gerrymandering_claims_beyond_reach_of_federal_judges_140676.html

[<https://perma.cc/2SHL-7ZGP>] (“[T]he 2020 elections will proceed under the same districts used for the past decade” “The fact that these districts aren’t fairly

where the state legislature has declared its intent to create partisan gerrymanders and has total control over the process, the party in power may use technology to draw a hyper-effective partisan gerrymander in 2021.⁶⁴ It may even conduct mid-decade redistricting to cement its control.⁶⁵

Rucho's impacts on fair districting generally, and its implications more specifically for the 2021 redistricting, are to allow parties to increase their own power with no judicial oversight. Though the Court has changed its tack on some redistricting issues in the past,⁶⁶ fair districting advocates cannot simply wait for it to overturn *Rucho*; the case remains the law of the land, and reformers must take into account its implications for redistricting.

C. The Necessity of Judicial Solutions to Partisan Gerrymandering

While legislative initiatives are crucial to redistricting reform, they cannot fully address the issue of partisan gerrymandering without judicial remedies. This Section discusses the limits of legislative reform and the need for judicial solutions as part of a redistricting reform strategy.

1. The Limits of Legislative Reform

In *Rucho*, Chief Justice Roberts argued that while courts were not equipped to handle the problem of partisan gerrymandering, federal and state legislatures could take on that role. He pointed to efforts of the states to “actively address[] the issue on a number of

drawn makes it a tough slog for us,’ Michigan Democratic Party Chairwoman Lavora Barnes said.”).

64. Hasen, *supra* note 57.

65. *Id.* Mid-decade redistricting is not prohibited by law; in 2003, Texas conducted a mid-decade redistricting which was later upheld by the Supreme Court. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006).

66. Early cases addressing malapportionment in the twentieth century saw the initial reluctance of the Supreme Court to interfere on political question grounds. *See South v. Peters*, 339 U.S. 276, 277 (1950); *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946). The following decades, however, saw the Court overturn *Colegrove* in *Baker v. Carr*, 369 U.S. 186, 237 (1962), holding that state legislative apportionment was a justiciable political question. *See also Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (holding that the constitutionality of congressional district lines was justiciable).

fronts,” particularly by placing districting power in the hands of independent commissions, and the passage of laws by Congress to limit partisan gerrymandering.⁶⁷ However, these solutions alone are not enough to ensure fair districts.

Independent redistricting commissions are an established means of redistricting reform. While such commissions may be effective,⁶⁸ they are not sufficient—and their future is not entirely certain.⁶⁹ Chief Justice Roberts has previously argued that such commissions are unconstitutional when used to draw congressional districts.⁷⁰ Though his opinion in *Rucho* suggests he has since come to accept these redistricting commissions, it is possible that the Court might nonetheless declare them unconstitutional, particularly given its changed composition.⁷¹

67. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). For a discussion of the use of state constitutional provisions to litigate partisan gerrymandering claims, as Chief Justice Roberts suggested, see *infra* Sections III.A–C.

68. YURIJ RUDENSKY & ANNIE LO, BRENNAN CTR. FOR JUST., A BETTER WAY TO DRAW DISTRICTS 1 (2019); see also Stephanopoulos, *supra* note 11, at 337–40 (arguing that redistricting commissions have no self-interest, are perceived as more legitimate, allow the legislature to devote its time to other issues, produce fairer elections, and draw maps less likely to be challenged in court).

69. In 2019, Michigan plaintiffs challenged the constitutionality of the state’s redistricting commission. If the case is brought to the Supreme Court, it could have consequences beyond Michigan, imperiling redistricting commissions nationwide. See *Daunt v. Benson*, 425 F. Supp. 3d 856, 869 (W.D. Mich. 2019). In April 2020, the Sixth Circuit denied plaintiffs’ motion for a preliminary injunction to block the commission. See *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020).

70. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm.*, 135 S. Ct. 2652, 2677 (2015) (Roberts, C.J., dissenting) (arguing that the vesting of congressional redistricting authority in independent redistricting commissions violates the Elections Clause’s grant of congressional redistricting authority to “the Legislature” of each state). Even if Roberts’ opinion had prevailed, however, it would not bar the use of such commissions to draw state legislative boundaries.

71. Hasen, *supra* note 57 (“With Justice Kennedy gone, the court could well reverse this 5-4 holding in the next few years, and block the use of redistricting commissions for federal elections.”); Elise Viebeck and Ann E. Marinow, *Ruth Bader Ginsburg’s Death Brings New Uncertainty to the Battle Over Voting Rights in 2020*, WASH. POST (Sept. 21, 2020), https://www.washingtonpost.com/politics/ginsburg-supreme-court-voting-rights/2020/09/21/2bbda99a-fb45-11ea-8d05-9beaaa91c71f_story.html (on file with the *Columbia Human Rights Law Review*) (“The death of Supreme Court Justice Ruth Bader Ginsburg has injected new uncertainty into the legal battle over how Americans will vote . . . as liberals mourn a champion for voting rights”).

Chief Justice Roberts' second suggestion was that Congress take action to prohibit the practice of partisan gerrymandering. While there have been recent attempts to pass such legislation,⁷² none have yet succeeded. As Justice Kagan stated in her dissent in *Rucho*:

[W]hat all these *bills* have in common is that they are not *laws*. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.⁷³

Justice Kagan's observation is borne out by the many examples of redistricting reforms that did not survive to see the House or Senate floor.⁷⁴ While federal legislative reform may be a worthwhile path, its failure to materialize means it cannot alone comprise a reform strategy.

To be sure, federal and state legislative reforms to redistricting are necessary to ensure a fairer process nationwide.⁷⁵ However, their primary effect is to prevent future gerrymanders, and they provide no legal recourse for gerrymanders which may arise despite these reforms. They cannot be fully effective if unaccompanied by a judicial remedy for the many gerrymandered maps already in existence and which may arise in the future.

72. See For the People Act of 2019, H.R. 1, 116th Cong. §§ 2401–02, 2411–15 (2019) (requiring the use of independent state redistricting commissions, prohibiting mid-decade redistricting, and requiring redistricting to be conducted with the involvement of a three-judge panel). The bill passed the House of Representatives, but as of November 2020 has not passed the Senate.

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

74. See, e.g., Redistricting Transparency Act of 2010, H.R. 4918, 111th Cong. (2010); Redistricting Transparency Act of 2011, H.R. 419, 112th Cong. (2011); Fairness and Independence in Redistricting Act, H.R. 453, 112th Cong. (2011); We the People Democracy Reform Act of 2017, H.R. 3848, 115th Cong. (2017). H.R. 1—the Democrats' political reform bill—would reform redistricting practices, but has not passed through the Senate as of the time of writing. See For the People Act of 2019, H.R. 1, 116th Cong. §§ 2401–02, 2411–15 (2019).

75. J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL'Y REV. 543, 554–55 (2011).

2. The Value of Bringing Challenges to Partisan Gerrymanders in Court

The above reforms fail to address an important aspect of the problem: existing partisan gerrymanders, whose effects on the 2020 elections and subsequent redistricting will be keenly felt. To achieve fair maps nationwide, individuals must be able to challenge existing gerrymanders in court, notwithstanding *Rucho*.

Where legislative reforms are forward-looking, seeking to create new processes to ensure fairer redistricting in the future, they do not allow individuals to correct the current harm to voting rights wrought by hyper-partisan maps. Judicial recourse allows plaintiffs to seek the redrawing of maps already in effect, without having to wait for the next redistricting cycle. Furthermore, the potential for court involvement may have a deterrent effect on would-be gerrymanderers in the legislature; such legislators may draw more constitutionally acceptable plans knowing that unfair gerrymanders have the potential to be overturned in court.⁷⁶ Judicial recourse for individuals affected by partisan gerrymandering is undoubtedly important; the only question that remains is where individuals might find relief, given *Rucho*'s bar to federal claims.

III. CHALLENGING PARTISAN GERRYMANDERS UNDER STATES' FREE ELECTIONS CLAUSES

Though the doors of federal court are barred to litigants in partisan gerrymandering cases under *Rucho*, state courts may present an alternative. Chief Justice Roberts said as much in *Rucho*, pointing to the ability of state courts to adjudicate partisan gerrymandering claims under state law.⁷⁷ Accordingly, Section III.A argues that redistricting litigation post-*Rucho* should focus on state courts, and explores sources of state law upon which redistricting claims might rest. Section III.B examines explicit prohibitions on partisan considerations in redistricting, arguing litigators should use those prohibitions where available to mount challenges to unfair maps. Section III.C concludes that elsewhere, challengers to gerrymandered maps should look to state constitutions' Free

76. WINBURN, *supra* note 13, at 27.

77. *Rucho*, 139 S. Ct. at 2507 (majority opinion) (discussing the Florida Supreme Court's decision in *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 413 (Fla. 2015)).

Elections Clauses, using Pennsylvania and North Carolina as examples.

A. Looking to State Courts Post-*Rucho*

Post-*Rucho*, the future of partisan gerrymandering litigation lies in state court, its drawbacks notwithstanding. This Section examines the advantages of bringing state-law claims and the general framework under which such claims may be brought.

1. Why Bring Cases in State Court?

Following the decision in *Rucho*, state-law claims are effectively the only option for redistricting litigants.⁷⁸ But bringing claims in state court also carries several distinct advantages. Because state constitutions are independent sources of law, their meaning does not necessarily depend on the interpretation of similar provisions in federal or other state law.⁷⁹ State courts may interpret provisions more generously than the Supreme Court has read similar provisions of the federal Constitution.⁸⁰ Indeed, state courts have often gone further than the Supreme Court in protecting individual rights.⁸¹ State court rulings have the added impact of potentially influencing federal law in the long run, both by persuasion of the

78. See Vikram David Amar, *Advice for State Courts in the Aftermath of Rucho*, VERDICT (July 18, 2019), <https://verdict.justia.com/2019/07/18/advice-for-state-courts-in-the-aftermath-of-rucho> [<https://perma.cc/B9A2-H46S>].

79. James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELEC. L.J. 643, 645 (2004). *But see* Joshua Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 106 (2014) (noting that state courts may engage in “lockstep[ping] . . . analyz[ing] the analogous rights in the state constitution as conferring the same level of protection as their federal counterparts”).

80. Gardner, *supra* note 79, at 645. *But see* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELEC. L.J. 179, 210–11 (2003) (stating that it is “difficult to convince [state courts] not to follow lockstep the U.S. Supreme Court’s . . . jurisprudence”).

81. MARK DENNISTON, *DIALOGUE AMONG STATE SUPREME COURTS: ADVANCING STATE CONSTITUTIONALISM* 5 (2014); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (“State constitutions, too, are a font of individual liberties”); *see generally* Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) (discussing state courts’ ability to decide fundamental rights claims under state law before reaching a federal question).

federal courts on a case-by-case basis and by “contributing to the establishment of a nationwide legal consensus at the state level.”⁸²

Contrary to potential claims that *Rucho* rendered partisan gerrymandering claims entirely nonjusticiable in both state and federal courts, state courts are a suitable venue for such claims even where they have been barred in federal court.⁸³ An illustration of this suggestion can be found in the twentieth century’s malapportionment cases. Initially, the Supreme Court was reluctant to interfere in apportionment;⁸⁴ it was not until 1962 that the Court reconsidered and held state legislative apportionment to be justiciable.⁸⁵ In the interim, however, state courts did hear challenges to apportionment acts under state law.⁸⁶ The idea that state courts may take on violations of voting rights where federal courts refuse to can and should be transposed onto the partisan gerrymandering context.

2. Redistricting Under State Law

State courts may interpret the Supreme Court’s decision in *Rucho* to mean that state courts are prohibited from adjudicating

82. Gardner, *supra* note 79, at 646; *see generally* DENNISTON, *supra* note 81 (describing state supreme courts’ tendencies to find doctrine of other state supreme courts persuasive and adopt such doctrine when presented with it). At the same time, some commentators have raised concerns about bringing partisan gerrymandering claims in state courts. *See* Diego Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2110 (2019) (noting that state judiciaries are often constrained by “federal expansion, relatively low budgets, insufficient political support, and ‘legislative assault’”).

83. For examples of state courts rejecting Supreme Court doctrine as unpersuasive beyond those discussed here, *see* Brennan, *supra* note 81, at 499–501.

84. *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946) (“It is hostile to a democratic system to involve the judiciary in the politics of the people.”); *see also* BUTLER, *supra* note 10, at 27 (noting the Court’s hesitation to take on questions of legislative apportionment).

85. In 1962, the Supreme Court ruled in favor of states’ authority to hear cases on apportionment and affirmed this ruling in the following years. *See* *Baker v. Carr*, 369 U.S. 186, 238 (1962); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964); BUTLER, *supra* note 10, at 27.

86. *See, e.g.*, *Asbury Park Press, Inc. v. Woolley*, 161 A.2d 705, 712 (1960) (affirming the New Jersey Supreme Court’s authority to review legislative acts for compliance with constitutional provisions regarding apportionment); *Jones v. Freeman*, 146 P.2d 564, 571 (1943) (holding that the Oklahoma Supreme Court was empowered to test the constitutionality of legislative apportionment acts).

partisan gerrymandering claims under the federal Constitution.⁸⁷ Thus, advocates bringing such claims must ensure their arguments rest on “independent and adequate state-law grounds.”⁸⁸ This need not present a problem for state redistricting claims, though, given that state constitutions “provide greater protection against partisan gerrymandering than is available through federal constitutional guarantees.”⁸⁹ Whereas the U.S. Constitution does not enumerate an individual right to vote, state constitutions explicitly provide for the right to vote⁹⁰ and often contain entire sections dedicated to the franchise.⁹¹

State judicial action on redistricting is not unprecedented in the wake of Supreme Court decisions declaring federal apportionment cases nonjusticiable.⁹² The question is not whether such claims are possible, but where to locate state-law prohibitions on partisan gerrymandering.

B. Florida: A Case Study in Explicit Constitutional Prohibitions on Partisan Gerrymandering

Florida is relatively rare among the fifty states in that its state constitution forbids the drawing of congressional and state legislative districts “with the intent to favor or disfavor a political

87. Samuel S.-H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 213 (2019) (“With the Supreme Court’s move toward a more restrictive interpretation of voting rights under the U.S. Constitution, the way forward for election reform there is uncertain . . .”); Amar, *supra* note 78.

88. Amar, *supra* note 78.

89. Nancy Martorano Miller et al., *An Alternative Route to Voting Reform: The Right to Vote, Voter Registration, Redistricting and U.S. State Constitutions*, 49 PUBLIUS 465, 467 (2019).

90. State constitutions usually phrase the guarantees of voting rights in terms that a citizen “shall be entitled to vote,” “shall be qualified to vote,” or “is a qualified elector.” Douglas, *supra* note 79, at 93–94; *see, e.g.*, GA. CONST. art. II, § 1, ¶ II (“shall be entitled to vote at any election”); COLO. CONST. art. VII, § 1 (“shall be qualified to vote at all elections”); WIS. CONST. art. III, § 1 (“is a qualified elector”). The only state constitution that does not include explicit language granting the right to vote is Arizona’s; instead, Arizona’s constitution implicitly grants the right to vote by providing for who is *not* qualified to vote. ARIZ. CONST. art. VII, § 2. This is the rare exception to the otherwise relatively uniform guarantee of an affirmative right to vote across the states.

91. Douglas, *supra* note 79, at 105.

92. *See supra* notes 84–86 and accompanying text.

party or an incumbent.”⁹³ These provisions, referred to as the “Fair Districts Amendments,” were adopted by ballot initiative in 2010, making Florida the only state at the time to prohibit partisan gerrymandering while leaving the redistricting process in the hands of the state legislature rather than an independent commission.⁹⁴

However, the provisions did not stop the practice of partisan gerrymandering. In 2012, the legislature passed maps that “game[d] the Voting Rights Act . . . hid[ing] partisanship under the guise of being fair to people of color.”⁹⁵ It did so under conditions of secrecy and subterfuge; the maps were submitted by political consultants to the state legislature under the name of Florida State University student Alex Posada, who denied any involvement.⁹⁶ The maps allowed Republicans to carry 63% of the state’s congressional seats while only winning 51% of the statewide vote.⁹⁷ They also preserved Florida’s fifth congressional district, described by the judge in the resulting challenge as “visually not compact [and] bizarrely shaped.”⁹⁸

While the constitutional prohibitions on partisan gerrymandering may not have stopped the legislature from drawing

93. The relevant text for both provisions (prohibiting congressional and state legislative partisan gerrymandering, respectively) reads: “No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” FLA. CONST. art. III, §§ 20(a), 21(a). In addition to Florida, seven states constitutionally prohibit the favoring or disfavoring an incumbent, candidate or party in the redistricting process. See CAL. CONST. art. XXI, § 2(e); COLO. CONST. art. V, §48.1(4)(a); HAW. CONST. art. IV, § 6; MICH. CONST. art. IV, § 6(13); MO. CONST. art. III, § 3(c)(1)(b); N.Y. CONST. art. III, § 4(c)(5); OHIO CONST. art. XI, §§ 6, 9; OHIO CONST. art. XIX, § 1. Five states prohibit this practice by statute. See DEL. CODE ANN. tit. 29, § 804 (2020); IDAHO CODE § 72-1506 (2020); IOWA CODE § 42.4(5) (2020); MONT. CODE ANN. § 5-1-115 (2019); OR. REV. STAT. § 188.010 (2020).

94. Jack Fitzpatrick, *Florida’s Anti-Gerrymandering Measures Didn’t Work. Here’s How Both Parties Hope to Change Them.*, THE ATLANTIC (Nov. 17, 2015), <https://www.theatlantic.com/politics/archive/2015/11/floridas-anti-gerrymandering-measures-didnt-work-heres-how-both-parties-hope-to-change-them/443478/> [<https://perma.cc/HJ7N-SVA5>].

95. Karen Duffin & Noel King, *Ungerrymandering Florida*, NAT’L PUB. RADIO (June 8, 2018), <https://www.npr.org/sections/money/2018/06/08/618410306/episode-846-ungerrymandering-florida> [<https://perma.cc/ZX86-9KQT>].

96. *Id.*

97. Andrew Prokop, *The Florida Supreme Court Just Made a Huge New Anti-Gerrymandering Ruling*, VOX (July 9, 2015), <https://www.vox.com/2015/7/9/8922811/florida-gerrymandering-supreme-court> [<https://perma.cc/Q9UV-8TMT>].

98. League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 435 (Fla. 2015).

unfair maps, they did provide plaintiffs with legal grounds upon which to challenge the maps. In 2015, the Supreme Court of Florida struck down the districting plan as a violation of Article III, § 20 of the Florida Constitution—the congressional Fair Districts Amendment.⁹⁹ The court’s analysis focused on determining whether the legislature acted with the unconstitutional intent “to favor or disfavor a political party,”¹⁰⁰ and found there was “no acceptable level of improper intent.”¹⁰¹ This intent analysis created a clear standard for the court to follow and thus avoided entirely the concern articulated in *Rucho* with lack of standards for finding partisan gerrymanders.¹⁰² Finding the state legislature acted with such impermissible intent, the Florida Supreme Court eliminated eight of the state’s congressional districts, including the Fifth District.

Florida serves as an illustration of what may be accomplished in state courts when state law explicitly prohibits partisan gerrymanders. Florida’s Fair District Amendments, which serve as independent legal grounds for redistricting claims in Florida state court, prevent the ruling in *Rucho* from affecting such claims.¹⁰³ However, only thirteen states prohibit partisan considerations in redistricting by law.¹⁰⁴ The unique character of these anti-gerrymandering provisions means that this success does not easily translate to other states.

99. *Id.* at 427 (noting that partisan considerations are “now explicitly outlawed by the Florida Constitution’s prohibition on partisan political gerrymandering”).

100. *Id.* at 387. The intent of “individual legislators and legislative staff members” involved in the map-drawing process is relevant to the intent inquiry. *Id.* at 388.

101. *Id.* at 387.

102. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019).

103. *Id.* at 2507 (“Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”).

104. *See supra* note 93. Of the states that have adopted explicit prohibitions on partisan gerrymandering, only Delaware and Oregon do not also use independent redistricting commissions or other nonpartisan means of drawing state or congressional districts—meaning that many of the states with these prohibitions may be less likely to have gerrymandered maps in any case.

C. Free Elections Clause Claims as an Avenue for Challenging Partisan Gerrymanders

While Florida's constitutional prohibition on partisan gerrymandering is relatively rare, many state constitutions contain provisions that address the fairness of elections and their administration.¹⁰⁵ Thirty states require constitutionally that elections be "free."¹⁰⁶ Eighteen of these states further require that elections be either "equal" or "open" in addition to being free.¹⁰⁷ This kind of provision in a state constitution, often referred to as a "Free Elections Clause" or "Free and Equal Elections Clause," has been used as a state-law source of voting rights¹⁰⁸ and as the legal basis for challenges to partisan gerrymanders in state courts.¹⁰⁹ Some have argued specifically that these clauses "might provide purchase in

105. Hannah Tokerud, *The Right of Suffrage in Montana: Voting Protections Under the State Constitution*, 74 MONT. L. REV. 417, 417 (2013). For a complete accounting of states' Free Elections Clauses, see *Free and Equal Election Clauses in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 4, 2019), <http://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx> [https://perma.cc/42DS-E3U8].

106. The states mandating that elections be "free" are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 105; *see, e.g.*, N.C. CONST. art. I, § 10 ("All elections shall be free.").

107. The states requiring "equal" elections are Arizona, Arkansas, Delaware, Illinois, Indiana, Kentucky, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, and Wyoming; the states requiring elections be "open" are Colorado, Missouri, Montana, New Mexico, and Wyoming. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 105; *see, e.g.*, WYO. CONST. art. I, § 27 ("Elections shall be open, free and equal").

108. *See Chavez v. Brewer*, 214 P.3d 397, 408 (Ariz. Ct. App. 2009) (holding the state's "free and equal" elections clause was implicated when votes were not properly counted); *see also* *Gunaji v. Macias*, 31 P.3d 1008, 1016 (N.M. 2001) (holding that "an election is only 'free and equal' if the ballot allows the voter to choose between the lawful candidates").

109. *See, e.g.*, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019) (challenging the North Carolina General Assembly's map-drawing practice); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (finding that the Pennsylvania Congressional Redistricting Act of 2011 violated the equal elections clause of the Pennsylvania Constitution). For further discussion of these cases, *see infra* Sections III.C.1–2.

challenging partisan gerrymandering as a form of incumbent self-protection.”¹¹⁰

Free Elections Clauses have another advantage: they have no federal counterpart. Where state constitutional provisions have federal analogues—as with equal protection and freedom of association provisions—state courts may engage in the practice of “lockstepping.”¹¹¹ This entails defining the state’s grant of rights with the same scope as the right under federal jurisprudence.¹¹² A “grave threat to independent state constitutions,”¹¹³ lockstepping renders state courts incapable of providing stronger protections under state law than those granted by the federal judiciary.¹¹⁴ For example, a state court that engages in lockstepping may decide that, post-*Rucho*, state constitutional provisions on equal protection and free association cannot prohibit partisan gerrymandering where the Supreme Court has ruled that the counterpart federal provisions cannot do so. On the other hand, as is the case with Free Elections Clauses, “[s]tate judges are most free to act when there is no corresponding federal constitutional provision.”¹¹⁵

Where explicit prohibitions on partisan gerrymandering do not exist under state law, and where Free Elections Clauses are included in state constitutions, reformers should pursue challenges based on these clauses. The following Section examines two cases arising out of North Carolina and Pennsylvania which struck down gerrymandered maps on the ground that they violated the state constitutions’ Free Elections Clauses, and analyzes the applicability of this approach to other states.

1. Pennsylvania

Following the 2010 census, Pennsylvania’s state legislature enacted congressional maps that would come to be described as “the

110. Gardner, *supra* note 79, at 650.

111. Douglas, *supra* note 79, at 106.

112. *Id.*

113. JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018).

114. Ben Williams, *If SCOTUS Refuses to Act on Partisan Gerrymandering, State Supreme Courts Offer a Path to Reform*, SLATE (Mar. 29, 2019), <https://slate.com/news-and-politics/2019/03/partisan-gerrymandering-state-supreme-court-constitutions.html> [<https://perma.cc/GLW6-V7M2>].

115. *Id.*

gerrymander of the decade.”¹¹⁶ In the 2012 elections, Democrats and Republicans each took roughly 49–50% of the statewide two-party vote share; but Republicans won thirteen out of eighteen congressional districts.¹¹⁷ No seats changed partisan hands in the 2014 and 2016 House elections.¹¹⁸ The plan was also notable for splitting twenty-eight of Pennsylvania’s sixty-seven counties between at least two different congressional districts, with one county being split between five districts.¹¹⁹ One district even earned the moniker of the “Goofy kicking Donald Duck district” based on its irregular boundaries.¹²⁰

In June 2017, plaintiffs challenged the 2011 maps in state court, arguing that the maps violated the rights to equal protection and free expression and association under the Pennsylvania Constitution, as well as its Free and Equal Elections Clause.¹²¹ After granting expedited review, in February 2018 the Supreme Court of Pennsylvania struck down the maps on the ground that they violated the Free and Equal Elections Clause of the Pennsylvania Constitution.¹²²

116. Sean Trende, *In Pennsylvania, the Gerrymander of the Decade?*, REALCLEARPOLITICS (Dec. 14, 2011), https://www.realclearpolitics.com/articles/2011/12/14/in_pennsylvania_the_gerrymander_of_the_decade_112404.html [<https://perma.cc/N39Q-6H7Z>].

117. *2012 Pennsylvania House Results*, POLITICO (Nov. 11, 2012), <https://secure.politico.com/2012-election/results/house/pennsylvania> [<https://perma.cc/F3YQ-RE63>].

118. *2014 Pennsylvania House Election Results*, POLITICO (Dec. 23, 2014), <https://www.politico.com/2014-election/results/map/house/pennsylvania/> [<https://perma.cc/2EAG-3VMH>]; *2016 Pennsylvania House Election Results*, POLITICO (Dec. 13, 2016), <https://www.politico.com/2016-election/results/map/house/pennsylvania/> [<https://perma.cc/CR3D-3487>].

119. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 761 (Pa. 2018).

120. Meghna Chakrabarti & Alex Schroeder, *An Unbridgeable Divide? Pennsylvania’s (Ongoing) Story of Gerrymandering and Redistricting*, WBUR NEWS (Oct. 7, 2018), <https://www.wbur.org/onpoint/2018/10/07/pennsylvania-gerrymandering-redistricting-congressional-map-7th-district> [<https://perma.cc/KF6Y-ZNSJ>]; *League of Women Voters of Pa.*, 178 A.3d at 775.

121. *Id.* at 765–66.

122. *Id.* at 801–02. The Pennsylvania Supreme Court declined to address the free expression and equal protection claims, deciding the case solely on the basis of the Free and Equal Elections Clause.

i. Free and Equal Elections Clause

Pennsylvania’s Free and Equal Elections Clause states that “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.”¹²³ In construing the provision, the court looked at the “actual and plain language,” concluding that it “mandates that all voters have an equal opportunity to translate their votes into representation.”¹²⁴ The court supported this interpretation with historical background: the delegates to the Pennsylvania Constitutional Convention intended to protect against “the dilution of the right of the people of [Pennsylvania] to select representatives to govern their affairs.”¹²⁵ The court also looked towards past case law interpreting the provision, which it said ascribed an “expansive meaning” to the provision.¹²⁶ Under the established interpretation of the Free and Equal Elections Clause, the court concluded that partisan gerrymanders violated the requirement of free and equal elections by diluting the votes of those who favored the party not in power.¹²⁷

The court did not set out a numerical standard for determining when a district map violated the Free and Equal Elections Clause. Instead, it pointed to several “neutral criteria”: compactness, contiguity, equal population, and preservation of political subdivisions.¹²⁸ The court ruled that where these neutral criteria have been subordinated in the creation of congressional districts “to extraneous considerations such as gerrymandering for unfair partisan political advantage,” the redistricting plan violates the Free and Equal Elections Clause.¹²⁹ This standard does not require a showing of intent to subordinate other criteria in favor of partisan criteria, only that such criteria were in fact subordinated.¹³⁰

123. PA. CONST. art. I, § 5.

124. *League of Women Voters of Pa.*, 178 A.3d at 804.

125. *Id.* at 808.

126. *Id.* at 809; *see also* *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914) (noting that elections are free and equal “when they are public and open to all qualified electors alike; when every voter has the same right as any other voter . . . and when no constitutional right of the qualified elector is subverted or denied him”).

127. *League of Women Voters of Pa.*, 178 A.3d at 814.

128. *Id.* at 816–17.

129. *Id.* at 817.

130. *Id.* (“[I]t is sufficient to establish a violation of this section to show that these traditional criteria were subordinated to other factors.”). The court also

Applying the standard to the 2011 congressional plan, the court found that the maps “subordinate[d] the traditional redistricting criteria in service of achieving unfair partisan advantage.”¹³¹ Importantly, the Pennsylvania Supreme Court declined to follow the approach it took in *Erfer v. Commonwealth*, where it rejected petitioners’ claim that the state’s Free and Equal Elections Clause provides greater protection of the right to vote than the federal Equal Protection Clause.¹³² Instead, it disowned the lockstepping approach and chose to adjudicate the Free and Equal Elections and equal protection claims separately.¹³³

2. North Carolina

Just months after the ruling in *Rucho*, the Superior Court of North Carolina in Wake County released its opinion in *Common Cause v. Lewis*, striking down politically gerrymandered maps under the state’s Free Elections Clause.¹³⁴ The maps at issue in *Lewis* have a long, winding history. Following the 2010 census, North Carolina’s legislature passed new state legislative maps. Plaintiffs brought suit, and in 2016 the maps were struck down by a federal court in North Carolina as unconstitutional racial gerrymanders.¹³⁵ The legislature subsequently passed new redistricting criteria and hired Thomas Hofeller, the political consultant responsible for the prior plan, to

emphasized that this was not the only way to establish a violation of the Free and Equal Elections Clause, but declined to address other possibilities. *Id.*

131. *Id.* at 821.

132. *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002), *abrogated by* *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

133. *League of Women Voters of Pa.*, 178 A.3d at 813. The court pointed to a past instance in which plaintiffs challenged an election statute under the Free and Equal Elections Clause in addition to both the federal and state Equal Protection Clauses; there, the court “applied different constitutional standards in deciding these claims.” *Id.* at 812 (citing *Shankey v. Staisey*, 257 A.2d 897 (Pa. 1969)).

134. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *404 (Super. Ct. N.C. Sept. 3, 2019). While *Common Cause* specifically dealt with the constitutionality of state legislative boundaries, soon after its judgment was handed down plaintiffs brought suit in state court challenging North Carolina’s congressional maps. *See* Complaint, *Harper v. Lewis*, 2019 N.C. Super. LEXIS 122 (Super. Ct. N.C. 2019) (No. 19 CVS 012667).

135. *Covington v. North Carolina*, 316 F.R.D. 117, 178 (M.D.N.C. 2016), *aff’d*, 137 S. Ct. 2211 (2017).

draw the new maps.¹³⁶ Perhaps unsurprisingly, the resulting 2017 plan still carried partisan bias, grouping voters based on partisan criteria with “surgical precision.”¹³⁷

When the 2017 maps were challenged in *Common Cause v. Lewis*, the Superior Court found that the maps “were designed intentionally and effectively to maximize Republican partisan advantage on a statewide basis.”¹³⁸ It found the plan violated the Free Elections Clause, in addition to equal protection and free speech and assembly rights under the state constitution.¹³⁹

i. Free Elections Clause

The Free Elections Clause of the North Carolina Constitution states that “[a]ll elections shall be free.”¹⁴⁰ As the clause had not previously been interpreted by the state’s appellate courts, the Superior Court construed the provision in line with the underlying principle that “because elections should express the will of the people . . . ‘all acts providing for elections, should be liberally construed, that tend to promote a fair election or expression of this popular will.’”¹⁴¹ Taking into account this principle and the history underlying the adoption of the state’s Free Elections Clause,¹⁴² the court concluded that the clause’s meaning “is that elections must be

136. Michael Wines, *The Battle Over the Files of a Gerrymandering Mastermind*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/us/gerrymander-north-carolina-hofeller.html> (on file with the *Columbia Human Rights Law Review*).

137. *Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56, at *8. In the 2018 state elections, Republicans won 48.8% of the statewide vote, but 54% of the 120 available state House seats and 58% of the 50 available state Senate seats. *Id.* at *223–24.

138. *Id.* at *33. The court based this finding on Thomas Hofeller’s files, which established that partisan intent was the primary driver behind the map-drawing process, in addition to the testimony of several experts who demonstrated that the map was an extreme partisan outlier in comparison to alternatives. *Id.* at *35, *49.

139. *Id.* at *13–14.

140. N.C. CONST. art. I, § 10.

141. *Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56, at *336 (internal citations omitted).

142. North Carolina, like many states, adopted its Free Elections Clause based on a provision of the 1689 English Bill of Rights, which “grew out of the king’s efforts to manipulate parliamentary elections, including by changing the electorate in different areas to achieve electoral advantage.” *Id.* at *340–42.

conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.”¹⁴³ The court referred to this grant as a “fundamental right of the citizens . . . a compelling governmental interest, and a cornerstone of our democratic form of government.”¹⁴⁴

The court then turned to the question of whether an extreme partisan gerrymander would violate the clause, and determined that since partisan gerrymandering “operates through vote dilution,” or “the devaluation of one citizen’s vote as compared to others,” it was contrary to the right to free elections laid out by Art. I, § 10 of the state constitution.¹⁴⁵ Such gerrymanders, the court said, close off the possibility of free elections by stopping the will of the people from being “fairly and truthfully ascertain[ed],” and reflecting “the will of the map drawers” instead.¹⁴⁶

Finally, the court concluded that a “satisfactory and manageable” standard exists under the Free Elections Clause to determine whether a partisan gerrymander was impermissible: “elections are not ‘free’ where the partisan will of the mapmaker predominates over the ascertainment of the fair and truthful will of the voters.”¹⁴⁷ Though the Court did not come up with a numerical standard by which to precisely measure gerrymanders, it came to the conclusion that the maps in question were impermissible based both on the demonstrated partisan intent of the mapmakers and the actual discriminatory partisan effect of the maps.¹⁴⁸

ii. Equal Protection & Free Speech

Unlike the court in *League of Women Voters of Pennsylvania*, the *Lewis* court ruled on the equal protection and free speech claims raised by the plaintiffs. The court held that the maps violated the

143. *Id.* at *337.

144. *Id.*

145. *Id.* at *338, *342. Vote dilution refers to the idea that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Proponents of this theory argue that gerrymandering, by diluting the value of an individual’s vote in a district whose electoral outcome is predetermined, violates the right to vote.

146. *Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56, at *339.

147. *Id.* at *389.

148. *Id.* at *34–35, *48–49. This standard was suggested by plaintiffs in oral argument in *Rucho*. Transcript of Oral Argument at 58–59, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422).

rights to equal protection and free speech under state law.¹⁴⁹ In its equal protection analysis, the court noted that “North Carolina’s Equal Protection Clause provides greater protection for voting rights than federal equal protection provisions,” and did the same for plaintiffs’ free speech claims.¹⁵⁰ The court noted that given *Rucho’s* holding, “in the context of partisan gerrymandering, it is especially important that North Carolina courts give independent force to North Carolina’s constitutional protections.”¹⁵¹

The decision not to interpret state constitutional provisions in lockstep with the federal Constitution has implications for future litigation; it means that even bringing challenges under state constitutional provisions with federal analogues is not entirely out of the question. This approach may be successful in states that do not apply the lockstep approach as a rule, or where litigants can convince state courts not to take the lockstep approach.¹⁵² In states without comparable Free Elections guarantees, litigants should consider bringing claims under state constitutional provisions dealing with free speech and equal protection, and arguing that the court should not interpret such provisions in lockstep with the federal Constitution.¹⁵³

3. Applying the Free Elections Approach to Other States

Where possible, fair districting litigants should take advantage of Free Elections arguments in state court to combat

149. The court held that maps violated the Equal Protection Clause because they were designed with the intent and effect of classifying voters by partisanship, with no compelling interest. *Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56, at *349. On free speech, it held that the maps violated Democratic voters’ rights of free expression and association by discriminating against them based on their political viewpoints. *Id.* at *368.

150. *Id.* at *346 (citing *Stephenson v. Bartlett*, 562 S.E.2d 377, 393–96 (N.C. 2002)).

151. *Id.* at *364.

152. See Douglas, *supra* note 79, at 94 (arguing that state courts should construe state constitutional provisions guaranteeing the right to vote broadly to maintain a robust voting rights framework).

153. In the wake of Supreme Court decisions curtailing civil liberties, Justice Brennan also suggested that advocates bring state constitutional claims: “[A]lthough in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.” Brennan, *supra* note 81, at 502.

unfairly drawn maps. Not only do these provisions exist in most state constitutions,¹⁵⁴ but their lack of a federal constitutional counterpart also means that state courts have more room to interpret such provisions broadly.¹⁵⁵ Litigants have two cases to look to—*Common Cause v. Lewis* and *League of Women Voters of Pennsylvania v. Commonwealth*—in which state courts have located anti-gerrymandering protections in Free Elections Clauses.

Of course, these cases are not representative of the many more instances of partisan gerrymandering nationwide that are harder to measure. Pennsylvania and North Carolina's gerrymanders were obvious in both their intent and their effect.¹⁵⁶ Not all gerrymanders are so clear-cut. Districts can be compact and contiguous while still drawn with the intent to lock the minority party out of as many seats as possible.¹⁵⁷ To the extent that they present an independent state-law claim against partisan gerrymanders, though, the Pennsylvania and North Carolina cases should serve as a roadmap for redistricting reformers wishing to argue that partisan gerrymandering violates the right to free and equal elections.

It is not only litigants who may look to these two cases. State courts operate in dialogue about the content of various constitutional rights, with some states often adopting interpretations of constitutional guarantees from other states' jurisprudence.¹⁵⁸ States with comparable free elections guarantees should look to Pennsylvania and North Carolina's interpretations of their Free Elections Clauses, just as the Arizona Court of Appeals looked to other states' interpretations of free elections guarantees when

154. See *supra* notes 106–07.

155. See *supra* notes 111–15 and accompanying text. Neither the Pennsylvania court nor the North Carolina court settled on a statistical standard to determine when a partisan gerrymander fell within the purview of the Free Elections Clause, finding instead that the maps prioritized partisan intent.

156. See *supra* Sections III.C.1–2 for a discussion of the partisan intent and effect demonstrated by the North Carolina and Pennsylvania maps and the statements of map-drawers.

157. For a demonstration of this phenomenon, see Aaron Bycoffe et al., *The Atlas of Redistricting*, FIVETHIRTYEIGHT (Jan. 25, 2018), <https://projects.fivethirtyeight.com/redistricting-maps> [https://perma.cc/W6ZJ-8FSP].

158. See DENNISTON, *supra* note 81, at 22–26 (describing the “horizontal federalism” theory of dialogue between state supreme courts and pointing to examples of this phenomenon).

deciding a voting rights case under Arizona law.¹⁵⁹ Even the court in *Lewis* specifically referenced the aforementioned Florida and Pennsylvania cases that struck down partisan gerrymanders under state law.¹⁶⁰

Judge Jeffrey Sutton argues that state constitutional law has recently played an important role in advancing civil liberties and may even “facilitate the development of federal constitutional law.”¹⁶¹ Under this model, if the practice of striking down partisan gerrymanders under Free Elections Clauses continues, state courts may find themselves in the midst of building a national consensus on the appropriate way to handle partisan gerrymandering claims, perhaps eventually persuading the Supreme Court to revisit the issue.¹⁶² If state courts embrace the opportunity to provide more robust protections for voting rights than federal courts do, they may be able to take the place of federal courts in protecting democratic principles nationwide.

CONCLUSION

Unfairly drawn maps effectively deprive millions of Americans from exercising their right to vote, striking at foundational democratic principles. Following *Rucho*, it is imperative to find a path forward in judicial responses to partisan gerrymandering. Litigants are well-positioned to bring claims in state court; they should cite to explicit constitutional prohibitions on partisan gerrymandering in the states that have them, and under Free Elections Clauses in other states. The Free Elections Clause approach has proven successful in North Carolina and Pennsylvania,

159. *Chavez v. Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009). The court in *Chavez* also looked to interpretations of Free Elections Clauses by state courts in Illinois, New Mexico, and Kentucky, finding that those states found violations of the clause where the right to vote was denied. *Id.* at 407–08 (citing *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932); *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026–27 (Ky. 1915); *Gunaji v. Macias*, 31 P.3d 1008, 1016 (N.M. 2001)).

160. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *382 (Super. Ct. N.C. 2019). *See supra* Section III.B, Section III.C.1 for a discussion of the Florida and Pennsylvania cases.

161. SUTTON, *supra* note 113, at 19 (emphasis omitted).

162. Gardner, *supra* note 79, at 646; *see also* SUTTON, *supra* note 113, at 178 (“we have the option of allowing the states to be the vanguard . . . and allowing the U.S. Supreme Court, informed by these experiences, to decide whether to federalize the issue” (internal quotations omitted)).

setting out a clear guide for other state courts facing unfairly drawn maps.

Of course, this approach does not necessarily work in every state; some state courts may not find the free elections reasoning persuasive, and other states' constitutions do not provide for free and equal elections. In these states, litigants must find state constitutional and statutory provisions that, in combination, establish a right to fairly drawn maps under state law. These might include due process guarantees, traditional redistricting requirements such as compactness and contiguity, and the rights to equal protection and freedom of association.

If state courts recognize state protections against partisan gerrymanders, they may be able to transform the national landscape of redistricting reform. The sustained success of state-law gerrymandering claims could build a nationwide legal consensus on partisan gerrymandering, rendering federal rulings irrelevant. These standards could even make their way into federal law in the long run, encouraging the Supreme Court to overturn *Rucho* as it overturned *Colegrove* almost sixty years ago. State courts could pave the way forward on voting rights, finding a way to do what the Supreme Court could not: reinforce judicial safeguards against partisan gerrymandering and move the nation closer to having truly free and equal elections.