

A TURN TO PROCESS: PARTISAN GERRYMANDERING POST-*RUCHO*

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*For nearly sixty years, litigants have challenged congressional and state redistricting maps, raising claims of partisan gerrymandering. Each time, the Supreme Court would hear and reject the challenge but continued to entertain the possibility that a claim of partisan gerrymandering could succeed. Then, in 2019, the Court in *Rucho v. Common Cause* took the dramatic step of holding that claims of partisan gerrymandering were nonjusticiable political questions. This both walked federal courts out of the picture and signaled the Court’s tacit approval of gerrymandering. The decision came down at a time when gerrymandering was at an all-time high—in 2020, only 7.5% of the seats in the House of Representatives were “competitive.” Now, despite clear attempts by lawmakers to subvert democracy through partisan gerrymandering, federal courts can no longer police district maps for partisan imbalance. Though some states have created independent redistricting commissions to draw district maps, these commissions are neither common enough nor strong enough to withstand political tendencies to gerrymander.*

Time and time again, litigants and scholars have searched for (and failed to find) a substantive standard by which partisan gerrymandering claims might succeed. This Note offers a new approach, grounded in classic legal principles: process instead of substance. Identifying both normative reasons for why process can better protect against partisan gerrymandering and highlighting instances in certain states where bolstering and, crucially, enforcing the processes by which district maps are drawn has helped mitigate gerrymandering, this Note argues that states (and litigants) should turn to process-based arguments to counter gerrymandered maps. Through process, states can strengthen their redistricting procedures and commissions, allowing for the creation of more balanced, competitive maps. Democracy hinges on competitive elections, and we need solutions to the problem of partisan gerrymandering; this Note offers a new framing of the problem and a path forward.

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INTRODUCTION

In 2016, out of the 435 seats in the U.S. House of Representatives, only 10% were “competitive.”¹ The number of competitive seats in the 2020 election was again 10%.² Following the 2020 redistricting cycle and election, only approximately 7.5% of seats were competitive—a mere thirty-three seats.³ This trend is likely to continue given political goals of preserving the status quo and insulating incumbents.⁴ While there are

¹ Liz Kennedy, Billy Corriher & Danielle Root, *Redistricting and Representation: Drawing Fair Election Districts Instead of Manipulated Maps*, CTR. FOR AM. PROGRESS (Dec. 5, 2016), <https://www.americanprogress.org/article/redistricting-and-representation> [<https://perma.cc/6KHQ-XLTH>]. For the purposes of this Note, a “competitive” seat is one in which the projected margin of victory for either candidate presents a reasonable opportunity for either candidate to win. Conventionally, races where the margin of victory is within 10% are competitive. See *Margin-of-Victory*, BALLOTPEdia, [https://ballotpedia.org/Margin-of-victory_\(MOV\)](https://ballotpedia.org/Margin-of-victory_(MOV)) [<https://perma.cc/C6HZ-J3JD>].

² See *Factbox: A Look at the 43 Competitive Races in the U.S. House of Representatives*, REUTERS (Sept. 18, 2020, 6:11 AM), <https://www.reuters.com/article/us-usa-election-house-factbox/factbox-a-look-at-the-43-competitive-races-in-the-u-s-house-of-representatives-idUSKBN2691HP> [<https://perma.cc/QY62-HZ5U>].

³ See Dave Wasserman (@Redistrict), TWITTER (May 19, 2022), <https://twitter.com/Redistrict/status/1527341258305605632> [<https://perma.cc/WBH4-4KRD>].

⁴ See discussion *infra* Section III.A (discussing 2020 maps produced by Texas that are widely seen as incumbent-protecting). But see Michael Li & Chris Leaverton, *After*

many reasons behind this competitive decline, political control over the redistricting process plays a significant role in eliminating competitive seats; those in charge of drawing district lines have a vested interest in drawing districts that preserve their personal seat and promote party power.

Fundamentally, competitive elections ensure political accountability and protect the “political-responsiveness” of elected officials, two core foundations of democratic legitimacy.⁵ It is therefore worthwhile to explore the ways in which the redistricting process—and its susceptibility to gerrymandering—has reduced competitiveness in American elections.⁶ To do so, this Note focuses on Independent Redistricting Commissions (IRCs) by evaluating the spectrum of independence these commissions exhibit on a state-by-state basis. It argues that the piecemeal nature of IRC setup and their weak institutional independence from political tendencies to subvert the redistricting process result in a failure to prevent gerrymandering. This Note also tracks the weakening of “substantive review” of partisan gerrymandering claims by the Supreme Court. The Court’s withdrawal from reviewing claims of partisan gerrymandering limits the means to challenge maps once they are enacted. While Congress recently attempted to address both the lack of uniform independence in the redistricting process (at least for federal redistricting) and the Court’s withdrawal from reviewing partisan gerrymandering claims with the For the People Act,⁷ the legislation is now dead.⁸ As a result, a focus on alternative means of addressing partisan gerrymandering is necessary.

Redistricting, Here’s How Each Party Could Win the House, BRENNAN CTR. FOR JUST. (Aug. 3, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/after-redistricting-heres-how-each-party-could-win-house> [<https://perma.cc/YUC5-4JLJ>] (noting small inroads against partisan gerrymandering “thanks largely to commissions and courts” with a slight increase in competitive seats as a result).

⁵ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615–16 (2002) (“[A]ccountability is a central feature of democratic legitimacy, regardless who wins or loses a particular election.”); SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES* 121 (2015) (defining “repeat play” or the “risk of electoral defeat” as fundamental to democracy as it ensures commitment and buy-in from various political actors).

⁶ See Annie Lo, *Want Competitive Elections? Don’t Let Partisan Lawmakers Draw Districts*, BRENNAN CTR. FOR JUST. (Oct. 24, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/want-competitive-elections-dont-let-partisan-lawmakers-draw-districts> [<https://perma.cc/T2E4-E7KS>] (“Districts drawn by lawmakers in trifecta states—states under unified one-party control—are nearly four times less likely to be toss-ups than districts drawn by courts, commissions, and legislatures under split control . . .”).

⁷ For the People Act, H.R. 1, 117th Cong. §§ 2400–55 (2021).

⁸ See Barbara Sprunt, *Senate Republicans Block Democrats’ Sweeping Voting Rights Legislation*, NPR (June 22, 2021), <https://www.npr.org/2021/06/22/1008737806/democrats-sweeping-voting-rights-legislation-is-headed-for-failure-in-the-senate> [<https://perma.cc/D3RT-BRM9>] (noting the Republicans’ successful filibuster of the For the People Act).

With these trends in mind, this Note argues that a heightened focus on the process of drawing, reviewing, and enacting maps is needed to combat the incentive to gerrymander. As opposed to the typical proposed solutions to gerrymandering—proposals that aim to attack the substantive bias in maps⁹—this Note offers a new approach by arguing that states and litigants should consider ways to insulate the redistricting process itself from political influence; some states are already turning to process, and this Note aims to build on that approach. To do so, it draws on recent examples where states have limited gerrymandering through process-based reforms and procedural review and on academic literature discussing the benefits of a process-based review (looking at how a state's maps were drawn), rather than a substance-based review (looking at possible underlying bias in a state's maps).¹⁰ The Note concludes with proposed best practices for states contemplating redistricting reform and for litigants seeking new avenues to bring claims of partisan gerrymandering.

Gerrymandering (and judicial review of claims of gerrymandering) implicates several “big issues.” These include federalism (should states or Congress define map drawing), separation of powers (who should make and review maps), democratic representation (how should we draw districts), equal protection (are maps fairly representing people), and more. Gerrymandering also implicates Alexander Bickel's counter-majoritarian difficulty,¹¹ *Carolene Products* Footnote Four,¹² and John

But see Nate Cohn, *A Bill Destined to Fail May Now Spawn More Plausible Options*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/06/23/us/politics/voting-rights-bill.html> [<https://perma.cc/LAY4-PBZR>] (arguing that parts of the For the People Act might still see successful passage into law, though notably redistricting reform is not mentioned).

⁹ See *infra* Introduction (discussing the various failed attempts to challenge substantive bias in district maps).

¹⁰ For the purposes of this Note, “substantive review” sees a court exploring the validity of the gerrymander itself. For example, in the racial gerrymandering context, the test established in *Shaw v. Reno*, 509 U.S. 630 (1993), asks whether race was the motivating factor in the drawing of district lines. In the partisan gerrymandering context, the Court has struggled to establish a substantive test for unconstitutional partisan gerrymanders, which would assess whether the map has improperly disadvantaged a political party. See discussion *infra* Part III. By contrast, “procedural review” asks only whether the *processes* by which a map was produced were proper. This distinction appears throughout the law, most famously in the contrast between “substantive due process” and “procedural due process.” See Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. REV. 1501, 1501 (1999) (discussing the difference between substantive and procedural due process).

¹¹ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (conceptualizing a more limited form of judicial review given its “counter-majoritarian” nature). For a discussion on Alexander Bickel's influence on scholarship around the role of judicial review, see Adam J. White, *The Lost Greatness of Alexander Bickel*, COMMENTARY (Mar. 2012), <https://www.commentary.org/articles/adam-white/the-lost-greatness-of-alexander-bickel> [<https://perma.cc/6J4N-ST6P>].

¹² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (raising the possibility of an expansive view of judicial review and “whether prejudice against discrete and insular

Hart Ely’s notion of “democratic malfunction.”¹³ When we see gerrymandering challenges, they are grounded in these substantive issues.¹⁴ Yet the past approaches to tackling gerrymandering have proved largely unworkable.¹⁵ Despite this generally unsuccessful history of “substantive” challenges, scholarship and litigants continue searching for new ways to conceptualize gerrymandering, yet still grounded in these “big issues.”¹⁶ This Note aims to make a simpler argument, one more likely to be realized, and ultimately more effective. Rather than focusing on these substantive issues, we should look at how maps are drawn—by examining the procedures states use to do so—and how these procedures can be best marshaled to mitigate gerrymandering. It is a classic argument seen in other areas of the law¹⁷ and one which some state legislatures and courts are starting to pick up.¹⁸ This Note offers a new framing of the age-old problem of gerrymandering and calls for a turn to process.

This Note evaluates the role IRCs play in limiting partisan gerrymandering and argues that courts (particularly state courts) must police partisan gerrymandering through process-based review. Part I offers a brief history of gerrymandering and the democratic harms that follow. Part II provides an overview of IRCs, explaining the various types of commissions across the country and the criteria they use to draw maps.

minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry”).

¹³ See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that judicial review is needed when access to the political process is “malfunctioning”). For a discussion of John Hart Ely’s influence through his ideas on the judiciary’s role in protecting the “democratic process,” see Adam Liptak, *John Hart Ely, a Constitutional Scholar, Is Dead at 64*, N.Y. TIMES (Oct. 27, 2003), <https://www.nytimes.com/2003/10/27/us/john-hart-ely-a-constitutional-scholar-is-dead-at-64.html> [<https://perma.cc/2QJ4-ZEG6>].

¹⁴ See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 541–42 (2004) (noting the “array of doctrinal tools” focusing on the substantive arguments which have been utilized in challenges to partisan gerrymandering).

¹⁵ See *id.* at 578 (summarizing the state of partisan gerrymandering litigation after *Davis v. Bandemer*, 478 U.S. 109 (1986), as likely “consigning us to another generation of hacking our way through the political thicket”). These “past approaches” are the “array of [substantive] doctrinal tools” Issacharoff and Karlan refer to. See *id.* at 541–42.

¹⁶ See, e.g., Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 833–34 (2015) (proposing the “efficiency gap” as a “new measure of partisan symmetry” that “could be fashioned into a workable judicial standard”). But see *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (holding that the use of the efficiency gap did not establish individual harm for standing purposes for plaintiffs raising a partisan gerrymandering challenge to Wisconsin maps).

¹⁷ See *infra* Section IV.A.

¹⁸ See *infra* Part IV.

Part III looks at the outcomes IRCs have had in practice, primarily drawing on maps from the 2020 election cycle; the challenges commissions face in maintaining independence; and the impact *Rucho* and subsequent gerrymandering decisions the Court has issued will likely have. Finally, Part IV provides both normative and descriptive arguments for process-based review. First, it analogizes to other areas of law to draw out the argument that bolstering process *can* be rights-protecting, particularly when the underlying substantive rights are underdeveloped. Next, it highlights attempts by some states to use process to reinforce redistricting. Finally, it summarizes the normative and descriptive arguments with process-based takeaways that states and litigants ought to focus on in thinking of methods to mitigate gerrymandering.

This Note concludes by arguing that state legislatures should focus on passing legislation that creates means for judicial review of the procedures used when drawing maps and also that litigants should raise process-based arguments in challenging maps. Focusing on process, rather than the underlying substantive bias in proposed maps, works to counter political tendencies to gerrymander and better insulates redistricting from partisan influence. IRCs backed by procedural reinforcement provide an opportunity to counter the 250-year history of politicians picking their voters. This Note attempts to chart a path forward.

I

A BRIEF HISTORY OF GERRYMANDERING

Gerrymandering has played a role in American politics since the founding of the country.¹⁹ During the drawing of district lines for the first Congress, Patrick Henry attempted to prevent James Madison from being elected by drawing Madison's district to include counties that opposed him.²⁰ The word "gerrymandering" itself famously comes from former Massachusetts Governor Elbridge Gerry who, in 1812, signed a district plan for the state that he believed would ensure his party's control.²¹ Gerrymandering practices have only grown in influence and technique, and, of course, gerrymandering has long played a significant role in limiting the ability of voters of color to influence elections and gain

¹⁹ See JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *A CITIZEN'S GUIDE TO REDISTRICTING* 7 (2010) [hereinafter LEVITT, *CITIZEN'S GUIDE*] (defining gerrymandering as "the manipulation of . . . district lines to affect political power," and noting that "a gerrymander is a conscious and . . . undue attempt to draw district lines specifically to increase the likelihood of a particular political result").

²⁰ See *id.* at 8.

²¹ See *id.* ("An artist added wings, claws, and the head of a particularly fierce-looking salamander creature to the outline of one particularly notable district; the beast was dubbed the 'Gerry-mander' in the press . . .").

political representation through the use of techniques such as “packing” and “cracking.”²² Gerrymandering is also divided into two categories: racial gerrymandering and partisan gerrymandering. Racial gerrymandering sees map drawers draw maps with race in mind,²³ whereas partisan gerrymandering sees map drawers draw maps with the intent to favor their political party.²⁴ That being said, as many scholars have noted, these two categories frequently blend together, often purposefully, to evade judicial scrutiny of blatant racial gerrymanders.²⁵ This Note will focus solely on partisan gerrymandering.

Before delving into the heart of this Note, however, it is worth briefly discussing the harms of gerrymandering as well as defenses of the practice of allowing elected officials to draw district lines. There are two competing understandings of the process of redistricting. One approach views redistricting as inherently political, meaning that democratically elected officials, supposedly representing their constituents’ views, are in the best position to draw district lines.²⁶ The second approach views

²² See, e.g., KENNY J. WHITBY, *THE COLOR OF REPRESENTATION: CONGRESSIONAL BEHAVIOR AND BLACK INTERESTS* 114–20 (2010) (recounting the history of gerrymandering used to prevent the political representation of Black people in the U.S.); Gabriella Limón, *It’s Time to Stop Gerrymandering Latinos Out of Political Power*, BRENNAN CTR. FOR JUST. (Nov. 4, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/its-time-stop-gerrymandering-latinos-out-political-power> [<https://perma.cc/WAE3-HJQB>] (detailing the use of gerrymandering in states such as Texas and Florida to restrict Latino representation in response to significant increases in the Latino population in these states). “Packing” and “cracking” refer to the practices of “splitting some disfavored voters between districts to prevent them from constituting an electoral majority and concentrating others into a smaller number of districts than they might otherwise have controlled.” Robert Yablon, *Gerrylaundrying*, 97 N.Y.U. L. REV. 985, 987 (2022).

²³ *Gerrymandering*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “racial gerrymandering” as “[g]errymandering along racial lines, or with excessive regard for the racial composition of the electorate”).

²⁴ See *Gerrymandering*, BALLOTPEdia, <https://ballotpedia.org/Gerrymandering> [<https://perma.cc/CZ9M-BEZF>] (“The phrase *partisan gerrymandering* refers to the practice of drawing electoral district maps with the intention of favoring one political party over another.”).

²⁵ As many scholars have noted, partisan gerrymandering has supplanted explicit racial gerrymandering as a means of continuing to prevent people of color from having equal voting power. See generally, e.g., Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088 (2021) (explaining the “race-driven effect” that partisan gerrymandering often, intentionally, produces); Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018) (explaining doctrinal approaches to the intersection of race and party in redistricting and voting cases).

²⁶ See Justin Levitt, *Essay: Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 518–22 (2011) [hereinafter Levitt, *Weighing the Potential*] (discussing arguments for leaving redistricting to elected officials: familiarity with the district, understanding the technicalities of redistricting, the stability of reelecting incumbents, and democratic legitimacy).

the redistricting process as “pre-political”; it operates as a “reset” of the electoral process prior to voting.²⁷ Under this second view, giving politicians and political parties the power to draw district lines allows them to advance their own self-interest, often at the expense of the public at large.²⁸ Viewing the redistricting process through this second lens allows us to see the harms that flow from gerrymandering which are: 1) letting politicians pick their constituents, 2) furthering incumbent complacency,²⁹ 3) the dilution of minority votes,³⁰ 4) the splitting of communities,³¹ and 5) the polarization and increased hostility of American politics.³² These consequences make it clear that the end goal of gerrymandering is to diminish democratic accountability and prevent voters from voicing their opposition to those in power.³³

In attempts to mitigate the harms of gerrymandering, litigants have turned both to the judiciary and to other legislative and institutional options for relief. In *Baker v. Carr*, the Supreme Court recognized that gerrymandering claims are justiciable under the Fourteenth Amendment.³⁴ The Court’s subsequent decisions, however, have taken different approaches when considering claims of racial gerrymandering as compared to claims of partisan gerrymandering. In the line of racial gerrymandering cases, the Court held that racial gerrymandering is

²⁷ See *id.* at 519 (“[T]he redistricting process can be seen as an Etch-a-Sketch for politics, vigorously shaken every ten years, erasing the existing district map before new lines are drawn. . . . [I]t is not clear why legislators elected by obsolete groups of voters should have presumptive authority to represent the present public will.”).

²⁸ *Id.* at 520–21.

²⁹ Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 5, at 620–30.

³⁰ See *supra* note 25.

³¹ See Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 10, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [<https://perma.cc/UJL6-KZ4M>] (explaining that partisan gerrymandering can be used to “split[] groups of people with similar characteristics”).

³² See LEVITT, CITIZEN’S GUIDE, *supra* note 19, at 10–13 (arguing that giving politicians the power to draw district lines feeds a “hostile atmosphere among incumbents” and enhances political deadlock).

³³ In *Rucho v. Common Cause*, Justice Kagan emphasizes this point in responding to the majority. The majority claims that the Court can abstain from policing partisan gerrymandering because opinions over partisan gerrymandering should be left to the “judgment” of the American people. However, as Justice Kagan points out, gerrymandering enables a party to gain oversized representation in a state, meaning that it is inherently designed not to be representative of the wills of the people. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2510 (2019) (Kagan, J., dissenting). But see *infra* Part III (discussing the weaknesses of IRC redistricting, including the burden of the workload on citizen commissioners, the high aspirational expectations of IRC work, and the political dissatisfaction experienced on both sides with the resulting IRC maps).

³⁴ 369 U.S. 186, 237 (1962) (“We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.”).

prohibited by the Fifteenth Amendment,³⁵ and it afforded racial gerrymandering challenges strict scrutiny protection.³⁶ The Court's approach to partisan gerrymandering has been far weaker. While it held in *Davis v. Bandemer* that such claims were justiciable,³⁷ it failed to establish a standard through which to evaluate such claims, and the concurrences argued instead that these claims were nonjusticiable, political questions.³⁸ Since *Davis*, the Court has slowly walked back its holding: first in *Vieth v. Jubelirer*, where a plurality would have held partisan gerrymandering claims nonjusticiable,³⁹ and then in *League of United Latin American Citizens v. Perry (LULAC)*, where the Court continued to reject standards for evaluating these claims.⁴⁰ Finally, in 2019, the Court held in *Rucho v. Common Cause* that claims of partisan gerrymandering are political questions beyond the scope of the judicial branch, concluding that there is no manageable standard for evaluating such claims.⁴¹

Certainly, *Rucho* was right in pointing to IRCs as an important component of solutions addressing partisan gerrymandering;⁴² however, this Note argues that commissions alone are not sufficient. For one, these commissions vary in how they are set up and in their level of independence,⁴³ greatly impacting how balanced the resulting maps are. Further, the possibility of challenging maps in federal court provided a

³⁵ *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (holding that the Fifteenth Amendment bars racial gerrymandering under its prohibition on laws depriving a citizen of the right to vote on account of race).

³⁶ *Shaw v. Reno*, 509 U.S. 630, 653 (1993). It should be noted that *Shaw* has seen a fair share of criticism given it came about in an attempt to weaken vote dilution claims under the Voting Rights Act. See generally Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993) (criticizing *Shaw*'s rejection of race-conscious districting and arguing for the importance of considering race in districting in order to ensure minority representation). That being said, subsequently, *Shaw* has been used to counter racial gerrymanders that were seen as attempts to "pack" minority voters. See, e.g., *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015).

³⁷ 478 U.S. 109, 123 (1986) ("[I]n light of our cases since *Baker* we are not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided.").

³⁸ See, e.g., *id.* at 143–44 (Burger, C.J., concurring). In general, the Court sees "political questions" as issues of justiciability; if a series of factors are met, the Court will hold that the question presented by a case is "non-justiciable" and thus not appropriate for consideration by a Federal Court. See generally *Baker*, 369 U.S. 186 (defining the categories of political questions).

³⁹ 541 U.S. 267, 281 (2004).

⁴⁰ 548 U.S. 399, 414 (2006); see also Issacharoff & Karlan, *supra* note 14 (noting the various approaches to frame substantive challenges taken by litigants and rejected by courts).

⁴¹ 139 S. Ct. 2484, 2508 (2019) ("In this rare circumstance . . . our duty is to say 'this is not law.'").

⁴² *Id.* at 2507 ("Indeed, numerous . . . States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions.").

⁴³ See *infra* Part II.

backstop, serving as added deterrence against extreme gerrymandering.⁴⁴ The Court's elimination of this backstop reduces the incentive for states to shift redistricting to IRCs and instead suggests that states are free to gerrymander.

Rucho's implications for substantive review are discussed later in this Note.⁴⁵ Congressional inaction on redistricting reform combined with *Rucho* and subsequent gerrymandering decisions suggest that federal attempts to address the problem of partisan gerrymandering—particularly solutions aimed at addressing the underlying substantive issue of partisan bias in maps—are off the table. This Note steps in by reframing the issue around process. While this Note will show that partisan gerrymandering is a state-by-state issue, the underlying theme of the Note is that procedural reinforcements, particularly through establishing avenues of judicial review of the processes by which maps are produced, offer an underappreciated method to mitigate gerrymandering tendencies. The rest of this Note explores the idea of process; first by describing the current, varying processes by which states draw maps and then by proposing avenues through which these processes can be bolstered.

II

INDEPENDENT REDISTRICTING COMMISSIONS: AN OVERVIEW

The rationale behind the use of Independent Redistricting Commissions is grounded in recognizing the inherent conflict of interest in allowing a state legislature to draw district lines.⁴⁶ Instead, some states have shifted redistricting responsibility to an IRC, a body separate (to some degree)⁴⁷ from the legislature tasked with drawing new district maps for a state. Empirical studies that compared electoral competitiveness in congressional districts drawn by state legislatures to those drawn either by state courts or state IRCs suggest that goals of combatting partisan gerrymandering and producing more balanced

⁴⁴ While state courts still present some opportunity for review, these courts are typically more partisan and the Supreme Court's decision in *Moore v. Harper* may further limit pathways to state court. See *infra* Section III.C.

⁴⁵ See *infra* Section III.C.

⁴⁶ See *supra* notes 25–27 and accompanying text; see also Cheyna Roth & Jake Neher, *Here's Where Michigan's Redistricting Effort Stands After SCOTUS Gerrymandering Ruling*, WDET (July 1, 2019) (quoting Michigan Secretary of State Jocelyn Benson), <https://wdet.org/posts/2019/07/01/88365-heres-where-michigans-redistricting-effort-stands-after-scotus-gerrymandering-ruling> [<https://perma.cc/BC25-8XHk>] (“‘But the [*Rucho*] decision also makes it even more important that last fall Michigan voters took the process of drawing district lines out of the hands of politicians in Michigan and placed it squarely in the hands of our citizens.’”).

⁴⁷ See *infra* Section II.A.

maps have been, to some extent, realized in states that have shifted redistricting responsibilities away from the legislature and towards state courts and IRCs.⁴⁸

Motivated by the idea that redistricting responsibility should be separated from political influence, states started passing legislation creating IRCs. Starting with Arkansas in 1956,⁴⁹ thirty-three states have shifted redistricting authority to commissions in some fashion and for some level of districting.⁵⁰ Though these commissions all fall under the overarching title of an “Independent Redistricting Commission,” in reality their design and set-up vary from state-to-state.⁵¹ For the remaining twenty-two states, redistricting authority still resides with the legislature itself.

This Part proceeds by explaining the categories of IRCs that exist and the spectrum of independence they exhibit. It also discusses IRCs in practice by highlighting both how states with IRCs have chosen to set up redistricting commissions, and what criteria the commissions purport to follow. Finally, it concludes by discussing the redistricting process in states that continue to permit the legislature to draw maps.

A. *Commission Categories*

Independent Redistricting Commissions exhibit a spectrum of “independence,” defined as the degree of separation from Legislative Conflict of Interest (LCOI).⁵² This definition reflects an idea that has

⁴⁸ See James B. Cottrill & Terri J. Peretti, *Gerrymandering from the Bench? The Electoral Consequences of Judicial Redistricting*, 12 ELECTION L.J. 261, 267 (2013) (finding that incumbents faced greater competitive challenges in districts drawn by courts (18.2%) or commissions (17.4%) than in districts drawn by the legislature itself (11.5%)).

⁴⁹ Ben Williams, *Redistricting: It's All Over But the Suing*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 15, 2022), <https://www.ncsl.org/state-legislature—news/details/redistricting-its-all-over-but-the-suing> [<https://perma.cc/R2US-PRL8>] (“Redistricting commissions didn’t even exist until 1956, when Arkansas created its Reapportionment Board. Since then, about two states per decade have shifted redistricting power from the legislature to a commission.”).

⁵⁰ See *State-by-State Redistricting Procedures*, BALLOTPEdia, https://ballotpedia.org/State-by-state_redistricting_procedures [<https://perma.cc/2N8Z-5ZFA>].

⁵¹ See *infra* Section II.A.

⁵² Bruce Cain explains that there are five degrees of separation from Legislative Conflict of Interest (LCOI). The first, “separation by dilution,” involves commissions where citizens or state-wide elected officials are *added* to a commission comprised of state legislators, “diluting” the influence state legislators have in the process. The second, “separation by office,” *excludes* state legislators from serving on the commission. The third, “separation from office,” removes elected officials altogether, with commissions comprised of citizens *selected* by legislative leaders. The fourth, “separation by independent pool selection,” requires that the legislative leaders select citizen commissioners from a pool *chosen* by a partisan-balanced body. Finally, fifth, “separation from legislative designation,” involves a citizen pool formed

been discussed at length above: The motivating purpose and rationale behind IRCs is to shift redistricting away from the legislature in order to dampen the inherent political tendency to influence the redistricting process.⁵³ This spectrum of independence is seen through the varying nature of IRC setup across the eighteen states that have commissions for congressional redistricting⁵⁴ and the twenty-six states that have commissions for state legislative redistricting.⁵⁵

IRCs fall into four categories, and each category highlights legislative choices around how much to separate the commission from LCOI.⁵⁶ Two categories that often blend together are “advisory” and “backup” commissions.⁵⁷ Advisory commissions involve a group of either elected or non-elected—but partisan-selected—officials who draw and recommend maps to the political branches.⁵⁸ The political branches then vote on whether to approve the map as is, send it back for redrawing, or draw it themselves (depending on the state).⁵⁹ Certain states also have restrictions that make overruling commission maps more difficult, though the political branches still retain the power to approve or reject maps.⁶⁰ Right now, five states have advisory commissions

and selected by the state auditor (or other ostensibly nonpartisan bodies), with minimal legislative influence (this is the California model). Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 *YALE L.J.* 1808, 1818 (2012).

⁵³ *Supra* notes 46–48.

⁵⁴ See *Redistricting Commissions: Congressional Plans*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-commissions-congressional-plans> [<https://perma.cc/TF2Q-4VRK>].

⁵⁵ See *Redistricting Commissions: State Legislative Plans*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-commissions-state-legislative-plans> [<https://perma.cc/3SEP-426X>] (citing to Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Michigan, Missouri, Montana, New Jersey, Ohio, Pennsylvania, Virginia, Washington, Maine, New Mexico, New York, Utah, Vermont, Connecticut, Illinois, Mississippi, Oklahoma, Texas, and Iowa as having redistricting commissions).

⁵⁶ See Cain, *supra* note 52, at 1813 (noting the four general categories are “purely advisory commissions,” “backup” commissions, “politician commissions,” and “independent citizen commissions”).

⁵⁷ See *id.* at 1814–15 (noting that backup and advisory commissions both typically lack independence from elected officials’ influence).

⁵⁸ See, e.g., *id.* at 1813–14 (describing the advisory commission models in Iowa and New York).

⁵⁹ See *id.* at 1813–15.

⁶⁰ See *id.* at 1814 (“The fatal flaw in the advisory redistricting commission model in the eyes of the reform community is that elected officials retain the power to adopt or reject the proposed new district lines.”).

for congressional districts,⁶¹ and six states have advisory commissions for their legislative districts.⁶²

Backup commissions exist if the legislature fails to enact a map; when this occurs, the responsibility defaults to the backup commission (which is often comprised of individuals similar to the advisory commission).⁶³ These commissions can influence legislative redistricting simply by existing; they may create an incentive for the legislature to reach a compromise map itself rather than default to the commission.⁶⁴ Though backup commissions in states with legislatures split roughly along partisan lines may reach compromise on maps as a result of this incentive, backup commissions may not solve the problem of bipartisan gerrymandering. If anything, such commissions might actually worsen bipartisan gerrymandering by incentivizing the legislature to reach negotiated maps on the one thing the two parties can likely agree: status-quo, incumbent-protecting maps.⁶⁵ Three states have backup commissions for congressional districts,⁶⁶ and five states have backup commissions for state legislative districts.⁶⁷

The next category that exists is the “politician” commission.⁶⁸ In these states, the legislature must defer to the maps drawn by the commission. These commissions, reflecting the political nature of the redistricting process, are made up either of elected officials or non-elected individuals chosen by elected officials; these commissions typically have a bipartisan balance requirement that is meant to counteract the partisan tendency to gerrymander.⁶⁹ Often, these commissions also have a tie-breaking requirement, which some see as a way to further incentivize compromise by the commission.⁷⁰ Currently, six states use maps drawn

⁶¹ These states are Maine, New Mexico, New York, Rhode Island, and Utah. ME. CONST. art. IV, pt. 3, § 1-A; ME. REV. STAT. ANN. tit. 21-A, § 1206 (2013); 2021 N.M. LAWS 3–5; N.Y. CONST. art. III, § 4(b); 2011 R.I. Pub. LAWS ch. 100, § 1; UTAH CODE ANN. § 20A-20-201 (LexisNexis 2021).

⁶² The six states include all of the states that have advisory commissions for congressional districts and Vermont. *Id.*; VT. STAT. ANN. tit. 17, § 1904 (2021).

⁶³ See Cain, *supra* note 52, at 1815 (providing an overview of backup commissions).

⁶⁴ *Id.*

⁶⁵ *Cf. id.* at 1837 (suggesting that increased LCOI separation works to more “insulate from incumbent self-interest”).

⁶⁶ CONN. CONST. art. III, § 6(b); IND. CODE § 3-3-2-2 (2021); OHIO REV. CODE ANN. § 103.51 (LexisNexis 2021); Doug Spencer, *Ohio*, ALL ABOUT REDISTRICTING, <https://redistricting.ills.edu/state/ohio/?cycle=2020&level=Congress&startdate=2022-02-19> [<https://perma.cc/BJ4W-QX4Q>].

⁶⁷ CONN. CONST. art. III, § 6(b); ILL. CONST. art. IV, § 3; MISS. CONST. art. XIII, § 254; OKLA. CONST. art. V, § V-11A; TEX. CONST. art. III, § 28.

⁶⁸ Cain, *supra* note 52, at 1816.

⁶⁹ See *id.* (describing the possible partisan makeup of politician commissions).

⁷⁰ See Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 839, 845–46 (1997) (explaining the ways in which a tie-breaking requirement encourages dialogue among commissioners along with other advantages).

by politician commissions for congressional districts,⁷¹ and eleven states use them for state legislative districts.⁷²

The final commission setup, the “independent citizen redistricting” commission, creates a body separated from the political branches.⁷³ Currently, four states, California,⁷⁴ Arizona,⁷⁵ Michigan,⁷⁶ and Colorado,⁷⁷ use citizen commissions. In all four states, citizens are selected to sit on commissions,⁷⁸ receive training, and draw maps through a process that includes public hearings and opportunities for public comment. Once proposed maps are drawn, procedures are in place that provide oversight, judicial review, and public approval prior to enactment.⁷⁹ These opportunities for judicial review prior to enactment offer one avenue through which to strengthen the institutional autonomy of redistricting commissions; the reason being that such required ex ante judicial review allows courts to monitor the independence of these commissions.⁸⁰ Indeed, many see citizen commissions as the best approach to countering gerrymandering,⁸¹ as they shift map drawing responsibility to non-elected officials. Citizen commissions do, however, experience significant problems ranging from administrative difficulties to attempts by political actors to weaken their intended independence.⁸² These

⁷¹ HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2; VA. CONST. art. II, § 6-A; VA. CODE ANN. § 30-391 (2022); WASH. CONST. art. II, § 43.

⁷² ALASKA CONST. art. VI, § 8; ARK. CONST. art. VIII, § 1; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; MO. CONST. art. III, §§ 3, 7; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2; OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17; VA. CONST. art. II, § 6-A; VA. CODE ANN. § 30-391 (2022); WASH. CONST. art. II, § 43.

⁷³ See Cain, *supra* note 52.

⁷⁴ CAL. CONST. art. XXI, § 2; CAL. GOV'T CODE §§ 8251–53.6 (Deering 2008).

⁷⁵ ARIZ. CONST. art. IV, pt. II, § 1.

⁷⁶ MICH. CONST. art. IV, § 6.

⁷⁷ COLO. CONST. art. V, § 48.

⁷⁸ In Arizona, the potential appointees come from a group of twenty-five individuals, ten each from the major political parties and five who are unaffiliated. Each party picks two nominees, the four then pick a fifth, not of any party already represented, to chair the commission. *Redistricting Commissions: Congressional Plans*, *supra* note 54. In the other three states, applications are solicited from the public and applicants are selected to serve from application pools through random lot, party input, and judicial oversight. See *id.*

⁷⁹ For example, in California, the commission proposes four maps that then face a public referendum. If none of the maps are approved by the public, the California Supreme Court adjusts the maps according to defined criteria. CAL. CONST. art. XXI, § 2(g)–(j). By contrast, in Colorado, the Supreme Court is required to review and approve commission maps and confirm that the maps comport with required criteria and that the commission followed appropriate procedures. COLO. CONST. art. V, § 48(e).

⁸⁰ See discussion *infra* Part III.

⁸¹ See, e.g., Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL F. 477, 480–81 (using political process theory, which argues that “courts should strike down laws only when the political process has broken down in some way,” to advocate for citizen commissions); Levitt, *Weighing the Potential*, *supra* note 26, at 537–39 (same).

⁸² See discussion *infra* Part III.

problems will be addressed in Part III and will inform the paths forward proposed in Part IV.

B. Commission Criteria

State legislation also defines criteria and procedures that IRCs must follow in drawing district lines. This is valuable because it provides the commission with guidance around drawing maps,⁸³ works to prevent partisan skew from becoming too strong a factor, and could provide courts with an opportunity to review commission maps prior to enactment (as is required in Colorado, for example).⁸⁴ Typically, these criteria include district compactness and contiguity, the preservation of political subdivisions such as counties, the preservation of communities of interest, the preservation of the core of prior districts,⁸⁵ and the goal of avoiding pitting incumbents against each other.⁸⁶ Of late, criteria, such as prohibitions on favoring incumbents, candidates, or parties, prohibitions on the use of partisan data, and a competitiveness requirement, have emerged.⁸⁷ The competitiveness criteria typically requires drawing districts to target an election outcome of 55–45% or closer⁸⁸ by drawing on historical election data. In fact, federal legislation mandating competitive districts might be one method through which to reestablish

⁸³ The idea here is that by defining certain criteria commissions must consider, the scope of possible maps a commission may draw is narrowed. Most importantly, it defines a process the commission must walk through (i.e., did it consider the specific criteria defined by the legislature) and works to prevent political influence from corrupting the process.

⁸⁴ See discussion *infra* Section IV.B.

⁸⁵ Some have argued that this “continuity” requirement also contributes to incumbent-protecting “gerrylaunders.” See Yablon, *supra* note 22, at 987 (defining “gerrylaunders” as the practice of locking in already favorable maps and arguing that the continuity requirement can contribute to this practice).

⁸⁶ Traditional criteria include compactness (the goal of minimizing constituency distance within a district), contiguity (requiring all parts of the district be physically connected), preservation of political subdivisions (keeping county, city, and town boundaries intact), preservation of communities of interest (keeping communities of interest that may not conform to geographical bounds whole), preservation of cores of prior districts (working to ensure “continuity of representation”), and avoiding pairing incumbents (avoiding pitting incumbents against each other in a new district). *Redistricting Criteria*, NAT’L CONF. OF STATE LEGISLATURES (July 16, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-criteria> [<https://perma.cc/2M38-7C9P>].

⁸⁷ These newer criteria include prohibitions on favoring or disfavoring an incumbent, candidate, or party, prohibitions on using partisan data (prohibitions on the use of “incumbent residences, election results, party registration, or other socio-economic data as an input when redrawing districts”), and competitiveness (requires partisan balance and avoiding the creation of “safe” districts). *Id.*

⁸⁸ LEVITT, CITIZEN’S GUIDE, *supra* note 19, at 62.

judicial review post-*Rucho*, something the recently-failed *For the People Act* would have required.⁸⁹

C. *Non-Commission States*

This discussion of states with IRCs accounts for roughly half the states; in the states remaining, the legislature itself is responsible for drawing and voting on district maps.⁹⁰ It is in these states that the political process is the least democratic. The discussion in Part III will address both the perceived failures of IRCs in preventing partisan gerrymandering and highlight gerrymandering examples in states where the legislature controls redistricting. States without IRCs exhibit the most gerrymandering,⁹¹ though as the following Section will discuss, IRCs have had limited success in weakening the political hold over the redistricting process.

III

WHERE COMMISSIONS GO WRONG

Though Independent Redistricting Commissions have existed for over sixty years,⁹² extreme partisan gerrymandering has continued to worsen.⁹³ There are various factors that have contributed to this phenomenon;⁹⁴ however, it does raise the question of whether IRCs

⁸⁹ For the People Act, H.R. 1, 117th Cong. § 2403(b) (2021).

⁹⁰ Michael Li, Gabriella Limón & Julia Kirschenbaum, *Who Draws the Maps?*, BRENNAN CTR. FOR JUST. (Sept. 16, 2021), <https://www.brennancenter.org/our-work/research-reports/who-draws-maps-0> [https://perma.cc/G6KA-PCPU].

⁹¹ The Princeton Gerrymandering project grades state maps based on how much partisan skew the maps exhibit. The maps with the worst grades often come from states without commissions. See *Redistricting Report Card*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/redistricting-report-card> [https://perma.cc/4DHD-9WUX].

⁹² See *Creation of Redistricting Commissions*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/redistricting-and-census/creation-of-redistricting-commissions> [https://perma.cc/EHM6-85MM] (noting the creation of Arkansas's redistricting commission in 1956).

⁹³ See Richard Pildes, *Why Gerrymandering Is Going to Get Even Worse*, WASH. POST (Apr. 26, 2018, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/26/yes-gerrymandering-is-getting-worse-and-will-get-worse-still-this-explains-why> [https://perma.cc/W63D-5ZZ8] (explaining why partisan gerrymandering has worsened over the last fifty years including due to our hyperpolarized, existential politics).

⁹⁴ Far more powerful technology and computing algorithms have allowed parties to gerrymander with surgical precision, and parties have poured more money and resources into redistricting efforts as one part of an overall project to weaken the ability to vote in this country. See Jordan Ellenberg, *Opinion, How Computers Turned Gerrymandering into a Science*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/opinion/sunday/computers-gerrymandering-wisconsin.html> [https://perma.cc/D8F9-KXNP] (discussing the use of technology to aid the Wisconsin legislature's precision in gerrymandering); see also Alyce McFadden, *How 'Dark Money' is Shaping Redistricting in 2021*, OPENSECRETS (May 20, 2021),

actually mitigate gerrymandering. As Justice Kagan pointed out in her *Rucho* dissent, “The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country’s history.”⁹⁵ And these trends only appear to have worsened in the 2020 cycle.⁹⁶ Therefore, it is worth exploring how IRCs have fared in preventing partisan gerrymandering.

To evaluate commission success, this Part will proceed in three segments. First, a discussion of the maps that have been released in the 2020 redistricting cycle, highlighting increasing partisan and bipartisan gerrymandering. Second, a focus on one of the most pressing questions around IRCs: how independent are they in reality? Third, a discussion of *Rucho* and its impact on litigating partisan gerrymandering claims. Finally, this Part concludes that while IRCs are a necessary component to combatting partisan gerrymandering, in practice, their setup often fails to achieve the intended goal of creating more competitive elections.

A. *The 2020 Redistricting Cycle: Incumbent Protection and Increasing Partisan Gerrymandering*

Justice Kagan’s warning that the “proof is in the 2010 pudding,”⁹⁷ remains true. In fact, the 2020 “pudding” seems rotten. With *Rucho* greenlighting partisan gerrymandering,⁹⁸ parties have rushed to cement their dominance and incumbency. As Dave Wasserman of the Cook Political Report noted on Twitter, “The biggest loser so far [of the 2020 redistricting cycle]? Competition.”⁹⁹ There has been a 58% reduction in the number of districts that were competitive in the 2020 election.¹⁰⁰ Loss of political competition on both sides seems to be a consistent result of the 2020 redistricting cycle, along with the usual course of partisan gerrymandering to gain party advantage when possible.

3:08 PM), <https://www.opensecrets.org/news/2021/05/dark-money-redistricting-reshaping-redistricting> [<https://perma.cc/W4DC-4WTH>] (illustrating both Democratic and Republican financial efforts to impact the redistricting process); see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2512 (2019) (Kagan, J., dissenting) (“But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today’s gerrymandering altogether different from the crude linedrawing of the past.”).

⁹⁵ *Id.* at 2513 (noting Pennsylvania and Ohio as examples of states with very skewed maps, unrepresentative of the state-wide split between Democrats and Republicans).

⁹⁶ See *infra* Section III.A.

⁹⁷ *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

⁹⁸ See Kirschenbaum & Li, *supra* note 31 (explaining how gerrymandering poses a bigger threat than ever to democracy in the latest post-*Rucho* round of redistricting).

⁹⁹ Dave Wasserman (@Redistrict), TWITTER (Nov. 21, 2021, 11:59 PM), <https://twitter.com/Redistrict/status/1462646775051952134?s=20> [<https://perma.cc/TMW4-5RPP>].

¹⁰⁰ *Id.*

1. *Non-Commission States*

Snapshots from states across the country and controlled by parties on both sides of the aisle provide important insight into how extreme and problematic gerrymandering was in the 2020 redistricting cycle. For example, though North Carolina claims to exclude partisan considerations from redistricting,¹⁰¹ its new map creates ten safe Republican seats and three safe Democratic seats in the U.S. House of Representatives in a state President Biden lost by 1%.¹⁰² Though both racial and partisan gerrymandering lawsuits have been filed, without the possibility of a federal court challenge, these lawsuits rely on *elected* North Carolina state court judges to strike down these maps—a running theme across the country.¹⁰³ Conversely, Texas map drawers prioritized status-quo entrenchment (i.e., maintaining the current partisan split over attempting to gain more seats). The new 2020 map results in all Republican-held seats but one becoming seats that Republicans would have carried by at least a 20% margin in 2020.¹⁰⁴ Because population and demographic changes in Texas are making the state more blue, Republican map drawers focused on subverting the supposed “blue wave” coming to

¹⁰¹ See N.C. GEN. ASSEMBLY, 2021 JOINT REDISTRICTING COMMITTEE PROPOSED CRITERIA (2021), <https://webservices.ncleg.gov/ViewDocSiteFile/38464> [<https://perma.cc/C4T4-JYKL>] (“Partisan considerations and election results data shall not be used in the drawing of districts in the 2021 Congressional, House and Senate plans.”).

¹⁰² Mackenzie Wilkes, *North Carolina Republicans Passed A Heavily Skewed Congressional Map. How Will the Courts Respond?*, FIVETHIRTYEIGHT (Nov. 10, 2021, 12:56 PM), <https://fivethirtyeight.com/features/north-carolina-republicans-passed-a-heavily-skewed-congressional-map-how-will-the-courts-respond> [<https://perma.cc/C25C-MG66>].

¹⁰³ While the North Carolina Supreme Court has so far proven effective in blocking extremely skewed maps, the 2022 election saw Republicans gain an advantage on the court, sparking fears that these maps will soon be enacted. See Grace Whittemore, *Republicans Sweep North Carolina Supreme Court Elections: How the Conservative Court Could Have Major Impacts in the New Year*, CAROLINA POL. REV. (Dec. 15, 2022), <https://www.carolinapoliticalreview.org/editorial-content/2022/12/15/republicans-sweep-north-carolina-supreme-court-elections-how-the-conservative-court-could-have-major-impacts-in-the-new-year> [<https://perma.cc/5LJ9-ZSMV>] (noting that one of the biggest issues the new Republican-dominated court will likely rule on is the drawing of electoral maps). Ominously, the new majority-conservative North Carolina Supreme Court plans to rehear the case that threw out the gerrymandered maps. See Richard L. Hasen, *Unfortunately, the Biggest Election Case of the Supreme Court Term Could Be Moot*, SLATE (Feb. 6, 2023, 5:50 AM), <https://slate.com/news-and-politics/2023/02/moore-v-harper-supreme-court-election-case-moot.html> [<https://perma.cc/P7JW-PCM6>] (describing the history of the underlying case in *Moore v. Harper*, which the North Carolina Supreme Court is set to rehear).

¹⁰⁴ Alex Samuels & Geoffrey Skelley, *Texas’s New Congressional Map Could Give a Huge Boost to GOP Incumbents*, FIVETHIRTYEIGHT (Sept. 27, 2021, 6:33 PM), <https://fivethirtyeight.com/features/texass-new-congressional-map-could-give-a-huge-boost-to-gop-incumbents> [<https://perma.cc/UVZ8-RXS8>].

Texas.¹⁰⁵ As the *Texas Tribune* noted: “The map also incorporates two additional House seats the state gained, the most of any state in this year’s reapportionment. Though Texas received those districts because of explosive population growth—95% of it attributable to people of color—Republicans opted to give white voters effective control of both”¹⁰⁶ So much for Chief Justice Roberts’ belief in *Rucho* that voters will make their opposition to gerrymandering known;¹⁰⁷ clearly, Republican legislators in Texas are able to use gerrymandering to *pick* their voters rather than vice versa. Finally, Princeton’s Gerrymandering Project gave Democrat-controlled Illinois’ final map an “F” grade on partisan fairness, competitiveness, and geographical features, demonstrating that the problem of partisan gerrymandering is not unique to one party.¹⁰⁸

2. *Commission States*

North Carolina, Texas, and Illinois are all states where the legislature draws congressional districts; however, many states with IRCs have not fared much better at implementing maps that are not gerrymandered. In Ohio, a 2018 constitutional amendment, which created a bipartisan redistricting commission, was approved by 70% of voters, but in its first redistricting cycle, it deadlocked, kicking its map-drawing authority to the Republican-controlled legislature.¹⁰⁹ While the legislature is required to pass district maps with a supermajority and support from a third of the minority party to lock maps in for the next ten years, it can pass four-year maps with a simple majority.¹¹⁰ Given Republican

¹⁰⁵ *Id.*; see also Bob Moser, *Texas Is Bracing for a Blue Wave in 2020. Yes, Texas.*, NEW REPUBLIC (Aug. 12, 2019), <https://newrepublic.com/article/154723/texas-bracing-blue-wave-2020-yes-texas> [https://perma.cc/DDP6-M2XS] (describing how Republicans are on the defensive in Texas in response to a Democratic surge).

¹⁰⁶ Alexa Ura, *Texas Republicans Send Gov. Greg Abbott a New Congressional Map that Protects GOP Power, Reduces Influence of Voters of Color*, TEX. TRIB. (Oct. 18, 2021, 11:00 PM), <https://www.texastribune.org/2021/10/18/texas-congressional-maps-redistricting> [https://perma.cc/3SN2-NYZA].

¹⁰⁷ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019) (citing proposed legislation at the state and federal level that would work to counter gerrymandering as evidence that the political process is where gerrymandering can be stopped).

¹⁰⁸ See *Redistricting Report Card*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/redistricting-report-card> [https://perma.cc/4DHD-9WUX].

¹⁰⁹ Reid Wilson, *Ohio Redistricting Commission Gives Up on US House Map*, THE HILL (Nov. 1, 2021, 11:39 AM), <https://thehill.com/homenews/campaign/579405-ohio-redistricting-commission-gives-up-on-us-house-map> [https://perma.cc/3ATF-AAH7].

¹¹⁰ Akron Beacon Editorial Board, Opinion, *Fire the Politicians. Ohio Needs a New Independent Redistricting System Before 2025*, AKRON BEACON J. (Nov. 12, 2021, 12:00 AM), <https://www.beaconjournal.com/story/opinion/editorials/2021/11/07/ohio-gerrymandering-remove-politicians-redistricting-process-congressional-maps/6284221001> [https://perma.cc/U8DD-6TF4].

control of the Ohio legislature is all but assured,¹¹¹ this second option appears to be the route the Ohio legislature will take in passing skewed maps.¹¹² Over three years after the 2020 cycle, Ohio has yet to pass final maps for the decade.¹¹³

Similarly, Utah's legislature proposed maps that departed significantly from maps proposed by its advisory commission, perfectly highlighting the inability of an advisory commission to overcome partisan instinct.¹¹⁴ Though Utah voters from across the political spectrum lodged their displeasure with the partisan maps proposed by the legislature,¹¹⁵ the Republican Governor signed the maps into law.¹¹⁶ The citizen comments from Utah highlight well two major themes running through this Note: that gerrymandering is opposed by the public regardless of party affiliation, and that the current redistricting process allows the legislature to both pick its own voters and ignore the political will of its constituents even when commissions are in place. Much is often discussed

¹¹¹ See *Ohio General Assembly*, BALLOTPEdia, https://ballotpedia.org/Ohio_General_Assembly [<https://perma.cc/93NG-MZLU>] (breaking down the partisan makeup of the Ohio General Assembly).

¹¹² For example, Princeton's Gerrymandering Project gave Ohio's proposed draft congressional maps for 2022 an "F" for partisan fairness; this demonstrates how the legislature will likely continue passing the same, Republican-favoring maps. *Ohio 2022 Latest Draft Congressional Map*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/redistricting-report-card?planId=recYVt3NqPYEZsTtz> [<https://perma.cc/JE3R-TDNE>].

¹¹³ See Samantha Hendrickson, *Ohio Will Keep GOP-drawn Congressional Maps in 2024 Elections, Ending Court Challenges*, ASSOC. PRESS (Sept. 7, 2023, 9:59 PM), <https://apnews.com/article/redistricting-ohio-maps-republican-election-gerrymandering-69f4f1b6852ba5ea1c7df80286cb38b1> [<https://perma.cc/M836-MWFT>] (noting that same Republican drawn maps are still in place); Julie Carr Smyth, *Ohio Redistricting Panel Adopts GOP-drawn Statehouse Maps for Public Discussion, as Democrats Object*, ASSOC. PRESS (Sept. 21, 2023, 3:32 AM), <https://apnews.com/article/ohio-redistricting-statehouse-maps-republicans-8b9a4e2edb7f36023bcbb03da9154da2> [<https://perma.cc/F246-A6S2>] (noting both the ongoing deliberations in Ohio over district maps as well as the continued Republican bias of proposed maps).

¹¹⁴ See Katie McKellar, *Utah Lawmakers Released Their Proposed Redistricting Maps. Accusations of Gerrymandering Swiftly Followed*, DESERETNEWS (Nov. 6, 2021, 11:50 AM), <https://www.deseret.com/2021/11/6/22766845/utah-lawmakers-released-their-proposed-redistricting-maps-accusations-of-gerrymandering-salt-lake> [<https://perma.cc/6GGD-BYQ5>] (discussing how the maps proposed by the Utah legislature do not mirror those proposed by the independent redistricting commission).

¹¹⁵ The Utah Legislature's decision to reject the commission maps and adopt its own faced public pushback during the public comment component of the process. One citizen noted, "The voters asked for nonpartisan redistricting . . . [t]his is a blatant gerrymander Please use the IRC maps." *Id.* Another citizen, a "moderate GOP voter," wrote, "I am so sick and tired of the partisan bickering[.] . . . one of the big contributing factors to that is the idea of 'safe' districts for one party. I want to see more districts that don't simply split up cities and communities in order to draw maps that favor one political party." *Id.*

¹¹⁶ Bethany Rodgers, *Gov. Spencer Cox Signs Utah's New Congressional Map, Resisting Calls for a Veto*, SALT LAKE TRIB. (Nov. 12, 2021, 6:51 PM), <https://www.sltrib.com/news/politics/2021/11/12/gov-spencer-cox-signs> [<https://perma.cc/4AXT-PF86>].

about the increasing divisiveness in politics in the United States,¹¹⁷ and voters across the spectrum in Utah seemed to identify the political gamesmanship of gerrymandering as contributing to this.¹¹⁸ Even in Iowa, long championed as a model for nonpartisan redistricting,¹¹⁹ Republican lawmakers rejected the nonpartisan Legislative Services Agency's first map (splitting Iowa's districts into two Democratic and two Republican) and passed a second map creating four districts that President Trump would have won.¹²⁰

The states with citizen redistricting commissions do appear to be drawing more balanced maps,¹²¹ but there are still concerns around attempts to weaken the institutional integrity of these commissions.¹²² This discussion is meant to highlight both the decreasing political competition in the 2020 redistricting cycle¹²³ and the ad hoc nature of redistricting in the country. Each state employs a different method for redistricting and states with IRCs are seen as politically disadvantaged.¹²⁴ That's because these states, often Democrat-dominated ones, gave up their ability to gerrymander by shifting power to IRCs, while most other states have not yet followed suit. Unsurprisingly, these IRC

¹¹⁷ See, e.g., Michael Dimock & Richard Wike, *America Is Exceptional in the Nature of Its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide> [https://perma.cc/4MFY-83EP] (discussing the increasing polarization in American politics).

¹¹⁸ See McKellar, *supra* note 114.

¹¹⁹ See Cain, *supra* note 52, at 1813 (“Iowa’s [advisory commission] . . . is closest to the independent citizen commission model in the sense that the legislature delegates the line-drawing to a bipartisan advisory commission and a nonpartisan Legislative Services Agency.”).

¹²⁰ Nick Corasaniti & Reid J. Epstein, *How a Cure for Gerrymandering Left U.S. Politics Ailing in New Ways*, N.Y. TIMES (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/us/politics/gerrymandering-redistricting.html> [https://perma.cc/88VS-ZKE5].

¹²¹ See, e.g., Nick Corasaniti, *Ungerrymandered: Michigan’s Maps, Independently Drawn, Set Up Fair Fight*, N.Y. TIMES (Dec. 29, 2021), <https://www.nytimes.com/2021/12/29/us/politics/michigan-congressional-maps.html> [https://perma.cc/5QBJ-RACV] (“With lawmakers excluded from the mapmaking process, Michigan’s new districts will much more closely reflect the overall partisan makeup of the hotly contested battleground state. . . . The commission’s three new maps . . . restore a degree of fairness . . .”).

¹²² See discussion *infra* Section III.B.

¹²³ See Ashlyn Still, Harry Stevens & Kevin Uhrmacher, *Competitive House Districts Are Getting Wiped off the Map*, WASH. POST (Nov. 23, 2021, 5:00 AM), <https://www.washingtonpost.com/politics/2021/11/23/gerrymandering-redistricting-competitive-house-districts> [https://perma.cc/3HB7-XBMS].

¹²⁴ Tim Henderson, *Bipartisan Commissions Cause Redistricting Pain for Democrats*, STATELINE (Nov. 2, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/11/02/bipartisan-commissions-cause-redistricting-pain-for-democrats> [https://perma.cc/H79Y-CG2R].

states have now started to pull back on the independence of their redistricting commissions.¹²⁵

IRCs can produce fewer partisan maps, but in their current capacity most are either too weak (e.g., the Utah advisory commission) or too susceptible to partisan influence (e.g., the Ohio commission's experience with partisan takeover).¹²⁶ The few states with redistricting commissions that have successfully led to less gerrymandering offer lessons for reform (as discussed in Part III), but such setups are not employed in nearly enough states to combat gerrymandering at a national level.

B. Targeting Commission Independence

One of the most important takeaways from the discussion in Part II is that IRCs sit on a spectrum of independence.¹²⁷ The more entwined with the legislature the commission is, the less it can exert its independence to consider factors beyond ensuring political success when drawing new maps. That being said, even the commissions more removed from the legislature, such as citizen commissions, see attacks on their independence. Moreover, citizen commissioners might be poorly trained, unfamiliar with the political process, or influenced by political capture in more subtle ways.¹²⁸ And at its core, the question of independence is fundamental to creating a redistricting system that is able to neutralize political influence. In practice, IRCs across the LCOI spectrum have experienced significant attacks on their independence.

Arizona and California are often championed as models of success for the Arizona Independent Redistricting Commission (AIRC) and the California Citizens Redistricting Commission (CCRC), respectively.¹²⁹ Empowering trained citizens to draw district lines is an effective way to weaken the inherent conflict of interest that exists when

¹²⁵ See, e.g., *Proposal 1, 2021 Statewide Ballot Proposals*, N.Y. STATE BD. OF ELECTIONS, <https://www.elections.ny.gov/2021BallotProposals.html> [<https://perma.cc/QZJ8-QYYC>] (eliminating some partisan balance requirements for map approval).

¹²⁶ See *supra* notes 109–16.

¹²⁷ Cain's LCOI separation is one way of measuring this. See Cain, *supra* note 52.

¹²⁸ See Levitt, *Weighing the Potential*, *supra* note 26, at 539–43 (explaining that citizen commissioners face poor training, lack of familiarity with the process, and public disillusionment, exposing the commission to political attack and influence).

¹²⁹ See generally Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 ELECTION L.J. 472 (2012) (describing the success of the California independent Citizen Redistricting Commission as well as some initial challenges it faced); COLLEEN MATHIS, DANIEL MOSKOWITZ & BENJAMIN SCHNEER, *THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION: ONE STATE'S MODEL FOR GERRYMANDERING REFORM* (2019) (describing the Arizona Independent Redistricting Commission's success in creating more fair maps); see also Stephanopoulos, *supra* note 81, at 484 (discussing Republican challenges to the Arizona commission's maps on the basis that the maps were "not as favorable to Republican candidates as [they] could be").

politicians draw their own districts. However, both the AIRC and CCRC have experienced significant challenges to their independence and institutional capacity. While both commissions have partisan balance requirements for membership, this is not reflected at the staffing level, where possible partisan control over support staff might expose one potential avenue through which the legislature can influence the maps put out by the commission.¹³⁰ Furthermore, both commissions are still tied to the legislature for funding, and the legislature and executive retain significant oversight over commission conduct.¹³¹

Compromising IRC independence even more, these commissions rely on the state judiciary as a “buffer[,]” meant to insulate the IRC from political influence.¹³² And since “redistricting is bedeviled by the sore loser problem,”¹³³ political parties will routinely challenge the maps put out by commissions. Therefore, if the opportunities for judicial review are not set up in ways that mitigate these challenges, political parties will use litigation to weaken IRC independence and slow their work.¹³⁴ To address this, opportunities for judicial review of IRC maps must streamline challenges to them (in order to limit potential delay to map implementation), and such judicial review must also be able to deploy robust procedural protections to quickly identify attempts to stall IRC work.¹³⁵

IRCs, particularly those of the AIRC and CCRC form, often have public engagement requirements; these typically take the shape of mandatory public interviews and hearings prior to map development¹³⁶ and notice-and-comment requirements on proposed maps.¹³⁷ While these

¹³⁰ See Cain, *supra* note 52, at 1833 (arguing that legislative influence could be exerted through staff capture as well as through the possibility that the more-informed staff might “steer” commission decisions).

¹³¹ *Id.* at 1835–36; see also Matt Vasilogambros, *The Tumultuous Life of an Independent Redistricting Commissioner*, STATELINE (Nov. 26, 2019, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/11/26/the-tumultuous-life-of-an-independent-redistricting-commissioner> [<https://perma.cc/X3Z4-WDYB>] (telling the story of AIRC Commission Chair Colleen Mathis, who Republican Governor Jan Brewer attempted to remove from the commission after alleging concerns of partisanship).

¹³² Cain, *supra* note 52, at 1836.

¹³³ *Id.* (“[B]ecause new district lines can determine the electoral fates of candidates, political parties, and interest groups, it is usually worth their time and effort to overturn a plan that they do not like for the uncertain prospect of something better.”).

¹³⁴ See *id.* at 1837 (arguing that judicial review offers opportunities for political influence by impeding the commission and slowing it down through litigation).

¹³⁵ Note that the For the People Act attempted to address this problem of weaponized stalling through litigation. See For the People Act of 2021, H.R. 1, 117th Cong. § 2432(b) (2021) (requiring “expedited consideration” of actions brought to challenge proposed maps).

¹³⁶ See, e.g., Mac Donald, *supra* note 129, at 482–83.

¹³⁷ See, e.g., ARIZ. CONST. art. IV, pt. 2, § 1(16) (requiring public notice and opportunity to comment prior to map enactment); MICH. CONST. art. IV, § 6(9) (same).

public engagement requirements are certainly important to ensuring maps respect community groups and that the lines drawn reflect the needs and values of the state, these requirements have been perverted and used to weaken the institutional independence of the commission. For example, in 2011, the CCRC's public hearings were co-opted by Tea Party activists who used the opportunity to boost their profile and further their messaging.¹³⁸ More insidiously, in the 2020 cycle, the Republican Party has used public hearing requirements to work around the ban on partisan influence over the commission. In Michigan, for example, the Republican Party held training sessions with Michigan residents on talking points that they should raise at commission hearings.¹³⁹ These talking points are meant to bias the commission into producing maps that favor Republicans.¹⁴⁰

Fundamentally, there is also an inherent weakness in shifting redistricting responsibilities to citizens. The lack of prior knowledge around the highly technical process of map-drawing, the time demands of serving on the commission, and the expectations of complete non-partisanship all render these commissions susceptible to political influence (or at least the perception of influence). Citizens selected to serve on the commission suddenly face hours of meetings, thousands of documents to review, the pressure to produce maps in a short time frame, and newfound public scrutiny and media attention.¹⁴¹ Added to this, is "that expectations for an independent, citizen-led process may be set too high, creating rather than reducing public disillusionment with the political process."¹⁴² Both parties can feel slighted by the maps that are produced, and in turn will often attempt to undermine the commission's institutional legitimacy by turning to the public.¹⁴³

¹³⁸ See Mac Donald, *supra* note 129, at 483 ("Hissing and sneering at speakers that supported the Voting Rights Act was not uncommon, and in one hearing, the atmosphere became so hostile that the Commission interrupted the meeting until more security could be brought in.").

¹³⁹ Jane C. Timm, *How Michigan Republicans Are Trying to Sway State's Independent Redistricting Process*, NBC NEWS (Nov. 5, 2021, 8:11 AM), <https://www.nbcnews.com/politics/elections/how-michigan-republicans-are-trying-sway-state-s-independent-redistricting-n1283296> [<https://perma.cc/3CVX-FCW4>].

¹⁴⁰ Citizen commission redistricting is aimed at excluding political parties from the redistricting process, and these organized efforts circumvent such goals. Public participation is an important part of the redistricting process, however these organizing and training efforts by political parties seem aimed at frustrating the very purpose of shifting redistricting away from the political branches. See Corasaniti & Epstein, *supra* note 120 (noting the "pressure campaign" launched in Arizona and Michigan by both parties).

¹⁴¹ See Mac Donald, *supra* note 129, at 484 (discussing the life and demands of commissioners on the Citizen Redistricting Commission).

¹⁴² Levitt, *Weighing the Potential*, *supra* note 26, at 541.

¹⁴³ See Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184, 188 (2007)

This discussion seems to suggest the deflating conclusion that the redistricting process is inherently political and cannot be shifted to independent institutions. However, Part IV explores ways to challenge this conclusion by arguing that a shift in approach is needed. Rather than focusing on the maps that are produced, focus should be shifted to the process by which these maps were produced. In the context of the discussion here, it would, for example, require looking at whether the attempts to influence the IRC in Michigan corrupted the process rather than asking if the resulting maps were too biased. An examination of process offers a way to reinforce IRC independence against partisan attack, cures the procedural weaknesses exhibited by citizen commissions, and provides an avenue of review that judges often feel more comfortable taking.

C. *Rucho and Its Progeny*

In 2019, the Supreme Court heard *Rucho v. Common Cause*, a consolidated case brought by voters and organizations in North Carolina and Maryland challenging extremely partisan maps drawn by those states during the 2010 redistricting cycle.¹⁴⁴ In North Carolina, the proposed map displayed a ten-to-three Republican-to-Democrat split in congressional districts, and in Maryland, the proposed map displayed a seven-to-one Democrat-to-Republican split.¹⁴⁵ Before the Court was yet again the question of whether partisan gerrymandering is permissible, with the respondents arguing that extreme partisan consideration in the redistricting process violated the Constitution.¹⁴⁶

The decision in *Rucho* was the last in a line of cases that attempted and failed to find a standard by which courts could evaluate claims of partisan gerrymandering.¹⁴⁷ As Professors Samuel Issacharoff and Pam Karlan note, litigators raising partisan gerrymandering claims attempted to develop a standard through a variety of approaches.¹⁴⁸ The underlying problem is that the Supreme Court seems to approach this issue most often from a political party “versus” political party angle; this means the Court sees the question as how to develop a standard for determining when one party has gerrymandered a map to the extent that it prevents

(discussing the rejection of commission referenda in Ohio and California and attributing such failure to voters taking “cues” from elected officials).

¹⁴⁴ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

¹⁴⁵ *Id.* at 2491–93.

¹⁴⁶ *Id.* at 2491.

¹⁴⁷ See *supra* Part I (describing the line of cases from *Baker* to *Rucho*).

¹⁴⁸ See Issacharoff & Karlan, *supra* note 14.

the other party from winning.¹⁴⁹ Unable to find a standard that allows judges “to take the extraordinary step of reallocating power and influence between political parties,” the Court held such claims nonjusticiable.¹⁵⁰ With federal judicial remedy completely gone, *Rucho* signals the Court’s tacit approval of political gerrymandering by state legislatures (though Chief Justice Roberts claims otherwise).¹⁵¹

To make matters worse, in the few years since *Rucho*, the Court has doubled down on its hostility to claims of gerrymandering. In early 2022, the Court issued an emergency order enjoining a district court decision requiring Alabama to redraw its maps; the lower court had found that the state’s maps violated the Voting Rights Act by diluting the voting power of Black voters.¹⁵² In concurring with the decision to enjoin the district court order, Justice Kavanaugh wrote: “This Court has repeatedly stated that federal courts ordinarily should not enjoin a state’s election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle.”¹⁵³ Though the surprise ultimate decision in *Allen* sided with those challenging the map and against Alabama,¹⁵⁴ Justice Kavanaugh’s invocation of the *Purcell* Principle only further highlights the Court’s

¹⁴⁹ In *Davis*, the Court viewed the issue as one of proportional representation, stating that the “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.” *Davis v. Bandemer*, 478 U.S. 109, 132 (1986). Similarly, Justice O’Connor’s concurrence saw the *Davis* question as one of vote dilution, with the claim being that partisan gerrymandering “diluted” the vote of both Democrats and Republicans. In rejecting the plaintiffs’ challenge and arguing that such claims should be nonjusticiable, she wrote that “members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process” *Davis*, 478 U.S. at 152 (O’Connor, J., concurring). In *Vieth*, Justice Scalia’s plurality opinion reflects a similar view. *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004). Even Justice Kennedy, who did not want to foreclose all partisan gerrymandering claims, wrote in *LULAC*, “[t]o be sure, there is no constitutional requirement of proportional representation, and equating a party’s statewide share of the vote with its portion of the congressional delegation is a rough measure at best.” *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 419 (2006). *Rucho* dealt the final blow; it viewed the claim similarly and resoundingly foreclosed claims of partisan gerrymandering. *Rucho*, 139 S. Ct. at 2499.

¹⁵⁰ *Rucho*, 139 S. Ct. at 2502.

¹⁵¹ *Id.* at 2507.

¹⁵² *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.), *vacated*, *Allen v. Caster*, 2023 U.S. LEXIS 2528; *see also* Adam Liptak, *Supreme Court Leans Toward Alabama in Voting Rights Dispute*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/us/alabama-supreme-court-voting-rights-act.html> [<https://perma.cc/E2D9-S3SS>].

¹⁵³ *Merrill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring) (“That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled.”).

¹⁵⁴ *Allen v. Milligan*, 599 U.S. 1 (2023) (holding that Alabama’s proposed maps violated the Voting Rights Act). As a note, by the time *Merrill* was heard on the merits, its caption was changed to *Allen v. Milligan*.

move away from gerrymandering claims.¹⁵⁵ If the timing of the intervention is now something courts must consider, it provides another avenue through which courts can escape reviewing gerrymandering claims. As Professors Melissa Murray and Stephen Vladeck noted, the ultimate decision in *Allen* was still too little, too late,¹⁵⁶ and Alabama continues to seek ways to avoid the Court's order that it redraw its maps more fairly.¹⁵⁷

Finally, the Court also released its decision in *Moore v. Harper* in 2023.¹⁵⁸ This case brought the Independent State Legislature Doctrine (ISLD) before the Court.¹⁵⁹ The ISLD, long a fringe theory, argues that the Elections Clause's use of the phrase "the Legislature thereof" means that state legislatures have exclusive power to regulate federal regulations—checked only by congressional override under the Elections Clause.¹⁶⁰ Though the Court rejected the ISLD,¹⁶¹ the fact that the Court even heard this case suggests skepticism among some members of the Court over the role state courts should play in reviewing the substance of a gerrymandering claim. Further, even though *Moore* accepts that state courts can play a role in reviewing gerrymandering claims, these claims are still dependent on the provisions of a given state's constitution and whether these provisions can and have been interpreted to prohibit partisan gerrymandering.¹⁶² As North Carolina's Supreme Court has demonstrated,

¹⁵⁵ *Merrill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring).

¹⁵⁶ See Melissa Murray & Stephen Vladeck, *The Supreme Court's Voting Rights Act Ruling Is No Victory for Democracy*, WASH. POST (June 8, 2023, 9:28 PM), <https://www.washingtonpost.com/opinions/2023/06/08/supreme-court-alabama-redistricting-voting-rights-act> [<https://perma.cc/CM5C-8MWJ>] (“[The decision is] a sobering reminder of just how far the court has gone not just to water down voting rights but also to affect electoral outcomes.”).

¹⁵⁷ See Abbie VanSickle, *Alabama Asks Supreme Court to Revisit Dispute Over Congressional Map*, N.Y. TIMES (Sept. 11, 2023), <https://www.nytimes.com/2023/09/11/us/politics/supreme-court-alabama-gerrymandering.html> [<https://perma.cc/KXW3-MXME>] (noting Alabama's continued efforts to avoid the Court's ruling in *Allen*).

¹⁵⁸ *Moore v. Harper*, 143 S. Ct. 2065 (2023).

¹⁵⁹ See Ethan Herenstein & Thomas Wolf, *The 'Independent State Legislature Theory,' Explained*, BRENNAN CTR. FOR JUST. (June 27, 2022), <https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained> [<https://perma.cc/6CG6-9UP8>] (explaining the Independent State Legislature Doctrine).

¹⁶⁰ *See id.*

¹⁶¹ *See Moore*, 143 S. Ct. at 2065.

¹⁶² For example, the North Carolina Supreme Court first interpreted provisions of its constitution to prohibit partisan gerrymandering, *see Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (relying on North Carolina's "free elections clause" to strike down the State General Assembly's proposed map as too partisan), and more recently reversed course and decided these same provisions actually do not prohibit partisan gerrymandering. *See Hansi Lo Wang, A North Carolina Court Overrules Itself in a Case Tied to a Disputed Election Theory*, NPR (Apr. 28, 2023, 12:25 PM), <https://www.npr.org/2023/04/28/1164942998/moore-v-harper-north-carolina-supreme-court> [<https://perma.cc/VUV5-Y7M3>].

these interpretations vary significantly with the political makeup of the court and often flip back and forth.¹⁶³ The state of the doctrine around reviewing gerrymandering generally, and partisan gerrymandering specifically, suggests a need to rethink redistricting wholesale and thus calls for a turn to process.

IV

PROCEDURAL REVIEW AND INSTITUTIONAL REINFORCEMENT: SOLUTIONS TO THE PROBLEM OF PARTISAN GERRYMANDERING

Part III aims to make two things clear. First, the current process for redistricting is failing: IRCs are neither sufficiently independent nor common enough to mitigate tendencies to gerrymander in a meaningful way. The failure by many IRCs to produce competitive maps and the apparent partisan subversion, even among the most independent of commissions, highlights their insufficiency. Second, *Rucho* and its progeny show that the federal judiciary will not provide relief for substantive claims of partisan gerrymandering. With a federal legislative response likely off the table (at least for now), it seems that substantive protections against gerrymandering are all but eliminated.

It cannot be, however, that we resign ourselves to all-out gerrymandering. Partisan gerrymandering undermines foundational principles of democracy and representation. Moreover, other democracies around the world are successfully able to block political tendencies to gerrymander.¹⁶⁴ Instead, we need to rethink how we approach redistricting by focusing on institutional reinforcements to insulate IRCs and the redistricting process itself. In *Gerrymandering and Political Cartels*, Professor Issacharoff argues for a “focus on ex ante rules of process.”¹⁶⁵ Expanding on this idea, he contends that such process-based rules are necessary when the “norm” is corruption of the process—namely, for him, the “overracialization of redistricting.”¹⁶⁶ Concluding, he notes that “the Court could turn to the sorts of prophylactic rules employed in other domains in which there is a considerable risk of unconstitutional behavior but a high level of difficulty in policing it after the fact.”¹⁶⁷ Much of his discussion therein charts an analogy between redistricting

¹⁶³ See Wang, *supra* note 162.

¹⁶⁴ See Nicholas Stephanopoulos, *Depoliticizing Redistricting* (Harv. Pub. L., Working Paper No. 20-10, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3774436 [<https://perma.cc/QHD5-AFCR>] (discussing lessons from commissions in other countries on preventing gerrymandering).

¹⁶⁵ Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 5, at 643.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 646.

and antitrust law, pointing to rules in antitrust doctrine meant to further market competition and arguing that courts could police attacks on political competition through such antitrust-like technique.¹⁶⁸

But the idea of “prophylactic rules” more generally provides inspiration for the process-based approach which this Note advocates. Such rules, again analogizing to other areas of law, would provide *ex ante*, process-based norms to reinforce the institutional independence of redistricting commissions. Redistricting is an area where process-based review can provide ways to control gerrymandering and enhancing these process-based “prophylactic rules” might counter the “norm” of political influence Part III of this Note exposes. Part IV explores this idea of a “turn to process” in three steps. First, it analogizes to other areas of law to argue that, as a normative matter, process might actually be the preferred method through which to control gerrymandering. Second, it provides a descriptive argument for increased procedural protections by looking to Colorado and New York as case studies in the use of process (both before and after maps have been drawn) to block gerrymandering. Third, it concludes with some parting thoughts on best practices that states ought to adopt in their redistricting process, informed by approaches taken in other countries.

A. *The Normative Argument for Process*

Process as a means to protect substantive rights appears across academic literature and court opinions in varying areas of the law.¹⁶⁹ In an article titled *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, Professor Hiroshi Motomura sketches out the idea that “procedural surrogates” have been used to protect underlying substantive constitutional rights in the immigration context.¹⁷⁰ He argues that in the immigration con-

¹⁶⁸ See *id.* at 599–601.

¹⁶⁹ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”); Alex Abdo, *Why Rely on the Fourth Amendment to Do the Work of the First?*, 127 *YALE L.J.F.* 444, 450 (2017) (noting that in the context of surveillance, courts typically look to the procedural protections of the Fourth Amendment rather than considering the underlying substantive First Amendment rights at stake); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 *COLUM. L. REV.* 1625, 1628 (1992) (“Judges with constitutional misgivings about an immigration decision by the government have . . . constru[ed] the constitutional challenge as ‘procedural,’ and then invalidat[ed] the decision on procedural due process grounds.”).

¹⁷⁰ See generally Motomura, *supra* note 169 (discussing the rise of procedural protections which litigants in immigration cases turned to in order to protect substantive rights). It should be noted that in the thirty years since Professor Motomura’s article, immigration law has

text, there is little constitutional law.¹⁷¹ Therefore, challenges to immigration decisions required framing the attack as “procedural,” thereby allowing courts to invalidate decisions under the Due Process Clause.¹⁷² As Professor Motomura highlights in immigration law, the voting rights context is also one of little underlying constitutional law.¹⁷³ Famously, the Constitution does not explicitly guarantee the right to vote,¹⁷⁴ and the Elections Clause only speaks in terms of the processes for voting.¹⁷⁵ Likewise, the Constitution’s discussion of redistricting is limited.¹⁷⁶ It is this lack of underlying substantive constitutional protections that has often frustrated the Court in its partisan gerrymandering opinions.¹⁷⁷

Under Professor Motomura’s model for “procedural surrogates,” a constitutional challenge “seems quintessentially ‘procedural’ if it questions the manner in which an admission or expulsion classification is applied—for example, a claim that the government has denied an alien the opportunity to be heard at a meaningful time on the issue of whether she qualifies under an immigration category.”¹⁷⁸ In the immigration context, Professor Motomura grounds this in the familiar *Eldridge*-balancing

changed significantly. Avenues of review that Professor Motomura saw may no longer exist. That being said, the underlying argument of Professor Motomura’s paper—that process can be rights-protecting—is still helpful in the gerrymandering context where there is limited substantive doctrine.

¹⁷¹ *Id.* at 1626 (“The primary reason has been the judicially created plenary power doctrine, under which Congress and the executive branch have broad and often exclusive authority in immigration matters. Courts have been reluctant to apply constitutional norms and principles to test the validity of subconstitutional immigration law.”).

¹⁷² *Id.* at 1628.

¹⁷³ SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, NATHANIEL PERSILY & FRANITA TOLSON, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 47 (6th ed. 2022) (“Despite the centrality of . . . the U.S. Constitution, however, there is paradoxically little that the text or its history offers in the way of directly relevant guidance in how to structure the political process.”).

¹⁷⁴ *Id.* (“[N]either the original Constitution nor the Fourteenth Amendment secured even the basic right to vote.”). Even the Fifteenth Amendment’s prohibition denying the right to vote on account of race presumes that a state has first given citizens the right to vote. *See id.* (“[T]he entitlement to vote . . . was entirely dependent on a state’s grant of the franchise . . .”).

¹⁷⁵ *See* U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ‘chusing’ Senators.”).

¹⁷⁶ The Constitution’s discussion of redistricting is constrained to the Fourteenth Amendment which states that, “[r]epresentatives shall be apportioned among the several States according to their respective numbers . . .” U.S. CONST. amend. XIV, § 2. Otherwise, redistricting is determined by the state under the Elections Clause. U.S. CONST. art. 1, § 4.

¹⁷⁷ *See supra* note 149.

¹⁷⁸ Motomura, *supra* note 169, at 1629.

test,¹⁷⁹ noting that process is a measure of “what is reasonable under the circumstances . . . [and an] inquiry to the procedural protections for those similarly situated.”¹⁸⁰

Given the lack of substantive rights to rely on, courts have often been limited by an inability to compare the underlying substantive claims in gerrymandering challenges. When a court reviews a redistricting plan, it is limited to a single state’s plan and is often unable to evaluate the effect the state’s plan will have on the overall distribution of power in Congress.¹⁸¹ Justice Scalia raised this point in *Vieth*, arguing that the problem with partisan gerrymandering claims is the difficulty in connecting partisan affiliation on a state or national level with what the outcome in any given district “should” be.¹⁸² It would seem, then, that Professor Motomura’s “procedural surrogate” argument might provide the comparison the Court desires. Rather than compare the underlying substance, compare the processes by which a state has produced its map and weigh whether those processes sufficiently sideline partisan opportunities for influence. In the redistricting context, Professor Adam Cox has argued that evaluating these claims requires an “aggregate” approach by the federal judiciary as a whole, or at least requires that federal courts “adopt[] the same rules for intervention and then apply[] those rules in roughly the same fashion.”¹⁸³ Instead of courts adopting the same rules for “intervention,” states might converge on similar processes for drawing maps, and courts could then compare such processes to protect the independence of the process.

On top of providing a more common ground for comparison, process is also an area in which courts are often more comfortable operating in. The *Eldridge* balancing test is something courts have long applied.

¹⁷⁹ See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (setting out a procedural balancing test for determining if one’s substantive rights have been denied).

¹⁸⁰ Motomura, *supra* note 169, at 1680.

¹⁸¹ See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 411 (explaining that judicial review of gerrymandering claims limits a court to a single congressional districting plan, which causes the court to miss harms at the institutional level).

¹⁸² See *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (“Moreover, to think that majority status in statewide races establishes majority status for district contests, one would have to believe that the only factor determining voting behavior at all levels is political affiliation. That is assuredly not true.”).

¹⁸³ The argument here is that a court reviewing a map of Pennsylvania, for example, may not see the gerrymandering harms that arise in the federal context because such harms might only arise when viewed in aggregate with gerrymanders in other states. Therefore, Professor Cox argues that unless federal courts have a standard operating procedure for reviewing such claims, inconsistencies in approach might obscure the aggregate harms of gerrymandering in the federal context. One such solution, discussed below, is federal legislation defining common redistricting procedures; such an approach would give any court reviewing district maps the same set of procedures on which to operate. See Cox, *supra* note 181, at 449.

Administrative law has also experienced a long-standing debate over procedural versus substantive review; it highlights some of the benefits of a process-based approach to judicial review that ought to be applied to gerrymandering claims. This, famously, was the divide between Judges David Bazelon and Harold Leventhal while they served on the D.C. Circuit. While in the administrative law context, the Court endorsed “hard look” substantive review, Judge Bazelon often argued that due to the limitations of a generalist court, judges should focus on “strengthening administrative procedures” instead.¹⁸⁴ His point was, rather than have judges review the outputs of administrative agencies—often highly technocratic decisions—judges were better at evaluating the procedures taken by an agency in coming to a decision.¹⁸⁵ A Bazelon-inspired approach is highly attractive in a context where the Court has rejected substantive review of partisan gerrymandering claims. As an alternative to current unsuccessful practice, courts in the gerrymandering context could police the procedures taken by IRCs in efforts to ensure IRCs are compliant with defined criteria for drawing maps.

Judicial-backing and process-based reinforcements in the gerrymandering setting would create a prophylactic “default rule”¹⁸⁶ of sorts. Should legislators know that they risk losing any control over redistricting for failure to abide by a state’s procedures for drawing district maps, they might be incentivized to draw more competitive maps. Scholarship supports the idea that default rules in the public domain can be rights-protecting.¹⁸⁷ In looking at penalty default rules,¹⁸⁸ Professors John

¹⁸⁴ See Ronald J. Krotoszynski, Jr., “History Belongs to the Winners”: The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action, 58 ADMIN. L. REV. 995, 996, 999–1000 (2006) (recounting the Bazelon-Leventhal process versus substance debate and arguing for the “continued validity” of Judge Bazelon’s focus on procedural review).

¹⁸⁵ *Id.* at 999–1000.

¹⁸⁶ See *Default*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “Default” as “[t]he omission or failure to perform a legal or contractual duty”); *Default Clause*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a “Default Clause” as “[a] contract provision defining what constitutes an act of default and the consequences of it”). Judicially-enforced “default rules” for redistricting might incentivize legislators to draw maps that will avoid the consequences that arise when they gerrymander to the extreme. Of course, as discussed above, this might also incentivize bipartisan gerrymanders, though should courts be as vigilant as the New York Court of Appeals was in *Harkenrider*, judicial enforcement of the default rule might protect against legislative abuse of the redistricting process when parties also agree to protect incumbents. See *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022).

¹⁸⁷ See generally John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825 (2006) (applying private law contract default rules in the constitutional realm).

¹⁸⁸ *Id.* at 845–46 (defining penalty default rules in the contract law context); see also *Penalty Clause*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A contractual provision that assesses against a defaulting party an excessive monetary charge unrelated to actual harm.”).

Ferejohn and Barry Friedman argue that penalty default rules can be “information-forcing” in both private and public law contexts.¹⁸⁹ They use the example of habeas, arguing that the “penalty” the government faces for an unlawful detention is the release of the individual detained and the disclosure of information about the detention in judicial proceedings.¹⁹⁰ Therefore, the theory goes, *ex ante*, the government is less likely to engage in unconstitutional detentions because the habeas default rule both bolsters the procedures the government must take during detention and threatens the government with revealing potentially embarrassing information about the detention to the public in court. Such a penalty default rule could operate in a similar fashion in the redistricting context. Legislatures or commissions that fail to follow the procedural standards defined by their state would face the penalty of a court or a special master drawing their district maps. At the very least, the instinct to gerrymander and protect their power would be revealed to a public opposed to gerrymandering.¹⁹¹ In the face of these risks, the “penalty” would incentivize legislators to follow the defined procedures, and the judicial enforcement would force the legislature and commission to reveal the procedures utilized in drawing maps.

This discussion is meant to drive home the argument that a process-based approach can protect underlying substantive rights that are otherwise vulnerable. Redistricting is defined by its processes, and these processes can be marshaled to provide the prophylactic rules necessary to reinforce redistricting commissions. Taking process seriously requires a shift both in the approaches that state legislatures considering reform are taking and the litigation tactics used by those challenging maps. The discussion that follows offers initial examples of both.

B. The Descriptive Argument for Process: How Colorado and New York Mitigate Gerrymandering

In addition to being normatively preferable for the reasons discussed above, certain states are already utilizing process-based review to limit gerrymandering, suggesting that in practice a turn to process might already be occurring. This Note looks at Colorado and New York as descriptive models for process-based review because these states have chosen differing approaches to achieve the same end goal: limiting gerrymandering by controlling and reviewing process. Colorado uses an *ex ante* approach, requiring a “preclearance” of IRC maps by the

¹⁸⁹ Ferejohn & Friedman, *supra* note 187, at 845–46.

¹⁹⁰ *Id.* at 846–47.

¹⁹¹ See *supra* Sections III.A–B.

Colorado Supreme Court before the maps are enacted.¹⁹² By contrast, New York operates on an *ex post* model where maps that have been drawn can be challenged in court.¹⁹³ Both of these models provide crucial judicial reinforcement to IRC processes for drawing maps, helping to remedy many of the weaknesses discussed above.

1. *Colorado's Ex Ante Approach*

Reliance on *ex post* judicial review of partisan gerrymandering claims (even in a pre-*Rucho* world) has never been sufficient to prevent gerrymandered maps.¹⁹⁴ Maps will always slip through the cracks of *ex post* judicial review, and, as the Court has discussed at length, courts are ill-equipped to evaluate such claims or provide remedies when a claim is successful.¹⁹⁵ While this does not mean that substantive judicial review of district maps should not exist, *ex ante* review meant to prevent partisan gerrymandering in the first place is also needed. Of course, IRCs play a central role in this. However, for the reasons discussed in Parts I and II, IRCs have failed to prevent gerrymandered maps from being produced. Even the most independent of commissions suffer from procedural attacks meant to weaken their capabilities.¹⁹⁶

One state that provides a possible solution to this problem is Colorado. There, an independent citizen commission is tasked with drawing district maps, and the Colorado Supreme Court must review commission procedures *prior* to map enactment.¹⁹⁷ In November 2021, the Colorado Supreme Court released its opinion approving the commission's map,¹⁹⁸ highlighting its *ex ante* procedural review of commission maps.

¹⁹² COLO. CONST. art. V, §§ 44.4(5)(b), 44.5(1).

¹⁹³ See *Harkenrider v. Hochul*, 197 N.E.3d 437, 445 (N.Y. 2022) (“Article III, § 5 of the New York Constitution provides that “[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe.” (internal citations omitted)).

¹⁹⁴ See Stephanopoulos, *supra* note 81, at 490 (“[C]ourts are unlikely to catch all (or even most) gerrymanders.”).

¹⁹⁵ *Id.*; see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2488–89 (2019) (describing how partisan gerrymandering claims boil down to questions of “fairness,” yet that “federal courts are neither equipped nor authorized to apportion political power as a matter of fairness. It is not even clear what fairness looks like in this context.”). This difficulty stems from the lack of constitutional grounding for challenges to partisan gerrymandering; the result is a lack of “legal standards” by which to adjudicate such claims. *Id.* at 2489.

¹⁹⁶ See *supra* Section III.B.

¹⁹⁷ COLO. CONST. art. V, § 44.4(5)(b) (“No later than September 1 of the redistricting year, the commission shall adopt a final plan, which must then be submitted to the supreme court for its review”); *id.* at § 44.5(1) (“The supreme court shall review the submitted plan and determine whether the plan complies with the criteria listed in [Article V].”).

¹⁹⁸ *In re Colo. Indep. Cong. Redistricting Comm'n*, 497 P.3d 493 (Colo. 2021).

The court first noted that Colorado's redistricting process "has . . . a checkered history," and that in three of the past four redistricting cycles, the General Assembly (then vested with redistricting power) deadlocked, requiring the court to draw the maps.¹⁹⁹ In 2018, Colorado voters approved a constitutional amendment shifting redistricting power to the Colorado Independent Redistricting Commission (CIRC).²⁰⁰ The amendment requires the Colorado Supreme Court to review the CIRC's proposed map for compliance with the redistricting criteria defined in the amendment.²⁰¹ The court noted that it would approve a plan "unless [it found] that the commission . . . abused its [discretion] in applying or failing to apply the criteria . . . in light of the record before the commission."²⁰² The court spent the rest of the opinion describing its analysis of the Commission's proposed map under this standard, looking at commission procedures, such as the holding of hearings and taking of expert testimony, in developing the map; the map's compliance with the Voting Rights Act and Supreme Court precedent; and whether the Commission abused its discretion.²⁰³ The court then approved the Commission's map.²⁰⁴

Colorado's *ex ante* procedural review of IRC maps provides an example that ought to be adopted across the country. Such a review reinforces the independent, nonpartisan criteria an IRC utilizes in drawing maps, and provides courts with an avenue to object to a map when there is evidence of partisan interference with commission procedures (such as the political influence that occurred in Michigan and Arizona).²⁰⁵ This type of procedural review is an area in which a court may be more comfortable operating in²⁰⁶ and might alleviate the concerns raised in the *Rucho* line of cases over a court's ability to provide substantive review of

¹⁹⁹ *Id.* at 497 ("Such litigation required 'the apolitical judiciary to engage in an inherently political undertaking.'" (quoting *Hall v. Moreno*, 270 P.3d 961, 964 (Colo. 2012))).

²⁰⁰ *Colorado Independent Redistricting Commissions*, COLORADO.GOV, <https://redistricting.colorado.gov> [<https://perma.cc/Q2MZ-RDX5>].

²⁰¹ See *In re Colo. Indep. Cong. Redistricting Comm'n*, 497 P.3d at 498 (noting the criteria includes a good faith effort to achieve mathematical equality between districts, compliance with the Voting Rights Act, the preservation of communities of interest and whole political subdivisions, the creation of compact districts, and thereafter the maximization of politically competitive districts).

²⁰² *Id.* at 503.

²⁰³ *Id.* at 505–15.

²⁰⁴ *Id.* at 516.

²⁰⁵ See Corasaniti & Epstein, *supra* note 140.

²⁰⁶ This is something the Colorado Supreme Court itself notes, pointing out that it was uncomfortable with the prior process where it often had to take up the job of drawing district lines following General Assembly deadlock. See *In re Colo. Indep. Cong. Redistricting Comm'n*, 497 P.3d 493 (Colo. 2021).

partisan gerrymandering claims.²⁰⁷ Such an approach, inspired by Judge Bazelon, is highly attractive in a context where the court has rejected substantive review of partisan gerrymandering claims; as an alternative, courts could police the procedures taken by IRCs and ensure IRCs are compliant with defined criteria for drawing maps.

2. *New York's Ex Post Approach*

New York, by contrast, provides a strong example of ex post procedural review that might also be attractive. As opposed to the conventional ex post review where maps are drawn and then substantive challenges are brought,²⁰⁸ New York's ex post review is framed as a procedural check. It offers judicial reinforcement to the institutional independence of New York's redistricting commission.

In 2014, New York voters approved an amendment to the state constitution that created an advisory commission²⁰⁹ and a "carefully structured process"²¹⁰ by which the state was supposed to draw maps going forward. Even with this new process in place, however, the Democrat-controlled state initially produced maps that were highly partisan. These maps would have created three Democrat-leaning seats, eliminated three Republican-leaning seats, and left the state with only one "highly competitive" seat.²¹¹ The maps were produced after the IRC stalemated, defaulting map drawing responsibility to the state legislature.²¹² While expectations were that these gerrymandered maps would be enacted²¹³ and would thus cement increased Democratic control in the state, the story diverges from what is often the case with backup commissions.

²⁰⁷ One of the reasons behind the failure to establish a substantive standard for reviewing partisan gerrymandering claims was the inherent discomfort the Court felt in reviewing the political decisions made by a state legislature. *See, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019) ("To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities.").

²⁰⁸ *See supra* Part III.

²⁰⁹ *See supra* Section II.A.

²¹⁰ *Harkenrider v. Hochul*, 197 N.E.3d 437, 440 (N.Y. 2022).

²¹¹ *What Redistricting Looks Like In Every State*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://projects.fivethirtyeight.com/redistricting-2022-maps/new-york/amended_democratic_proposal [<https://perma.cc/7PLA-JBQ4>].

²¹² *Harkenrider*, 197 N.E.3d at 440.

²¹³ *See* Nicholas Fandos, Luis Ferré-Sadurní & Grace Ashford, *A 'Master Class' in Gerrymandering, This Time Led by N.Y. Democrats*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/nyregion/redistricting-gerrymandering-ny.html> [<https://perma.cc/LK35-AJUU>] ("The new lines would shape races in New York for a decade to come, making Democrats the favorites in redrawn districts currently held by Republicans on Long Island, Staten Island and in Central New York.").

A group of New York voters challenged the maps, arguing that the legislature violated provisions of the state constitution that set forth the “procedures” the state must follow in creating new maps.²¹⁴ Specifically, they argued that the state constitution required that the IRC send two sets of maps to the legislature before it could draw its own.²¹⁵ The challenge eventually reached the New York Court of Appeals, which struck down the proposed gerrymandered maps and required that a special master draw “neutral” maps for the state.²¹⁶ It is significant that the court of appeals both struck down the legislature’s maps and then ordered an independent process for drawing maps. Further, and more to the point of this Note, the court’s review focused primarily on the *processes* taken by the IRC and the legislature and why these *processes* were insufficient under the state constitution.

The court first noted that the 2014 amendments were “procedural” and discussed the various processes the amendments enacted around redistricting.²¹⁷ Key to the court’s decision was the fact that these procedural amendments were meant to limit legislative control over the redistricting process both by requiring that the IRC submit two separate sets of maps to the legislature and by limiting the legislature’s subsequent review to “amendments” of the map, not “the wholesale drawing of entirely new maps.”²¹⁸ As the court makes very clear, “[t]he procedural amendments . . . were enacted in response to criticism of the scourge of hyper-partisanship, which the United States Supreme Court has recognized as ‘incompatible with democratic principles.’”²¹⁹

The court of appeals saw the 2014 constitutional amendments as enacting procedural protections which courts were to then enforce to counter potential legislative abuse.²²⁰ The court concluded that the legislature’s maps were “drawn with impermissible partisan purpose” and refused to let the maps be used even for the next election cycle.²²¹ An adoption of New York’s *ex post* model of procedural review by other

²¹⁴ *Harkenrider*, 197 N.E.3d at 442–43.

²¹⁵ *Id.* at 443.

²¹⁶ *Id.* at 455–56 (“[W]e endorse the procedure directed by Supreme Court to ‘order the adoption of . . . a redistricting plan’ with the assistance of a neutral expert, designated a special master, following submissions from the parties, the legislature, and any interested stakeholders who wish to be heard.” (citing N.Y. Consr, art. III, § 4(e))).

²¹⁷ *Id.* at 446–47 (noting the constitutional procedures redistricting in New York must follow).

²¹⁸ *Id.* at 447.

²¹⁹ *Id.* at 449 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 791 (2015)).

²²⁰ *See id.* at 451 (“[T]he drafters of the 2014 constitutional amendments and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature’s enactment of redistricting legislation.”).

²²¹ *Id.* at 454.

state courts would strengthen the otherwise powerless position backup commissions often find themselves in.²²² As in Colorado, the New York Court of Appeals viewed process as the avenue through which it would police gerrymandering, and evidence of procedural abuse is what allowed it to determine that the maps were indeed substantively unconstitutional: “[T]he enactment of the congressional and senate maps by the legislature was procedurally unconstitutional . . . leaving the state without constitutional district lines for use in the 2022 primary and general elections.”²²³

New York’s approach is one form of the “prophylactic” default rule discussed above. Though the review is *ex post*, its presence offers a prophylactic rule *ex ante* because the legislature is aware of potential judicial review should it attempt to subvert the process. The opinion, in effect, sees the court of appeals reinforcing the state commission’s default rule and appointing a special master to draw the state’s maps in the event of the legislature’s failure to abide by the state’s redistricting process. While this may be a narrow approach, limited to one state that *affirmatively chose* to enact a constitutional amendment strengthening redistricting procedures, it highlights the argument made in Section III.A; the bolstering of redistricting procedures, backed by judicial support, can create the prophylactic rules necessary to stifle partisan influence in the redistricting process.

C. Process-Based “Best Practices”

Sections IV.A and IV.B identify process-based approaches meant to develop “prophylactic rules” aimed at curing the institutional weaknesses IRCs currently exhibit. Colorado’s *ex ante* review operates as a judicial “preclearance”²²⁴ requiring that the state’s supreme court review the IRC’s processes to protect against abuse. Meanwhile, New York continues to rely on *ex post* review, but empowers the state’s court of appeals to hear claims brought by any New York citizen challenging

²²² For a discussion of the weaknesses of backup commissions generally, see *supra* Section II.A.

²²³ *Harkenrider*, 197 N.E.3d at 454.

²²⁴ *Cf.* Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 5, 79 Stat. 439 (creating the preclearance regime under which covered jurisdictions are required to either receive clearance from the Department of Justice or seek a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia confirming that any proposed changes to the state’s voting laws will not have the “purpose [or] . . . effect” of denying the right to vote on account of race before the change can be enacted); see also Adam B. Cox, *Designing Redistricting Institutions*, 5 ELECTION L.J. 412, 416 (2006) (arguing for “preclearance” of state congressional plans by a federal administrative institution prior to enactment).

proposed maps by the legislature “or [any] other body.”²²⁵ While the state constitution itself makes no mention of process, *Harkenrider v. Hochul*²²⁶ clearly indicates that the Court of Appeals views process as inherently tied to preventing partisan gerrymandering.²²⁷ These models for redistricting are where states must go after the *Rucho*-line of cases and the Court’s disdain for substantive claims of partisan gerrymandering—adopting procedural rules that reinforce the institutional independence of the redistricting process.

The Constitution and federal law simply do not provide the substantive protections needed to support claims of partisan gerrymandering. In light of these gaps, process-based prophylactic rules emerge as the best path forward in combating gerrymandering. Such rules offer the best method for courts to compare gerrymanders. This judicial backing offers a way for IRCs to ensure their processes are robust, protecting against the subversion discussed in Part III.²²⁸

Admittedly, there is an obvious collective action problem here—one addressed earlier through the example of New York’s attempt to undo its commission.²²⁹ The failure of the For the People Act itself highlights the difficulties with legislative reform. Gerrymandering allows politicians to avoid being responsive to their constituents, so even if constituents want to eliminate gerrymandering, the fact that they have been gerrymandered limits their ability to influence their representatives in this way. That being said, it is still important to think about avenues of reform: Would-be litigants should turn to process in challenging maps in light of *Rucho* and subsequent cases. Further, Sections IV.A and IV.B identify approaches states can draw on to create the procedural rules necessary to develop a needed norm of independence. Judicial enforcement of independent redistricting procedures can protect the underlying substantive right to vote and create powerful default rules.

In the end, we return to the argument made in the introduction: Process is both a classic argument and one that offers a simpler solution than the many failed substantive approaches. A generous reading of *Rucho* would say this is what Chief Justice Roberts is arguing as well.²³⁰

²²⁵ N.Y. CONST. art. 3, § 5 (“An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe . . .”).

²²⁶ N.E.3d 437 (N.Y. 2022).

²²⁷ See *supra* Section IV.B.2.

²²⁸ See *supra* Section III.A–B.

²²⁹ See *supra* note 125.

²³⁰ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (“Our conclusion does not condone excessive partisan gerrymandering. . . . [T]here is no ‘Fair Districts Amendment’ to the Federal Constitution. . . . [State legislation and constitutions] can provide standards and guidance for state courts to apply.”).

Rather than focusing on the task of evaluating maps once they are drawn, we should bolster the processes and structures by which maps are created, make commissions more institutionally robust, provide courts with an avenue of review they are more comfortable operating in, and define clear, prophylactic rules for when the process is abused. Though this approach may not be as attractive as an approach tackling the deep, substantive issues that this conversation has often been framed around, it appears more realistic and more effective. If nothing else, this Note attempts to be a call to action. It identifies a new approach to the issue of gerrymandering, one academic scholarship has not yet fully explored. Applying classic process-based arguments, this Note hopes to provide examples others can build on in thinking about methods of redistricting reform.

As it currently stands, federal courts play a very limited role in blocking gerrymandering and state commissions see their processes abused by both political parties. In this world, a turn to process is necessary, and Colorado and New York offer successful examples that other states ought to emulate. More importantly, however, just as in other parts of the law, redistricting is an area where process is normatively more preferable. Process can protect the underlying substantive right to vote and right to participate in the political process. *Rucho* may have left these substantive rights unprotected, but we can and should turn to process to resurrect protections.

CONCLUSION

Ultimately, the current approach to redistricting does not work. While states such as Arizona, California, Michigan, and Colorado offer examples of commissions working hard to maintain independence in map drawing, other states such as Texas, Ohio, and Illinois continue to produce maps with extreme partisan imbalance. States are locking in—and will continue to lock in—the status quo, and *Rucho* was a signal to state legislators that they can continue to gerrymander. Polling in 2017 and 2019 revealed that Americans across the political spectrum believe gerrymandering must be limited.²³¹ According to the *Rucho*-majority, this means legislators will respond by stopping the practice, and yet it continues to persist. It is clear that democracy is “malfunctioning,” and

²³¹ *Americans Are United Against Partisan Gerrymandering*, BRENNAN CTR. FOR JUST. (Mar. 15, 2019), <https://www.brennancenter.org/our-work/research-reports/americans-are-united-against-partisan-gerrymandering> [<https://perma.cc/4FOG-FATE>] (“Polls from both 2017 and 2019 showed over 70 percent of voters from all parties agree the Supreme Court should place limits on gerrymandering.”).

elected officials are incapable of solving this problem on their own; judicial intervention remains necessary.²³²

This Note offers a path forward. The proposed process-based solutions are currently in practice in some form throughout various states. Colorado and New York provide strong models for judicially-enforced, independent redistricting. Colorado with its *ex ante* procedural review of IRC process offers the best approach; however, the ultimate take-away is that procedural protections of the sort outlined in Professor Motomura's article and seen at play in both of these states will be all the more necessary in a world without substantive review of gerrymandering claims. Combatting the political instinct to gerrymander requires a multifaceted solution, and these solutions exist. Expanding them will allow the country to finally embody a bedrock principle: "[T]he people should choose whom they please to govern them."²³³

²³² See ELY, *supra* note 13.

²³³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2525 (2019) (Kagan, J., dissenting) (quoting Alexander Hamilton (citing 2 DEBATES ON THE CONST. 257 (J. Elliot ed., 1891))).