How to Win by Losing: The Effects of Gerrymandering and How it is a Threat to Democracy

by Franz Kieviet, Irvine Valley College
Mentor: Emily Liu

Abstract

Gerrymandering, the process of diluting one's vote by redrawing districts to pack or crack voters, has been an issue since the inception of the U.S preventing voters from holding their elected officials accountable, and leading to voter disenfranchisement. While partisan gerrymandering, moving voters on the basis of party affiliation, was previously actionable for most of the 20th century, in 2004 the Supreme Court removed all protections and then in 2018 ruled that federal courts should not get involved. Due to the 2004 ruling, the Republican State Leadership Committee devised the Redistricting Majority Project (REDMAP) to coordinate state legislature wins in states across the country with the intent to gerrymander the maps to make it easier for Republicans to win more elections. This ultimately proved successful where in many states Republicans won around 50% of the vote, but took over 60% of the state legislature. This allowed them to block popular backed bills like a minimum wage increase. But change does not seem to be coming anytime soon, and the two most effective solutions, using computer algorithms and independent councils, still face significant hurdles, but are necessary to help ensure that gerrymandering does not continue to plague our democracy.

Paper

In 2010, a handful of strategists from the Republican State Leadership Committee devised a new plan, Redistricting Majority Project (REDMAP), which would secure Republican victories for the next decade, save over 100 million dollars, and cost a mere 30 million dollars which is just a fraction of current senate elections. The plan was focused on winning just over 100 state legislature elections in 18 states where the legislature was fairly evenly split between the two parties. These state elections are often overlooked by voters, the media, and fundraising, and therefore tend to be cheaper and far less competitive compared to House elections. In 2011, these state legislatures redrew the districts for 190 congressional districts per state constitutions. With Republican controlled legislatures, districts can be redrawn to give their party a massive advantage, allowing them to sweep victories in future elections and therefore have far more power on the federal scale. REDMAP worked as planned, Republicans won control from Democrats in New York, Pennsylvania, Ohio, Michigan, North Carolina, Alabama, and Wisconsin (Daley xii-xix). REDMAP is one of the largest scaled and well-funded operations to take advantage of the redistricting process that occurs every ten years, following the US census. This redistricting process is still a necessary component for a democracy as it helps to ensure a balanced representation and allocate federal funding which needs to be adjusted for population changes. In the years following REDMAP, gerrymandering received national attention: gerrymandering is the process where districts are drawn to give one group an advantage over another. However, due to its complexity, little has been done to address this issue, making it critical to understand what gerrymandering is and how it works.

With the maps drawn following each Census being used for the next ten years, partisan gerrymandering, where districts are drawn to help one party, can threaten democracy as it may not accurately portray the electorate. The intent behind representatives is to have someone who can make decisions on behalf of the district that they represent, which is obstructed when districts are gerrymandered. To illustrate what

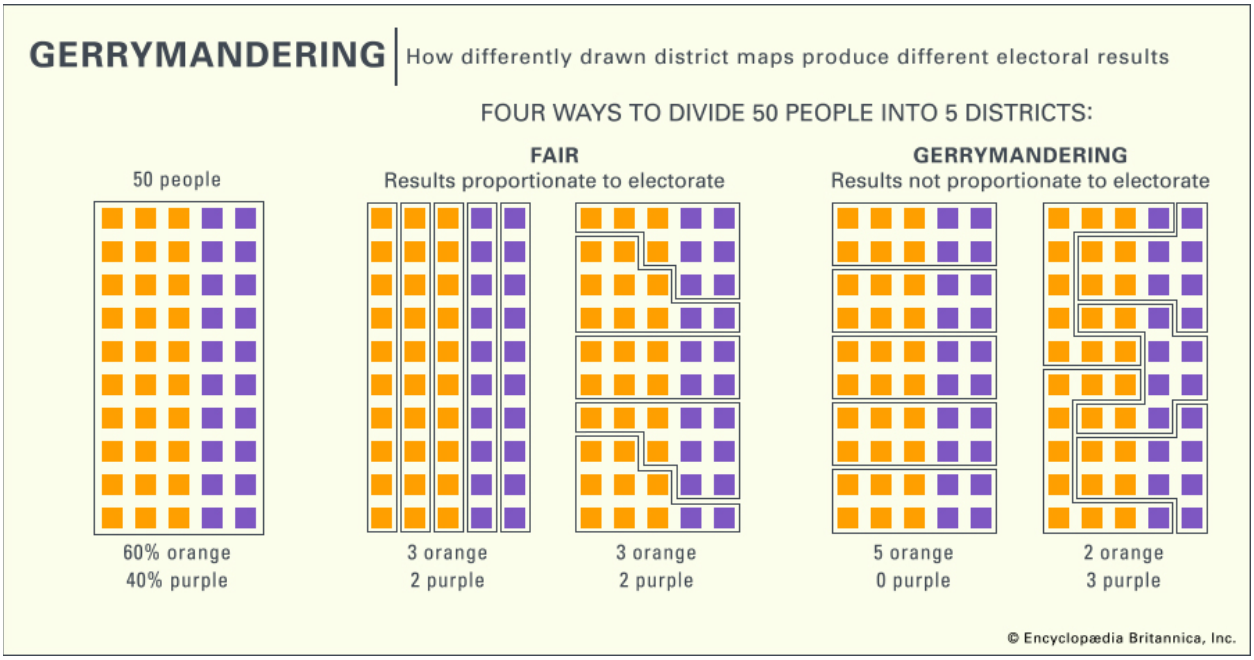

Figure 1: This diagram uses orange and purple to represent political parties to show how districts can be cut to give an advantage to one party. "Gerrymandering." Britannica Academic, Encyclopædia Britannica, 11 Oct. 2019. Academic-eb-com.ezproxy.ivc.edu

The second and third drawings create districts where the number of representatives elected is proportional to the voting population, and elections in these maps are fair as no party is given an unfair advantage. However, the last two maps are gerrymandered to give orange control over all districts instead of 60% to match its electorate. The second gerrymandered map is more common where districts are drawn to snake through the region to give the minority control. This map also creates minority majority districts where the minority is packed into one district to give an advantage to the majority in the surrounding districts. The map that a state will use is designed and selected by the party that is in control of the legislature. Gerrymandering can also be bipartisan where both parties agree to create gerrymandered districts, often done to protect incumbents. And rather than using political affiliation to cut up districts, racial gerrymandering uses the race of the voter to affect election outcomes. Regardless of the basis that is being used to divide the region, gerrymandering can have far reaching effects.

Partisan gerrymandering—when state legislatures redraw districts to pick their voters to help give their party less competitive races and advantages in future elections—has been allowed to continue because of vague rulings from the Supreme Court. Partisan gerrymandering is a threat to democracy because it prevents voters from electing representatives who share their views and from holding their elected officials accountable, which together lead to lower voter turnout. In addition, gerrymandering can be used to help dilute racial minority votes which can change the outcome of elections. In spite of these consequences, some experts argue that creating racial minority majority districts helps ensure that minorities are properly represented. Experts also argue that creating competitive districts may be necessary to help the government run smoothly as it protects incumbents.

Although most Supreme Court rulings have addressed the fundamental issues with redistricting to ensure equal representation, these rulings do not go far enough to address partisan gerrymandering, and more stringent rulings that directly address this issue are needed. The majority of Supreme Court rulings over the past 80 years have centered around equal representation on the basis of population size. It was only within the last few decades where the Supreme Court has taken additional steps to address partisan gerrymandering. In researcher Mikayla Foster's paper, "'Gobbledygook' Or Unconstitutional Redistricting?: Floterial Districts and

Partisan Gerrymandering," which was published in the Boston University Law Review, discusses the ways that one could gerrymander a district while following the precedents set up by the Supreme Court based on these latest rulings. In her paper, Foster refers to a concurrence by Supreme Court Justice Kennedy where he acknowledges that "complying with a traditional redistricting principle 'cannot promise political neutrality when used as the basis for relief'" (12). His concurrence comes from a pivotal case, where the court decided not to rule on whether a district was gerrymandered and defaulted to the "traditional redistricting principles" which include the precedents that the court has established before, like how each district must represent roughly the same number of people. While these fundamental principles are necessary for equitable representation, Justice Kennedy points out how these do not go far enough to ensure that the district has not been gerrymandered. This idea can be seen in the two gerrymandered maps in Figure 1 as both represent the same number of people but are gerrymandered. While each district has the same number of voters which is fundamental as it helps ensure equal weight for each vote, these principles do not take into account the political affiliation of voters, which state legislatures use to gerrymander their districts. If the Supreme Court took more active steps to try and limit partisan gerrymandering, elected officials would not be able to pick their voters and many states would not have massive disparities between the electorate and their representatives.

	Republican Percentage of Votes	Republican Percentage of Seats	Republican Number of Seats	Democratic Number of Seats	Republican Seat (%) – Vote (%)
Michigan	47.3	64.3	9	5	17.0
N. Carolina	49.1	69.2	9	4	20.1
Pennsylvania	49.2	72.2	13	5	23.0
Wisconsin	49.2	62.5	5	3	13.3
Virginia	50.9	72.7	8	3	21.8
Ohio	52.1	75.0	12	4	22.9
Florida	53.0	63.0	17	10	10.0
Totals	50.4	68.2	73	34	17.8

Figure 2: The share of Republican votes compared to the number of seats that were won. Engstrom, Richard L. "Partisan Gerrymandering: Weeds in the Political Thicket." Social Science Quarterly (Wiley-Blackwell), vol. 101, no. 1, Jan. 2020, pp. 23–36.

For example, following the 2012 elections in Pennsylvania, Republicans won 49.2% of the popular vote, yet won 72.5% of the legislature which is a veto proof margin. Or in North Carolina where Republicans won just under a majority with 49.1% of the total vote, but received 69.2% of the vote. And this was the case for Michigan, Wisconsin, Virginia, Ohio, and Florida, where Republican have a disproportionate share of the seats (Engstrom). The consequences of misrepresentation can be huge as it can prevent legislation that a majority of people want from being passed. When the minority wins by veto proof margins, they do not need to have control of the governors and it means that a party that did not win the majority is able to have pretty much full control over the legislative process without checks of the majority. In addition, this makes it difficult for the majority party to have a say in the redistricting process as the minority will update their winning maps to help continue their stay in office. However, the effects of gerrymandering is not just limited to popular legislation

getting blocked, but with these less competitive districts, voters are not able to hold their representatives accountable.

Through partisan gerrymandering, the majority elected minority ignore the voices of voters and answer to the party platform, rather than their constituents. When the minority has control over the legislature, they are able to control the priorities, and since they are able to get elected without a majority support across the state, they will not appease the majority, and will push their own bills through. A 2017 report from the Center for American Progress, a nonpartisan organization that focuses on policy initiatives, focused on the effects of the gerrymandered districts in Wisconsin, Virginia, Rhode Island, Michigan, Ohio, and North Carolina. The report outlines several examples where voters have overwhelmingly supported policies, based on polling or ballot initiatives, that were blocked by the majority elected minority. One notable example is in Wisconsin where polling showed that 75% of voters supported a minimum wage increase, and all 13 districts that voted on it by over two-thirds margins, were blocked by a new law that prevented local regions from passing their own minimum wage increase (Kennedy and Corriher). In this example, voters were not able to hold their representatives accountable when they overwhelmingly supported minimum wage increases, so they tried that they work more locally to pass the policies that they wanted. These minimum wage increases, and many of the other initiatives that were blocked by the majority elected minority, would help the poorest Americans the most. But even these efforts were blocked leaving a majority of voters stuck with representatives that they are not able to hold accountable and without policies that they wanted. Because of gerrymandering, the minority is able to make policy decisions without very many repercussions. Voters who live in a gerrymandered district are less likely to want to vote because they do not believe that they will be able to do anything against a system that is warped against the will of the true majority.

Knowing that one's vote will not change an election's outcome because they live in a gerrymandered district is more likely to disenfranchise the voter, and further solidify a victory for the party that represents the minority. One of the most common methods to measure the effects of partisan gerrymandering on voters is by using the efficacy test, which "represents the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what [they] needed to prevail... The efficiency gap essentially aggregates [gerrymandering's effects] into a single, tidy number" (Stephanopoulos and McGhee 4). These numbers are able to measure how gerrymandered a district is because it is able to show the two major forms of gerrymandering where all the support for one candidate is placed in a few districts and the support of the opponent is spread out and condensed into just a few districts. Referring back to Figure 1, the efficacy test would measure the extra orange voters that were not needed to win in the fourth map, and the purple votes that were essentially wasted as the purple candidate had no chance in each of those districts. In Figure 1, the final map best demonstrates how voters can be packed into a district, to create districts like the ones on the far left, or split, which is often called cracking, into other districts like the ones on the right. This process of packing and cracking, is measured in the efficacy test, and helps readers see how gerrymandered a district is. The efficacy test has also shown how racial minorities living in the United States have been packed and cracked through racial gerrymandering.

With racial gerrymandering, minority groups have been split across many districts in attempts to suppress their vote, allowing their representatives to ignore the issues that affect these groups. Traditional racial gerrymandering focused on how to disenfranchise minority voters, modern racial gerrymandering builds off of this and has become more partisan gerrymandering as minorities tend to reliably vote Democratically. In a 2017 ProPublica article, discuss how an upcoming Supreme Court case on partisan gerrymandering, are really cases of racial gerrymandering as "ahead of the 2016 election, legislators shifted over a thousand African-American and Hispanic voters out of Georgia House District 105, one of the most contested seats in the state, to a majority-white neighboring district with an uncontested seat. The Republican incumbent in District 105 won by fewer than 250 votes" (Pierce and Rabinowitz). By moving a thousand minority voters to a largely white

district, legislators were able to crack the minority vote and dilute the power that they would have had. In addition, because the margin of victory was less than a quarter of the group that was moved, this potentially could have swayed the results of that election. And by being placed in the second district, their voters were essentially wasted as they had no significant effect on the results of that election. Although this is a really blatant example of representatives picking their voters, and diluting the power of minorities' votes, there is a lot of debate that surrounds packing racial minorities.

While the effects of splitting racial minorities dilute their vote, many experts argue that creating a racial minority majority, will help amplify minority votes. The intention behind creating these districts is that rather than having minority groups being spread across several districts their votes could be consolidated to help ensure representatives who will reflect their views. A 2004 study published in The American Political Science Review, focused on Latino majority minority districts in California and how it affected voter turnout of Latinos across several elections for several positions. Compared to other districts, Latinos living in these minority majority districts "vote more when in a majority-Latino district, contrary to the expectations of those who expected or feared minority demobilization" (Barreto 10). Many experts feared that the Latino turnout would be lower because they feel like their vote has less impact because there are so many other Latino voters. However, living in these districts seems to empower these voters as they do not feel like their votes would be wasted if their vote was split across several districts. In addition, voters in these districts are more likely to elect Latino representatives, as there is more enthusiasm in their elections. These representatives will be far more responsive to their Latinos' needs, because they make up such a large sector of their voter body, which would not be the case if they were split. However, many other experts point to what is happening in the surrounding districts as their voice is diluted. In a 2016 Washington Post article, reviewed how these minority majority districts do more harm to racial minorities than good as "these districts, rather than giving African Americans more political power, might have actually started to deprive them of it. Majority-minority districts, by concentrating the minority vote in certain districts, have the unintended consequence of diluting their influence elsewhere" (Soffen). By packing a minority group into one district, the representatives in the surrounding district will not face any pressure to do things that would help these minority groups. While racial minorities will get a district where they will be able to have a representative that will advocate for them, it can be worse than having multiple representatives who are forced to be supportive of their needs. In addition, many of the minority votes may be wasted living in a minority majority district. While many experts continue to debate if racial majority minority districts help or hurt these groups, others argue that it may be really needed as it protects incumbents.

Many experts debate the effects that gerrymandering has on bipartisan gerrymandering and whether it is vital to keeping our government running smoothly. Becoming increasingly more common, bipartisan gerrymandering is where both parties work together to have maps to protect some of their seats. Published in 2004 as a foreword in the Harvard Law Review, New York University law professor Richard Pildes notes that bipartisan gerrymandering is a different kind of threat to American democracy. Congressional elections in the wake of the 2000 round of redistricting were the least competitive of any general elections in United States history, with redistricting a central reason" (34). Through bipartisan gerrymandering, both parties came together and drew maps that would protect their incumbents. This may be really important as it helps protect party leadership, which helps guide the newly elected representatives. Without this advantage, every two years will cause the entire party leadership to change. In addition, not having to run an election allows many incumbents to continue writing bills. However, this causes issues as it prevents voters from being able to hold their representatives accountable. Following the January 6th capital insurrection, voters across the country wanted to hold the representatives who instigated the attack and supported the baseless elections claims, but many realized that they would not be able to. One example, representative Jim Jordan who supported these claims, comes from a clearly gerrymandered district but the "outlines of Ohio's Fourth Congressional District have left Mr. Jordan, like scores of other congressional and state lawmakers, accountable only to his party's

electorate in Republican primaries" (Epstein and Corasaniti). Coming from these gerrymandered districts has prevented any real contest in the general election, so representatives would have to lose the primary which is extremely rare. While protecting incumbents brings many benefits and allows things to run smoothly, the lack of accountability allows representatives to engage in extreme beliefs. However, while the individual candidate may not be held accountable, it ripples through the party as voters may hold the party accountable instead of the representative. Both parties benefit and use bipartisan gerrymandering to help protect incumbents and party leadership, but it comes at the cost of holding the individual candidate accountable.

While it is clear that the effects of partisan gerrymandering are dangerous to the U.S. democracy, it is important to understand the events that shaped the current climate around gerrymandering today. The specifics on how this apportionment and subsequent redistricting should be carried out, is vaguely outlined in the U.S. Constitution where each state legislature has the power to act as "the judge of the Elections, Returns and Qualifications of its own Members" (U.S. Constitution Art. I, Sect. 5). This clause effectively gives the state legislature the power to carry out this process in whatever way they see fit and gives them the power to oversee the fairness of their own redistricting. Given the vagueness of the Constitution, the Supreme Court is able to interpret the meaning of this clause, and if a state violates other parts of the Constitution, the Court is able to step in to protect voters.

Partisan gerrymandering and its anti-democratic effects have prevailed because of past failures of the Supreme Court to set clear limitations on regulating gerrymandering; instead, the Court moved in the opposite direction by removing protections. With the 1986 case Davis v. Bandemer, the Supreme Court established clear grounds to challenge partisan gerrymandered maps, however in the 2004 case Vieth v. Jubelirer the Court removed this precedent. However, with this case, clear guidelines for what is necessary to identify partisan gerrymandering would need to be established. Following this case, legal experts and academics developed new methods of quantifying gerrymandering, like the 2016 Efficiency Test, but the Supreme Court refused to use these methods as a way to quantify partisan gerrymandering cases, thwarting future legal challenges. Without a clear way to regulate partisan gerrymandering, the Supreme Court ruled in the 2019 case Rucho v. Common Cause that federal courts could not determine the legality of these redistricted maps. Over the span of 15 years, the Supreme Court failed to adequately establish grounds that partisan gerrymandering cases can be brought on, thereby stripping the legal protections against partisan gerrymandering and opening the door for even more extreme cases of partisan gerrymandering.

Although the 1986 case, Davis v. Bandemer established grounds that partisan gerrymandering cases can be brought under, which were similar to the basis for racial gerrymandering cases, the Supreme Court later reversed this ruling in the 2004 case, Vieth v. Jubileer, and failed to provide new grounds that these cases can be brought under. Under the ruling from Davis v. Bandemer, partisan gerrymandering cases can be argued in federal courts under the Equal Protections Clause, a section of the Fourteenth Amendment where all Americans should receive the same privileges or penalties from the law. For future partisan gerrymandering cases, plaintiffs would need to show the new district boundaries would "degrade a voter's or a group of voters' influences on the political process as a whole" (Davis v. Bandemer 2). Being able to show that a set of gerrymandered maps has decreased the power of a vote, would violate the Equal Protections Clause as other voters are receiving more of a say with their vote, and therefore are receiving more privileges from the law. In gerrymandered districts, the vote of the true majority could be rendered insignificant if the maps are drawn to give the minority preference, so using this metric is a Constitutionally viable way to protect voters from gerrymandering. However, being able to show that a population's vote has less of an influence can prove difficult, but it is not impossible as it has been used in racial gerrymandering cases for years prior. Dozens of partisan gerrymandering cases were challenged using the basis that Davis v. Bandemer established, until the 2004 case Vieth v. Jubelirer. This landmark case effectively totally overturned Davis v. Bandemer as the Equal Protections Clauses could no longer be used as grounds for a partisan gerrymandering case. The Court's reasoning for this stems from difficulties proving that a voter's influence was weakened and that it was the

result of how the maps were drawn (Li, Michael, et al.). Through this ruling the Supreme Court overruled the precedent that protected voters from partisan gerrymandering cases as no new basis for future partisan gerrymandering cases was presented. Considering that this ruling came at a time where computers were becoming far more accessible and powerful, the Supreme Court, through this ruling, has created the perfect environment for partisan gerrymandering to thrive. With better technology and few rules, parties would be able to draw some of the most deliberate maps to suppress the power of the opposing parties. While Vieth v. Jubelirer removed many of these much-needed protections, Justice Anthony Kennedy left the door open for new protections that could be placed in future cases. In the majority opinion, Justice Kennedy states that while partisan gerrymandering cases may be not brought under grounds of a Equal Protections violation, Vieth v. Jubelirer does not fully prevent legal challenges for future partisan gerrymandering cases. In addition, he writes future gerrymandering cases would need methods that show the intent to gerrymander and that these gerrymandered maps had an impact on voters (Vieth v. Jubelirer). While this addition to the ruling created the potential for new protections to return against partisan gerrymandering, the need for these methods to show the intent and effect of the new maps is very vague, making it difficult for academics to develop effective new methods to quantify gerrymandering. In addition, the standards used to evaluate the methods can become highly subjective. With this ruling, methods to quantify gerrymandering and its effects drew heightened attention, and these methods would be needed to reestablish protections against partisan gerrymandering.

For the following decade, legal experts and academics began to devise and review new methods to quantify gerrymandering, but the Court refused to incorporate any of these methods as many were brought before the Supreme Court following the 2010 redistricting cycle. Among these new methods, the Efficiency Test, quickly became the most popular because of its simplicity as it compiled a complex process into one single number that can be used to compare multiple districts. The 2017 article, “Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws,” published in the University of Chicago Law Review, measures how gerrymandered a district is by looking at the number of wasted votes which is where a vote “either was superfluous insofar as it was cast in a district that the party already won without need of this particular vote or was cast in a district that the party did not win and thus did not contribute to a victorious… [The Efficiency Test] is a simple and elegant way to capture the evil of gerrymandering, because a gerrymander is designed precisely to cause an opposing party to waste more of its vote” (669-670). The Efficiency Test measures the votes that the winning candidate did not need in order to win the election, and by design partisan gerrymandered districts will have a much higher percentage of wasted votes. This test is really effective since it easily calculates the efficiency gap for all districts in a state, allowing experts to then take that number and compare it to previous elections in that state or compare it to computer simulations where districts can be randomly drawn. With these comparisons, one is able to show the intent to gerrymander as being able to show that one party is winning by much larger margins than it should as well as showing the effect of the gerrymander through the number of wasted votes. With a method as simple as the Efficiency Test, plaintiffs are able to clearly show the intent and effects that the Supreme Court had outlined in Vieth v. Jubelirer. Within academic circles, this method drew popular support and was used to argue that maps in Wisconsin had been partisan gerrymandering following the 2010 redistricting cycle. While previously being a very split chamber, the final maps that had been proposed by the Republican controlled legislature, effectively ensured that Republicans would be able to maintain control in each election thereafter. These maps were challenged in Gill v. Whitford, where the Supreme Court had ruled that the “plaintiffs lacked standing because they failed to demonstrate how statewide measures of partisan fairness such as the efficiency gap prove that individual voters have suffered harm in a particular districting plan” and upheld the Wisconsin maps that to many had been partisan gerrymandering (Rush 53-54). Court argued that this concise number was not able to show how the individual voter is affected by gerrymandering, making it harder to find a method that could adequately show effects and intent. While to academics, the effects of the wasted votes are clear, the Efficiency Test provided too much of an simplified view which makes it difficult to show the specific individual impact. While

other methods exist, they can be very expensive and complicated, making it difficult to create a clear case of partisan gerrymandering as each layer that is added to a method brings on additional scrutiny and research to ensure that it is still accurate. While rejecting this method, the Supreme Court still failed to set clear expectations of methods or measures that would be needed to accurately show gerrymandering. This forced experts to effectively take shots in the dark and wait years till a case reached the Supreme Court to see if their method is able to meet the vague standards that the court had previously set. Since Vieth v. Jubelirer, the Supreme Court has not given clear and precise guidance for what would be needed to show gerrymandering, which culminated in a landmark Supreme Court Case in 2019.

Following many years of failed cases to establish methods to quantify gerrymandering, the fate of the protections that would be provided against partisan gerrymandering culminated in Rucho v. Common Cause, where the Supreme Court decided that courts would no longer take gerrymandering cases, thereby failing its duty to determine the validity and constitutionality of actions by legislatures. This 2019 case was the combination of two other partisan gerrymandering cases that looked at gerrymandering by Democrats in Maryland, and by Republicans in South Carolina. By combining cases of partisan gerrymandering from both parties into one case, the Supreme Court focused Rucho v. Common Cause on what metrics would suffice, by reviewing “the difficulties that the Supreme Court has faced in deciding partisan gerrymandering cases compared to racial gerrymandering cases. The majority specifically noted that the ‘central problem’ is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is ‘determining when political gerrymandering has gone too far’” (Nickel 230). In order to determine the guidelines for partisan gerrymandering, the Supreme Court reflected on what they had used as a basis for a racial gerrymandering case and found that they had troubles deciding where gerrymandering made it too difficult for the opposing party to win. However, any form of gerrymandering is done to decrease the value of the vote of certain groups, whether that be a racial minority group, or a political group, and the Supreme Court should focus on ensuring that votes carry the same weight. With this ruling the Supreme Court effectively decided that it cannot figure out how to quantify this problem, and it no longer wants to act as the judge in these cases. Coming just a few years after the Efficiency Test was struck down, it is clear that the Supreme Court has not given academics and legal experts a strong chance to devise a method that could show both intent and effect. In her dissent, Justice Elena Kagan notes that this ruling is a failure of the Supreme Court as “the majority declines to provide any remedy. For the first time in this nation’s history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply” (Liptak). Justice Kagan notes that because the court was unable to agree on a method to quantify partisan gerrymandering, it has failed its duty to the county as the court agrees that it is a problem, but will not provide a solution. Noting that this is the first time that this has happened further demonstrates how this a failure as the court normally decides what is unconstitutional and why, but in this case, they have only said that it is unconstitutional. However, the court has not allowed enough time to find solutions as with new technology, new ways to measure gerrymandering may be possible. If the court set a precedent where partisan gerrymandering is unconstitutional, like it has done with racial gerrymandering, the court would not need to set a legal limit. However, with this ruling, new debates have begun regarding the interconnectedness of racial and partisan gerrymandering given the racial makeup of both major parties. Published in the Columbia Law Review, researcher Sara Tofighbakhsh explores partisan gerrymandering through the lens of racial gerrymandering because when Rucho v. Common Cause closed “the door on an independent constitutional limit to partisan gerrymandering, this familiar dynamic—a claim that legislators unconstitutionally sorted voters on the basis of race, a defense that voters were sorted not on impermissible racial grounds but on the legitimate basis of party, and courts choosing one motivation over the other—is the now-unavoidable pattern of gerrymandering case” (1887). Many experts are arguing that if there is a gerrymandering case, whether or not the intent to racially gerrymandered is present, so long as the results are the same as racial gerrymandering, the maps must be redrawn. Experts argue that this logic should be applied to partisan gerrymandering, it may

be possible to argue that racial gerrymandering may exist when the intent was to gerrymander a district. Because the effect of cases made for racial gerrymandering when the intent is partisan is not as significant as the results if they were racial, loops back to the original argument between how much is too much. However, this is still a failure by the Supreme Court since even though these two types of gerrymandering cases are similar, they should not be given the same treatment.

While the Supreme Court created protection against partisan gerrymandering in Davis v. Bandemer, the Supreme Court has continued to fail to establish these protections following its ruling in Vieth v. Jubelirer. Following the ruling in Rucho v. Common Cause, the Supreme Court removed all protections against this practice. This is especially dangerous as the U.S. enters another redistricting cycle, and with even less protections than there were in 2010, there is a high chance that partisan gerrymandering could be at its worst. And with public confidence in the Supreme Court starting to fall, it is critical that the Supreme Court establish these protections, or new legislation is passed that is clearer. While gerrymandering is an old problem that clearly is dangerous to the U.S. democracy, there are several popular solutions that would really address these problems.

The two solutions that receive the most focus from legal and academic experts is to incorporate algorithms to help draw nonpartisan maps and to give this redistricting power to independent councils to generate nonpartisan maps. Given the new advancements in computing, algorithms can be optimized for “the creation of new districts based on equal numbers of voters and compactness. This method relies heavily on compactness as the ultimate goal in creating a district, ignoring the current stipulation that districts focus on ‘communities of interest’”(Payne-Riley). These algorithms would be able to remove interests of certain groups to gerrymander maps, while meeting the requirements outlined in the Constitution. In addition, using these maps, experts can input previous election data to determine what the results would be to ensure that these maps did not accidentally get drawn to favor one party over another. Recently, using independent councils has received renewed coverage due Section E in the 2021 H.R. 1- For the People Act, which would establish independent councils in each state that would include either equal representation from each party, or citizens who do not identify with either party to draft the maps. This policy ensures that plans don’t help or hurt certain parties, abide by laws preventing racial gerrymandering, and would encompass members from both parties and independents (Sarbanes). While it may seem that gerrymandering is a really large issue that is so deeply rooted in our government that it cannot be solved, experts have studied which remedies would be most effective.

Computer algorithms address the root cause of the problem as they have been shown to have removed human bias from the map making process. While these algorithms are yet to be implemented into practice, studies have shown to work extremely well at removing human bias and intent compared to human drawn maps. These algorithms are not widely used due to issues with feasibility, as these computers will have trouble picking the best map and drawing with all the unique state rules. Like computer algorithms, independent councils also lead to maps without human bias because the design of these councils ensure that it is nonpartisan and transparent. However, to stay nonpartisan, these councils require members to belong to certain political parties which could lead to potential legal ramifications as it can be seen as giving a preference towards one person for their political affiliation. However, these councils have been organized in several states, like California, which shows that even with these potential legal challenges, independent councils remain a viable solution. Since both solutions have substantial flaws, the best strategy to fix gerrymandering would be to combine these two solutions to allow independent councils to judge the computer-generated maps that would be drawn which can also help loosen strict rules on the council member’s party affiliation.

In order to address the fundamental problem that gerrymandering creates, experts focus on the capabilities of these algorithmic programs and how they are able to draw nonpartisan maps that are fair and how they can be used to compare these maps to each other. In their research paper, “Calculated Democracy—Explorations in

Gerrymandering," statistic researchers Davis McCune and Samuel Tunstall developed an algorithm that would randomly decide which district to add a voter that is a reasonable proximity, as the use of "random choice to add voters to districts, [allows them to] consider it nonpartisan. [They then] ran this method 1,000 times and computed the efficiency gap for each run" (4). For voters that live on the boundary of a district, the algorithm would randomly place the voter in one district over another, which is nonpartisan as they are not making the decision based on the voter's party affiliation, and then comparing the efficiency gap, a popular method to test for gerrymandering, of each map. Through these algorithms, researchers are able to draw thousands of maps with relative ease and speed, which provides plenty of options when trying to decide which maps they would theoretically recommend. In addition, by calculating the efficiency gap for each district, they are able to ensure that their computer did not randomly create gerrymandered districts. With these two features combined, researchers would be able to graph the efficiency test for each map and pick the maps that land in the middle of this distribution. However, the most crucial feature of this algorithm is that it randomly places voters in each district to remove a human intent from the map drawing formula. While the study focused on using this algorithm on hypothetical *daa*, many worry how one can check the validity of these maps. One example of these methods published in the Stanford Law Review in 2016 attempts to demonstrate the intent to gerrymander a district using computer simulations to see "if a given state's popular House vote were split into differently composed districts carved from the same statewide voting population, what would its congressional delegation look like? The answer allows the definition of a range of seat outcomes that would arise naturally from districting standards that are extant at the time of the election in question" (Wang 27). These simulations would take the state's voter data and would randomly draw thousands of possible maps that could be used in an attempt to predict all the possible outcomes of that election had the maps been drawn differently. Without an intent to skew an election, these results from the simulation help show what results should be expected from an election and how common they are. Then experts can compare the maps in question to the results of these simulations, and if the real results don't fall within the most common outcomes, it is reasonable to assume that these maps had been gerrymandered. This method can be an effective way to measure gerrymandering as it is able to account for how voters are spread out across the state to draw the maps. While these algorithms are able to draw districts that address the root cause of the issue, many worry that since it is being drawn by humans that new bias could be introduced.

One concern around these computer-drawn maps is that the bias from the programmer could persist through the program, but when compared to maps that are drawn without partisan bias. In Daniel Magelby, and Daniel Mosesson's research article published by Cambridge University Press, used commonly used electoral information to compare their algorithm which would "partition the space into three districts with the populations that deviate no more than 10% from the population parity… for the comparison between the distribution received by the algorithm propose[d] and the true distribution are not exactly equivalent… yield a test statistic of 0.1587" (10). In this experiment, researchers created districts such that the popular difference between each district was no less than 10 percent and later 1.5 percent before comparing the maps from a well cited paper and found that the difference between the two was so low, 0.1587, that it was negligible. This experiment is able to show no bias has made its way into the algorithms, making this a really effective solution as this mapmaking process has removed the intent to dilute the vote of one group. And this shows that when compared nonpartisan drawn maps, these algorithmically drawn maps performed just as well. However, while this solution is able to produce maps without bias, many argue that they are still impractical to use.

Due to the complexity of how these algorithms work and the extensive number of unique laws in each state, many argue that this solution is too impractical. Focused on the roadblocks that these mapmaking algorithms will face, researchers Micah Altman and Michael McDonald's article published in the Duke Journal of Constitutional Law & Public Policy, notes that even for "a modest-sized jurisdiction there are an infinite number of ways census blocks can be assigned to districts. Across this infinite terrain, there are many peaks and valleys that define a redistricting plan that has equal population and contiguous districts minimizing the number

of split counties” (14). Because these computers are able to draw an effectively infinite number of maps, they are not able to pick which map is considered the best map. In addition, human drawn maps are able to easily consider geographical issues like valleys or county borders, but this becomes very difficult for computer algorithms. These additional challenges in how computer algorithms could draw new maps, make this solution less practical as additional layers to account for these issues can overcomplicate the program, which could make it difficult for state officials to monitor the redistricting. In addition, while having so many options may seem really helpful, it can be extremely difficult to pick which maps to use, making the redistricting process longer than it was before. However, each state also has its own rules and preferences for how it wants to draw its boundaries, which is a factor that is often overlooked when discussing these solutions. Discussed in the article “Our Democracy Is Broken. Why Can't Technology Fix It?” published in Engadget, one of the leading technology news organizations, these computer algorithms need to account “number of details that must be overcome as well. For instance, every state has its own rules for how maps are drawn” (Tarantola). In order to build these algorithms, each state would need to employ legal experts and computer scientists who together would have to each build these algorithms from scratch to address all of these rules. This sets the stage for future issues as lawmakers could pass new rules for how to draw districts, which could allow them to indirectly gerrymander. These huge upfront costs and issues in standardizing these algorithms across the country makes this solution less feasible as sustained national focus is needed to ensure that these algorithms are rolled out correctly. While these programs work really well in theory, they struggle to meet the complicated real-world requirements, but members of independent councils can provide the deep institutional knowledge that these programs lack.

Being nonpartisan, transparent, and free from control from the legislature are the most important features that allow independent councils to address the root causes of gerrymandering. The Committee for Economic Development proposed a plan for how these independent councils should be organized to help ensure that they target the cause of this issue, and remove bias. They note that these committees should have an equal number of members from both parties and from another party, and exclude elected officials, and those planning to run for office. And they should be open and transparent to the public and held accountable by the courts (Committee for Economic Development). These features would help ensure that the body is able to create maps without bias as no one party will have control over the map making process, so all maps need to be supported by other members from the opposing party, or from neither party. In addition, these restrictions on who can serve help ensure that elected officials do not have the maps drawn to protect their current or future seats. Finally, by being open to the public, this process is open for all to see and citizens will be able to voice any concerns that they may have, and which with the courts, will help keep the council accountable. While there are many finer details outlined in both this report and in H.R. 1, researcher James Ruley argues that the most important feature of these councils is that if state legislatures attempt to strike down a plan designed by the independent counsel, that they would need to “create a report showing any reasons for rejection if the redistricting plan is not approved” (32). One of the biggest worries is that if these councils are established, the state legislature would refuse to approve any maps that do not help their party. However, this requirement would force a discussion and would show the public if the majority is trying to game the system. In addition, by going past a simple yes or no vote, direct action can be taken on these reports and alternative means can be taken to ensure that fair maps are used. This critical feature will ensure that one party is not gerrymandering as the maps proposed by these councils would need approval form multiple parties, and its passage through the legislature has additional protections to ensure that it is able to pass. Independent councils are able to target the root cause of gerrymandering by removing human bias.

These councils have also been incorporated in several states across the US, demonstrating their feasibility, but there are potential legal concerns that may arise. In a policy essay published in the Harvard Journal of Legislation, Alan Lowenthal, author of legislation that introduced independent commissions in California, outlines how the state has taken additional steps to help ensure balance between the two competing parties

where “five commissioners come from the largest political party, five from the second largest, and four from neither of those two parties. The chair must be appointed from the last group. In addition, California commissioners are prohibited from participating in overt political activity. Both states’ commissions require that all of their meetings be transparent and open to the public, with ample opportunities for public input” (18). Having been used in California for almost 20 years, these councils have removed much of the political pressure. In addition, the council in California is designed to include all the crucial properties, like members from both parties and transparency, that have shown that this solution is plausible. However, these councils in California are relatively new and legal challenges may still be working their way through the courts. Since these councils only take a certain number of members from each party to serve, it could potentially set up legal implications that really weaken these councils. Published in The University of Chicago Law Review, researcher Andrew Maxfield dissects the potential legal roadblocks that may arise as “plaintiffs will likely push courts to evaluate the challenged provisions under a subset of the Supreme Court’s political association doctrine: the ‘Patronage Cases.’ Employing these cases would compel a court to apply strict scrutiny to redistricting commissions, which would require the state to provide a compelling state interest for these provisions and require that the law be narrowly tailored to achieve that interest” (16). Patronage Cases are cases that involve hiring people based on their political party which some feel like benefit certain people over others because of their affiliation to a party. To avoid these legal issues, lawmakers need to be extremely careful with how they word the rules while ensuring that the council is nonpartisan enough so that it can create unbiased maps. These concerns put these councils in a really tricky position, as lawmakers have to walk a really fine line. Although these councils have been implemented in states like California, their future is at risk due to legal concerns.

While both solutions have their flaws, when combined these solutions would be really effective in managing these issues. Wendy Cho and Bruce Cain’s paper, “Human-Centered Redistricting Automation in the Age of AI.” published in the American Association for the Advancement of Science was one of the first papers that focused on the intersectionality of human and computer drawn maps. This article illustrates that through “automation in redistricting is not a substitute for human intelligence and effort; its role is to augment human capabilities by regulating nefarious intent with increased transparency, and by bolstering productivity by efficiently parsing and synthesizing data to improve the informational basis for human decision-making” (2). This combined solution would create a human and computer relationship where the computer would create these maps, and the humans would act as an additional judge to ensure that they are fair and possible given other smaller features, like trying to keep one neighbor in the same district. This solution would ensure that non biased maps are being created, meaning that the councils do not need to be as nonpartisan as they would have needed to be without these algorithms. Therefore, strict requirements would not be necessary, preventing any legal implications that may arise from people feeling like they cannot voice their concerns.

Partisan gerrymandering prevents voters from having a representative body that is reflective of the voters, which leads to lower voter turnout as more votes are seen as wasted, and prevents voters from holding their elected officials accountable. While the best solution to fix gerrymandering would be to incorporate algorithms into independent councils, it is unlikely that any major changes will happen in the near future. Currently H.R. 1, which would add these councils, is being held up in the Senate and without rule changes, it is unlikely to make its way through. And computer drawn maps have not reached the mainstream support and attention where it is seriously reviewed by legislatures. However, there is still hope as more and more states are proposing ballot initiatives that would create independent councils, like what was done in California. For decades, gerrymandering has been a topic that few voters were really aware about, but this will be a major issue in these upcoming years, and has direct impacts on the health of US democracy. This year is another redistricting year, and given all of the challenges that the country will face over the next ten years, from Covid-19 recovery, to the climate crisis, to social justice, it is more important than ever that the institutions that elect representatives are reflective of the will of the people and hold them accountable.

Works Cited:

Altman, Micah, and Michael McDonald. “The Promise and Perils of Computers in Redistricting.” Duke Journal of Constitutional Law & Public Policy, vol. 5, Jan. 2010, pp. 69–111.

Barreto, Matt A., et al. “The Mobilizing Effect of Majority-Minority Districts on Latino Turnout.” The American Political Science Review, vol. 98, no. 1, 2004, pp. 65–75. JSTOR, www.jstor.org/stable/4145297. Accessed 11 Mar. 2021.

Cho, Wendy K Tam, and Bruce E Cain. “Human-Centered Redistricting Automation in the Age of AI.” Science (American Association for the Advancement of Science) 369.6508 (2020): 1179–1181. Web.

Committee for Economic Development of The Conference Board. “Solving the Problem of Partisan Gerrymandering.” Committee for Economic Development of The Conference Board, 13 Mar. 2018, https://www.ced.org/reports/solving-the-problem-of-partisan-gerrymandering

Daley, David. Ratf**Ked: The True Story Behind the Secret Plan to Steal America's Democracy. Liveright Publishing Corporation, 2017.

Encyclopædia Britannica. "Gerrymandering." Britannica Academic, Encyclopædia Britannica, 11 Oct. 2019.

Engstrom, Richard L. “Partisan Gerrymandering: Weeds in the Political Thicket.” Social Science Quarterly (Wiley-Blackwell), vol. 101, no. 1, Jan. 2020, pp. 23–36. EBSCOhost, doi:10.1111/ssqu.12743.

Epstein, Reid J., and Nick Corasaniti. “How Gerrymandering Will Protect Republicans Who Challenged the Election.” The New York Times, The New York Times, 20 Jan. 2021, https://www.nytimes.com/2021/01/19/us/politics/republicans-gerrymander-trump-election.html.

Foley, Edward B. “Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws.” The University of Chicago Law Review, vol. 84, no. 2, 2017, pp. 655–756. JSTOR, https://www.jstor.org/stable/44288159.

Foster, Mikayla. “’Gobbledygook’ Or Unconstitutional Redistricting?: Floterial Districts And Partisan Gerrymandering.” Boston University Law Review, vol. 98, no. 6, 2018, pp. 1737-1780. ProQuest, https://ezproxy.ivc.edu/login?url=https://www-proquest-com.ezproxy.ivc.edu/scholarly-journals/gobbledygook-unconstitutional-redistricting/docview/2215509752/se-2?accountid=39837.

Kennedy, Liz, and Billy Corriher. “Distorted Districts, Distorted Laws.” Center for American Progress, 19 Sept. 2017, https://www.americanprogress.org/issues/democracy/reports/2017/09/19/439164/distorted-districts-distorted-laws/.

Li, Michael, et al. “Earlier Partisan Gerrymandering Cases.” Brennan Center for Justice, 16 Mar. 2021, www.brennancenter.org/our-work/court-cases/earlier-partisan-gerrymandering-cases.

Liptak, Adam. “Supreme Court Bars Challenges to Partisan Gerrymandering.” The New York Times, 27 June 2019, www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html.

Lowenthal Alan S. “The Ills of Gerrymandering and Independent Redistricting Commissions as the Solution.” Harvard Journal on Legislation, vol. 56, no. 1, Winter 2019, pp. 1–21. EBSCOhost, https://search-ebscohost-com.ezproxy.ivc.edu/login.aspx?direct=true&db=a9h&AN=136432326&site=ehost-live&scope=site.

Magleby, Daniel B., and Daniel B. Mosesson. "A New Approach for Developing Neutral Redistricting Plans." Cambridge University Press, vol. 26, no. 2, 2018, pp. 147-167. ProQuest, https://ezproxy.ivc.edu/login?url=https://www-proquest-com.ezproxy.ivc.edu/scholarly-journals/new-

approach-developing-neutral-redistricting/docview/2033934585/se-2?accountid=39837 , doi: http://dx.doi.org.ezproxy.ivc.edu/10.1017/pan.2017.37.

Maxfield, Andrew C. “Litigating the Line Drawers: Why Courts Should Apply Anderson-Burdick to Redistricting Commissions.” The University of Chicago Law Review, vol. 87, no. 7, 2020, pp. 1845–1892. JSTOR, www.jstor.org/stable/26932606.

McCune, David, and Samuel Luke Tunstall. “Calculated Democracy—Explorations in Gerrymandering.” Teaching Statistics, vol. 41, no. 2, Summer 2019, pp. 47–53. EBSCOhost, doi:10.1111/test.12181

Nickel, Rebekah. “Rucho V. Common Cause: The Government Game of Hot Potato.” Denver Law Review, vol. 98, no. 1, Oct. 2020, pp. 229–263. EBSCOhost, https://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=148669925&site=ehost-live&scope=site.

Payne-Riley, Lauren. “Solutions to Gerrymandering.” PolicyMap, 20 May 2020, www.policymap.com/2017/08/solutions-to-gerrymandering/.

Pierce Olga, and Kate Rabinowitz. “‘Partisan’ Gerrymandering Is Still About Race.” ProPublica, ProPublica, 9 Oct. 2017, https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race

Pildes, Richard H. “Foreword: The Constitutionalization of Democratic Politics.” Harvard Law Review, vol. 118, no. 1, Nov. 2004, pp. 29–154. EBSCOhost, https://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=15191929&site=ehost-live&scope=site.

Ruley, James. “One Person, One Vote: Gerrymandering and the Independent Commission, A Global Perspective.” Indiana Law Journal, vol. 92, no. 2, Spring 2017, pp. 783–816. EBSCOhost, https://search-ebscohost-com.ezproxy.ivc.edu/login.aspx?direct=true&db=a9h&AN=122855471&site=ehost-live&scope=site.

Rush, Mark. “The Efficiency Gap After Gill v. Whitford.” Social Science Quarterly (Wiley-Blackwell), vol. 101, no. 1, Jan. 2020, pp. 53–67. EBSCOhost, doi:10.1111/ssqu.12742.

Sarbanes, John P. “Text - H.R.1 - 117th Congress (2021-2022): For the People Act of 2021.” Congress.gov, 11 Mar. 2021, www.congress.gov/bill/117th-congress/house-bill/1/text.

Soffen, Kim. “How Racial Gerrymandering Deprives Black People of Political Power.” Washington Post, The Washington Post, 9 June 2016. https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/

Stephanopoulos, Nicholas O., and Eric M. McGhee. “Partisan Gerrymandering and the Efficiency Gap.” University of Chicago Law Review, vol. 82, no. 2, Spring 2015, pp. 831–900. EBSCOhost, https://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=108492906&site=ehost-live&scope=site.

Supreme Court of the United States. Davis v. Bandemer. Library of Congress, 1986, https://tile.loc.gov/storage-services/service/ll/usrep/usrep478/usrep478109/usrep478109.pdf.

Supreme Court of the United States. Vieth v. Jubelirer. Library of Congress, 2004, https://tile.loc.gov/storage-services/service/ll/usrep/usrep541/usrep541267/usrep541267.pdf.

Tarantola, Andrew. “Our Democracy Is Broken. Why Can't Technology Fix It?” Engadget, Apr. 2018, www.engadget.com/2018-04-18-voting-tech-gerrymandering-av-star-vote.html.

Tofighbakhsh, Sara. “Racial Gerrymandering After Rucho V. Common Cause: Untangling Race and Party.” Columbia Law Review, vol. 120, no. 7, Oct. 2020, pp. 1885–1928. EBSCOhost,

https://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=147540751&site=ehost-live score=site.

United States Constitution. Art.I, Sec. 5. https://www.law.cornell.edu/constitution/articlei