Slaying the Gerrymander: Bringing Ethics Rules to Bear on Abusive Redistricting

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* Georgetown University Law Center, J.D. expected 2026; University of Georgia, B.A., A.B.J. 2018. I would like to thank Abbe Smith and Meryl J. Chertoff for their invaluable feedback, as well as Allie Kotter, Caleb Linville, and John Groden for their contributions through many rounds of edits. I would also like to thank my father, Lawrence Young, for teaching me just how vital strong ethical principles are to the legitimacy of our legal system and the values it defends.

I. INTRODUCTION

In a democracy, there is no more fundamental question than how the people conduct their elections. From the founding to the present, partisan gerrymandering[1] has been an ever-present burr in the nation's side as it struggled to answer that question. It is as universally reviled by the populace as it is embraced by their representatives. And it is not a one-party issue. Gerrymandering has irreparably harmed voters across the political spectrum. Republicans in blue states and Democrats in red states are united in their frustration. But despite this shared anger among the American people, gerrymandering has remained a stubbornly undeniable fact of the country's political life. This Note explores the history of gerrymandering and proffered solutions, and then proposes using the *Model Rules of Professional Conduct* to discipline attorneys for their role in perpetuating it.

Part II of this Note explains briefly how and why the Court got out of the business of partisan gerrymandering. Part III assesses some of the most prominent solutions that the states have adopted and reviews some of the obstacles, like defensive state legislatures and mercurial state and federal courts, that continue to hamper real reform. Part IV discusses the difficulties involved in applying ethics rules to government attorneys, and proposes several model rules that either already apply, or should be applied, to practicing attorneys to create real consequences for those who engage in gerrymandering.

II. A BRIEF HISTORY OF GERRYMANDERING IN THE SUPREME COURT

The Supreme Court struggled for more than seventy years to decide how to use the Constitution to ensure the equality of voting power. Initially the Court rejected it as a "political thicket" beyond any standard courts might apply.[2] But soon it leapt in anyway, establishing redistricting standards, creating one person one vote, and attempting to find a solution to partisan gerrymandering.[3] The Court's first attempt, in *Gaffney v. Cummings*, addressed the question of whether a map drawn to reflect the proportional share of the vote for each of the two parties was constitutional.[4] There the Court was happy to accept a roughly proportional gerrymander as fair and reasonable, holding that "judicial interest should

1. Gerrymandering is a catchall term which describes the abuse of the power to draw voting district lines to gain an electoral advantage. It gets its name from Elbridge Gerry, founding father and signer of the Declaration of Independence. While he was Governor of Massachusetts a district was drawn which was so winding and contorted that it was said to resemble a salamander. The Boston Gazette dubbed it a "Gerry-mander" and the name has stuck. Mark Dimunation, *Gerrymandering: The Origin Story*, LIBR. OF CONG.: BLOGS (July 18, 2024), https://blogs.loc.gov/loc/2024/07/gerrymandering-the-origin-story/ [https://perma.cc/KLR3-7MB2]. Partisan gerrymandering describes when this process is used to group voters by political affiliation with the aim of giving the party in power more seats in the legislature or U.S. Congress.

2. Colegrove v. Green, 328 U.S. 549, 556 (1946).

3. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964).

4. Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength . . . ."[5] The Court endorsed politically aware line drawing which reflected partisan balance, adopting an intuitive standard for fairness.

But the Court was unsatisfied with proportionality, believing the standard was unworkable, and sought a more nuanced test for partisan gerrymandering. It tried to create that test in *Davis v. Bandemer,* but the Court failed to endorse a single standard, with a majority only able to agree the matter was justiciable.[6] Instead, a plurality proposed a two part test based on the Court's racial gerrymandering standard which required proving both "intentional discrimination against an identifiable political group" and "actual discriminatory effect," with discriminatory effect involving effective denial of access to the political process.[7] In theory this test could have been workable, but lower courts read this standard to require total denial of access to the political process.[8] The result was a partisan gerrymandering test that virtually never overturned a partisan gerrymander.[9] Out of thirty nine lower court opinions which dealt with the issue, only one even found a partisan gerrymander, and there the case was dismissed as moot.[10]

Fixing that standard proved harder than creating it. In *Vieth v. Jubelirer* each of three liberal justices proposed different tests to replace the mess created by *Bandemer,* while Justice Scalia's plurality sought to hold the whole area nonjusticiable.[11] Justice Kennedy's concurrence represented the deciding vote, rejecting all the proposed resolutions, and finding every standard unworkable.[12]

The Court failed to even agree on what the problem was. Justice O'Connor, in her *Davis* concurrence, suggested that unlike race, which is immutable, politics is something which shifts over time, making the line drawing more difficult.[13] On the other hand, Kennedy argued in *Vieth* that the challenge was figuring out when an otherwise permissible classification had been used for an invidious purpose.[14] But neither he nor the liberals on the Court could agree on a test to decide what was invidious.[15]

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5. *Id.* at 754.

6. *See* Davis v. Bandemer, 478 U.S. 109, 113 (1986).

7. *Id.* at 127.

8. Easha Anand, *Finding A Path Through the Political Thicket: In Defense of Partisan Gerrymandering's Justiciability*, 102 CAL. L. REV. 917, 933–35 (2014). This reading is understandable given that was essentially the standard used in the Court's racial gerrymandering cases, where nothing short of a total disenfranchisement could establish a constitutional violation.

9. *Id.*

10. *Id.*

11. *See* Vieth v. Jubelirer, 541 U.S. 267 (2004).

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

13. *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring).

14. Vieth v. Jubelirer, 541 U.S. 267, 306–07 (2004) (Kennedy, J., concurring).

15. The liberals in three separate dissents presented three separate options for how a test might operate. Their own inability to coalesce around any one standard certainly suggests that the conservative position has merit. *Id.* at 317–368 (2004) (Breyer, J., dissenting) (Souter, J., dissenting) (Stevens, J., dissenting).

When the matter returned to the Court in *Rucho v. Common Cause*, this struggle ended where it had begun, with the Court declaring that the "political thicket" was beyond its ability to manage.[16] Chief Justice Roberts, writing for a majority, acknowledged the "instinct" that proportionality should be the guide of fairness, but held it impossible to decide what constituted fairness.[17] Fairness was a political question entrusted by the founders to the political branches.[18] The fact that the framers entrusted it to political actors, he argued, suggested that partisan advantage must be a permissible consideration.[19] Even so Chief Justice Roberts insisted that the Court's "conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void."[20] Instead he encouraged Americans to seek reform in the proper venues: state legislatures, state courts, redistricting commissions, state constitutional amendments, and Congress.[21]

III. GERRYMANDERING REFORM IN THE STATES

The several states have already made a strong start on answering that challenge, experimenting with a variety of solutions to the problem. The leading form, and the solution with the greatest variety, is the redistricting commission. California, Arizona, and several other states have created fully independent redistricting commissions, while New Jersey, Virginia, and others have created semi-independent political commissions. Other states are in the process of pioneering their own novel versions of both.[22] At the same time, many states like Florida have adopted new constitutional standards governing the redistricting process, and state courts continue to play a vital role in the process even where federal courts have retreated.[23]

Independent commissions have made a strong start on creating fairer and more competitive maps, but are not without controversy.[24] Political commissions on the other hand have frequently been plagued by the same political forces which have made map drawing so contentious, but have also been shown to create some more modest improvement.[25] Both of these solutions, however, have met with

16. Rucho v. Common Cause, 588 U.S. 684 (2019).
17. *Id.* at 704–10.
18. *Id.*
19. *Id.* at 701
20. *Id.* at 719.
21. *Id.* 719–21.
22. For the purposes of this Note, fully-independent commissions are those whose members are not political actors outside of their role on the commission and which are free from the direct oversight of the state legislature. Semi-independent political commissions are those which are themselves composed of existing state politicians, or where the state legislature has no obligation to accept the map which the commission produces. In short, the difference is a simple one, fully-independent means that the final map lies with the commission, and semi-independent means that the final map lies with the legislature.
23. FLA. CONST. art. III, § 20–21.
24. *See infra* Part III.A.
25. *See infra* Part III.B.

considerable political resistance from the legislatures of their states. Ohio and Utah provide particularly poignant examples of what this resistance looks like and how important state courts can be in resolving these contests.[26] The Supreme Court's independent state legislature doctrine, culminating in the recent decision in *Moore v. Harper,* also further complicates these solutions in state courts.[27]

A. A COMPARISON OF FULLY INDEPENDENT COMMISSIONS

Fully independent state redistricting commissions are the most visible, and possibly the most effective, solution to gerrymandering tried so far. At least four states had established commissions active for the 2020 redistricting cycle, with ongoing efforts to establish them in others.[28] Each of these states has adopted its own unique variation on how and to what extent the independence of the commission is assured. This Note reviews California and Arizona's approaches as indicative of two possibilities. Most importantly, both designs are highly protective of the independence of their commissions. While California's use of random selection from a filtered list seems more likely to ensure neutrality, Arizona's greater focus on competitiveness and neutral line drawing, may offer a slightly stronger approach to the actual work to be done.

The California Constitution establishes a fourteen seat commission with five seats going to the largest party in the state, five seats going to the second largest, and four going to individuals not registered with either party.[29] Party affiliations must have been maintained for the preceding five years and applicants must have voted in two of the last three statewide general elections.[30] Initial applications are reviewed by independent auditors who select 120 applicants, those 120 are then grouped by party affiliation and narrowed down to sixty.[31] Legislative leadership can then strike up to eight applicants per party group, up to a total of twenty four.[32] Finally, the Auditor's office draws three names from each party's group and two from the non-partisan group. These eight members then select the final six members of the commission from the pool.[33] The California Constitution also lays out redistricting criteria which must be observed by the commission. Districts must: comply with the Voting Rights Act, be geographically contiguous,

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26. *See infra* Part III.C.

27. *See infra* Part III.D.

28. Chris Leaverton, *Who Controlled Redistricting in Every State*, BRENNAN CTR. FOR JUST. (Oct. 5, 2022), https://www.brennancenter.org/our-work/research-reports/who-controlled-redistricting-every-state [https://perma.cc/5W9K-LKYD]; *see also* Matthew Nelson, *Independent Redistricting Commissions Are Associated with More Competitive Elections,* 56 PS: POL. SCI. & POL. 207, 211 (2023) (finding a statistically significant increase in competitiveness in states with independent commissions).

29. CAL. CONST. art. XXI § 2.

30. *Id.*

31. ABOUT US, https://wedrawthelines.ca.gov/about-us/ [https://perma.cc/XE86-VD7Q] (last visited Mar. 9, 2025).

32. *Id.*

33. *Id.*

minimize the separation of geographic subdivisions, and be as compact as possible without affecting the foregoing criteria.[34] The commission is also specifically required not to consider the residence of incumbents, and maps cannot be drawn to favor or discriminate against them.[35]

The commission has been a qualified success, though not without controversy. Reporting has alleged that the state Democratic party manipulated the process by shaping the testimony that the commission received.[36] The party recruited unions, lobbyists, interest groups and local partisans across the state to give testimony friendly to Democrats without exposing their ties to the party.[37] However, the committee insisted it had "defused the most egregious attempts" to mislead it, and noted that bias is inherent in all testimony.[38] Subsequent analysis supports that finding. Though the map remains deeply partisan, it is significantly more competitive than previous legislative maps.[39] Independent redistricting also remains popular in California. A bill instituting independent commissions in every locality in the state passed the legislature easily, only failing because of a gubernatorial veto.[40]

Arizona has adopted a similar but distinct approach. Arizona's commission has five seats, no more than two of which can be held by the same political party at any given time, meaning there is at least one member of the commission not a member of either major party.[41] No more than two of the first four can come from the same county, applicants must have been registered with their party or unaffiliated for three years, and cannot have run for office in the same period.[42] The Commission on Appellate Court Appointments creates a list of twenty five applicants, and from that list, the majority and minority leaders of both state houses select one applicant from the list.[43] The final non-partisan member is selected by the four chosen members of the commission to serve as Chair, and if they cannot decide then the Commission on Appellate Court Appointments chooses while "striving for political balance and fairness."[44] All commissioners are ineligible to hold any public office or work as a lobbyist both during and for three years after their term.[45] Like California, the state constitution also provides redistricting

34. CAL. CONST. art. XXI § 2.

35. *Id.*

36. Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission,* PROPUBLICA (Dec. 21, 2011), https://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission [https://perma.cc/ZWB4-MZZU].

37. *Id.*

38. *Id.*

39. ERIC MCGHEE, ASSESSING CALIFORNIA'S REDISTRICTING COMMISSION 14 (2018).

40. Sameea Kamal, *Why California politicians will keep drawing their own election districts,* CAL MATTERS (Oct. 11, 2023), https://calmatters.org/politics/2023/10/redistricting-california-newsom/ [https://perma.cc/9NEX-24EG].

41. ARIZ. CONST. art. IV pt. 2 § 1.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

criteria: compliance with the Voting Rights Act, equal population, geographic compactness, contiguity, preservation of communities of interest, and preservation of existing boundaries.[46] Uniquely, Arizona also includes a requirement that competitiveness should be "favored where to do so would create no significant detriment to the other goals."[47]

This commission too is not without its controversies. Some have accused the commission of drawing maps that pack Democrat and native voters, diluting their electoral power.[48] The commission also experienced some internal factionalism in deciding the 2020 map, which saw a switch from a map favoring Democrats to a map favoring Republicans.[49] Still, the resulting maps have proved consistently more competitive than the national average.[50]

B. POLITICAL COMMISSIONS AS AN ALTERNATIVE

Some other states have adopted commissions that are not independent in the true sense, but instead are composed of or by politicians balanced between the parties. New Jersey and Virginia's commissions offer a valuable comparison both with each other and with their independent counterparts. That comparison demonstrates the pitfalls of relying on the same tired political organizations in new configurations, but commissions of both types are an improvement over legislative maps.[51]

New Jersey appoints its commissioners similarly to Arizona. Each of the majority and minority leaders and the two party chairs nominate two members to the commission, with the committee choosing its final member, the only difference being that they are drawn from candidates proposed by the parties themselves.[52] If they deadlock then the state supreme court votes on the deciding member instead, though agreement between the parties made this largely unnecessary in 1991, 2001, and 2011.[53] When the process broke down in 2021 the New Jersey Supreme Court

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46. *Id.*

47. *Id.*

48. Carina Dominguez, *Experts say Arizona redistricting aims to diminish Native vote*, INDIAN COUNTRY TODAY (Dec. 9, 2021), https://ictnews.org/news/experts-say-arizona-redistricting-aims-to-diminish-native-vote [https://perma.cc/UDX2-GKRB].

49. Ray Stern, *AZ Republicans come out ahead in seats for Legislature, Congress as redistricting panel approves maps*, ARIZ. REPUBLIC (Dec. 22, 2021), https://www.azcentral.com/story/news/politics/arizona/2021/12/22/arizona-independent-redistricting-commission-votes-final-maps/8988737002/ [https://perma.cc/Y3YL-2NZJ].

50. *E.g.* Kim Soffen, *Independently Drawn Districts Have Proved to Be More Competitive*, N.Y. TIMES (July 1, 2015), https://www.nytimes.com/2015/07/02/upshot/independently-drawn-districts-have-proved-to-be-more-competitive.html [https://perma.cc/LM2C-DTSY]; Jim Small, *Arizona at low risk of gerrymandering in 2022: report*, ARIZ. MIRROR (Apr. 6, 2021), https://azmirror.com/briefs/arizona-at-low-risk-of-gerrymandered-districts-report/[https://perma.cc/Q5CD-TCAF].

51. Nelson, *supra* note 28, at 210.

52. *State Summary: New Jersey*, ALL ABOUT REDISTRICTING, https://redistricting.lls.edu/state/new-jersey/?cycle=2020&level=Congress&startdate=2021-12-22 [https://perma.cc/Z8KU-PEE5] (last visited Nov. 17, 2024).

53. David Wildstein, *Justices pick Wallace as Congressional Redistricting Tiebreaker*, N.J. GLOBE (Aug. 6, 2021), https://newjerseyglobe.com/redistricing/justices-pick-wallace-as-congressional-redistricting-tiebreaker/ [https://perma.cc/82HQ-CQZS].

chose a Democrat as tiebreaker causing frustration with Republican lawmakers and questions about bias.[54]

Virginia faces much the same issue with its politically appointed commission. In Virginia eight legislators and eight citizen members are chosen from each party, with the aim of creating bipartisan maps.[55] The citizen members are selected by a panel of appointed judges but from lists assembled by the legislature.[56] Unfortunately, the commission fell into gridlock the first time it attempted to produce a map.[57] As in New Jersey, the map fell to the state supreme court. However, unlike New Jersey which simply picked a party tiebreaker, the court appointed two special masters to draw a fair map.[58] Their map polarized the districts more than the proposed maps, giving each party an additional likely win as compared to the prior legislative map.[59] The resulting map was less competitive, but fundamentally fair. However, that only happened because the commission had fundamentally failed in its assigned duties, again illustrating the pitfalls of political commissions.

Independent commissions, when properly framed, can serve their function effectively though not wholly free from partisan strife. Political commissions, though the sample size is small, frequently repeat the mistakes of the legislatures they replace, and maps revert to state courts.[60] State courts are valuable institutions for resolving these issues, particularly with constitutional guidance, but relying on courts is a capricious and undemocratic solution.

Other reforms have been proposed, such as expanding the size of the House or adopting larger multimember districts.[61] But these reforms remain entirely theoretical and lack the body of practical evidence that redistricting commissions have produced. They would likely require wider federal implementation—and shifts in Supreme Court precedent—to make them effective, which further reduces the chances for successful implementation. The state-by-state approach and the dynamic experimentation it enables, which makes commissions attractive, cannot operate effectively when system wide change is required.

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54. Nikita Biryukov, *GOP says redistricting tiebreaker conflicted, chose worse congressional map*, N.J. MONITOR (Jan. 6, 2022), https://newjerseymonitor.com/2022/01/06/gop-says-redistricting-tiebreaker-conflicted-chose-worse-congressional-map/[https://perma.cc/78QW-P636].

55. VA. CONST art. II §6-A.

56. *Id.*

57. Graham Moomaw, *Though critiques persist, many agree Virginia's new political maps are 'quite balanced'*, VA. MERCURY (May 17, 2023), https://virginiamercury.com/2023/05/17/though-critiques-persist-many-agree-virginias-new-political-maps-are-quite-balanced/ [https://perma.cc/EZT3-N9DJ].

58. *Id.*

59. Laura Vozzella, *Virginia Supreme Court approves redrawn congressional, General Assembly maps,* WASH. POST (Dec. 28, 2021), https://www.washingtonpost.com/dc-md-va/2021/12/28/virginia-redistricting-final-maps-supreme-court/ [https://perma.cc/JLS2-X6VD].

60. Some have criticized these commissions as highly protective of incumbents. For example, political commissions in Idaho and Hawaii produced maps that were highly likely to protect incumbents. *See* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. 985, 1006 n.93 (2022).

61. *See* CAROLINE KANE, GIANNI MASCIOLI, MICHAEL MCGARRY & MEIRA NAGEL, WHY THE HOUSE OF REPRESENTATIVES MUST BE EXPANDED AND HOW TODAY'S CONGRESS CAN MAKE IT HAPPEN 3 (2020).

C. CASE STUDIES IN RESISTANCE TO INDEPENDENT COMMISSIONS: OHIO AND UTAH

Independent commissions are far from a silver bullet, but they do usually produce fairer maps and enjoy broad public support.[62] However, the legislative institutions of the state can be loath to accept a usurpation of their authority, especially one that challenges their incumbency. The actions of legislatures in both Ohio and Utah, and the response of state courts in each case, illustrate potential hurdles commissions face on the way to wider national adoption.

In Utah voters passed Proposition 4 in 2018, not a constitutional amendment but a ballot initiative, which created an "independent redistricting commission" which was more of a bipartisan political commission with an obligation to act independently.[63] It did however only permit the legislature a straight up or down vote on the plan adopted by the commission.[64] The map it drew applied the redistricting criteria introduced in the proposition to create a new blue congressional district for Utah.[65] This did not sit well with the Republican legislature, which passed a law overriding the provision requiring an up or down vote.[66] With no obligation to stick to the commission's map, the legislature was free to draw its own.[67] The committee was effectively defanged, which proponents challenged in state court.[68] When the matter reached the Utah Supreme Court, the court struck down the law as an unconstitutional override of a properly passed ballot initiative, holding that popular referenda could only be overridden with a sufficiently compelling government interest.[69] Seemingly undeterred, the state legislature called an emergency session and proposed a constitutional amendment to grant them the power to modify ballot initiatives after they had passed.[70] That amendment was added to the 2024 ballot, and twisted ballot language was used to paint the amendment as a way to "strengthen" the initiative process.[71] The legislature attempted to

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62. *Bipartisan Poll Shows Strong Support for Redistricting Reform,* CAMPAIGN LEGAL CTR. (Jan. 18, 2019), https://campaignlegal.org/update/bipartisan-poll-shows-strong-support-redistricting-reform [https://perma.cc/GR6C-8VTJ].

63. UTAH PROPOSITION 4, INDEPENDENT ADVISORY COMMISSION ON REDISTRICTING INITIATIVE (2018).

64. *Id.*

65. UTAH INDEP. REDISTRICTING COMM'N, UTAH 2021 DRAFT COMMISSION PUBLIC CONGRESSIONAL SH2 MAP (2021).

66. Mead Gruver, *Utah Supreme Court Sides with Opponents of Redistricting that Carved up Democratic-leaning Area*, ASSOCIATED PRESS (July 11, 2024), https://apnews.com/article/utah-supreme-court-redistricting-lawsuit-a3bc251ded9dfe4a75b48c79fece0a86 [https://perma.cc/P47M-UQPK]. Note that this was not a constitutional amendment and therefore the legislature claimed to have the power to override the results of the popular referendum.

67. *Id.*

68. *Id.*

69. *Id.*

70. Hannah Schoenbaum, *Utah Lawmakers Want Voters to Give Them the Power to Change Ballot Measures Once They've Passed*, ASSOCIATED PRESS (Aug. 21, 2024), https://apnews.com/article/utah-ballot-measures-voting-rights-b01900725e0e4979d111e4455a0f1747 [https://perma.cc/N58S-LS9U].

71. Hannah Schoenbaum, *Utah Supreme Court Crushes Constitutional Amendment Deemed 'counterfactual' by Lower Court*, ASSOCIATED PRESS (Sept. 25, 2024), https://apnews.com/article/utah-constitutional-

manipulate voters into passing an amendment it knew was unpopular. The Utah Supreme Court once again struck down the legislative power grab, agreeing that the language was "misleading."[72] The court did not, and indeed could not, find the proposed amendment unconstitutional on its face. While the court struck it from the ballot in 2024, given the legislature's clear opposition to the independent commission it will likely return.

Ohio's struggles bear some striking similarities. Ohio had previously created a political commission that was effectively nonfunctional, with seven separate maps being held unconstitutional.[73] Ohio voters responded by placing an initiative on the ballot to amend the state's constitution and create a truly independent redistricting commission.[74] That proposed amendment would have created a strong commission with an even three way split between the two parties and independents, with the first six being chosen by random lottery from a pool assembled by judges.[75] Those first six would then select the rest of the committee.[76] Like its counterpart in Utah, the Ohio legislature rewrote the ballot language to mischaracterize the amendment. The first bullet of the new measure read that the amendment would "Repeal constitutional protections against gerrymandering . . . and eliminate the longstanding ability of Ohio citizens to hold their representatives accountable . . . ."[77] As in Utah, proponents of the amendment challenged the language as misleading, but the Ohio Supreme Court was not as dedicated to democracy.[78] They instead largely upheld the false language as "consistent with dictionary definitions."[79] The ballot went up largely unchanged, and the amendment was defeated by a clear margin.[80]

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amendment-voting-rights-622fd9d4ff15c23ce8ad5f44dad7c333 [https://perma.cc/QH2H-YQVU]. The ballot language proposed by the legislature would have told voters the amendment would "strengthen the initiative process" when in fact the effect would have been to give the legislature the authority to override citizen initiatives at will. *Id.*

72. *Id.*

73. Kendall Karson Verhovek, *Ohio's Legacy of Gerrymandering Could End This November*, BRENNAN CTR. FOR JUST. (Sept. 4, 2024), https://www.brennancenter.org/our-work/analysis-opinion/ohios-legacy-gerrymandering-could-end-november [https://perma.cc/FM8R-4FGT]. In fact, the Court was blocked by language adopted by Ohio that barred the state supreme court from drawing its own map. The issue was only resolved when the matter finally wound up in federal court and the federal judge simply picked one of the 7 maps.

74. *What Ohio's 'Citizens Not Politicians' Redistricting Amendment Would Do,* BRENNAN CTR. FOR JUST. (Apr. 25, 2024), https://www.brennancenter.org/our-work/research-reports/what-ohios-citizens-not-politicians-redistricting-amendment-would-do [https://perma.cc/Q4C5-5YYY].

75. *Id.*

76. *Id.*

77. OHIO SECRETARY OF STATE, OFFICIAL GENERAL ELECTION BALLOT (2024).

78. Courtney Cohn, *Ohio Supreme Court Largely Upholds 'Misleading' Ballot Language for Redistricting Amendment*, DEMOCRACY DOCKET (Sept. 17, 2024), https://www.democracydocket.com/news-alerts/ohio-group-garners-over-700000-signatures-for-ballot-initiative-to-end-gerrymandering/[https://perma.cc/JE9G-7M65].

79. *Id.*

80. *Issue 1: Ohio General Election Results,* CNN (Nov. 5, 2024, 1:57 PM), https://www.cnn.com/election/2024/results/ohio/issue-1 [https://perma.cc/8T4N-JYW4].

D. THE INDEPENDENT STATE LEGISLATURE DOCTRINE AS AN OBSTACLE TO STATE REFORMS

Even those states who are willing to enact more radical change may still face resistance at the federal level. Though the Supreme Court held partisan gerrymandering non-justiciable, its recent opinion in *Moore v. Harper* calls that decision into question. In *Moore* the Court adopted elements of a hyper-textualist constitutional theory called the Independent State Legislature Doctrine (ISLD), creating a form of backdoor review of partisan gerrymandering decisions in state courts. The ISLD focuses on the specific language of Art. II, § 1, cl. 2—the electors clause of the Constitution.[81] That clause states in relevant part "[e]ach State shall appoint, in such manner as the *legislature* thereof may direct, a number of electors. . . ."[82] In *Bush v. Palm Beach County Canvassing Board*, Chief Justice Rehnquist read this clause narrowly to mean the legislative body alone, and then combined it with a century old opinion to argue it barred any other branch of state government from "circumscrib[ing] the legislative power."[83] This reading has little basis in history or the practice of the states, and the Court did not decide the case on those grounds.[84] Since the Court did not actually reach the merits, this remained arguably dicta.[85] It also stood in direct contradiction with the Court's precedents which read this passage and the elections clause broadly.[86]

When the same issues returned to the Court in *Bush v. Gore,* Chief Justice Rehnquist returned to this argument. While the case itself was decided on equal protection grounds, Chief Justice Rehnquist wrote a concurrence that expanded on this theory. [87] He argued that the Constitution assigned the duty to the Legislature alone, and that any "significant departure" from the legislature's scheme was a federal constitutional question.[88] State courts could not infringe upon the constitutional duty of the legislature of each state.

Several respected scholars have since argued that this theory has no basis in the practice of the states, is not reflected in the actions of the founders, and that the few cases that support it are wild outliers.[89] The ISLD nevertheless gained enough support to return to the Supreme Court in *Arizona State Legislature v. Arizona*

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81. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000).

82. U.S. Const. art. II, § 1, cl. 2.

83. *Palm Beach*, 531 U.S. at 77 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).

84. *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 145–55 (2023).

85. *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 735 (2001).

86. *See* Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916) (holding that referenda are also a part of the legislative process of the state); Smiley v. Holm, 285 U.S. 355 (1932) (holding that the governor is also a part of the legislative process for the purposes of the elections clause and therefore elections law was subject to veto).

87. Bush v. Gore, 531 U.S. 98, 111 (2000).

88. *Id.* at 112–13 (Rehnquist, J., concurring).

89. *See, e.g.*, Shapiro, *supra* note 84, at 145–55.

Independent Redistricting Commission (*AIRC*). The Court entirely, but narrowly, rejected the doctrine, holding 5–4 that election law was subject to all state constitutional structures including courts.[90] Yet even as the doctrine was rebuked again, it found its strongest expression yet in a conservative dissent. Chief Justice Roberts, writing for the four, chastised the majority for overreaching, declared that the federal Constitution controlled all state constitutions in this area, and argued that the word legislature could only refer to the body and not the state lawmaking process as a whole.[91]

The *Rucho* opinion may be surprising in light of Chief Justice Roberts' dissent in *AIRC*. *Rucho* saw Chief Justice Roberts effectively embrace the argument of the *AIRC* majority he refused to join, and send petitioners to the very state venues he had rejected just a few years before.[92] Perhaps that incongruity is part of the reason the ISLD soon returned to the Court in *Moore*.[93] *Moore* saw a six justice majority of the Court reject the ISLD in its most maximal form, relying on its holding *AIRC* to find that state constitutions properly controlled the legislature even when making law governing federal elections.[94] Yet even as Chief Justice Roberts struck down the doctrine with one breath, he resurrected it with another. The Court held that federal courts have an ongoing responsibility to review state court decisions—even those interpreting state constitutions—when state courts "transgress the ordinary bounds of judicial review" and "arrogate to themselves the power vested in state legislatures to regulate federal elections."[95]

It is not immediately apparent what effect this softer form of the doctrine will ultimately have on elections. Many had predicted a second round of attacks on electoral systems following the 2024 elections, which might have featured *Moore* heavily. But Donald Trump's victory meant those attacks never arrived, and so the chaotic potential of *Moore* has not yet been realized.[96] *Moore* may reject the most expansive form of the doctrine, but the Court's outright refusal to define this oversight role or apply it to the facts has created more ambiguity than it resolves.

Neither party in *Moore* argued the maximal interpretation, instead relying on alternative weaker theories.[97] Any of these interpretations would still carry many

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90. Arizona State Legislature v. Arizona. Indep. Redistricting Comm'n, 576 U.S. 787, 808 (2015).

91. *Id.* at 824–45 (Roberts, C.J., dissenting). In fairness to the Chief Justice, he does provide a means by which redistricting commissions could continue, arguing they could essentially just be made a part of the legislature itself or comprised thereof.

92. *See* Rucho v. Common Cause, 588 U.S. 684 (2019).

93. Moore v. Harper, 600 U.S. 1 (2023).

94. *Id.* at 27.

95. *Id.* at 36.

96. Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News,* N.Y. TIMES (Jun. 28, 2023), https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html [https://perma.cc/PXB4-HV6W].

97. Michael Weingartner & Carolyn Shapiro, *After the Oral Argument in Moore v. Harper*, 54 U. TOL. L. REV. 387, 390–95 (2023). One version would draw a substantive-procedural distinction, which given the lack of clarity about what is substance and what is procedure, would likely do little more than prolong debate about the ISLD, resolving little. Another option would see a line drawn between express constitutional law and

of the downsides of the ISLD, effectively federalizing election law and hampering states' reforms.[98] But the Supreme Court specifically chose not to address these possible interpretations, instead it opted for general language that is broadly within the proper scope of federal courts. Federal courts obviously have some role in reviewing state court actions when they come into conflict with the Constitution. Weingartner and Shapiro, for example, propose that due process analysis is the proper role.[99] Equal protection analysis, like that applied by the Court to resolve *Bush v. Gore,* is another.[100] But *Moore* is a "cobbled together" majority that makes the future difficult to predict. [101] It is ultimately unclear whether the Court was merely protecting its broad authority or assuming significant power over state elections.

In many of those futures the ISLD could present a real obstacle to state-based solutions. In fact, Ohio provides a perfect illustration. Ohio's Supreme Court was unable to resolve the commission's map after seven attempts because Ohio had passed an amendment enacting similar restrictions to the ISLD, barring the court from making its own map and instead requiring it to send it back to the commission.[102] The result was that federal courts were forced to step in to resolve the issue, usurping state law.[103]

IV. A POTENTIAL ETHICS BASED SOLUTION

At the state level generally, legislative reforms either face significant resistance from existing institutions or are plagued by the same biases and power dynamics that shape the systems they seek to replace. To accomplish lasting change, it is necessary to disrupt those dynamics. Other solutions have been proposed to accomplish that disruption, from simply electing new officials, to expanding the size of the House of Representatives, or even randomly selecting legislators or

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more ambiguous clauses, like the free and fair elections clauses some state courts use, to push back on partisan gerrymandering. This may cabin its application in the most direct cases, for example as applied to redistricting standards or independent commissions where constitutional provisions are express, but would still leave extensive holes and hobble state court's ability to define their own law.

98. Shapiro, *supra* note 84, at 192–95.

99. Weingartner & Shapiro, *supra* note 97, at 399.

100. *Id.*

101. Pildes, *supra* note 96. Some of the Court's past opinions do offer guidance on the various justice's likely position. Since Kagan and Sotomayor joined the majority in *Arizona*, it's unlikely they support such a radical role for the Court. Conversely, Thomas and Gorsuch make plain in *Moore* itself that they continue to support the independent state legislature doctrine and suggest this reservation will wreak havoc in the lower courts. Alito joined Thomas' dissent but only on mootness, and since he joined Roberts' dissent in *Arizona* it seems likely he continues to support the doctrine. Given Roberts' own reversal of course from *Arizona* to *Rucho* and *Moore* it may be foolish to predict, but his statements in *Rucho* suggest that he would be supportive of novel state solutions. While Kavanaugh's *Moore* concurrence makes clear that while he joined the majority in full, he would also adopt Rehnquist's distortion standard from *Bush v. Gore*. Barrett and Jackson's positions could only be guessed at.

102. *See* Weingartner & Shapiro, *supra* note 97, at 397–98.

103. *Id.*

citizen oversight bodies.[104] This Note proposes an additional option: using existing ethics rules to sanction attorneys who engage in partisan gerrymandering. This is not entirely unprecedented. Following the legal malfeasance which occurred in the wake of the 2020 election many of the attorneys involved faced disciplinary action or ethics complaints.[105]

This Part first examines the unique challenges of applying these ethics rules to government lawyers, then to legislators who are attorneys. In doing so it establishes two main points. First, applying the *Model Rules* to attorneys in government always requires some interpretive work to resolve latent ambiguities. And second, that these ambiguities, viewed through the lens of the *Model Rules* stated purpose in preserving the rule of law, should be resolved in favor of resisting gerrymandering. This Part then builds on that, proposing ways that Rules 8.4, 3.3, and 5.1 could all be applied not only to the government's attorneys, but also to those legislators who are still licensed to practice. It then closes by defending this proposal against arguments that it pushes the *Model Rules* too far, that it would politicize or weaponize the *Model Rules*, or be ineffective at combatting partisan gerrymandering.

A. THE PROBLEM OF APPLYING ETHICS RULES TO GOVERNMENT LAWYERS AND LEGISLATORS

Much of the scholarship that addresses the application of the existing *Model Rules* to the government context finds two core problems. First, the *Model Rules* are fundamentally built around a lawyer-client relationship that does not graft easily into the government lawyer's practice.[106] Second, traditional confidentiality rules, also formed around a one-to-one client relationship, are not properly able to address the nature of a government lawyer's duty of confidentiality.[107]

Identifying the client presents the bigger obstacle. Most of the ethics rules deal specifically with an attorney in their role as representative of the client, but when the attorney is working for a state government or the federal government, it is not immediately apparent who that client should be. It might be their direct employer, their agency as a whole, the government as a whole, or even the people themselves. Many rules turn on how this ambiguity is resolved. In the gerrymandering context for example, the lawyer's duty to his client will call for two separate, conflicting, and irreconcilable sets of actions: one set if the client is an incumbent legislator, and another set if the client is that legislator's constituency. Gerrymandering to remain

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104. *See* KANE ET AL., *supra*, note 61; Samuel Bagg, *Sortition as Anti-Corruption: Popular Oversight against Elite Capture*, 68 AM. JOUR. OF POL. SCI. 93 (2024) (discussing existing proposals for random selection of legislators, then offering a more nuanced model that would see individuals randomly selected to serve in an anti-corruption oversight role).

105. Alex B. Long, *Imposing Lawyer Sanctions in a Post-January 6 World*, 36 GEO. J. LEGAL ETHICS 273, 277–79 (2023). It is relevant that few of these ethics complaints were particularly successful.

106. *See, e.g.*, Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question,* 37 FED. B.J. 61 (1978).

107. *See* Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033 (2007).

in office would almost certainly be in the legislator's interest, but it impedes the public's interest by hindering their ability to engage in democratic self-help and undermines fundamental democratic institutions. This issue is only compounded by the fact that there are authorities that identify each of the potential clients discussed here as the correct choice.[108]

The analogy to the other obvious multilevel organizational client, the corporation, is also unhelpful. Corporate lawyers deal with a similar structure, but one with a singular chain of command.[109] While the structure may complicate the question, ultimately their obligation is clearly to a singular corporate entity.[110] Turning to the question of confidentiality provides a valuable illustration. Government lawyers lack the same undivided obligation, often having a duty to multiple interrelated government entities, or even to the public, that might compel them to reveal past wrongdoing.[111] The traditional confidentiality obligation is applied easily to the corporate client, which has a singular interest despite multiple decision makers. It gives clients cover to reveal such wrongdoing, thereby enabling zealous representation. But government lawyers' multiple potential obligations to the public and other government institutions, or even to the public good, split that confidential relationship.[112] This has many hypothetical resolutions, but all are imperfect. Kathleen Clark, for example, proposed comparing the structural relationships between potential clients to identify key decision makers, not unlike the question of who holds operational authority in a corporate client.[113] She uses the example of an independent agency. The very independence of the agency is evidence that the agency, and not the government or the executive writ large, is properly considered the client. But as Clark herself acknowledges, this approach is complicated by the fact that government lawyers are themselves often engaged in decision making that would traditionally be the sole province of the client.[114] They may also have their own policy obligations to the public, or even in some cases obligations to their own constituency.

Others have proposed that since these attorneys have an obligation to act in the public interest, that makes the public interest itself the "client."[115] This seems too non-specific to be practicable. Clark suggests the public interest should instead serve as a guide to shaping action and not the client itself.[116] But even then, the public interest is a vague and amorphous concept. Clark's solution is to treat the laws themselves as a crystallization of the public interest.[117] This works well

108. *Id*. at 1050–52 (collecting authorities for "'public interest,' government employing the lawyer, the particular agency employing the lawyer, and a particular government official").

109. *See* Lawry, *supra* note 106, at 66–69.

110. *Id*.

111. *Id*.

112. *Id*.

113. Clark, *supra* note 107, at 1056–57.

114. *Id*. at 1062.

115. *Id*. at 1069.

116. *Id*.

117. *Id*. at 1071–72.

enough for confidentiality, where open government laws clearly seek to serve that interest.[118] But its applicability in other contexts is more problematic. If the government passes laws or regulations that are in keeping with their procedures and are therefore duly enacted, but which are themselves deceptive of the public or counter to the will of the people, then it cannot truly be said that those laws are embodying the public interest. Even if a single solution could be found, as Lawry pointed out when he discussed this problem, none of these answers adequately resolve the problem by themselves.[119]

It is not immediately apparent how the rules should apply to those attorneys who support gerrymandering. It cannot reasonably be said that these attorneys are free from obligations to ethics rules, but the ethical act might well be different for each potential client. The legislator they work for, the legislative body, their legislator's constituency, and the public at large could all have interests diametrically opposed to each other. Do they have an obligation to balance the confidentiality of those clients? Do they have an obligation to reveal information they learn from one if it actively harms another? After all, the issue is not that they do not have a client, but rather that they have too many possible clients. It is not that they have no duty of confidentiality, but that this duty is irreconcilable as between these respective potential clients. When the interests of all these would-be clients converge, the duty of the attorney is obvious. But when there is a conflict between the various potential clients, the solution becomes murky. Even Rule 1.7 is shaped to address concrete client relationships and predicated on the notion that a client's informed consent can be sought. [120] You cannot get informed consent when your clients are a nebulous cloud of potential interests.

These ambiguities mean that some interpretation of these rules is necessary to make them fully operative in the government context. In resolving this ambiguity, the attorneys' duty to democracy and the rule of law should resolve the conflict.[121] The preamble to the *Model Rules* makes this explicit. "[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[122] Gerrymandering prevents fair elections by manipulating outcomes before elections ever take place. In a democratic republic, the rule of law takes its legitimacy from free and fair elections. Preserving the rule of law and the administration of justice then requires preserving free and fair elections. Therefore, the attorneys' duty to those institutions obligates them to resist gerrymandering.

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118. *Id.*
119. *See* Lawry, *supra* note 106, at 62.
120. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2018).
121. MODEL RULES OF PROF'L CONDUCT pmbl.
122. MODEL RULES OF PROF'L CONDUCT pmbl.

B. THE CHALLENGE OF APPLYING THESE RULES TO ELECTED OFFICIALS

All the foregoing has dealt with lawyers acting in their professional capacity as legal advisors and representatives of clients, even if those clients are nebulous or unidentified. The question is not if the *Model Rules* apply, but how. But the *Model Rules* go further, they extend by their terms to all attorneys, even those outside of the client context. Many legislators—both in the several states and in Congress—are practicing attorneys and still more remain licensed to practice in their respective states.[123] They are also subject to these rules.

There are several unique obstacles to applying the rules in this posture. The first and most obvious is that the rules themselves are clearly devised and structured around the practice of law. Difficult though it may be to find a client for a government attorney, there is no client when that attorney is acting as legislator. Still, there are model rules which apply even outside the client relationship. Rule 8.4 is not framed in terms of a lawyer's representative capacity, and by its plain text applies to any fraudulent acts or misrepresentations.[124] Rule 3.3 bars all attorneys from making false statements of fact to a tribunal or offering evidence they know to be false.[125] Rule 3.5 bars attorneys from influencing tribunals unlawfully or engaging in behavior intended to disrupt those tribunals.[126] And Rule 5.1 imposes responsibility on the supervising attorney for professional conduct violations by all attorneys directly under their supervision.[127] Though they are not in a direct attorney client relationship, all of these legislators are still lawyers. They still have responsibilities under the *Model Rules*.

Rule 8.4 is the most obvious candidate to push back against gerrymandering. Rule 8.4 is broad, and read literally it bars attorneys from lying at all.[128] This overstates the rule by half, and it would be foolish to contend that the rule prevents an attorney in their personal capacity from minor misrepresentations, for example, lying to a friend about their plans.[129] The misrepresentations these legislators engage in, however, are not little white lies. Take the Utah example discussed *supra*.[130] There the Utah legislature drafted ballot language that completely reversed the meaning of the amendment, and the state supreme court even found it

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123. In the U.S. House of Representative alone there are 142 members of the 119th Congress who hold a Juris Doctorate. LAWYERS IN THE UNITED STATES HOUSE OF REPRESENTATIVES ONE HUNDRED NINETEENTH CONGRESS (2025).

124. MODEL RULES OF PROF'L CONDUCT R. 8.4.

125. MODEL RULES OF PROF'L CONDUCT R. 3.3.

126. MODEL RULES OF PROF'L CONDUCT R. 3.5.

127. MODEL RULES OF PROF'L CONDUCT R. 5.1.

128. MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

129. David B. Isbell & Lucantonia N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 817 (1995) (applying principles of interpretation to conclude that the rule can only apply to incidents of misrepresentation that rise to the level of fraud or other grave deceptions).

130. *See supra* Part III.

to be misleading.[131] If the Utah Supreme Court concluded that these legislators are actively misleading voters, that rises well beyond a white lie and calls into question the truthfulness of the attorneys who advanced that language. This should fall squarely within the heartland of Rule 8.4.

Rule 8.4 also bars conduct that is "prejudicial to the administration of justice."[132] While the traditional construction of this rule focuses on the judicial process, by its terms the rule protects all systems that administer justice. Gerrymandering is an assault on the fundamental institutions of democratic representation from which those systems of justice take their mandate and legitimacy. To protect those systems, attorneys arguably have an ethical obligation to defend against that assault.

Rule 8.4 also bars discrimination on the basis of race, sex and socioeconomic status among many other characteristics.[133] Gerrymandering sees attorneys actively engaged in separating out districts and people groups by precisely these criteria, and the result is frequently to disadvantage one or more of these groups.[134] This is conduct the lawyers who engage in should "reasonably know" to be discriminatory and may also fall under Rule 8.4.[135] This is particularly true since partisan gerrymandering by criteria like this have largely replaced the more overt racial gerrymanders of the last century.[136]

Finally, Rule 8.4 seems to speak directly to issues like this. It explicitly applies with special significance to attorneys holding public office, noting that "[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."[137]

Rule 5.1 also provides a potential avenue for holding legislators accountable. Under Rule 5.1 attorneys are responsible for the ethical violations of those attorneys under their supervision so long as they have ratified that conduct or failed to take proper remedial measures to prevent it.[138] The first comment to the rule clearly applies this liability not only to firm attorneys but to any attorney in a comparable organization including a government entity.[139] If it can be established under Rule 8.4 that an attorney under their direct authority has engaged in misrepresentation, discrimination, or prejudice through gerrymandering, or under Rule 3.3 has offered false evidence before a tribunal in connection to their gerrymandering, then it could be possible to hold the legislator accountable as a supervisory attorney under Rule 5.1.

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131. *Id.*

132. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

133. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

134. Bertrall L. Ross II, *Partisan Gerrymandering as a Threat to Multiracial Democracy*, 50 SW. L. REV. 509 (2022).

135. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

136. *See* Ross, *supra* note 134, at 522.

137. MODEL RULES OF PROF'L CONDUCT R. 8.4, cmt. 7.

138. MODEL RULES OF PROF'L CONDUCT R. 5.1.

139. MODEL RULES OF PROF'L CONDUCT R. 5.1, cmt. 1.

Some might argue these interpretations go too far and strain the rules as they are written. Not all these applications of Rule 8.4 and Rule 5.1 are the traditional heartland of these rules, but little about government lawyering fits seamlessly into the heartland of the *Model Rules*. The *Model Rules* are shaped around a one-to-one client relationship, usually either in the criminal or firm context. As a result, there are many ambiguities that are unique to the government lawyer. These rules are, by their nature, poorly adapted to government lawyering, but government lawyers more than any other attorney must be subject to the highest ethical standards. If the application of each rule requires some interpretation, then the objection can only be one of degree. While some of these interpretations are admittedly outside the narrow traditional coverage of these rules, they absolutely conform to the core mischief each is meant to address. More importantly, the misconduct they are seeking to curtail strikes at the fundamental institutions the *Model Rules* seek to defend. Some interpretation of the rules is always necessary in the government context, and this expansion is more than warranted by their aim and scope.

Likely more problematic is the possible operation of the speech or debate clause (SODC) and its state constitutional counterparts. At its most straightforward the SODC provides that, "Senators and Representatives shall . . . be privileged from Arrest . . . for any Speech or Debate in either House, they shall not be questioned in any other Place."[140] The Supreme Court has generally read this clause more broadly than its language would suggest to encompass all claims or testimony related directly to official legislative business in civil and criminal cases.[141] Disciplinary proceedings are definitionally neither civil nor criminal cases and therefore may not be subject to this expansion.[142] There are also any number of adjacent activities, like giving testimony in outside litigation or the actions of attorneys under their supervision, that might fall outside of the penumbra of the clause.

But the conflict likely goes deeper. In interpreting the clause, the Court raised two rationales for expanding the SODC beyond its plain text—protecting the separation of powers and ensuring Congress' effectiveness.[143] Because many state bar organizations are not traditional state actors, they may not run up against these rationales in the way a court ruling would.[144] It may also be possible to argue, as some have, that because state legislators are not directly protected by the SODC, that they might still be reached even in spite of any potential conflicts.[145] The separation of powers rationale has also been rejected by the Court at this level, which further strengthens the case for piercing the clause.[146] That being

140. U.S. CONST. art. I, § 6, cl. 3.

141. *See* Christopher Asta, *Developing a Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U. L. REV. 238, 243–45 (2014).

142. MODEL RULES FOR LAWYER DISCIPLINARY ENF'T R 18.A.

143. *See* Asta, *supra* note 141, at 245.

144. Of course, it is not uncommon for these disciplinary actions to find their way into courts, and at that point the application of direct state power becomes more problematic for this analysis.

145. *Id*. at 245–49.

146. *Id*. at 254–56.

said, in order to bring a successful ethics complaint, it may require at least addressing these hurdles, the specific circumstances of which involve constitutional law in the individual states. Existing bar opinions may also present some obstacles.[147]

C. THE MERITS OF AN ETHICS BASED SOLUTION

Commentators have proposed many different core purposes for the ethics rules, but at their bottom all agree that these rules are intended to protect the public and ensure the fair operation of our legal system.[148] The preamble repeatedly makes clear that lawyers have a responsibility to uphold the law and seek reform to ensure its continued integrity and value to our society.[149] It explicitly reminds attorneys that "legal institutions in a constitutional democracy depend on popular participation and support" for legitimacy.[150] In a democratic system there can be no more fundamental foundation of the law than the election, and any attempt to corrupt that election process is a fundamental attack on the rule of law and the system of justice that all attorneys are compelled to uphold. When those attorneys are further entrusted with the powers of elected office it is counterproductive to that purpose to suggest that their ethical obligations diminish. If anything, those attorneys who are the most visible should be held to higher standards, not lower ones. This belief is explicitly reflected in Comment 7 of Rule 8.4.[151]

These sentiments are both noble and valuable. But some would argue, not without merit, that if the *Model Rules* were read as broadly as the preamble suggests, they would at best become so abstract as to be unhelpful and at worst become so intensely litigated as to become self-defeating. It is possible, however, to expand these rules slightly to give more force to the duty to democracy laid out in the preamble without letting the rules run wild or fall into irrelevance. All that is required is a limiting principle, and here the institutions themselves provide the perfect candidate. The duty to defend democracy need only be applied to the most fundamental of our democratic institutions in the form of a duty not to undermine democratic representation. As the Supreme Court itself has repeatedly acknowledged, partisan gerrymandering appears unfair to most who confront it.[152] The Court has simply decided federal courts are largely the wrong venue to rectify that injustice and turned the issue over to the several states.[153] State bar associations can be, and are, one of those institutions able to right this wrong.

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147. DC Bar Ethics Opinion 231 for example suggests that the proper reading of the rules is to draw them narrowly, arguing largely on canon alone, that were such wide reaching applications intended by the rules the rules themselves would include a mention thereof. DC Bar Ethics Opinion 231 (1992).

148. *See* Long, *supra* note 105, at 280.

149. MODEL RULES OF PROF'L CONDUCT pmbl.

150. MODEL RULES OF PROF'L CONDUCT pmbl.

151. MODEL RULES OF PROF'L CONDUCT R. 8.4, cmt. 7.

152. *See* Rucho v. Common Cause, 588 U.S. 684, 704 (2019).

153. *See id*. at 720–21.

There is undoubtedly also a valid argument that expanding the rules in this way could mean the weaponization of those rules. And this argument has even more force in light of the recent actions of the Trump administration. It has seemingly taken dramatic steps towards turning the *Model Rules* into a cudgel of authoritarian power, citing both the Federal Rules of Civil Procedure and the *Model Rules* in instructing the Department of Justice to "seek sanctions against attorneys and law firms who engage in frivolous, unreasonable, and vexatious litigation."[154] The memorandum seems to suggest that by "vexatious litigation" what President Trump means is any litigation that goes against his policy aims.[155] In light of this clear abuse, it is understandable that many would be unwilling to contribute to the further deterioration of the norms surrounding the *Model Rules*.

The first answer to this is that ethics rules have consequences for a reason. Sanctions are weapons by design, meant both to protect the public, and ensure the integrity of the profession. The simple fact that some would abuse those weapons, does not mean they cannot be deployed as tools where appropriate. That said, if these sanctions can be expanded to fit anything one attorney, or citizen, or President believes is wrong, they would become less than useless. They would destroy the very institutions they seek to uphold.

This proposal is different in kind. The nature of the systems being undermined and the rules being applied create a natural limiting principle. President Trump is seeking to wield a rule aimed at administrative convenience and judicial economy to twist our adversarial system to his liking. This proposal instead seeks to moderately expand our interpretation of rules intended to guard against fraud, discrimination, and misrepresentation, and use them to shield the foundation of our democracy. No law in a democratic nation can be more fundamental than democracy itself. Democracy cannot operate without free and fair elections. Therefore, attacks on those free and fair elections are attacks on the foundation of democracy itself. The ethics rules share that assessment.[156] For these rules to mean anything in a democratic legal system, they must contain a duty at a minimum not to undermine that most fundamental foundation. The only thing these interpretations would do is bring the rules in line with that goal.

That point, however, naturally leads into the next Trump-shaped hole in our democratic foundations. President Trump has spread extensive lies and misinformation as he has tried to exploit legal systems for partisan advantage. Some may argue this proposal would commit the same crime. We should avoid politicizing the *Model Rules*, the argument goes, because we cannot afford for neutral ethical principles to become political footballs. But treating the *Model Rules* as if they are apolitical ignores the many ways in which they already reflect the implicit

154. Presidential Memorandum, Preventing Abuses of the Legal System and the Federal Court (Mar. 22, 2025).

155. *Id.*

156. MODEL RULES OF PROF'L CONDUCT pmbl.

biases of the legal profession in a deeply political way.[157] The rules are already political. Again the question is one of limiting principles, and again the answer is to look to gerrymandering itself.

It is true that gerrymandering is about attaining partisan advantage. It is also true that any time gerrymandering is blocked, one of the parties loses. All actions regarding elections invite partisan critique, and in this context refusing to answer is also partisan. But gerrymandering is not a partisan issue. Gerrymandering is a form of exploitation that both parties have engaged in, to the detriment of voters across the political spectrum. The minority party always loses, and the majority party always wins, regardless of the animal on their flag. Look at the actions of the Democratic party in California, or the Republican parties in Ohio and Utah. [158] This is an issue that harms both parties and every American voter. It is possible, even reasonable, to create this duty without warping the ethical rules into a bat to beat the other side of the aisle.

It must be conceded that even if these ethical obligations were fully enforced, they can only be part of the answer. Like the solutions discussed in Part III, this change cannot solve the problem by itself. For one thing, while attorneys make up one of the largest professions in many legislatures, if not the largest, they are not the majority.[159] Even if this change were to convince every single attorney never to engage in gerrymandering again, which it will not, it would still not solve the issue. It can, however, add to the web of pressure placed upon some of the states' most knowledgeable and influential politicians. It can become one of the many avenues to reform pointed to by Chief Justice Roberts in *Rucho*.[160] Even if this change has no effect on those attorneys' behavior, it still has merit. It offers the profession the chance to distance itself from bad actors who are harming the public and eroding trust in our democratic values. It offers the profession the chance to protect the very institutions which all attorneys rely on for their livelihood. And it offers the profession the chance to lead the way in solving one of the most fundamental issues facing American democracy.

V. CONCLUSION

The Court struggled for more than half a century to find a way to slay Elbridge's seemingly immortal serpent. It came up empty. Congress has found itself equally

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157. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS ETHICS 151(6th ed. 2023) (arguing that the *Model Rules* give "corporate clients significantly greater confidentiality protection than . . . individual clients."); *id.* at 295 (noting that bar counsel are often reluctant to bring charges against attorneys with large firms); *id.* at 360–62 (arguing that the current *Model Rules* perpetuate a standard for solicitation which disadvantages underprivileged clients).

158. *See supra* Part III.

159. *See, e.g.*, Maggie Lee, *How Georgia lawmakers are above average—in age and wealth,* ATLANTA CIVIC CIRCLE (Feb. 9, 2022), https://atlantaciviccircle.org/2022/02/09/georgia-lawmakers-older-and-wealthier-than-average/ [https://perma.cc/83TD-DZXE].

160. *See Rucho*, 588 U.S. at 719–21.

unable to draw a sword sharp enough, or raise an arm strong enough, to properly conquer the beast. But as the Court has acknowledged many times, the capacity of the individual states to create novel independent solutions using our democratic and federal principles is one of America's great strengths.[161] No one arrow can drive the gerrymander from the garden. But the states have already pioneered real, actionable improvements, and combining those ideas with novel solutions could finally free American democracy from this pernicious evil.

The *Model Rules* wax poetic about attorneys who defend democracy and move the rule of law forward. But those values, trapped in the preamble, ring hollow when attorneys actively abet the destruction of democratic institutions. Many individual attorneys are committed to upholding and preserving these most sacred of traditions, but the profession insists on remaining neutral. The rules that are meant to shield our democracy and defend the rule of law, are powerless to protect the foundations of those principles. Those attorneys should not be left to fight alone. Lawyer's ethics is not an oxymoron. There was a time when lawyers were pillars of the community, not objects of derision. If the profession lives up to the high-minded ethical obligations it has set for itself, it could take a real step toward earning that mantle again.

161. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1973).