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Gerrymandering (Almost) Gone Wild: How the Supreme Court Saved Independent Redistricting Reform

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GERRYMANDERING (ALMOST) GONE WILD: HOW THE
SUPREME COURT SAVED INDEPENDENT REDISTRICTING
REFORM

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n,
135 S. Ct. 2652 (2015)

*Michael Woods**

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INTRODUCTION

Elections have consequences. In the 2010 U.S. midterm elections, the Republican Party made historic congressional gains.¹ After the election, much political discourse focused on the incoming battle between the new Republican Congress and President Barack Obama.² Yet the midterm results affected much more than the presidential agenda, as the Republican Party also achieved impressive state-level gains that resulted

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1. James E. Campbell, *The Midterm Landslide of 2010: A Triple Wave Election*, FORUM, Dec. 2010, at 1, 1, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.421.1773&rep=rep1&type=pdf>.

2. See, e.g., Paul Harris & Ewen MacAskill, *US Midterm Election Results Herald New Political Era as Republicans Take House*, GUARDIAN (Nov. 3, 2010, 12:22 PM), <http://www.theguardian.com/world/2010/nov/03/us-midterm-election-results-tea-party>.

in control of many legislative chambers nationwide.³ These sweeping state-level gains did not affect policy alone. The Democratic Party—and the Republican Party in several “blue” states⁴—paid a drastic price: the gerrymandered results of the 2010 decennial redistricting cycle.⁵

As a partisan tool, gerrymandering refers to drawing electoral districts “in a manner that intentionally discriminates against a political party.”⁶ Although the practice of gerrymandering is historically common, state legislatures arguably gerrymandered to an even higher degree during the 2010 redistricting cycle.⁷ Not all states face gerrymandering issues, however. In fact, several states have curtailed legislative gerrymandering while others have completely removed the legislature’s redistricting power. For example, Florida voters approved a ballot proposal amending the state’s constitution to set strict guidelines on the legislature’s redistricting.⁸ In California, a voter initiative established an independent redistricting commission to combat problems associated with

3. Campbell, *supra* note 1, at 1.

4. The Republicans did not sweep every competitive state race in 2010. For example, the incumbent Democratic governor of Illinois survived a Republican challenge in a very close race. JOHN S. JACKSON, PAUL SIMON PUB. POLICY INST., *THE 2010 ELECTIONS: ILLINOIS STILL BLUE DESPITE THE RED WAVE THAT SWEEPED THE NATION 2* (2011), http://paulsimoninstitute.siu.edu/_comon/documents/simon-review/paper-22-final.pdf. This resulted in several Republican members of the Illinois congressional delegation receiving politically unfriendly districts. See James Warren, *Redistricting Squeezes G.O.P. Class of 2010*, N.Y. TIMES (July 9, 2011), <http://www.nytimes.com/2011/07/10/us/10cncwarren.html>.

5. Several prognosticators warned of these consequences before the midterm election. See, e.g., Mara Liasson, *Midterm Elections Play Major Role in Redistricting*, NPR (Sept. 21, 2010, 4:00 AM), <http://www.npr.org/templates/story/story.php?storyId=130011228>; Peter Roff, *Election 2010 Redistricting Gains Will Give GOP Lasting Majority*, U.S. NEWS (Sept. 28, 2010, 9:20 AM), <http://www.usnews.com/opinion/blogs/peter-roff/2010/09/28/election-2010-redistricting-gains-will-give-gop-lasting-majority>.

6. NAT’L CONFERENCE OF STATE LEGISLATURES, *REDISTRICTING LAW 2010*, at 115 (2009); accord Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 405 (1993). Gerrymandering can also encompass drawing district lines to discriminate against a certain minority group. Howard M. Shapiro, Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 189–90 (1984). For this Comment’s purposes, gerrymandering does not encompass racial gerrymandering.

7. See Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC (Oct. 2012), <http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>.

8. J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL’Y REV. 543, 557 (2011). The Florida Constitution now mandates that “[i]n establishing congressional district boundaries[,] [n]o apportionment plan [by the legislature] . . . shall be drawn with the intent to favor or disfavor a political party or an incumbent; and . . . districts shall be . . . nearly equal in population[,] . . . compact[,] and . . . where feasible, utilize existing political and geographical boundaries.” FLA. CONST. art. 3, § 20. This amendment has curbed extensive gerrymandering in Florida. After extensive litigation, the Florida Supreme Court struck down several congressional districts that the Florida legislature drew following the 2010 redistricting cycle. See *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 413–14 (Fla. 2015).

gerrymandering.⁹

Some observers likened California's commission to the one Arizona voters enacted almost a decade before,¹⁰ the Arizona Independent Redistricting Commission (AIRC).¹¹ However, these two commissions had one key difference: Arizona's initiative authorized legislative party leaders to appoint members onto the AIRC,¹² making it inherently more partisan. While some heralded the initiative as "the most advanced citizen-based approach" to redistricting when enacted,¹³ this wrinkle of partisan appointment was controversial and almost led to the destruction of all independent redistricting reform. After the 2010 redistricting process in Arizona, the AIRC's debatably partisan map aided Democratic candidates in winning additional seats the following election.¹⁴ Angered, various Republicans attacked the AIRC commissioners as biased and "unaccountable to the people."¹⁵ In turn, the growing crescendo of attacks resulted in a massive legal battle between the Arizona legislature and the AIRC that would culminate in a narrow five-to-four decision—*Arizona State Legislature v. Arizona Independent Redistricting Commission*.¹⁶

In June 2012, the Arizona legislature sued the AIRC and its members, arguing that Proposition 106—the voter initiative creating the AIRC—

9. See Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 ELECTION L.J. 472, 474–75 (2012). Subsequently, another proposition added congressional redistricting to the scope of the commission. *Id.* at 477.

10. See, e.g., RAPHAEL J. SONENSHEIN, WHEN THE PEOPLE DRAW THE LINES: AN EXAMINATION OF THE CALIFORNIA CITIZENS REDISTRICTING COMMITTEE 2 (2013), <https://cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf>; Aaron Blake, *California-Size Overhaul Not Likely with Arizona Redistricting Commission*, WASH. POST: THE FIX (Aug. 17, 2011), https://www.washingtonpost.com/blogs/the-fix/post/california-size-overhaul-not-likely-with-arizona-redistricting-commission/2011/08/17/gIQAZyqbLJ_blog.html; Adam Liptak, *Supreme Court Rebuffs Lawmakers over Independent Redistricting Panel*, N.Y. TIMES (June 29, 2015), <http://www.nytimes.com/2015/06/30/us/supreme-court-upholds-creation-of-arizona-redistricting-commission.html>.

11. See SONENSHEIN, *supra* note 10, at 2 n.5.

12. See *id.* at 2 n.5, 12. In contrast, California's Citizens Redistricting Committee was created to "weed out those with conflicts of interest and strong partisan affiliation, and find qualified candidates" in its selection process. Mac Donald, *supra* note 9, at 475.

13. SONENSHEIN, *supra* note 10, at 11.

14. See Samantha Lachman, *Supreme Court Upholds Arizona's Independent Redistricting Committee*, HUFFPOST POL. (June 29, 2015, 10:28 AM), http://www.huffingtonpost.com/2015/06/29/arizona-redistricting-supreme-court_n_7470488.html. For an overview of the redrawn districts, see *Final Congressional & Legislative Maps Adopted 1.17.2012*, ARIZ. INDEP. REDISTRICTING COMM'N, <http://azredistricting.org/Maps/Final-Maps/default.asp> (last visited Aug. 9, 2016).

15. Lachman, *supra* note 14; accord Mary Jo Pitzl, *Arizona Redistricting Case Nearing a Decision*, ARIZ. REPUBLIC (Mar. 29, 2013, 10:39 PM), <http://www.azcentral.com/news/politics/articles/20130329arizona-redistricting-case-nearing-decision.html>.

16. 135 S. Ct. 2652 (2015).

was unconstitutional.¹⁷ A three-judge panel ruled that the legislature had standing by showing “its loss of redistricting power constitute[d] a concrete injury,” but dismissed the claims that the AIRC’s existence was unconstitutional.¹⁸ Subsequently, the Supreme Court accepted jurisdiction on the case.¹⁹ Many worried that the Court would invalidate all redistricting reform that did not originate in a state legislature.²⁰ During the case’s oral argument,²¹ the Court appeared to be narrowly divided on the actual merits, i.e. whether the word “legislature,” as used in the U.S. Constitution’s Election Clause, literally meant that only the legislature could draw congressional districts.²² If the Court had ruled in favor of this interpretation, it would not only have struck down the AIRC, but other states’ redistricting committees as well.²³

This Comment discusses how the *Arizona State Legislature* majority reached its decision to uphold independent redistricting commissions, addresses issues that several of the dissenters raised, and analyzes how the decision will impact partisan gerrymandering and future redistricting reform. Part I briefly overviews reapportionment, gerrymandering, and redistricting reform. Part II then examines *Arizona State Legislature* and provides the legal and political context for the nearly five-year debate over the AIRC. Finally, Part III explores potential legal and policy ramifications of the decision on the future of partisan gerrymandering and redistricting reform.

17. *Id.* at 2662.

18. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 997 F. Supp. 2d 1047, 1050, 1056 (D. Ariz. 2014), *aff’d*, 135 S. Ct. 2652.

19. David G. Savage, *Supreme Court to Review Independent Redistricting Commissions*, L.A. TIMES (Oct. 2, 2014, 4:21 PM), <http://www.latimes.com/nation/la-na-court-redistricting-20141003-story.html>.

20. In fact, some House members even introduced a bill to preempt the Court. *See* The Citizen’s Districts Preservation Act, H.R. 2501, 114th Cong. (1st Sess. 2015).

21. Transcript of Oral Argument, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1314_q8l1.pdf.

22. *See* Nina Totenberg, *Supreme Court Seems Divided over Independent Redistricting Commissions*, NPR (Mar. 3, 2015, 12:49 PM), <http://www.npr.org/2015/03/02/390245031/high-court-case-tests-independent-redistricting-commissions>.

23. *See* Jessica Taylor, *One-Third of Congressional Districts Could Be Affected by Supreme Court Ruling*, NPR (June 28, 2015, 7:03 AM), <http://www.npr.org/sections/itsallpolitics/2015/06/28/417530683/one-third-of-congressional-districts-could-be-affected-by-supreme-court-ruling>; *see also* *Ariz. State Legislature*, 135 S. Ct. at 2662 (discussing how “[s]everal other States, as a means to curtail partisan gerrymandering, have also provided for the participation of commissions in redistricting”).

I. CONGRESSIONAL REAPPORTIONMENT, GERRYMANDERING, AND INDEPENDENT REDISTRICTING IN A NUTSHELL

Since the Constitution's ratification, state legislatures have held the power to redistrict the House of Representatives. There is a constitutional mandate to apportion representatives "according to their respective Numbers, which shall be determined by [the U.S. population]," and that the reapportionment of districts "shall be made . . . every . . . ten Years."²⁴ Congress fulfills this duty via the U.S. Census, which collects data decennially to reallocate districts among the fifty states.²⁵ Traditionally, state legislatures exercised the power to redistrict once district reapportionment occurred. The U.S. Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature."²⁶ Commonly referred to as the Elections Clause,²⁷ the Constitution has historically authorized state legislatures to redraw—or in some cases, to choose not to redraw²⁸—congressional seats. In modern redistricting cycles, the Supreme Court has mandated equal-population voting districts and enforced requirements of the Voting Rights Act to provide equal opportunity for minority populations.²⁹

Likewise, politically motivated gerrymandering has existed since the Constitution authorized legislatures to redistrict.³⁰ In recent years, however, political parties have increasingly manipulated redistricting rules for their own benefit.³¹ To combat this, many states saw efforts to

24. U.S. CONST. art. I, § 2, cl. 3.

25. See 13 U.S.C. § 141 (2012). For a discussion of the U.S. Census's evolution, see generally NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 6, at 7–21.

26. U.S. CONST. art. I, § 4.

27. *E.g.*, *Ariz. State Legislature*, 135 S. Ct. at 2659 (quoting U.S. CONST. art. I, § 4).

28. Draper, *supra* note 7 ("[S]everal states, for much of the 20th century, [did not] bother to adjust their district boundaries at all."). The Supreme Court ruled this practice of not redistricting, or alternatively not providing equal population for congressional districts if at all possible, as unconstitutional. See *Karcher v. Daggett*, 462 U.S. 725, 734 (1983).

29. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 6, at 29, 54.

30. Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 ELECTION L.J. 312, 312 (2015) ("Gerrymandering has been part of American political lexicon and landscape for more than two centuries."); Draper, *supra* note 7 (noting the Virginia legislature's 1788 gerrymandering of Virginia's fifth congressional district to set up a political battle between future Presidents James Madison and James Monroe). The actual term "gerrymandering" was coined after Madison's Vice President, Elbridge Gerry, "presided over a redrawing of [Massachusetts] so blatant in its partisan manipulations that the . . . shape of one . . . district resembled a salamander." *Id.*

31. Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1379–80 (2012) (observing the "increasing efficiency" of partisan gerrymandering); see also Conner Johnston, Comment, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post-Shelby County*, 62 UCLA L. REV. 236, 253–57 (2015) (describing how parties use the

enact various types of redistricting reform. Proposals and goals of those advocating for reform often included factors such as “greater transparency, . . . third-party map submissions, citizen approval [by] direct [vote], careful vetting for conflict of interest, [and] partisan and racial balance,” as well as “neutral criteria” including geographic considerations.³²

However, enacting redistricting reform via initiative has not been very successful historically.³³ Even as late as 2005, independent redistricting had suffered several voter-based setbacks.³⁴ Yet reform-minded redistricting activists became even more vocal in their support for independent proposals.³⁵ Some states, like Florida, enacted guidelines restricting legislatures from excessive partisan gerrymandering while urging the use of neutral criteria.³⁶ Other states directly removed the redistricting power from the legislature. For instance, in Iowa, the authority to redistrict congressional and state districts lies with “nonpartisan, administrative agency of the [Iowa] legislature,” which draws the districts without access to data regarding incumbency or political preferences.³⁷ Voters in Arizona and California took a further step by enacting independent redistricting commissions, which some heralded as the “boldest departure[] from the traditional legislative redistricting model” for including many of the factors advocates desired for an ideal redistricting reform package.³⁸ These efforts reflect a growing

Voting Rights Act to create partisan gerrymanders); Draper, *supra* note 7 (noting how computer software enables partisan gerrymanders to be much more accurate).

32. See Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1812 (2012).

33. Barbara Norrander & Jay Wendland, *Redistricting in Arizona*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST 180 (Gary F. Moncrief ed., 2011) (“[There were] failures in eight out of the 12 attempts to use the initiative process to create independent redistricting commissions between 1936 and 2005.”).

34. See Michael S. Kang, *De-rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 667 (2006) (referencing the voter rejection of commission proposals in both California and Ohio). Ironically, voters in these same states later approved redistricting reform when new proposals were placed on the ballot. See Mac Donald, *supra* note 9, at 474, 477; Jim Siegel, *Voters Approve Issue to Reform Ohio’s Redistricting Process*, COLUMBUS DISPATCH (Nov. 4, 2015, 10:00 AM), <http://www.dispatch.com/content/stories/public/2015/election/ohio-state-issue-1-redistricting.html>.

35. See, e.g., *Model State Redistricting Reform Criteria*, FAIRVOTE.ORG, http://www.fairvote.org/redistricting#model_state_redistricting_reform_criteria (last visited Aug. 9, 2016).

36. See *supra* note 8 and accompanying text.

37. Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 848 (1997); see also Tracy Jan, *Iowa Keeping Partisanship off the Map*, BOS. GLOBE (Dec. 8, 2013), <https://www.bostonglobe.com/news/politics/2013/12/08/iowa-redistricting-takes-partisanship-out-mapmaking/efehCnJvNtLMIAFSQ8gp7I/story.html> (discussing the effects of Iowa’s redistricting system).

38. Cain, *supra* note 32, at 1812.

trend of states moving toward independent redistricting reform, but reform efforts soon faced an existential challenge.

II. PARTISAN GERRYMANDERS ARE INCOMPATIBLE WITH DEMOCRATIC PRINCIPLES

While several redistricting issues, such as racial gerrymandering, are frequently litigated,³⁹ many questions regarding *partisan* gerrymandering remain unsettled.⁴⁰ Given this uncertainty, voters have increasingly limited or removed their state legislatures' power to redistrict. In 2011, one of the most controversial redistricting reform vehicles was the AIRC, which almost immediately rankled the Arizona legislature.⁴¹ Although unsurprising, given other recent controversies involving the Arizona legislature,⁴² this conflict ultimately resulted in litigation that led to the Supreme Court resolving one of the questions concerning partisan gerrymandering: whether the Constitution prohibits all non-legislative redistricting.⁴³

A. *Much Ado About a Commission*

Even before the AIRC, the Arizona legislature frequently faced litigation over the redistricting plans it enacted.⁴⁴ In response, in 2000, Arizona voters approved Proposition 106, a redistricting-reform ballot initiative.⁴⁵ Proposition 106 amended the Arizona constitution to set standards for the newly established AIRC.⁴⁶ According to these standards, legislative party leaders select four commission members from

39. This is not to say that the law regarding racial gerrymandering and the Voting Rights Act is settled. Most recently, in *Shelby County v. Holder*, the Supreme Court invalidated the Voting Rights Act's coverage provision, which effectively ended the preclearance procedure for determining whether a redistricting map was a racial gerrymander ahead of time. *See* 133 S. Ct. 2612, 2631 (2013).

40. McDonald & Best, *supra* note 30, at 312.

41. *See* Marc Lacey, *Arizona Governor and Senate Oust Redistricting Leader*, N.Y. TIMES (Nov. 2, 2011), <http://www.nytimes.com/2011/11/02/us/chairwoman-of-arizona-redistricting-commission-ousted.html> (discussing the ouster of one of the five AIRC commissioners).

42. *See* *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (holding that federal law preempted several provisions of Arizona's controversial S.B. 1070); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 105 (2015).

43. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2671 (2015).

44. *See* Cain, *supra* note 32, at 1830–31 (noting issues with the legislature's maps in three different redistricting cycles).

45. *Id.* at 1831.

46. ARIZ. CONST. art. IV, pt. 2, § 1.

a citizen pool of twenty-five finalists.⁴⁷ In turn, these members select a chairperson not “registered with any party already represented on the [AIRC]” from the pool.⁴⁸ In redistricting, the AIRC must create equal-population districts, ensure political competitiveness, preserve communities of interest, and take into account several geographic considerations.⁴⁹ The AIRC only suffered minimal setbacks in its initial redistricting cycle.⁵⁰

During the next redistricting cycle, however, the AIRC’s selection process received much more scrutiny.⁵¹ Controversy quickly arose after the selection of the “independent” chairperson, Colleen Mathis.⁵² Although registered as an independent, Mathis’s husband had Democratic affiliations, raising questions about Mathis’s actual impartiality.⁵³ Arizona Republican leaders accused her of improper conduct and “skewing the redistricting process toward Democrats.”⁵⁴ After the maps’ release, Mathis was ousted from the AIRC for “gross misconduct.”⁵⁵ Nonetheless, the Arizona Supreme Court reinstated Mathis,⁵⁶ which led to the commission subsequently approving similarly drawn maps.⁵⁷

Unable to alter the AIRC’s composition, the Arizona legislature sued in federal court.⁵⁸ The legislature alleged that creating the AIRC violated

47. *Id.* § 1(3)–(5).

48. *Id.* § 1(8).

49. *Id.* § 1(14). Like all other states, the AIRC must comply with the Voting Rights Act. *Id.*

50. See Cain, *supra* note 32, at 1832. The AIRC’s map was challenged on the grounds that it did not create enough “competitive districts,” but the case was dismissed because the petitioner failed to “meet its burden of establishing that the [2001] plan lack[ed] a reasonable basis.” *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d 676, 682, 689 (Ariz. 2009) (en banc).

51. See Evan Wyloge, *Critics Say Partisan Fights Take New Shape in ‘Independent’ Redistricting*, ARIZ. CAPITOL TIMES (Mar. 15, 2011, 11:46 AM), <http://azcapitoltimes.com/news/2011/03/15/critics-say-partisan-fight-takes-new-shape-in-independent-redistricting/>.

52. Lacey, *supra* note 41.

53. Marc Lacey, *Arizona Redistricting Panel Is Under Attack, Even Before Its Work Is Done*, N.Y. TIMES (Sept. 3, 2011), <http://www.nytimes.com/2011/09/04/us/04redistrict.html>.

54. Lacey, *supra* note 41; accord Mary Jo Pitzl, *Arizona Redistricting Chief Ousted*, ARIZ. REPUBLIC (Nov. 2, 2011, 12:00 AM), <http://www.azcentral.com/news/election/azelections/articles/2011/11/01/20111101arizona-redistricting-brewer-wants-chair-Mathis-removed.html>.

55. Pitzl, *supra* note 54. An Arizona governor may only remove an AIRC member “for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office,” and two-thirds of the Arizona Senate must concur. ARIZ. CONST. art. IV, pt. 2, § 1(10).

56. *Ariz. Indep. Redistricting Comm’n v. Brewer*, 275 P.3d 1267, 1278 (Ariz. 2012).

57. Alex Isenstadt, *Colleen Mathis’s Revenge*, POLITICO: DAVID CATANESE BLOG (Dec. 20, 2011, 10:23 PM), <http://www.politico.com/blogs/david-catanese/2011/12/colleen-mathiss-revenge-108259>.

58. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2662

the Constitution's Elections Clause, as voters were controlling redistricting instead of state legislators.⁵⁹ More specifically, the crux of the legislature's argument was that "[t]he word 'Legislature' in the Elections Clause [only meant] the representative body which makes the laws of the people," meaning "[n]o State can constitutionally divest its Legislature entirely of the redistricting authority."⁶⁰ After recognizing that the Arizona legislature had standing,⁶¹ a federal district court held that the Elections Clause permitted the AIRC's creation, as Arizona's "lawmaking power plainly includes the power to enact laws through [voter] initiative."⁶² The district court also affirmed a broader interpretation of "Legislature" in the Elections Clause.⁶³ After this ruling, the Supreme Court postponed jurisdiction and addressed the matter.⁶⁴

B. "Legislature" Means More than Legislature

This Comment centers its analysis on the Elections Clause discussion in *Arizona State Legislature* rather than on the standing discussion.⁶⁵ First, the Supreme Court provided much-needed clarity on its views concerning partisan gerrymandering. Justice Ruth Bader Ginsburg, author of the opinion, explicitly recognized that "[p]artisan gerrymanders . . . [are incompatible] with democratic principles," setting

(2015).

59. See Brief for Appellant at 42, 47, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314).

60. Joint Appendix at 21, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314).

61. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1050 (D. Ariz. 2014) ("[The Arizona legislature's] loss of redistricting power constitute[d] a concrete injury."), *aff'd*, 135 S. Ct. 2652.

62. *Id.* at 1056. One judge dissented on this point, believing that the AIRC unconstitutionally denied the Arizona legislature "the ability to have any outcome-defining effect on the congressional redistricting process." *Id.* at 1058 (Rosenblatt, J., concurring in part and dissenting in part).

63. See *id.* at 1055–56 (majority opinion) ("The Supreme Court's decisions . . . 'provided a clear and unambiguous answer . . . twice explaining that the term 'Legislature' in the Elections Clause refers not just to a state's legislative body but more broadly to the entire lawmaking process of the state.'" (quoting *Brown v. Sec'y of State*, 668 F.3d 1271, 1276 (11th Cir. 2012)). Incidentally, *Brown* upheld the Fair Districts Florida initiative, or Amendment Six, against a challenge that it was procedurally and substantively unconstitutional. See *Brown*, 668 F.3d at 1285.

64. *Ariz. State Legislature*, 135 S. Ct. at 2659.

65. The majority also thoroughly discussed whether the Arizona legislature possessed standing and determined that there was an "injury in the form of [an] 'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Id.* at 2663 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). The Court noted that the alleged injury was not "premature, nor . . . too 'conjectural' or 'hypothetical' to establish standing," as any attempt to enact a competing plan would immediately conflict with the Arizona constitution. *Id.* at 2663–64 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

the tone for the rest of the decision.⁶⁶ The majority then proceeded to deduce principles from relevant precedent, first noting that precedent established that “the word [Legislature] encompassed a veto power lodged in the people,” not just the representative body.⁶⁷ The Court then analyzed other early precedent to differentiate various uses of the term “Legislature” in the Constitution, distinguishing the “lawmaking” function of state legislatures from their other constitutional functions.⁶⁸ The Court noted that, normally, lawmaking “must be in accordance with the method which the State has prescribed for legislative enactments” and further that the Elections Clause did not “endow the legislature of the State with power to enact laws in any manner other than that . . . [State’s] constitution.”⁶⁹ Justice Ginsburg strategically distinguished the concept of lawmaking from just a legislative body here. Her discussion previously examined Arizona’s constitutionally approved voter-initiative process, showing that it was a form of lawmaking, and thus constitutional.⁷⁰ In this manner, the majority demonstrated that a state constitution may grant lawmaking power to a non-legislative party, whether an executive or a state’s citizens.⁷¹

Next, the majority addressed one of the dissenting arguments⁷²: If “Legislature” in the Constitution encompasses more than just state legislatures, and even includes a state’s citizens, why was the Seventeenth Amendment even necessary, since that amendment’s purpose was to enable “the people” rather than “the Legislature” of each state to elect senators, as originally prescribed by the Constitution?⁷³ In other words, why was it necessary to transfer this power from the state legislatures to the people if the term “Legislature” includes the people? In light of its previous discussion, the majority dismissed this argument,⁷⁴ citing precedent stating that “legislature” has several meanings within the U.S.

66. *Id.* at 2658 (second alteration in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 316 (Kennedy, J., concurring in the judgment)).

67. *Id.* at 2666.

68. *See id.* at 2666–67.

69. *Id.* at 2667 (quoting *Smiley v. Holm*, 285 U.S. 355, 367–68 (1932)).

70. *See id.* at 2660–61 (noting that the Arizona constitution established Arizona voters on “equal footing” with the Arizona legislature).

71. *Compare id.* (discussing voter-initiative power to establish a redistricting commission), with *Smiley*, 285 U.S. at 366, 368 (upholding the Minnesota governor’s veto power on redistricting maps).

72. *Ariz. State Legislature*, 135 S. Ct. at 2667–68.

73. *See id.* at 2677–78, 2681 (Roberts, J., dissenting).

74. *Id.* at 2667–68 (majority opinion) (quoting U.S. CONST. art. I, § 3).

Constitution.⁷⁵ Ultimately, the Court held that there was “no constitutional barrier” to lawmaking via voter initiative.⁷⁶

After rejecting the claim that the Elections Clause conflicted with a federal statute permitting Congress to adopt redistricting maps without legislative involvement,⁷⁷ the majority turned to whether the AIRC was constitutional. Affirming the lower court’s decision, the Court held that Arizona voters could enact redistricting reform via independent commissions without violating the Elections Clause.⁷⁸ Again noting Arizona’s constitution permitted lawmaking via voter initiative, the majority determined that “the people,” similarly to a legislative body, may delegate their lawmaking power to an independent redistricting commission.⁷⁹

Turning to the Elections Clause, the majority declared its central purposes to be “the Framers’ insurance against . . . a State [refusing] to provide [congressional] election[s]’ . . . [and] to act as a safeguard against manipulation of electoral rules by politicians . . . to entrench themselves or place their interests over those of the electorate.”⁸⁰ Thus, the Elections Clause cannot be reasonably interpreted to prevent a state from allocating lawmaking power to “the people,” as that interpretation would run contrary to the historic role of “States as laboratories.”⁸¹ Finally, the majority warned that the dissent’s interpretation would invalidate all initiative-enacted redistricting commissions and that a wide array of other initiatives enacted via the people’s lawmaking ability would likely suffer the same fate.⁸² Invoking the ideals of direct democracy,⁸³ the majority adopted a legally sound and practical solution to the controversy.

75. *Id.* at 2668. Later, the majority pointed out that even during the founding, several dictionaries defined “legislature” as encompassing all lawmaking power. *See id.* at 2671 (discussing early dictionary definitions of “legislation”).

76. *Id.* at 2668.

77. *See id.* at 2668–71 (dissecting the legislature’s arguments against a federal statute with the provision’s legislative background and prior Court precedent).

78. *Id.* at 2671.

79. *Id.* at 2671–72. At oral argument, the Arizona legislature’s counsel conceded that a legislature could delegate its redistricting power to a commission. *See* Transcript of Oral Argument, *supra* note 21, at 15–16.

80. *Ariz. State Legislature*, 135 S. Ct. at 2672 (quoting *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013)) (deriving support from both the Federalist Papers and James Madison’s discussions of the Elections Clause).

81. *Id.* at 2672–73 (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)).

82. *Id.* at 2676–77 (noting that popular initiatives regulating voter registration and straight-ticket voting as well as “[c]ore aspects of the electoral process” in state constitutions, which were ratified by convention as opposed to state legislatures, would be endangered).

83. *See id.* at 2677.

C. *The Dissent's Pre-Seventeenth Amendment Interpretation of "the Legislature"*

While *Arizona State Legislature* produced three detailed dissents attacking the majority's various positions, this Comment focuses on Chief Justice John Roberts's dissent discussing the Elections Clause.⁸⁴ His dissent first invoked the Seventeenth Amendment before sarcastically criticizing its drafters for not just interpreting "the Legislature" in Article I, Section 3, as "the people."⁸⁵ Claiming the majority's interpretation ignored supportive evidence, the Chief Justice criticized the historical sources—"founding era dictionaries"—the majority used to construe "legislature," while relying on other historical sources to support a strict textualism interpretation of the term.⁸⁶ Yet the claim that "any ambiguity about the meaning of 'the Legislature' is removed" when presented with other founding-era sources is puzzling,⁸⁷ given the existence of separate historical schools of thought on the term's actual definition.⁸⁸ The dissent further argued that the majority was amending the Elections Clause "by judicial decision."⁸⁹

Chief Justice Roberts's strongest argument focused on the Court's previous invalidation of provisions in state constitutions imposing term limits on federal representatives, although those limits would give the people more control over their representation.⁹⁰ While an interesting analogy, the Constitution's Qualifications Clauses are much less ambiguous than the Elections Clause and pertain to an almost exclusively federal domain.⁹¹ Additionally, using a case decided by the House Elections Committee in 1866, his dissent argued that state legislatures

84. Justices Antonin Scalia and Clarence Thomas also condemned the majority's interpretation of the Elections Clause. *See id.* at 2697 (Scalia, J., dissenting) (deriding the majority's interpretation of "legislature"); *id.* at 2697–99 (Thomas, J., dissenting) (dismissing the Court's tradition of ballot initiatives as inconsistent while viewing the majority's support for the AIRC as "faux federalism"). Both dissents also discussed standing and federalism issues beyond this Comment's scope.

85. *See id.* at 2677 (Roberts, C.J., dissenting) (quoting U.S. CONST. art. I, § 3, cl. 1, *amended* by U.S. CONST. amend. XVII).

86. *Id.* at 2679–80.

87. *See id.* at 2679.

88. *See supra* note 75 and accompanying text.

89. *Ariz. State Legislature*, 135 S. Ct. at 2682 (Roberts, C.J., dissenting). Oddly, Chief Justice Roberts cited the AIRC's counsel's lack of answer [to what?] as support for his claim that the majority "judicial[ly]" amended the Constitution. *See id.* (highlighting a brief dialogue between Justice Samuel Alito and the AIRC's counsel at oral argument).

90. *See id.* at 2690 ("Yet the Court refused to accept 'that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded.'" (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995))).

91. *Compare* U.S. CONST. art. I, § 2, cl. 2 (House Qualifications Clause), *and id.* § 3, cl. 3 (Senate Qualifications Clause), *with id.* § 4 (Elections Clause).

could override voter-initiative-enacted constitutional provisions regulating federal elections under the majority's reasoning.⁹² Yet the majority disagreed with that case's value as precedent, remarking that courts generally hold that state legislation in direct conflict with that state's constitution is void.⁹³ The dissent also dismissed concerns over upending other initiative-created electoral laws as beyond the scope of the case.⁹⁴

Concluding his dissent, the Chief Justice acknowledged the people's concerns over their redistricting process but, "for better or worse," offered no judicial recourse in his interpretation of the Elections Clause.⁹⁵ Rather, he encouraged redistricting advocates to pursue reform via Congress or the constitutional amendment process⁹⁶—a highly unlikely proposition given the current, highly partisan era. While this dissent is thought-provoking, the majority opinion, which relied on both legal precedent and historical record, is more practical and provides the best solution for this issue.

III. INDEPENDENT REDISTRICTING REFORM SURVIVES—WHAT NOW?

In whole, *Arizona State Legislature* kept the Pandora's Box of partisan gerrymandering closed in Arizona, and likely nationwide. The majority's legal discussion and reliance on historical record demonstrates that the Elections Clause should not be interpreted in a way that permits state legislatures to manipulate the Clause to retain their redistricting, and consequently gerrymandering, powers. Rather, the Clause's inclusion in the U.S. Constitution was to protect the people against those very forms of political abuse. Although "[t]he Framers may not have imagined the modern initiative process" at the time,⁹⁷ allowing initiative-based, independent redistricting commissions perfectly aligns with the goals of the Constitution.

The majority also provided proponents of redistricting reform a more concrete legal ground to stand upon. Many redistricting-reform advocates praised the Court's decision.⁹⁸ Voters in states possessing various forms

92. See *Ariz. State Legislature*, 135 S. Ct. at 2685–86 (Roberts, C.J., dissenting) (citing *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess. (1866)).

93. See *id.* at 2674 (majority opinion).

94. See *id.* at 2691 (Roberts, C.J., dissenting).

95. *Id.* at 2692.

96. *Id.*

97. *Id.* at 2674 (majority opinion).

98. See, e.g., Bill Chappell, *Supreme Court Backs Arizona's Redistricting Commission Targeting Gridlock*, NPR (June 29, 2015, 8:12 PM), <http://www.npr.org/sections/thetwo-way/2015/06/29/418521823/supreme-court-backs-arizonas-redistricting-commission-targeting-gri>

of redistricting commissions could breathe a sigh of relief after the ruling.⁹⁹ In particular, California's voter-approved commission would not have survived a constitutional challenge under the dissent's interpretation of the Elections Clause.¹⁰⁰ A federal court later relied on *Arizona State Legislature* to uphold California's commission.¹⁰¹ The Court's decision has also inspired challenges to partisan congressional gerrymanders. In Wisconsin, challengers to that state's political map filed a complaint in federal court after the Supreme Court's decision, on grounds that the map was overtly partisan.¹⁰² Partly due to the dicta in *Arizona State Legislature*, this case will likely reach the Supreme Court, which will finally have the opportunity to rule whether partisan gerrymanders are constitutional. If *Arizona State Legislature* is any indicator, the Court could finally press forward in ending this undemocratic practice. However, the Court might take a more nuanced approach, as a decision outright ending the practice would drastically increase litigation over whether states' district maps are valid. Depending on the new composition of the Supreme Court, this is likely to be a narrow five-to-four decision.

Additionally, *Arizona State Legislature* gave the green light for several states to continue pursuing their own independent reforms. Before the decision, Ohio's legislature had passed a series of redistricting reforms that required the approval of Ohio voters, but that vote was stalled due to the litigation surrounding the AIRC.¹⁰³ After the Supreme Court's ruling, Ohio's redistricting-reform package was overwhelmingly voted into law the following November election.¹⁰⁴ Democratic-leaning

dlock; Lachman, *supra* note 14.

99. See Tarini Parti, *Supreme Court Upholds Arizona Redistricting Committee*, POLITICO (June 29, 2015, 1:59 PM), <http://www.politico.com/story/2015/06/arizona-redistricting-commission-supreme-court-voting-119543> (listing states with redistricting commissions); Taylor, *supra* note 23 (discussing the states that could have been forced to redraw lines if the Court decided the case differently).

100. See Savage, *supra* note 19.

101. *Dewitt v. Ryan*, No. C 15-05261 WHA, 2016 WL 127291, at *3 (N.D. Cal. Jan. 12, 2016) (dismissing a claim that California's redistricting commission was unconstitutional).

102. See Complaint at 1–2, *Whitford v. Nichol*, No. 15-cv-421-bbc, 2015 WL 7294549 (W.D. Wis. Nov. 17, 2015) (No. 3:cv-00421-bbc); Louis Weisberg, *Case to Overturn Wisconsin's Overtly Partisan Political Districts Moves One Step Forward in Court*, WIS. GAZETTE (Oct. 3, 2015), <http://wisconsin Gazette.com/2015/10/03/case-to-overturn-wisconsins-gerrymandered-legislative-districts-moves-forward/>. Although there were questions as to whether the case could even proceed on standing grounds, the federal court hearing *Whitford* denied a motion to dismiss, allowing the cause of action to proceed. See *Whitford*, 2015 WL 9239016, at *1.

103. Jackie Borchart, *U.S. Supreme Court Ruling Clears the Way for Ohio Congressional Redistricting Reform*, CLEVELAND.COM (June 29, 2015, 4:25 PM), http://www.cleveland.com/open/index.ssf/2015/06/us_supreme_court_ruling_clears.html.

104. Siegel, *supra* note 34.

states with their own gerrymanders are also likely to face voter-initiative efforts to pass independent redistricting reform. For example, there are already efforts underway in states such as Illinois and Maryland.¹⁰⁵

Other courts have also adopted the Supreme Court's reasoning that partisan gerrymanders are not compatible with democracy. For example, in ordering the adoption of a map to remedy an unconstitutional racial gerrymander in Virginia,¹⁰⁶ one federal court rejected an argument that the replacement map had to maintain the same partisan makeup as the legislature's original map, using the *Arizona State Legislature* reasoning.¹⁰⁷ Another federal court noted that the Court's decision could give gerrymandering "an expiration date."¹⁰⁸ Finally, in litigation over Florida's Fair Districts voter initiative, the Florida Supreme Court adopted principles from the *Arizona State Legislature* majority in defending the initiative.¹⁰⁹ Recognizing the importance of independent reform in the context of democratic principles, the Florida Supreme Court set an example for other state courts to follow. Because Florida voters enacted these guidelines, a constitutional challenge to their validity should not be successful under the principles the *Arizona State Legislature* majority established. Granted, there are differences between the AIRC and the Florida initiative, as the latter only restricts the state legislature's redistricting power and does not outright abolish it. Yet *Arizona State Legislature*'s importance in preventing the Florida initiative from being struck down should not be understated. In a scenario in which the dissent's principles prevailed, the Court might have struck down the Florida initiative's restrictions on the legislature's redistricting power. However, because voters are able to completely remove a state legislature's redistricting power, they should *a fortiori* be able to restrict that power. Notably, in the months after the Florida Supreme Court's decision, no challenge to the Florida initiative has surfaced.

105. Gabrielle Levy, *Redistricting Reform Gains Steam*, U.S. NEWS (Dec. 1, 2015, 12:01 AM), <http://www.usnews.com/news/articles/2015/12/01/redistricting-reform-gains-steam>. In fact, the redistricting effort in Illinois is facing resistance. The Illinois Supreme Court ruled that an initiative placing independent redistricting reform on the ballot was unconstitutional under the Illinois Constitution. *See* *Hooker v. Ill. State Bd. Of Elections*, No. 121077, 2016 WL 54776601 ¶ 49 (Ill. Aug. 25, 2016).

106. *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at *18–19 (E.D. Va. June 5, 2015), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

107. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 563 (E.D. Va. 2016), *stay denied sub nom. Wittman v. Personhuballah*, 136 S. Ct. 998 (2016).

108. *Harris v. McCrory*, 159 F. Supp. 3d 600, 628 (M.D.N.C. 2016) (Cogburn, J., concurring), *stay pending appeal denied sub nom. McCrory v. Harris*, 136 S. Ct. 1001 (2016), *prob. juris. noted sub nom. McCrory v. Harris*, 136 S. Ct. 2512 (2016).

109. *See League of Women Voters v. Detzner*, 172 So. 3d 363, 370 (Fla. 2015) (discussing *Arizona State Legislature*).

Despite these developments, *Arizona State Legislature* has not completely clarified the Court's stance on partisan gerrymandering. After the decision, courts have recognized that there is some uncertainty surrounding the Supreme Court's jurisprudence on the subject.¹¹⁰ Earlier in 2015, the Court implied that "political affiliation" was a "traditional race-neutral districting principle[]" that a legislature could consider in redistricting.¹¹¹ Likewise, the Court has struggled to establish a test to identify when partisan gerrymandering is unconstitutional.¹¹² With *Arizona State Legislature*, however, the Court has likely adopted a more aggressive stance on the various legal issues surrounding redistricting.

Immediately after the *Arizona State Legislature* decision, the Court agreed to hear another case involving the AIRC, *Harris v. Arizona Independent Redistricting Commission*.¹¹³ In 2012, the *Harris* plaintiffs alleged that the AIRC purposefully overpopulated certain legislative districts for partisan purposes.¹¹⁴ In a divided opinion, the lower court held that the plaintiffs failed to meet their burden of proving that the AIRC violated the "one-person, one-vote" principle derived from the Fourteenth Amendment, and that "legitimate considerations" outweighed any political calculations.¹¹⁵ This became one of the central questions that the *Harris* appellants presented to the Supreme Court.¹¹⁶

From several of the Justices' tones at oral arguments, there seems to be a growing reluctance to support partisan gerrymandering on the Court.¹¹⁷ Moreover, the Court has now had the chance to address the issue

110. See, e.g., *Alcorn*, 155 F. Supp. 3d at 566 (Payne, J., concurring in part and dissenting in part) (noting that there is "substantial, and unfortunate, uncertainty present in the Supreme Court's decisions respecting the legitimacy, if any, of [partisan] gerrymandering"); *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 541 & n.21 (E.D. Va. 2015) (discussing the Supreme Court's redistricting decisions).

111. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015).

112. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416–20 (2006) (Kennedy, J.) (rejecting a proposed test and discussing other previously disavowed tests in past Court precedent); see also *Harris v. McCrory*, Case No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016) ("[I]t may be possible to challenge redistricting plans when partisan considerations go 'too far[.]' . . . [b]ut it is presently obscure what 'too far' means." (citing *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting))).

113. 135 S. Ct. 2946 (2015).

114. Complaint at 2, *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2012) (No. 2:12CV00894); S.M., *The Supreme Court Seems Suddenly Worried About Partisan Gerrymandering*, *ECONOMIST: DEMOCRACY IN AM.* (Dec. 14, 2015, 7:33 PM), <http://www.economist.com/blogs/democracyinamerica/2015/12/voter-equality>.

115. *Harris*, 993 F. Supp. 2d at 1073, 1079–80.

116. See Brief for Appellants at i, *Harris*, 135 S. Ct. 2946 (2015) (No. 14-232), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-232_appellant.authcheckdam.pdf.

117. See S.M., *supra* note 114 (noting Justice Samuel Alito's hesitation to affirm his previous statements supporting the consideration of partisanship in gerrymandering as valid).

of whether partisan gerrymandering is a legitimate consideration for redistricting. The *Harris* district court raised this point, noting that “[t]he Supreme Court has not [concretely] decided whether or not political gain is a legitimate state redistricting tool.”¹¹⁸ However, in deciding *Harris*, the Court did not determine the legitimacy of partisanship as a redistricting factor.¹¹⁹ The Court agreed with the district court’s decision and affirmed the plan, holding that there was not enough evidence to show that the AIRC’s plan violated the Constitution.¹²⁰ It determined that the population variations mainly reflected the AIRC’s “efforts to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party.”¹²¹

Although *Harris* did not decide whether partisanship was an illegitimate consideration in redistricting, the Court has also accepted several other redistricting cases.¹²² In particular, one case centered on which interpretation of the term “population” should be used in redrawing districts.¹²³ This case—*Evenwel v. Abbott*¹²⁴—slightly differed from *Arizona State Legislature* in that the controversy surrounded state legislative districts.¹²⁵ In late 2014, the lower federal court rejected the plaintiffs’ claim that the wide variations in voter population in Texas’s state legislative districts violated the Equal Protection Clause, even though the districts had relatively equal total population.¹²⁶ But like in *Arizona State Legislature*, the resolution of this issue depended on the Supreme Court’s interpretation of constitutional wording in relation to redistricting issues. The Court recognized as much, since the entire *Evenwel* oral argument focused on how past Court precedent interpreted the word “population.”¹²⁷ Following the *Arizona State Legislature*

118. *Harris*, 993 F. Supp. 2d at 1072.

119. *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1309 (2016).

120. *Id.* at 1305.

121. *Id.* at 1307.

122. Josh Gerstein, *SCOTUS Wrestles with Redistricting Cases*, POLITICO: UNDER THE RADAR (Dec. 8, 2015, 6:35 PM), <http://www.politico.com/blogs/under-the-radar/2015/12/scotus-wrestles-with-redistricting-cases-216569>.

123. Robert Barnes, *Justices Appear Split in Texas Redistricting Challenge*, CHI. TRIBUNE (Dec. 8, 2015, 5:40 PM), <http://www.chicagotribune.com/news/nationworld/ct-supreme-court-one-person-one-vote-20151208-story.html>; Abby Livingston, *Texas Redistricting Case Could Have National Effect*, TEX. TRIBUNE (Dec. 8, 2015), <https://www.texastribune.org/2015/12/08/lawyers-argue-texas-redistricting-case/>.

124. 135 S. Ct. 2349 (2015) (mem.).

125. See Livingston, *supra* note 123. Predictably, *Evenwel* has become a hotbed for partisan battles, similar to *Arizona State Legislature*. See *id.*

126. *Evenwel v. Perry*, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507, at *1–2 (W.D. Tex. Nov. 5, 2014).

127. See, e.g., Oral Argument at 4–6, *Evenwel*, 135 S. Ct. 2349, 2015 WL 9919332 (No. 14-940).

principles would require the Court to hold that a more expansive interpretation of “population” is required to comply with the one-person, one-vote requirement. In contrast, a decision following the main *Arizona State Legislature* dissent would lead to a citizens-only criterion for redrawing congressional districts. This approach could potentially lead to partisan abuse—especially in states without any independent guidelines—and to extensive litigation over not just redistricting, but the Census, citizenship, and immigration laws. In fact, the Court ruled that there was no reason to “upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades” and kept the total population standard.¹²⁸ Thus, the Court chose the more sensible and judicially efficient choice and followed the practical principles discussed in *Arizona State Legislature*. In light of the *Harris* and *Evenwel* decisions, the Court may not have a chance to decide on partisanship in redistricting until after the 2016 presidential election and a new Supreme Court Justice is appointed.

Upholding these independent redistricting commissions is a strong step forward in curbing the excesses of partisan gerrymandering, as state legislatures can be reluctant to enact reform. This reluctance likely stems in part from states concerned with “unilateral disarmament.” Historically, both parties have gerrymandered when the chance presented itself,¹²⁹ and a Democratic or Republican legislature may hesitate to create an independent redistricting commission even if the other political party guarantees nonpartisan redistricting—similar to a classic prisoner’s dilemma. Self-preservation for both federal and state legislators also comes into play, as independent redistricting can result in a different partisan makeup of the drawn districts. Thus, for reform advocates voter initiative, if a state permits the process, may be the only option to enact independent redistricting.

Beyond redistricting reform, the *Arizona State Legislature* decision has broader impacts. It preserved other voter initiatives related to election law, including mail-in ballots and voter ID regulations, on the principle that they do not violate the Elections Clause.¹³⁰ Both political parties should be pleased with this result, as Chief Justice Roberts’s reasoning might have invalidated many of the parties’ respective priorities enacted by voter initiative.¹³¹ While other constitutional challenges to some of these laws may succeed, they will not be invalidated based on the principles stated in *Arizona State Legislature*.

128. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132–33 (2016).

129. See *Draper*, *supra* note 7.

130. See *Parti*, *supra* note 99.

131. See *supra* Section II.C.

CONCLUSION

Overall, *Arizona State Legislature* halted an effort opposing independent redistricting reform, especially those enacted by voter initiative. The majority took a strong stance against partisan gerrymandering, bringing clarity to the Court's jurisprudence on the subject. In doing so, the majority relied on sound precedent and legal reasoning to reach an outcome that preserved current independent-redistricting reforms and offered further possibilities to counter the abuses of gerrymandering. The case also signals the Court's shift toward bringing clarity to redistricting law. The majority's stance against partisan gerrymandering is an important step in promoting necessary independent redistricting reform throughout the United States. With the next redistricting cycle less than five years away, the clock is ticking.

