

2020

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Recommended Citation

Ortega, Michael (2020) "Preserving a Democratic Shield: First Amendment Challenges to Michigan's Independent Redistricting Commission," *University of Chicago Legal Forum*: Vol. 2020 , Article 16.
Available at: <https://chicagounbound.uchicago.edu/uclf/vol2020/iss1/16>

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Preserving a Democratic Shield: First Amendment Challenges to Michigan’s Independent Redistricting Commission

Michael Ortega[†]

I. INTRODUCTION

The First Amendment protects speech from the street corner to the ballot box.¹ With a pervasive fear of governmental suppression and a commitment to strong public discourse, courts have forged the modern First Amendment into a democratic shield.² Although this shield does not go far enough to protect those who need it,³ this Comment focuses on a different problem: the warping of a pro-democratic shield into an anti-democratic sword. How should the First Amendment apply when plaintiffs challenge government action that broadens public debate? How should courts address plaintiffs wielding the First Amendment to attack pro-democratic reforms? This Comment addresses these questions by analyzing recent First Amendment challenges to Michigan’s independent redistricting commission (“IRC”).⁴

Partisan gerrymandering, the manipulation of electoral district lines for partisan gain, is “incompatible with democratic principles.”⁵

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¹ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939); see also *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

² See *Stromberg v. California*, 283 U.S. 359, 369 (1931).

³ See Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2127 (2018) (“The result [of the Supreme Court’s recent jurisprudence] has been to limit the effectiveness of the First Amendment as a tool for protecting the expressive freedom of those at the bottom of the economic and social hierarchies—those whose speech is most likely to be constrained by forces other than the discriminatory animus of government actors.”).

⁴ S.M., *Republicans Challenge Michigan’s Redistricting Commission in Court*, ECONOMIST (Aug. 1, 2019), <https://www.economist.com/democracy-in-america/2019/08/01/republicans-challenge-michigans-redistricting-commission-in-court> [https://perma.cc/4TN9-G4YV].

⁵ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (quoting *Ariz. State Legislature v.*

Partisan gerrymanders discriminate against voters on the basis of party affiliation and frustrate the effectiveness of political association, “undermin[ing] the protections of ‘democracy embodied in the First Amendment.’”⁶ In 2018, sixty-one percent of Michiganders voted to amend the state’s constitution to create an independent redistricting commission.⁷ The amendment empowers this citizen-led commission to draw congressional and state legislative districts, thus preventing the majority party in the legislature from unilaterally controlling the map-drawing process.⁸ Less than a year later, the Michigan Republican Party and a group of Republican political actors (hereafter, “the Michigan plaintiffs”) filed complaints on First Amendment grounds seeking to prevent Michigan from implementing the commission.⁹

The First Amendment protects rights that are necessary for democratic self-governance.¹⁰ Courts crafted the doctrines on which the Michigan plaintiffs rely—bans on political patronage, the associational rights of political parties, and viewpoint discrimination—in response to government practices limiting the ability of private actors to participate in public debate.¹¹ By challenging redistricting reform in this manner, the plaintiffs’ claims warp these doctrines; Michigan’s IRC expands public discourse rather than contracting it. Moreover, the plaintiffs’ success would entail striking down a ballot initiative passed by a supermajority of Michiganders, overturning the results of a public debate. The Michigan plaintiffs seek to distort jurisprudence, forcing the First Amendment to “bit[e] its own tail.”¹²

The Supreme Court has closed the federal courthouse door to partisan gerrymandering claims.¹³ In doing so, the Court may not have ended these battles so much as shifted the battleground from the maps

Ariz. Indep. Redistricting Comm’n, 576 U.S. 787, 791 (2015)).

⁶ *Id.* at 2514 (Kagan, J., dissenting) (quoting *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (plurality opinion)). *But see id.* at 2504. (“[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.”).

⁷ 2018 *Michigan Election Results*, MICH. DEP’T OF ST. (Nov. 26, 2018), https://mielections.us/election/results/2018GEN_CENR.html [<https://perma.cc/EN8H-3WFE>].

⁸ *Amendment Language*, VOTERS NOT POLITICIANS, <https://votersnotpoliticians.com/language/> [<https://perma.cc/N3QG-BAKF>].

⁹ S.M., *supra* note 4; Complaint for Declaratory and Injunctive Relief [hereinafter *Political Actors Complaint*] at ¶ 2, *Daunt v. Benson*, 425 F.Supp.3d 856, No. 1:19-cv-00614 (W.D. Mich. July 30, 2019).

¹⁰ See Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1102 (2016) (collecting cases and scholarship).

¹¹ See *infra* Part IV.A.

¹² Tim Wu, *Beyond First Amendment Lochnerism: A Political Process Approach*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), <https://knightcolumbia.org/content/beyond-first-amendment-lochnerism-a-political-process-approach> [<https://perma.cc/2E32-8Y26>].

¹³ See *infra* notes 23–27 and accompanying text.

to the mapmakers. Litigation similar to Michigan's IRC challenge is likely in the coming years,¹⁴ and the 2020 census and reapportionment will bring fierce redistricting battles across the country.¹⁵ In some cases, these fights will be between citizens and their elected officials.¹⁶ Courts should not construe the First Amendment to aid the latter.

The argument of this Comment is two-fold. First, because the Michigan plaintiffs' arguments subvert the doctrines on which they rely, courts should reject their First Amendment claims. Second, these doctrines cannot support the plaintiffs' claims because of their origins as pro-democratic shields against government action. This signals a potential limiting principle for First Amendment jurisprudence more generally: plaintiffs should not be able to use pro-democratic doctrine to achieve anti-democratic ends.¹⁷

This Comment proceeds in four parts. Part II provides a brief historical background to the problem of partisan gerrymandering, focusing on Michigan's current congressional maps, and describes the relevant features of Michigan's independent redistricting commission. Part III analyzes the doctrines on which the Michigan plaintiffs rely and shows that they cannot support the plaintiffs' claims without serious distortion. Part IV demonstrates why these doctrines are inapposite by returning to their pro-democratic roots and introduces a pro-democratic limiting principle on First Amendment claims. The theoretical contours of this principle and some anticipated responses are then mapped out. Part V concludes.

II. PARTISAN GERRYMANDERING AND MICHIGAN'S "PROP 2"

A. The Problem of Partisan Gerrymandering

Every ten years, states must redraw their state legislative and congressional district maps to account for population changes.¹⁸ Partisan

¹⁴ John Wildermuth, *Redistricting Battle in Michigan Could Threaten California Citizens' Commission*, S.F. CHRON. (Aug. 8, 2019), <https://www.sfchronicle.com/politics/article/Redistricting-battle-in-Michigan-could-threaten-14284757.php> [<https://perma.cc/GXM2-RLB3>]; see also David Gartner, *Arizona State Legislature v. Arizona Independent Redistricting Commission and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551, 590–91 (2019).

¹⁵ Ally Mutnick, *Epic Redistricting Battles Loom in States Poised to Gain, Lose House Seats*, POLITICO (Dec. 30, 2019), <https://www.politico.com/news/2019/12/30/redistricting-house-2020-091451> [<https://perma.cc/XN8P-DNTK>].

¹⁶ Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-red-map-2020/543888/> [<https://perma.cc/L8CB-U49T>].

¹⁷ Cf. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 123 (2009) (“[W]hen a statute is not clear, the law should favor the voters and their enfranchisement. . . . This is a venerable principle, and one that all courts should embrace as a legitimate canon of construction in election law cases.”).

¹⁸ *Reynolds v. Sims*, 377 U.S. 533, 583 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

gerrymandering is the process of manipulating district lines for political gain, typically to advantage one political party over another.¹⁹ Partisan gerrymandering has always been a part of American politics,²⁰ but the practice has become much more relevant in recent years.²¹ Gerrymanders have also become much more efficient. “[T]he scale and skew of today’s gerrymandering are unprecedented in modern history.”²²

In *Rucho v. Common Cause*,²³ the Supreme Court held that challenges to partisan gerrymanders present political questions “beyond the reach of federal courts.”²⁴ The majority determined that, despite the undemocratic nature of partisan gerrymandering,²⁵ courts have “no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions” when remedying gerrymandering harms.²⁶ The Court did recognize, however, that some states are addressing partisan gerrymandering by taking away the legislature’s power to draw districts, and cited Michigan’s 2018 constitutional amendment doing just that.²⁷

B. Michigan’s Maps

Before 2018, the state legislature drew Michigan’s congressional district map.²⁸ Republicans controlled both legislative houses and the governorship during the 2010 redistricting cycle and produced one of the most gerrymandered congressional maps in the country.²⁹ Emails uncovered during litigation revealed partisan motivations and self-dealing underlying the redistricting process: accommodating incumbents, cramming “ALL of the Dem garbage” into four districts, and

¹⁹ RUTH GREENWOOD ET AL., DESIGNING INDEPENDENT REDISTRICTING COMMISSIONS 4–5 (2018), https://campaignlegal.org/sites/default/files/2018-07/Designing_IRC_Report2-071018_0.pdf [https://perma.cc/V4VM-V28H].

²⁰ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494–95 (2019).

²¹ N.Y. Times Editorial Board, *Do-It-Yourself Legislative Redistricting*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/opinion/redistricting-gerrymandering-citizens-michigan.html> [https://perma.cc/6ZZT-7Q9R].

²² Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 876 (2015).

²³ 139 S. Ct. 2484 (2019).

²⁴ *Id.* at 2506–07.

²⁵ *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015)).

²⁶ *Id.* at 2507.

²⁷ *Id.*

²⁸ MICH. COMP. LAWS ANN. §§ 3.61–64, *repealed* by MICH. CONST. art. IV, § 6.

²⁹ Ted Roelofs, *Gerrymandering in Michigan is Among the Nation’s Worst, New Test Claims*, BRIDGE (Apr. 13, 2017), <https://www.bridgemi.com/michigan-government/gerrymandering-michigan-among-nations-worst-new-test-claims> [https://perma.cc/BE4U-ESGR].

spending “a lot of time providing options to ensure [that Republicans] have a solid 9-5 delegation in 2012 and beyond.”³⁰

Opponents of Michigan’s gerrymander turned to the ballot box and the federal courts. In November 2018, a non-profit organization called Voters Not Politicians spearheaded a successful effort to amend Michigan’s constitution, instituting an independent redistricting commission.³¹ Concurrently, the League of Women Voters challenged the district maps on First Amendment grounds. In *League of Women Voters of Michigan v. Benson*,³² a three-judge district court panel concluded that “the predominant purpose of the Enacted Plan was to subordinate the interests of Democratic voters and entrench Republicans in power,” in violation of the First Amendment.³³ The court held that legislators discriminated against citizens based on their partisan views and burdened citizens’ associational rights by making it more difficult to organize as a party.³⁴ That court enjoined the use of those maps for future elections and required Michigan to draw a remedial map,³⁵ but the Supreme Court vacated this order in light of *Rucho*.³⁶

C. Redistricting Commissions and Michigan’s Step Forward

Although states have relied on redistricting commissions since the 1950s, most states reserve a large role for the state legislature.³⁷ In Hawaii and New Jersey, for example, legislative leaders of each major party choose an equal number of commissioners, who then select a chairperson.³⁸ Newer commissions, such as California’s, have limited the role of legislative actors.³⁹ In 2018, Michigan amended its constitution through ballot initiative to create an independent citizens

³⁰ Beth LeBlanc & Jonathan Oosting, *GOP Emails: Let’s ‘Cram Dem Garbage’ Into Southeast Michigan Districts*, DETROIT NEWS (July 26, 2018), <https://www.detroitnews.com/story/news/politics/2018/07/26/gop-emails-dem-garbage-gerrymander-lawsuit/838694002/> [<https://perma.cc/GU5H-CU2J>].

³¹ MICH. CONST. art. IV, § 6. See *infra* Part II.0.

³² 373 F. Supp. 3d. 867 (E.D. Mich. 2019), *vacated* by *Chatfield v. League of Women Voters*, 140 S. Ct. 429 (2019).

³³ *Id.* at 953–54.

³⁴ *Id.* at 938, 954–55. *But see* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019) (holding that partisan gerrymanders do not violate the First Amendment).

³⁵ *League of Women Voters of Mich.*, 373 F. Supp. 3d. at 960.

³⁶ *Chatfield*, 140 S. Ct. at 429–30.

³⁷ *Creation of Redistricting Commissions*, NAT’L CONF. OF ST. LEGISLATURES, (Aug. 1, 2020), <http://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx> [<https://perma.cc/8fpv-KL5y>].

³⁸ HAW. CONST. art. IV, § 2; N.J. CONST. art. II, § 2.

³⁹ CAL. GOV’T CODE § 8252(2)(B)(e) (limiting legislative leaders to only striking randomly selected applicants).

redistricting commission similar to California's for state legislative and congressional races.⁴⁰

By codifying expert guidance on how best to prevent gerrymandering and preserve independence, Michigan's IRC marks a step forward in IRC design.⁴¹ The amendment requires that the commission consist of thirteen randomly selected members: two sets of four commissioners for affiliates of each major party, and five commissioners that do not affiliate with either major party.⁴² This distinguishes Michigan's IRC even from California's, which grants each party five seats with four for independents, creating an even-numbered commission that could deadlock.⁴³ Decisions adopting district maps require a majority vote that must include at least two commissioners from each major political party and two unaffiliated commissioners.⁴⁴

Michigan's IRC bans political actors and their immediate families from serving on the commission. The constitutional amendment prevents anyone from applying for the commission who currently is or in the past six years has been: a candidate or elected official to a partisan office; a member of a political party's leadership; an employee of the legislature, partisan officials, candidates, or political action committees; a registered state lobbyist; or an immediate family member of individuals otherwise barred.⁴⁵ The IRC's proponents defend these restrictions as necessary to create "a fair, impartial, and transparent process where voters—not politicians—will draw Michigan's . . . district maps."⁴⁶

III. FIRST AMENDMENT CHALLENGES TO MICHIGAN'S IRC

In August 2019, Republicans challenged the amendment establishing Michigan's IRC, wielding novel expansions of First Amendment doctrine in an attempt to invalidate the commission. Two groups of plaintiffs filed now-consolidated complaints. As of this writing, the case is pending before the Sixth Circuit⁴⁷ after the Western District of Michigan granted the defendants' motions to dismiss.⁴⁸

⁴⁰ Compare MICH. CONST. art. IV, § 6, with CAL. GOV'T CODE § 8252.

⁴¹ See generally GREENWOOD ET AL., *supra* note 19; *Redistricting Commissions: What Works*, BRENNAN CTR. FOR JUST., (July 24, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/redistricting-commissions-what-works> [<https://perma.cc/8RJC-PLJ2>].

⁴² MICH. CONST. art. IV, § 6(2)(a)(iii), (f).

⁴³ CAL. CONST. art. XXI, § 2(c)(2).

⁴⁴ MICH. CONST. art. IV, § 6(14)(c).

⁴⁵ *Id.* § 6(1)(b)(i–vi), (c).

⁴⁶ *We Ended Gerrymandering in Michigan*, VOTERS NOT POLITICIANS, <https://votersnotpoliticians.com/redistricting/> [<https://perma.cc/XGY7-CPFX>].

⁴⁷ Plaintiffs' Notice of Appeal at 1, *Daunt v. Benson*, No. 1:19-cv-614 (W.D. Mich. Aug. 3, 2020).

⁴⁸ Opinion and Order at 34, *Daunt v. Benson*, No. 1:19-cv-614 (W.D. Mich. July 6, 2020).

The first group of plaintiffs, backed by an affiliate of the National Republican Redistricting Trust,⁴⁹ consists of political actors banned from serving on the commission. They argue that the amendment places an unconstitutional condition on a government benefit: commission membership is available only to those who do not exercise their First Amendment rights.⁵⁰ Relying on the Supreme Court's jurisprudence banning political patronage, the group challenges what they perceive to be an underlying assumption of the IRC: that "it is only elected officials and candidates, and those somehow tied to them, [that] have a personal and passionate interest in the outcome of redistricting."⁵¹

The Michigan Republican Party ("MRP") spearheads the second complaint, which relies on the First Amendment's protections of associational rights for three constitutional attacks.⁵² First, the MRP argues that individuals express their party affiliation in part by running for office, working on campaigns, and serving in party leadership; by restricting who may serve on the commission, Michigan forces individuals to choose between associating with the MRP and serving on the commission.⁵³ Second, the MRP alleges injuries to its own associational interests, including not being involved in the seating of Republican commissioners and the lack of assurance that self-designated Republicans are "bona-fide affiliates."⁵⁴ Third, the MRP claims that the allocation of five commissioner positions to non-affiliated candidates amounts to viewpoint discrimination: each major party is disfavored with only four seats apiece. The MRP seeks to show that the challenged provisions fail to satisfy strict scrutiny: that no compelling government interest justifies the provisions and that there are less restrictive alternatives.⁵⁵

It is difficult to imagine how the redistricting commission could remain independent if a court accepts the Michigan plaintiffs' claims. Their viewpoint discrimination theory would likely bar any seat allocation that did not afford equal space to party-affiliated and non-affiliated members. Expanded associational rights would then lead to party leaders vetting would-be commissioners. And should the patronage claims succeed, Michigan would be unable to prevent political parties from choosing those with financial and professional incentives to particular redistricting outcomes from serving on the commission. Fortunately,

⁴⁹ S.M., *supra* note 4.

⁵⁰ Political Actors Complaint, *supra* note 9, at ¶¶ 6, 38–47.

⁵¹ *Id.* ¶ 61.

⁵² See Complaint for Declaratory and Injunctive Relief at 2 [hereinafter *MRP Complaint*], Mich. Republican Party v. Benson, No. 1:19-cv-00669 (W.D. Mich. Aug. 22, 2019).

⁵³ *Id.* ¶¶ 78–82.

⁵⁴ *Id.* ¶¶ 66–73.

⁵⁵ *Id.* ¶¶ 74–75, 85–86, 98–99.

none of these doctrines support the Michigan plaintiffs' claims. This Section addresses these doctrines—political patronage, associational rights, and viewpoint discrimination—in turn, showing that the Michigan plaintiffs are attempting to shoehorn their grievances into inapposite jurisprudence.

A. Political Patronage: Turning *Elrod* On Its Head

The banned political actors root their claim in a series of cases striking down political patronage systems. This line begins with *Elrod v. Burns*,⁵⁶ when the Supreme Court held that a sheriff violated the First Amendment rights of Republican subordinates when he required them to support the Democratic Party or risk termination.⁵⁷ The plurality held that “[t]he denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly,”⁵⁸ and that

[I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.⁵⁹

The Supreme Court later refined and expanded the *Elrod* plurality's holding in *Branti v. Finkel*,⁶⁰ when it heard a challenge to an alleged partisan-motivated termination of public defenders.⁶¹ *Branti* refined an exception the Court made in *Elrod* for policymakers: elected officials may discriminate on partisan grounds for high-level employees to ensure the proper functioning of representative government.⁶² The Court held that some positions can be exempt from *Elrod* if “the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”⁶³ In 1990, the Court in *Rutan v. Republican Party of Illinois*⁶⁴ expanded its

⁵⁶ 427 U.S. 347 (1976) (plurality opinion).

⁵⁷ *Elrod v. Burns*, 427 U.S. 347, 350–51, 357 (1976) (plurality opinion).

⁵⁸ *Id.* at 361.

⁵⁹ *Id.* at 363.

⁶⁰ 445 U.S. 507 (1980).

⁶¹ *Branti v. Finkel*, 445 U.S. 507, 515–16 (1980).

⁶² *Id.* at 518 (citing *Elrod*, 427 U.S. at 366–67).

⁶³ *Id.*

⁶⁴ 497 U.S. 62 (1990).

patronage ban beyond firing to include other employment decisions, including hiring.⁶⁵

The Michigan plaintiffs claim that the IRC amendment's exclusionary provisions force them to choose between the exercise of their First Amendment rights and a government benefit: between political activity and eligibility to serve on the commission.⁶⁶ But the cases on which the plaintiffs rely ban employment discrimination solely on the basis of *party affiliation*, not engaging in professional politics.⁶⁷ Party affiliation is not grounds for exclusion from Michigan's IRC,⁶⁸ and to claim the contrary is to misunderstand the ban. The amendment bans individuals because of their professional conflicts of interest, not their political beliefs.⁶⁹ Moreover, even if a court were to grant that party affiliation was a criterion for serving on the commission, the commissioners of the IRC easily fall within the policymaker expression. Granting the Michigan plaintiffs' claims subverts the rationales behind banning patronage in the first place: to ensure an effective governance system and preserve the democratic process.

The Michigan plaintiffs misunderstand the patronage ban. *Rutan* articulates the Supreme Court's rule regarding political patronage: "the First Amendment forbids government officials to discharge[, hire, transfer, or recall] . . . public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved."⁷⁰ No part of Michigan's IRC does this. Party affiliation plays no role in the Michigan plaintiffs being banned from the commission, which excludes their Democratic counterparts as well.⁷¹

Michigan's IRC also differs from patronage systems because government officials are barely involved in the selection process. Being selected is akin to winning two lotteries; the Secretary of State has no discretion whatsoever in choosing commissioners.⁷² Legislative leaders from both major parties are able to strike some applicants, but such strikes do not affect the partisan composition. That is, attempting to strike candidates of rival parties would not result in fewer rival party

⁶⁵ *Id.* at 79.

⁶⁶ Political Actors Complaint, *supra* note 9, at ¶¶ 6, 38–47.

⁶⁷ *Rutan*, 497 U.S. at 64 (summarizing *Elrod* and *Branti*).

⁶⁸ MICH. CONST. art. IV, § 6(1)(b).

⁶⁹ VOTERS NOT POLITICIANS, *supra* note 46 ("The amendment disqualifies these individuals from servicing on the Commission because they are most likely to have a conflict of interest when it comes to drawing Michigan's election district maps.").

⁷⁰ *Rutan*, 497 U.S. at 64.

⁷¹ MICH. CONST. art. IV, § 6(1).

⁷² *Id.* § 6(2).

members from sitting on the commission.⁷³ Patronage systems worked, in part, to alter the partisan makeup of government employees, and the IRC's partisan makeup can only change if a third party wins more representatives in the state legislature than either the Democratic or Republican Parties.⁷⁴

If courts find that the patronage cases control this dispute, they should also recognize that the commissioners are high-level policymakers exempt from the patronage ban.⁷⁵ The Sixth Circuit has extended the policymaking exception articulated in *Branti* to positions on partisan-balanced commissions.⁷⁶ When such a commission is tasked with drawing political boundaries, partisan considerations are much more important. Through commissioner selection, consensus-driven voting rules, and explicit criteria, the IRC's design prevents any political faction from unilaterally controlling the redistricting process.⁷⁷ Neutralizing partisanship—ensuring that “representative government not be undercut by tactics obstructing the implementation of [new] policies”—requires knowing candidates' party affiliations and seating them accordingly.⁷⁸ Without question, party affiliation is an appropriate requirement for an IRC commissioner. Moreover, the commission has sole power to draft its procedural rules and hire staff and consultants to aid its deliberations,⁷⁹ it has legal standing to defend actions regarding adopted plans,⁸⁰ and its commissioners are subject to strict limitations on receiving gifts.⁸¹ Government officials with such broad discretion and authority typically fall within *Branti*'s policymaking exception.⁸²

Using political patronage jurisprudence to enjoin an independent redistricting commission subverts the rationale of the patronage ban. In striking down patronage systems, the Court chided the government for claiming that such partisan systems were required for effective governance;⁸³ in this case, banning the Michigan plaintiffs and others like

⁷³ *Id.* § 6(2)(e).

⁷⁴ *Id.* § 6(2)(a)(iii), (f).

⁷⁵ See *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

⁷⁶ *McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996).

⁷⁷ See *Statewide Ballot Proposal 2018-2—Redistricting*, CITIZENS RES. COUNCIL OF MICH. (Aug. 30, 2018), https://crcmich.org/wp-content/uploads/Official_Ballot_Wording_Prop_18-2_6320_52_7-1.pdf [<https://perma.cc/RV6D-FWUP>]; see also *VOTERS NOT POLITICIANS*, *supra* note 46.

⁷⁸ *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

⁷⁹ MICH. CONST. art. IV, § 6(4).

⁸⁰ *Id.* § 6(6).

⁸¹ *Id.* § 6(11).

⁸² *Cf. Branti v. Finkel*, 445 U.S. 507, 518 (1980) (comparing the irrelevance of party affiliation for a football coach with its relevance to assistants to the Governor).

⁸³ *Rutan v. Republican Party of Ill.*, 497 U.S. 75, 75 (1990).

them, irrespective of party affiliation, is necessary to effectively govern.⁸⁴

The Supreme Court has recognized the preservation of the democratic process as a compelling government interest.⁸⁵ In the context of patronage bans, this means that individuals cannot be discouraged from expressing themselves politically at work.⁸⁶ But an IRC is different. Commissioners are encouraged to express themselves politically; the diversity of political opinion allows partisan commissioners to produce non-partisan outcomes.

Allowing the banned Michigan plaintiffs to serve on the commission would undermine the democratic process in at least two ways. The allowing court would not only overrule the will of a supermajority of Michiganders, but also grant immense power to those with the most to gain professionally from redistricting. Banning individuals directly involved in the political process, or those with close family members so involved, is a narrowly tailored regulation that serves multiple compelling state interests, if it raises constitutional problems at all.⁸⁷

B. Associational Rights: Who Speaks for “The Party”?

The Michigan plaintiffs rely in part on the First Amendment protections afforded to political parties.⁸⁸ Political parties are quite complex,⁸⁹ and for decades, defining their scope has tied academics and judges in knots.⁹⁰ Political scientist V. O. Key defined parties as having three basic components: first, the “party-in-government,” elected officials who affiliate with a party; second, the “party leadership,” individuals who work for the party organization itself; and finally, the “party-in-the-electorate,” individuals whose affiliation with the party is limited

⁸⁴ Intervenor-Defendant Voters Not Politicians’ Answer in Opposition to Motion for Preliminary Injunction [hereinafter *Voters Not Politicians’ Answer*] at 30–31, *Daunt v. Benson*, No. 1:19-cv-00614 (W.D. Mich. Sep. 19, 2019) <<The exclusion of applicants who are officeholders, candidates, or those financially tied to officeholders and candidates is necessary to maintain the integrity of the electoral system, to ensure district lines that will foster competition, reduce incumbency protection in line-drawing, and encourage new candidates. . . . All of these compelling interests can only be advanced by excluding from the Commission those whose interests are advanced by drawing districts that benefit their own political and financial interests, rather than drawing districts that foster a functioning representative democracy.>>

⁸⁵ See *infra* notes 135–145 and the accompanying text.

⁸⁶ *Rutan*, 497 U.S. at 69–71.

⁸⁷ See *Voters Not Politicians’ Answer*, *supra* note 84, at 30–31.

⁸⁸ See *supra* notes 52–54 and accompanying text.

⁸⁹ Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 95–115 (2002).

⁹⁰ Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 775–79 (2000).

to self-identifying, voting in party primaries, and the like.⁹¹ Although the Supreme Court generally focuses on party leadership when discussing parties, the Court has made clear that political parties are more than their state and national committees.

*Tashjian v. Republican Party of Connecticut*⁹² marked the first time the Supreme Court struck down a state election regulation on the grounds that it violated a political party's First Amendment associational rights.⁹³ The Connecticut GOP opened its primary elections to unaffiliated voters, in violation of a state statute requiring party primaries be open only to voters registered with the party.⁹⁴ Citing *Elrod*, the Court held that "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization."⁹⁵ The Court articulated two distinct associational rights that are in tension in the IRC litigation: an individual's "right to associate with the political party of one's choice" and a party's "freedom to identify the people who constitute the association."⁹⁶

The Court may have implicitly resolved this tension by limiting a party's associational freedom to the selection of nominees for elected office. In *California Democratic Party v. Jones*,⁹⁷ the Court struck down California's blanket primary, which allowed individuals to vote for any party's candidate in any race, with the highest vote-getter of that party's candidates being considered that party's nominee.⁹⁸ In doing so, the Court highlighted the importance of a party's "right to exclude," holding that the blanket primary forced parties "to adulterate their candidate-selection process—the basic function of a political party—by opening it up to persons wholly unaffiliated with the party."⁹⁹

The Supreme Court's most recent case in the *Tashjian* line squarely presented this tension. In *Washington State Grange v. Washington State Republican Party*,¹⁰⁰ party leaders challenged Washington's primary system, in which the top two vote-getters, regardless of party affiliation, would advance to the general election, but candidates

⁹¹ V.O. KEY, JR., *POLITICS, PARTIES & PRESSURE GROUPS* 163–65 (5th ed. 1964) (Key uses slightly different terms: "party-in-the-legislature" when discussing the "party-in-government" and "professional political workers" when discussing the "party leadership").

⁹² 479 U.S. 208 (1986).

⁹³ *Id.* at 211.

⁹⁴ *Id.*

⁹⁵ *Id.* at 214.

⁹⁶ *Id.* (internal citations omitted); *see also id.* at 215 ("Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals . . . while still others limit their participation to casting their votes for some or all of the Party's candidates.").

⁹⁷ 530 U.S. 567 (2000).

⁹⁸ *Id.* at 586.

⁹⁹ *Id.* at 575, 581 (internal citations omitted).

¹⁰⁰ 552 U.S. 442 (2008).

could self-designate their party preferences.¹⁰¹ The Court held that Washington's primary system did not infringe on the associational rights affirmed in *Jones* because it did not choose nominees: "the law never refers to candidates as nominees of any party, nor does it treat them as such."¹⁰²

The Michigan plaintiffs seek an unprecedented expansion of a political party's right to exclude. Parties have never been understood to have First Amendment claims to non-elected partisan offices: the line of cases demarcating associational rights has been limited to internal party affairs and primary elections. Additionally, such an expansion of associational rights would empower party leadership to exclude self-affiliated members, putting the rights of the party and the individual in tension.

Political parties do not have an associational right to vet appointments to partisan offices. Many federal agencies have partisan balance requirements in which neither major party chooses its standard-bearers.¹⁰³ Moreover, presidents must often appoint cross-partisans.¹⁰⁴ Given the MRP's worry of Democratic leaders striking applicants from the Republican pool, such requirements would seem to inflict a greater associational harm. Yet no court has held these requirements unconstitutional, and it is difficult to see how they could be on associational grounds.¹⁰⁵

The MRP seeks a role in the commissioner selection process because it does not trust that those who self-identify as Republicans are "bona-fide affiliates."¹⁰⁶ The Michigan plaintiffs' challenge, therefore, can be cast as a battle between the party leadership and the party-in-the-electorate—the average Republican voter.¹⁰⁷ Viewed in this light, the MRP's claim seems much more sinister: individuals not known by party officials to promote the tenets of "the party" have no right to call themselves members. In *Washington State Grange*, Chief Justice Roberts and Justice Alito expressly rejected the view that self-designated political affiliation outside of party nominations raises such forced association concern: "[T]here is no general right to stop an individual from

¹⁰¹ *Id.* at 444.

¹⁰² *Id.* at 453.

¹⁰³ See *infra* notes 114–121 and accompanying text.

¹⁰⁴ Ronald J. Krotoszynski, Jr., Johnjerica Hodge, & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 969 (2015).

¹⁰⁵ *But cf. id.* at 983–84 (arguing that increased restriction on presidential appointments could invalidate federal partisan balance requirements on separation of powers grounds). Even if parties could show an associational harm, scholars have been skeptical of universally applying strict scrutiny to such cases. See Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1287–88 (2018).

¹⁰⁶ MRP Complaint, *supra* note 52, at ¶¶ 66–73.

¹⁰⁷ See KEY, *supra* note 91, at 164.

saying, ‘I prefer this party,’ even if the party would rather he not.”¹⁰⁸ The MRP has a right to protect its brand and make its positions known, but that right does not extend to preventing others from affiliating with the party or requiring a purity test for self-designated affiliates.

C. Viewpoint Discrimination or Viewpoint Channeling?

Michigan’s IRC allocates five seats to commissioners unaffiliated with either major political party and four seats to each party’s affiliates.¹⁰⁹ The Michigan plaintiffs claim this disparity amounts to viewpoint discrimination because, by allocating a minority of seats to each major party, the IRC “seeks to suppress speech and expression motivated by Republican ideologies and perspectives, while enhancing the perspectives of commissioners who are unaffiliated.”¹¹⁰

A government engages in content-based discrimination when its regulation targets particular speech, can only be justified by referencing its content, or is adopted because of government disapproval of the proscribed message.¹¹¹ Viewpoint discrimination, a more pernicious form of content-based discrimination, occurs when the government “targets not subject matter, but particular views taken by speakers[:] . . . when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”¹¹² In order to survive a viewpoint discrimination challenge, the government must show its regulation is narrowly tailored to serve a compelling state interest.¹¹³

Michigan’s 4-5-4 seat allotment is a kind of partisan balance requirement. These requirements, common at the federal level, are typically reserved for independent governmental bodies; they not only temper partisan considerations, but also “foster a sense of legitimacy in the agency’s actions in the public’s eye.”¹¹⁴ Michigan’s partisan balancing is unique even among other redistricting commissions. Only two other states include a contingent of non-affiliated commissioners: Colorado’s commission requires a 4-4-4 split among the two major parties and non-affiliated members,¹¹⁵ and California’s requires a 5-4-5 split, ensuring

¹⁰⁸ Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 460–61 (2008) (Roberts, C.J., concurring). Cf. Clingman v. Beaver, 544 U.S. 581, 592 (2005) (distinguishing between an individual right to affiliate with a party and a “less important burden” on a party’s right to attract new voters).

¹⁰⁹ MICH. CONST. art. IV, § 6(2)(f).

¹¹⁰ Brief in Support of Plaintiffs’ Motion for Preliminary Injunction at 23, Mich. Republican Party et al. v. Benson, No. 1:19-cv-00669 (W.D. Mich. Aug. 22, 2019).

¹¹¹ Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015).

¹¹² Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

¹¹³ See *Reed*, 576 U.S. at 163.

¹¹⁴ Krotoszynski, Jr. et al., *supra* note 104, at 983, 1009–17.

¹¹⁵ COLO. CONST. art. V, § 44.1(10).

that party-affiliated members have greater seats than non-affiliated members.¹¹⁶ Both come with the cost of an even-numbered commission, risking deadlock and various contingency mechanisms to approve district maps.

The Michigan plaintiffs' viewpoint discrimination claim should fail. First, no court has held partisan balance requirements to discriminate on the basis of viewpoint, even though the majority of them allow for an imbalance between the major political parties. Second, the selection process and composition of the commission make it nearly impossible to intentionally suppress any ideology. Third, the fact that the people barred from serving as commissioners are not excluded from any other part of the redistricting process—and that any barred individual can serve on the commission after six years—undercuts the notion that the government seeks to suppress a particular viewpoint.

Partisan balance requirements are something of a misnomer; rather than requiring equal party representation, nearly all of them simply limit partisan imbalance to no more than a bare majority.¹¹⁷ If successful, however, the Michigan plaintiffs' viewpoint discrimination challenge could apply with equal force to institutions such as the FTC,¹¹⁸ the SEC,¹¹⁹ the EEOC,¹²⁰ and dozens more, despite having been perceived as constitutional for decades.¹²¹ Therefore, courts should be wary of extending viewpoint discrimination jurisprudence to reach this commission.

It is difficult to see how Michigan's IRC discriminates on the basis of viewpoint. No part of the commission discriminates on the basis of a particularized message or seeks to suppress particular ideologies.¹²² On the contrary, the IRC's design channels partisan interests in such a way that no one ideology dominates any other.¹²³ The complaint also assumes that non-affiliates of either party constitute a unified viewpoint that disfavors the Michigan plaintiffs.¹²⁴ This assumption is misguided.

¹¹⁶ CAL. CONST. art. XXI, § 2(c)(2).

¹¹⁷ Krotoszynski et al., *supra* note 104, at 962.

¹¹⁸ 15 U.S.C. § 41 (1914).

¹¹⁹ Securities Exchange Act, 15 U.S.C. § 78d (1934).

¹²⁰ Civil Rights Act, 42 U.S.C. § 2000e-4 (1964).

¹²¹ Krotoszynski, Jr. et al., *supra* note 104, at 948 (“Partisan balance requirements for independent federal agencies. . . ha[ve] been, for the most part, uncontroversial and widely accepted by Congress, the President, and the federal courts.”).

¹²² See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹²³ MICH. CONST. art. IV, § 6(14)(c) (“A final decision of the commission to adopt a redistricting plan requires a majority vote of the commission, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party.”).

¹²⁴ Plaintiffs' Consolidated Response to Defendants' Respective Motions to Dismiss and Plaintiffs' Consolidated Reply to Defendants' Respective Responses to Motion for Preliminary Injunction

Given the multiple layers of random selection, neither affiliated nor non-affiliated commissioners are likely to have monolithic viewpoints. It is highly unlikely that the four Democratic, four Republican, and five non-affiliated commissioners will represent three distinct positions on redistricting that correspond with their respective labels. Attempts by partisans from either major party to game the non-affiliated group will simply make a diversity of views more likely. This makes a claim that the government is seeking to repress any particular ideology suspect.¹²⁵ Moreover, if the alleged discrimination is rooted in affiliation with a major party, then such discrimination would favor the Michigan plaintiffs: commissioners affiliating with major political parties enjoy an 8-5 seat advantage.

Echoing the responses to the political patronage claims, the IRC amendment bars the Michigan plaintiffs not because of their viewpoints but because of their professional conflicts of interest.¹²⁶ This undermines the notion that the government is targeting their ideology. Furthermore, the Michigan plaintiffs can still participate in the redistricting process. The commission is required to be incredibly transparent by holding public meetings, facilitating public participation, and publishing the materials used to create the maps.¹²⁷ Political actors can still participate in public hearings as can any other citizen. They are only restricted from casting votes for particular maps, something the First Amendment should not guarantee.

IV. PROTECTING THE DEMOCRATIC FIRST AMENDMENT

Democracy thrives when citizens exercise their First Amendment rights. The Founders valued freedom of speech because they believed “that public discussion is a political duty; and that this should be a fundamental principle of the American government.”¹²⁸ The First Amendment traditionally accomplishes this by shielding individuals from governmental regulation of speech; it protects the autonomy of citizens to choose how to express themselves on matters of public concern,¹²⁹ free from government censorship¹³⁰ or command.¹³¹

at 31–32, *Daunt v. Benson*, No. 1:19-cv-00614 (W.D. Mich. Oct. 3, 2019).

¹²⁵ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

¹²⁶ MICH. CONST. art. IV, § 6(1)(b).

¹²⁷ *Id.* § 6(8)–6(10).

¹²⁸ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹²⁹ See *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

¹³⁰ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹³¹ See *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

What happens, then, when private actors attempt to weaponize the First Amendment and undermine democratic governance?¹³² The remainder of this Comment will address this dangerous strand of “First Amendment opportunism”: one in which private, partisan actors wield the First Amendment against public, democratic reforms.¹³³ The following Section grounds the doctrinal distortion the Michigan plaintiffs seek in the doctrines’ pro-democratic origins: the Supreme Court fashioned these doctrines to preserve democratic governance or its pre-requisites.¹³⁴ It addresses each of those doctrines in turn before introducing a theoretical limiting principle on First Amendment jurisprudence and addressing some potential responses.

A. Forging Anti-Democratic Swords from First Amendment Shields

The Supreme Court consistently justified its holdings banning patronage schemes with appeals to democratic values. The *Elrod* plurality cited “the free functioning of the electoral process” as a distinct First Amendment harm.¹³⁵ With regard to belief and association, the plurality held patronage to be “inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment.”¹³⁶ *Branti* contemplated an electoral regulation in which party affiliation would be essential to a government employee’s work.¹³⁷ When reaffirming these decisions in *Rutan*, the Court once again referred to “the preservation of the democratic process” as a compelling state interest.¹³⁸

The Court uses the phrases “democratic process” and “electoral process” to refer to processes of political competition.¹³⁹ The *Elrod* plurality held that preserving that competition “is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms.”¹⁴⁰ It then reasoned that patronage schemes ran counter to this compelling interest because they could result in the entrenchment of the party in power.¹⁴¹ This is precisely the problem Michigan’s IRC solves. By removing any party’s monopoly over the

¹³² See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

¹³³ Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175–76* (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

¹³⁴ See *infra* Part IV.A.

¹³⁵ *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion).

¹³⁶ *Id.* at 357 (internal citations omitted).

¹³⁷ *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

¹³⁸ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990).

¹³⁹ See *Elrod*, 427 U.S. at 368; see also *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

¹⁴⁰ *Elrod*, 427 U.S. at 368.

¹⁴¹ *Id.* at 369 (internal citations omitted).

redistricting process, it prevents the majority party from entrenching itself, thereby protecting the free functioning of the electoral process.

The Supreme Court also grounds its unconstitutional conditions analysis in concerns about political competition. *Rutan* makes clear that the government may not condition the receipt of a benefit on the waiving of a constitutional right.¹⁴² The conditions in patronage systems are unconstitutional “because of the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one’s job.”¹⁴³ The Michigan plaintiffs argue that the IRC’s conditions bring their claim within the Court’s patronage jurisprudence.¹⁴⁴ Again, the Michigan plaintiffs are not banned from the IRC because of their political beliefs.¹⁴⁵ And because they are not being coerced into supporting a particular ideology,¹⁴⁶ the plaintiffs’ unconstitutional conditions claim is meritless.

Turning to the associational rights claims, these arguments suffer from a major anti-democratic flaw. The arguments elevate the associational rights of a party above those of individuals and ignore the associational harms the IRC seeks to prevent. Once properly taken into account, the associational harms of partisan gerrymandering should dissuade courts from ruling for the Michigan plaintiffs.

The First Amendment rights of political organizations, though distinct, are rooted in the rights of individuals to associate towards common ends.¹⁴⁷ In *California Democratic Party v. Jones*, the Supreme Court held that “[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”¹⁴⁸ This reliance on political parties should not blind courts to their unique dangers. Political parties “seek to gain and keep control of the machinery of government and thus to direct the great involuntary association, the state. This makes it especially critical that courts guard against the dominant political party attempting to entrench itself in power by squeezing out its rivals.”¹⁴⁹

The Michigan plaintiffs, currently members of the majority party in the Michigan state legislature,¹⁵⁰ seek to use the right of association

¹⁴² *Rutan*, 497 U.S. at 71.

¹⁴³ *Id.* (internal citations omitted).

¹⁴⁴ Political Actors Complaint, *supra* note 9, at ¶ 44.

¹⁴⁵ See MICH. CONST. art. IV, § 6(1)(b).

¹⁴⁶ *Id.* § 14(c).

¹⁴⁷ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

¹⁴⁸ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

¹⁴⁹ Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2195 (2018) (internal citations omitted).

¹⁵⁰ MICH. DEP’T OF ST., *supra* note 7.

to run roughshod over the associational rights of individuals. Several members of the Supreme Court, though never a majority, have attributed associational harms to partisan gerrymandering. In his concurrence in *Vieth v. Jubelirer*,¹⁵¹ Justice Kennedy argued that partisan gerrymanders burden individual associational rights because they have “the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.”¹⁵² Most recently, Justice Kagan led three other justices in dissent, arguing that partisan gerrymandering dilutes the votes of disfavored party members, “frustrat[ing] their efforts to translate those affiliations into political effectiveness.”¹⁵³ The majority in *Rucho*, however, did not find that partisan gerrymandering caused any First Amendment harms because the petitioners failed to provide a manageable judicial standard.¹⁵⁴

The Supreme Court has not considered another associational harm: the manner in which legislatures draw partisan gerrymanders. The First Amendment protects political parties because of their ability to advance the beliefs of the individuals that constitute them.¹⁵⁵ A partisan gerrymander’s true frustration of political success is not the lack of enthusiasm the minority party may experience in its interactions with voters and donors. It is the exclusion of that party’s elected officials from meaningful participation in the redistricting process.

Michigan’s last redistricting cycle illustrates this well. Because Republicans held the governorship and majorities in both legislative houses in 2011, they could exclude Democrats entirely from the process. “[S]ecuring enough voters for passage did not necessarily require securing a single vote from a Democratic legislator in either chamber.”¹⁵⁶ During the 2011 redistricting cycle, the line-drawers worked “in a secure location” to avoid Democrats.¹⁵⁷ Republican leadership met weekly away from the legislature to discuss redistricting, and “took several steps to ensure that these . . . meetings remained secret,” including using personal rather than government email addresses and labeling meeting agendas confidential.¹⁵⁸ No Democrats were invited to attend any of the meetings until after the maps were voted out of committee.¹⁵⁹

¹⁵¹ 541 U.S. 267 (2004).

¹⁵² *Id.* at 314 (Kennedy, J., concurring).

¹⁵³ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2514 (2019) (Kagan, J. dissenting).

¹⁵⁴ *See id.* at 2504 (“How many door knocks must go unanswered? How many petitions unsigned?”).

¹⁵⁵ *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

¹⁵⁶ *League of Women Voters of Mich. v. Benson* 373 F. Supp. 3d. 867, 886 (E.D. Mich. 2019), *vacated* by *Chatfield v. League of Women Voters*, 140 S. Ct. 429 (2019).

¹⁵⁷ *Id.* at 886.

¹⁵⁸ *Id.* at 887.

¹⁵⁹ *Id.*

If the First Amendment purports to protect an “unfettered interchange of ideas,”¹⁶⁰ then the necessary exclusion of partisan opponents in designing partisan gerrymanders could constitute an associational harm in its own right.

Finally, the Michigan plaintiffs argue that the commission’s unequal seat allocation constitutes viewpoint discrimination. The anti-democratic implications of this charge are less apparent because viewpoint discrimination claims are not inherently focused in the electoral process. The First Amendment protects individuals from viewpoint discrimination because “[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”¹⁶¹ Here again, the doctrinal subversion the Michigan plaintiffs seek is clear: in their attempt to preserve their ability to stifle speech of minority party members, the Michigan plaintiffs would have courts dismantle an institution designed to stop them.

The crux of the Michigan plaintiffs’ viewpoint discrimination claim is an unequal seat allocation.¹⁶² First Amendment doctrine seems to be in tension on this point. On one hand, the Supreme Court has held that “there is an equality of status in the field of ideas and government must afford all points of view an equal opportunity to be heard.”¹⁶³ On the other hand, the Court maintains that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”¹⁶⁴ This leaves the government in an untenable position. If both are true, the government can neither allocate an equal nor unequal number of seats. Some authors accept this tension as proof that the Court must address structural questions of democracy with a different paradigm than rights-interests balancing.¹⁶⁵ The First Amendment is flexible enough to engage in this kind of structural analysis.

B. A Pro-Democratic Limiting Principle on First Amendment Jurisprudence

If the doctrinal distortion is unconvincing, a review of the challenged governmental action should put this litigation’s anti-democratic nature in stark relief. A supermajority of Michiganders passed a

¹⁶⁰ Roth v. United States, 354 U.S. 476, 484 (1957).

¹⁶¹ Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

¹⁶² Plaintiffs’ Consolidated Response, *supra* note 124, at 31–32.

¹⁶³ Carey v. Brown, 447 U.S. 455, 463 (1980) (internal citations omitted).

¹⁶⁴ Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

¹⁶⁵ Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998).

constitutional amendment via ballot initiative.¹⁶⁶ That amendment vests the power to draw district lines—to determine which votes will count towards particular seats—away from the self-interested legislature and into the hands of citizens. It is this governmental action that the Michigan plaintiffs seek to enjoin. The Michigan plaintiffs are attempting to use the First Amendment to overturn the results of a public debate that will change how future debates will be had.

Success for the Michigan plaintiffs would repudiate the First Amendment doctrines' democratic origins. That fact sheds light on a potential limiting principle: the First Amendment should not be construed to further anti-democratic efforts. There are many ways courts could incorporate this principle: for instance, upholding the preservation of the democratic process as a compelling interest, as in *Elrod*;¹⁶⁷ refusing judicial review to overturn the result of public debate,¹⁶⁸ or presuming the constitutionality of facially pro-democratic actions. Courts adopting this principle may simply leave doctrine as is but apply it with a more pro-democratic mood.¹⁶⁹ The remainder of this Comment will provide a theoretical framework for this limiting principle regardless of the doctrinal form it takes.

1. Protecting democracy with a republican First Amendment

At its root, a pro-democratic limiting principle flips the First Amendment's "premised . . . mistrust of governmental power."¹⁷⁰ In the early twentieth century, the Supreme Court used this mistrust to fashion a shield for the soapbox dissenter.¹⁷¹ Although this shield is necessary for democratic self-governance, this model of the First Amendment assumes a world in which the state only works to restrict speech, and the individual only seeks to express himself. The Michigan plaintiffs flip the script: it is private individuals, rather than the state, who seek to restrict speech. To adapt to circumstances like these, a different model might prove useful:

We should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public

¹⁶⁶ See MICH. DEPT OF ST., *supra* note 7.

¹⁶⁷ *Elrod v. Burns*, 427 U.S. 347, 368–69 (plurality opinion).

¹⁶⁸ See Wu, *supra* note 12.

¹⁶⁹ Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (describing a situation where the Court decided to interpret legislation in light of the "mood" expressed by Congress on the legislation); see also *supra* notes 33–35 and accompanying text.

¹⁷⁰ *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

¹⁷¹ Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

debate as the touchstone, we must begin to discriminate between them. When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the [F]irst [A]mendment. What is more, when on occasions it fails to, we can with confidence demand that the state so act. The duty of the state is to preserve the integrity of public debate[,] . . . to safeguard the conditions for true and free collective self-determination. It should constantly act to correct the skew of social structure, if only to make certain that the status quo is embraced because we believe it the best, not because it is the only thing we know or are allowed to know.¹⁷²

The idea that the state is able—and sometimes required—to enhance speech is not new. Courts have understood the First Amendment not only as protecting a means of self-fulfillment, but also as a collective tool used to define the social good, what Morgan Weiland refers to as the “republican tradition,” in the classical sense of the term.¹⁷³ Proponents of the republican tradition argue that “[w]hat the phrase ‘the freedom of speech’ in the First Amendment refers to is a social state of affairs, not the action of an individual or institution.”¹⁷⁴

Government action is valid, so held the Supreme Court, as long as it furthers “the First Amendment goal of producing an informed public capable of conducting its own affairs.”¹⁷⁵ Thus, governments can be made to protect speakers from hecklers’ vetoes, not only to respect the speaker’s rights, but also to ensure that the audience can listen.¹⁷⁶ This understanding presumes the existence of mechanisms that allow an informed public to conduct its affairs according to its own will.¹⁷⁷ A pro-democratic limiting principle would fit neatly within this tradition, and the litigation challenging Michigan’s IRC—a representational reform enacted via ballot initiative—tees up this principle quite well.

¹⁷² *Id.* at 1416.

¹⁷³ Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN L. REV. 1389, 1404–13 (2017) (in contrast with the First Amendment’s “liberal tradition” that emphasizes individual self-expression and the need for protection from government interference).

¹⁷⁴ See, e.g., Fiss, *supra* note 171, at 1411.

¹⁷⁵ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969).

¹⁷⁶ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

¹⁷⁷ *Cf. Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. . . . [because] it is the *democratic electoral process* that first and foremost provides a check on government speech. . . . [T]he Free Speech Clause helps produce informed opinions among members of the public, *who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate*) (emphasis added) (internal citations omitted).

2. Representational reforms via ballot initiative

Michigan passed the IRC via ballot initiative. The popular initiative has been part of American democracy since the dawn of the twentieth century.¹⁷⁸ Although government action should not escape liability simply because a majority of voters approve,¹⁷⁹ initiatives are far from the legislative¹⁸⁰ or executive¹⁸¹ actions that typically give rise to First Amendment challenges. Whereas traditional government action constrains public debate, popular initiatives take effect as the result of one.

Furthermore, the IRC initiative survived attempts by several of the Michigan plaintiffs to remove it from the ballot in the first place.¹⁸² Rejecting the plaintiffs' claims then, the Michigan Supreme Court explained "that the adoption of the initiative power, along with other tools of direct democracy, reflected the popular distrust of the Legislative branch of our state government."¹⁸³ It is telling that legislators and party leaders, having failed to block the measure and having lost at the polls, now seek to use the courts to overturn popular will.¹⁸⁴ The First Amendment protects the right of individuals to participate in public debate; it does not guarantee that they win.

Michigan's IRC is also a particular kind of government action: a representational reform. Questions regarding how votes are cast and aggregated, as well as how winners are declared, form the core of the electoral process. When governments act to open these decisions to public discussion, they further First Amendment principles. Since *Stromberg v. California*,¹⁸⁵ the Court has held that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."¹⁸⁶ Pro-democratic representational reforms generally, and

¹⁷⁸ For a brief history, see Robert S. Sandoval, *Restricted Subject Matters: Misconceptions of Speech and Ballot Initiatives*, 2015 U. CHI. LEGAL F. 669, 671–76 (2015).

¹⁷⁹ See, e.g., *Romer v. Evans*, 517 U.S. 620, 623 (1996).

¹⁸⁰ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382–83 (1968) (reviewing a challenge to a federal statute based in part on the alleged intent of Congress to stifle protests against the Vietnam War).

¹⁸¹ See, e.g., *Gregory v. Chicago*, 394 U.S. 111, 111–12 (1969) (reviewing a challenge to law enforcement officers' arrests of civil rights protesters).

¹⁸² *Citizens Protecting Mich.'s Constitution v. Sec'y of State*, 921 N.W.2d 247, 247 (Mich. 2018).

¹⁸³ *Id.* at 254 (internal citations omitted).

¹⁸⁴ See Wu, *supra* note 12 (proposing a specific variant of the democratic limit: an anti-circumvention principle); *id.* ("In cases where the underlying law does not censor political speech, nor arise from majoritarian prejudice against a despised or unpopular speaker, and particularly where the political debate is in progress, the judiciary should avoid using the First Amendment to give one side of the debate a judicially granted circumvention of democratic politics.")

¹⁸⁵ 283 U.S. 359 (1931).

¹⁸⁶ *Id.* at 369.

Michigan's IRC in particular, create space for public debate by supplanting a traditionally opaque and one-sided process.¹⁸⁷

Representational reforms are especially powerful when passed via ballot initiative. As was the case in Michigan, heavily gerrymandered district maps render the legislature unresponsive to citizens' concerns. As Justice Ginsberg noted, direct democracy is fully consistent with the notion of the people as sovereign.¹⁸⁸ Courts can and should give ballot initiatives a "hard[] look" if they appear to endanger the rights of minorities.¹⁸⁹ But this strict review is misplaced when voters themselves act to improve the mechanisms by which their voices are heard.¹⁹⁰

C. Anticipated Responses

A pro-democratic limiting principle on First Amendment jurisprudence could face several challenges. Practically, whatever doctrinal form this principle takes, courts will have to reckon with plaintiffs who ground their claims, as the Michigan plaintiffs have, in pro-democratic language. Theoretically, three larger issues loom. First, courts might reject the premise altogether: the First Amendment protects individuals from government interference, not government from private challenges. Second, it is precisely when government claims to act pro-democratically that courts should apply more scrutiny, not less. Finally, and perhaps most damning, such a principle may run afoul of *Rucho*: judgments about which side of a First Amendment dispute is "pro-democratic" are not legal, but political. The remainder of this Section addresses each of these in turn.

1. Finding the wolf in sheep's clothing

Plaintiffs are not likely to bring First Amendment challenges in anti-democratic language, although post-*Rucho* this may change.¹⁹¹ One difficulty with a pro-democratic limiting principle arises not when plaintiffs are brazenly anti-democratic, but when they couch their anti-

¹⁸⁷ MICH. CONST. art. IV, § 6(8)–6(10).

¹⁸⁸ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2674–76 (2015).

¹⁸⁹ Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1559–60 (1990).

¹⁹⁰ Eule did not extend the same relaxed approach to apportionment or redistricting reforms, recognizing that often such reforms are merely façades intended to disenfranchise minorities. *Id.* When a redistricting reform is targeted at an anti-democratic practice, however, this suspicion should be tempered, if not entirely assuaged.

¹⁹¹ Nicholas Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 124 n.75 (2019).

democratic intentions in pro-democratic language. The Michigan plaintiffs do this in spades.¹⁹²

Courts can overcome this hurdle in at least two ways. First, they could refuse to apply the limiting principle if the government does not address the democratic implications of the plaintiff's challenge. Judges would trust the adversarial process to illustrate what the plaintiff's rhetoric might hide. Second, they might only apply the limiting principle in extreme cases, which are easier to identify. If plaintiffs are seeking large doctrinal expansions, judges may feel more comfortable applying the limit. A strong version of this principle would have courts sanction plaintiffs for making frivolous claims,¹⁹³ but the intended result of the limiting principle can be achieved simply by raising the limit *sua sponte*. This practical difficulty is no different than many circumstances in which courts skeptically examine the claims that come before them, and so should not pose much of a problem for this limiting principle.

2. A narrower First Amendment

In contrast to the small-“r” republican view articulated above, the understanding of the First Amendment as primarily a shield *for* private actors *from* government action dominates the Supreme Court's jurisprudence.¹⁹⁴ This view focuses on the removal of governmental restraints from the arena of public discussion,¹⁹⁵ but is not incompatible with a pro-democratic limiting principle.

The First Amendment shields private actors from government interference because autonomy of expression typically results in the speech environment required for functioning democracies.¹⁹⁶ The republican approach does not require abandoning individual expressive rights; Zechariah Chafee described the First Amendment as balancing individual interests with the societal needs of collective decision-making.¹⁹⁷ A pro-democratic limiting principle could provide this balance by stopping plaintiffs from commandeering First Amendment jurisprudence to exclude expression from political opponents.¹⁹⁸

¹⁹² See Political Actors Complaint, *supra* note 9, at ¶¶ 40–46, 58–59; see also MRP Complaint, *supra* note 52, at ¶¶ 8, 66–111.

¹⁹³ FED. R. CIV. P. 11(b)(2), (c)(3).

¹⁹⁴ Weiland, *supra* note 173, at 1404–08.

¹⁹⁵ Cohen v. California, 403 U.S. 15, 24 (1971).

¹⁹⁶ Fiss, *supra* note 171, at 1409–10.

¹⁹⁷ ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 510 (1941).

¹⁹⁸ Cf. Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (holding that judicial intervention was itself a governmental action subject to constitutional restraints).

Even granting that a pro-democratic First Amendment limit should exist, how should it apply to anti-democratic actions not grounded in speech? Gerrymandering's democratic deficits differ from typical First Amendment harms: fair district lines are not intrinsically related to broadening public discourse. Chief Justice Roberts made this point implicitly in *Rucho*: "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district."¹⁹⁹

Courts should adopt a pro-democratic limit in rejecting IRC challenges, even if they adhere to a narrow view of the First Amendment. Independent commissions are designed to address non-speech issues like representative skews *via the expansion of public debate*. Michigan's IRC opens up a traditionally secretive redistricting process to the public.²⁰⁰ Eliminating that opportunity could prove a larger First Amendment harm than upholding it.

Moreover, non-speech mechanisms can create speech harms, which weakens the case for not applying the First Amendment in defense of independent commissions. The relationship between partisan gerrymandering and political competitions makes this clear. If the First Amendment is to protect expression and association such that government is responsive to popular will,²⁰¹ then uncompetitive elections produce serious First Amendment harms.²⁰² District maps drawn by commissions are typically more competitive than those drawn by legislatures,²⁰³ so interpreting the First Amendment to uphold IRCs is fully consistent with its aims.

3. More or less government skepticism

When should courts trust the government's word? Dissenting from the Court's validation of a campaign finance ballot initiative, Justice Scalia quipped, "The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched

¹⁹⁹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). *But see* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (internal citations omitted).

²⁰⁰ See MICH. CONST. art. IV, § 6(8)–(10).

²⁰¹ *Stromberg v. California*, 283 U.S. 359, 369 (1931).

²⁰² Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 270–71 (2006) ("When statewide political gerrymanders . . . intentionally and systematically turn congressional elections into a mere formality, the acts of voting, assembling, associating, and petitioning are reduced to hollow rituals. Under such circumstances, voters ratify political choices made for them by someone else, but do not exercise the generative political power that is the essence of representative self-government.")

²⁰³ *Id.* at 259–60.

monopolist who says he welcomes full and fair competition.”²⁰⁴ First Amendment jurisprudence can be seen as having “as its primary, though unstated, object the discovery of improper governmental motives.”²⁰⁵ The motives underlying government action on representational issues are especially relevant because decisions on these matters change the rules of political participation, affecting every other public debate.²⁰⁶

In an article defining this motive-discovering approach to the First Amendment, Justice Kagan, then a professor, outlined a typology of impermissible motives for speech restrictions: disapproving of particular ideas, privileging favored speech, threatening officials’ self-interest.²⁰⁷ These motives are unlikely to drive reforms like Michigan’s IRC. Official self-interest and entrenchment are almost mutually exclusive with the introduction of an independent redistricting commission.²⁰⁸ And although it is easy to imagine a commission designed to discriminate on the basis of viewpoint—such as one that banned any affiliates from a minority party from meaningful participation—it is precisely that First Amendment harm that IRCs prevent.²⁰⁹

4. Another political question?

A pro-democratic limiting principle could entangle courts in non-justiciable political questions. The government must create elections before citizens can become candidates, finance campaigns, organize political parties, and vote. Building electoral systems requires making decisions about what kind of politics is desirable.²¹⁰ For courts to apply a democratic limiting principle, they might have to make normative decisions about what kind of democratic system should be furthered or whether a provision promotes democracy at all.²¹¹

²⁰⁴ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

²⁰⁵ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

²⁰⁶ *Cf. Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“Especially since the right to exercise the franchise . . . is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

²⁰⁷ Kagan, *supra* note 205, at 428–29.

²⁰⁸ Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1824–27 (2012).

²⁰⁹ *See, e.g.*, CAL. CONST. art. XXI, § 2(c)(5); COLO. CONST. art. V, § 48(2); ARIZ. CONST. art. IV, pt. 2, § 1(12).

²¹⁰ Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 50–51 (2004).

²¹¹ *Cf. Jane S. Schacter, Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 753–54 (2004).

This kind of normative decision might run afoul of *Rucho*.²¹² The Supreme Court has long held political questions beyond the reach of the judiciary,²¹³ and this proposed limiting principle invites them. The majority in *Rucho* understood the plaintiffs to have made a claim about a particular democratic system—proportional representation—and chastised them for doing so.²¹⁴ The *Rucho* Court was also clear that, unlike in racial vote-dilution cases, political motives raise no constitutional quandaries.²¹⁵ This might signal an unwillingness to involve courts in determining whether a reform is democracy-promoting and therefore worth protecting. So, is a pro-democratic limiting principle on First Amendment jurisprudence feasible in a post-*Rucho* world? Yes.

The foregoing critique assumes that courts do not and should not engage in policymaking. This assumption is neither true nor tenable. Justices consider policy outcomes as early as the certiorari process.²¹⁶ And despite deriving much of its legitimacy from the fiction that it is a legal institution, rather than a political one, the Supreme Court must often “decide cases where legal criteria are not in any realistic sense adequate to the task.”²¹⁷ The question, then, is not whether courts should refrain from making policy decisions, but—in Chief Justice Roberts’ words, whether the Court has the duty to say “this is not law.”²¹⁸ The question, then, is how to understand the judiciary’s role as a policymaker not directly accountable to the people.²¹⁹

Democracy requires a commitment to abide by collectively adopted rules despite individual dissent, so long as the rulemaking process is open and fair. Democratic malfunction, therefore, does not occur when elected officials craft rules with which people disagree. “Malfunction occurs when the *process* is undeserving of trust, when . . . the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.”²²⁰

²¹² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

²¹³ See *Luther v. Borden*, 48 U.S. 1, 46 (1849).

²¹⁴ *Rucho*, 139 S. Ct. at 2499 (“Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment . . . and to rearrange the challenged districts to achieve that end.”).

²¹⁵ *Id.* at 2497 (“The basic reason [partisan gerrymandering is difficult to adjudicate] is that, while it is illegal for a jurisdiction . . . to engage in racial discrimination in districting, a jurisdiction may engage in constitutional political gerrymandering.”) (internal citations omitted).

²¹⁶ Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1067 (2009) (“When they prefer the expected policy outcome of the merits decision to the status quo, justices are more likely to vote to hear a case.”).

²¹⁷ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as A National Policy-Maker*, 6 J. PUB. L. 279, 280 (1957).

²¹⁸ *Rucho*, 139 S. Ct. at 2508 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

²¹⁹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

²²⁰ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980) (emphasis in original); see also

The *Rucho* majority's deference to the political branches on the solution to partisan gerrymandering is backwards. It is precisely because judges are not elected—and therefore insulated from political pressures—that they must safeguard the process by which individuals translate their preferences into government action.²²¹ Justices need not apply their own conceptions of democracy. They must simply clear the path for the public to decide for themselves. The proposed limiting principle would fit this mold well: courts should uphold Michigan's IRC against First Amendment challenges not only because the commission will result in a more inclusive political process, but also because it was chosen directly by those with the right to decide.

The Supreme Court has intervened in the political process before, most notably in striking down malapportioned districts. In *Reynolds v. Sims*,²²² the Court invalidated a state legislative map with wildly unequal district populations, beginning a massive wave of redistricting across the country.²²³ With “no effective political remedy” available to the plaintiffs,²²⁴ the Court exalted political participation such that it asked whether any “constitutionally cognizable principles” justified judicial *inaction*, a far cry from the *Rucho* Court's recalcitrance.²²⁵ Far from reducing the Court's legitimacy, its intervention in *Reynolds* quickly removed a barrier to political participation in a manner most came to respect.²²⁶ A democratic limiting principle on First Amendment jurisprudence might do the same.

The *Rucho* court distinguished *Reynolds*—and might target a democratic First Amendment limit—on two grounds. First, although malapportionment is unconstitutional, partisan considerations in redistricting are not.²²⁷ Second, the one-person, one-vote standard is “relatively easy to administer as a matter of math,” whereas partisan gerrymandering claims lack an objective measure based in the Constitution.²²⁸ Both these distinctions fall short. The Supreme Court has largely held government partisanship unconstitutional in other areas, including the First Amendment via the patronage cases discussed

Rucho, 139 S. Ct. at 2524–25 (Kagan, J., dissenting).

²²¹ ELY, *supra* note 220, at 103; see also Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 53–54 (2000) (“What exactly is the Supreme Court good for if it refuses to examine a likely constitutional error that if uncorrected will engender a national crisis? . . . Political considerations in a broad, nonpartisan sense will sometimes counsel the Court to abstain, but sometimes to intervene.”).

²²² 377 U.S. 533 (1964).

²²³ *Reynolds v. Sims*, 377 U.S. 533, 545–47 (1964).

²²⁴ *Id.* at 553.

²²⁵ *Id.* at 561.

²²⁶ See ELY, *supra* note 220, at 121.

²²⁷ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

²²⁸ *Id.* at 2501.

above.²²⁹ As to the second challenge, the one-person-one-vote standard is not found in the Constitution either—indeed, the composition of the Senate explicitly rejects such a conception of democracy.²³⁰ Administrability and objectivity depend largely on the form such a limiting principle would take. Some limits are easier to administer or more objective than others: compare a refusal to entertain challenges at all with a presumption of constitutionality, for instance. Administrability and objectivity should inform how courts apply this limit, but these constraints do not prevent courts from enforcing any limit whatsoever.

V. CONCLUSION

Pro-democratic reformers are building independent redistricting commissions on shaky grounds. The majority that held partisan gerrymanders nonjusticiable in *Rucho* may soon strike down independent commissions across the country,²³¹ perhaps using the Michigan plaintiffs' claims to do so. But whereas that decision was based on the Elections Clause and governed only congressional redistricting, a First Amendment challenge would reach even further. "[T]he First Amendment theory would [hold unconstitutional] *all* commissions, whether created by voter initiative, state legislation, or Congress, and whether responsible for congressional or state legislative redistricting . . . if they excluded certain citizens from membership."²³² Regardless of the outcome of the pending litigation, the Michigan plaintiffs' challenges provide a peek into Pandora's box: a warning of the kinds of challenges reformers can expect.

This Comment has labored to make two points. First, the First Amendment doctrines on which the Michigan plaintiffs rely in challenging their state's IRC fail to support their claims. They are either entirely inapposite or would require such peripheral expansion as to threaten the doctrines' cores.²³³ Second, the Michigan Plaintiffs' use of these doctrines fail because the doctrines are rooted in the preservation of prerequisites for a functioning democracy—government insulation from party patronage, rights of political association, and protection from viewpoint discrimination. This Comment then proposed a solution to

²²⁹ Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 376–403 (2017); *see also supra* notes 135–143 and accompanying text.

²³⁰ SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 50–53 (2006).

²³¹ Stephanopoulos, *supra* note 191, at 148.

²³² *Id.* at 158 (emphasis in original).

²³³ *Cf. Weiland, supra* note 173, at 1389–90.

similar challenges going forward: courts should refuse to bend First Amendment doctrines in a way that furthers anti-democratic ends.

Proponents of reforms like Michigan's IRC would do well to counter anti-democratic challenges with a robust articulation of the First Amendment, one that stands in full-throated defense of the ways it can and should protect our democracy. Only by holding true to the core of the First Amendment—by resisting the forging of anti-democratic swords from democratic shields—can courts prevent the First Amendment from collapsing under the weight of its own distorted doctrine.