



May 2014

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Recommended Citation

Nathan S. Catanese, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323 (2014).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol28/iss1/9>

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GERRYMANDERED GRIDLOCK: ADDRESSING THE HAZARDOUS IMPACT OF PARTISAN REDISTRICTING

NATHAN S. CATANESE*

“It used to be that the idea was, once every two years voters elected their representatives, and now, instead, it’s every ten years the representatives choose their constituents.”¹

“We are in the business of rigging elections.”²

“To sum up, redistricting is a political disaster—an enormous political train wreck that occurs every ten years.”³

INTRODUCTION

Nate Silver, noted statistician and founder of the popular blog *Five Thirty Eight*, recently estimated that in the House of Representatives, out of the four hundred and thirty-five districts, there are only thirty-five swing districts.⁴ Essentially, this means that congressional districts have become more polarized—either Republican-leaning districts are more conservative or Democratic-leaning districts are more liberal.⁵ With more members elected from districts in which there is no threat from

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1. Jeffrey Toobin, *Drawing the Line: Will Tom DeLay’s Redistricting in Texas Cost Him His Seat?*, NEW YORKER, Mar. 6, 2006, at 35 (quoting Stanford Law School Professor Pamela Karlan).

2. John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1 (quoting former North Carolina State Senator Mark McDaniel).

3. DOUGLAS J. AMY, REAL CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY 59 (2d ed. 2002).

4. Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, FIVE THIRTY EIGHT (Dec. 27, 2012, 9:46 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/>. To contrast today’s numbers with recent history, he said that in 1992 there were as many as 103 swing districts. *Id.*

5. The 112th Congress was the most polarized Congress since Reconstruction. See Ezra Klein, *14 Reasons Why This is the Worst Congress Ever*, WONKBLOG (July 13, 2012, 8:00 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/>.

an opposing party, there is less incentive for members of Congress to moderate or to make bipartisan deals. This is because the only likelihood of their losing an election is from losing to a more ideologically extreme candidate in a primary election.⁶ Ultimately, this polarization leads to less policy-making and more gridlock in Washington.

This shift has been costly to the United States. In 2011, citing gridlock in Congress, Standard & Poor's downgraded the United States's debt rating to AA+ for the first time in history.⁷ Gridlock not only increases the likelihood that the federal government will default on its debt obligations, but is also bad for public policy in general. Similarly, gridlock was one of causes that led Congress to shut down the federal government in the fall of 2013.⁸ With such detrimental impact on the United States, understanding the cause of this problem and taking appropriate action to remedy it are of paramount importance.

This Note argues that partisan redistricting, also known as gerrymandering, is a major cause of America's gridlock in Congress because it increases the number of representatives elected from polarized congressional districts. Rather than simply trying to draw districts along pre-existing county or municipal boundaries, state lawmakers have tried to achieve hyperpartisan gain through the redistricting process. In so doing, they have created fewer competitive districts. This arrangement favors electing ideologically extreme candidates that have little to no interest in making political compromises, especially since it increases the likelihood of a primary election challenger.⁹

Specifically, in Part I, this Note examines the history of gerrymandering in the United States: how various requirements for redistricting—both from Congress and from the Supreme Court—were imposed on the states and the effects that historical Supreme Court cases have had on redistricting. Part I also looks at the state of gerrymandering today by examining its effects in the 2012 congressional elections and exploring some of the Supreme Court's recent jurisprudence on state redistricting laws. Specifically, this Note looks at how the Supreme Court has been vague about what would comprise an unconstitutional partisan gerrymander, even in the face of some outrageous examples, thus permitting the status quo.

In Part II, I argue that because the Supreme Court and Congress have failed to act on gerrymandering, either the state legislatures or

6. See Silver, *supra* note 4. "Most members of the House now come from hyperpartisan districts where they face essentially no threat of losing their seat to the other party. Instead, primary challenges, especially for Republicans, may be the more serious risk." *Id.*

7. Binyamin Appelbaum & Eric Dash, *S & P Downgrades Debt Rating of U.S. for the First Time*, N.Y. TIMES, Aug. 6, 2011, at A1.

8. See e.g., J.P.P., *Sorry we're closed, Democracy in America*, ECONOMIST (Oct. 1, 2013, 5:30), <http://www.economist.com/blogs/democracyinamerica/2013/10/americas-government-shutdown>.

9. See Steve Coll, *Building a Better Democracy*, DAILY COMMENT (Jan. 10, 2013), <http://www.newyorker.com/online/blogs/comment/2013/01/ending-gerrymandering-and-building-a-better-democracy.html> ("[B]ecause many . . . run in super-safe conservative districts, Republican congressional candidates often fear radical-right primary challengers more than the Democrats they will face in the general election.").

Congress need to provide guidance in order to create a better redistricting system.

In Part III, this Note looks at some of the practical consequences of gerrymandering, and also examines the impact that it has on participation in the political system and on public policy.

Part IV discusses how various states have dealt with partisan gerrymandering and what they have done to prevent it. It also looks at the relative success of the various legislative initiatives in those states. Part IV also briefly looks at how the United Kingdom and Canada have dealt with and prevented partisan redistricting.

Finally, in Part V, I recommend what can be done to alleviate the gridlock and to help the United States moving forward: state legislatures and Congress need to pass legislation mandating the creation of independent commissions to redraw districts. However, Congress is not likely to act until more states pass their own legislation. But if more states pass redistricting reform laws, it will help to fix the problems the United States currently faces because of gerrymandering.

I. BACKGROUND

When the Founding Fathers drafted the Constitution, they decided that the states would have equal representation in the Senate and proportional representation in the House of Representatives.¹⁰ Specifically, the Constitution states that members of the House of Representatives “shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”¹¹ Because of this provision, the government needed to accurately ensure that each state was allocated the correct number of representatives. Thus, the Constitution also mandates that a census be held every ten years, stating that an “actual Enumeration shall be made . . . within every subsequent Term of ten Years, in such manner as [Congress] shall by Law direct.”¹² The United States Census Bureau, a division of the U.S. Department of Commerce, conducts modern censuses.¹³

But the determination of how many representatives each state receives is not the only purpose of the census—each state must also draw districts of equal population to ensure that all of its citizens have an equal voice in Congress. “In addition to determining the apportionment of Representatives among the states, decennial population census data fulfills several purposes [including] provid[ing] state and local governments a basis for establishing district boundaries for congressional, state legislative, and local representative bodies”¹⁴

10. See *July 16, 1787: A Great Compromise*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/A_Great_Compromise.htm (last visited Apr. 8, 2014).

11. U.S. CONST. amend. XIV, § 2.

12. U.S. CONST. art. I, § 2, cl. 3.

13. See, e.g., U.S. CENSUS BUREAU, <http://www.census.gov> (last visited Apr. 7, 2014).

14. MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., R42483, LEGAL ISSUES REGARDING CENSUS DATA FOR REAPPORTIONMENT AND REDISTRICTING 1 (2012).

A. Policy Matter for the States

Generally, states have the authority and prerogative to draw districts how they see fit. “For the nation’s first fifty years, federal lawmakers ignored redistricting entirely: as long as a state elected no more than its allotted number of representatives, its legislature could draw district boundaries any way it wanted.”¹⁵ However, in 1842 Congress limited the drawing of districts so that they were single-member and contiguous.¹⁶ In 1872, Congress added a third criterion—that the districts must have “as near as practicable, an equal number of inhabitants.”¹⁷ Thus, “[e]ven states not adding or losing congressional representatives need new district maps that reflect the population shifts within their borders, so that residents are equally represented no matter where they live.”¹⁸ The Supreme Court affirmed this principle in *Wesberry v. Sanders*,¹⁹ when it said, “[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.”²⁰ The case also applied the “one person one vote” standard to redistricting.²¹

In 1929, Congress established a permanent number of representatives in the House—435—and set forth a means to reapportion the number of representatives among the states after each decadal census.²²

Other than the criteria that have been established by Congress, along with other criteria set forth by the courts, the states are essentially able to determine on their own how to redraw the congressional districts within their borders.²³ Some state legislatures, like California’s, have delegated the duty to redraw congressional districts to a non-government or “citizens” panel.²⁴ Other states, like Pennsylvania, pass their new congressional district maps as normal legislation needing bicameral and gubernatorial approval.²⁵ Each state still has the authority to change the way in which it redraws its congressional map. In theory, they could do away with partisan gerrymandering through

15. MARK MONMONIER, *BUSHMANDERS & BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS* 20 (2001).

16. *Id.*

17. An Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census, ch. 11, 17 Stat. 28, 28 (1872).

18. Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC (Sep. 19, 2012, 8:56 PM), <http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>.

19. 376 U.S. 1 (1964).

20. *Id.* at 18.

21. *Id.*

22. The Reapportionment Act of 1929, ch. 28, 46 Stat. 21 (1929) (codified at 2 U.S.C. § 2a).

23. Of course, it is worth noting that as of the last census in 2010, six states were only allocated one representative, thus nullifying the need for redistricting.

24. See *infra* Part V.A, *California*.

25. *Congressional Redistricting*, PA. REDISTRICTING, <http://www.redistricting.state.pa.us/Congressional-Redistricting.cfm> (last visited Apr. 8, 2014).

legislation (as some states have done).²⁶ Alternatively, they could continue to allow partisan gain through the political process.²⁷

B. *Redistricting for Partisan Gain*

In 1812, the Massachusetts legislature redrew its legislative boundaries following the 1810 census. The state's Democratic-Republicans were the majority party and drew a new map to increase their ranks over the state's dwindling Federalists. They did this by "packing Federalist voters into a few strongholds while carving out a long, thin Republican district along the northern, western, and southwestern edges of Essex County."²⁸ Ultimately, Massachusetts Governor Elbridge Gerry signed the new plan into law, even though he disliked it.²⁹ Newspapers sympathetic to the Federalist Party were quick to mock the plan in a political cartoon, dubbing the new district a "Gerrymander."³⁰ The term for redrawing political districts for partisan gain has been around ever since.

26. See *infra* Part V.A, *California*.

27. See *infra* Part V.C, *Florida*.

28. MONMONIER, *supra* note 15, at 1.

29. *Id.*

30. *Id.* at 2. Even though today's term gerrymandering is used with a soft "j" sound, Gerry's last name was pronounced with a hard "g." *Id.*

THE GERRYMANDER POLITICAL CARTOON³¹

Today's gerrymandering has been called "the most insidious practice in American politics—a way, as the opportunistic machinations following the 2010 census make evident, for our elected leaders to entrench themselves in 435 impregnable garrisons from which they can maintain political power while avoiding demographic realities."³²

After examining the congressional elections held in November 2012, it is obvious that gerrymandering helped the Republican Party retain control of the House of Representatives.³³ The Republicans won

31. Elkanah Tisdale, *The Gerry-Mander*, BOSTON GAZETTE, Mar. 26, 1812, at 2.

32. Draper, *supra* note 18. *But see* Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395, 398 (2012) (arguing that partisan gerrymandering is actually positive for governance, because it safeguards federalism). *See also* Richardson Dilworth, *American Cities as Firms in the 21st Century—Or, Should Philadelphia Move to New Jersey?*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99 (2010) (suggesting that states should be able to redistrict major cities into or out of their borders, albeit for urban development policy reasons).

33. In fact, the redistricting following the 2010 census may help Republicans for the next decade. *See* Alex Isenstadt, *The Democrats' Lost Decade?*, POLITICO (June 19, 2013, 5:05

a majority of seats in the House of Representatives, winning 233 seats to the Democrats' 192.³⁴ However, Americans, as a whole, cast more votes for Democratic candidates than Republicans—as of counts on November 8, 2012, 53,952,240 votes were cast for Democratic candidates while only 53,402,643 votes were cast for Republican candidates.³⁵ Thus, it can be mathematically deduced that the Democrats elected to Congress won by larger majorities than their Republican counterparts. More than likely, this was due to gerrymandered districts, where Democrats were “packed” into liberal districts in order to reduce the impact that they would have in surrounding districts, and were “cracked” in areas where they had a large stronghold, so as to divide their impact among multiple districts and to prevent them from forming a majority in any single district.³⁶

In an interview with the *Pittsburgh Post-Gazette*, Nicholas Goedert, a redistricting expert from Washington University in St. Louis, stated, “The key way a gerrymandering party is able to win more than its share of seats is to pack the opposite partisans into a district where they control a huge amount of the vote and essentially waste their vote.”³⁷ He also said that Pennsylvania was “arguably the most distorted map in the country in terms of comparing the vote share and the seats won.”³⁸ Pennsylvania’s redistricting is a particularly egregious example of partisan gerrymandering, where in November 2012, voters cast 2,701,820 votes for Democrats and 2,626,995 votes for Republicans.³⁹ Yet Pennsylvania’s new congressional delegation is not comprised of roughly the same number of Republicans and Democrats—the state is only sending five Democrats to the 113th Congress, while it is sending thirteen Republicans.⁴⁰

AM), <http://www.politico.com/story/2013/06/democrats-lost-decade-house-redistricting-midterms-93018.html>.

34. Randy LoBosso, *Pennsylvanians and Americans Voted for a Democratic U.S. House—So Why Do Republicans Still Hold Huge Majorities?*, PHILLYNOW (Nov. 8, 2012), <http://blogs.philadelphiaweekly.com/phillynow/2012/11/08/pennsylvanians-and-americans-voted-for-a-democratic-u-s-house—so-why-do-republicans-still-hold-huge-majorities/>.

35. *Id.*

36. See Sam Wang, Op-Ed, *The Great Gerrymander of 2012*, N.Y. TIMES, Feb. 3, 2013, at SR5 (stating, “Gerrymandering is not hard. The core technique is to jam voters likely to favor your opponents into a few throwaway districts where the other side will win lopsided victories, a strategy known as ‘packing.’ Arrange other boundaries to win close victories, ‘cracking’ opposition groups into many districts.”). See also Coll, *supra* note 9, (citing Samuel Wang and arguing that “twenty-six seats out of the thirty-three-seat Republican advantage in the House can be attributed to gerrymandering in states with legislatures controlled by Republicans.”).

37. Timothy McNulty, *How Gerrymandering Helped GOP Keep Control of House*, PITT. POST-GAZETTE (Nov. 28, 2012), <http://www.post-gazette.com/stories/news/us/how-gerrymandering-helped-gop-keep-control-of-house-663716/>.

38. *Id.*

39. LoBosso, *supra* note 34. But, Pennsylvania was not the only state in which the party that won the most votes did not win at least half the seats. See Wang, *supra* note 36, at SR1, SR5 (stating that in addition to Pennsylvania, Arizona, Michigan, North Carolina, and Wisconsin were all states in which the party that won a majority of votes failed to win at least half of the delegation’s seats).

40. LoBosso, *supra* note 34.

Looking at specific examples of how Pennsylvania's gerrymandered congressional districts played out, "Democrat Allyson Schwartz beat Republican Joe Rooney by a tally of 205,287 to 92,415 and Bob Brady beat John Featherman 226,189 to 39,752," while "would-be swing districts like the 12th saw Republican Keith Rothfus beat Democrat Mark Critz 51.5 percent to 48.5 percent."⁴¹ Furthermore, Democrats "carried both districts in the Philadelphia area — by 85 percent and 89 percent, respectively — and three other districts, by 77, 69 and 61 percent."⁴² On the other hand, "[o]f the 13 districts where Republicans prevailed, GOP candidates won seven with less than 60 percent of the vote; in only one district did the Republican candidate's total exceed 65 percent of the votes cast."⁴³

Understanding the realities of gerrymandering, political parties know that having partisan and ideologically friendly districts can help them withstand opposing political forces. Political expenditures corroborate this. The Republican State Leadership Committee, in its REDMAP 2012 Summary Report, essentially patted itself on the back for money it spent in state legislative races in 2010 to ensure that the Republicans would control congressional (and state legislative) redistricting in key states:

Controlling the redistricting process in [states projected to gain or lose Congressional representation] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn. Drawing new district lines in states with the most redistricting activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade.⁴⁴

The report provided financial amounts spent in various states to support key state legislative races, including \$1.4 million in New York, \$1 million in Pennsylvania, \$1 million in Ohio, and \$1 million in Michigan.⁴⁵ Simply put, "[t]he \$30 million strategy consist[ed] of two steps for tilting the playing field: take over state legislatures before the decennial Census, then redraw state and Congressional districts to lock in partisan advantages."⁴⁶

The purpose of this Note is not to pick on Republican gerrymanders. Democrats are guilty of the practice as well (although they were

41. *Id.*

42. Harold Meyerson, Op-Ed, *GOP's gerrymandered advantages*, WASH. POST (Nov. 13, 2012), http://www.washingtonpost.com/opinions/harold-meyerson-gops-gerrymandered-advantages/2012/11/13/4785e4d6-2d2f-11e2-a99d-5c4203af7b7a_story.html?hpid=z2.

43. *Id.* For a map of the Pennsylvania Congressional districts following the gerrymandering, see *Pennsylvania Congressional Districts*, PENNSYLVANIA REDISTRICTING, <http://www.redistricting.state.pa.us/Resources/GISData/Districts/Congressional/2011/PDF/2011-PA-Congressional-Map.pdf> (last visited Apr. 7, 2014).

44. *REDMAP 2012 Summary Report*, REPUBLICAN STATE LEADERSHIP COMM. (Jan. 4, 2013), http://rslc.com/_blog/News/post/REDMAP_2012_Summary_Report.

45. *Id.*

46. Wang, *supra* note 36, at SR1.

not as effective as the Republicans during the cycle following the 2010 census). For instance, after a Democratic-controlled gerrymander in Illinois, the Democrats increased their ranks in their congressional delegation by five members in the last election, for a total of twelve of eighteen seats.⁴⁷

Historically, it has been common to see a disparity between the national popular vote for congressional candidates and the percentage of seats parties win in the House. “From the end of World War II through 1994, Democrats nationally won a bigger percentage of House seats than their popular-vote total, probably due to the prevalence of old-time Southern Democrats.”⁴⁸ And then after the Republican Revolution in 1994, in which the Republicans won control of the House for the first time in a generation, “the GOP has outperformed its popular-vote total in the two decades since.”⁴⁹ So, while this type of result may seem normal, “[t]he GOP’s nearly 6 percent gap between votes and seats won on Nov. 6 [2012] was the biggest for either party since the Democrats last did it in 1992.”⁵⁰

C. *Increased Partisanship and Gridlock*

Looking at the membership of ideological caucuses in the House of Representatives shows how gerrymandering has impacted the make-up of Congress. In the 113th Congress, there are fifteen members of the Congressional Blue Dog Coalition,⁵¹ a caucus comprised of moderate Democrats, while there are seventy-four House members of the more liberal Congressional Progressive Caucus.⁵² On the Republican side, there are fifty-five House members of the Republican Main Street Partnership,⁵³ a moderate Republican group, while there are 168 members of the Republican Study Committee,⁵⁴ which is comprised of the most conservative members of the Republican caucus. This shows that the more ideological wings of the Democratic and Republican parties outweigh the moderates. This can be attributed to gerrymandering. Of

47. Meyerson, *supra* note 42. However, while the Democrats did increase their representation in Illinois, Meyerson points out that this more closely resembles the political leanings of the state, which voted for President Obama by a sixteen-point margin. *Id.* For additional examples of partisan gerrymandering in other states, see Chris Christoff & Greg Giroux, *Republicans Foil What Majority Wants by Gerrymandering*, BLOOMBERG (Mar. 18, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-03-18/republicans-foil-what-most-u-s-wants-with-gerrymandering.html> (discussing examples of partisan gerrymandering in Michigan and Ohio).

48. McNulty, *supra* note 37.

49. *Id.*

50. *Id.* (citing data from the University of Virginia Center for Politics).

51. *Blue Dog Membership*, BLUE DOG COALITION, bluedogdems.ngpvanhost.com/content/blue-dog-membership-1 (last visited Apr. 8, 2014).

52. *What is CPC?*, CONGRESSIONAL PROGRESSIVE CAUCUS, cpc.grijalva.house.gov/caucus-members/ (last visited Apr. 8, 2014).

53. *RMSP Members*, REPUBLICAN MAIN STREET PARTNERSHIP, www.republicanmainstreet.org/members/ (last visited Apr. 8, 2014).

54. *RSC Member List*, RSC, <http://rsc.scalise.house.gov/about/rsc/members> (last visited Apr. 8, 2014).

course, with more ideologically members of the House, compromise is rare and the legislative process is increasingly gridlocked.

It is important to note that the increased number of ideological members of the House of Representatives is not due to an increasingly partisan electorate. In fact, today's electorate is actually less partisan than in the past. According to a study by the Pew Research Center for People and the Press, in 2012, thirty-eight percent of the electorate considered themselves independent, thirty-two percent identified with the Democratic Party, and twenty-four percent identified with the Republican Party. This is in contrast to most years since 1939 where more people identified with the Democratic Party or with both major parties than as independents.⁵⁵

Nate Silver has observed that by not compromising with opponents, "individual members of Congress are responding fairly rationally to their incentives. *Most* members of the House now come from hyperpartisan districts where they face essentially no threat of losing their seat to the other party. Instead, primary challenges, especially for Republicans, may be the more serious risk."⁵⁶ This is true, especially given that

[o]ne of the firmest conclusions of academic research into the behavior of Congress is that what motivates members first and foremost is winning elections. If individual members of Congress have little chance of losing their seats if they fail to compromise, there should be little reason to expect them to do so.⁵⁷

But, the effects are not limited to electoral politics. In acting to protect themselves from ideological primary challenges, they vote for policy "that voters in more competitive districts would not long countenance."⁵⁸ And the gridlock could also lead to shutting down the federal government.⁵⁹

Common Cause has argued that, in addition to facilitating congressional gridlock, "gerrymandering contributes to alienation by reducing the impact that voters can have on elections; weakens incentives for legislators to satisfy constituents; and weakens political parties by

55. *Trend in Party Identification 1939 – 2012*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (June 1, 2012), <http://www.people-press.org/2012/06/01/trend-in-party-identification-1939-2012/>.

56. Silver, *supra* note 4.

57. *Id.* See also Shannon McGovern, *Who is to Blame for Washington Gridlock?*, U.S. NEWS & WORLD REPORT (Aug. 23, 2012), <http://www.usnews.com/opinion/articles/2012/08/23/who-is-to-blame-for-washington-gridlock>.

58. Coll, *supra* note 9. *But see* Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666 (2009) (presenting an empirical argument that partisan gerrymandering is not the cause of increased partisan gridlock and that it can be attributed to other factors) and Janelle Bouie, *Don't Blame Gerrymandering*, AM. PROSPECT (Nov. 21, 2011), <http://prospect.org/article/dont-blame-gerrymandering> (arguing that "there isn't much evidence for the claim that partisan gerrymandering is responsible for heightened polarization" and that "[t]he increase in polarization among lawmakers has more to do with changes in political parties, party leadership, and issue priorities than it does gerrymandering.").

59. Coll, *supra* note 9.

allowing them to field less qualified candidates.”⁶⁰ These effects could also be additional causes of gridlock in Congress.

D. *The Influence of Technology on Gerrymandering*

Recent technological advances have allowed gerrymandering to become more precise. But, the precision is really just a more accurate version of what has been going on for decades. “Both parties rely on sophisticated computer programs”⁶¹ The software is essentially doing what mapmakers have always done—crack or pack—with more efficiency.⁶²

Specifically, new “[t]echnological developments have enabled mapmakers to augment their knowledge of the state’s political environment with (1) precinct-level data about the electorate and (2) computer programs that can generate maps custom-fitted to meet any group’s needs.”⁶³ New software “has vastly increased the speed with which mapmakers can generate plans and calculate the effects of any changes to a plan.”⁶⁴ They can also take voting trends into consideration. For instance, “[t]he state lawmakers can build databases with detailed voter registration figures, election results and population data to project campaign outcomes and demographic trends.”⁶⁵

However, “computers are only a tool, not an end in themselves. They may expand the set of possible redistricting plans, but that does not mean that those in charge have to choose any particular one. The real choices are made by those drawing the districts”⁶⁶

E. *The Supreme Court’s Interpretation of Partisan Redistricting*

1. Early Cases

While Congress has continued to legislate on redistricting and has established some parameters, the Supreme Court has also weighed in on the subject. In 1975, it ruled that “reapportionment is primarily the duty and responsibility of the State through its legislature or other body”⁶⁷ However, in 1986, in *Davis v. Bandemer*,⁶⁸ “the Supreme Court ruled that partisan gerrymanders were justiciable,”⁶⁹ bringing

60. JEREMY BUCHMAN, *DRAWING LINES IN QUICKSAND: COURTS, LEGISLATURES, & REDISTRICTING* 194 (2003).

61. Michael Cooper, *How to Tilt an Election Through Redistricting*, N.Y. TIMES (Sep. 25, 2010), <http://www.nytimes.com/interactive/2010/09/26/weekinreview/26marsh.html>.

62. *See id.*

63. BUCHMAN, *supra* note 60, at 118.

64. *Id.* at 186.

65. Christoff & Giroux, *supra* note 47.

66. Micah Altman et. al., *Pushbutton Gerrymanders? How Computing Has Changed Redistricting*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 51, 63 (Thomas E. Mann & Bruce E. Cain eds., 2005).

67. *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

68. 478 U.S. 109 (1986).

69. MARK E. RUSH, *DOES REDISTRICTING MAKE A DIFFERENCE?: PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR* 11 (1993).

upon itself a “reapportionment revolution.”⁷⁰ Justice White, writing for the majority and establishing the justiciability of partisan gerrymanders, wrote,

Disposition of the case does not involve this Court in a matter more properly decided by a coequal branch of the Government. There is no risk of foreign or domestic disturbance. Nor is this Court persuaded that there are no judicially discernible and manageable standards by which political gerrymandering cases are to be decided.⁷¹

2. Recent Cases

While the Court tried to clarify the justiciability issue in *Bandemer*, a plurality sought to overrule that justiciability ruling in *Veith v. Jubelirer*.⁷² Writing for the plurality and acknowledging *Bandemer*’s unworkable standard, Justice Scalia wrote,

Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.⁷³

However, although concurring in the judgment, Justice Kennedy disagreed, saying that there are potential cases in which partisan gerrymanders could have a negative impact on constitutional rights. Ultimately, he concurred with the plurality’s result, but not with the justiciability issue. He said, “If workable standards [on political gerrymanders] do emerge to measure these burdens, however, courts should be prepared to order relief.”⁷⁴ Therefore, it is still possible for the Supreme Court, and other federal courts, to hear complaints regarding political gerrymanders. Nevertheless, the standard by which a court will hear such a complaint is still not clear.

3. The Roberts Court’s Jurisprudence on Redistricting

a. League of United Latin American Citizens v. Perry⁷⁵

After the 2002 elections, Republicans in Texas gained control of the state house for the first time in 130 years.⁷⁶ Following his party’s

70. *Id.* Rush argues that this was actually the “second reapportionment revolution,” with the first “erupt[ing] in the early 1960s, when the Court first chose to hear reapportionment cases, previously avoided because they involved political questions.” *Id.*

71. *Davis*, 478 U.S. at 110.

72. 541 U.S. 267 (2004).

73. *Id.* at 281.

74. *Id.* at 317 (Kennedy, J., concurring).

75. 548 U.S. 399 (2006).

76. *Overview and History*, REPUBLICAN PARTY OF TEX., <http://www.texasgop.org/overview-and-history> (last visited Apr. 8, 2014). Democrats were able to hold on to control of Texas and other southern states following the collapse of the “Solid South” because of

electoral gains, Republican Tom DeLay, then Majority Leader in the House of Representatives, encouraged the state party to pass “legislation . . . to redraw the Congressional map in [the Republicans’] favor.”⁷⁷ While it was unusual for a state to redistrict congressional lines in the middle of a decade, the legislation received national attention when the state house’s Democrats, in a failing effort, fled the state in order to not allow a quorum.⁷⁸ It was also evident that the legislation would have ramifications beyond Texas, given that it would ultimately help the Republicans keep control of the House of Representatives.⁷⁹

This gerrymandering was immediately criticized. The *New York Times* editorial board stated, “Texas’ Congressional district lines threw aside the longstanding tradition that new lines are drawn only every 10 years, after the census. The purpose of this heavy-handed line-drawing was purely to increase the number of Republican districts. It worked.”⁸⁰ There were also charges of illegal minority voter voice dilution.⁸¹

Various plaintiffs brought suit against Rick Perry, the Republican Governor of Texas, who had signed the redistricting bill into law. Such plaintiffs included the League of United Latin American Citizens, an organization that “advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans through community-based programs;”⁸² Travis County, Texas (the home of Austin); the American GI Forum of Texas, an organization that “is dedicated to addressing problems of discrimination and inequities endured by Hispanic veterans;”⁸³ and various other citizens groups. The plaintiffs argued that:

the new [redistricting legislation was] an unconstitutional partisan gerrymander and that the redistricting statewide [violated] § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973. [The plaintiffs] also [contended] that the use of race and politics in drawing lines of specific districts [violated] the First

gerrymandering. Similarly, Republicans won control of the state legislatures in Alabama and North Carolina for first time since Reconstruction in 2010. Draper, *supra* note 18. For further illustration, in 1990 Republicans did not control any chambers in any southern state legislature. Karen Hansen, *A GOP Wave Washed Over State Legislatures on Election Day, Red Tide: December 2010*, NCSL: NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/red-tide.aspx> (last visited Apr. 8, 2014).

77. David Barboza & Carl Hulse, *Texas’ Republicans Fume; Democrats Remain AWOL*, N.Y. TIMES, May 14, 2003, at A17.

78. Philip Shenon, *Texas Legislative Dispute Goes National*, N.Y. TIMES, May 16, 2003, at A18.

79. *Id.* For a map of Texas’s congressional districts for the 2002 elections, see *Texas Congressional Districts 2002 Elections*, TEX. LEGISLATIVE COUNCIL, http://www.tlc.state.tx.us/redist/pdf/congress_historical/c_2002.pdf (last visited Apr. 7, 2014). For a map of Texas’s congressional districts for the 2004 elections, see *Texas Congressional Districts 2004 Elections and 2006 Primaries*, TEX. LEGISLATIVE COUNCIL, http://www.tlc.state.tx.us/redist/pdf/congress_historical/c_2004_2006.pdf (last visited Apr. 7, 2014).

80. *Redistricting Tom DeLay*, Editorial, N.Y. TIMES, Dec. 14, 2005, at A34.

81. *Id.*

82. *About Us*, LEAGUE OF UNITED LATIN AM. CITIZENS, <http://lulac.org/about/> (last visited Apr. 8, 2014).

83. *About the American GI Forum*, AM. GI FORUM OF TEX., <http://www.agiftx.org/index.php?page=about.the.gi.forum> (last visited Apr. 8, 2014).

Amendment and the Equal Protection Clause of the Fourteenth Amendment.”⁸⁴

The lawsuit gave the Supreme Court the opportunity to expand or to clarify its jurisprudence on the justiciability of challenges to partisan gerrymanders. Though now, the Court had a different make-up than during its previous decisions. John Roberts had just been named Chief Justice the year prior, and Samuel Alito had also been named to the Court.

Ultimately, the Court did “not revisit the justiciability holding [in *Veith*] but [proceeded] to examine whether appellants’ claims offer[ed] the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”⁸⁵ The Court reaffirmed its standard from *Veith*, saying that in order to successfully challenge an overtly-partisan and unconstitutional gerrymander, “a successful claim . . . must do what appellants’ sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants’ representational rights.”⁸⁶

In terms of partisan gerrymandering, the Roberts Court has left state legislatures (and potential plaintiffs) with the status quo—essentially, that a justiciable claim of unconstitutional partisan gerrymandering theoretically exists, albeit difficult to define. However, the Court did point out that even with Texas’s legislature “decid[ing] to redistrict with the sole purpose of achieving a Republican congressional majority . . . partisan aims did not guide every line it drew.”⁸⁷ So, perhaps in order for redistricting to be unconstitutional, every line drawn would have to be motivated by partisanship.

Nevertheless, the Court did find that other aspects of the mid-decade gerrymander were unconstitutional, but this was because Texas had violated aspects of the Voting Rights Act.⁸⁸ With a different majority than the majority ruling on the partisan-gerrymander issue, the Court ruled that changes to a particular district “violated Section 2 of the Voting Rights Act because it diluted the voting power of Latinos.”⁸⁹ Consequently, after court orders, Texas adopted a new plan redrawing five congressional districts including the district in question.⁹⁰

84. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 409 (2006).

85. *Id.* at 414.

86. *Id.* at 418.

87. *Id.* at 417.

88. L. PAIGE WHITAKER, CONG. RESEARCH SERV., R42482, CONGRESSIONAL REDISTRICTING AND THE VOTING RIGHTS ACT: A LEGAL OVERVIEW 4 (2012).

89. L. PAIGE WHITAKER, CONG. RESEARCH SERV., RS22479, CONGRESSIONAL REDISTRICTING: A LEGAL ANALYSIS OF THE SUPREME COURT RULING IN *League of United Latin American Citizens v. Perry* 6 (2008).

90. *Id.* For a map of Texas’s congressional districts following changes made from LULAC, see *TEXAS U.S. Congressional Districts Court-Ordered Districts LULAC v. Perry PLAN 01438C*, TEXAS LEGISLATIVE COUNCIL, www.tlc.state.tx.us/redist/pdf/chronology_plans/PLAN1438C.pdf (last visited Apr. 7, 2014).

b. *Perry v. Perez*⁹¹

Following the most recent round of redistricting after the 2010 census, additional litigation presented the Court another opportunity to either expand or clarify its previous rulings regarding partisan gerrymandering. Once again in Texas, various plaintiffs sued Governor Rick Perry, alleging that the state's most recent gerrymander "violate[d] the United States Constitution and § 2 of the Voting Rights Act."⁹²

At the time, "Texas [was] a 'covered jurisdiction' under Section 5 of the Voting Rights Act of 1965."⁹³ Essentially, covered jurisdictions were required to receive federal "preclearance" for their maps before they become law.⁹⁴ To do this, states had to demonstrate that a "proposed change 'neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.'"⁹⁵

Since then, however, *Shelby County v. Holder*⁹⁶ effectively neutered the preclearance requirement. The Supreme Court held Section 4 of the Voting Rights Act, the section of the Act which contained the coverage formula, to be unconstitutional.⁹⁷ Thus, although Section 5 was not struck down, "it will have no actual effect unless and until Congress can enact a new statute to determine who should be covered by it."⁹⁸

Nevertheless, because Texas was not going to meet its preclearance obligation before an upcoming primary election, a district court imposed a new map to avoid having an election without a pre-cleared map. This was also because Texas's "old district lines could not be used, because population growth had rendered them inconsistent with the Constitution's one-person, one-vote requirement."⁹⁹

In a *per curiam* decision, the Supreme Court provided guidelines for district courts on how to best draw maps when the necessary situation arose, but in terms of general redistricting policy, it largely confirmed its previous jurisprudence. For instance, the Court reaffirmed that "[r]edistricting is 'primarily the duty and responsibility of the State.'"¹⁰⁰ It also gave a specific example, saying that the district court should have followed Texas's example in splitting precincts in order to come as close as possible to Texas's map,¹⁰¹ thus implying that courts should be as deferential as possible to state redistricting law.

91. 132 S. Ct. 934 (2012).

92. *Id.* at 940. For a general discussion of the political effects of race-conscious redistricting, see Stephen Wolf, Note, *Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225 (1997).

93. *Perry*, 134 S. Ct. at 939.

94. *See id.*

95. *Id.* at 940 (citing 42 U.S.C. § 1973c(a) (2012)).

96. 133 S. Ct. 2612 (2013).

97. *Id.* at 2616.

98. Amy Howe, *Details on Shelby County v. Holder: In Plain English*, SCOTUSBLOG, (June 25, 2013, 11:03 AM), <http://www.scotusblog.com/2013/06/details-on-shelby-county-v-holder-in-plain-english>.

99. *Perry v. Perez*, 132 S. Ct. 934, 940 (2012).

100. *Id.* (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

101. *Id.* at 943.

In summation, the case did not clarify the vagueness that surrounded gerrymandering. It is still not clear what could be considered an unconstitutional partisan gerrymander.¹⁰² But what we are left with is that, at this point, both Congress and the Supreme Court have been highly deferential to the states to determine their own redistricting policy.

II. ARGUMENT

In light of the Supreme Court's jurisprudence on redistricting, and when coupled with Congress's historical silence on specifics, there needs to be further guidance for state legislatures on how to redraw legislative maps without the negative partisan consequences. If the Supreme Court will not supply that guidance, it is critical that Congress, the state legislatures, or both, provide it.

If increased guidance is not provided, state legislatures will continue to maximize partisan gain through redistricting. This will further increase partisanship in Congress, resulting in higher levels of polarization and even more gridlock. Simply put, this is bad for public policy and harmful to the United States.

III. DISCUSSION

Gerrymandering is a "political disaster"¹⁰³ because of the effects that it has on the political system, on voters, on public policy and government services, and on public officials.

A. Practical Consequences

Given that there has not been much guidance from the Supreme Court, state legislatures have free reign to draw districts, as long as they comply with minimal federal restrictions. As previously mentioned,¹⁰⁴ states must draw contiguous districts of roughly equal population, and they must respond to changes in the population following each decadal census. They may even make gerrymandering a more frequent occurrence.

Specifically, after the Supreme Court's ruling in *League of United Latin American Citizens*, "commentators have observed other states may dispense with the tradition of redrawing congressional districts only once per decade following the decennial census, and instead, redistrict following a change in political control of the state government."¹⁰⁵

102. For additional information on the muddled state of partisan gerrymandering case law, see Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097 (2007).

103. AMY, *supra* note 3, at 59.

104. See *supra* Part I (discussing federal laws requiring states to comply with various standards when redrawing maps).

105. WHITAKER, *supra* note 88, at 6. The report, however, also noted that "there does not appear to be any urgency on the part of state legislatures to [redistrict more than once per decade]." *Id.*

Gerrymandering also causes districts to not have rational shapes. Many are often weirdly shaped, sometimes with no logical boundaries.¹⁰⁶ This can create confusion for constituents and voters, who may not know which district they live in.

B. *Impact on Partisanship*

As already mentioned, gerrymandering creates more partisan districts and thus facilitates the election of more partisan representatives.¹⁰⁷ Speaking about what is wrong in Washington on *Meet the Press*, Tom Brokaw said,

The fact is the system is rigged. Seventy-five percent of the congressmen come from gerrymandered districts in which they're bulletproof. They only play to one constituency. There are no swing states. They don't go home and have to prove their case, because they've got a choir back home. And that's a huge part of the problem here.¹⁰⁸

Nate Silver estimated that out of the 435 seats of the House of Representatives, only thirty-five are swing districts.¹⁰⁹ Similarly, in its final "race ratings" before the November 2012 election, the Cook Political Report listed only twenty-nine toss-up races in the entire House.¹¹⁰ Likewise, the *New York Times* listed twenty-five seats as toss-ups,¹¹¹ *Roll Call* listed twenty-eight,¹¹² and the Rothenberg Political Report listed eighteen as pure toss-ups.¹¹³

As a consequence, the only time many incumbents will face a real possibility of losing an election is when they are challenged in a primary.¹¹⁴ This increases the likelihood that incumbents representing non-competitive districts will pander to the ideologically extremes of their parties, which will generate further extremism in Congress as a whole.

106. See Zombie, *The Top Ten Most Gerrymandered Congressional Districts in the United States*, PJ MEDIA (Nov. 11, 2010, 1:30 PM), <http://pjmedia.com/zombie/2010/11/11/the-top-ten-most-gerrymandered-congressional-districts-in-the-united-states/?singlepage=true>. For a historical perspective on the shape of Congressional districts, see KENNETH C. MARTIS, *THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS 1789-1989* (1989) (detailing various maps that show the Congressional districts in each of the Congresses between 1789 and 1989).

107. See *supra* Part I.C, *Increased Partisanship and Gridlock*.

108. Tom Brokaw, *The System is Rigged*, MEET THE PRESS, video available at <http://www.politico.com/blogs/politico-live/2012/12/brokaw-the-system-is-rigged-152993.html>.

109. See Silver, *supra* note 4.

110. *2012 House Race Ratings for November 5, 2012*, THE COOK POLITICAL REPORT (Nov. 5, 2012), <http://cookpolitical.com/house/charts/race-ratings/5105>.

111. Jennifer Steinhauer et al., *House Race Ratings*, included in *Election 2012*, N.Y. TIMES, <http://elections.nytimes.com/2012/ratings/house> (last visited Apr. 8, 2014).

112. *Race Ratings for 2012 House Elections*, ROLL CALL, <http://www.rollcall.com/politics/race-ratings-chart-2012-house-elections.html> (last visited Apr. 8, 2014).

113. *House Ratings*, ROTHENBERG POLITICAL REPORT (Nov. 2, 2012, 3:25 PM), <http://rothenbergpoliticalreport.com/ratings/house>.

114. So, a Democrat may be challenged from the liberal wing of the party while a Republican may be challenged from the conservative wing of the party.

Another consequence of gerrymandering is that it facilitates the selection of ideologically extreme House members as committee chairs. This is primarily because both parties, in most circumstances, select committee chairs based on the length of their committee tenure.¹¹⁵ The members representing non-competitive districts—those most likely to obtain seniority—are those who are incentivized to be more ideologically extreme. In contrast, moderate members are not likely to obtain the seniority necessary to become a committee chair because they are more likely to lose elections, either to a more ideologically extreme member in a primary, or in a general election because they represent a swing district. The same logic applies to ranking committee members in the minority party, thus making gridlock more likely because committee counterparts would come from their parties' more ideologically extreme factions.

C. *Impact on Voter Turnout and Voter Apathy*

While redistricting may be conducted under the guise of “one person, one vote,”¹¹⁶ it can have the practical consequence of rendering a person’s vote pointless. “[U]nbridled gerrymandering undercuts individual choice, eroding the ability of each voter to express a preference for a particular candidate with a fair and realistic chance that his candidate may win.”¹¹⁷ For instance, if someone lives in a congressional district in which the results of an election, based on the partisan make-up of the district, are easily predictable, a voter may not have an incentive to vote. “Gerrymandering . . . is arguably the greatest structural barrier to the people’s right and responsibility to participate in politics in a meaningful and impactful manner.”¹¹⁸ Thus, gerrymandering can contribute to complacency or apathy among American voters.

1. Voter Turnout

People are more likely to vote in competitive races than in races where the outcome appears predetermined.¹¹⁹ This may seem to be a given, but it can have rippling effects. Just like there are “feature acts” that bring people out to the concert on Friday night, “opening acts” benefit from the heightened attention the feature brings. Likewise, there

115. See Jennifer Bendery, *House GOP Committee Chairs Will All Be White Men In Next Congress*, HUFFPOST POLITICS (Nov. 27, 2012, 8:53 PM), http://www.huffingtonpost.com/2012/11/27/house-committee-chairs-all-white-men_n_2201136.html (“House committee chairs are typically chosen based on their seniority on the committee . . .”).

116. See *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

117. DAVID K. RYDEN, *REPRESENTATION IN CRISIS: THE CONSTITUTION, INTEREST GROUPS, AND POLITICAL PARTIES* 138 (1996).

118. Ramon Luzaftaga, *The Kids on the Hill (or How Gerrymandering is the Single Largest Barrier to Citizens’ Right and Responsibility to Participation)*, CATHOLIC MORAL THEOLOGY (Dec. 30, 2012), <http://catholicmoraltheology.com/the-kids-on-the-hill-and-how-to-send-adults-there-or-make-the-incumbents-grow-up/>.

119. See David S. Broder, *Voting’s Neglected Scandal*, WASH. POST, June 26, 2008, at A19. See also Marc Dunkelman, *Gerrymandering the Vote: How a “Dirty Dozen” States Suppress as Many as 9 Million Voters* 7, DLC, http://www.dlc.org/specials/Gerrymandering_the_Vote.pdf (last visited Apr. 8, 2014).

are “feature elections” that bring people to the polls and lesser elections that are unable to generate attention by themselves. So, just like there can be repercussions for the opening acts if the feature act cancels, other races, besides the marquee race, can be affected if the congressional race is a snoozer. The same studies have shown that if races become more competitive, voter turnout, and thus overall government participation rates, increases.¹²⁰

2. Voter Choice

Because of gerrymandering, voters may not have a real choice as to who to vote for during an election, if there is even a challenger.¹²¹ Either the outcome is preordained because the district is so gerrymandered, or there might not even be anyone challenging the incumbent.¹²² Some have even called this type of system “a major form of disenfranchisement.”¹²³ People may be going through the motions when they go to the voting booth on Election Day, or as previously stated, they may not go at all.

D. *Impact on Public Policy*

Gerrymandering also has a direct effect on public policy, namely, in that it “slow[s] or forestall[s] representative responsiveness to the changes in the current of public sentiment.”¹²⁴ It also reduces “the public’s ability to hold its governors accountable, hence discrediting the governmental actions and outcomes which follow.”¹²⁵

Similarly, gerrymandering facilitates bad policy outcomes. For instance, leaving aside the political goals of not raising the country’s debt ceiling, America is worse off for having a lower debt rating than it did before the debt ceiling fight of 2011.¹²⁶ And, America is worse off

120. *Id.*

121. See Editorial, *Jesse and Gerrymandering*, CHI. TRIB., Feb. 21, 2013, at 18. The *Tribune* argues that incumbents in heavily gerrymandered districts often have large campaign coffers, which can intimidate potential challengers and dissuade them from running for Congress. Of course, this can be true of any incumbent, but the inference is that incumbents in heavily gerrymandered districts have larger war chests because they do not need to spend money on campaigning.

122. Some have stated that partisan gerrymandering increases the number of incumbents who win reelection. However, there are arguments against that. See Bouie, *supra* note 58 (arguing that “there are reams of political-science research showing that partisan gerrymandering is low on the list of factors that explain the rising incumbency rate.”). However, the rising incumbency rate is not crucial to my argument. It is enough that gerrymandering artificially increases the likelihood that one party’s candidate will beat the other’s.

123. Wang, *supra* note 36, at SR5.

124. RYDEN, *supra* note 117, at 139.

125. *Id.*

126. America is worse off because it has a lower debt rating from Standard & Poors. See Abelbaum & Dash, *supra* note 7. See also Jeanne Sahadi, *Cost of Debt Ceiling Fight: \$1.3 Billion*, CNNMONEY (July 26, 2012, 10:49 AM), <http://money.cnn.com/2012/07/23/news/economy/debt-limit/index.htm> (saying that the uncertainty in ability to borrow caused the federal government to have to pay an extra \$1.3 billion leading up to the debt ceiling showdown).

after having its government shutdown because various services could not be performed. It is likely that a less-gridlocked Congress would have acted to avoid these situations in the first place.

E. *Impact on Public Officials*

Finally, gerrymandering reduces the incentive that elected officials have to respond to constituents. This stems from an economic analysis of the incentives that members typically have while they are in Congress. “Influenced by law and economics, public choice theory makes the . . . assumption that individuals are motivated exclusively by self-interest. Thus, legislators are motivated primarily by the desire to be reelected”¹²⁷ But if reelection in gerrymandered districts is assured, then legislators lose the motivation to act in a manner that would help to ensure their electoral success.

Essentially, members of Congress from heavily gerrymandered districts, because of the preordained electoral outcomes in those districts, take it for granted that they will be reelected. Consequently, members of Congress may not listen to the opinions of the entire electorate in their district—they may only care about the opinions of primary voters.¹²⁸ In an interview, President Obama stated, “The House Republican majority is made up mostly of members who are in sharply gerrymandered districts that are very safely Republican and may not feel compelled to pay attention to broad-based public opinion, because what they’re really concerned about is the opinions of their specific Republican constituencies.”¹²⁹ Worse yet, there may be members, due to a combination of partisan primaries and gerrymandering, who do not listen to any public opinion.¹³⁰ They may only listen to special interests. When donors give money to members of Congress from gerrymandered districts, they “know they’re buying access to members of Congress who are sure to win the election – a tacit assurance that the contribution is money well-invested.”¹³¹

127. Edward Rubin, *Rational States?*, 83 VA. L. REV. 1433, 1440 (1997) (citations omitted).

128. This can be true of any district in which the general election outcomes are preordained, whether or not it from partisan redistricting. However, gerrymandering increases this likelihood.

129. Franklin Foer & Chris Hughes, *Barack Obama is Not Pleased: The President on His Enemies, the Media, and the Future of Football*, NEW REPUBLIC (Jan. 27, 2013), <http://www.newrepublic.com/article/112190/obama-interview-2013-sit-down-president>. Of course the same logic would also apply to Democrats.

130. “[I]f the combination of partisan primaries and bipartisan gerrymandering are resulting in a legislature that cannot be said to be broadly responsive to the American people, then we may have identified a cause of actual democratic dysfunction.” Josh Chavetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2086 (2013) (citing Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 297–319 (2011)).

131. Editorial, *supra* note 121, at 18.

IV. RESPONSES TO GERRYMANDERING

As previously mentioned, Congress and the Supreme Court have given states much autonomy in redistricting. But with this autonomy, states have responded differently. Some states, like Pennsylvania and Texas, have continued to partisanly draft congressional districts, aiming to exact as much political gain from the process as possible. A few states have taken a middle of the road approach. Others have abandoned the practice of partisan redistricting in favor of other processes. Similarly, other countries have also abandoned partisan redistricting in favor of having neutral commissions redraw legislative boundary lines.

A. *California*

Governor Arnold Schwarzenegger led a ballot initiative fight to overhaul California's redistricting process in 2008.¹³² Proposition 11 ultimately established the California Citizens Redistricting Commission, which, in addition to drafting the state's legislative seats, also drafts the map for all of its congressional districts.¹³³ This essentially took the redistricting power out of the state legislature, and gave it to a non-partisan commission.

The commission is comprised of eight members: "three who are Democrats, three who are Republican, and two who are either Decline-to-State or are registered with another party."¹³⁴ The eight members were chosen randomly from a pool of twenty-four people, which had been whittled down from a larger pool of the sixty most qualified individuals who had applied to be on the commission.¹³⁵ Following the selection of the eight members, those eight then chose six more members to bring the commission to a total of fourteen.¹³⁶

The commission was tasked with drawing legislative boundaries following the 2010 decadal census. Throughout this process, the Commission

[drew] the district lines in conformity with strict, nonpartisan rules designed to create districts of relatively equal population that will provide fair representation for all Californians. The Commission [held] public hearings and accept[ed] public comment. After hearing from the public and drawing the maps for the House of Representatives districts, 40 Senate districts, 80 Assembly

132. John Wildermuth, *Redistricting Victory a Big Win for Governor*, SFGATE (Nov. 27, 2008, 4:00 AM), <http://www.sfgate.com/politics/article/Redistricting-victory-a-big-win-for-governor-3260386.php>.

133. Gregory Giroux, *Grading California's Congressional Map*, POLITICAL CAPITAL: THE CURRENCY OF GOVERNMENT (Dec. 18, 2012, 2:31 PM), <http://go.bloomberg.com/political-capital/2012-12-18/grading-californias-congressional-map/>.

134. *Background on Commission*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/commission.html> (last visited Apr. 8, 2014).

135. *Id.* Part of the whittling down process included an opportunity for California legislative leaders to strike some of those who were in the pool. *Id.*

136. *Id.*

districts, and four Board of Equalization districts, the Commission [voted] on the new maps to be used for the next decade.¹³⁷

Under the new system of redistricting, California saw a lot of change. For instance, in the previous ten years, only one congressional seat changed parties.¹³⁸ However, after the 2012 elections, which were the first to take place after redistricting done with the new system, four seats changed parties.¹³⁹

In establishing a non-partisan commission, California essentially tried to take politics out of redistricting. While there are still districts that heavily favor one party, that is mostly due to the political tendencies of established communities contained within one district, rather than the artificial line-drawing designed to sway elections. The efforts in California have largely been successful. “The result is that California no longer has divided, gridlocked government, as it has had for the past decade.”¹⁴⁰

Other states that have non-partisan processes include Washington, Idaho, and Arizona.¹⁴¹

B. Iowa

Some states have also successfully utilized non-partisan procedures, while not necessarily handing the entire process over to a non-partisan independent entity. For instance, “Iowa’s redistricting process is handled by the non-partisan Legislative Services Agency. It draws the boundaries based on population data and presents it to the Legislature for approval.”¹⁴² Iowa’s non-political process has led to more competitive elections, and, because it also draws state legislative districts, has led to small majorities in the state legislature.¹⁴³ Furthermore, Iowa has other rules for redrawing congressional districts, including that districts cannot divide counties, counties in the district must be contiguous, districts should be reasonably compact, and the population of each district cannot deviate from the ideal population size by more than one percent.¹⁴⁴

137. *Id.*

138. See Adam Nagourney, *California Set to Send Many New Faces to Washington*, N.Y. TIMES (Feb. 14, 2012), <http://www.nytimes.com/2012/02/14/us/california-congressional-delegation-braces-for-change.html?pagewanted=all>.

139. Kitty Felde, *Redistricting Shakes Up California’s Congressional Races; Bono Mack Trailing*, 89.3 KPCC – Represent! (Nov. 7, 2012, 8:34 AM), <http://www.scpr.org/blogs/politics/2012/11/07/10948/redistricting-shakes-californias-congressional-rac/>.

140. Coll, *supra* note 9.

141. *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, <http://redistricting.ills.edu/who.php> (last visited Apr. 8, 2014).

142. James Q. Lynch, *Iowa Redistricting Process, Split Legislature Linked*, GAZETTE (Dec. 3, 2012, 7:00 AM), <http://thegazette.com/2012/12/03/iowa-redistricting-process-split-legislature-linked/>.

143. *Id.*

144. *Census 2010: Redistricting*, DESMOINESREGISTER.COM, <http://data.desmoinesregister.com/dmr/iowa-census/redistricting-game/> (last visited Apr. 8, 2014).

C. Florida

Unlike California, Florida's state legislature has not delegated its power to redraw congressional districts to a non-partisan commission. However, Florida has shown constraint in gerrymandering. Specifically, in November 2010, Florida's citizens voted to amend the state constitution to prevent overly partisan redistricting.¹⁴⁵ In regards to congressional redistricting, Florida's constitution now reads:

No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.¹⁴⁶

While the new method of redistricting might have had some impact on the elections, many are not satisfied with the system—people want to have something that takes the process entirely out of the hands of politicians.¹⁴⁷ There are charges that “Florida’s legislative leaders appear to have authorized their staff to use private email accounts, personal ‘dropboxes’ and to engage in ‘brainstorming meetings’ with Republican Party of Florida consultants in attempting to draw favorable political districts, despite a constitutional ban on such coordination.”¹⁴⁸

While these are three different methods, other states utilize different systems to try to prevent or limit partisan gerrymandering. These systems include advisory commissions, backup commissions, and politician commissions.¹⁴⁹ However, the vast majority of states still leave the system to the elected, partisan state officials in the state legislatures.¹⁵⁰

D. International Examples of Redistricting

Other countries’ efforts to limit and reduce partisanship through redistricting are good examples for the United States. In the United Kingdom, redistricting is referred to as “redistribution.” Independent boundary commissions in each of the four countries that comprise the United Kingdom redraw the boundaries of parliamentary constituencies. For instance, “[t]he Boundary Commission for England is an independent and impartial public body, which reviews all Parliamentary

145. See *Redistricting*, FAIRDISTRICTSNOW.ORG, <http://www.fairdistrictsnow.org/redistricting/> (last visited Apr. 8, 2014).

146. FLA. CONST. art. III, § 20(a).

147. See *Redistricting*, *supra* note 145.

148. S.V. Dáte, *In Florida, an Email Trail on Redistricting Raises Questions*, KPBS (Feb. 5, 2013), <http://www.kpbs.org/news/2013/feb/05/in-florida-an-email-trail-on-redistricting-raises/>. See Editorial, *Fixing the Political Game*, HERALD-TRIBUNE, Feb. 13, 2013, at A10 (arguing that even after the changes in Florida law, party officials were still able to push-through partisan gerrymandering in the state).

149. See *Who Draws the Lines?*, *supra* note 141.

150. *Id.*

constituency boundaries . . . every five years.”¹⁵¹ Similarly, the Boundary Commission for Scotland is an “Advisory Non-departmental Public Body sponsored and wholly funded by the Scotland Office. [It is] independent and non-political.”¹⁵²

In an effort to address unfairness in a previous method of conducting redistribution, Parliament included revisions to its system in the Parliamentary Voting System and Constituencies Act of 2011.¹⁵³ Under the new legislation, boundaries are redrawn every five years, and “all constituencies (with four exceptions) have electorates within +/-5 per cent of [a] quota . . . and only within that range could the Commissions take into account factors such as local authority boundaries, communities of interest and previous constituency boundaries.”¹⁵⁴ Ultimately, the Commissions offer their plans to Parliament, “which can accept or reject, but not modify, them.”¹⁵⁵ However, “[a] Secretary of State can modify the recommendations before transmitting them to Parliament.”¹⁵⁶

In Canada, historically “redistributions at both the federal and provincial levels . . . were carried out by elected politicians.”¹⁵⁷ “A partisan committee of the House itself” drew the boundaries of electoral districts, which in Canada are called “ridings.”¹⁵⁸

Like individual states in the United States, Canadian provinces also proposed their own solutions. “The province of Manitoba was the first Canadian jurisdiction to pass legislation mandating the establishment of an arms-length, nonpartisan boundary commission once every ten years.”¹⁵⁹ The problems that stemmed from gerrymandering in Manitoba were particularly egregious, which led to the change.¹⁶⁰ Interestingly, Manitoba “looked to Australia and New Zealand as possible sources for an acceptable alternative to government-dominated gerry-

151. *About*, BOUNDARY COMM’N FOR ENG., <http://consultation.boundarycommissionforengland.independent.gov.uk/about-the-review/> (last visited Apr. 8, 2014).

152. *The Commission – Functions and Appointments*, BOUNDARY COMM’N FOR SCOT., <http://www.bcomm-scotland.independent.gov.uk/commission/> (last visited Apr. 8, 2014). Scotland’s Boundary Commission is responsible for redistribution for “UK Parliament constituencies in Scotland; and Scottish Parliament constituencies and regions.” *Id.*

153. David Rossiter et al., *The Redistribution of Parliamentary Constituencies (and What it Means)*, BALLOTS & BULLETS (July 4, 2012), <http://nottspolitics.org/2012/07/04/the-redistribution-of-parliamentary-constituencies-and-what-it-means/>.

154. *Id.* Previously, the “rules prioritised representation of communities over electoral equality – they made no stipulation regarding the permissible range of constituency electorates, which merely had to be ‘as near the electoral quota as is practicable.’” *Id.* (citations omitted).

155. Ron Johnston, et al., *The United Kingdom: Redistribution Process*, ACE: THE ELECTORAL KNOWLEDGE NETWORK, http://aceproject.org/ace-en/topics/bd/bdy/bdy_gb (last visited Apr. 8, 2014).

156. *Id.*

157. John C. Courtney, *Electoral Districting in the U.S.: Can Canada Help?*, BROOKINGS INST. GOVERNANCE STUDIES: ISSUES IN GOVERNANCE STUDIES 1, 4 (2008).

158. *Redistricting: Something Canada Does Better*, FILIBUSTER (Mar. 1, 2011), <http://www.filibustercartoons.com/index.php/2011/03/01/redistricting-something-canada-does-better/>.

159. Courtney, *supra* note 157, at 5.

160. *Id.*

manders . . . [Manitoba] found [its] answer in the independent electoral boundary commissions used in both countries.”¹⁶¹

But Canada’s problems from gerrymandering were not limited to Manitoba, and in 1964, the Canadian government passed the Electoral Boundaries Readjustment Act.¹⁶²

Under the terms of the new legislation, parliamentary ridings could henceforth only be modified by special non-partisan committees residing in each province. Each redistricting committee would consist of one provincial judge and two individuals appointed by Canada’s apolitical Speaker of the House, and their decisions could only be overturned by parliament in the case of exceptional, and provable, concern.¹⁶³

The Act also provided guidance for what should be taken into consideration when drawing boundary lines. For instance, district lines were to take communities of interest or identity into account, and also “set limits on the degree to which borders were allowed to deviate from their historic status quo.”¹⁶⁴ But the Canadians have leeway to meet these goals because, as it was historically in Britain, they allow a fair amount of deviation in population among their districts.¹⁶⁵ Specifically, each electoral district in a province must be within twenty-five percent more or less of the electoral quota for the province.¹⁶⁶

V. RECOMMENDATION

Even with the advances made by states to address partisan redistricting and the problems associated with it, Parts I, III, and IV clearly show that gerrymandering is still a huge problem in the American political system. Many individuals and institutions have argued that the practice of partisan redistricting needs to be abandoned, and different people have argued for various alternatives.¹⁶⁷ As stated in Part III, if the Supreme Court will not provide guidance on what state legislatures can do during redistricting, it is critical that the state legislatures, Congress, or both, provide it.

The guidance, as passed by state legislatures, should be specific and should mandate that communities are kept in the same congressional districts and that districts are not drawn solely for partisan gain. These guidelines will help to keep districts compact, will help people

161. *Id.*

162. *Redistricting: Something Canada Does Better*, *supra* note 158.

163. *Id.*

164. *Id.*

165. Richard S. Katz, *Malapportionment and Gerrymandering in Other Countries and Alternative Electoral Systems*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 245, 253 (Mark E. Rush ed., 1998).

166. *Id.*

167. See generally Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 *TEX. L. REV.* 837 (1997). See also AMY, *supra* note 3, at 52–53 (arguing that “eliminating gerrymandering in all of its forms can only be accomplished by abandoning the single-member districts that make it possible and by adopting proportional representation elections.”).

understand and know district boundaries, and will help members of Congress represent a cohesive community. Ideally, the guidance would also mandate independent, non-partisan redistricting commissions because they take the process out of the hands of interested politicians. California's system is a model to emulate because its independent redistricting commission is able to redraw lines without paying attention to party affiliation or incumbency, and has helped to end the state's past legislative gridlock. Finally, because it is important for citizens to have some say in redistricting, guidelines should model the United Kingdom's practice of giving Parliament an up or down vote on new district lines after they are submitted by the boundary commission.

Preferably, Congress would ultimately pass legislation to encourage or mandate that the states that have not yet adopted the aforementioned practices do so. Members of Congress have already introduced legislation to mandate independent state redistricting commissions. In the 113th Congress, Congressman Steven Cohen of Tennessee introduced the John Tanner Fairness and Independence in Redistricting Act.¹⁶⁸ This bill had been championed by Congressman John Tanner of Tennessee during his two-decade career in the House of Representatives, and had also been introduced by Congressman Heath Shuler in the 112th Congress.¹⁶⁹ In introducing the Act, Cohen said:

It's time to take politics out of the redistricting process. Congress is so polarized today that we're unable to find common ground on the major issues facing our country. Instead of solving our nation's problems, Congress is just kicking the can down the road and waiting until the next election for answers. I believe that if we eliminate the gerrymandering of districts we will help get more accomplished for our country.¹⁷⁰

Specifically, the bill would prevent more than one redistricting after each apportionment of Representatives in Congress.¹⁷¹ It also requires that "the redistricting plan [is] developed by [an] independent redistricting commission established in the State"¹⁷² It further requires that the independent redistricting commissions adhere "to the 'one person, one vote' standard and other requirements imposed under the Constitution of the United States," and "[t]o the greatest extent practicable, the maintenance of geographic continuity of the political subdivisions of the State which are included in the same Congressional district"¹⁷³ The bill also states that to the greatest

168. John Tanner Fairness and Independence in Redistricting Act, H.R. 278, 113th Cong. (2013).

169. *Cohen Introduces Fairness and Independence in Redistricting Act*, CONGRESSMAN STEVE COHEN (Jan. 16, 2013), <http://cohen.house.gov/press-release/cohen-introduces-fairness-and-independence-redistricting-act>.

170. *Id.*

171. H.R. 278 § 2.

172. *Id.* at § 3(a)(1)(A).

173. *Id.* at § 4(b)(1)(A), (D). The statute gives an order of preference for maintaining the continuity of subdivisions. They are: counties or parishes, municipalities, and neighborhoods. *Id.* at § 4(b)(1)(D).

extent practicable, the commissions should maintain compact districts.¹⁷⁴ It also prohibits the commissions from considering “voting history,” “political party affiliation of the population of the district,” and “[t]he residence of incumbent Members of the House of Representatives in the State.”¹⁷⁵ Finally, as in the British system, the bill would give state legislatures an opportunity to vote for the proposed redistricting, or to reject it, but not to amend it.¹⁷⁶

One big concern with this legislation is that if there is not enough leeway given for population deviation among districts, legislators, or even members of nonpartisan commissions, will cite the “one person one vote” principle as a cause for further gerrymandering. Essentially, all of the other factors listed in the legislation that members of the redistricting commissions are supposed to consider will be secondary to ensuring that the population of each district is as equal as possible. In discussing his concern that the requirement for mathematical equality for redistricting will actually enable further gerrymandering, Justice Byron White, in his dissent in *Wells v. Rockefeller* stated that the requirement:

downgrade[s] a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect. I see little merit in such a confusion of priorities.¹⁷⁷

Precedent suggests that the largest population deviation that a federal court will allow is a little over .8%.¹⁷⁸ Previous deviations of only a bit more were struck down. For instance, a federal court rejected a previous Kansas plan where population deviation was .94%.¹⁷⁹

Perhaps if Congressman Cohen were to revise his bill so that it specifically allowed for additional population deviation, such as what is allowed in other countries, those responsible for redistricting would be able to focus on maintaining the continuity of preexisting governmental subdivisions and compactness.¹⁸⁰ However, this is not likely to be enough. Because the *Wesberry* Court said that the “Constitution’s plain objective [was to] mak[e] equal representation for equal numbers of

174. *Id.* at § 4(b)(1)(E).

175. *Id.* at § 4(b)(2) (A)–(C).

176. *Id.* at § 4(c)(2).

177. *Wells v. Rockefeller*, 394 U.S. 542, 555 (1969) (White, J., dissenting).

178. J. GERALD HEBERT ET AL., *THE REALISTS’ GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* 6 (2000).

179. *State ex rel. Stephan v. Graves*, 796 F. Supp. 468, 472-73 (D. Kan. 1992) (three-judge court).

180. As previously mentioned, Britain allows for a five percent population deviation in its districts while Canada allows a twenty-five percent deviation. *See supra* Part IV. Australia allows a plus or minus ten percent deviation, while New Zealand allows a plus or minus five percent deviation. Katz, *supra* note 165, at 253.

people,”¹⁸¹ any fundamental deviations from “one person one vote” would probably need to be in an amendment to the Constitution. This is an ideal—that the Constitution will be amended in a way to prevent future partisan redistricting. However, even though it will not address the issues that were originally brought up by Justice White, H.R. 278 is a step in the right direction.

Nevertheless, it does not look like this legislation will move out of committee any time soon. Unfortunately, in the 112th Congress, the bill¹⁸² only garnered twenty-one cosponsors and was never reported out of committee.¹⁸³ Similarly, the bill in the 111th Congress¹⁸⁴ only garnered thirty-three cosponsors and also was not reported out of committee.¹⁸⁵

So while it appears as though Congress, like the Supreme Court, will not be acting anytime soon, it will be valuable for states to continue to pass redistricting reform measures. Eventually, as more members of Congress are elected from states that do not have partisan gerrymandering, there may be enough supporters in Congress to pass legislation like the John Tanner Fairness and Independence in Redistricting Act. It is also possible that more people will become aware of the possibility of reform and will call upon their representatives in Congress to enact such legislation, or support candidates that pledge to do so.

The easiest and most feasible option is for states to pass legislation like California’s legislation. While states passing this type of legislation may put pressure on Congress to do something at the national level, the immediate effect would be that there would be more members of Congress elected from non-gerrymandered districts, and thus more centrist members willing to make bipartisan compromises. This would help to reduce gridlock in Congress.

CONCLUSION

Since the early days of the United States, redistricting has been used for partisan gain. Gerrymandering has been mastered in order to protect incumbents from challengers and to preserve majorities in legislatures. But with modern technology, gerrymandering has gotten more precise and the problems it brings have gotten worse.

Gerrymandering causes problems for public policy. Specifically, gerrymandering facilitates the election of more partisan members of Congress that do not have an electoral incentive to work with members

181. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

182. John Tanner Fairness and Independence in Redistricting Act, H.R. 453, 112th Cong. (2011).

183. *H.R.453 – John Tanner Fairness and Independence in Redistricting Act*, CONGRESS.GOV, <http://beta.congress.gov/legislation> (search for “John Tanner Fairness and Independence in Redistricting Act”; follow the “H.R.453” hyperlink).

184. Fairness and Independence in Redistricting Act, H.R. 3025, 111th Cong. (2009).

185. *H.R.3025 – Fairness and Independence in Redistricting Act of 2009*, CONGRESS.GOV, <http://beta.congress.gov/legislation> (search for “Fairness and Independence in Redistricting Act of 2009”; follow the “H.R.3025” hyperlink).

not in their own party. This has led to a high level of partisan gridlock that is bad for public policy. It is also bad for the country generally. It causes problems for those who participate in democracy—it negatively impacts voter turnout, causes voters to be apathetic about voting or even disenchants voters from wanting to participate in the system. Gerrymandering can also negatively influence the behavior of elected officials.

In the past, Congress and the Supreme Court have provided minimal guidelines to the states for when they redraw district maps. These guidelines have been important, but they do not prevent the egregious partisanship that takes place every decade, or in some cases, more frequently. Even though the Court has left open the possibility of there being an unconstitutional partisan gerrymander, it has not defined what that is. That has left states to pursue unbridled partisanship.

Many states have addressed partisan gerrymandering, and their methods have been diverse with varying success. But if there is to be national progress on the issue, it will ultimately have to come from many more states or from Congress. There is currently not enough support in the House of Representatives to pass legislation to mandate that states create non-partisan redistricting commissions, and it is not likely that there will be enough support until other states pass similar laws. Given the hazardous impact that stems from partisan gerrymandering, it is crucial for positive public policy that progress is made to address the redistricting process.

